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Confirms Power of the EU Member States to Control and Regulate their Online Gambling Markets

On September 8, the European Court of Justice has finally delivered its long awaited judgment in the *Liga Portuguesa de Futebol Profissional* case. The ruling is a clear victory for the EU Member States and the European State Lotteries, 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 Bot has rendered its 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, a private online gaming company established in Gibraltar, 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 in the *Läära* and *Zenatti* cases, by stating that the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and the proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure. Therefore, 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 also refers to its previous rulings in which it already recognized that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gam-

bling within controlled channels and of preventing the risk of fraud and crime in the context of such operation.

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 State must in principle 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 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 ...continued on page 29

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regulated and government licensed world. I² will operate as a both a B2B and a B2C company. We have always been a trusted partner for the Lotteries and a legitimate operator that has respected and served the Government's will and interests. INTRALOT's strategy has always been country-based and this style of market development perfectly fits our strategy. We are happy to live and operate in a regulated environment.

Tell us more about what I² does.

C. Antonopoulos: INTRALOT Interactive has developed an Integrated Platform that brings together a unique Player Management System together with a wide portfolio of games, across all segments of the e-Gaming Industry. We provide best of class Technology & Services to our Customers. These manage Customer Acquisition & Retention processes as well as all other operational and technical issues. As you know, the internet gaming industry poses a new and different set of regulatory issues. Europe is pioneering the process of figuring out how to regulate this industry, how to balance the interests of each member state with the goal of maintaining fee and open markets. Italy and France are notable examples, where we have established our brand and provide the full suite of electronic Services & Games to the end consumer. We are also following and supporting the efforts of our Lottery clients, in the Internet space, providing all the necessary infrastructure and services as a B2B trusted partner.

Any comments on how this ECJ Portugal ruling impacts INTRALOT's strategies?

C. Antonopoulos: Contemplating on the overall impact on the gaming sector, I would say that the recent success of the controlled opening of the Italian market has stimulated the interest of various countries to proceed with a model of controlled deregulation of their markets. Tech-

nology, processes, and service innovation converge to give rise to new business models that will respect the taxation policies of each nation-state as well as the advertising and responsible gaming practices that are desired for each market. INTRALOT's strategy is to build the technologies and products that will support the implementation of internet gaming initiatives based on these new policies and regulatory structures.

Congratulations for your success in the US market. How has the procurement process changed in the US? Is there more flexibility afforded the bidders to pitch their big-picture solutions and creative strategic ideas?

C. Antonopoulos: Thank you, Paul. We are very pleased with the results that INTRALOT USA and Tom Little's team have achieved in the US market. We now have 11 contracts in the States and we are the only non-American company that managed to enter this very demanding and protected market. We think that there is great potential in the US market, not only due to its size and its diversity, but also because of the high standard of living. US lotteries are in a great place to take full advantage of this potential. And we are dedicated to helping them achieve the best results possible.

And yes to your question about procurement. The procurement processes have evolved to make room for more innovative approaches and solution-focused proposals, which is indeed INTRALOT's competitive advantage in this field. We feel that this is very good for the industry and will result in superior performance and results.

Your adventures in Victoria make for interesting reading. It seems to me that the government made the decision to allow a second operator to provide competition but that there were (and remain?) strong interest groups that never really intended to give the

second operator a chance to compete fairly.

C. Antonopoulos: We have been through an adventure in Australia that illustrates how and why Governments should be extremely careful when deciding how to change regulations. When the terms do not assure competitive fairness and equivalence between the different operators, the results will not be good for the government. And it discourages additional operators from participating. The result is less competition and, therefore, diminished benefits for the Governments. I think that INTRALOT is the only international player in the industry that could come out of this situation intact. But, my concern is that such incidents are bad for our industry as a whole.

It is likely that more and more countries will be opening up their markets in the coming years. There are tremendous benefits to the government and the consumer to opening up the markets in this way. The issues facing Australia will be faced by everyone who opens up their markets to multiple operators. It is vital that regulatory changes be implemented in ways that are consistent with the principles of free market competition in order to avoid the inefficiencies and disequilibrium that result when there is an uneven playing field. Europe is in the process of finding its way right now, and I think we have reason to be very hopeful that the regulatory structures will support an efficient and fair marketplace that protects the integrity of the industry, protects the public, and continues to maximize funding for good causes.

Privatizations and the markets liberalization need tremendous amounts of money. Financial sponsors try to understand the rules of our industry. Convincing them to invest in our sector is a challenge both for us and our Associations (World and regional). Otherwise, both privatizations and the opening of various markets are doomed to fail. ♦

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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. It is clear the Court wanted to deliver a breakthrough ruling on the principal issue of mutual recognition in the gambling sector, as it didn't even refer the matter back to the national judge for interpretation in this specific case. The Court ruled itself that a Member State is as such entitled to prohibit the provision of online gambling services within its territory by an operator established in another

Member State. This leaves no room for a proportionality assessment by the national judge as the ruling of the ECJ is unconditional. So a breakthrough ruling in the gambling sector it was, but unfortunate for those companies who had put their money and business strategy on another outcome.

Today it is clear that the EU follows on Internet gambling a route which is comparable to the route taken by the USA. States have the competence to regulate this matter but only within the boundaries of their own territory. Several EU states are now considering taking criminal court actions against those remote gambling operators who would continue to violate their laws. ♦