

# **Discriminatory taxation of gambling winnings: European Commission brings action against Spain**

## **First action relating to cross-border gambling in the course of pending infringement proceedings**

The barriers against the cross-border offering of sports betting and gambling erected by the EU (and EEA) Member States have been under strict scrutiny by the European Commission for several years. The Commission judges numerous national provisions to be in breach of Community law and has therefore already initiated infringement proceedings against several Member States, including Germany (two proceedings, one relating to the sports betting monopoly and one relating to the new Interstate Treaty on Gambling) and Austria. In one of these proceedings, and after preliminary steps to no avail (letter of formal notice by the Commission, statement by the government) the Commission has now filed suit against the Kingdom of Spain with the European Court of Justice (Case C-153/08). So far, the Commission had brought action only against Italy four years ago for procuring horse betting licenses without an invitation to tender and obtained a positive decision of the ECJ (Case C-260/04).

In its statement of claim against Spain, the European Commission invokes discriminatory taxation in breach of Community law. Pursuant to the Spanish tax provisions, winnings from lotteries and betting organised by the Loterías y Apuestas del Estado (the Spanish public-law body in charge of lotteries and betting) or by bodies or entities of the Comunidades Autónomas (Autonomous Communities comparable to the German states) as well as winnings from lotteries

organised by the Spanish Red Cross or ONCE (Organización Nacional de Ciegos Españoles, the national association for the Spanish blind persons) are exempt from income tax. However, income from lotteries, games or betting organised by other national bodies or by foreign bodies, including those established in Member States of the EU or the EEA is added to the taxable amount and subject to progressive rates of taxation.

Relying in particular on the relevant ECJ case-law relating to the taxation of games of chance, the Lindman decision (Case C-42/02), as well as the Safir decision (Case C-118/96, concerning the taxation of life insurances), the Commission points out that, according to the settled case-law of the ECJ, the organising of lotteries is to be regarded as a „service“ for the purposes of the EC Treaty. Also, according to that case-law, Article 49 EC Treaty prohibits any restriction on the freedom to provide services, or any obstacle to that freedom – even where such a restriction or obstacle applies equally to national providers of services and to those of the other Member States – and precludes the application of any rule of national law the effect of which is to make it more difficult to provide services between Member States than to provide services wholly within a particular Member State. Given the particular features of the gaming sector, the case-law accepts certain restrictions imposed by Member States, provided that such measures can be shown to be appropriate and proportionate, as well as non-discriminatory.

The Commission maintains that the Spanish legislation is discriminatory because entities of other Member States are excluded from the benefit of that tax exemption. Even if the Spanish authorities had shown, in the course of the infringement proceedings, that the legislation at issue is a measure which is appropriate and proportionate to the stated objective of protecting consumers and public order – which they have failed to do – the legislation at issue could not in

any circumstances be regarded as compatible with Community law, in so far as it is wholly discriminatory.

Deciding this case, the ECJ will therefore have to clarify the scope of the rule of non-discrimination relating to the cross-border offering of gambling and sports betting services. It is the opinion of most German authorities, for example, that licensing only one operator of games of chance, which is to a significant part owned by the state or a federal state (Land) and completely banning operators from other Member States (via the internet or via receiving offices in Germany) is not discriminatory. However, the scope of the rule of non-discrimination is much broader. The ECJ held any rule of law to be discriminating if it makes it more difficult to provide services between Member States (cross-border) than to provide services wholly within a particular Member State.

After bringing this first action for infringement, one can assume that the European Commission will bring actions against the other Member States involved as well, provided that they cannot clear away the Commission's objections and shape their national law in conformity with Community law respectively.