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The EU Gambling Debate after the ECJ Ruling in Liga Portuguesa de Futebol Profissional Case

In the fall of 2009 the European Court of Justice has been very active in the EU gambling debate. Not only did we see, on September 8, the long awaited judgment in the Liga Portuguesa de Futebol Profissional case, but in the meantime we had oral hearings as well as the opinion of the Advocate-general Bot (AG) in the Dutch Ladbrokes and Betfair cases, and oral hearings in the German Markus Stoss, Carmen Media, Winner Wetten and other cases.

The ruling in Liga Portuguesa is a clear victory for the EU Member States, as the European Court of Justice has clearly recognised the right of the EU Member States to regulate and control their national online gambling markets and therefore the application of the principle of mutual recognition in the gambling sector was explicitly denied.

The delivery of the judgment, almost a year after Advocate-general rendered his Opinion in this case, has proven to be a very challenging task for the 13 judges of the Grand Chamber. Nonetheless, the Court has managed to deliver a very clear and even concise ruling, establishing the core principles of the power of the Member States in the field of online gambling.

The Court was asked to rule upon the validity of the extension of an exclusive right for the organisation of lottery and gambling activities to an online offer, under the European free movement principles. The case concerns the Portuguese legislation which confers on Santa Casa de 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. The aim of this restrictive legislation is to prevent the operation of games of chance via the Internet for fraudulent or criminal purposes and to protect Portuguese consumers against gambling addiction and other gambling related risks. The Portuguese legislation in question also provided for penalties in the form of fines which may be imposed on those who organise such games in breach of this exclusive right and who advertises such games.

Bwin and the Portuguese Professional Football League were fined 74500€ and 75000€ respectively for offering games of chance via the internet and for advertising those games within Portuguese territory. According to a sponsorship agreement between Bwin and the Portuguese Football League, Bwin logos were displayed to the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The League's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

In its ruling, the European Court of Justice first confirmed its previous case law. According to the case law the Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. It must however be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.

The Court extended its previous case law on the validity of an exclusive right in the gambling sector to an exclusive right system regarding the online provision of gambling services. Indeed, in the Liga Portuguesa de Futebol Profissional ruling, the ECJ acknowledges that the grant of exclusive rights to operate games of chance via the internet to a single operator which is subject to strict control by the public authorities may, in circumstances such as those in the proceedings, confine the operation of gambling within controlled channels against fraud on the part of operators.

The key point and most important achievement of this ruling is that the European Court of Justice has explicitly denied the application of the EU principle of mutual recognition in the gambling sector. According to the basic "mutual recognition" principle a Member States has in principle to recognise a license granted in another EU state without duplication. The Court considers that this basic principle cannot be applied to gambling services.

The Court states that in the absence of harmonisation, a Member State is entitled to take the view that the mere fact that a private operator such as Bwin lawfully offers gambling services 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.

According to the Court, in such a context 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 Court also recognised that games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers, compared with the traditional markets for such games, given the lack of direct contact between customer and operator. Thereby the Court thus ruled that internet games are more dangerous than physically offered games, even when regulated and controlled by the competent authorities of the Member State of residence of the consumer.

This assessment goes very far and means the end of gambling hubs like Malta and Gibraltar. The ECJ indeed rules that the competent authorities in those jurisdictions, being the jurisdiction of establishment of the operator, cannot sufficiently guarantee the integrity and quality of operators providing their games in another Member State. Therefore, the Member State of residence of the consumer can maintain its own

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restrictive conditions and can legitimately prohibit access to its market for operators established abroad.

Although the legal counsels of Bwin and other companies operating from such jurisdictions have heavily criticized this ruling as being 'irrelevant' or very limited to the particular circumstances of this case, there is no doubt that they need to put an end to the abuse of the internal market committed by providing their games all over the EU without abiding by the restrictive legislation in the Member State of their consumer. Several of their legal counsels have tried to find escape routes by inventing terms like 'conditional mutual recognition' and presenting the solution for the Member States to engage in bilateral agreements. Admittedly these thoughts are very creative but unfortunately they are not only very unclear as to their meaning but also in blunt contradiction with European law.

The answer the ECJ formulated to the question referred by the Portuguese judge leaves no room for interpretation.

In the Ladbrokes and Betfair cases the AG Bot confirms the ruling in the Liga Portuguesa de Futebol Profissional case, in which the Court clearly has taken the position that the principle of mutual recognition does not apply to a licence to offer games on the internet.

He further states that a system of exclusive rights has precisely the object of preventing any operator other than the holder of those rights from engaging in the activity covered by that system. Such a system is justified and therefore compatible with EU law, it is immaterial that the operators wishing to offer games in the Member states where such a monopoly exists are authorised to do so in their Member state of establishment.

Meanwhile, the Swedish Presidency of the EU came to its end and the Progress Report on the discussions held between the Member States within the Establishment and Services Working Group was be presented to the Competitiveness Council. A special attention was paid to the issues of responsible gaming and the need for proper regulation. A large task is still waiting for the upcoming Spanish and Belgian Presidencies, shaping the position of the Member States even more, by determining which gambling related elements should remain national and which elements require a European solution. The different cases in the European Court show us the issues which remain under discussion and will require rather a regulatory approach.

In the Ladbrokes and Betfair cases the AG pointed to two main difficulties which remain unresolved: the possibility for exclusive right holders to expand their activities and still to fulfil the consistency test and the discussion regarding the procedure for allocation of operating licences.

Similar to the position of the Commission in recent German cases, the AG limits the recognition of the theory of controlled expansion to the objective of the prevention of crime and fraud. He states that an attractive alternative is indeed necessary if a Member State aims to prevent fraud and crime, but he doesn't recognise this regarding consumer protection (prevention of gambling addiction). Therefore, one cannot conclude, based on this opinion, that an attractive alternative, requiring a wide range of games, advertising to a certain extent, and the use of new distribution techniques, might be necessary to channel the gaming desire into a highly regulated offer which aims to protect the consumer against gambling addiction etc.

The AG concludes that the fact that holders of exclusive rights to operate gaming in The Netherlands are authorised to make their offers attractive by creating new games and advertising is not, as such, inconsistent with the aims of the Dutch legislation, because it contributes to the prevention of fraud.

However, in so far as the Dutch legislation also aims to protect consumers against gambling addiction, the creation of new games and advertising must be strictly controlled by the national authorities and limited so that they are also compatible with the pursuit of that aim. Accordingly, the reconciliation of the two aims pursued requires that the games offered by the holders of exclusive rights and advertising for authorised games be sufficient to induce consumers to remain within the legal gaming system without constituting an inducement to excessive gaming, which would lead consumers, or at least the weakest among them, to spend more than the share of their income available for leisure pursuits. If this balance is not respected, the policy is not consistent and cannot be upheld.

The AG also argues that the case law concerning the obligation of transparency is also applicable to a licensing system limited to a single operator in the gambling sector.

The obligation of transparency appears to be a mandatory prior condition of the right of a Member state to award to one or more operators, other than the state, the exclusive right to carry on an economic activity, irrespective of the method of selecting the operator(s). According to the AG, the particular nature of gaming does not justify authorising a Member state to create an exception to that obligation. Once a Member state decides to entrust the operation of one kind of gaming to the private sector, the Member state must respect the principle of equal treatment of all economic operators who would be potentially interested.

He does not believe that a call for tenders for the contract would have detrimental effects comparable to those of competition in the market. In the context of a system of an exclusive right granted to a single operator, protection for consumers against the risk of addiction to gambling and the prevention of fraud are ensured by means of conditions imposed by the Member state on the single operator in order to strictly limit its activities. A call for tenders would also enable the competent authorities to grant the licence to the operator who appears best able to comply with all the conditions in question.

The AG emphasizes that transparency is the fair counterpart of the constraints which the Member states, in exercising their sovereign rights may impose on the freedoms of movement.

The grounds capable of justifying such constraints on the freedom of movement in the gambling sector may also legitimise the grant of exclusive rights for a sufficiently long period of several years. A Member state may consider that the protection of consumers against the risks associated with unauthorised gambling, in particular through Internet, necessitate a degree of stability in the selection of the holder(s) of exclusive rights. However, the grant of exclusive rights for an unlimited period is difficult to justify in principle, because it closes the market of a Member state to all the operators who would be potentially interested with no limitation in time.

When it comes to the renewal of the exclusive licence, it may be justified by the defence of an essential interest or by reason of overriding reason in the public interest, such as the protection of consumers against the risks of excessive expense and addiction to gambling, as well as the prevention of fraud to renew the licence without a call for tenders. It is for the Member state to show that the derogation from the principle of equal treatment and obligation of transparency are justified on one of those grounds and that it conforms the principle of proportionality.

To what extent the European Court will follow the reasoning of the AG regarding consistency and transparency in licence allocation , is not yet totally clear, but clearly it will have a serious impact on the way games of chance are operated in the EU, unless the Member States decide to provide for a regulatory consolidation of their model through European legislation. ◆