ECJ Plunges German Gambling Into ‘Legal Chaos’

Private gambling operators secured a rare victory at the European Court of Justice yesterday when it ruled that German gambling laws might be unjustifiable in their current form.

In three separate but linked judgments the ECJ found that the maintenance of sports betting and lottery monopolies in German states, largely on grounds of minimising gambling addiction, was inconsistent with the headlong expansion of seemingly more addictive privately-run slot machines.

Germany’s controversial 2008 Interstate Gambling Treaty maintained state monopolies over lotteries and sports-betting games until at least January 2012 and also introduced a ban on most forms of online gaming.

However, critics have charged that the German regime is invalid under EU law due to that fact that it covers neither horserace bets nor Germany’s federally-regulated slot machine sector.

Discussions over possible future reforms have already begun in Germany.

And the ECJ’s findings are now likely only to fast-forward the negotiations, say local experts.

“The first thing the states have to do is speed up their talks. This was primarily a legal issue in the ECJ, but its decision is important,” Winfried Wortmann, managing director of Westdeustche Lotterie, told GamblingCompliance.

“Until yesterday I was convinced that the 16 states would modify and improve the Interstate Treaty, but fundamentally go on the same way.

“Immediate compliance has to be established with some of the things that the court says if Germany wants to continue with a state monopolistic regulation for lotteries and sports betting,” Wortmann added.

The ECJ yesterday delivered three separate rulings on eight cases after a Grand Chamber hearing, involving thirteen judges as opposed to the usual three or five.

A variety of key points on European and German gambling law came out in the judgments, including:

- Operators using an offshore licence to offer gambling in another EU member state can still rely on an Article 49 (free movement of services) defence, even if they cannot take bets in the jurisdiction from which they are licensed.
- Under the same article, though, countries are not precluded from issuing their own national licences to remote operators, or from taking active steps to exclude unlicensed operators from their territories.
- EU member states are free to establish gambling monopolies, but only where they pursue a public-interest objective and where they limit games of chance in a consistent and systematic manner.
- National rules that uphold the inconsistent German system cannot continue to apply while the laws are brought into line with EU law.

“The rulings were much more positive for private operators than expected, and it was quite surprising after previous ECJ rulings in Portugal and Sweden that the ECJ would be so clear,” German gambling law expert Martin Arendts told GamblingCompliance after the decisions.

“Any provision that upholds monopolies in the treaty is debatable, and so certain parts of the Interstate Treaty are no longer applicable.

“We have got legal chaos in Germany now,” Arendts added.

Ahead of the ECJ ruling, a number of German states and sporting bodies indicated their opposition to the Interstate Treaty’s ban on online gambling and monopolisation of sports betting.

“More and more stakeholders are raising concerns with regard to the efficiency of a ban on online gaming and are calling on the government to overturn the Interstate Treaty. Their arguments will be bolstered by today’s rulings,” Sigrid Ligne, secretary general of the Brussels-based European Gaming and Betting Association, said.

Local private operators who were outlawed under the Interstate Treaty have also been actively lobbying to overturn the gambling rules, and Ligne yesterday echoed their call for a political solution.
“There is a need for a solution that does justice to the demand of consumers to play online and that at the same time ensures a high level of consumer protection,” she said. “It is now up to German politicians to draw the appropriate conclusions and take their responsibility towards their consumers.”

Yesterday’s decisions represent a significant boost to European private operators that have suffered a string of setbacks before Europe’s top court since September 2009’s ‘Santa Casa’ judgment from Portugal.

The ECJ’s rulings, though, did reiterate previous case law in stressing that online gambling raises more substantial risks of fraud and consumer protection than offline gambling, while stating that prohibitive measures may be suitable for combating those problems.

“The potential ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer... constitute so many factors likely to foster the development of gambling addiction and the related squandering of money,” the European Court said.

“Contrary to how proponents of a liberalisation would like to interpret these rulings, the Court today did by no means advocate a liberalisation of gambling,” said Friedrich Stickler, president of the state lottery monopoly lobbying group European Lotteries.

“The Court also pointed again to the higher risks associated with internet gambling compared to land- based offers and therefore advocates a stricter regime like monopolies,” Stickler added.

Still, Germany’s monopolised system makes it a holdout in Europe, where other powers, led by Italy and France, have taken the route of licensing private operators but subjecting them to strict local restrictions and taxation.

With Germany’s current regime more precarious than ever, it is now more likely to adopt the same strategy, suggests Arendts.

“It is quite likely Germany will introduce a licensing system now, similar to the one in France, but only for gambling forms that are not as attractive for monopoly operators,” he said.