

Communication concerning the decision of the Curia of Hungary
in the administrative case n° Kfv.II.37.639/2011/5.

Hungarian X Television Zrt. (plaintiff) v. Hungarian Authority for Consumer Protection (defendant)

As means to provide legal assistance, the national tax authority informed the Central-Hungarian Regional Inspectorate of the Hungarian Authority for Consumer Protection (hereinafter referred to as the first instance authority) that the plaintiff had broadcast advertisements promoting the website www.bet.com, which is operated by a foreign gambling service provider.

The first instance authority found that the plaintiff had broadcast two versions of the advertisements promoting bet.com services. The online betting system operated by the foreign-based company Bet International Ltd. (hereinafter referred to as Bet Ltd.) could be considered providing gambling services, and the foreign-based company had neither requested, nor been given any authorisation from the Gambling Supervision Department of the National Tax and Financial Control Administration to provide such services. Consequently, the first instance authority inflicted a consumer protection fine of 50 000,- HUF on the plaintiff as the broadcaster of the above advertisements, and placed a ban on the continuation of the infringement. The defendant upheld the decision of the first instance authority.

In connection with the case, the Curia of Hungary pointed out that merchandising, organising or transmitting gambling services in Hungary by Hungarian or foreign-based gambling service providers without the prior authorisation of the national tax authority shall be unlawful. The organisation of online gambling that ensures access to its services from the territory of Hungary shall be in compliance with the relevant legal rules, and the broadcasting of advertisements offering gambling services shall be subject to the authorisation of the national tax authority. The operator of the above mentioned website had, however, no such authorisation.

Without the required authorisation, the plaintiff had broadcast, for several days, advertisements contrary to the relevant provisions of legal rules.

The parties to proceedings did not contest that the gambling service provider had its seat in Gibraltar, which, according to Article 229, paragraph (4) of the Treaty establishing the European Community (hereinafter referred to as TEC), belonged to the territory of the European Community, and that the gambling service provider obtained authorisation in the State where it had its seat. Therefore, it had to be examined whether the principle laid down in Article 49 TEC and referred to by the plaintiff had been violated and whether the relevant national legislation had been in conformity with EU law.

Pursuant to the provisions of Article 56 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU), corresponding to Article 49 TEC, restrictions on the freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are intended. By virtue of Article 62 TFEU (ex Article 55 TEC), the provisions of Articles 51 to 54 TFEU (ex Articles 45 to 48 TEC) shall apply to the matters covered by this Chapter, i.e. to Article 56 TFEU (ex Article 49 TEC) as well. Article 52, paragraph (1) TFEU (ex Article 46 TEC) stipulates that the provisions related to the freedom to provide services shall not prejudice the applicability of national regulations providing for special treatment for foreign nationals on grounds of public policy, public security or public health. Given that the European Court of Justice has a well-established and clear case-law in examining the conformity of national regulations on gambling services with Article 56 TFEU (ex Article 49 TEC), there was no need to initiate a preliminary ruling procedure in this matter.

In the present case, the restriction on the inland-based plaintiff's freedom to provide services within the EU was not the subject matter of proceedings, since no right or legal interest directly attributable to the plaintiff could be derived from EU law. In order to protect the rights guaranteed by EU law, in particular by Article 56 TFEU (ex Article 49 TEC), it had to be examined whether the requirement of authorisation in respect of providing online gambling services had been in conformity with EU law.

The European Court of Justice stated in numerous judgements that the Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of

protection sought. The legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (Case C-42/07 *Santa Casa*, paragraph 57). However, the restrictive measures imposed by the Member States must satisfy the conditions laid down in the case-law of the European Court of Justice as regards their proportionality. It is necessary to examine whether the restriction of the provision of games of chance, imposed by the national legislation, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (Case C-338/04 *Placanica*, paragraph 49; Case C-55/94 *Gebhard*, paragraph 37; Case C-243/01 *Gambelli*, paragraphs 64-65).

A certain number of overriding reasons in the public interest have been recognised by the case-law of the European Court of Justice, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order. The requirement of authorisation can be justified by the fact that games of chance involve a high risk of crime or fraud (Case C-42/07 *Santa Casa*, paragraph 63). In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (Case C-42/07 *Santa Casa*, paragraph 70). It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the requirement of authorisation may be regarded as justified by the objective of combating fraud and crime (Case C-42/07 *Santa Casa*, paragraph 73).

In the *Carmen Media* case, answering the third preliminary question, the European Court of Justice established that it is for the national court, which alone has jurisdiction to interpret national law, where appropriate, to verify whether or not the legislation at issue in the main proceedings satisfies the requirements of EU law. On a proper interpretation of Article 49 TEC (Article 56 TFEU), where a system of prior administrative authorisation is established in a Member State as regards the supply of certain types of gambling, such a system, which derogates from the freedom to provide services guaranteed by Article 49 TEC (Article 56 TFEU), is capable of satisfying the requirements of that latter provision only if it is based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them (Case C-46/08 *Carmen Media*, paragraphs 89-90).

It follows from the foregoing that the Curia of Hungary reached the opinion that the Hungarian authorisation system as regards gambling services fell in line with the so-called *Gebhard* test, and the overriding reasons in the public interest, as recognised by the case-law of the European Court of Justice, and present in Hungary as well, justified the requirement of authorisation related to providing online gambling services, in particular because of the availability of effective judicial remedy against the administrative decision of the competent national authority.

Budapest, the 15th of November 2012

Administrative and Labour Department of the Curia of Hungary