

The ECJ to rule again on Italy's online gambling laws

On 18 April 2013 the European Court of Justice ('ECJ') discussed the last hearing of case C-660/11 (the 'Biasci Case'), a reference for a preliminary ruling filed by the administrative court of Tuscany and concerning the compatibility of some Italian gaming laws with articles 43 and 49 of the EC treaty on freedoms of establishment and to provide services. Yan Pecoraro, Partner at Portolano Cavallo Studio Legale, discusses the current gaming laws in Italy, the Biasci case and the Bersani decree, which partially liberalised the Italian online market by increasing the amount of licences available.

The ECJ has discussed several references for a preliminary ruling on gaming laws originating from Italian courts and two landmark decisions on gaming laws issued by the ECJ (Gambelli, 2003, and Placanica, 2007) originated in Italian cases. ECJ case law has indisputably influenced Italian gaming policies and Italy's gaming market over the past 10 years. In 2007, titles like 'the end of States' monopolies' appeared in the press commenting on the Placanica decision; the shares of operators who had declared expansion plans in Italy increased in value. In light of the Italian rulings which followed Placanica as well as the legislative reforms undertaken in Italy thereafter, these reactions were maybe disproportionate and the Italian gaming market cannot be defined as a fully liberalised market (the State monopoly is still in place and controls access to the market and to some extent the contents of the gaming services which can be offered). That being said, the Italian gaming laws have

significantly changed over the past 10 years; this is due to the need to adapt these rules to EU principles as interpreted by the ECJ rulings.

Therefore, the interpretations of the ECJ on Italian gaming laws are valuable for operators looking at the Italian gaming market.

Background

By and large the facts underlying the majority of cases referred to the ECJ by Italian courts with respect to gaming laws are the same: several operators duly licensed in other EU countries have established in Italy a network of data collection centres ('*centri trasmissione dati*' or 'CTD'). These are shops where players can send bets to foreign bookmakers through the net. Even if CTDs look like real betting shops, from the legal point of view some courts have rejected such a qualification on the grounds that bets are not placed in CTDs nor do CTDs collect bets on behalf of gaming operators; according to the courts, CTDs simply provide access to gaming services offered abroad. Such a difference is subtle, but has significant consequence from a legal stand point as under the Italian gaming laws anyone offering gaming services in Italy must hold an Italian gaming licence and any unauthorised offering of gaming services triggers civil and criminal liabilities. Thus, for a CTD not to qualify as a betting shop under Italian gaming law means that they avoid being required to hold a gaming licence.

Over the past few years several shops have been fined and seized by Italian police and their owners sued both before civil and criminal courts on the grounds of breaching the gaming laws; defendants have challenged these fines and seizing orders before civil, administrative and criminal courts, which in some instances have filed references for

preliminary ruling with the European Court of Justice to gather the European judges' views on the compatibility of the Italian gaming laws with EU laws.

Questions referred to the ECJ

With specific respect to the Biasci Case, the preliminary ruling request relates to the compatibility with EU laws of article 88 of royal decree no. 773/1931 (known in Italy as 'TULPS') and of law decree no. 40 of 2010; according to these gaming laws, authorisation to be issued by the local police under the TULPS in order to open a CTD in Italy should be granted exclusively to individuals/businesses holding an Italian gaming licence. The two gaming laws have been issued mainly to fight the phenomenon of CTDs in Italy.

The application of this set of gaming laws prevented Mr. Biasci (and several other managers of CTDs in similar situations), an affiliate of the Goldbet Sportwetten GmbH's network ('GoldBet'), from obtaining the authorisation required by TULPS, because GoldBet only holds a gaming licence issued by the Austrian Province of Tyrol and does not have an Italian gaming licence.

The administrative court of Tuscany also filed a request for preliminary ruling with respect to article 38 of decree no. 223/2006 (the 'Bersani Decree'), which is known to gaming operators as it introduced into Italy a large amount of additional gaming licences (mostly in response to the ECJ, which identified that the limited number of gaming licences available in Italy blocks access for EU gaming operators, which is in breach of the EC treaty).

Interestingly, in the Biasci case, prior to the referral to the ECJ by the administrative court of Tuscany, in a preliminary review of the matter, the court suspended the

denial of authorisation, which could be seen as anticipation of a favourable outcome for the plaintiff CTD.

Other Italian administrative courts have already issued rulings in favour of CTDs on the grounds that Italian gaming laws, in requiring an Italian gaming licence in order to grant the TULPS authorisation, would be contrary to the European freedoms of establishment and to provide services. In particular, these courts (Administrative Court of Emilia Romagna no. 462/2011; Administrative Court of Sicilia no. 5588/2010) have noted that the prevention of criminal or fraudulent interferences into gaming services (which, as indicated in *Placanica*, could in theory justify a licensing system such as the Italian one¹) could be achieved by other means rather than requiring applicants to hold an Italian gaming licence. To these courts the Italian regulations look inconsistent and disproportionate to the objectives pursued by the regulations restricting articles 43 and 49 of the EC treaty, in particular when the conditions to obtaining a gaming licence from other EU gaming bodies as well as the controls usually provided by domestic regulations and applicable to gaming operators holding a gaming licence issued in another EU state, could achieve the objective to prevent criminal activities in gaming.

The Italian state monopoly authority which filed its brief in the proceeding before the administrative court of Tuscany has argued that the Italian gaming laws have changed significantly after the substantial increase in the number of licences made by the Bersani decree which, in the administration's view, almost liberalised access to the gaming market in Italy by injecting a high

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number of gaming licences onto the market. In fact, according to the administration, the Bersani decree would have made the market accessible to the majority of (if not all) the operators willing to offer their services in Italy; the need to hold an Italian gaming licence would still be justified by public policies (i.e. for the prevention of fraud and criminal activities) which may justify, at certain conditions, the restrictions provided by the Italian gaming laws to the freedoms provided by articles 43 and 49 of the EC treaty. In this respect, the administrative court of Tuscany noted that if on the one hand the number of licences has been increased substantially by the Bersani decree, on the other hand several gaming rules contained in such a decree could be interpreted as 'protecting' the holders of old licences, in breach of European principles/freedoms. The administrative court of Tuscany refers in particular to article 38 of the Bersani Decree, which contains a set of gaming laws which protect the CTDs lawfully operated prior to the issuance of the Bersani Decree, for example by providing minimum distances between CTDs (this of course grants older CTDs the right to keep to the best locations available to the market) or by including in the standard agreement with operators an exclusivity provision according to which an operator would lose its gaming licence in Italy if it were to offer unlawful gaming services in Italy. This latter provision could be extremely powerful if one takes into account that foreign websites offering access to gaming services accessible from Italy could qualify under the Italian gaming laws as 'unlawful gaming services;' this is to say that in theory, if one had to apply the rule properly, any operator offering its services in

several jurisdictions could lose its Italian gaming licence if not restricting access to its foreign offering of gaming services.

In addition, the administrative court of Tuscany has asked the ECJ whether or not, assuming that the rules contained in the Bersani Decree are to be found compatible with EU principles, an Italian judge should investigate if the gaming laws applicable in the European State which issued a gaming licence to an operator willing to offer its services in Italy, already provides for adequate precautions to reduce the risk of criminal activities.

Conclusions

At this stage it is hard to predict the ECJ's decision. The last question referred to the ECJ (i.e. the obligation of the national judge to make an assessment on the contents of foreign regulations), if answered positively, could have relevant consequences, as Italian judges would ultimately be legitimised to ignore Italian gaming laws based on their own evaluation of the adequacy of other EU regulations to ensure the achievement of the same objectives pursued by Italian regulations (i.e. for the prevention of crimes). In our view, the ECJ is unlikely to confirm this interpretation, as this would ultimately not comply with the subsidiarity principle as defined in article 5 of the EC treaty. The decision from the ECJ on the *Biasci* case will be helpful to predict the evolution of gaming laws in Italy for the years to come.

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1. The ECJ stated: 'a licensing system could constitute an efficient mechanism enabling operators in the betting and gaming sector to be controlled [by the State] with a view to preventing the exploitation of those activities for criminal or fraudulent purposes.'