

Member states may clamp down online gaming - ECJ ruling

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THE European Court of Justice (ECJ) has ruled that Portuguese legislation preventing operators such as Bwin from offering gambling opportunities via the internet may be regarded "as compatible with the freedom to provide services".

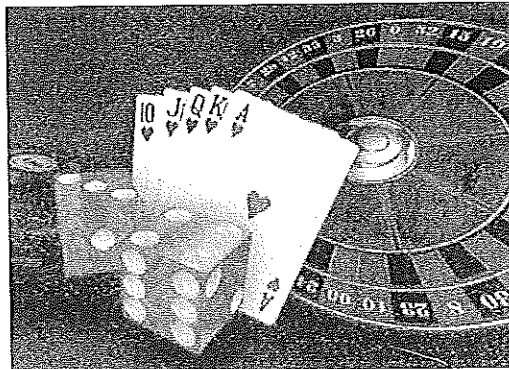
This judgement has significant repercussions on the Maltese e-gaming sector and its income-generating potential, which runs into millions of euros, both for the Lotteries and Gaming Authority (LGA) which licences online gaming operators working in Malta, as well as for the e-gaming companies themselves.

In order to prevent the operation of games of chance via the internet for fraudulent or criminal purposes, Portuguese legislation conferred on the Santa Casa da Misericórdia de Lisboa, a centuries-old non-profit-making organisation operating under the strict control of the Portuguese Government, the exclusive right to organise and operate lotteries, lotto games and sporting bets via the internet.

That legislation also provides for penalties in the form of fines which may be imposed on those who organise such games in contravention of that exclusive right and who advertise those games.

Bwin, a private on-line gaming undertaking established in Gibraltar, and the Liga Portuguesa de Futebol Profissional were fined €74,500 and €75,000 respectively for offering games of chance via the internet and for advertising those games.

The Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court of Oporto), before which Bwin and the Liga challenged those fines, questioned whether the Portuguese legislation was compatible with freedom of establishment, the



free movement of capital and the free movement of services.

First of all, the European Court of Justice took the view that "freedom of establishment and the free movement of capital do not apply to the dispute in question."

In those circumstances, the Court examined whether the freedom to provide services precluded the Portuguese legislation in so far as the latter prohibits operators such as Bwin, established in other Member States where they lawfully provide similar services, from offering games of chance via the internet in Portugal.

In the context of that analysis, the Court explained that the Portuguese legislation "constitutes a restriction on the freedom to provide services."

The Court pointed out, however, that "restrictions on the freedom to provide services may be justified by overriding reasons relating to the public interest."

"In the absence of Community harmonisation in the area of games of chance, Member States are free to set the objectives of their policy in that area and, where appropriate, to define in detail the level of protection sought," the ECJ said in its ruling.

However, the Court noted that

"the restrictive measures that Member States may impose must satisfy certain conditions - they must be suitable for achieving the objective or objectives invoked by the Member State concerned, and they must not go beyond what is necessary in order to achieve those objectives."

"Lastly, in any event, those restrictions must be applied without discrimination," the ECJ added in its ruling.

As regards the justification for the Portuguese legislation, the Court recalled that the objective of the fight against crime relied on by Portugal may constitute "an overriding reason relating to the public interest that is capable of justifying restrictions in respect of operators authorised to offer services in the sector concerning games of chance."

"Games of chance involve a high risk of criminal activity or fraud, in view of the scale of the earnings and the potential winnings on offer to players," the ECJ added in its ruling.

With regard to the suitability of the legislation in question for achieving that objective, the Court expressed the view that "the grant of exclusive rights to operate games of chance via the internet to an operator

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such as Santa Casa, which is subject to strict control by the public authorities, may confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

As to whether the system in dispute was necessary, the ECJ

found that a Member State was entitled to take the view that "the mere fact that a private operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime."

"In such a context, indeed, difficulties are liable to be encountered by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators," the ECJ added in its ruling.

In addition, because of the lack of direct contact between consumer and operator, the Court considered that "games of chance accessible via the internet involve different and more substantial risks of fraud compared with the traditional markets for such games."

The Court also considered it possible that "an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence the outcome directly or indirectly and thus increase its profits."

"Accordingly, in the light of the specific features associated with the offering of games of chance via the internet," the Court took the view that "the prohibition imposed on operators such as Bwin of offering games of chance via the internet may be regarded as justified by the objective of combating fraud and crime and may therefore be compatible with the principle of the freedom to provide services," the ECJ concluded its ruling.

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