

# ECJ judgment in Carmen Media case causes legal chaos in Germany

By Wulf Hambach of Hambach and Hambach



Wulf Hambach

**T**he ECJ's judgments on the Carmen Media case on September 8 have plunged the German gambling market into legal chaos, as they found that Germany's regulations did not limit games of chance in a consistent and systematic manner.

The press coverage of the decision was widespread in Germany. The media suggested that the "end of the German gambling monopoly" seems to be inevitable. Examples of headlines and statements of the German press and media were...

"The German monopoly on lotteries and sports betting and other games of chances is inapplicable with immediate effect." (Tagesspiegel, September 8, 2010).

"Sport betting is now allowed in Germany." (Sueddeutsche Zeitung, September 9, 2010).

"The European Court of Justice stops the hypocrisy." (Die Welt, September 9, 2010).

"The Germany monopoly on gambling is illegitimate and - even transitionally - not applicable." (Tagesspiegel, September 9, 2010).

However, over the following days we saw the tide reverse somewhat, with the state lotteries in Germany (lotto.de) maintaining the right for the gambling monopoly to exist. Philippe Vlaeminck concluded in an article

with his colleague Annick Hubert: "By questioning the German monopoly, the European Court of Justice calls for stricter regulation of gambling services in Europe. These recent judgments (including Carmen Media) taken together, we can conclude that the court has given a clear signal to the national governments that an exclusive and non-competitive environment is the most appropriate for the gambling sector, given the specific public interest objectives which are at stake."

A clear reaction on the political front came immediately from the region of Schleswig-Holstein, whose proposal now becomes trend-setting. The press release sent out by the parliamentary parties of the CDU (conservatives) and the FDP (liberals) in Schleswig-Holstein on September 10 reads as follows:

"The parliamentary parties of the CDU and the FDP in Schleswig-Holstein today suggested a two-stage process for the development of a new gaming law. According to this, the new gaming law will come into force by the end of 2011 at the latest.

"The judgment by the European Court of Justice requires fast and at the same time well-coordinated measures," said Dr Christian von Boetticher, head of the CDU parliamentary party. "Otherwise, the courts will no longer be able to prosecute illegal gambling," FDP leader Wolfgang Kubicki said. "Therefore, we need a new regulation as quickly as possible."

Von Boetticher and Kubicki named seven criteria which the new gaming law mandatorily needs to fulfil in the opinion of the coalition parties in Schleswig-Holstein:

- Compliance with European Union law
- Provision of funds for popular sports and public welfare work, at least at their present level



The ECJ states, in unusually clear words, that if - as is the case in Germany - a state which pursues the objective of preventing incentives to squander on gambling and of combating gambling addiction, fails to pursue this objective in a consistent and systematic manner, it acts in violation of European law



- Effective protection of players and minors
- Effective prevention of addiction
- Effective measures against manipulation of bets
- Prevention of bets whose contents are detrimental to the reputation of sports
- Drying up of the black market in gambling

Back to the ECJ decision and its history... What exactly did the ECJ decide? In its decision of the case C-46/08 Carmen Media, the ECJ makes it clear that the



Verwaltungsgericht (Administrative Court) of Schleswig, in its resolution of January 30, 2008, referring the case for a preliminary ruling, correctly reached the conclusion that the German gambling regulation is not in compliance with European law.

The chief judge at the VG Schleswig, during the hearing on January 30, already expressed her view of the legal situation that a state gambling monopoly could only be justified by the objectives of combating gambling addiction if all legal regulations and actual measures taken by the 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 September 8, 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 (Interstate Treaty on Gambling).

The ECJ states, in unusually clear words, that if - as is the case in Germany - a state which pursues the objective of preventing incentives to squander on gambling and of combating gambling addiction, fails to pursue this objective in a consistent and systematic manner, it acts in violation of European law. A regulation is in particular in violation of European 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.

- Secondly, with regard to the offer of other games of chance such as casino games or gaming machines, a policy of expansion is being pursued.

The ECJ stressed 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



**The judgment given by the ECJ therefore states with unexpected clarity that the basic provisions of the currently valid Interstate Treaty on Gambling are not in compliance with the fundamental freedoms of the internal market as provided for in European law**



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 European law cannot be justified by the fact that some games of chance are subject to the legislative competence of the Länder while others are subject to that of the federal state.

Finally, the ECJ states that the authorities must not act arbitrarily when deciding on the grant 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 European 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 (Article 49 EC) 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 judgment given by the ECJ therefore states with unexpected clarity that the basic provisions of the currently valid Interstate Treaty on Gambling are not in compliance with the fundamental freedoms of the internal market as provided for in European law.

This means that the discussion regarding a new legal framework for lotteries and games of chance must be resumed immediately. Trend-setting ideas in this context come from Schleswig-Holstein and, according to a recent press release, also by the FDP party in Hesse, who comment on the ECJ judgment 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 these 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.

## Conclusion

The legal wrangling over the gambling monopoly should now finally come to an end. Now, political judiciousness and expertise will be required, which can be found again in the trend-setting state of Schleswig-Holstein: "Our suggestion is based on the Danish model, which the EU has not objected to," Hans-Jörn Arp, gambling expert of the CDU parliamentary party in Schleswig-Holstein, stressed in the press release of September 10.