Glücksspielstaatsvertrag (German Interstate Treaty on Gambling) violates Union law – Schleswig-Holstein's model now trend-setting

ECJ Judgement in the Carmen Media case (represented by Hambach & Hambach Law Firm)

After the ECJ's decision in case C-46/08 Carmen Media, the German gambling monopoly has come to an end. In its decision given today, the ECJ makes it clear that the Verwaltungsgericht (Administrative Court) of Schleswig, in its resolution of 30 January 2008 referring the case for a preliminary ruling, correctly reached the conclusion that the German gambling regulation is not in compliance with Union law (see press release dated 31 January 2008). The chief judge at the VG Schleswig, during the hearing on 30 January 2008, already expressed her view of the legal situation that a state gambling monopoly could only be justified with the objectives of combating gambling addiction if **all** legal regulations and actual measures taken by a Member state in the **entire** gambling market, rather than merely the provisions on which the monopoly on sports betting and lotteries is based, are made subject to examination with regard to whether restrictions on games are systematic and consistent. As a logical conclusion, the Verwaltungsgericht of Schleswig referred, among other issues, this question of consistency to the ECJ.

In its decision given on 8 September 2010, some two and a half years after this referral, the ECJ has now confirmed the concerns based on European law, and has removed the basis of justification, and thus also the basis of existence, of the

Glücksspielstaatsvertrag.

The ECJ states, in unusually clear words, that there is no compliance with Union law if – as is the case in Germany – the following line of argumentation is used to justify the regulations: A state which pursues the objective of preventing incentives to squander on gambling and of combating gambling addiction, but fails to pursue this objective in a consistent and systematic manner, acts in violation of Union law. A regulation is in particular in violation of Union law if it contains the following provisions, as is the case in Germany at the moment:

- • firstly, private participants in the industry are permitted to offer other games of chance, such as horse betting or gaming machines and
- secondly, with regard to the offer of other games of chance such as casino games or gaming machines in amusement arcades, bars and restaurants as well as hotels, a policy of expansion is being pursued.

The ECJ stresses that, according to the findings of the Verwaltungsgericht of Schleswig, the number of casinos – which are subject to the legislative competence of the Länder – increased from 66 to 81 between 2000 and 2006 alone. Also, the requirements for the operation of gaming machines in facilities other than casinos, such as amusement arcades, bars and restaurants as well as hotels (federal legislative competence) were found to have recently been loosened significantly.

Another point made by the Court with unusual clarity is that violations of Union law cannot be justified by the fact that some games of chance are subject to the legislative competence of the Länder whilst others are subject to that of the federal State.

Finally, the ECJ states that the authorities must not act

arbitrarily when deciding on the granting of a licence to Carmen Media, and that the issue of such licence must be based on objective, non-discriminating and pre-established criteria.

With regard to the question of the protection by Union law for a company offering games under a licence which is not valid in its own state of establishment, the Court made reference to its standing jurisdiction in the past, according to which the freedom to provide services applies in such cases as well. In particular, the Court stressed once more that the tax-related reasons put forward by Advocate General Paolo Mengozzi, which led to the regulation applicable in Gibraltar, are irrelevant for the issue of the scope of a licence under gaming law.

The judgement given by the ECJ therefore states with unexpected clarity that the basic provisions of the currently valid Glücksspielstaatsvertrag are not in compliance with the fundamental freedoms of the internal market as provided for in Union law.

This means that the discussion regarding a new legal framework for lotteries and games of chance must be reassumed immediately. Trend-setting ideas in this context come from Schleswig-Holstein (see paper on key issues published by the governing coalition on the new gaming act: http://www.ltsh.de/presseticker/2010-06/09/11-58-46-11a9/PI-TA9l1hGp-cdu.pdf), followed by Lower Saxony (see https://www.isa-guide.de/gaming/articles/30385.html), and, according to today's press release, also by the FDP party in Hesse, who comment on the ECJ judgement as follows: "(…) The State treaty, which was probably well-meant, has proven to be a disadvantage for the state monopoly on lotteries", according to Florian Rentsch, chairman of the FDP parliamentary party in the Hesse parliament and Wolfgang Greilich, home affairs spokesman.

According to the opinion held by the two liberal politicians, Hesse should now as soon as possible present a lawful draft

regulation which takes into consideration the decision by the ECJ, and provides for a liberalisation (http://www.fdp-hessen.de/webcom/show_article_pm.php/_c-181/_cat-/_nr-2273/_p-/_ao-/_lkm-/i.html). The legal wrangling over the gambling monopoly has now finally come to an end. Now, judiciousness and expertise will be required. There is a lot of work to be done – let us get on with it!