II-8.2 : The European Court of Justice restricts Member State's ability to hinder the free provision and establishment of gambling services on their national territory.

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MAIN INFORMATION

The September 8th 2010 decision of the European Court of Justice rules that any national law on gambling restraining freedom of establishment and freedom to provide services, if not consistent and systemic in its purpose, violates EU Law.

CONTEXT AND SUMMARY

In Germany, the organisation of games of chance is a matter dealt with separately by each federated state (*Land*). At the federal level however, the *Lotteriestaatsvertrag* (LottStV, literally State Agreement on Lotteries) of July 1st, 2004, was adopted in order to provide a uniform framework for the organisation of games of chance in Germany, requiring that companies operating in this field be directly or indirectly publicly-owned.

However, a decision of the *Bundesverfassungsgericht* (Germany's Supreme Court) of March 26th, 2006 ruled that the LottStV violated the constitutionally guarantee of occupational freedom. Indeed, the Court emphasized that the existing LottStV did not provide a regulatory framework capable of ensuring in form and in substance an effective struggle against gambling addiction. Therefore, as such, the restrictions to occupational freedom as guaranteed by article 12(1) of the *Grundgesetz* (the German Constitution) created by the LottStV were disproportionate and invalid. However, the Court did not annul the LottStV, but rather, maintained its validity until December 31, 2007, stating that the legislature thereby had time to modify the existing framework to make it compliant with the Constitution. It further stated that during this transitional period, and without delay, a minimum of consistency should be established in order to properly pursue the aim of reducing gambling addiction by the public monopolies.

It was in this particular framework that the Winner Wetten GmbH vs. Bürgmeisterin der Stadt Bergheim's case emerged. Winner Wetten is a Bergheim-based company, which places sport bets on behalf of a company named Tipico, established in Malta, and authorised under a Maltese licence. Yet, Winner Wetten did not obtain the licence issued by the Land of North Rhine-Westphalia. In this Land, the only company authorised in this market is a public one, Westdeutsche Lotterie & Co OHG.

Because it considered Tipico's licence sufficient under European Union legislation on the free provision of services, Winner Wetten provided its services, until the Mayor of the town of Bergheim, in North Rhine-Westphalia, decided to order the company to cease betting operations for lack of proper authorization on June 28th, 2005.

Winner Wetten refused, and made an administrative appeal, arguing amongst other things, that the Mayor of Bergheim's order represented a violation of both the freedom of establishment and provide services guaranteed by articles 43 and 49 EC. Of course the German existing legal framework, the LottStV, justified this order. The administrative suit brought by Winner Wetten was rejected, so the company appealed the case before the *Verwaltungsgericht Köln* (the Administrative Tribunal of Cologne).

The Cologne Tribunal noted the non-conformity of the state monopoly with regards to the freedom of establishment guaranteed by both the German and European Laws. However, the restrictions to this freedom can be justified if the state monopoly constitutes a proportionate framework that enables hindering the promotion of excessive spending on gambling. Yet, the Tribunal found that this was not the case, since the measures restricting freedom of establishment were neither consistent nor systemically applied.

However, at that time, the German legal framework was already found unconstitutional, but the German Supreme Court instituted *de facto* a transitional period, in which it was still valid. The German Supreme Court, in the 2006 ruling, did not rule on whether or not the LottStV violated EU Law, but solely ruled on the infringement of German law that it represented. Therefore, the Cologne Tribunal had to observe that the measures taken during this transitional period by Westdeutsche Lotterie & Co were not sufficient to avoid violating European Community Law. It stated that these measures perpetuated the breach of European Law and did not effectively contribute to fighting gambling addiction in a consistent and systemic manner.

So the question that was raised before the European Court of Justice was that of the compatibility of the institution of such a transitional period considering the requirements arising from the principle of the primacy of Community Law. Since the Simmenthal judgement of 1978[1], national legislation contrary to articles 43 and 49 EC must be immediately held to be unenforceable. The Cologne Tribunal addressed a request for a preliminary ruling to the European Court of Justice on September 21th, 2006.

The Court did not appreciate the effectiveness of the breach since the Administrative Tribunal of Cologne already had done so. It solely determined that "by reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of

[1] Court of Justice of the European Communities (CJEC), Judgment of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal S.p.A., Case 106/77, accessible on http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61977J0106

establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period."

Furthermore, the Court refuted the argument according to which there is an analogy between the power of the ECJ to institute a transitional period — during which the annulment or invalidity of a European measure is suspended until a remedy is adopted — and the power of a Member State to do the same when an incompatibility between a national measure and European Law has been identified. Indeed, the purpose of such discretionary power is to prevent a legal vacuum from arising and it may be justified where “overriding considerations of legal certainty involving all the interests, public as well as private, are at stake and during the period of time necessary in order allow such illegality to be remedied”.[2] The European Court avoided stating on the validity of such an analogy by stating in § 67 that "even assuming that considerations similar to those underlying that case-law, developed as regards acts of the Union, were capable of leading, by analogy and by way of exception, to a provisional suspension of the ousting effect which a directly-applicable rule of Union law has on national law that is contrary thereto, such a suspension, the conditions of which could be determined solely by the Court of Justice, must be excluded from the outset in this case, having regard to the lack of overriding considerations of legal certainty capable of justifying the suspension."[3]

This decision conveys a clear statement of the extent to which state monopolies on bets and sporting competitions are compatible with European Law. Indeed, there is no common European legal framework on the organization and supervision of gambling activities, especially not those provided on the Internet. Member States have the sovereign power to regulate said services. In the pursuit of general interest objectives, such as consumer protection, some Member States require these companies to meet certain criteria - to have licences, as it was the case in Germany, or require these activities to be state monopolies. Those limitations represent legitimate general interest objectives, and their pursuit can justify a derogation to the application of articles 43 and 49 EC (freedom of establishment and to provide services). However, these restrictions must be consistent and systematic in how they seek to limit betting activities. Consequently, a Member State cannot invoke a need to restrict its citizen's access to betting services if at the same time it incites them, through State-owned betting companies’ advertising (for example), to participate in state lotteries, hazard games or betting, as it was the case in North Rhine-Westphalia.

[2] ECJ, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, September 8th 2010, C 409-06, §66, accessible on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0409:EN:NOT

[3] ECJ, Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim, September 8th 2010, C 409-06, §67, accessible on http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0409:EN:NOT

BRIEF COMMENTARY

Therefore, this judgement by the ECJ clearly states that national measures restricting freedom of establishment and to provide services must consistently and systematically pursue the goal of consumer protection. It is up to national judges to examine whether this condition is fulfilled. If it is not the case, the primacy of European law obliges Member States to put an immediate end to the concerned measures. As such, this decision only confirms the policy defended by the Commission concerning the regulation of games of chance. Even more, this decision intervenes exactly one year after the *Santa Casa* judgement of September 8th, 2009, in which the legitimacy of state monopolies in game-related activities was recognized. Conditions for the validity of such monopolies, the Court required restrictions imposed by Member States be proportionate and non-discriminative.

The *Santa Casa* judgement validates the prevailing conception, according to which gaming activities are marketable, albeit in a controlled fashion considering the fact that they are not ordinary. As the first article of the French Act on the liberalisation of gaming activities of May 12, 2010 puts it: “gambling is neither an ordinary business, nor an ordinary service”[4]. Therefore, accepting the marketable component of such activities and insisting on the particular risks attached to these games enabled Member States to maintain a certain oversight over their national gaming markets. Indeed, denying the marketable aspect of these activities would have exposed Member States to the European Commission’s prosecution of anticompetitive behaviours, and they would have faced the risk of sanctions for abuse of dominant market positions. Hence, the *Santa Casa* judgement, by recognizing the non ordinary aspect of gaming activities, their addictive and dangerous aspects, validates their oversight by Member States. This is exactly the same process as with the Obama reform of financial services, which are also dangerous and thus require better supervision.

So, due to the lack of a harmonized framework in the European Union, the Court reaffirms in the *Winner Wetten* case the right for Member States to appreciate and set the level of consumer protection in the sector of games of chance. Indeed, they are not obliged to recognise the authorisations issued by other Member States, and, as for Internet hazard games, they even can forbid the offer of such games on the Internet. This decision is in the line with the ECJ’s defence of Member State’s prerogatives, especially in sectors in which a certain consensus on the level of risk-exposure for the population must be set. Indeed, the ECJ recognizes the specificity of the regulation of certain areas, such as gambling or healthcare, for which Member States alone have the necessary democratic legitimacy to decide on the applicable rules.

So this decision does not favour a liberal approach over state monopolies regarding

[4] Loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne, article 1, accessible on http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022204510&dateTexte=&categorieLien=id

online gambling. On the contrary, the ECJ sets out some guidelines to further define criteria for assessing whether or not a restrictive gambling policy is coherent and systematic, by allowing Member States great discretionary power in the organisation of such activities. The inconsistency here resides in the fact that, unlike what was required by the national Supreme Court (the *Bundesverfassungsgericht*) in order to justify the transitional period, no active policy was undertaken to reduce the offer of bets available and the incentive publicity around them. Furthermore, no active public awareness campaign on the dangers of betting was launched. Therefore, a company that continued active promotion of the consumption of gambling services, increased its offer, and did not undertake any of the aforementioned measures, did not achieve the goals of consumer protections.

LINKS WITH OTHER DOCUMENTS

I-1.10 : A comparative analysis of Internet gambling regulations, Alex Raiffe

II.10-1 on a decision by the ECJ invalidating the Commission's criteria for interpreting the validity of Member States' national greenhouse gas emissions plans, on the grounds that the Commission cannot take the place of States in deciding on risk-exposure measures.

II-9.3: On April 27, 2010, the European Parliament proposed an amendment to the European Commission's Pharmacovigilance and Prescription Medicine Package to regulate the sale of prescription medicine on the Internet

II.9-2 on a decision by the ECJ that upholds Germany's BSE testing standards, which were stricter than the European Commission's standards, deciding that Germany's stricter criteria are legitimate, in that each state is free to reduce public health risks without such measures constituting disproportional restrictions on trade.