Judgment of the First Senate of 28 March 2006 on the basis of the oral hearing of 8 November 2005 – 1 BvR 1054/01

Sports betting case

HEADNOTE:

A state monopoly on sports betting is compatible with the fundamental right of occupational freedom of Article 12.1 of the Basic Law (*Grundgesetz – GG*) only if it is consistently geared to the goal of combating the dangers of addiction.

Judgment of the First Senate of 28 March 2006
on the basis of the oral hearing of 8 November 2005
– 1 BvR 1054/01 –

in the proceedings on the constitutional complaint of Ms. K.,

- authorised representatives: attorneys Professor Dr. R. und Koll., …,

– against a) the judgment of the Federal Administrative Court (*Bundesverwaltungsgericht – BVerwG*) of 28 March 2001 – BVerwG 6 C 2.01 –,

b) the judgment of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) of 30 August 2000 – 22 B 00.1833 –.

RULING:

1. Taking into account the provisos that are contained in the grounds, it is incompatible with Article 12.1 of the Basic Law that under the Act on the Lotteries and Betting Organised by the Free State of Bavaria (*Gesetz über die vom Freistaat Bayern veranstalteten Lotterien und Wetten, Staatslotteriegesetz* – State Lottery Act) of 29 April 1999 (Bavarian Law Gazette, *Bayerisches Gesetz- und Verordnungsblatt – GVBl.* p. 226) sports betting in Bavaria may be organised only by the Free State of Bavaria, and only bets of this kind may be arranged commercially, and yet the monopoly is not consistently geared to the goal of combating the dangers of addiction.
2. The legislature is ordered to pass new provisions for the organisation and arranging of sports betting, taking into account the constitutional requirements that follow from the grounds, by 31 December 2007.
3. Until there is new legislation, the State Lottery Act may continue to be applie d taking into account the provisos that are contained in the grounds.
4. Apart from this, the constitutional complaint is rejected as unfounded.
5. The Free State of Bavaria is ordered to reimburse the complainant’s necessary expenses.

GROUNDS:

A.

The constitutional complaint relates to organising and arranging sports betting where the organiser agrees to multiply at predetermined odds the stakes of individual gamblers who correctly predict the outcome of a future sports event. 1

I.

One form of betting on the outcome of sports events follows the totalisator system (pari-mutuel betting), where a part of the stakes is divided between the winners who have the correct results, as is the case, for example, in traditional football pools. A different form of betting follows the bookmaker system (fixed-odds betting), where odds are given: the organiser lays down fixed odds which it must in any event pay to the winner if one or more sporting events have a particular outcome. Such bets have long been familiar in horse racing. In Germany, they are made available by licensed commercial bookmakers under the Racing Betting and Lottery Act (*Rennwett- und Lotteriegesetz*) of 8 April 1922 (Reich Law Gazette (*Reichsgesetzblatt – RGBl*, pp. 335, 393), which continues in force as federal German law and which has been amended several times by the federal legislature. Outside Germany, there are bets of this kind on other types of sport and events too. Under trade regulation law which was liberalised in the year 1990 but applied only until reunification, authorities of the German Democratic Republic granted a few licences for the commercial provision of sports betting. Since then, commercial sports betting has been in existence in Germany too. Since the year 1999, the lottery companies of the *Länder* (states) that together form the Deutscher Lotto- und Totoblock have offered the sports betting system ODDSET, and they sell it through the lotto agencies and on the Internet. 2

II.

1. Under federal law, unauthorised public games of chance are a criminal offence under § 284 of the Criminal Code (*Strafgesetzbuch – StGB*). Subsection 1 of this section imposes a sentence of imprisonment of up to two years or a fine on a person who “without official permission publicly organises or runs a game of chance or provides the equipment for this”. In addition, § 284.4 of the Criminal Code imposes a sentence of imprisonment of up to one year or a fine on a person who promotes a public game of chance. 3

Apart from bets at public performance tests for horses, which may be permitted under the Racing Betting and Lottery Act as amended by the Third Act to Amend the Trade Regulation Act and Other Trade Regulation Law Provisions (*Drittes Gesetz zur Änderung der Gewerbeordnung und sonstiger gewerberechtlicher Vorschriften*) of 24 August 2002 (Federal Law Gazette (*Bundesgesetzblatt – BGBl.*) pp. 3412, 3420), there are no other circumstances defined in federal law in which permission may be granted that exempts a person from criminal liability under § 284.1 of the Criminal Code. 4

2. Following this, the *Länder*, under *Land* (state) legislation, permit lotteries and betting to be organised by the state or by private companies controlled by the state. In Bavaria, this was done by the Act on the Lotteries and Bets Organised by the Free State of Bavaria (*Gesetz über die vom Freistaat Bayern veranstalteten Lotterien und Wetten, Staatslotteriegesetz* – State Lottery Act) of 29 April 1999 (Bavarian Law Gazette (*Bayerisches Gesetz- und Verordnungsblatt – BayGVBl*) p. 226); Article 1 of this Act applies to the organisation of games of chance by the Free State of Bavaria (subsection 1), unless these are bets under the Racing Betting and Lottery Act, the operation of a casino or lotteries organised by Süddeutsche Klassenlotterie (subsection 2). 5

Under Article 2 of the State Lottery Act, the Free State of Bavaria organises games of chance in the form of lotteries and bets (subsection 1) including additional games (subsection 2); the nature, form and scope of these is determined by the State Ministry of Finance (subsection 3), and the State Lottery Administration (*Staatliche Lotterieverwaltung*) operates them as a public institution without its own legal personality in the province of this ministry (subsection 4). Under subsection 5, the State Lottery Administration, with the consent of the ministry, may assign the operation of games of chance to a legal person under private law, provided that the Free State of Bavaria is the sole member and the legal person is subject to the control of the ministry. 6

The further provisions of the State Lottery Act govern the commercial arrangement of the games of chance organised by the Free State of Bavaria by agencies (Article 3), the official terms and conditions of use and the apportionment of the money in the bank (Article 4), and the joint organisation and operation of games of chance with other *Länder* (Article 5). 7

3. In the State Treaty on Lotteries in Germany (*Staatsvertrag zum Lotteriewesen in Deutschland, Lotteriestaatsvertrag*, Lottery Treaty (Bavarian Law Gazette 2004, p. 230), which entered into force on 1 July 2004, the *Länder* have created a framework uniform in the entire Federal Republic for the organisation, operation and commercial arranging of games of chance with the exception of casinos. Under § 1 of the Lottery Treaty, the goal of the Treaty is 8

1. to guide the natural gambling instinct of the population into ordered and monitored paths, and in particular to prevent it switching to unlawful games of chance, 9

2. to prevent excessive gambling incentives, 10

3. to prevent the gambling instinct being exploited for the purpose of private or commercial gain, 11

4. to ensure that games of chance are carried out in an orderly and transparent manner and 12

5. to ensure that a considerable part of the earnings from games of chance is used to promote public or tax-privileged purposes as defined in the Tax Code (*Ab-* 13

gabenordnung – AO).

For this purpose, § 4 of the Lottery Treaty provides: 14

General Provisions 15

(1) The organisation, operation and commercial arranging of public games of chance must be consistent with the goals of § 1. 16

(2) The organisation, operation and commercial arranging of public games of chance may not conflict with the requirements of the protection of children and young persons. Minors are prohibited from taking part. 17

(3) The nature and extent of the advertising measures for games of chance must be reasonable and may not conflict with the goals of § 1. The advertising may not be misleading, and in particular not be directed to suggesting mistaken ideas of the chances of winning. 18

(4) The organisers, operators and the commercial gambling agencies must keep information on gambling addiction, prevention and possibilities of treatment available. 19

Within the goals of the Lottery Treaty, the *Länder*, under § 5, have the task under regulatory law of ensuring that a sufficient quantity of games of chance is available (subsection 1). They may carry out this task on the basis of *Land* legislation itself, through legal persons under public law or through private-law companies with substantial participation of public-law legal persons (subsection 2). In doing this, they are restricted to their own territory, unless they have the consent of another *Land* (subsection 3). In addition, § 14 of the Lottery Treaty contains requirements for the commercial arranging of gambling (subsection 2) and provides that the authority responsible must monitor compliance with these obligations (subsection 3). 20

III.

1. With an authorisation under the Racing Betting and Lottery Act, the complainant runs a betting office in Munich, in which, as a bookmaker, she commercially takes and arranges bets at public performance tests for horses. In July 1997, she registered with the *Land* capital, the city of Munich, an extension of her business to arranging sports bets with betting businesses in the rest of the EU. The city, in consultation with the Bavarian State Ministry of the Interior, refused this, referring to the comprehensive prohibition against public games of chance, which carried sanctions, contained in § 284 of the Criminal Code. 21

The complainant took legal action against the city at the Administrative Court (*Verwaltungsgericht*), with the goal of obtaining a declaratory judgment that organising fixed-odds sport bets with the exception of horse-racing bets, or alternatively arranging sports bets in the rest of the EU, did not require permission. During the proceedings, she made an application for the grant of permission, which was rejected by the defendant, and she then added to her statement of claim an application in the alterna- 22

tive that the defendant be judicially obliged to grant permission to organise or arrange sports bets.

2. The Administrative Court dismissed the application for a declaratory judgment as inadmissible, but it granted the application for a judicial obligation to the extent that it obliged the defendant to make a new decision on the application for permission, taking into account the court's view of the law (*Zeitschrift für Sport und Recht – SpuRt* 2001, p. 208). Essentially, the court based its decision on the consideration that since *Land* law contained no provisions governing the occupation of a sports betting bookmaker, the decision on the application had to be made, under Article 12.1 of the Basic Law (*Grundgesetz – GG*), according to the authority's best judgment. Provided that the complainant is reliable and the activity is not dangerous, both of which must be decided by the defendant, the defendant, according to the court, must grant a clearance certificate. 23

3. The representative of the public interest appealed to the Higher Administrative Court (*Verwaltungsgerichtshof*), which dismissed the action as a whole and at the same time dismissed the complainant's appeal (*Gewerbearchiv – GewArch* 2001, p. 65). 24

The court stated that it was an obstacle to the declaratory judgment sought that the organisation and arrangement of fixed-odds sports betting in Bavaria were prohibited. Bavarian *Land* law, in particular the State Lottery Act, did not expressly contain a prohibition to this effect or an obligation of permission. But the State Lottery Act indicated that the *Land* legislature wanted to leave the relevant prohibition of unauthorised public games of chance by § 284.1 of the Criminal Code in place. This provision prohibited the organisation and arrangement of games of chance even if the official permission for games of chance it referred to, which meant that contraventions were not criminal offences, was not laid down in administrative-law provisions, whether under federal or under *Land* law. § 284.1 of the Criminal Code, the court said, contained a repressive prohibition with reservation of power to permit acts otherwise prohibited, which served to protect against the dangers associated with exploiting the passion for gambling of the population. 25

The application for a decision was also unsuccessful. The court stated that the legal position in Bavaria under non-constitutional law was only just within what was constitutionally acceptable. Nevertheless, the complainant did not have a claim to the grant of permission under Article 12.1 of the Basic Law. It was not mandatory for the concerns of public security to have priority over the private interest in the choice of an occupation on the part of the bookmaker, but the *Land* legislature reserved to the state the right to offer lotteries and betting, since in this way there was a better guarantee of protection against the dangers associated with the passion for gambling than through state monitoring of private businesses. This concept of restrictive legislation, aimed at averting dangers in the best way possible, according to the court, is called for and justified by the goals of § 284.1 of the Criminal Code and is also implemented effectively 26

in practice.

4. The Federal Administrative Court (*Bundesverwaltungsgericht*) dismissed the appeal on points of law filed against this decision (Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 114, 92). The decision of the Higher Administrative Court, according to the court, does not violate federal law. 27

The court states as follows: sports bets are games of chance in the meaning of § 284.1 of the Criminal Code. This is a prohibitory provision against conduct that is undesired because it is socially damaging. The requirement of official permission also serves to protect against dangers of games of chance. The purpose of the sanction of § 284 of the Criminal Code is, *inter alia*, to prevent an excessive stimulation of the demand for games of chance, to guarantee that games of chance are conducted in due form and to prevent the gambling instinct being exploited for the purpose of private or commercial gain. In setting this goal, the legislature expanded the scope of application of § 284 of the Criminal Code as part of a criminal law reform. This is based on the assessment that games of chance are in principle, on account of their possible effects on the psychological (gambling addiction) and financial situation (loss of property) of the gamblers and their capacity to encourage crime, in particular in the area of money laundering, undesired and harmful. 28

On the other hand, according to the court, the legislators are aware that the gambling instinct cannot be completely stopped. § 284.1 of the Criminal Code therefore offers an instrument to channel the gambling instinct, in the form of the official permission which cancels the sanction. The federal legislature, which is the competent legislative body for criminal law, has an obligation to decide, within reason, what conduct it assesses to be so dangerous that it prohibits such conduct under threat of criminal penalty. If conduct is in general subject to a penalty, this shows the assessment that such conduct is in general dangerous to the protected legal interests. The statutory assessment of the danger of the organisation of games of chance conflicts with an understanding of § 284.1 of the Criminal Code to the effect that the provision applies only if games of chance are organised or arranged without authorisation in violation of existing provisions on permissibility. The understanding of § 284.1 of the Criminal Code as a repressive prohibition, according to the court, also underlies the casino order of the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) of 19 July 2000 – 1 BvR 539/96 – (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 102, 197 (223-224)). 29

Federal law, according to the Federal Administrative Court, does not permit an exemption from the repressive prohibition of § 284.1 of the Criminal Code for the games of chance at issue in this case. According to the remarks of the Higher Administrative Court, which are non-appealable, there are also no provisions of *Land* law on the permission of the organisation and arranging of sports betting at fixed odds by private persons. The Statutory Order on the Authorisation of Public Lotteries and Drawing of 30

Lots (*Verordnung über die Genehmigung öffentlicher Lotterien und Ausspielungen*) of 6 March 1937 (Reich Law Gazette (*Reichsgesetzblatt – RGBl*) I p. 283; *Bayerische Rechtssammlung – BayRS* 2187-3-I), which continues in effect as *Land* law, does not govern the sports betting at issue here. Nor does the State Lottery Act contain any provisions for privately organised sports betting, but reserves the organisation of such betting to the State Lottery Administration.

According to the Federal Administrative Court, the unrestricted prohibition that exists under this Statutory Order, which exists in the whole of Bavaria, against private organisation and arranging of fixed-odds betting, does not violate the Basic Law, and more specifically it does not violate Article 12.1 of the Basic Law. It is true that the commercial organisation and arranging of fixed-odds betting is within the scope of protection of Article 12.1 of the Basic Law. But the prohibition of fixed-odds betting is justified. Restrictions of the fundamental right of freedom of choice of an occupation by means of objective conditions for admission to the occupation are in general admissible only if they are compellingly necessary to avert dangers to a paramount public interest that are demonstrable or highly probable. If – as in the case of the complainant – the regulation of the practice of an occupation or a profession is similar to an objective regulation of the access to an occupation or a profession, it must be justified by general interests that are so weighty that they deserve "priority over the obstruction of access to an occupation or profession" (BVerfGE 77, 84 (106)). In the Order of 19 July 2000 (BVerfGE 102, 197), according to the court, the Federal Constitutional Court reduced the standards for the weight that the grounds for an objective restriction of the access to an occupation should have in relation to the access to the occupation of a casino manager. 31

It is necessary to avert dangers which threaten the population and gamblers as a result of public games of chance, and for this reason restrictions of the access to an occupation or profession are permitted, even if the protection of paramount public interests must be established for such restrictions to be justified. These requirements, according to the court, are satisfied. Public games of chance give rise to dangers threatening the population. These dangers relate to the property of the individual gambler and the individual gambler's next of kin and, in the case of the loss of property, indirectly the finances of the public authorities, and in the case of gambling addiction the health of the gambler. The assessment of the above objects of legal protection as of paramount public interest is the foundation of criminal legislation, as is shown by the tightening of §§ 284 et seq. of the Criminal Code by the Sixth Criminal Law Reform Act (*Sechstes Strafrechtsreformgesetz*). The legislature's assessment that, in order to avert or at least reduce the dangers it attributes to taking part in games of chance, it is necessary to pass a repressive prohibition is based on the legislature's assessment of these dangers. 32

According to the court, the Bavarian *Land* legislature proceeded on the basis of the same assessment when it passed the State Lottery Act. This Act was intended to meet the desire of the population for possibilities of gambling. But at the same time 33

the associated dangers “gambling addiction and its negative effects such as destruction of the basis of existence, drug-related crime, manipulation, fraud, money laundering and irregular payment out of winnings by dishonest private organisers of games of chance etc.” are to be reduced as much as possible.

The legislature’s assessment that the above dangers are connected with participation in games of chance of the kind involved in the present case has not been disproved. In particular, the experience with horse-racing bets, which has been described as positive, did not lead to a situation where the legislature’s assessment of the dangers from other sports betting is regarded as having been shaken. Horse-racing bets relate only to a narrower, and therefore more manageable, spectrum of sport, and were opened to private organisation in a particular economic situation in order to fight unauthorised bookmakers. Experience in this specific sector does not automatically permit prognoses to be made for other games of chance that proceed in a similar way. This also rules out the suggestion that fixed-odds betting shops and bookmakers have impermissibly been given unequal treatment. 34

In view of the scope for assessment and prognosis to which it is entitled, the *Land* legislature was permitted to regard the exclusive organisation of fixed-odds betting by the State Lottery Administration, accompanied by penalties to discourage private suppliers, as suitable and necessary to avert the dangers of games of chance which the legislature assumed existed. The fixed-odds betting was new in Germany, which meant that there was a lack of experience with this form of game of chance, and in view of this and of the great public interest, there was no sufficiently confirmed reason to think that private organisation or arrangement, together with a strict licensing and monitoring system, could give control of the dangers of games of chance that was equal in effect to organisation under government administration. This distinguishes the situation from that considered in the Order of the Federal Constitutional Court of 19 July 2000 (BVerfGE 102, 197), which was characterised by many years of positive experience with private operators of casinos. In this decision too, at least, the Federal Constitutional Court fundamentally had no criticism of the *Land* legislature’s assessment that if the state is responsible for casinos, there is a better guarantee that gambling is monitored and that the passion for gambling is contained than if private organisers are admitted. 35

In conformity with this, according to the court, in the proceedings for the passing of the State Lottery Act it was emphasised that the State Lottery Administration guaranteed the operation of the games of chance in a manner that was protected against manipulation and reliable, without any pursuit of gain on the part of the state. The fact that the organiser engaged in no pursuit of gain might contribute to containing the gambling instinct. In addition, the Higher Administrative Court rightly pointed out that the special characteristic of the fixed-odds betting meant that special protection of the individual gambler was necessary not only against the general dangers of games of chance, but also with regard to the handling of the individual contract, since there was no gambling procedure binding on all gamblers. In these circumstances, the private 36

organisers or arrangers could also reasonably be expected to accept the prohibition of fixed-odds bets on the basis of overriding grounds of public interest.

However, after a certain period of time had passed, in which further experience of fixed-odds betting, including experience of the private organisation of such betting abroad, could be and had to be obtained, the legislature would have to examine whether its assessment that private organisers and arrangers of such games of chance should be excluded could still be justified by objective considerations, which should in particular also consider the fundamental rights of potentially interested private persons. In addition, it was necessary for the legislature to examine critically whether the organisation of sports betting under a state monopoly was really suitable to contain the dangers inherent in games of chance: there could be no question of such containing where the range of gambling on offer was being greatly expanded and at the same time aggressive advertising was being used. The court stated that consideration would in particular have to be given to ensuring that the undesirability of games of chance, which was presumed in § 284 of the Criminal Code, was not in irreconcilable contradiction to the conduct of the state as organiser. At present, however, the assessment of the legislature was unobjectionable, for the above reasons. 37

European Community law reached the same result. However, the arranging of fixed-odds betting in countries outside Germany belonging to the European Community was subject, under the case-law of the European Court of Justice, to the provision in Article 49 (new) of the EC Treaty on freedom of provision of services. The provisions of the EC Treaty on freedom of provision of services, however, did not conflict with national legal provisions on the reservation to the state of the organisation of bets if these provisions were actually justified by goals of “social policy”, in particular by the limitation of the harmful effect of such activities, and were not out of proportion. This is the case here. 38

IV.

1. In her constitutional complaint against the decisions of the Higher Administrative Court and the Federal Administrative Court, the complainant challenges a violation of her fundamental rights under Article 12.1 and Article 3.1 of the Basic Law and of European Community law. She argues as follows: 39

a) Contrary to the interpretation in the challenged decisions, fixed-odds sports bets are not games of chance in the meaning of § 284.1 of the Criminal Code, since it is not chance, but the expert knowledge of the gamblers that is decisive for winning. Nor are sports bets and games of chance undesired activities, for the Free State of Bavaria, by offering the sports betting system ODDSET, which it promotes strongly, itself makes sports betting an omnipresent everyday phenomenon. In view of this, the dangers to the population adduced to justify the betting monopoly are questionable. With regard to these dangers, the legislature, too hastily referred to its own scope for assessment and prognosis, without adequately determining a workable basis. The Federal Administrative Court also overlooks the fact that by reason of the Racing Bet- 40

ting and Lottery Act there have certainly been many years of positive experience with commercial bookmakers for horse-racing bets and state monitoring of these and the relief sought by the complainant is fundamentally only aimed at extending bookmaking activity to other kinds of sport. This is precisely the experience gained as a result of the range of commercial betting that has actually been provided in Germany since 1990 by some enterprises which were granted licences under the German Democratic Republic. Finally, commercial bookmakers are also admitted in Europe outside Germany, in particular in Austria. At all events, there is a great demand for betting in Germany.

b) Even if there are compelling reasons of public interest, the exclusion of commercial bookmakers is a disproportionate encroachment on the freedom of occupation. The prohibition of commercial betting is unsuitable to avert the dangers cited, since the population has access to a large number of opportunities for gambling by using foreign bookmakers on the Internet. In addition, the exclusion of commercial bookmakers is neither necessary nor reasonable. The dangers cited do not result from the fact that the organisation of betting is commercial. The pursuit of gain by commercial bookmakers is wrongly equated with manipulation and unreliability. There are no reasons to assume that betting organised by the state or by an enterprise controlled by the state could control the cited dangers better than the legislative regulation and official monitoring of private bookmakers. On the contrary: when the legislature admitted exclusively state-organised betting, the legislature, while purporting to act on motives of regulatory law, was primarily pursuing public-revenue interests. 41

For the same reasons, Article 3.1 of the Basic Law has also been violated. Commercial betting shops are unconstitutionally treated unequally both in comparison with state organisers and also in comparison with bookmakers admitted under the Racing Betting and Lottery Act. 42

c) Contrary to the opinion of the Federal Administrative Court, the betting monopoly is incompatible with European Community law. By its decision of 21 October 1999 (*Gewerbearchiv* 2000, p. 19), the European Court of Justice regards a monopoly as justified only if the restriction accompanying it in the first instance genuinely serves the goal of reducing the opportunity for gambling, and the financing of social activities out of the earnings from games of chance is merely a welcome side-effect rather than the real reason for the restrictive policy. In view of the omnipresence of state betting and the primarily public-revenue interest of the state in organising betting, there can be no question of this. 43

d) In view of all the above, the state betting monopoly cannot continue in force. In order to avoid a disproportionate encroachment, it is a constitutional requirement that § 284.1 of the Criminal Code be interpreted narrowly in conformity with the Basic Law to the effect that fixed-odds sports bets are regarded not as games of chance but as games of skill, and the organisation and arrangement of such games is therefore not prohibited. 44

2. At the request of the Federal Constitutional Court, the complainant additionally gave her opinion on the effects of the Lottery Treaty; she adhered to her previous opinion. She stated as follows: The Lottery Treaty has not removed the constitutional objections to § 284.1 of the Criminal Code, and in particular to its interpretation in the challenged decisions; for, just like the State Lottery Act, it contains no separate prohibition of the organisation and arrangement of bets; in addition, it does not even mention bets expressly. Also under the legal position of the Lottery Treaty, the complainant is unconstitutionally refused the grant of permission, and the previous system continues in place, without the critical examination called for by the Federal Administrative Court. 45

V.

The following submitted opinions on the constitutional complaint: the Federal Ministry of Justice on behalf of the Federal Government, the Government of the Free State of Bavaria, the North-Rhine/Westphalia *Land* government, the Thuringian *Land* government, the *Land* capital Munich, the Deutscher Buchmacherverband Essen, the Interessengemeinschaft Freier Europäischer Buchmacher, the Verband Europäischer Wettunternehmer, the Deutscher Sportbund and the Fachverband Glücksspielsucht. 46

1. The Federal Ministry of Justice regards the constitutional complaint as unfounded. It submits as follows: With regard to § 284.1 of the Criminal Code, a distinction must be made between the general prohibition and the criminal sanction. Firstly, it is an encroachment on freedom of occupation that § 284.1 of the Criminal Code basically prohibits the organisation and also – at least in the form of participation – the arranging of games of chance, if this is done without prior official permission. In this respect, the prohibition is only a framework that needs to be filled in; for § 284 of the Criminal Code itself does not govern the grant of permission. Provisions on this can be made only under *Land* law, since the federation is not competent in the matter, nor does such competence arise under Article 74.1 no. 11 of the Basic Law. The prohibition in § 284.1 of the Criminal Code is therefore substantively subject to *Land* law and can therefore not violate the right of occupational freedom. 47

The nature and scope of the encroachment can be determined only in interaction with the *Land* law in which the actual encroachment upon fundamental rights is to be seen. The criticism of the structure of state sports betting therefore relates only to the *Länder*. In contrast, § 284 of the Criminal Code requires constitutional justification only with regard to the fundamental decision it makes, which is a restriction of the admission to an occupation if – as is the case in the Free State of Bavaria – no permission may be granted to commercial betting shops. 48

The general prohibition by § 284.1 of the Criminal Code – notwithstanding further legitimate purposes – is absolutely necessary to avert serious dangers for the paramount public interest of health protection. It is a question of the protection of the population against the harmful effects of unmonitored and excessive numbers of games 49

of chance. The action plan of the Federal Government Commissioner on Narcotic Drugs reveals more and more problems with pathological behaviour in games of chance and calls for the endangerment potential of games of chance to be made plainer to those who supply them and to the public. In this respect, the reduction, caused by the prohibition, of the number of games of chance available is qualified to reduce the dangers inherent in unauthorised games of chance. The Federal Government cannot create a more lenient means than a general prohibition, *inter alia* for lack of competence. The reasonableness of the prohibition is shown by the circumstance that there is no adequate guarantee that the gamblers will protect themselves. Sports betting in particular has a special potential to create addiction, in part because of the emotional involvement and the illusory conviction of control based on knowledge of sport. It may therefore certainly not be excluded from the scope of application of § 284 of the Criminal Code, not even in view of the existing possibilities of state sports betting. The justification of the prohibition also supports the encroachment, by the imposition of criminal punishment, on [the rights to life and physical integrity protected by] Article 2.2 sentence 2 of the Basic Law.

Finally, the assumption that the prohibition is compatible with European Community law does not violate the prohibition of arbitrariness, since this is a defensible interpretation of the EU-law requirements of a monopoly. But in particular, § 284 of the Criminal Code is not based on any public-revenue interests. 50

2. The Government of the Free State of Bavaria regards the constitutional complaint as unfounded and the challenge of a violation of European Community law as inadmissible. It submits as follows: 51

a) The challenged decisions are constitutionally unobjectionable. The classification of fixed-odds sports betting as a game of chance is an assessment under ordinary law that may only be made by the non-constitutional courts. In their view of the legal position, the challenged decisions remain within the scope constitutionally granted to the legislature. 52

The unrestricted prohibition of commercial organisation and arranging of bets is justified only by the legitimate goal of preventing commercial profit being made from an exploitation of the gambling instinct. In this respect, the organisation and arranging of bets is an activity characterised by atypical peculiarities which is attended by specific dangers and is therefore undesired. The legislature therefore has a particularly broad latitude in legislating and structuring when restricting the freedom of occupation. 53

In view of the general exclusion of private profits being made from games of chance, a – restricted – permission of commercial supply is from the outset not a more lenient means, for it is necessary to avoid a competitive situation aimed at increase of profits between various suppliers, with all its negative consequences for the stimulation of gambling behaviour, and the attendant increases of danger. A person who takes part in games of chance does not make a financially rational decision, but seeks a decision of fate in the course of an activity fraught with the dangers of addiction. Unlike in 54

other fields, therefore, the market logic that competition leads to optimisation does not work. A monopoly structure free of competition is necessary, above all in fixed-odd sports betting, to exclude a dangerous competition in odds and to guarantee low-risk and safe betting.

In contrast, a competitive market that controls itself creates additional specific risks in the area of games of chance as a result of insolvencies and attempts to avoid insolvency by means of fraudulent arrangements. There is an elementary distinction between state and commercial organisers with regard to their orientation to profit. But insofar as the complainant proceeds on the basis that the prohibition is disproportionate, this is based on an inadmissible modification of the central goal of monopolisation. Despite the fact that state gambling too serves the gambling instinct, which cannot be suppressed, the necessary measure of control can be better achieved as part of state betting. Incentives to make winnings are dampened from the outset, and the regulatory authority can have a direct effect on the gambling by giving instructions. In contrast to this, the supervising of private persons involves attrition and time-consuming legal arguments. 55

In addition, since the primary goal is the prevention of commercial profit, it is not important to justify the prohibition on the grounds that the monopoly finances activities that are in the public interest. Notwithstanding this, when the legislature introduced the sports betting system ODDSET in the year 1999, it was reacting in regulatory law to an actual demand, which had already been fanned for several years by forms of sports betting which were illegal or based on a questionable form of permission from the German Democratic Republic. In view of the de facto competition from illegal bookmakers, the channelling of this demand into supervised possibilities of involvement can necessarily only be effected by means of advertising; this advertising therefore does not conflict with the goal under regulatory law, but positively fulfils it. There must also be a well-developed net of agencies for the customer, in order that interested persons can be offered state-supervised and reputable betting and in order to prevent potential customers turning to illegal betting instead. An Internet platform is therefore essential too. 56

Finally, it should be noted that any deficiencies in the state provision of betting are primarily a problem of implementation, which is to be solved by way of supervision, and deficiencies affect the constitutionality of the legal basis only if they are structural deficiencies, but such structural deficiencies are not apparent in the present case. From this point of view, the practice of state organisation of betting must also be granted the opportunity to become further differentiated and optimised with the help of increasing knowledge. 57

The Lottery Treaty confirms the substantive legal position that already exists in the Free State of Bavaria and recognises it as appropriate for all *Länder*, on the basis of new assessments and prognoses. In particular, the coordinated organisation of games of chance, based on the monopoly structure, in all *Länder* helps to prevent un- 58

desired effects of expansion and the associated increase of the dangers of addiction. The connection between increased addiction potential and a large number of commercial agencies is proved by the final report of the investigation by Hayer and Meyer into the endangerment potential of lotteries and sports betting, which was submitted to the Ministry of Labour, Health and Social Affairs of the *Land* North-Rhine/Westphalia in May 2005.

c) The European Court of Justice has now passed judgment in the matter of Gambelli (Judgment of 6 November 2003 – C-243/01 – Gambelli and Others), holding that for a prohibition to be justified there must be a systematic and coherent restriction of games of chance; according to this judgment, the prohibition of commercial betting does not violate fundamental freedoms of European Community law either. In particular, an advertising campaign, which is large-scale for reasons of regulatory law, does not make the monopoly incompatible with Community law. For this advertising must be evaluated against the background of a market that would heat up without monopolisation, not against the background of mere earning of money by the state. 59

3. The *Land* government of North-Rhine/Westphalia also regards the constitutional complaint as unfounded. It submits as follows: The complainant's arguments are mistaken. In particular the existing demand and a broad acceptance of sports betting are incapable of casting doubt on the assessment of such betting from the point of view of legal ethics and the sociopolitical decision as to the direction to be followed, and they do not conflict with statutory provisions which make a measured and supervised availability of gambling possible. The complainant calls for an interpretation that is in conformity with the Basic Law; this would reverse the meaning of this clear leading decision. 60

Nor is doubt cast on the constitutionality of the statutory provisions by the de facto activity of the public organisers of games of chance. A certain degree of availability and advertising is in fact appropriate for the regulatory goal of channelling the gambling instinct, which at the same time prevents the cash flow being diverted into illegal spheres and ensures that profits from games of chance can be used for the community. Betting on supraregional top sporting events is incomparably more attractive, and therefore a constitutionally relevant comparison with betting on horse races, which is limited and can be clearly territorially defined, is impossible from the outset. 61

4. The Thuringian *Land* government also regards the constitutional complaint as at all events unfounded. Essentially, it follows the opinion of the Government of the Free State of Bavaria. 62

5. In the opinion of the *Land* capital Munich, the refusal of permission for private persons to operate games of chance in the form of sports betting violates neither constitutional law nor European Community law. It submits as follows: 63

a) The restriction is justified in order to prevent an unlimited expansion of games of chance in Germany. Sports betting, just like casino games, has a heightened poten- 64

tial for addiction. Precisely its element of knowledge encourages the assumption that the possibilities of winning are controllable and further stimulates the passion for gambling. A competitive market with betting shops outbidding each other, where these bookmakers have no particular entrepreneurial risk and are oriented to a purely financial exploitation of the passion for gambling, would further increase the dangers of betting. For in order to maximise their profits, commercial bookmakers would have to be determined to ensure that the customer crosses the fine line between responsible and compulsive gambling. The border between regular and aggressive advertising too can scarcely be bindingly laid down and effectively monitored with regard to commercial bookmakers. This is an argument in favour of a monopoly system; a restricted admission of private bookmakers which is in advance limited to a specific number of persons is not a more lenient means in contrast to a monopoly system, since in view of the large number of interested parties this would certainly not be more reasonable, but extremely problematic from a legal point of view in its turn.

b) The Lottery Treaty still preserves the monopoly structure. The only new element is the provision on commercial gambling agencies; the public organisers, under the case-law of the Federal Court of Justice (*Bundesgerichtshof*), are obliged to accept their betting instructions. In this respect, the area of commercial betting agencies, which was previously disorganised, is guided into ordered paths by a number of requirements under regulatory law. But this provision does not aim to expand the number of persons supplying games of chance or relax the requirements for operating games of chance. In addition, the prohibition of the organisation of commercial sports betting also applies to arranging such betting. All that is permitted is arranging the bets organised by the relevant *Land*. 65

6. The Deutscher Buchmacherverband Essen regards the exclusion of commercial sports betting as unconstitutional. It submits as follows: The existing monopoly is at all events unreasonable, since the advantages alleged to be attendant on it are by no means guaranteed. On the contrary, it should be pointed out that there is a contradiction between the assessment of private profit as immoral and the fact that where there is commercial marketing within the monopoly system profits are skimmed off and profits are made by the state. In the same way, the alleged necessity of a monopolisation is in contradiction with the fact that there is no regulation of the substance of state-run games of chance either and the legislature is content with the mere fact of monopolisation. The lack of distance between the supervision and the state as bookmaker prevents effective monitoring in the area of state bookmaking. This is also shown by the contradiction between the claimed containment policy and the business practice. In addition, no account is taken of the fact that the source of danger in betting is not primarily the organiser, which is interested in maintaining its business by reason of its own financial interest, but the manipulation of the event betted on by third parties, a risk to which both state and commercial organisers are equally exposed. Finally, the calculation of the odds certainly is an entrepreneurial activity, carrying the typical risks. 66

The interpretation of the Federal Administrative Court wrongly proceeds on the basis of a prohibition, contained in § 284.1 of the Criminal Code, of the organisation and arranging of bets; for such a prohibition cannot be justified either historically or systematically in law or by legislative purpose. The assumption that § 284 of the Criminal Code contains a repressive prohibition reinterprets this criminal-law provision as a regulatory-law provision. Such an interpretation is not found in the case of any other definition of a criminal offence in which punishability depends on whether or not permission has been granted. On the one hand, the Federal Government's capacity to legislate for criminal law does not contain a primarily regulatory-law interpretation of § 284 of the Criminal Code. On the other hand, the reservation of power to federal criminal law to permit acts otherwise prohibited is constitutionally questionable, since there are no federal-law provisions for granting licences. § 284 of the Criminal Code is therefore to be interpreted, in conformity with the Basic Law, either to the effect that the organisation of games of chance is a criminal offence only if permission that is required under other legal provisions has not been given, or to the effect that § 284 of the Criminal Code itself is the legal basis for granting permission. 67

7. In the opinion of the Interessengemeinschaft Freier Europäischer Buchmacher too, the existing legal situation is unconstitutional. The Association regards it as necessary for § 284 of the Criminal Code to be interpreted in conformity with the Basic Law, and it also regards an extension of the business activities of bookmakers already licensed under the Racing Betting and Lottery Act as a suitable possibility of creating a constitutional state of affairs, at least during a transitional period, without the need to forgo a strict and tested system of supervision. 68

8. The Verband Europäischer Wettunternehmer also regards the exclusion of commercial sports betting as unconstitutional. It is of the opinion that the Lottery Treaty too serves merely to secure earnings for the state. 69

9. The Deutscher Sportbund regards a monopolisation of games of chance as necessary in order to channel the gambling instinct and to avoid dangers inherent in games of chance. In particular, it refers to the accompanying financial support of projects of public interest in fields such as sport, welfare and culture. This support is essential for sport. The fact that this support is relatively at arm's length from the state is particularly conducive to the autonomy of sport and in turn it reduces the financial burden on the state. If games of chance are liberalised, the present participation of sport in the income from games of chance must be assured. 70

10. The Fachverband Glücksspielsucht rejects any expansion of the gambling market. It submits as follows: it has been unequivocally demonstrated by epidemiological research that increased availability of games of chance is inseparably accompanied by an increase in gambling addiction and problematic gambling behaviour. This applies irrespective of whether games of chance are organised by the state or by commercial entities. To achieve better control of the dangers of addiction associated with games of chance, it is necessary to strengthen the protection of gamblers and to build 71

up an independent, competent supervisory authority provided with effective instruments. In addition, it would be desirable to develop a uniform law of games of chance, which, unlike the present law, also imposes tightened substantial requirements on games of chance. In doing this, it is particularly important that sports betting is included; it is shown by many years of experience in countries where more sports betting is available, and by first experience since the introduction of sports betting in Germany, that sports betting has an addictive potential. Although in total there are still not enough representative epidemiological studies, it is apparent that young people in particular are turning to fixed-odds betting, and even at the early age of between 13 and 19 they show a marked degree of problematic gambling behaviour. Marketing games of chance like a normal commodity must therefore be regarded as problematical.

VI.

72 The following expressed their opinions in the oral hearing: the complainant, the Federal Ministry of Justice in the name of the Federal Government, the Government of the Free State of Bavaria, at the same time on behalf of the other *Länder* represented at the hearing, the *Land* capital Munich, the Deutscher Buchmacherverband Essen, the Interessengemeinschaft Freier Europäischer Buchmacher, the Verband Europäischer Wettunternehmer, the European State Lotteries and Toto Association, the Deutscher Sportbund, the Deutsche Fußball Liga, the Deutsche Hauptstelle für Suchtfragen and the Fachverband Glücksspielsucht.

73 In the hearing, above all the European State Lotteries and Toto Association pointed out, in addition to the aspects set out above, that when European countries are compared, notwithstanding some national peculiarities which exist with regard to sports betting, they generally have a fundamentally restrictive approach towards games of chance. In almost all countries of Europe, the organisation of games of chance is organised as a monopoly.

74 The Deutsche Fußball Liga referred to the specific financial effects on sport in connection with the present organisation of the state betting monopoly.

75 According to the Deutsche Hauptstelle für Suchtfragen, the restriction of games of chance is part of the national plan for combating addiction. It submitted as follows: In particular among young people, the manifestation of compulsive behaviour may be an increasing problem. Addiction to games of chance is now a greater problem among young people in Canada than alcohol and nicotine.

B.

76 The constitutional complaint is admissible.

77 However, it is inadmissible to challenge the violation of European Community law. Rights under Community law are not among the fundamental rights, or rights that are equivalent to fundamental rights, the violation of which can be challenged under Arti-

cle 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) by a constitutional complaint (see BVerfGE 110, 141 (154-155)). Nor may a possible violation of European Community law be challenged on the grounds that, because of the primacy of European Community law, there might be no applicable law satisfying the constitutional requirement for a fundamental right of the specific enactment of a statute, and therefore there might be no restriction of the guarantee of the fundamental right. For the decisive question here is whether a domestic non-constitutional provision is compatible with the provisions of European Community law, and the Federal Constitutional Court is not competent to answer this question (see BVerfGE 31, 145 (174-175); 82, 159 (191)).

C.

The constitutional complaint is well-founded in part. 78

I.

The Bavarian State Lottery Act of 29 April 1999 is incompatible with Article 12.1 of the Basic Law, because against the background of § 284 of the Criminal Code it reserves the organisation of sports betting to the Free State of Bavaria and its operation to the State Lottery Administration or a private-law legal person whose sole member is the Free State of Bavaria, without at the same time creating sufficient statutory provisions to ensure substantively and structurally that the goals pursued by this are achieved, in particular orienting the betting to restricting and combating betting addiction and problematic gambling behaviour. The restriction of the arranging of sports betting is also incompatible with Article 12.1 of the Basic Law for this reason. 79

1. The principal review standard under constitutional law is the fundamental right of occupational freedom under Article 12.1 of the Basic Law. 80

a) Article 12.1 of the Basic Law protects both the free exercise of an occupation and also the right to choose an occupation freely. Occupation here means every profit-making activity that is of a permanent nature and serves to create and maintain a basis of existence (see BVerfGE 105, 252 (265) with further references). Both the organising and the arranging of sports betting satisfy this definition and therefore are protected as occupations by the right of freedom of occupation under Article 12.1 of the Basic Law. 81

b) The fact that these activities, in the opinion expressed in the challenged decisions, are prohibited under non-constitutional law, and that bookmaking is reserved to the state in Bavaria, does not prevent them from qualifying as occupations in the meaning of Article 12.1 of the Basic Law. 82

aa) Protection in the form of the fundamental right of freedom of occupation is not denied to an activity which basically satisfies the definition of an occupation simply because non-constitutional law prohibits the commercial exercise of this activity. On the contrary, a restriction of the scope of protection of Article 12.1 of the Basic Law in 83

the sense that its guarantee from the outset applies only to permitted activities (see BVerfGE 7, 377 (397)), is a possibility, if at all, only in relation to those activities that are to be regarded as prohibited by their very nature, because by reason of their harmfulness to society and the community they simply cannot share the protection of the fundamental right of freedom of occupation.

This is not the case where private betting shops organise commercial sports betting and where bets are arranged that are not organised by the Free State of Bavaria, even if it is adduced to justify the exclusive admission of betting for which the state is responsible that the exploitation of the natural passion for gambling and betting of the population for the purpose of private and commercial gain is socially undesirable. 84

The legal system has established sports betting as a permitted activity. The Racing Betting and Lottery Act permits a special form of sports betting and creates rules for the occupation of the bookmaker who makes or arranges bets at public performance tests for horses as a private business. In addition, in the year 1990 individual business authorities in the German Democratic Republic granted permits for private betting shops to organise and arrange sports betting; § 3 of the Trade Regulation Act (*Gewerbegesetz*) of the German Democratic Republic of 6 March 1990 (Law Gazette of the German Democratic Republic (*Gesetzblatt der Deutschen Demokratischen Republik – GBl*) I p. 138), in conjunction with the associated implementing order of 8 March 1990 (*GBl* I p. 140), created the possibility of granting a business licence for “games of chance for money”. Finally, sports betting is recognised as a business activity in the meaning of Community law (see European Court of Justice, Judgment of 6 November 2003 – C-243/01 – Gambelli and Others). 85

bb) Equally, the organisation and arranging of sports betting are not activities that from the outset are open only to the state and are reserved to the state. 86

Notwithstanding the question whether Article 12.1 of the Basic Law can be excluded at all as a review standard in this way (see BVerfGE 41, 205 (218)), it does not automatically follow from the monopolisation of the organisation and operation of lotteries and betting under Article 2.1, 2.4 and 2.5 of the State Lottery Act in Bavaria that the activities in question as such are not open to being practised as occupations by private persons. The Racing Betting and Lottery Act, on the other hand, suggests the opposite. This Act subjects horse-racing bets of private racing associations and commercial bookmakers to a statutory provision without entrusting the organisers with a public-sector task. 87

Nor is there a conflict between the protection of the organisation and arranging of sports betting by Article 12.1 of the Basic Law and the Lottery Treaty entered into between the *Länder*, which entered into force on 1 July 2004; § 5.1 of the Lottery Treaty provides that it is a regulatory-law task of the *Länder* to ensure that a sufficient number of games of chance are available. For this is merely a mutual obligation of the *Länder* to monopolise the organisation and operation of games of chance in such a way that games of chance may be organised and operated only by the *Länder* them- 88

selves, by public-law legal persons or by private-law companies or partnerships in which public-law legal persons directly or indirectly participate. The accompanying exclusion of commercial sports betting organisation by private betting shops is a means to achieve the goals set out in § 1 of the Lottery Treaty which has to be justified against the background of the fundamental right of Article 12.1 of the Basic Law; it is not an indication that the activities in question are government activities.

The arranging of sports betting can in any case not be treated as a task that is reserved to the state, because the betting organised by the Free State of Bavaria is operated through agencies which act commercially and whose exclusive status merely follows from an agreement with the State Lottery Administration, not from their being entrusted with a government activity. 89

2. The relevant provisions are to be subjected to review under constitutional law with the content which the non-constitutional courts have attributed to them by interpretation. The Federal Constitutional Court does not review the interpretation and application of legal provisions by the administrative courts in full, but only to determine whether there has been a violation of constitutional law (see BVerfGE 18, 85 (92); 106, 28 (45); established case-law). But in this examination by the Federal Constitutional Court, particular attention is paid to the question of whether the legal provisions applied, with the content attributed to them by the non-constitutional court decisions challenged, are compatible with law of higher priority and whether compliance with the Basic Law requires them to be interpreted in conformity with the Basic Law (see BVerfGE 32, 319 (325-326); 75, 302 (313)). 90

In the opinion of the Higher Administrative Court and the Federal Administrative Court, the organisation and arranging of bets under § 284 of the Criminal Code are, in principle, prohibited, but in exceptional cases permission may be granted. Against this background, the State Lottery Act reserves the organisation and arranging of betting in Bavaria to the state, without creating the possibility that permission may be granted for commercial betting by private betting shops. In addition to the organisation and operation, the challenged decisions are of the opinion that within Bavaria it is also prohibited to offer bets that are not organised by the Free State of Bavaria. 91

This state betting monopoly, which exists in Bavaria based on the interpretation by the non-constitutional courts, is an encroachment on the complainant’s occupational freedom because of its accompanying exclusion of commercial organisation of betting by private betting shops and because of the exclusion of the arranging of bets that are not organised by the Free State of Bavaria; this encroachment must be justified. 92

3. This encroachment, in view of the present structure of the betting monopoly in Bavaria, is not constitutionally justified. 93

a) Pursuant to Article 12.1 sentence 2 of the Basic Law, which also applies to measures that affect the right to choose one’s occupation freely (see BVerfGE 7, 377 (399 94

et seq.); 86, 28 (40)), encroachments on the fundamental right of occupational freedom are permitted only on the basis of legislation which satisfies the requirements imposed by the Basic Law on statutes that restrict fundamental rights. This is the case if the encroaching provision was passed by the competent legislative body, is justified by sufficient reasons of public interest which take into account the nature of the activity in question and the intensity of the specific encroachment and satisfies the principle of proportionality (see BVerfGE 95, 193 (214); 102, 197 (212-213)).

b) The provisions restricting the fundamental right of occupational freedom are in conformity with the allocation of legislative competence between the Federal Government and the *Länder*. 95

Irrespective of the legislative competence of the Federal Government in criminal law, the Free State of Bavaria was competent to pass the State Lottery Act. This is the case if only because the Federal Government has at all events not made use of a possibility of legislative competence under Article 74.1 no. 11 of the Basic Law (law relating to economic matters), except in the area of betting on equestrian sports (Article 72.1 of the Basic Law). 96

c) The state betting monopoly that exists in Bavaria is based on legitimate goals related to the public interest. However, not all the goals adduced to justify the betting monopoly justify the restriction of occupational freedom. 97

aa) The main purpose of creating a state betting monopoly and the restriction and regulation of betting intended by this is combating gambling and betting addiction. This is a particularly important goal related to the public interest. 98

At the present stage of research it has been confirmed that games of chance and betting may result in pathological addictive behaviour (for general information, see Meyer, *Glücksspiel – Zahlen und Fakten*, *Jahrbuch Sucht* 2005, p. 83 (91 ff.); Hayer/Meyer, *Das Suchtpotenzial von Sportwetten*, in: *Sucht* 2003, p. 212). The World Health Association (WHO) has put pathological gambling in the international classification of mental and behavioural disorders (ICD-10). It cannot definitively be determined how far, in view of this finding, the state has a duty under Article 2.2 sentence 1 of the Basic Law to protect the citizens' health, but the avoidance and averting of addiction dangers is at all events a paramount goal of public interest, since gambling addiction can have serious consequences not only for the addicts themselves, but also for their families and for the community (see European Court of Justice, Judgment of 6 November 2003 – C-243/01 – Gambelli and Others, paragraph 67 with further references). 99

However, different forms of games of chance have differing addiction potential. According to the present state of knowledge, by far the most gamblers with problematical or pathological gambling behaviour play at slot machines which are permitted to be operated under the Trade Regulation Act (*Gewerbeordnung*). In second place in the statistics are casino games. At present, all other forms of games of chance con- 100

tribute markedly less to problematic and pathological gambling behaviour (see Hayer/Meyer, *Die Prävention problematischen Spielverhaltens*, *J Public Health* 2004, p. 293 (296)).

At present, the addiction potential of fixed-odds sports betting cannot be definitively assessed. First investigations and international experience suggest that the danger is less than for what are known as “hard” casino games of chance, but definitely exists (see Hayer/Meyer, *Das Suchtpotenzial von Sportwetten*, in: *Sucht* 2003, p. 212 (218)). It cannot be foreseen at present how addiction potential would develop with regard to sports betting if the latter were practised to a considerably greater degree. 101

Even if, for the great majority of the gamblers, sports betting probably has the character of pure recreation and entertainment (see Hayer/Meyer, *Das Suchtpotenzial von Sportwetten*, in: Sucht 2003, p. 212 (218); Schmidt/Kähnert, *Konsum von Glücksspielen bei Kindern und Jugendlichen – Verbreitung und Prävention*, Abschlussbericht, August 2003, p. 166), the legislature is entitled to expect that fixed-odd sports betting has a fairly considerable addiction potential, even on the basis of the present state of knowledge, and it may take this as an occasion for prevention, with the goal of averting a highly probable danger. This applies in particular to the protection of children and young persons. 102

bb) Further legitimate goals are the protection of the gamblers against fraudulent schemes by the bookmakers and additional consumer protection, in particular protection against the danger of misleading advertising, which is particularly likely to be encountered here. However, in fixed-odds sports betting, the typical dangers of fraud by the use of rigged gambling machines and gambling equipment, or by influencing the course of the game, are present to a lesser degree than in other games of chance, since bets are made on a sporting event organised by a third party, which the bookmaker itself cannot influence. There is also less cheating of the gamblers by deceiving them as to the chances of winning in the case of fixed-odds sports betting, since the risk and the chance of winning are more transparent than is the case with other games of chance, because the odds are agreed at a fixed ratio. 103

But in comparison with types of gambling where the organiser merely pays out the money collected from the gamblers after retaining a certain proportion, the gambler may be endangered by the organiser’s insolvency. As in the case of other commercial activities where third-party funds are entrusted to the organiser, therefore, the reliability and financial capacity of the organiser must be ensured in the interest of the gamblers in the case of fixed-odds sports betting. 104

cc) Another legitimate goal of a state betting monopoly is the averting of dangers which arise from crime that accompanies betting and is consequential upon betting. Insofar as sports betting in particular has addiction potential, it also carries the typical danger that addicts finance their addiction through criminal acts (see Meyer/Althoff/Stadler, *Glücksspiel und Delinquenz*, 1998, pp. 124 ff.). Large winnings may be made from sports betting, and therefore it is likely that organised crime will be involved. 105

Finally, sports betting fraud is an accompanying crime which is a danger specific to fixed-odds sports betting. The connection of sport with bets on the outcome of sports events may tempt gamblers not to leave the outcome of the sport to chance, but to manipulate the result in their own favour. In this way, sports betting also creates a danger to the integrity of sports. 106

dd) In contrast, the state's public-revenue interest does not justify the creation of a betting monopoly. 107

One goal of the state betting monopoly is to ensure that a considerable part of the earnings from games of chance is used to promote public or tax-privileged purposes in the meaning of the Tax Code (*Abgabenordnung – AO*), as is now provided in § 1 no. 5 of the Lottery Treaty. The opinion of the *Bundesrat* on the amended law of games of chance attaches weight *inter alia* to using a considerable part of the earnings from games of chance for charitable or public purposes (see *Bundestag* document 13/8587, p. 67). 108

Skimming off funds, however, is justified only as a means to combat addiction and as the consequence of a state monopoly system, but not as a goal in itself. Admittedly, the Federal Constitutional Court, in its Casino Decision, regarded it as a legitimate goal to direct a considerable part of the earnings of casinos to purposes in the public interest (see BVerfGE 102, 197 (216)). But it was the special possibilities of making profit that arise from privately operating a casino that were cited to justify this. It may therefore be justified to skim off profits from the earnings from games of chance beyond the otherwise customary tax rates, both in order to make betting more expensive and therefore to reduce its availability and to compensate for possibilities of making particularly large profits. However, in the Casino Decision too the Senate emphasised that the goal of increasing the state's earnings for public-revenue reasons cannot in itself justify a restriction of the freedom of choice of occupation (see BVerfGE 102, 197 (216)). 109

ee) The goal laid down in § 1 no. 3 of the Lottery Treaty, "to prevent the gambling instinct being exploited for the purpose of private or commercial gain", would also not be a constitutionally admissible goal if it were only a question of excluding private pursuit of gain. The exclusion of private pursuit of gain, in the case of an activity that is protected by Article 12.1 of the Basic Law among other things precisely because it is practised for private financial gain, can only be a means that in its turn requires justification, a means by which the other legitimate goals are to be attained. A legitimate goal, in contrast, is preventing the exploitation of the gambling instinct. 110

d) The statutory creation of a state betting monopoly is in principle a suitable means to achieve the legitimate goals. 111

For a means to be suitable in the constitutional sense, it is only necessary for it to be capable of assisting the desired result; the possibility of achieving the purpose is sufficient (see BVerfGE 63, 88 (115); 67, 157 (175); 96, 10 (23); 103, 293 (307)). In this 112

process, the legislature has priority in assessment and prognosis (see BVerfGE 25, 1 (17, 19-20); 77, 84 (106-107)). It is principally for the legislature, taking account of the inherent laws of the subject area in question, to decide what measures it wishes to take in the public interest (see BVerfGE 103, 293 (307)).

aa) By this yardstick, the assumption of the legislature that the creation of a state betting monopoly is a suitable means to combat the dangers associated with the betting is in principle unobjectionable. This also applies to the assumption that an opening of the market as a result of the competition that would then arise would lead to a substantial expansion of betting and this expansion would also lead to an increase in problematical and addiction-influenced behaviour. 113

bb) The means does not cease to be suitable simply because the state betting monopoly can be enforced only to a restricted extent. There will always be illegal forms of games of chance too; these cannot be completely prevented. In addition, under today's technological conditions, there are possibilities of placing sports bets over the Internet without the state being able to completely prevent these possibilities from being available in Germany. But merely because technological and economic development creates obstacles to complete prevention, this does not mean that an organisation at the national level to pursue the public interest which is in principle suitable for this becomes unsuitable. 114

e) The legislature was also entitled to assume that a betting monopoly was necessary. 115

aa) The legislature, in assessing the necessity, also has scope for assessment and prognosis (see BVerfGE 102, 197 (218)). As a result of this prerogative of assessment, measures that the legislature regards as necessary to protect an important reason of public interest such as the averting of the dangers that are inherent in the organising and arranging of games of chance may be constitutionally objected to only if, according to the facts known to the legislature and in view of the experience to date, it can be established that restrictions that are potential alternatives promise to be equally effective but at the same time are less onerous for those affected (see BVerfGE 25, 1 (12, 19-20); 40, 196 (223); 77, 84 (106)). 116

bb) By these standards, the assessment of the necessity of a betting monopoly by the legislature is constitutionally unobjectionable. 117

It is not excluded from the outset that consumer protection, the protection of children and young persons and the avoidance of crime accompanying betting and consequential upon betting can in principle also be realised by laying down in law corresponding legal standards for the commercial betting offered by private betting shops. Compliance with these standards could be ensured through imposing requirements for permission and official monitoring with the means of business supervision (see also European Court of Justice, Judgment of 6 November 2003 – C-243/01 – Gambelli and Others, paragraphs 73 et seq.). With regard to the dangers of addiction, howev- 118

er, the legislature, in view of its broad scope for assessment, was entitled to assume that with the help of a betting monopoly with betting made available under state responsibility, oriented to combating addiction and problematic gambling behaviour, these can be better controlled than by way of the monitoring of private betting shops (see BVerfGE 102, 197 (218-219)).

f) However, in its present structure, as shaped both by statute and practice, the state betting monopoly created in Bavaria is a disproportionate encroachment on occupational freedom . Citizens who are interested in working in this area can reasonably be expected to suffer the effects of the exclusion of commercial betting by private betting shops – which is subject to criminal sanctions – only if the existing betting monopoly serves to avoid and avert gambling addiction and problematic gambling behaviour, not only on paper, but as specifically implemented in practice. 119

But the sports betting system ODDSET, which was introduced under the betting monopoly, is not stringently oriented to the goal of reducing the passion for betting and combating betting addiction. The State Lottery Act contains no substantive provisions and structural safeguards to this effect that would be a sufficient guarantee. The deficiencies in the specific implementation of ODDSET are not merely a deficiency in the implementation of non-constitutional law. On the contrary: they reflect a deficiency in the legislation itself. 120

aa) The State Lottery Act, against the background of § 284 of the Criminal Code, provides that only the Free State of Bavaria may organise betting – but not horse-racing betting – (Article 2) and that betting may only be commercially arranged in agencies that have a written agreement with the state lottery administration (Article 3.1). The Lottery Treaty, which applies in the Free State of Bavaria as elsewhere, puts into concrete terms the goals applying for the organisation, implementation and commercial arranging of public games of chance, and contains conditions on the nature and scope of the advertising and on keeping information on gambling addiction, prevention and methods of treatment available (§ 4). Under § 5 of the Lottery Treaty, the Free State of Bavaria, like the other *Länder*, has the duty under regulatory law to ensure that a sufficient number of games of chance are available. 121

bb) These requirements are insufficient to promote the important public-interest concerns on which the betting monopoly is based. 122

(1) An orientation to the goal of combating betting addiction and problematic gambling behaviour is not ensured by a state betting monopoly alone. A monopoly may also serve public-revenue interests of the state and thus tension may arise between the monopoly and the objective of restricting the passion for betting and combating betting addiction. 123

This tense relationship is not defused by the fact that an amount of the money in the bank, which consists of the gamblers' stakes, is skimmed off to reduce the odds in order to ensure that the stimulus of the possibility of betting is kept at a low level from 124

the outset. For the mere fact that the organisation of betting is accompanied by public-revenue effects may of itself create a conflict of interests. The fact that the income is used to promote purposes in the public interest does not reduce the public-revenue incentive, but it leads to the promoted social activities being dependent on earnings from the organisation of games of chance and therefore to a situation where these resources appear scarcely dispensable and therefore there is a reason to expand the amount of betting available and to orient the advertising to the goal of obtaining new gamblers.

(2) In creating a betting monopoly under regulatory law, the state chooses a means to restrict the passion for betting and to combat betting addiction that goes beyond mere legal definition of betting, in particular by containing precepts and prohibitions. The state itself opens up an opportunity for the dangerous behaviour to be exercised, that is, the opportunity to take part in lawful games of chance. At the same time it is the state that acquires considerable earnings from the organisation of betting and that reserves this right to itself, pointing out that it promotes purposes in the public interest, in particular in the fields of sport and culture. But the earnings effect can lead (seductively) to a situation where the state ultimately undertakes the admission of betting and the supply of opportunities to bet in the sense of cultivating the passion for betting, where betting is marketed like a recreational activity that is in principle unobjectionable. 125

The opening up of a field of activity for the passion for betting that exists among the population, which has considerable earnings effects for the state, does not automatically demonstrate a rigorous and genuine orientation to the combating and restriction of betting addiction and problematic gambling behaviour. Instead, this must be positively expressed in the structure of the betting monopoly, in statute and in practice. Especially from the point of view of addiction medicine, active prevention is called for in this respect, even in association with state gambling monopolies, in particular in the form of information given, early recognition of problematic gambling behaviour and encouragement of the motivation to change one's behaviour, all provided in the context of the betting itself (see Hayer/Meyer, *Die Prävention problematischen Spielverhaltens*, *J Public Health* 2004, p. 293). 126

cc) The legal structure of the betting monopoly does not adequately guarantee that state betting is firmly placed in the service of active combating of addiction and restriction of the passion for betting, and that a conflict with a public-revenue interest of the state does not end in favour of this interest. 127

(1) The State Lottery Act contains almost exclusively provisions on competence and organisation. The substantive requirements of state lotteries and betting dealt with in Article 4 of the State Lottery Act are restricted to the requirement – admittedly suspended for fixed-odds betting – that the official terms and conditions of use must provide that at least half of the bank is to be paid out to the gamblers, and to a definition of the term "stake". Apart from this, it is merely provided that the terms and conditions 128

of use are laid down by the State Lottery Administration with the consent of the State Ministry of Finance. Both the definition of the authoritative substantive requirements and the structure of the betting actually made available are therefore the responsibility of the State Lottery Administration and the State Ministry of Finance. This means that there are no structural requirements, for example a neutral supervisory body, as a precautionary measure to ensure that the public-revenue interests are subordinate to the goal of achieving the protective purposes of the Act.

(2) Nor does the provision in § 284.1 of the Criminal Code remove the administrative-law deficiency in the State Lottery Act. § 284 of the Criminal Code contains no substantive requirements on the structuring of the betting. 129

(3) The administrative-law deficiency is not removed by the Lottery Treaty, which was ratified by all the *Länder*. In view of the Bavarian Act for the Implementation of the State Treaty on Lotteries in Germany (*Gesetz zur Ausführung des Staatsvertrags zum Lotteriewesen in Deutschland*) of 23 November 2004 (Bavarian Law Gazette p. 442), it is to be assumed that the requirements contained in the Lottery Treaty for the organisation, operation and commercial arranging of games of chance in the Free State of Bavaria are to apply directly and to supplement the State Lottery Act. 130

Admittedly, § 4 of the Lottery Treaty, in addition to its general reference to the goals of § 1 of the Lottery Treaty, provides that the organisation, operation and commercial arranging of public games of chance may not run counter to the requirements of the protection of children and young persons and advertising may not in its nature and extent be misleading and inappropriate, and that the organisers, operators and commercial bookmakers must keep information available on gambling addiction, prevention and possibilities of treatment. But this alone does not guarantee that the betting will be accompanied by active measures to combat addiction and to restrict the passion for betting. The requirements of advertising, above all, are ultimately directed only at avoiding advertising that is fundamentally dishonest or in the individual case exaggerated, but they do not prevent any advertising exclusively directed to the goal of expansive marketing. 131

dd) This legislative deficiency is reflected in the fact that at present there is indeed no strict orientation of the betting organised by the Free State of Bavaria to the goal of combating betting addiction and problematic gambling behaviour and of restriction of the passion for gambling and betting. 132

(1) The organisation of the sports betting system ODDSET clearly pursues public-revenue goals, among others. Even when it was introduced in the year 1999, this interest was a motivation. For example, the certain expectation of substantial earnings from the organisation of ODDSET is made clear by the State Treaty on the Provision of Funds from the Oddset Sports Betting Systems for Charitable Purposes in Connection with the Organisation of the FIFA World Cup Germany 2006 (*Staatsvertrag über die Bereitstellung von Mitteln aus den Oddset-Sportwetten für gemeinnützige Zwecke im Zusammenhang mit der Veranstaltung der FIFA Fußball-* 133

Weltmeisterschaft Deutschland 2006, Bavarian Law Gazette 2002, p. 628), which was ratified by the Free State of Bavaria and all the other *Länder*.

(2) Above all, however, the marketing of ODDSET is not actively oriented to a combating of gambling addiction and problematic gambling behaviour. Instead, the actual situation resembles the financially effective marketing of a recreational pursuit which is basically unobjectionable. 134

(a) An example of this appears in the official accompanying information *Hintergrund, Perspektiven, Chancen* (*Background, Perspectives, Opportunities*) of the State Lottery Administration in connection with the introduction of ODDSET. According to this document, the commencement of this betting system is definitively driven by the goal of developing the market and is particularly directed towards opening the market for the target group of 18- to 40-year-olds. There is mention of an "extensive package of measures and media that addresses the target groups in several stages and constantly stimulates the desire to join in the betting". 135

In line with this there is a large-scale advertising campaign which presents betting as a socially acceptable, or possibly even positively valued form of entertainment. The advertising in connection with the organisation of ODDSET, coordinated in the whole of Germany by the Deutscher Lotto- und Totoblock, is striking and in evidence everywhere. Contrary to what the Federal Administrative Court indicated, it does not matter whether the advertising is to be seen as aggressive. On the contrary, in the present context the decisive factor is that the advertising is not designed to channel the passion for betting, which exists in any case, towards state betting, but stimulates people to bet and encourages them (on this, see also the European Court of Justice, Judgment of 6 November 2003 – C-243/01 – Gambelli and Others, paragraph 69). According to the findings to date of research into addiction, some cases of problematic gambling behaviour are based on the gamblers' experience of state betting systems (see Hayer/*Meyer, Das Gefährdungspotenzial von Lotterien und Sportwetten*, May 2005, pp. 157 ff.). 136

(b) The channels of distribution for ODDSET are equally ill designed to combat the dangers of addiction and to restrict the passion for betting. 137

The State Lottery Administration markets ODDSET through its wide network of lottery agencies, which is based on the official slogan "weites Land – kurze Wege" ("big country – short paths"). These are mainly newspaper and tobacco shops or similar small or medium-sized business enterprises, so that the bets are usually made deliberately close to the customer. This make the possibility of sports betting a "normal" element of everyday life, which is available everywhere. 138

Against the background where betting is oriented to the goal of combating betting addiction and the restriction of the passion for betting, as is legally required, the possibility of taking part in betting through the Internet site of the State Lottery Administration is also questionable. In the oral hearing, the representative of the State Lottery 139

Administration himself demonstrated that at least at present it is not possible to effectively realise the protection of children and young persons, which plays a particularly important part in the prevention of addiction, if this channel of distribution is used. But the same is likely to apply to the use of text messages, which in principle make it possible to place sports bets by mobile telephone at any time and from any place.

(c) Finally, the presentation of the betting is also not sufficiently oriented to the goal of combating betting addiction and restricting the passion for betting. 140

In connection with the betting monopoly, the State Lottery Administration is restricted primarily to an indirect prevention, which is not actively communicated to the – potential – gamblers. It is intended that gamblers are to be prevented from engaging in an excess of betting acts, which is harmful for the individual and for society in general, by the opening up of betting possibilities that are attractive, albeit restricted in number, and in this way guiding the passion for betting into ordered and safe paths. From the point of view of addiction medicine, his concept is a suitable structural starting point for a betting system oriented to the prevention of problematic gambling behaviour (see Hayer/Meyer*, Die Prävention problematischen Spielverhaltens*, *J Public Health* 2004, p. 293 (302)). But in the present state betting system, the active prevention of addiction that is also important does not occur. Instead, the State Lottery Administration restricts itself to complying with the obligation under § 4.4 of the Lottery Treaty to have information available on gambling addiction, prevention and possibilities of treatment. On the website of the State Lottery Administration, in a position that is not very prominent, there is a brief reference to the dangers of excessive gambling and a link to a short informative text that can be consulted separately. The bricks-and-mortar agencies, according to the representative of the State Lottery Administration in the oral hearing, keep leaflets on this topic available. But the Internet information and the leaflet contain only a list of indicators of problematic gambling behaviour and apart from this refer to the advice offered by the Federal Centre for Health Education (*Bundeszentrale für gesundheitliche Aufklärung*). 141

ee) The legislation contains deficiencies, which are consequently demonstrated in practice, in realising the goals which in principle justify a betting monopoly; and the effect of this is that the current legal position is insufficient to legitimise this monopoly and to constitutionally justify the exclusion of private businesses from organising sports betting on this basis alone. 142

g) The disproportionality of the concrete de facto and legal structure of the state betting monopoly that exists in Bavaria also includes the exclusion of arranging other bets than those organised by the Free State of Bavaria. For this too can be justified by the yardstick of Article 12.1 of the Basic Law only if the monopoly is oriented, in law and de facto, to the above legitimate goals, in particular combating addiction and restricting the passion for betting. 143

In this respect, the requirements of German constitutional law are parallel to the requirements of European law formulated by the European Court of Justice. According 144

to the case-law of the European Court of Justice, the prevention of arranging betting in other Member States is compatible with Community law only if a state monopoly really serves the goal of reducing the opportunities for gambling, and the financing of social activities with the help of a levy on the earnings from authorised gambling is only a useful accompanying effect, but not the real reason for the restrictive policy pursued (see European Court of Justice, Judgment of 6 November 2003 – C-243/01 – Gambelli and Others, paragraph 62). The requirements of Community law are therefore the same as those of the Basic Law.

4. The exclusion of commercial organisation of bets by private betting shops and the arranging of bets that are not organised by the Free State of Bavaria accompanies the betting monopoly, and since this exclusion is not even compatible with Article 12.1 of the Basic Law, it is not necessary to review whether it is compatible with Article 3.1 of the Basic Law. 145

II.

1. The fact that the state betting monopoly existing in Bavaria is incompatible with Article 12.1 of the Basic Law does not automatically mean that the legal position challenged is null and void under § 95.3 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). 146

If legislation is not consistent with the Basic Law, but the legislature has more than one possibility of removing the violation of the Constitution, the Federal Constitutional Court generally takes this into account by merely declaring that the legislation is incompatible with the Basic Law (see BVerfGE 99, 280 (298); 104, 74 (91); 105, 73 (133)). This is also appropriate in the present case. 147

The exclusion of the commercial organisation of betting by private betting shops and the arranging of betting not organised by the Free State of Bavaria is incompatible with the Basic Law because the existing betting monopoly is structured in a way that does not ensure an effective combating of addiction that could justify the exclusion of private bookmakers. A constitutional state of affairs can therefore be reached either by a strict structuring of the betting monopoly that ensures that it really does serve to combat addiction, or by the admission, laid down by statute and monitored, of commercial organisation by private betting shops. 148

2. The legislature is constitutionally obliged to amend the legislation on the area of sports betting, exercising its framing discretion under legal policy. If the legislature wishes to retain a state betting monopoly, it must orient this strictly to the goal of combating betting addiction and restricting the passion for betting. In this process, there are substantive-law and organisational requirements for the constitutional structuring of a betting monopoly. It is the duty of the legislature to implement these individually and in interaction with each other. 149

The necessary provisions include criteria as to content with regard to the nature and design of sports betting and requirements for the restriction of its marketing. 150

The advertising for the betting, in order to avoid being an invitation to bet while keeping in mind the goal of offering legal betting possibilities, must restrict itself to information and clarification of the possibilities of betting. 151

The structuring in detail must be oriented to the goal of combating addiction and, linked to this, of protection of the gambler, also, for example, by precautions such as the possibility of a voluntary ban (on this, see Hayer/Meyer, *Sportwetten im Internet – Eine Herausforderung für suchtpräventive Handlungsstrategien*, *SuchtMagazin* 2004, p. 33 (40)). There is a need for measures to avert the dangers of addiction; these must go beyond merely having informational materials available. 152

The channels of distribution must be selected and established in such a way that possibilities of realising the protection of gamblers and of children and young persons are used. In particular, linking betting opportunities to television broadcasts of sporting events would run counter to the goal of combating addiction and would increase the risks associated with betting. 153

Finally, the legislature must ensure by means of suitable supervisory bodies which are sufficiently distant from the public-revenue interest of the state that these requirements are complied with. 154

a) In this process, a reform of the law might in principle be carried out either by the federal legislature or by the *Land* legislature. Therefore the Federal Government may act, on the basis of its concurrent right to legislate on the law relating to economic matters under Article 74.1 no. 11 of the Basic Law, subject to the conditions of Article 72.2 of the Basic Law. The competence of the Federal Government does not fail because of the regulatory-law aspect of the material to be legislated on. 155

b) A period of time until 31 December 2007 is appropriate for the reform of the law. 156

3. In the transitional period until there is a reform of the law, the present legal situation continues in place, subject to the proviso that the Free State of Bavaria must without delay create a minimum of consistency between the goal of restricting the passion for betting and combating betting addiction on the one hand and the actual implementation of its monopoly on the other hand. 157

a) The commercial organisation of betting by private betting shops and the arranging of bets which are not organised by the Free State of Bavaria may continue to be regarded as prohibited and be prevented by regulatory law. 158

Whether in the transitional period there is criminal liability under § 284 of the Criminal Code is a decision for the criminal courts. 159

b) In the transitional period too, however, a beginning must be made on strictly orienting the existing betting monopoly to combating betting addiction and restricting the passion for betting. The state may not use the transitional period for an expansive marketing of betting. For this reason, until the law has been reformed, the expansion of the opportunities of state organisation of betting is prohibited, as is advertising that 160

goes beyond factual information on the nature and manner of the betting possibilities and deliberately exhorts people to bet. In addition, the State Lottery Administration must immediately actively give information on the dangers of betting.

III.

The administrative-court decisions challenged by the constitutional complaint are not to be overturned under § 95.2 of the Federal Constitutional Court Act. Despite the fact that in the present case the State Lottery Act has been found to be incompatible with Article 12.1 of the Basic Law, they continue in existence in view of the fact that this Act continues to apply for the period until there is a reform of the law with the above stipulations. The constitutional complaint is therefore unsuccessful insofar as it challenges these decisions. 161

D.

The decision on the reimbursement of expenses is based on §§ 34a.2 and 34a.3 of the Federal Constitutional Court Act. 162

Judges: Papier, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffmann-Riem, Bryde, Gaier

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