



II-8.1 : The European Court of Justice handed down a judgement on September 9th 2010 in which it ruled that two criteria of the Austrian Glücksspielgesetz (the Federal Law on Games of Chance) violated articles 43 and 49 EC, that is to say the freedom of establishment and the freedom to provide services.

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MAIN INFORMATION

The European Court of Justice handed down a judgement on September 9th 2010 in which it ruled that two criteria of the Austrian *Glücksspielgesetz* (the Federal Law on Games of Chance) violated articles 43 and 49 EC, that is to say the freedom of establishment and the freedom to provide services.

CONTEXT AND SUMMARY

In Austria, games of chance are legally organised by the *Glücksspielgesetz* (GSpG, the Federal Law on Games of Chance). According to Article 21(1) of the GSpG, the Federal Minister for Finance is competent for granting concessions to operate gaming establishments. Only twelve such concessions might be issued, one for each municipal territory, and the lack of such a concession makes it impossible to provide gaming services. At the time of the case, the twelve concessions were all held by Casino Austria AG, under an administrative order of December 18th 1991 for a maximal length of 15 years.

The organisation of gaming activities without such a concession may fall under the provisions of paragraph 168 of the *Strafgesetzbuch* (StGB, the Austrian Criminal Code), according to which "any person who organises a game which is expressly prohibited or in which the chances of winning depend exclusively or predominantly on luck, or who promotes a meeting organised with a view to such a game taking place, with the intention of making a personal financial gain from such organisation or meeting or of obtaining a financial gain for a third party".

Furthermore, the Austrian Law on Games of Chance also required companies applying for these concessions to be public limited companies and to have their seat in Austria.

It is in this particular framework that the Engelmann case emerged. Ernst Engelmann, a German citizen, operated gaming establishment in two Austrian cities, Linz and Schärding, from 2004 to July 2006 in Linz and from 2004 to April 2005 in Schärding. During the exercise of his establishments, he did neither hold an authorization from any other Member State, or sought an Austrian concession to operate gaming establishments. Thus, in a judgement of March 5th, 2007, the *Bezirksgericht Linz* (the District Court in Linz) found M. Engelmann guilty of organising gaming activities on the Austrian territory without proper authorization, and condemned him to pay a fine of 2.000 Euros on the basis of article 168 of the Criminal Code.

Ernst Engelmann appealed before the *Landesgericht Linz* (the District Court, Linz). This Court doubted as to the compatibility of the provisions of the StGB, read in conjunction with the Austrian provisions on games of chance, with European Union law, more specifically with Articles 43 EC and 49 EC, and thus sent the case to the European Court of Justice (ECJ), asking for a preliminary ruling.

Three questions were raised by the Linzer District Court:

1) Is Article 43 EC to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?

(2) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming – such as public sports betting and lotteries – and advertise such gaming (on television and in newspapers and magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made ('TOI TOI TOI – Believe in luck!')?

(3) Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?¹

The Court decided to answer the first and the third questions together, noting that

¹ ECJ, Engelmann, September 9th, 2010, C64-08, accessible on <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-64/08>

whenever M. Engelmann had sought to obtain a concession, he could not since he had not established a public company; and, even had he done so, he could not have obtained such a concession, since they all had already been granted to Casino Austria AG.

First, the requirement of the gaming company to have its seat in Austria constitutes a clear violation of the freedom of establishment, since it creates barriers to market entry for any other European company which would wish to operate in Austria by way of an agency, a branch or a subsidiary, and had already chosen another corporate form. Also, this requirement does not constitute a proportionate measure to combat money laundering and crime financing, as the Austrian government had argued. Indeed, the ECJ reaffirms that other means can be implemented to prevent such criminal activities, and that the obligation for gaming firms to have their corporate headquarters in Austria goes beyond what is necessary to combat crime.

Second the Court observed that the obligation of transparency derived from Articles 43 EC and 49 EC, and from the principle of equal treatment, and the prohibition of discrimination on grounds of nationality, precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.

Regarding those previous answers, the ECJ refused to state on the second question and concluded that:

1. Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State.
2. The obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.²

BRIEF COMMENTARY

This decision is another tool given by the ECJ to assess how far national legislations on games of chance are compatible with the freedom of establishment and to provide services. Indeed, on September 8th, 2010, the ECJ insisted upon the fact that national exceptions to the freedom of establishment in the gaming sector are compatible with European Law if they are consistent and systematic in how they seek to limit betting activities³. The temporal proximity of both cases (one day separates both decisions)

² ECJ, Engelmann, September 9th, 2010, C64-08

³ ECJ, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, September 8th 2010, C 409-06

certainly constitutes a clue as for why the ECJ, in the Engelmann case, decided not to answer the second question.

What comes out of this judgement is that the ECJ does in no way support a liberal conception of gambling activities, opposed to state monopolies. However, it tends to favour a more transparent regime for the attribution of state authorizations to operate on their national markets, to enable competition during the call for application, especially when the number of authorizations is limited, as it is the case in Austria. This enables the realisation of a balanced competition scheme for gambling activities, considering their particular nature.

LINKS TO OTHER ARTICLES

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