

# Judgments of the Court of Justice in Case C-64/08 – Criminal proceedings against Ernst Engelmann

Austrian legislation under which only companies having their seat in Austria have the right to operate casinos is contrary to European Union law

*The award of concessions to Casinos Austria was not in accordance with European Union law*

Austrian legislation establishes a State monopoly over games of chance, with the effect that the right to organise and operate games of chance is, in principle, reserved to the State. The federal law in force is intended, in particular, to regulate games of chance with a view to their supervision and to enable the State to derive the maximum amount of revenue from them.

The Federal Minister for Finance is permitted to grant a total of 12 concessions entitling their holders to organise and operate gaming establishments. The concessionaire must be a public limited company having its seat in Austria and is subject to supervision by the ministry. The organisation of games of chance without authorisation may give rise to criminal proceedings.

The 12 concessions are currently held by a single company, Casinos Austria AG. They were granted and renewed without a public tendering procedure.

Ernst Engelmann, a German national, operated two gaming establishments in Austria without previously having applied for a concession from the Austrian authorities. By a judgment

at first instance, he was found guilty of unlawfully organising games of chance and ordered to pay a fine of €2000. In that context, the Landesgericht Linz (Regional Court, Linz, Austria), to which Mr Engelmann appealed, referred 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.

First of all, the Court of Justice finds that **the obligation on persons holding concessions to operate gaming establishments to have their seat in Austria constitutes a restriction on freedom of establishment.** That obligation discriminates against companies which have their seat in another Member State and prevents those companies from operating gaming establishments in Austria through an agency, branch or subsidiary.

With regard to the possibility of **justifying** that restriction in the interest of preventing those activities from being carried out for criminal or fraudulent purposes, the Court holds that **the categorical exclusion of operators whose seat is in another Member State is disproportionate,** as it goes beyond what is necessary to combat crime. There are in fact various less restrictive measures available to monitor the activities and accounts of such operators. In addition, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers. Moreover, there is nothing to prevent supervision being carried out on the premises of the establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.

Next, with regard to the grant of the concessions, the Court considers that limiting the number of concessions may be justified by the need to limit opportunities for gambling. The grant of concessions for a duration of 15 years may also be justified having regard to the concessionaire's need to have a sufficient length of time to recoup his investments.

However, the absence of a competitive procedure when the concessions were granted to Casinos Austria AG does not comply with freedom of establishment and freedom to provide services. The Court recalls in that regard that the obligation of transparency requires the concession-granting authority to ensure a degree of publicity sufficient to enable a service concession to be opened up to competition and the impartiality of the award procedures to be reviewed. That obligation is a condition which must be met before a Member State can exercise its right to award licences to operate casinos, irrespective of the method of selecting operators. The grant of a concession, in the absence of any transparency, to an operator located in the Member State of the awarding authority constitutes difference in treatment to the detriment of operators located in other Member States, who have no real possibility of manifesting their interest in obtaining the concession in question. Such a difference in treatment is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality, and constitutes indirect discrimination on grounds of nationality prohibited by EU law.