

# The *Carmen Media* Case – The Expected Catalyst from Brussels for a New Approach to German Gambling Law?

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Case C-46/08 *Carmen Media Group Ltd v. Land Schleswig-Holstein and others*<sup>1</sup>

## I. Approach

Billions of Euros of turnover are generated every year from games of chance. The legal framework conditions regulating this branch of the economy vary significantly within the European Union. Whilst in many countries such as Germany the state has a dominating monopoly position, other Member States, such as Denmark, France and Italy, have made moves towards a consistent partial liberalisation. These different framework conditions lead to problems, increasingly so as the European internal market is otherwise growing closer together. This is especially evident in the area of online gambling which, due to the structure of this medium, is not restricted by national boundaries, but must nevertheless not constitute a legal no man's land.

Against this background, it appears logical for the European Court of Justice (ECJ), on the occasion of the submission of cases by Member State courts pursuant to Art. 267 of the Treaty on the functioning of the European Union (TFEU) (previously Art. 234 EC), to repeatedly have called for the examination of

national gambling regulations with regard to their compliance with Union law, as the ECJ's standing jurisdiction acknowledges that a (national) state monopoly for cross-border issues represents a violation of the freedom of establishment as set out in Art. 56 TFEU (previously Art. 49 EC) or the freedom of establishment as set out in Art. 49 TFEU (previously Art. 43 EC) respectively.<sup>2</sup> Such restrictions of gambling activities may, however, be justified by matters of overriding general interest.<sup>3</sup> The ECJ explicitly mentions consumer protection, prevention of fraud and the prevention of incentives for the public to squander money on gambling. However, the ECJ has made it clear in this context that the corresponding restrictions of the freedom to provide services and the freedom of establishment respectively must be suitable to actually ensure the achievement of the pursued objective, and that the regulatory regime of the Member State concerned has to restrict the basic freedoms in a consistent and systematic manner.<sup>4</sup>

Especially the last two of the requirements set up by the ECJ show that the Court does not grant the Member States "carte blanche" with regard to the legal and factual implementation of a state monopoly. On the other hand, it is objectively difficult for the ECJ to conclusively condemn a Member State's regulatory regime in a preliminary ruling, as in particular the decision as to whether the legal standards have actually been implemented in a consistent manner, are exclusively subject to the competence of the various Member States. Against this background, a final clarification therefore equals the attempt to square the circle, as long as the regulatory parameters within the European Union have not been harmonized. This is why the latest ECJ decisions on German gambling law on 8 September 2010 had been expected anxiously. Whilst the cases *Winner Wetten*<sup>5</sup> and *Markus Stoß*<sup>6</sup> relate to the legal situation prior to 1 January 2008, the third decision, *Carmen Media*, refers to the current legal regulatory regime in Germany. The latter decision therefore is particularly prone to promot-

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1 Judgment of 8 September 2010. In these proceedings, *Carmen Media Group* was represented by Wulf Hambach together with Christian Koenig, Michael Hettich and Susanna Pfundstein.

2 Standing case law since *Schindler*, see ECJ, judgment of 24 March 1994, C-275/92 regarding the import of advertising material for a lottery.

3 See, for instance, *Gambelli*, ECJ, judgment of 6 November 2003, C-243/01.

4 On "consistency" as a general requirement in the context of the examination of proportionality, see in particular the ECJ's decision in *Hartlauer*, judgment of 10 March 2009, C-169/07.

5 See ECJ, judgment of 8 September 2010, C-409/06.

6 See ECJ, judgment of 8 September 2010, C-316/07.

ing a revision of German gambling law, and, possibly, to initiate a new political approach in Germany.

We shall therefore first of all summarise the most important facts on German gambling law in Part II., which will be followed in Part III. by a description of the examination programme for the assessment of the consistency of a state monopoly. In Part IV. we shall then specifically apply the consistency requirements set by the ECJ to the German regulatory regime, whilst Part V. summarises the conclusions reached and ventures a forecast of the future gambling law regime.

## II. Facts

The organisation of games of chance in Germany is regulated in different ways depending on the relevant gaming sector. For some areas, the federal government has regulatory competence, for some others, responsibility lies with the individual Laender (states). Within the Laender, a regional state monopoly exists for the organisation of sports betting and lotteries, whilst federal law permits individuals holding a corresponding licence to organise horse race bets and to operate gambling machines and casinos. With the Inter-State Treaty on Lotteries in Germany (LottStV), which came into effect on 1 July 2004, the Laender created a uniform legal framework for their area of regulatory competence with regard to the organisation, operation and commercial brokering of games of chance (with the exception of casinos). However, in its judgment of 28 March 2006, the Federal Constitutional Court (BVerfG) held (specifically with regard to the implementation of the LottStV in Bavaria) that the sports betting monopoly created in this manner violated the freedom of occupation guaranteed under Art. 12 of the German Constitution (*Grundgesetz*).<sup>7</sup> The BVerfG based this decision in particular on the statement that the state betting monopoly created by the LottStV, in its statutory and factual implementation, does not sufficiently ensure the prevention and combat of gambling addiction, so that the justification for the exclusion of private betting providers no longer applies. Based on this, the Laender replaced the LottStV with the Inter-State Treaty on Gambling (GlüStV), with effect as of 1 January 2008, in order to comply with the requirements specified by the BVerfG in its judgment of 28 March 2006.<sup>8</sup> The GlüStV maintains the state monopoly – in particular for sports betting. Furthermore, section 4 subsection

4 of the GlüStV prohibits the organisation and brokering of games of chance on the internet.

As early as February 2006, Carmen Media Group Ltd. (Carmen Media) had filed an application with Land Schleswig-Holstein, asking for confirmation that the company was permitted to offer internet sports bets in Germany. In this context, the Gibraltar-based company made reference to its license issued in Gibraltar, which, for tax reasons, was restricted to the marketing of such bets in other countries (so-called “offshore bookmaking”). When this application was turned down by Schleswig-Holstein in May 2006, Carmen Media filed a law suit before the VG (administrative court) of Schleswig, seeking confirmation that it was permitted to offer sports bets via the internet in Germany based on its license, justifying this application by stating that the state monopoly based on the GlüStV does not comply with the freedom to provide services pursuant to Art. 56 TFEU, due to lack of consistency of the regulations in Germany. The VG of Schleswig held that the doubts regarding compliance with Union law of the GlüStV were justified, and submitted the relevant questions with regard to Union law to the European Court of Justice (ECJ) for a preliminary ruling pursuant to Art. 267 TFEU.<sup>9</sup>

## III. Judgment

In its headnotes, the ECJ first of all states that the freedom to provide services is also applicable to cases where a provider holds a license permitting him to offer bets to persons abroad rather than to persons within the territory of the Member State of his establishment (so-called “offshore bookmaking”).<sup>10</sup> On this basis, the ECJ specifies the conditions under which, in view of the necessity to ensure the freedom to provide services, the regulatory regime of a Member State which creates a state gambling monopoly, violates the consistency requirement and therefore does not comply with Union law. This is the case if

<sup>7</sup> BVerfGE 115, 276 *et seq.*; in this context, also see *Christian Koenig*, DÖV 2007, 313 *et seq.*

<sup>8</sup> ECJ, judgment of 8 September 2010 – C-46/08 para. 9.

<sup>9</sup> Resolution for submission for preliminary ruling of 30 January 2008, see *ZfWG* 2008, 69 *et seq.*

<sup>10</sup> ECJ, judgment of 8 September 2010 – C-46/08 paras. 39 *et seq.* and 1st headnote.

“a national court holds that

- other types of games of chance may be offered by private providers holding a corresponding licence and that
- with regard to other types of games of chance, which are not covered by the monopoly and furthermore have a higher addiction potential than the games which are covered by the monopoly, the competent authorities implement a policy of extending the available offers which may develop and stimulate gaming activities, in particular with the aim of maximising the profits from such activities.”<sup>11</sup>

If these prerequisites are fulfilled, a national court is justified in concluding that such a monopoly is unsuitable in order to attain the objective of reducing the opportunities for gambling in a consistent and systematic manner. In this context, the ECJ expressly states that it is irrelevant with regard to the requirement of an overall consistency whether games of chance which are covered by the monopoly are subject to the scope of responsibility of regional authorities (in Germany: the Laender), whilst federal authorities are responsible for other types of games of chance.<sup>12</sup> Finally, the Court once more generally stated the issues to be taken into consideration when drafting the national gambling law in order to ensure the freedom of services.

On the one hand, national provisions which make the offer of certain types of games of chance subject to prior official approval, must state objective, non-discriminating criteria which must be known in advance, so that the discretion left to the national authorities cannot be exercised arbitrarily and can be reviewed by a court.<sup>13</sup> On the other hand, a national regulation which prohibits the organisation and brokering of games of chance on the internet, in

order to combat gambling addiction and to protect minors, can in general be considered to be suitable for the pursuit of such legitimate objectives, even if such games are still permitted to be offered through more traditional channels.<sup>14</sup>

#### IV. Comment

The judgment in *Carmen Media* is a wake-up call from Brussels, in order to put Germany out of the misery of its rigid structures in gambling law. With an unusual level of clarity, the ECJ specifies the prerequisites for the determination of a violation of Union law by the monopoly created in Germany by the GlüStV. Now, it is up to the German courts to apply this evaluation programme for the assessment of the consistency of a state monopoly to the German gambling law regime. This is at the same time accompanied by discussions on the political level regarding the form which allows adherence to the ECJ's consistency requirements in the future.

##### 1. Violation of Union law by the monopoly created in Germany by the GlüStV

In Germany, the prerequisites specified by the ECJ for the determination as to when a state gambling monopoly violates Union law are fulfilled. Gambling law regimes in Germany are anything but uniform. Whilst a state monopoly for the Laender has been established for the area of lotteries and sports betting based on the regulations of the GlüStV, private providers are expressly admitted in other areas of gambling, based on federal law. This applies in particular to horse race betting, based on the Act on horse racing, betting and lotteries (RennwLottG), and to commercial gambling machines, regulated in sections 33c-i of the Trade Regulations (GewO). According to the ECJ's unambiguous determinations, it is irrelevant that the games of chance which are covered by the monopoly are subject to Laender legislation, whilst the organisation of other types of games of chance – such as horse race betting and commercial gambling machines in Germany – are regulated by federal legislation. Furthermore, comprehensive studies have in the meantime provided scientific proof of the fact that commercial gambling machines have by far the highest addiction risks.<sup>15</sup> For the area of horse race betting, the European Commission as well as the ex-

11 ECJ, judgment of 8 September 2010 – C-46/08 paras. 53 *et seq.* and 2nd headnote.

12 ECJ, judgment of 8 September 2010 – C-46/08 paras. 63 *et seq.* and 2nd headnote.

13 ECJ, judgment of 8 September 2010 – C-46/08 paras. 72 *et seq.* and 3rd headnote. Another interesting decision in this context is the judgment in *Engelmann* of 9 September 2010 – C-64/08. In this case, the ECJ held upon submission for a preliminary ruling by an Austrian court, that if a licensing model is introduced, the licenses must be distributed by means of a transparent allocation procedure (see paras. 49 *et seq.*). Furthermore, the granting of a license must not be made subject to the precondition that the company has a domestic establishment (see para. 40).

14 ECJ, judgment of 8 September 2010 – C-46/08 paras. 91 *et seq.* and 4th headnote.

15 See, for instance, Gerhard Meyer in *Jahrbuch Sucht* 2009.

pert committee on gambling addiction (*Fachbeirat für Glücksspielsucht*, established pursuant to section 10 subsection 1 sentence 2 of the GlüStV), assume that horse race bets have an increased addiction potential, which is higher than the addiction potential of other types of sports bets.<sup>16</sup> This means that the second of the ECJ's prerequisites also is fulfilled in Germany, i.e. that areas of gambling which are not covered by the state monopoly have higher addiction potential than the games which are subject to the monopoly. The last prerequisite is that the competent authorities have to promote a policy of extending the offers with regard to games of chance not covered by the monopoly, in a way which is suitable to develop and stimulate gambling activities, in order to maximise the proceeds obtained. Especially the provisions regulating the operation of particularly addiction-prone gambling machines have been eased significantly by the revised gaming decree (*Spielverordnung – SpielV*) as per 1 January 2006. Now, larger numbers of gambling machines can be installed, the minimum duration of the games was reduced from 12 to 5 seconds, and the maximum stakes were increased, as was the limit for losses per hour – from 60 € to 80 €. As expected, the number of gambling machines increased correspondingly, from 183,000 in 2005 to 212,000 in 2009.<sup>17</sup> The corresponding changes of the SpielV were predominantly aimed at increasing the proceeds from gambling machines, as the reason for the easing of restrictions were losses in turnover, because the number of installed gambling machines had continuously decreased up until 2005. This means that the legislator intentionally eased the requirements of the SpielV in order to permit this branch of the economy to provide competitive offers, regardless of the proven high addiction potential of gambling machines. All prerequisites set by the ECJ for the determination of a violation of Union law by the monopoly established in Germany through the GlüStV have therefore been fulfilled<sup>18</sup>.

## 2. Legal consequences: Non-applicability of the provisions which violate Union law

Pursuant to the ECJ's standing case law, the binding effects of the grounds of a judgment apply "erga omnes" directly from the announcement of the decision and for all national courts and authorities.<sup>19</sup> This means that there is a direct obligation to not apply the licensing and sanctioning provisions of the GlüStV which do

not comply with Union law, as all bodies of the Member States are obligated to ensure the full practical realisation of the priority of Union law (French: "effet utile"). Any type of transitional period – for instance for the implementation of demands under Union law with regard to the consistency requirement – can only be granted by the ECJ itself. This was explicitly determined by the ECJ in *Winner Wetten GmbH*, in its headnote to the judgment of 8 September 2010.<sup>20</sup> The German constitutional court (BVerfG) recently addressed this topic in *Honeywell*, and found that the options of the Member States' courts of granting protection for reliance on existing law (*Vertrauensschutz*), are determined and limited by Union law. This means that the highest German court has acknowledged that the ECJ's decisions in the preliminary proceedings pursuant to Art. 267 TFEU (previously Art. 234 EC) always have effect "ex tunc", and therefore need to be applied by the courts in the Member States, also to cases which originate at a time prior to such preliminary ruling. Therefore, only the ECJ itself can temporally restrict the effects of the interpretation in its decisions.<sup>21</sup> As the ECJ has not made any restrictions with regard to time or other issues in its judgment in the *Carmen Media* case, the provisions of the GlüStV governing licencing and sanctioning which do not comply with Union law, are no longer applicable, neither directly nor "ex tunc".

16 Notification letter by the European Commission dated 31 January 2008, infringement no. 2007 (4866, p. 9; recommendation of the expert committee for gambling addiction (*Fachbeirat Glücksspielsucht*) of 12 March 2008, available on the Internet at <www.fachbeirat-gluecksspielsucht.hessen.de> under "Sonstige Empfehlungen" (other recommendations)).

17 Hans-Günther Vieweg, *Wirtschaftsentwicklung Unterhaltungsmaschinen 2009 und Ausblick 2010* (economic development entertainment machines 2009 and outlook 2010), ifo Institut für Wirtschaftsforschung an der Universität München.

18 Similar: VG (administrative court) of Arnsberg, resolution of 15 October 2010, 1 L 700/10 and VG of Berlin, resolution of 6 October 2010, VG 35 L 354.10. A policy aimed at maximising profits, in particular in the area of commercial gambling machines, is, however, not considered to have been proven by the LG (regional court) of Duesseldorf, judgment of 3 November 2010, 12 O 232/09, VG of Oldenburg, resolution of 4 November 2010, 12 B 2474/20 and OVG (higher administrative court) of Berlin-Brandenburg, resolution of 26 October 2010, OVG 1 S 154.10.

19 Since ECJ, judgment of 9 March 1978 – C-258/98 ECR 1978 629, para. 24. On the binding effect for national authorities, see in particular ECJ, judgment of 9 September 2003 – C-198/01 ECR 2004, I-8055, para 51.

20 ECJ, judgment of 8 September 2010 – C-409/06. This concerned an application for a preliminary ruling filed by the VG of Cologne with its decision of 21 September 2006. This case still refers to the LottStV.

21 BVerfG, resolution of 6 July 2010, 2 BvR 2661/06, paras. 83 *et seq.*

### 3. Application of the “online ban” pursuant to section 4 subsection 4 of the GlüStV?

Based on the found inconsistency and direct non-applicability of the GlüStV with regard to the establishment of a state monopoly, the question is whether this means that the ban on the organisation and brokering of public games of chance on the internet provided for in section 4 subsection 4 of the GlüStV (“online ban”) has also ceased to be applicable “ex tunc”. One might argue that this “online ban” as such does not violate Union law, and therefore continues to be valid, as the ECJ in *Carmen Media* has also held that, in principle, it is in compliance with the freedom to provide services if a national regulation prohibits the organisation and brokering of games of chance on the internet.<sup>22</sup> However, this line of argumentation overlooks the fact that the ECJ in *Carmen Media* did not specifically examine compliance with Union law of the “online ban” provided for in section 4 subsection 4 of the GlüStV and its factual implementation. Rather, the ECJ has explicitly limited the scope of its examination to the question as to whether an “online ban” may in principle be suitable to attain the objectives of combating gambling addiction and protecting minors.<sup>23</sup> The ECJ justified this restriction of the scope of examination by stating that the submitting

court (the VG of Schleswig) had only raised doubts with regard to the compliance of this ban with Union law in a very general form.<sup>24</sup> This means that the national courts are now called upon to specifically examine, taking into consideration the criteria set by the ECJ, whether the online ban in section 4 subsection 4 of the GlüStV in Germany complies with Union law.<sup>25</sup> Following this, it will be necessary to decide whether the “online ban” actually serves the legitimate objective of reducing opportunities for gambling and of ensuring the protection of minors. In this context, it will not only be necessary to take into consideration the national regulations, but also the specific modalities of application which have to limit the gambling offers in a consistent and systematic manner<sup>26</sup>. Insofar, it seems justified to transfer to “online games” the consistency requirements set by the ECJ for “offline games”. An “online ban” must also consistently and systematically serve the attainment of the described objectives. Otherwise, it would also violate the freedom to provide services, and would correspondingly not be applicable.

#### a. Legal and factual inconsistencies

In Germany, the “online ban” in section 4 subsection 4 of the GlüStV does not apply to all types of games of chance. Similar to the offline area, private providers may offer online horse race bets with a corresponding licence under the RennwLottG, as this act, which essentially originated in 1922, does not contain any restrictions with regard to the scope of application of the licenses issued under this act. As a logical consequence, German administrative authorities do not take action against online providers of horse race bets in Germany. The situation regarding commercial gambling machines is similar. As the requirements to these types of games of chance – similar to horse race bets – are governed by federal legislation, the “online ban” in section 4 subsection 4 of the GlüStV does not relate to online offers which simulate commercial gambling machines.<sup>27</sup> As far as can be seen at present, German administrative authorities have not taken any action in this respect either.<sup>28</sup> This means that games of chance, uploaded from Germany – in spite of section 4 subsection 4 of the GlüStV – are definitely present on the internet. Furthermore, horse race bets and commercial online gambling machines are the types of games of chance which show a particularly high addiction potential,

22 ECJ, judgment of 8 September 2010 – C-46/08, 4th headnote. Arguing along similar lines, Markus Ruttig, *K&R* (2010), pp. 714 *et seq.* (717), making reference to the decision by the OLG (higher regional court) of Frankfurt a. M., resolution of 12 November 2009, 6 U 333/08.

23 ECJ, judgment of 8 September 2010 – C-46/08 paras. 97/98.

24 In this respect, the ECJ does not consider it to be sufficient if the submitting court makes reference to the arguments posed by the Commission in a detailed statement addressed to Germany regarding the GlüStV. Had the ECJ followed up on the reference to the Commission’s statements, it would have been permitted to make specific determinations regarding the compliance of section 4 subsection 4 of the GlüStV with Union law. Therefore, submitting courts are strongly recommended in the future to directly provide their own even more comprehensive reasons for the submission for a preliminary ruling, in order to prevent the ECJ from restricting its own competence.

25 However, it is safe to even now forecast that German courts will have doubts with regard to the compliance of the “online ban” with Union law, and will therefore submit sufficiently specific questions to the ECJ in this respect.

26 ECJ, judgment of 8 September 2010 – C-46/08 paras. 64 *et seq.*; ECJ, judgment of 6 November 2003 – C-243/01 ECR 2003, I-1301, para. 75.

27 To this effect, see Gerald Spindler, *K&R* (2010), pp. 450 *et seq.*

28 See, for instance, the offers available on the Internet at <www.cinohetek.com>. The operators are based in Germany and therefore are subject to the actions taken by German authorities.

but nevertheless are not covered by the monopoly implemented by the GlüStV. For no apparent reason, the legislator has up to now failed to comply with its competence and obligation to regulate this area. It would be desirable for the legislator to accept its responsibility and to make the organisation of online horse race bets and commercial gambling machines subject to a consistent regulatory regime. The outcome of the legislator's present failure to act insofar amounts to a stimulation of such gambling sites.<sup>29</sup>

Another independent and particularly severe violation of the consistency requirement is that the responsible authority of the Land of Hesse has granted a license to the state-run lottery provider ("Lotto Hessen GmbH"), to enable persons resident in Hesse to take part in games on the internet after registering once by means of the so-called "E-Postbrief".<sup>30</sup> As the area of lotteries is directly covered by the GlüStV, this is a direct violation of the "online ban" in section 4 subsection 4 of the GlüStV, and on its own is sufficient to prove the inconsistency of this ban with regard to the freedom to provide services.<sup>31</sup> After all this, Germany at present lacks a consistent implementation with regard to the "online ban" in section 4 subsection 4 of the GlüStV, under aspects of legislation and administration. Therefore, this provision violates Union law and is directly inapplicable.

Those who try to come to the opposite conclusion based on the fact that the ECJ in *Carmen Media* has stated that an "online ban" may in principle be suitable to attain the legitimate objectives of combating gambling addiction and protecting minors, fail to understand in this context the above mentioned inconsistencies which exist in Germany. Furthermore, the ECJ has made its statements under the proposition that a Member State has provided for a *comprehensive* "online ban".<sup>32</sup> However, this is not the case in Germany, which means that, for this reason alone, the general statements made by the ECJ cannot be applied with regard to the evaluation of the present situation in Germany under Union law.

#### b. Inapplicability due to considerations regarding the structure of the law

However, aspects based on the structure of the law also stand in favour of the "online ban" in section 4 subsection 4 of the GlüStV not being applicable at present. The "online ban" is embedded into the GlüStV, which mainly serves to limit gambling of-

fers and to direct the public's natural play instinct into controlled and monitored channels.<sup>33</sup> Pursuant to section 4 subsection 1 of the GlüStV, public games of chance may only be organised and brokered with a license issued by the responsible authorities. Section 4 subsection 2 sentence 1 of the GlüStV on the other hand states that the license is to be refused if the organisation or brokering of games of chance contradicts the objectives of the GlüStV. Finally, section 4 subsection 2 sentence 3 GlüStV states that there is no legal claim to the issue of a license.

The latter provision in particular clearly shows that private providers cannot actually obtain a license for the organisation of games of chance in Germany. These provisions were not introduced by the legislator in order to liberalise the gambling sector, but rather to further reinforce the state monopoly for large areas of the trade. Section 4 subsection 4 of the GlüStV fits into this regulatory context, intending to strengthen the monopoly by preventing private operators from evading the ban by simply switching to the internet. However, as the state monopoly established under the GlüStV is to be regarded as violating Union law, the accompanying "online ban" in section 4 subsection 4 of the GlüStV cannot be maintained on its own and without sufficient regulatory context. The opposing legal opinion would violate elementary and fundamental principles of our legal system. The doctrine of methods teaches us that individual provisions and individual terms always must be considered with regard to the intent and purpose of the entire act and the specific normative context (teleological and systematic interpretation). However, as it has now been found that the essential normative context violates Union law, any individual provisions embedded into this regulatory context can no longer be maintained in a meaningful manner. Due to the

29 Existing inconsistencies are particularly obvious with regard to the organisation of sports bets: Whilst freedom of trade applies to horse race bets, so that they may also be organised online, the GlüStV would be applicable for the organisation of camel races, so that the monopoly and the online ban would be applicable, see Jörg Ennuschat, *GewArch* (2010), pp. 425 *et seq.*

30 See <[www.lotto-hessen.de](http://www.lotto-hessen.de)>.

31 The Fachbeirat Glücksspielsucht has reached the same conclusion with regard to the "E-Postbrief", and has requested that the competent authority immediately withdraw the license, see resolution of the Fachbeirat of 27 April 2010, available on the Internet at <[www.fachbeirat-gluecksspielsucht.hessen.de](http://www.fachbeirat-gluecksspielsucht.hessen.de)>, under "Sonstige Empfehlungen" (other recommendations).

32 ECJ, judgment of 8 September 2010 – C-46/08 para. 105.

33 See section 1 No. 2 of the GlüStV.

lack of a legally valid regulatory context as its framework, there is no possibility of interpreting the provision in a manner which fulfils the constitutional requirements. One principle to be mentioned as an example in this context is the principle of clarity and definiteness (*Bestimmtheitsgrundsatz*) based on the rule-of-law principle (Art. 20 para. 3 GG – German Constitution), which, in view of the intensity of the interference of an “online ban” into civil rights, must be given particular consideration. A person applying the law would basically be forced to assume, in an inadmissible form, that the regulatory context of the “online ban” is lawful. However, it is the legislator’s task to react to the determination that the GlüStV violates Union law. It cannot be excluded that this may lead to the need to drop the “online ban” in section 4 subsection 4 GlüStV. As a consequence of all this, the “online ban” violates Union law and is inapplicable, also due to reasons of the structure of the law, as a result of the determination of the violation of Union law by the GlüStV with regard to the establishment of a state monopoly.

#### 4. Consequences for the present legal situation in Germany

Based on the determined violation of Union law with regard to the GlüStV provision establishing the monopoly and with regard to the “online ban” in section 4 subsection 4 GlüStV, no sanctions may be imposed upon providers who, in violation of Union law, have not been permitted to provide their offers.<sup>34</sup> This has been stressed by the ECJ in the case of *Markus Stoß and others* which was published at the same time as *Carmen Media*.<sup>35</sup> According to this, sanctions cannot be imposed against gambling providers who can invoke the freedom to provide services. This includes all providers holding a corresponding licence for the organisation of games of chance in other EU coun-

tries. However, providers based outside the EU but lawfully permitted to advertise and/or offer games of chance on the basis of the so-called “Whitelisting” procedure, can de facto invoke a level of protection which corresponds to the freedom to provide services, for the duration of their inclusion into the so-called “White List”.<sup>36</sup>

## V. Summary and Outlook

The prerequisites set out by the ECJ for the determination of a violation of Union law by the state monopoly for individual areas of gambling in Germany have been fulfilled. The provisions of the GlüStV which establish the monopoly are therefore directly inapplicable. With regard to the compliance with Union law of a potential “online ban” for *all* types of games of chance, the ECJ has stated that this *may* in principle comply with Union law, while the Court has not made any statements with regard to the present regulatory regime in Germany. As the “online ban” in section 4 subsection 4 of the GlüStV does not cover all areas of gambling and violates the consistency criteria set out by the ECJ for the offline area – which can be applied *mutatis mutandis* to online games –, section 4 subsection 4 of the GlüStV also violates Union law and is not applicable. The consequence is that sanctions can, at present, not be imposed against providers of games of chance who can invoke the freedom to provide services based on Art. 56 TFEU (previously Art. 49 EC). The same applies to providers who are based outside the EU but are entitled to market and/or offer games of chance in an EU Member State under the so-called “Whitelisting” procedure.

After the decision in *Carmen Media*, the legislator in Germany is called upon to finally create a regulatory regime which complies with Union law. This probably is exactly what the ECJ judges intended to achieve. One can only hope that the legislator will recognise the writing on the wall and manage to create a future-oriented, practically feasible solution – in particular also for the unbounded legal area of the internet. This will depend decisively on whether the ability to take a new approach exists in Germany, or whether “backward thinking” will prevail. The *Carmen Media* decision has shown two options: Either, the state monopoly is maintained and liberalised areas such as commercial gambling machines and horse race bets are regulated more strictly in order to be

<sup>34</sup> See *Placanica*, ECJ, judgment of 6 March 2007 – C-338/04, C-359/04, C-360/04, ECR. 2007, I-1891, para. 63.

<sup>35</sup> ECJ, judgment of 8 September 2010 – C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, para. 115.

<sup>36</sup> Günter Heine, for instance, states with regard to the protection under criminal law that such protection must also exist if a license was issued abroad and the licensing proceedings correspond to the essential control criteria in Germany. In this context, Günter Heine expressly makes reference to the “Whitelisting” procedure, see Schönke/Schröder, § 284 StGB para. 22d. This leads to the conclusion that, at present, sanctions cannot be imposed upon holders of licenses issued, for instance, on the Isle of Man.

able to comply with the consistency requirements, or, the state monopoly is eased, for instance by a partial liberalisation, similar to Denmark, France and Italy. The signs of the time lean in favour of a paradigm shift, away from the classification of gambling law as a matter of regulatory law and towards a comprehensive classification as economic administrative

law. This would create the basis for a continuous convergence within the Union in the area of gambling, and would prepare the ground for a uniform set of regulations in the area of the internet, which is gaining increasing importance. As long as each government follows its own path, the internet will always remain a gateway for factual inconsistencies.