



## Philippe Vlaemminck & Annick Hubert

# By questioning the German monopoly, the European Court of Justice calls for stricter regulation of gambling services in Europe.

On September 8, exactly one year after the famous *Liga Portuguesa de Futebol Profissional* ruling, the Court of Justice of the EU has delivered its ruling in the preliminary cases *Markus Stoss e.a.*, *Carmen Media* and *Winner Wetten*. All three cases concern the question of compatibility of the German monopolies on lotteries and sport betting with the EU Treaty principles.

The main question was whether the German regime, whereby lotteries and sport betting are subject to a state monopoly, whereas at the same time more dangerous games like slot machines and casino games are provided in a more liberal way (by private operators), is considered to be consistent with EU law. This consistency question has been the debate in many previous cases and the Court has now provided clear guidelines regarding this element of the so-called proportionality test.

In the factual circumstances of these cases, the Court finds that the German monopoly is not consistent and therefore is in breach with EU law. According to the Court, the choice of an EU Member State to maintain a monopoly rather than a non-exclusive legislative framework is only proportionate in so far as, as regards the objective of a high level consumer protection, it is accompanied with a consistent legal framework. Such a framework should be suitable for ensuring that the monopolistic operator will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively and qualitatively planned and is subject to strict control by the public authorities.

The court rules that a restrictive gambling policy is not consistent, when at the same time:

- advertising measures are not limited to what is necessary in order to channel consumers towards the offer of the monopolistic operator by turning them away from other channels of unauthorised games, but are designed to encourage the propensity of consumers to gamble for the purpose of maximising the gaming revenues;
- other types of games of chance may be exploited by private operators with an authorisation and
- in relation to other types of games of chance with a higher potential risk of addiction, the competent authorities maintain a more liberal regime and are conducting or tolerating policies of expanding supply.

These were the specific elements on the basis of which the Court found the German monopoly, in its current state, to be in breach with the EU Treaty principles. The Court has however not ruled that the German government should opt for a liberalisation of the market, nor that the German market should be suddenly opened to competition. On the contrary, the Court has stated that a monopolistic approach can still be in line with the EU Treaty, but that the German model in its current state can not fulfil the consistency test for the above-mentioned reasons.

The task for Germany now consists in adapting its regime—not abolishing it—according to the guidelines of the Court given in its rulings. Despite the fact that the Court ruled in the *Winner Wetten* case that no transition period can be maintained when a regime was found to be contrary to EU law, there is no need for Germany to change its policy overnight. Indeed, these are preliminary rulings, which are directed to the national judges which has referred the preliminary questions. Only upon judgment of the national judge concerned, Germany will need to adapt its policy.

Although it might seem these cases are purely about the non compliance with EU law of the German system, the rulings provide us with a clear guidance from the Court regarding their view on the regulation of online gambling in Europe.

First of all, it is clear the Court does not favour a liberal approach over a monopolistic approach. On the contrary, the Court explicitly states that the authorities controlling a monopoly have additional means of influencing the latter's conduct outside the statutory regulating and surveillance mechanisms, which is likely to se-

cur a better command over the supply of games of chance and better guarantees that implementation of their policy will be effective than in the case those activities are carried on by private operators in a situation of competition, even if the latter are subject to a system of authorisation and a regime of supervision and penalties.

In the German cases, the Court yet again emphasizes the specific dangers of online gambling, and acknowledges that illicit transactions on the internet may prove more difficult to control and sanction. In that light, the Court is of the opinion that Member States cannot be deprived of unilateral legal means enabling them to ensure, as effectively as possible, compliance with the rules which they lay down in relation to actors operators on the internet and falling, for one reason or the other, within their jurisdiction.

These findings emphasize not only the need for the Member States to strictly regulate and control online games provided by private operators, but also to put effective enforcement mechanisms in place to tackle the increasing unfair competition from the operators providing their games illegally in the different EU Member States. In a context in which the Court acknowledges again that the principle of mutual recognition doesn't apply in the gambling sector, it seems the need for a better coordinated approach between the Member States on EU level has become of utmost importance.

It is clear that these judgments were intended to give a clear guidance to the EU Member States, in the light of the activities of the Council Working Group, in what direction to look for a sustainable solution for gambling services in the EU: a frame which allows the Member States to effectively regulate online gambling according to high level standards and to apply effective control mechanisms to tackle the ever increasing illegal provision of gambling services within their territory.

On September 9, the Court delivered another preliminary ruling, in the *Engelmann* case, which touches upon the multiple concession system for casinos in Austria. The most relevant question was whether, in a multiple concession system, all licenses could be granted to an Austrian public limited company with its seat within Austrian territory, without organising an open competitive procedure. This question was indeed highly relevant since the Court had ruled in the *Dutch Betfair* case, one June 3, that no open procedure was required for the granting and/or the renewal of the license in a sole licensing system.

In its ruling in the *Engelmann* case, the Court clearly distinguished the granting of a license in a monopolistic system, as was at hand in the *Betfair* case, with the granting of licenses in a multiple concession system. In the latter, the Court requires the national government to organise an open and non-discriminatory procedure, allowing for foreign companies to compete with domestic companies. However, the Court does grant the discretion to the EU governments to limit the number of licenses (12 concessions in the case at hand) and for the license to be granted for a sufficiently long period, even up to 15 years.

These 4 very recent judgments 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. Let this be a very stimulating kick-off for the upcoming meetings of the Council Working group organised by the Belgian Presidency. ♦

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