Switzerland

WAKEBOARDING DECREE

Wakeboarders v Canton of Zug

Swiss Federal Supreme Court
2P.191/2004, August 10, 2005

LT Equal treatment; Lakes; Legislation; Switzerland; Watersports

Facts: In 2004, the Swiss Canton of Zug enacted a decree regarding the trendy sport of wakeboarding on Lake Zug and Lake Ägeri. The decree determines the exercise of wakeboarding and other comparable water sports being conducted with heavy motor boats and corresponding wave generation to be subject to a cantonal permit if organised professionally or by clubs. One of the prerequisites to be met in order to be eligible for such a permit is the permit holder's residence in the Canton of Zug (which is smaller than 1 per cent of Switzerland's territory and home to approximately 100,000 people).

Six parties addressed the Swiss Federal Supreme Court (''FSC''), asking for the repeal of the decree or at least of certain parts of it. They claimed (among other things) that the constitutional principle of equal treatment was infringed as wakeboarders—who in their view would not cause different waves from waterskiers and windsurfers—needed a permit which was not required for waterskiers and windsurfers. They also claimed that the prerequisite of the permit holder's residence in the Canton of Zug was not legal in the light of the Swiss single market.

Held: The FSC ruled that—unlike drivers of boats towing waterskiers and unlike windsurfers—wakeboarding boat drivers intentionally try to cause artificial waves as high as possible, often even adding quite a lot of extra weight to the boat for this purpose. Such waves may disturb other people on the lake severely. For this reason, wakeboarding cannot be interpreted as a normal water sport but rather as an activity not compatible with other activities on the lake. In legal terms, a boat towing a wakeboarder is not an ordinary but rather an extraordinary use (''*gesteigerter Gemeingebrauch*'') of public property, i.e. the lakes. According to general principles of Swiss law, any such extraordinary use of public property requires a permit. In view of this difference, the FSC found the decree to be consistent with the principle of equal treatment as the criterion for the necessity of a permit was not the sport itself but the impact of the sport on the lakes.

Regarding the single market issue, the FSC referred to the Federal Act on the Single Market stating that any person domiciled in Switzerland has the same free access to the Swiss market for the exercise of its professional activities and that market access restrictions may not differ whether the supplier is domiciled locally or in any other Swiss canton. The FSC repealed the relevant clause of the decree with regard to any professional activities but not in respect to any other activities.

Comment: In answering the first question without firmly listing certain sports requiring a permit but rather declaring the waves caused by most boats towing wakeboarders to be incompatible with the ordinary use of public property, the FSC did not really restrict the Zug authorities in their discretionary power concerning who was to be required to hold a permit. It remains to be seen if this judgment would also apply to a lake larger than Lake Zug and Lake Ägeri, which are certainly not the largest lakes in Switzerland, if the question ever came up.

The answer to the second question seems logical in the light of the Federal Act on the Single Market. Factually, however, the decision leads to an illogical consequence. It is not understandable why persons responsible for professional wakeboard activities may be domiciled outside the canton but persons responsible for non-professional but still organised wakeboard activities (e.g. in social clubs) may not. This situation calls for an examination in view of the constitutional principle of equal treatment—such an examination was not conducted in the case at hand as the claimants did not raise this issue in this regard.

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