

Concerns remain in Portugal as online market opens up

The new Portuguese law on online betting and gambling came into force on 28 June and the regulatory framework is set to be fully completed by early August. Despite these developments, João Alfredo Afonso and Miguel Cortes Martins of Morais Leitão, Galvão Teles, Soares da Silva & Associados argue in this article that there are still parts of the new legal framework that are of serious concern for operators.

On 29 April, the Portuguese government approved the Legal Framework for online betting and gambling¹ ('RJO'). With this law, operators will be able to lawfully carry out the operation of games of chance, as well as sports betting and horserace betting, when carried out through electronic, interactive or technological means ('online gambling'). Although the law entered into force on 28 June, there is still the need to enact further technical regulation. Moreover, it is also important to point out that the RJO itself provides that the law must be reviewed within two years from the issuance date of the first licence, which, according to government expectations, should occur in the last quarter of 2015.

Despite this 'opening' of the market, there are still some provisions in the law that raise concern among operators.

Tax

The RJO determines that both games of chance and pari-mutuel horserace betting are taxed on a revenue basis, while fixed odds sports and horserace betting are levied on a gross income basis (i.e. on the total amount of bets placed). The tax on fixed odds sports and horseraces alone does not take into consideration any

costs borne by the company - namely the winnings the operator pays out to players.

This appears to run directly counter to the 'ability to pay' principle adopted by Portuguese tax law where corporate taxation is generally levied on a net profit basis. Simply put, it can be said that the corporate income tax rate is applied to the company's taxable income. To reach the company's taxable income, the departure point is the net result of the year as determined in the annual accounts, which is then subject to tax corrections in order to obtain the tax profit. To the tax profit the company may deduct available tax losses in order to obtain the company's taxable income.

Although the Constitutional Court has already ruled that the ability to pay/net profit is not an absolute criterion on corporate taxation, it has also stated that a corporation's profit must always be taken into consideration. In this case if i) it is possible to accurately determine the company's actual profit on fixed odds sports and horserace betting; and ii) if profits and the respective determination method of the company are verifiable by the competent authorities when needed, then it can be argued that the taxation on such activities as it is currently foreseen to come into force is constitutionally questionable, since an operator might demonstrably be taxed on a much higher amount than the one it actually earns, with no apparent justification.

EU and competition law

Freedom to provide services

Under Article 9(1) of the RJO, companies with a registered office in other Member States ('MS') can only be awarded a licence to operate online gambling and betting if they have a branch (sucursal) in Portugal. This

requirement constitutes a restriction to the freedom to provide services, as established by Article 56 of the Treaty on the Functioning of the European Union ('TFEU').

The organisation of games of chance and gambling constitutes a 'services' activity, and Article 56 therefore applies to the activity of online betting companies². In this context, the EU courts have ruled that "the requirement that an undertaking create a permanent establishment or branch in the Member State in which the services are provided runs directly counter to the freedom to provide services,"³ since such requirement "is the very negation of that freedom."⁴

Since it is specifically applicable to companies from other MS, the 'branch obligation' appears to be discriminatory in nature. For this reason, this requirement can only be justified on grounds of public policy, public security or public health under Articles 52 and 62 TFEU, and in particular if it complies with the principle of proportionality⁵. In fact, a number of public policy interests may be invoked to justify the measure, such as the prevention of fraud and money laundering. However, it can be argued that this restriction is unnecessary and in any event would not be proportional, as the law itself provides for other less harmful measures that are able to attain such objectives. For example, operators are subject to 'good standing' obligations, and must also provide significant deposits in order to guarantee compliance with legal obligations and the payment of online gambling tax. In addition, the operator's licence can be revoked at any time if the operator fails to comply with the regulations, instructions or guidelines issued by the regulatory authority.

State aid

The taxation provisions of the RJO provide that games of chance, pari-mutuel horserace betting and betting exchanges are taxed on a revenue basis, at a rate between 15% and 30%, while fixed odds sports and horserace betting are levied on a gross income basis (i.e. on the total amount of bets placed), at a rate of between 8% and 16%⁶. If this differentiated treatment in reality results in real higher taxation levels for fixed odds bets (as may possibly be the case), the implicit reduced taxation to online gambling companies that offer only or mostly games of chance, pari-mutuel betting and betting exchanges may constitute state aid to such companies within the meaning of Article 107(1) TFEU.

Pursuant to the case law and the practice of the European Commission ('EC'), if a Member State selectively reduces the taxation level for certain online gambling operators, it is foregoing revenue that constitutes state resources. In addition, such reduced taxation levels constitute an advantage to the companies that benefit (in this case, operators of games of chance, pari-mutuel betting and betting exchanges), which benefit from lower tax burdens. Furthermore, reduced tax levels for certain operators of online gambling affect intra-community trade and threaten to distort competition, as this activity routinely involves trade between national borders, and is subject to fierce competition⁷.

Finally, it can also be argued that the selectivity requirement is met, as the measure departs from the application of the general tax framework, and in particular "favours certain undertakings over other undertakings whose legal and factual situation is comparable in the light of the objective

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pursued by the scheme in question."⁸

At this stage, it is not clear whether such a differentiated tax regime could be justified by an objective of common interest, and in particular that it complies with the principle of proportionality.

Recent developments

The Gambling Regulation and Inspection Service ('SRIJ') has recently launched its new website⁹, where operators may find regulations, apply for a licence, and browse through documents relating to the market. From 29 June until 20 July, operators were able to submit their comments concerning the drafts of technical regulations currently being elaborated by the SRIJ. The documents set out the minimum technical specifications and associated control mechanisms for the gambling technical system, the procedure for recognition of qualified organisations as certifiers of a gambling technical system, as well as the general rules for the provision of fixed odds sports betting, pari-mutual and fixed odds horseraces and games of chance such as blackjack or poker. SRIJ expects that this 'regulation package' will be finished before the first week of August so operators are able to apply for a licence as soon as possible.

However, in the meantime, and regardless of the fact that operators are in fact legally unable to apply for a licence until the complete legal framework is approved, SRIJ has sent notifications requesting operators to suspend their activities in Portugal based upon the understanding that any operator offering online gambling services in Portugal without a licence since RJO's entry into force is committing a crime that may prevent the 'offending operator' from being granted a licence to

operate in Portugal.

One can only hope that this 'limbo' period - between the entering into force of the RJO and the approval of the 'regulation package' - is of the shortest duration possible, given the potential harmful effect to the declared intention of liberalising the market and the possibility that the 'limbo' period may promote distrust in the law and in the regulatory entities.

Conclusion

All in all, the RJO and the online gambling legislation in general still have several challenges to face in order to embody a consistent legal framework. As the RJO is an attempt to reconcile the feedback provided by Santa Casa da Misericórdia, operators, the EC and many other interested parties, government officials are confident that time and experience will prove the best counsellors to shape and improve any inconsistencies in Portugal's online gambling legislation.

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1. Decree-Law no. 66/2015, 29 April, <https://dre.pt/application/conteudo/67098359>
2. See Case C-275/92, Schindler ECR [1994] I-01039.
3. See Case C-546/07, Commission v. Germany ECR [2010] I-00439.
4. Case C-452/04 Fidium Finanz AG, ECR [2006] I-09521, para. 46.
5. Case C-347/09 - Dickinger and Ömer ECR [2011] I-0000, para.79.
6. See Articles 89, 90 and 91 of Decree-Law 66/2015.
7. See Commission decision 2012/140/CE, of 20 September 2011, Case C 35/10, Duties for online gambling in the Danish Games Duties Act, paras. 72 to 79.
8. See C-88/03 Portugal v. Commission [2006] ECR I-7115, para. 54 and Danish Gaming Duties, paragraphs 81-101.
9. <http://www.srij.turismodeportugal.pt/>