



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-64/08
Staatsanwaltschaft Linz v Ernst Engelmann

According to Advocate General Mazák, a Member State which reserves the operation of casinos exclusively to companies which have their seat in its territory is acting in a way which is incompatible with European Union Law

Furthermore, he considers that in order to assess the consistency of a national policy of restricting games of chance, it is necessary to make an analysis which takes account only of the gaming sector concerned

The Austrian legislation establishes a 'State monopoly' over games of chance and provides that the right to organise and operate games of chance is in principle reserved to the State. That being so, the Federal Minister for Finance may, by issuing licences, grant operators the right to organise and operate those games of chance under the monopoly (namely, lotteries, electronic draws and gaming establishments).

Ernst Engelmann, a German national, operated two gaming establishments in Austria without having previously sought a licence to organise games of chance from the Austrian authorities and without being the holder of a lawful authorisation issued by the competent authorities of another Member State. In a first judgment, Mr Engelmann was found guilty of unlawfully organising games of chance in Austrian territory in order to obtain a pecuniary advantage. In that context, the Landesgericht Linz (Regional Court, Linz, Austria), before which an appeal had been brought, referred three questions to the Court of Justice for a preliminary ruling on the compatibility of the Austrian legislation on games of chance with freedom of establishment and freedom to provide services.

In his Opinion, delivered today, Advocate General Ján Mazák considers, first, that the Austrian legislation which reserves the operation of games of chance in gaming establishments exclusively to limited companies which have their seat in Austrian territory is incompatible with freedom of establishment.

Mr Mazák considers that the requirement that companies must establish their seat in Austria involves a restriction on freedom of establishment which introduces direct discrimination inasmuch as it prohibits companies with their seat in another Member State from being holders of a licence to operate a casino.

On the basis of that finding, the Advocate General observes that, in the present case, a discriminatory restriction of this kind can be justified on grounds of public policy, public security or public health, inasmuch as recourse to one of those justifications presupposes the existence of a genuine and sufficiently serious threat affecting a fundamental interest of society. None the less, Mr Mazák considers that the latter condition is not met since, if the requirement that companies establish their seat in Austria did not exist, the Austrian authorities would not be faced with a genuine and sufficiently serious threat affecting a fundamental interest of society by reason of being unable to supervise effectively the activities of a gaming undertaking whose seat was situated in another Member State. In fact, any undertaking established in a Member State can be supervised and penalties imposed on it, regardless of the place of residence of its managers. Consequently, the Advocate General concludes that the restriction on freedom of establishment at issue cannot be justified.

Secondly, Mr Mazák considers that freedom to provide services precludes the Austrian provision under which all licences to operate games of chance and gaming establishments are granted on the basis of rules which exclude from tendering procedures candidates from the Community who do not possess Austrian nationality. The Advocate General considers that such a measure constitutes a restriction on freedom to provide services since the national legislation does not permit participation in those procedures on the basis of a secondary establishment in Austria. Furthermore, from his point of view, that restriction is discriminatory and cannot be justified in the present case on grounds of public policy, public security or public health in the absence of a genuine and sufficiently serious threat affecting a fundamental interest of society.

Thirdly, the Advocate General analyses the question whether the Austrian State monopoly on casinos is incompatible with the EC Treaty on the ground that the national policy of restricting games of chance lacks consistency inasmuch as the holders of licences in respect of other forms of gaming which are also subject to a monopoly (such as lotteries) advertise their product.

On that point, the Advocate General considers that the fact that holders of a national licence encourage participation in games of chance and advertise does not necessarily mean that the national policy of restricting games of chance lacks consistency. Since, among the various objectives which it pursues, the Austrian legislation seeks to combat fraud and criminality in the games of chance sector, by orienting demand for gaming towards an offer controlled and supervised by the State, Mr Mazák considers that it is for the national court to determine whether the said advertising is consistent with the objective of constituting an 'attractive' alternative to prohibited gaming, without stimulating the demand for games of chance to an excessive degree.

In any event, the Advocate General states that in order to assess the consistency of the advertising employed by an operator with a national policy of restricting games of chance, it is necessary to make a sectoral analysis. Thus, any possible lack of consistency would affect only the sector where there is a gaming monopoly which would develop disproportionate and inconsistent advertising. In Mr Mazák's view, a Member State is free to treat two gaming sectors differently, since each game is different from the others, with the result that one sector of games of chance may lend itself more readily to the development of fraudulent or criminal activities and another sector may be more dangerous from the point of view of addiction.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. 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 are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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