

## ECJ rules on Italy's gaming regulations

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### Background

On February 16 2012 the Court of Justice of the European Union (ECJ) issued its latest preliminary ruling on the compatibility of Italy's legal framework for gaming with the right of establishment and the freedom to provide services. The new ruling confirms principles already established in the landmark *Gambelli*(1) and *Placanica*(2) decisions (see "[ECJ rules again on Italian gambling law](#)").

The *Costa-Cifone* ruling has been eagerly awaited, particularly given the size and dynamism of the Italian gaming market - operators enjoyed a total turnover of almost €80 billion in 2011, a 30% increase on 2010. The growth in remote gaming turnover has been particularly remarkable, more than doubling between 2010 and 2011. This market expansion is mainly due to the introduction, in July 2011, of cutting-edge cash poker and casino games. The State Monopolies Authority has awarded 40 of a total of 200 authorisations for remote gaming through a tender process conducted in 2009, and the number of authorisations on offer is likely to increase in the coming months.

### Facts

The Court of Cassation sought a ruling from the ECJ in the context of criminal proceedings against two individuals who, while based in Italy, operated data transmission centres linked to the Stanley International Betting network. Stanley International is a fully licensed bookmaker, established in the United Kingdom, which operates in Italy through data transmission centres. The centres allow Italian users to place sports bets on a Stanley International server hosted in the United Kingdom, through which they also place their stakes and collect their winnings. A number of data transmission centre owners - including Mr Cifone and Mr Costa - who run such centres on behalf of Stanley International have been indicted for breach of the Italian legislation governing the collection of sports bets; it is alleged that they collected sports bets without a licence.

For many years Stanley International has contested the validity of Italy's gaming regulations, maintaining that they conflict with EU law insofar as they prevent an operator that is fully licensed in another EU member state, but does not hold an Italian licence, from carrying out its activities in

the Italian territory. Although the facts of the case are similar to those in *Gambelli* and *Placanica*, the *Costa-Cifone* ruling analyses Italy's gaming legislation from a different perspective.

The Italian court asked the ECJ to clarify a point of interpretation of EU law. The issue was whether the tendering procedures in the Bersani Decree (223/2006), which (among other things) require new licensees to establish their outlets at a minimum distance from those of existing licensees, are consistent with the Treaty on the Functioning of the European Union, which prohibits restrictions on freedom of establishment and freedom to provide services within the European Union.

### **ECJ ruling**

The ECJ has previously held that:

*"it is common ground that national legislation... which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the licence is to be withdrawn, constitutes an obstacle to the freedoms [of establishment and provision of services]."*(3)

However, the ECJ has established that such obstacles may be justified on the basis of "overriding reasons in the public interest, provided that they comply with the requirements under the case law of the court with regard to their proportionality".(4)

The government has sought to justify the requirement in the decree as a means of ensuring the uniform distribution of betting and gaming outlets in the Italian territory, thereby:

- limiting the gaming opportunities offered to Italian consumers and helping to prevent gambling addiction; and
- preventing consumers who live in areas where authorised gaming is unavailable from opting for clandestine betting.

The ECJ reaffirmed the principle that unequal treatment between operators on economic grounds cannot be used to justify a restriction of a fundamental freedom on the basis of overriding public interest.(5) It ruled that it is for the judges of the national courts to determine whether a given requirement, such as the obligation to maintain minimum distances between gaming outlets, is an appropriate means of achieving the purported objective. The ECJ questioned whether the requirement "indeed results in new operators choosing to set up in less populated areas, thereby ensuring nationwide coverage", or whether "the true objective [is] the protection of the market positions of the existing operators, rather than... channelling the activity of betting and gaming into the controlled systems".(6) Therefore, the ECJ ruled that:

*"[the] principles of equal treatment and effectiveness must be interpreted as precluding a Member State from... protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators."*(7)

A further set of restrictions was introduced following the adoption of the Bersani Decree, providing for the withdrawal of licences and the forfeiture of guarantees in the event of:

- criminal proceedings being initiated against the licensee; or
- the licensee marketing games of chance by means of data transfer sites located outside the

national territory.

The Court of Cassation sought to establish whether these provisions are compatible with EU law. The ECJ reiterated that such restrictions can be justified by national courts on the basis of overriding public interest. With specific reference to the withdrawal of licences awarded according to the 2009 tendering procedure and to the related model contract, which provides for the exclusion of tenders in the event of "any other offence liable to breach the relationship of trust with" the State Monopolies Authority,<sup>(8)</sup> the ECJ stated that the national court must determine whether a reasonably informed tenderer, exercising ordinary care, could have understood the exact significance of that reference and "whether it has been drawn up in a clear, precise and unequivocal manner". Furthermore, the ECJ stated that Articles 43 and 49 of the treaty must be interpreted as: "*precluding the imposition of penalties for engaging in the organised activity of collecting bets without a licence or police authorisation on persons [such as Costa and Cifone] who are linked to an operator [such as Stanley] which was excluded in breach of EU law from an earlier tendering procedure, even following the new tendering procedure intended to remedy that breach of EU law, insofar as that tendering procedure and the subsequent award of new licenses have not in fact remedied the exclusion of that operator from the earlier tendering procedure.*"<sup>(9)</sup>

#### **Comment**

The decision has confirmed some critical issues relating to the Italian legal framework for gaming and betting. Among other things, the ECJ ruled that the aim of protecting earlier licensees is not compliant with EU principles. The ruling is unlikely to have a widespread short-term impact on the Italian market, as the principles will be applied by the Italian judiciary on a case-by-case basis. However, in the long term the State Monopolies Authority will be forced to adapt the framework as indicated by the ECJ and to ensure that the market is regulated according to the principles of equal treatment, transparent regulation and legal certainty.

#### **Endnotes**

- (1) C-243/01, November 6 2003.
- (2) C-338/04, March 6 2007.
- (3) Paragraph 70, C-72/10 and C-77/10
- (4) Id, Paragraph 71.
- (5) Id, Paragraph 59.
- (6) Id, Paragraph 65.
- (7) Id, Paragraph 60.
- (8) Article 23(2)(a) of the model contract.
- (9) Paragraph 91, C-72/10 and C-77/10.