Germany's legal framework after the Carmen Media case

A number of European Court of Justice rulings - in particular, the Carmen Media case - have changed the legal basis for Germany's gambling ban and could possibly pave the way for the end of the German Interstate Treaty on Gambling. Dr. Wulf Hambach and Dr. Michael Hettich, of Hambach and Hambach, discuss the different cases and their impact on Germany's regulatory gambling framework.

The Carmen Media case

The European Court of Justice (ECJ) ruled on 8 September 2010 on eight preliminary rulings referred by German administrative courts. For the online gambling industry, the Carmen Media ruling is an important decision as it has, up to now, been the only case concerning an offer of online gambling services[1]. There is consensus that the Carmen Media ruling will have a significant and positive long-term impact on the process of liberalisation of the German online gambling market - as well as in the rest of Europe[2].

If the remaining state monopoly regimes on gambling are forced to implement a consistent and coherent gambling law, pursuing the aims of combating gambling addiction or fraud, fiscal revenue will decrease and governments will cease to support state monopoly solutions. Besides these long-term effects, the current legal situation in Germany for cross-border services is protected by the principle of freedom to provide services.

Reactions after the ECJ's decisions

The Carmen Media decision left gaming authorities and state monopoly companies in a state of shock. They were convinced that the ECJ would follow Advocate General Mengozzi's Opinion[3]. Instead of supporting German gambling regulation, and especially the Interstate Treaty on Gambling (ITG), authorities were confronted with a decision confirming the end of the state monopoly on gambling in Germany.

This raised concerns that the German market would immediately be inundated by unregulated and ungovernable gambling operators from abroad before a new gambling law could come into force.

As a backlash, the responsible Ministries of the Interior in some Federal States issued an administrative regulation directed to the gaming authorities which included the order to pursue online gambling providers and their marketing partners. Although many of them are aware that it is useless to ignore ECJ decisions in the long run, they hope to postpone the effect of the decisions until a new gambling law comes into force on 1 January 2012. The biggest state lottery company, Westlotto, which has been trying to protect its monopoly for the last six years by using German competition law proceedings, has up to now lost all cases in the last instance.

Nevertheless, Westlotto has made it clear that - even after the ECJ's decisions - it will not give up, and will pursue its strategy of achieving injunctions or intermediary judgments from courts of lower instance, even if such decisions are overturned in the last instance.

Legal science after the ECJ's decisions

Most legal publications came to the following interpretation of the ECJ's decisions:

- the ECJ's conclusions are binding for national courts;
- most of the decisive parts of the ITG and of Sections 284 et seq. of the German Ciminal Code, which exclude gambling providers (protected by the freedom of services) from the German market, are no longer applicable; and
- the gambling supervisory authorities may be liable for damages if they issue prohibition orders based on the ITG after the ECJ decisions.

One of the most reputable independent EU law experts, Professor Streinz, published a detailed analysis of the ECJ's judgments in a German legal

magazine[4]. Here is a translation of the most relevant parts: 'In the Carmen Media judgment, the ECJ decided that the state monopoly for lotteries and sports betting as established by the GlüStV ['*Glücksspielstaatsvertrag*' is the ITG] did not comply with Community law requirements regarding the consistent and systematic design of such regulations. This interpretation of Community law is binding for national courts and authorities. However, the ECJ has expressly stressed that this incompatibility is based on the determinations made by the submitting administrative court...according to which German operators are aiming to maximise revenue with regard to types of games of chance not covered by the monopoly, but which have higher addiction potential. This is in accordance with the division of labour between the ECJ and 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 Community law, whilst the determination and assessment of the facts falls on 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 this case, this seems 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 - a contradictory decision is thus not very likely.

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 reserves this licence to legal entities controlled by the German Laender, it may be held 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. Another inapplicable provision is Section 9 of the GlüStV (legal basis for prohibition orders), as the failure to hold a licence cannot be made the subject of sanctions, in particular as there is no licencing obligation under Community law.

The Carmen Media decision left gaming authorities and state monopoly companies in a state of shock. They were convinced that the ECJ would follow Advocate General Mengozzi's Opinion

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 justified, in principle, due to specific inherent dangers, the lack of a consistent overall concept for combating gambling addiction will probably lead to its inapplicability. In this context, the provisions of the GewO ('*Gewerbeordnung*' or trade regulations) replace the GlüStV, meaning that the principle of 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 Community law has been implemented.

A claim against the state for damages due to the execution of a provision which does not comply with Community law...requires...a "sufficiently severe breach" (to this effect, see Berg in: Schwarze, (editor), EU commentary, Art. 288 of the EC Treaty par. 82 et seq.). As the compliance of the German monopoly with the requirements of Community law was an issue before [the Carmen Media judgment]...such an action could not be based on a "sufficiently severe breach" prior to this judgment. This is not altered by the fact that the EU Commission opened infringement proceedings as early as 31 August 2010, as this does not (yet) unambiguously mean that Community law is breached. However, should authorities take action against private betting providers after 8 September 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).'

The German courts

During the last few years, most court proceedings have taken place before administrative courts or civil courts responsible for competition law cases. Administrative law proceedings arise whenever a private operator challenges the decision of a gaming authority (for example, a prohibition order). Competition law cases mostly arose from a lawsuit by Westlotto against a private operator.

In the aftermath of the ECJ's decisions, the courts of first and second instance released a number of contradictory decisions. There is a clear tendency towards favourable decisions for private operators in the last instance - that is, before the Federal Administrative Court when administrative law proceedings are concerned and before the Federal Court of Justice when it comes to

competition law proceedings.

Both these courts have, in the past, decided in favour of private operators. The Federal Administrative Court made it clear that prohibition orders against betting shops will probably have to be cancelled, but that some missing facts still have to be determined by the courts of lower instance in order to clarify the question of coherence of the German gaming regulation[5]. Furthermore, the Federal Court of Justice stated that an online gambling operator located in Gibraltar and providing services in Germany in the timeframe before 1 January 2008 did not breach the German law on unfair competition[6].

However, the cases that are concerned with the offer of games by online operators after 1 January 2008 are still pending. The next decision in this regard is expected to be published after an oral hearing before the Federal Court of Justice on 17 March 2011[7]. In the likely case that the Federal Court of Justice comes to the conclusion that facts are still missing, there will be a further postponement until 2012 because of the necessity to gather more evidence.

It would be a great success for the Single Market if the Federal Court of Justice held that the online gambling industry in Germany (protected by the freedom of services) has acted lawfully, even in the timeframe between 1 January 2008 and 31 December 2011. Starting on 1 January 2012, the new German gaming law will lead to new challenges and questions. The number of Federal States supporting a liberalised gaming regulation, including online sports betting and online casino games, is increasing by the day, but the concrete outline of the new regime is still uncertain.

The German media and the sports' industry

It is an unwritten market rule of the German media and sports' industry that, in the aftermath of a key ruling in favour of the private gambling industry, new deals with EU-licensed sports betting operators become public. An advertising tsunami for private bookmakers was recognised after the ground-breaking decision by the Federal Constitutional Court in March 2006, and could only be stopped by the fast declaration of all Presidents of the Laender to continue the monopoly, taking into consideration the new limitations.

Less than two months after the Carmen Media decision, Maltese-licensed sports betting operator Tipico announced, in the eighth round of the German football *Bundesliga,* a new sponsorship deal with the TSG 1899 Hoffenheim football club. By then, Bet-at-home had already closed their deals with a leading handball team from Schleswig-Holstein, SG Flensburg Handewitt. Currently, users of Yahoo Germany can see a big banner advertising MyBet.com and offering an attractive bonus if the user registers.

These examples will probably mark the beginning of a private sports betting market, or, at least, the end of the monopolist ODDSET. The reason: the monopoly will not find the support of all 16 Laender. During the last meeting of the working group of the Laender for a new ITG, the monopolists were unable to convince the necessary critical mass of 13 Minister Presidents (leaders of the Laender) that they were viable enough to continue providing gambling services alone.

Dr. Wulf Hambach Partner
Dr. Michael Hettich Junior Partner
Hambach & Hambach
w.hambach@timelaw.de
m.hettich@timelaw.de

1. Carmen Media Ltd. was represented in case C-46/08 by the authors, in cooperation with Prof. Koenig.
2. *World Online Gambling Law Report*, Volume 9 Issue 12 for Germany, Volume 9 Issue 9 and 10 for Austria.
3. Opinion in case C-46/08.
4. *Neue Juristische Wochenschrift* 2010, 3745.
5. Decision of the Federal Administrative Court, dated 24 November 2010, files no. 8 C 14.09 and 8 C 15.09.
6. Decision of the Federal Court of Justice, dated 18 November 2010, file no. I ZR 156/07 et al.
7. File no. I ZR 93/10 et al.