

Media & Entertainment - Portugal

ECJ ruling puts spotlight on Portuguese gaming laws

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Background

In principle, games of chance are prohibited under Portuguese law. However, the state reserves the right to authorize the operation of one or more such games according to a system that it deems appropriate. Such games may be operated directly, through either a state body or a body controlled directly by the state; alternatively, the state may allow profit-making or not-for-profit private entities to operate such games by inviting tenders in accordance with the Code of Administrative Procedure.

This legal framework came under scrutiny in 2009 as a result of a case involving the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, a not-for-profit organizer of lotteries; the Portuguese Professional Football League; and Bwin International Ltd. The dispute concerned fines that the director of Santa Casa imposed on the league and Bwin on the grounds that they had infringed Portuguese legislation governing the provision of certain games of chance on the Internet. The court asked the European Court of Justice (ECJ) to consider whether the relevant Portuguese legislation breached EU law, in particular Articles 43, 49 and 56 of the EC Treaty. The ECJ decided this question in its judgment of September 8 2009 in Case C-42/07.

Portuguese law recognizes three categories of gaming, each with a different legal framework: casino games, raffles and similar games, and lotteries, lotto games and sports betting.

Legislative Decree 422/1989 restricts the operation of casino games to the state or private entities with a concession granted under an administrative contract. Casino games may be provided only in legally authorized locations.

Raffles and similar games are subject to prior government authorization, which is granted on a case-by-case basis according to specific conditions established in accordance with the type of game, the type of prize and other factors. However, such games are not an economically significant part of the gaming sector.

Games of chance in the form of lotteries, lotto games and sports betting are regulated by Legislative Decree 84/1985. Pursuant to Article 1, the state reserves the right to promote and operate lotteries, lotto games and sports betting, entrusting this right exclusively to Santa Casa.

In 2003 the legal framework governing lotteries, lotto games and sports betting was changed in order to accommodate technical developments enabling games to be offered by electronic means, particularly on the Internet. The provisions of Legislative Decree 282/2003 (i) license Santa Casa to distribute its products by electronic means, and (ii) extend Santa Casa's exclusive right to operate games of chance within the Portuguese territory to electronic games, thereby prohibiting all other operators from providing online and other electronic games.

Article 11 makes it an administrative offence to:

- promote, organize or operate electronic games;
- promote, organize or operate by electronic means a lottery or other draw similar to those offered by the national lottery or the Lotaria Instatânea scratch card game; or

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- issue, distribute or sell virtual tickets or advertise draws (regardless of whether they take place within the Portuguese territory or not) in contravention of the exclusive rights granted to Santa Casa.

Contravention of Article 11 is punishable by a fine. Article 12 establishes that the fine may not be less than €2,000 for legal persons, but may be up to a maximum of €44,890 for each administrative offence.

Santa Casa's monopoly

Santa Casa is a centuries-old non-profit-making organization operating under state control, which enjoys the exclusive right to organize and operate lotteries, lotto games and sporting bets. Santa Casa has held this right since 1783, when a royal edict allowed it to operate a national lottery. Since then, the concession has been renewed regularly.

Following a number of legislative developments, Santa Casa acquired the right to organize other games of chance based on drawing lots or on sporting events. This led to the introduction of two football-based betting games called Totobola and Totogolo, which allow participants to bet on results and the number of goals scored. In addition, Santa Casa has the exclusive right to organize two lotto games: Totoloto, in which six numbers are drawn from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called Joker, which consists of the drawing of a single number by lot. Santa Casa also operates Lotaria Instantânea.

Each game of chance organized by Santa Casa is governed by a different legislative decree, with specific legislation applying to the organization and operation of the various games, including:

- the size of the stake;
- the system for awarding prizes;
- the frequency of the draws;
- the specific percentage of each prize;
- the methods of collecting stakes;
- the methods of selecting authorized distributors; and
- the methods and timing of prize payouts.

In order to prevent games of chance from being offered with fraudulent or criminal intent, Legislative Decree 282/2003 prohibits operators from offering online games of chance without prior authorization, thereby guaranteeing Santa Casa's exclusive right to operate and promote electronic gaming.

Bwin and the league

Bwin is a gaming company which offers a wide range of games of chance on the Internet, including casino games, sports betting and lottery-type games similar to Totoloto and EuroMillions. Its registered office is in Gibraltar and its servers for its online services are in Gibraltar or Austria. It has no permanent establishment in Portugal.

Users place bets on Bwin's website or by other means of direct communication, paying by credit card or other electronic payment methods. The sports bets that Bwin offers are based on the results of football matches and other sporting events. Its games include betting on the results of football matches in the Portuguese league, which are also the basis for the Totoloto and Totogolo games operated exclusively by Santa Casa. Bwin offers real-time, in-play betting in which the odds change as the match is played.

On August 18 2005 Bwin and the Portuguese Professional Football League concluded a sponsorship agreement for four seasons, starting from the 2005/2006 season. The agreement made Bwin the main institutional sponsor for Portugal's top division of professional football, which had been called the Super Liga, but was renamed the Liga betandwin.com before becoming the Bwin Liga. Bwin's logos were displayed on the kits worn by players and referees and were displayed around the club's stadia. The league's website included references to Bwin and a link to its website, allowing consumers in Portugal and other jurisdictions to use Bwin's gambling services.

Fines and appeal

Pursuant to its administrative powers under Legislative Decree 282/20003 to investigate the illegal operation of games of chance, Santa Casa fined the league €75,000 and Bwin €74,000 for breaching its exclusive right to (i) promote, organize or operate electronic games of chance, and (ii) issue, distribute or sell virtual tickets and advertise draws.

In response, the league and Bwin sought the annulment of the decisions before a Portuguese court. Among other things, they cited the freedom to provide services, the freedom of establishment and the free movement of capital, as safeguarded by the EC

Treaty. The Portuguese court suspended the proceedings and referred to the ECJ for a preliminary ruling on whether Portuguese legislation on games of chance breached the principles established by Articles 43, 49 and 56 of the treaty.

ECJ analysis

The ECJ held that freedom of establishment and the free movement of capital did not apply to the dispute in question. It then examined whether the freedom to provide services precluded Portuguese legislation from prohibiting operators such as Bwin - which are established in other EU member states, where they lawfully provide similar services - from offering online games of chance in Portugal.

The ECJ found that the legislation constituted a restriction on the freedom to provide services. However, such restrictions may be justified by overriding public interest considerations. In the absence of a harmonized position on games of chance, EU member states are free to set their own objectives for policies in this area and, where appropriate, to define in detail the level of protection sought.

Nevertheless, the ECJ noted that restrictive measures imposed by EU member states must satisfy conditions of suitability, necessity and non-discrimination established by case law, so that the restrictions:

- constitute suitable means of achieving the objective or objectives identified by the member state;
- do not go beyond what is necessary in order to achieve such objectives; and
- are applied without discrimination.

Games of chance involve a high risk of fraud or other criminal activity, particularly in view of the scale of the potential profits and the potential winnings on offer to players. Fighting crime may constitute an overriding justification for restricting operators that are authorized to offer services in the gaming sector.

In considering the suitability of the legislation, the ECJ considered that granting an exclusive right to operate online games of chance to an operator such as Santa Casa, which is strictly controlled by the public authorities, may be seen as confining gambling operations to controlled channels and may be regarded as appropriate for the purpose of protecting consumers against fraudulent operators.

In considering the necessity of the system, the ECJ held that a member state is entitled to consider that the mere fact that a private operator such as Bwin lawfully provides online gambling services in another member state - where, in principle, it is already subject to statutory conditions and controls - does not provide sufficient assurance that consumers will be protected against the risks of fraud and crime. The authorities in the operator's member state of establishment may encounter serious difficulties in assessing the professional qualities and integrity of operators and may therefore struggle to meet the objectives of the law. Moreover, the ECJ accepted the view that online games of chance involve different and more substantial risks of fraud compared with traditional gaming due to the lack of direct contact between consumers and the operator.

Furthermore, the ECJ considered that a gambling operator which sponsors some of the sporting competitions on which it accepts bets, as well as some of the competing teams, could be in a position to influence the outcome of the events, either directly or indirectly, and that this increased the risk of fraudulent behaviour.

Accordingly, and in light of the specific features of online games of chance, the ECJ concluded that prohibiting operators such as Bwin from offering such games online is justifiable in terms of combating fraud and crime and is therefore potentially compatible with the freedom to provide services.

Comment

The ECJ ruling refers specifically to the legal framework established by Legislative Decree 282/2003, which extends the exclusive right to provide games of chance to electronic games. The ECJ did not consider the more generally applicable legal framework for games of chance.

Notwithstanding that some aspects of the reasoning behind the ruling are primarily influenced by Santa Casa's particular institutional status, the ECJ frequently referred to Portugal's legislation on games of chance as a whole. This seems to raise the possibility of extending the reasoning for the prohibition on promotion, organization, operation and advertising on the Internet to all games (including casino games), not only those licensed to Santa Casa on an exclusive basis.

The question of whether exclusive rights to operate casino games under concession may be extended to online and other electronic casino games was not explicitly considered. However, the ECJ's approach opens the door to interpretations which may consider Portuguese legislation to be compatible with EU law, but which prohibit the

promotion, organization, operation and advertising of games of chance, regardless of the platform used, that are not authorized or franchised by the state, even if such activity is pursued by an entity established in another member state, provided that the national legal regime is proportional, necessary and appropriate to protect Portuguese consumers from the risks of fraud and crime.

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