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Content

i. Tears of joy

By Attorney-at-law Dr. Wulf Hambach, Hambach & Hambach law firm, published in SPONSORs 10/2010, p. 68

When I, together with my colleagues at the law firm, submitted an application to the Ministry of Finance in Schleswig-Holstein in 2006, intending to obtain access to the sports betting market in this state for the Gibraltarian online gaming provider Carmen Media Ltd., we obviously were aware of the following: First, we overthrow the German betting monopoly before the ECJ, and then our client can enter the German betting market. But all jokes aside: getting to Luxembourg with this case, and to even win it in the end, was about as likely as making a top Bundesliga side out of a village football team.

At least up to now. After the ECJ judgment of 8 September, the 16 Minister Presidents will probably have lost interest in a monopoly solution. This should now have cleared the way for the elimination of the ban on organising and advertising EU licenced online games of chance.

Bundesliga clubs will therefore probably soon themselves have the option of advertising for providers of sports bets and online poker such as Bwin.de or Pokerstars.de, who will by then hold a German licence. The potential for sponsoring deals which the online betting sector may soon bring to Germany should bring tears of joy to the eyes of the marketing and finance managers in the sector. According to estimates by the Remote Gambling Association, nine-time Champions league winners Real Madrid received up to 45 million Euro over a three-year-period from the online sports betting provider Bwin.

A factor which at present is still being underestimated in Germany is that online poker as an economic factor can easily keep up with sports betting: Pokerstars, the world's largest online poker provider, would, for instance, enter the market with an estimated advertising budget of approx. 25 million Euro per year after obtaining a German licence and will probably - as in France with rugby star Sebastien Chabal or in Italy with goalkeeping star Gigi Buffon - close massive sponsoring deals with stars from the German sporting scene.

At the latest from 2012 onwards, it should also be possible for FC Bayern Munich to send out invitations to friendlies to Madrid or Milan without a dress code add-on ("no Bwin shirts, please"). The "Miracle of Schleswig" would then have been achieved.

ii. What is the position of German legal science regarding the decisive issues after the ECJ's judgments of 8 September 2010?

By Attorney-at-law Dr. Stefan Bolay, Hambach & Hambach law firm

An analysis of the following essays: *Streinz/Kruis*: „*Unionsrechtliche Vorgaben und mitgliedstaatliche Gestaltungsspielräume im Bereich des Glücksspielrechts*" (Requirements under union law and discretion of the member states with regard to the design of gambling law) (NJW 2010, 3745 et seq.) and *Heine*: „*Glücksspielstaatsvertrag ade? – Zur Bedeutung der jüngsten EuGH-Rechtsprechung*" (Goodbye to the Inter-State Treaty on Gambling? - On the consequences of the latest ECJ judgments) (NJW-aktuell 41/2010, 16 et seq.)

1. Are the ECJ's judgments binding for the national courts, meaning that these courts will have to decide that the German gambling monopoly does breach union law?

Streinz/Kruis (NJW 2010, 3749):

"*In the Carmen Media judgment, the ECJ decided that the state monopoly for lotteries and sports bets as established by the GlüStV (Glücksspielstaatsvertrag = Interstate Treaty on Gambling) does not comply with the requirements under union law regarding the consistent and systematic design of such regulations. This interpretation of union law is binding for the national courts and authorities. However, the ECJ has expressly stressed that this incompatibility is based on the determinations made by the submitting administrative court, the VG of Schleswig, according to whom the German authorities are pursuing a policy of extending offers with the aim of maximising revenue with regard to other types of games of chance which are not covered by the monopoly, but have higher addiction potential. This is in accordance with the division of labour between the ECJ and the national courts in proceedings under section 267 of the Treaty on the Functioning of the European Union, according to which the ECJ is responsible for the interpretation of union law, whilst the determination and assessment of the facts is incumbent upon the national courts (ECJ, Stoß and others par. 63,* NVwZ 2010, 1409 *with further references). In theory, this means that a deviation from the ECJ's binding decisions seems possible, provided that a national court comes to a different conclusion with regard to the facts of a case. However, in practice this is unlikely, as the decision was mainly based on the easing*

of the legal prerequisites for the operation of slot machines; this is a fact which can easily be verified, so that a contradicting decision is not very likely."

Heine (NJW-aktuell 41/2010, 16 and 18):

"In the preliminary proceedings pursuant to section 267 of the Treaty on the Functioning of the European Union (previously section 234 EC Treaty), the ECJ is neither responsible for deciding on the validity or the interpretation of the member states' legal norms, nor for the determination of the compliance of such norms with union law (see, for instance, B. Hecker, Europäisches Strafrecht (European Criminal Law), 3rd edition, § 6 par. 11). Rather, the court (merely) provides 'suggestions' on the basis of the facts submitted by the national courts, in order to allow the national courts to interpret the national rules without breaching union law. Any breaches detected in this context will, due to the priority of union law, without fail lead to the non-applicability of such national rules. These suggestions by the ECJ are binding for authorities, for the courts and for the legislator. The suggestions in the judgments of 8 Sep. 2010 are far-reaching indeed! (…)

Compliance with union law depends on the overall consistency of gambling policy as a whole (Stoss par. 83, CM par. 45, 68). Therefore, it is irrelevant that the BVerfG (German Constitutional Court) has decided that the GlüStV as a part of this gambling policy complies with the Constitution (NJW 2009, 139). This total package of gambling rules is where the (German) spanner is in the (European) works. Pursuant to the facts submitted by the national court, there are two main reasons which do not fulfil the union law requirement of consistent and systematic restrictions of the fundamental freedoms in the course of an overall assessment: 1. The intensive advertising campaigns by the holders of the state monopolies, with the aim of maximising their profits (Stoss par. 100); 2. The policy of extending the offers for liberalised games of chance (additional casinos, easements of the SpielV (gaming decree); see CM par. 67). (…)

The first of the objections raised by the ECJ may be open to different evaluation; however, the second issue is not: the easing of statutory requirements for slot machines and casinos."

Summary and conclusive answer:

Yes.

Whilst the ECJ's decisions in principle do not have directly binding legal effect which would mean that all national courts would imperatively be forced to determine that the

German gambling monopoly is in breach of union law, they *de facto* lead to a binding effect in the specific case, as the facts provided by the submitting courts with regard to the easing of the commercial law requirements for gambling machines and the increase in the number of casinos cannot be refuted, so that a national court *de facto* cannot reach a conclusion other than the one stating that the German gambling monopoly is in breach of union law.

2. Do sections 1 et seq. of the GlüStV and sections 284 et seq. StGB (Strafgesetzbuch = German Criminal Code) continue to be (partially) applicable in spite of the German gambling monopoly being in breach of union law?

Streinz/Kruis (NJW 2010, 3749 and 3750):

"*At this point, we need to address the question as to which provisions of the GlüStV are inapplicable. As section 4 (1) of the GlüStV only contains a general licencing obligation, whilst the state monopoly only results from section 10 (2) and (5) of the GlüStV, which reserve this licence to legal entities controlled by the German Laender, it may be assumed that only section 10 (2) and (5) of the GlüStV are inapplicable, which would mean that private betting providers could apply for a licence pursuant to section 4 (1) of the GlüStV. However, a fact speaking against this is that the legislator has up to now attempted to completely exclude private providers from the sports betting and lottery market. Furthermore, non-compliance with union law does not mean that the legislator will now imperatively have to open the market to private competitors. Rather, he continues to be entitled to establish a state monopoly which is oriented to the requirements of union law, even though this will probably be difficult due to the distribution of competence between the German national government and the Laender. The application of section 4 (1) of the GlüStV, with the consequence of an opening of the market to private competitors, will therefore probably not correspond to the legislative intent, so that section 4 (1) of the GlüStV will also be inapplicable, meaning that no licencing requirements exist until a revision which complies with union law has been implemented. Another inapplicable provision is section 9 of the GlüStV as the legal basis for prohibition orders, as the failure to hold a licence which cannot be obtained in a way which complies with union law cannot be made subject to sanctions, in particular as there is no licencing obligation due to the priority of union law. This may not be sidestepped by applying the subordinate provisions of the criminal law regulations of one of the Laender (such as section 7 (2) of the BayLStVG in connection with section 284 of the StGB).*

An issue which cannot be answered quite so unambiguously is the inapplicability of the internet ban pursuant to section 4 (4) of the GlüStV. Whilst the ban of this marketing channel for games of chance is in principle justified due to the specific inherent dangers, the lack of a consistent overall concept for combatting gambling addiction will probably lead to the inapplicability of this ban.

In this context, the provisions of the GewO (trade regulations) replace the GlüStV, meaning that the principle of the freedom of trade pursuant to section 1 (1) of the GewO applies. As sections 33 c through 33 g are not applicable to games of chance pursuant to section 33 h of the GewO, private market participants are only subject to a notification obligation under section 14 of the GewO, until a revision which complies with union law has been implemented."

Heine (NJW-aktuell 41/2010, 18):

"*With regard to criminal prosecution, authorities are at present well advised to dismiss the relevant criminal proceedings in accordance with section 170 (2) of the StPO (criminal procedure code). In practice, the assessment has frequently been made that the non-compliance with union law of the administrative provisions on gambling is irrelevant for sections 284 of the StGB due to the fundamental values chosen by the legislator (repressive ban). However, irrespective of the question as to whether the choice of these values (generally undesirable and only permitted in exceptional cases) can be maintained under the present circumstances, the functional separation of the administrative law ban which breaches union law on the one hand and a criminal law provision which complies with union law simply must be regarded as a breach of union law (ECJ, NJW 2004, 140 - Gambelli).*"

Summary and conclusive answer:

No.

The violation of union law leads to the inapplicability of sections 1 et seq. of the GlüStV, meaning that the provisions in sections 284 et seq. of the StGB, which are linked to the administrative law provisions, also must be inapplicable.

In view of the GlüStV, teleological and systematic reasons show that the provision in section 10 of the GlüStV, on which the monopoly is based, cannot be inapplicable on its

own, but that the entire regulatory system, including the internet ban in section 4 (4) of the GlüStV, must be inapplicable.

Furthermore, the internet ban in particular is lacking a "*consistent overall concept" (Streinz/Kruis*) or an "*overall consistency" (Heine)*, as the German internet ban does not cover online horse race bets (see, for instance: http://www.wettstar.de) and online slot machines (such as http://www.7play.de), and is being bypassed by state offers such as LOTTO by e-letter in Hesse (see https://service.deutschepost.de/epost/faq/was-ist-der-dienst-lotto-e-postbrief).

3. May gambling supervisory authorities be liable for damages if they issue prohibition orders based on the GlüStV after 08 Sep. 2010?

Streinz/Kruis (NJW 2010, 3750):

"*A claim against the state for damages due to the execution of a provision which does not comply with union law (…) requires (…) a "sufficiently severe breach" (to this effect, see Berg in: Schwarze, (editor), EU commentary, (above footnote 63) Art. 288 of the EC Treaty par. 82 et seq.). As the issue of the compliance of the German monopoly with the requirements of union law were highly controversial before the judgment by the ECJ on 08 Sep. 2010, and as even the majority of the German courts assumed that the provisions were in compliance with union law, such action did not constitute a "sufficiently severe breach" prior to this judgment. This is not altered by the fact that the Commission opened infringement proceedings as early as 31 Aug. 2010, as this does not (yet) unambiguously mean that union law is breached. However, should authorities take action against private betting providers after 08 Sep. 2010, based on the provisions of the GlüStV, this would represent a "sufficiently severe breach" which would give rise to damage claims, provided that the other prerequisites are fulfilled (damage and attributability) (see ECJ, ECR 1996, I-1029 par. 57 - Brasserie du pêcheur = NJW 1996, 1267).*"

Summary and conclusive answer:

A simple but significant "Yes".

iii. Reform online gambling legislation in the Netherlands?

By Attorney-at-law Justin Franssen and Attorney-at-law Frank Tolboom, VMW Taxand Gaming Practise Group.

Introduction

The legal basis of the Dutch gaming policy can be found in the Dutch Betting and Gaming Act 1964 (hereinafter: "**Gaming Act**"). The Gaming Act stipulates that offering games of chance or promoting games of chance without a licence is prohibited. The Gaming Act includes an enumeration of the specific games for which a licence can be granted. The only types of licence available are those expressly stated in the Gaming Act and currently does not include remote gambling licences. Therefore, all forms of remote gambling are currently prohibited in the Netherlands.

Reform online gambling legislation?

Having regard to the shift towards liberalization in other European countries, such as Denmark, France, Belgium, Spain and Italy, we feel that the developments abroad are likely to influence the process in our country as well. In addition, the following developments increase the feasibility of a reform of the current online gambling legislation:

1. **Legal:**

- 3 June 2010: ECJ judgment in the Betfair and Ladbrokes cases

Both cases address the compatibility of the Dutch gambling legislation with key principles of EU law. Although the ECJ reiterated the rejection of the mutual recognition principle, the Betfair case also created a new battleground between operators and monopolists in Europe. Not only the legality of a monopoly system is questioned, but the debate has shifted to how and to whom a monopoly is granted. The ECJ clearly stated that the principle of transparency applies to the procedure for the granting of a gaming licence in a single-license system, which essentially means that the licence-awarding procedures have to be open to competition. However, the Court provided with par. 59 a much debated

exemption to the transparency principle. The obligation of a member state to offer or renew a single private operator license through a transparent public tender process may be disregarded when the government subjects that private operator's activities to strict control.

- 2 July 2010: Judgment Dutch court "poker is a game skill"

On 2 July 2010 the District Court in The Hague ruled that poker cannot be classified as a game of chance and therefore acquitted the organizer of an offline poker tournament charged with violating the Dutch Betting and Gaming Act. The Court argues at length why Poker cannot be classified as a game of chance. This judgment is contrary to a ruling rendered by the Supreme Court in 1998, and the District Court also found the evidence used in that ruling to be scientifically lacking. The judgment is not yet final pending the outcome of the appeal lodged by the Public Prosecutor.

2. **Political:**

- August 2010: Report Advisory Commission Jansen on the future regulation of remote gaming

The Commission was formed to advise the (outgoing) Minister of Justice on the regulation of online games of chance with a view to a further possible regulation. The Advisory Commission recommends regulation of the Dutch online gaming sector for online poker only. New regulations must be accompanied by financial, ISP and media-blocking measures. In response to the report the major left-wing Labour Party has already announced that they will come up with new proposals aimed at reforming the whole Dutch gaming policy, thus not only internet poker.

- September/October 2010: new Dutch Government

The most crucial development is the formation of a new Dutch right-wing minority government consisting of the VVD party (Liberals) and CDA party (Christian-Democrats) backed by Geert Wilders' PVV (Freedom Party). The new government increases the feasibility of a regulated (remote) gaming sector. It seems that the new government plans to introduce a licensing system for online gaming as of 2012. The financial paragraph of the new coalition agreement states literally:

"*Introduction of licence fee for (or auction of) licenses for the exploitation of internet gambling and lotteries*"

Future scope

It is clear that the current prohibition on all forms of remote gambling will be most likely abandoned. It is not inconceivable that a multiple licensing system for remote gambling will be introduced, but the precise scope is still unclear. The financial paragraph of the coalition agreement at least suggests that the new government intends to break away from the "poker-only" approach of the Advisory Commission Jansen, as it speaks of internet gambling in general and also includes lotteries. However, both the Advisory Commission report and the coalition agreement lack further details (such as tax issues, cross-border liquidity, physical presence, server location etc).

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iv. The Engelmann ruling and its implications on Austria

By Attorney-at-law Dr. Arthur Stadler and scientific assistant Nicholas Aquilina from our Austrian co-operation partner Brandl & Talos law firm.

A year and a day after the European Court of Justice ("ECJ") had ruled on the Portuguese case C-42/07, *Liga Portuguesa* and only one day after three judgements in German gaming cases (C-316/07 et al, *Markus Stoß et al*, C-46/08, *Carmen Media* and C-409/06, *Winner Wetten*), the ECJ issued its judgement on the Austrian case for a preliminary ruling C-64/08, *Engelmann* on 9 September 2010. The Court holds that certain provisions in the Austrian Gaming Act and "*the total absence of transparency for the purposes of the grant of the concessions*" to the Austrian de-facto monopolist casino operator, Casinos Austria AG ("CASAG"), are contrary to EU law.

1. The "*Engelmann*" case

The Austrian Gaming Act (Glücksspielgesetz) establishes a state monopoly on lotteries and casinos. Only operators having been granted a license according to § 14 respectively § 21 of the Act are entitled to offer such gaming operations in Austria. At the time of the referral to the ECJ by the Regional Court of Linz, the Act required a casino operator to be a publicly listed company with a seat in Austria and a share capital of EUR 22 million. All twelve licenses are currently held by CASAG, to which the licenses had been awarded behind closed doors without any tender procedure. Furthermore it is interesting to note, that the licensing and supervising authority, the Ministry of Finance, is an indirect shareholder of CASAG through the participation of the state.

The German citizen Ernst Engelmann "*operated gaming establishments in Austria […]. In those establishments, he offered his customers, inter alia, a game called observation roulette and the card games Poker and Two Aces. He had not sought a concession to organise games of chance, nor was he the holder of a lawful authorisation in another Member State.*"[1] Therefore he was charged according to § 168 of the Austrian Criminal Code for offering games of chance without a national license. The court of first instance (District Court of Linz) imposed a fine of EUR 2,000 upon Mr Engelmann, however, the

[1] ECJ, 9 September 2010, C-64/08, *Engelmann*, para 17.

court of appeal (Regional Court of Linz) was in doubt of the conformity of relevant provisions of the Austrian Gaming Act with EU law, namely with the freedom of establishment (Art 49 TFEU) and the freedom to provide services (Art 56 TFEU).

The national court, therefore, asked the ECJ to clarify (a) whether Art 49 TFEU precludes the provision which constitutes the requirement of a certain legal form and seat within a certain Member State in order to obtain a license. Furthermore the referring court wanted to know (b) whether Art 49 TFEU and 56 TFEU preclude a national monopoly on certain types of gaming if there is no consistent and systematic policy as the monopoly is being advertised aggressively. Regarding the allotment of the licenses, the court wanted to know (c) whether Art 49 TFEU and 56 TFEU preclude national legislation granting licenses without a tender procedure, thereby excluding operators from other Member States.

a. License requirements not in conformity with EU law

Concerning the first question, targeting the requirement of a certain legal form and a seat in Austria, the ECJ stated that regarding the legal form it leaves the decision to the national court "*in the absence of additional information.*"[2] However, the ECJ ascertained that the requirement of a seat infringes the freedom of establishment. "*Doubt is not in any way cast on that finding by the fact, raised by the Austrian Government, that the obligation in question is imposed on operators only from the time that they are selected and for the duration of the concession. […] Such an obligation may deter companies established in other Member States from applying, owing to the establishment and installation costs in Austria that they would have to incur if their application were successful […].*"[3]

The requirement to have a seat in Austria in order to obtain a license constitutes a restriction to the freedom of establishment and the freedom to provide services, which can only be justified by overriding public interest objectives, which must be met in a non-discriminatory matter, suitable to achieve the objectives and not go beyond what is necessary in order to attain the objectives.[4] In the *Engelmann* ruling the ECJ concludes that "*[…] the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime […].*"[5]

[2] ECJ, 9 September 2010, C-64/08, *Engelmann*, para 31.
[3] ECJ, 9 September 2010, C-64/08, *Engelmann*, para 33.
[4] ECJ, 30 November 1995, C-55/94, *Gebhard*, para 37 and ECJ, 6 November 2003, C-243/01, *Gambelli*, para 65.
[5] ECJ, 9 September 2010, C-64/08, *Engelmann*, para 37.

The ECJ itself gives some examples on how the Austrian legislator could pursue its objective for these restrictions and sufficiently monitor its licensees without harshly violating basic EU law: "*[...] There are indeed various measures available to monitor the activities and accounts of such operators. [...] Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition [...] any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers.*".[6]

Therefore the freedom to provide services precludes the "*legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State*".[7]

b. Consistency of Austrian gaming laws

Concerning the second question on the consistent and systematic approach of the Austrian gaming regulation in regard to the extensive and aggressive advertising attitude of casino licensee Casinos Austria AG and the lottery licensee Österreichische Lotterien GmbH (Austrian Lotteries, "ÖLG"), the ECJ did not give an answer as it did not deem it relevant for the decision at hand. However, concerning the extensive advertisement conducted by the de-facto monopolists, the ECJ had ruled just one day before issuing its *Engelmann* judgement that all advertising needs to be "*[…] measured and strictly limited to what is necessary in order thus to channel consumers towards authorised gaming networks.*" Advertising must not "*[…] aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours*".[8] As this is exactly the advertising policy that CASAG and ÖLG pursue, it is clear that this internal "inconsistency" of the Austrian gaming market does not conform to what the ECJ laid out in *Markus Stoß et al*.

6 ECJ, 9 September 2010, C-64/08, *Engelmann*, paras 37-38.
7 ECJ, 9 September 2010, C-64/08, *Engelmann, para 40.*
8 ECJ, 8 September 2010, C-316/07, *Markus Stoß et al.*, para 103.

c. Violation of EU law when awarding Austrian gaming licenses

By answering the third question the ECJ assesses the compliance of Austria's license awarding practice with EU law.

In the Engelmann ruling, the ECJ directly addressed its critics to the Austrian government confirming Austria's total lack of transparency. As previously laid out in its consistent case law, the ECJ held that a prior administrative authorisation scheme "*must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily*".[9]

If a Member State (i.e. in this case Austria) issues concessions without applying the principle of transparency, the ECJ states that, although concessions in the field of games of chance are not subject to any specific EU regulation, the Member States "*[…] are none the less bound to comply with the fundamental rules of the Treaties, in particular [Art 49 and 56 TFEU], and with the consequent obligation of transparency […]*".[10] Furthermore, any person affected by a restrictive measure based on such derogation must have an effective judicial remedy in place.[11] An impartially conducted competition must be sufficiently made possible by the licensing authority.[12] However, the ECJ ascertained the "*total absence of transparency for the purposes of the grant of the concessions*" in the Austrian system.[13]

d. Consequences of the Engelmann ruling

It is vital to note, that due to the Austrian regulations at stake it was impossible for potential licensees from other Member States to acquire a license under Austrian law. The requirement of a seat and the lacking transparency are clearly violating EU law. Therefore, according to established ECJ case law, an operator, who was not able to obtain a license due to these circumstances, may not be sanctioned.[14]

9 ECJ, 3 June 2010, C-203/08, *Sporting Exchange*, para 50.
10 ECJ, 9 September 2010, C-64-08, *Engelmann*, para 49.
11 ECJ, 9 September 2010, C-64/08, *Engelmann*, para 55.
12 ECJ, 9 September 2010, C-64/08, *Engelmann*, paras 49-50.
13 ECJ, 9 September 2010, C-64/08, *Engelmann*, para 56.
14 ECJ, 6 March 2007, C-338/04 et al, *Placanica et al*, para 69 and subsequently ECJ, 8 September 2010, C-316/07, *Markus Stoß et al.*, para 115.

2. Amendments to the Austrian Gaming Act and further outlook

a. Amendments of 2010

The main purpose of the amendment of the Austrian Gaming Act was to regulate the slot-machine sector. In the course of this amendment, the Austrian legislator, also extended the number of casino licenses from 12 to 15, introduced a new license for poker casinos and adapted provisions concerning the licensing procedure for the casino licenses and the single lottery license.

The amendment had come into force before the ECJ delivered its judgement in the *Engelmann* case, in July 2010. The amendment takes into account some of the aspects which had been criticized before the ECJ in the oral pleadings of the *Engelmann* case in January 2010:

In the amendment, the Austrian government abolished the requirement of a seat for the application phase. However, during the operational phase the operator is still required to have a seat in Austria. This is clearly contrary to the freedom of establishment and freedom to provide services and has also been repeated in the *Engelmann* ruling.[15]

In order to comply with EU law, the Austrian government also changed the objective pursued when choosing the most suitable licensee for casinos and the lottery license. Before the amendment the licensee was supposed to gain the highest revenues for the state treasury, however, now that licensee shall be chosen, who can best safeguard the aim of protecting consumers. A "public and transparent" announcement shall take place before licenses are tendered.

b. Amendments of 2011

In November 2010, the Austrian government issued a draft amendment of the Austrian Gaming Act as part of the budgetary bill, slightly redesigning one license requirement for the lottery and casino licenses. The purpose of the new draft amendment was to overcome violations of EU freedoms which were found by *Engelmann* ruling.

The amendment has two main areas of focus. It modifies the requirements listed in § 14 for companies in order to be able to apply for a lottery license as well as the requirements for casino licenses given in § 21 of the Austrian Gaming Act.

[15] ECJ, 9 September 2010, C-64/08, *Engelmann*, para 40

This recent amendment modified the requirement of having a seat in the operational phase to the effect that now a seat in any Member State is sufficient, if the potential licensee also has a "comparable license" from the Member State in which it is established or, in case of a successful application, the company founds its seat in Austria within a certain respite. The comments to the §§ 14 and 21 of the Austrian Gaming Act further explain that it is the duty of applicants (!) established in another Member State to submit evidence of the comparability of their concession, as well as a statement by the gaming regulator of its home country declaring the willingness for administrative cooperation with the Austrian authorities.

The implications of the amendments of the Austrian Gaming Act clearly discriminate against applicants from other Member States, as for an Austrian applicant it is sufficient to have a seat in Austria while an applicant from another Member State finds numerous burdens: Even with a seat in an EU Member State, an applicant would still need a "comparable license" in its Member State of establishment plus a statement of the regulator, while an Austrian applicant needs to provide neither a previously obtained license nor a statement of any regulator. Beyond that, the provision "comparable state supervision and control"[16] leaves a wide discretion to the Austrian authority. There is also no justification why an applicant from another Member State would need a statement from the regulator of that Member State: According to EU law and consistent ECJ case law, it is the duty of the Austrian authority (and not the one of an applicant) to initiate and proceed with the administrative cooperation between national authorities.

This leads to the conclusion that the Austrian Gaming Act, even after these amendments would still not be compliant with EU law. The outcome of the amendments would ultimately result in a similar ECJ ruling like already delivered in the *Engelmann* case.

c. Further Amendments

According to the Austrian Gaming Act, online gaming can only be offered by the licensee for lottery products. This single license is currently held by ÖLG. Despite the fact that due to an order from the Ministry of Finance, the online platform of ÖLG is set up in cooperation with casino licensee CASAG, there is no EU compliant over-all regulation of online gaming within the Austrian Gaming Act. Drafting a compliant online regulation for the gaming sector has been on the table of the Austrian legislator for some time. The

[16] Compare to that extent the comments of Article 24 of the Amendment of Austrian Gaming Act.

Austrian deputy to the Minister of Finance recently announced that a regulation for online gaming shall enter the drafting process in 2011.

d. Another Austrian case "*Dickinger and Ömer*"

On 27 January 2011 the oral hearing of the next Austrian gaming case, C-347/09, "*Dickinger and Ömer*" will take place before the ECJ.

The Austrian referral court wants to know whether Art 49 TFEU and 56 TFEU preclude national licensing regulations under which a concession for lotteries is granted to only one applicant. Can this be justified as a restriction of betting activities relating to the public interest in light of the massive advertisement and expansionist policies of the de-facto monopolists? Does supervision in the Member State of establishment have to be considered?

During the hearing on 27 January 2011, the ECJ is going to assess the following aspects:

- What particular difficulties can the competent authorities foresee in evaluating the qualities and probity of private operators that operate only online and mostly target consumers from other Member States?
- Can these difficulties be met and a level of control ensured that is comparable to the levels met in offline gaming?
- Is there mutual trust between Member States in respect of the supervising activities and the actual implementation of the regulations applicable to games of chance on the part of the authorities of other Member States?

Targeting at the special constellation in the initial case, in which an Austrian operator, provides its services under a Maltese license, the referring court also asked to what extent the controls on the qualities and probity of organisers of games of chance undertaken by the competent Austrian authorities go beyond the controls applied by the competent Maltese authorities?

It is expected that the outcome will be similar to the *Engelmann* ruling, however, broaden its scope also to lotteries.

e. Transparent license awarding in 2011

The Austrian government has recently announced that in June 2011 the tender procedures for all 15 casino licenses, the license for poker casinos and the single lottery license shall be commenced. The licenses shall be awarded at end of 2011 respectively the beginning of 2012. The Secretary of State, deputy to the Minister of Finance, announced that the government will certainly wait for the developments in the *Dickinger and Ömer* case. It is rumoured that the submission of the application documents will cost EUR 10,000.- and the grant of a license will be subject to further fees of EUR 100,000.- payable to the Ministry of Finance.

f. No sanctions for operators until EU compliant license awarding concluded

As long as the Austrian government maintains the various provisions within the Austrian Gaming Act that clearly violate EU law for various reasons, according to the consistent case law of the ECJ, all operators, who have never been able to successfully apply or be granted a license due to the Austrian regulations being in breach of EU law, must remain without any sanctions whatsoever. Any sanctioning of non-compliant operators will be possible the earliest when the Austrian government is able to fully comply with EU law. Thereby a transparent and public licensing procedure must take place under circumstances that do not discriminate against operators from other Member States potentially interested in obtaining an Austrian license and do not violate the fundamental freedoms of the EU. The Austrian gaming system must be regulated in a consistent and systematic manner, both externally in an over-all approach and also internally, so that if the lottery license is awarded to only one licensee, this license holder must not extensively advertise.

Only when the Austrian government has taken all measures necessary to regulate the gaming market in a manner compliant with EU law, will sanctions against operators not willing to comply with the law be enforceable. Therefore and also in order to provide a secure and systematic gaming legislation, the Austrian government is called upon to take the appropriate measures in due time.

v. Guest Authors in this issue

Justin Franssen studied Law and Philosophy at the Universities of Leuven, Maastricht and Amsterdam.

Before he was admitted to the Bar he worked as legal counsel in Amsterdam and New York for a gaming company. He later founded the KPMG European Gaming and Entertainment Services Group. Justin co-founded www.gaminglaw.eu, the European portal on gaming law and regulation.

He is a shareholder/attorney at Van Mens en Wisselink were he heads the Gaming Practise Group. He regularly speaks at international conferences (European Gambling Briefing, European I-Gaming Conference & Expo, IMGL Conference) and writes on the subject matter (Internet Gambling Report, European Gaming Lawyer, Casino Lawyer)

The Gaming Practise Group is engaged in the majority of multi-year proceedings on cross-border internet gaming before various national and European courts. VMW counts a range of blue chip remote and land based gaming companies amongst its clients.

Justin is the Dutch General Member of the International Masters of Gaming Law and a member of the International Association of Gaming Attorneys. He received multiple Band 1 rankings in Chambers Global Edition in the category "Gaming and Gambling". He sits on the editorial board of the World Online Gambling Law Report and of Gaming Law Review & Economics. He is a Member of the Board of the Research Program on Gambling Law of the University of Leuven.

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Dr. Arthur Stadler: Education: University of Vienna 2004 – 2008, Law School, PhD in Law; Graduation March 2008; PhD-Thesis: Golden Shares and States' Influence Rights over Strategically Important Industries, under Scrutiny of EU Law; Awards: Wolf Theiss Award 2008 for Publication; Best-of-the-Best award 2008, 1st rank in the category "Best Doctoral Thesis" of the Law Faculty of the University of Vienna; Walther Kastner-Award 2009; Universidad Carlos III de Madrid 2001 – 2002, Law School, Madrid/Spain, Exchange Student; University of Vienna 1996 – 2002, Law School, Magister iuris (Master of Laws); Graduation in March 2004

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Frank Tolboom is Attorney-at-law at the Dutch law firm VMW Taxand. He read law and completed his degree in International and European law at the University of Utrecht, the Netherlands. Frank graduated in 2008 and from 2008 he worked part-time at a consultancy firm and a law firm Van Benthem en Keulen in Utrecht.

Frank joined VMW Taxand in January 2010. He works nationally and internationally in Corporate law with a focus on the Gaming Practise Group.

vi. In-house news

Dr. Wulf Hambach will speak on the following conferences:

24 - 25 January 2011 | London, Great Britain
Legal Gaming in Europe Summit 2011
Bullet Business

25 January 2011 | London, Great Britain
Combating Cybercime and Payment Solutions
Clarion Gaming

22 - 23 March 2011 | Stockholm, Sweden
Online Gaming Summit
FYI leading events

5 - 6 April 2011 | London, Great Britain
C5 Gambling Technology 2011
C5

3 - 4 May 2011 | Las Vegas, USA
iGaming North America
Best Bet Consulting

5 - 7 July 2011 | Madrid, Spain
World Gaming Executive Summit 2011
Terrapinn

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vii. Editorial Details

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