

Main Parties Involved

Case C-203/08 - *Betfair v the Minister of Justice* (intervening party, De Lotto)

Case C-258/08 - *Ladbrokes v De Lotto*

Observations

These were made by governments of Austria, Belgium, Denmark, Finland, Germany, Greece, the Netherlands, Norway, Spain and Portugal, and the European Commission.

Key Terms

Article 49 EC.

Restrictions on the freedom to provide services.

Games of chance.

Offer of games of chance via the internet.

Legislation reserving a licence to a single operator.

Renewal of licence without subjecting the matter to competition.

Principle of equal treatment and obligation of transparency.

Application in the field of games of chance.

Refusal to grant an operating licence to an operator who is licensed in other member states.

Justification.

Proportionality.

Review of each specific measure applying national legislation.

Key Issues

- Further application of *Santa Casa*.
- Application of transparency principle to gambling service tenders.
- The place of advertising in a restrictive licensing jurisdiction.

Executive Summary

Over the last decade Europe's gambling market has remained polarised. On one side, member states and their national monopolies have pursued restrictive national policies towards gambling services. On the other, the private gambling industry has advocated market liberalisation and harmonisation across Europe.

Gambling services are specifically excluded from European harmonisation instruments such as the Services Directive. At a European level, therefore, the European Court of Justice (ECJ) has been the main forum in which to challenge gambling monopolies' compliance with European law. The focus of these proceedings brought before the ECJ are the freedoms enshrined in the EC Treaty and specifically the freedom to provide services.

The ECJ has ruled that a gambling monopoly may be permitted under European law in a series of judgments, which culminated last September in what many observers term the 'landmark' judgment in the *Santa Casa* decision. This decision holds that monopolies can extend to the internet.

These European debates were brewing in courts in the Netherlands for some time, but came into sharp focus in 2008. This was when two Dutch courts referred various questions to the ECJ in cases involving *Betfair* and *Ladbrokes*. Both *Betfair* and *Ladbrokes* objected to the underlying principles of the Dutch monopolistic system. The European Commission also commenced infringement proceedings against the Netherlands regarding its sports-betting monopoly in 2006.

In the Netherlands, the primary gaming law is the 1964 Gaming Act. The law contains a total prohibition on offering unlicensed games of chance. The only licences that can be granted are for specific types of gaming mentioned in the Gaming Act. One operator holds each licence. In recent history there have been no public tenders following the expiration of Dutch gaming licences. *De Lotto* has seen its sports-betting licence renewed since 1961, while *Scientific Games'* horse-racing licence has been renewed since 1998.

Betfair has attempted to apply for a Dutch gambling licence on a number of occasions. *Ladbrokes* became involved, meanwhile, when *De Lotto* engaged proceedings against it for allegedly targeting Dutch citizens.



While in the *Santa Casa* decision the ECJ clearly stated that the mutual recognition principle does not apply to gambling monopolies, Ladbrokes and Betfair introduced new arguments to the debate concerning the legality of monopolies in the gambling industry.

The most controversial questions raised included:

- What level of transparency is required in granting or extending tenders for gambling services in a monopoly or closed single-licensing system?
- To what extent can a monopoly operator advertise and make games attractive when the aim of restrictive legislation is to prevent crime and problem gambling?

The European gambling industry and EU governments eagerly anticipated the ECJ's final ruling in these cases, as it was the first chance the court had to reaffirm and further elaborate on its reasoning in the *Santa Casa* decision.

When the opinion from the ECJ's advocate general on the two cases was delivered last year, it contained some gains for those seeking a more competitive environment. Anticipation that the ECJ's final decision would contain important caveats to the way in which a member state can restrict competition in its gambling market was high. However, the decisions delivered by the court on June 3, 2010 were generally interpreted as a blow to private operators across Europe.

This White Paper outlines the history of the proceedings, the oral arguments before the ECJ, the issues involved, the ECJ rulings and the subsequent reactions to them. With heightened anticipation from the polarised sides in the European gambling debate on the consequences of these decisions, this White Paper also outlines the implications of the decisions in the Netherlands and Europe.

The decisions have received mixed reactions, but both cases illustrate how the parameters for gambling debates in Europe have shifted, with political developments at both a national and European level set to continue to reshape how the gambling industry evolves across Europe.

Key Themes

Mutual Recognition

The concept of mutual recognition is now irrelevant in Europe and the ECJ has rejected arguments concerning the 'passive' offering of gambling services.

Proportionality and Implementing Measures

If it is accepted that ISP and payments blocking are implementing measures of a more general restrictive law on gambling, there is some argument that the ECJ has created a safe harbour for these measures against scrutiny under European law.

Policy Consistency and Advertising

Operators in a restrictive licensing regime may advertise and offer new games when the aim is to channel consumers away from illegal gambling. However, the member state has to establish that clandestine gambling is "significant" to justify such controlled expansion.

Transparency

The obligation of a member state to offer or renew a single private operator licence through a transparent public tender process may be discarded when the government subjects that private operator's activities to strict control. This is described as a "huge morph in opinion". With a lack of ECJ guidance, what constitutes "strict control" looks set to be hotly debated and litigated.