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Advocate General's Opinion in Case C-42/07

Liga Portuguesa de Futebol Profissional (CA/LFPF) and Baw International Ltd v Departamento de Jogos de Santa Casa da Misericórdia de Lisboa

ACCORDING TO ADVOCATE GENERAL BOT, PORTUGUESE LEGISLATION CONFERRING ON SANTA CASA A MONOPOLY FOR MUTUAL BETTING ON THE INTERNET MAY COMPLY WITH COMMUNITY LAW IF CERTAIN CONDITIONS ARE MET

In his Opinion, he states, however, that the Portuguese draft legislation should be notified to the Commission. Failing this, the legislation would not be applicable as against Bwin and the Liga.

Portuguese legislation confers on the Santa Casa da Misericórdia de Lisboa, a centuries-old non-profit-making organisation which has the object of financing causes in the public interest, the exclusive right to organise and operate lotteries and off-course betting in the whole of the national territory. The Portuguese legislation has extended this exclusive right to all electronic means of communication, in particular the internet. The legislation also provides for penalties in the form of administrative fines on those who organise such games in breach of that exclusive right and who advertise such games.

Bwin, an on-line betting company established in Gibraltar, and the Liga Portuguesa de Futebol Profissional were fined EUR 74 500 and EUR 75 000 respectively for offering mutual betting by electronic means and advertising it. The Tribunal de Pequena Instância Criminal do Porto, before which Bwin and the Liga have contested the fines, is uncertain as to whether the new Portuguese rules conform to Community law.

In his Opinion delivered today, Advocate General Yves Bot takes the view that the extension of the Portuguese legislation to lotteries and betting by electronic means of communication falls within the directive laying down a procedure for the provision of information in the field of technical standards and regulations¹. The legislation in question prohibits the provision or use of a service and thus constitutes a 'technical regulation' within the meaning of the directive.

Since the directive requires the Member States to notify the Commission of any draft technical regulation, **the Advocate General takes the view that the Portuguese draft legislation should**

¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18).

have been notified to the Commission. The Advocate General suggests that, in the event that the Portuguese Government has not notified the legislation, it will not be applicable as against Bwin and the Liga and the national court must decline to apply it. The national court will have to determine whether the Portuguese draft legislation was notified to the Commission. Similarly, it will also have to draw the appropriate conclusions with regard to the fines imposed on the Liga and Bwin.

Next, the Advocate General examines whether the new Portuguese legislation is compatible with principle of the freedom to provide services.

First of all, the Advocate General states that **the aim of Community law is not to open up the market in gambling and games of chance.** He argues that a Member State should be required to open up this activity to the market only if it treats games of chance and gambling as true economic activities intended to yield maximum profits.

According to the Advocate General's analysis, the Portuguese legislation constitutes a restriction on the freedom to provide services since it prohibits a provider of on-line games established in a Member State other than Portugal from offering lotteries and off-course betting on the internet to consumers residing in the latter State. **He points out, however, that such a restriction conforms with Community law if it fulfils certain conditions: that it is justified by an overriding reason relating to the public interest, it is appropriate for ensuring the attainment of the aim which it pursues and it does not exceed what is necessary for attaining it. Furthermore, and in any event, the restriction must not be applied in a discriminatory way.**

As regards justification for the Portuguese legislation, the Advocate General considers that Portugal could legitimately restrict the freedom to provide lotteries and off-course betting on the internet in order to protect consumers and maintain public order. It will be for the national court to carry out a twofold test to determine whether the Portuguese legislation is appropriate for providing effective protection for consumers and for maintaining public order.

First, the grant of an exclusive right to a single entity enables objectives such as those of the Portuguese legislation to be attained only if that entity is under the control of the State. It is thus for the national court to determine whether this is so for Santa Casa.

Secondly, the national court must also assess whether, in the course of implementing the Portuguese legislation in question, Portugal is not manifestly distorting its purpose in seeking to obtain the maximum profit. As regards the additional games created by the Portuguese Government in the field of lotteries and off-course betting and the accompanying advertising, the Advocate General observes that the Court has permitted a Member State to act in such a way as to draw players away from prohibited gaming activities to activities which are authorised. He goes on to state, however, that it will be for the national court to decide whether the extended range of games and the scale on which they have been advertised manifestly exceeded what was necessary in order to pursue the objectives on which Santa Casa's monopoly is based. As regards the policy of increasing the level of gaming taking place in casinos which, according to the applicants, the Portuguese authorities have pursued, the Advocate General considers that a Member State has a right to provide for different methods of organisation, which are more or less restrictive, for different games.

Finally, the Advocate General takes the view that the grant of an exclusive right to a single non-profit-making entity controlled by the Member State may constitute a measure proportionate to the attainment of the objectives of the Portuguese legislation. He also considers that the

legislation in question is not discriminatory since it involves no discrimination on grounds of nationality.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: CS DE EN ES EL HU IT NL PL PT RO SK SL

*The full text of the Opinion may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-42/07>
It can usually be consulted after midday (CET) on the day of delivery.*

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*Pictures of the delivery of the Opinion are available on EbS "Europe by Satellite",
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