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## The Implications of the Bwin Judgment for Malta Remote Gaming Licensees

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### The Judgment

In order to effectively analyse the legal implications of the case, we propose to begin from the very language used by the ECJ in reaching its conclusions, by reproducing some of the concluding paragraphs of the judgment (all emphases have been added):

67. (...) it must be acknowledged that **the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.**

68 As to whether the system in dispute in the main proceedings is necessary, **the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.**

69 In that regard, it should be noted that **the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.**

...

72 It follows that, **in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.**

73 Consequently, the answer to the question referred is that **Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.**

In the light of the above language it is possible to glean the follows principles:

- (i) The ECJ accepts that granting a monopoly (applicable within the Portuguese territory) to operate games of chance over the internet may be considered appropriate if directed at "protecting consumers against fraud on the part of



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- operators". The emphasis here is not fraud generally but specifically fraud on the part of the operators offering the game of chance;
- (ii) The ECJ has identified the question of "control" that a Member State ("MS") has over the activities going on within its territory as being central in relation to the granting of permits to operators who offer games of chance over the internet;
  - (iii) The fact that an operator lawfully offers games of chance from another MS does not appear to impede another MS (Portugal) to take the view that the statutory conditions and controls imposed in that other MS do not provide sufficient assurance that consumers within its territory will be protected against the risks of fraud and crime, seeing that the MS (Portugal) does not have any means of "assessing the professional qualities and integrity of operators";
  - (iv) Member States may implement legislation which prohibits operators from other Member States from offering their games of chance via the internet within its territory, and this without breaching the provisions of Article 49 of the EC Treaty;
  - (v) The restrictions imposed by Portugal against Bwin "**may** be regarded as justified by the objective of combating fraud and crime".

### A Closer Look

Taking these considerations together at face value, even in the context of the facts of this particular case, appears to weigh heavily against Malta which has established itself as a leading remote gaming hub.

However, it is necessary to give due consideration to the following arguments before drawing any conclusions on the way that the European remote gaming landscape may shape up over the course of the next couple of years:

1. In real terms, the ECJ's pronouncements in this particular case have not provided any ground-breaking insight into the application of EC Treaty rules to remote gaming business. What the Court has effectively done is invoked the provisions of Article 46 EC (which apply to the Chapter 3 in virtue of Article 55) which provides that the freedom to provide services "*shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health*". In our view it has always been amply clear that the offering of games of chance over the internet would find an obstacle in the invocation of such exceptions to the free movement of services- indeed, the arguments routinely raised by Member States seeking to restrict the cross-border offering of games of chance invariably centre around public policy idiosyncrasies.
2. Much of the language of the Bwin judgment should be weighed carefully before absolute conclusions, or any kind of "anti-gaming precedent", can be drawn from this case. Thus, for example, the use of the words "*may be regarded*" in paragraph 72 of the judgment as opposed to the more assertive "is regarded" suggests that the Court is deliberately exercising extreme caution in couching the operative provisions of the judgment. This wording provides a "pressure point" that may be targeted by a Maltese operator confronted by circumstances similar to those faced by Bwin in this case, since the word "may" effectively places the "hot" issue of determining whether or not the application of any restrictions has "the objective of combating fraud and crime" squarely back into the hands of the referring (Portuguese) courts.



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What the Court is effectively saying is that restrictions **may** be regarded as justified **only** in circumstances where the mischief of **combating fraud and crime** is the **sole** objective of such restrictions. The ascertainment as to whether or not the objective of the restriction is that of combating fraud and crime will depend entirely on the nature of the restriction imposed and the economic circumstances prevailing within the gaming sector in the Member State imposing such restrictions. As a result, if a Maltese licensee is faced with an ECJ ruling on the lines of the Bwin decision, the said Maltese operator could institute an action for damages and compensation against the Member State (or against the relative regulatory authority) seeking to restrict its freedom to provide services if the Maltese operator felt that it could satisfactorily demonstrate that the restrictions imposed are intended to achieve objectives other than those of combating fraud and crime.

This position is reinforced by the fact that Maltese operators face very rigorous vetting and strict operational monitoring. These standards are applied by a Lotteries and Gaming Authority that goes to significant lengths to ensure that a proper assessment of the **professional qualities and integrity** of operators is conducted and that the pro-active enforcement of **fraud and crime prevention measures** is applied to licensees on an on-going basis. In my view, this real and effective regulation heightens, to a material degree, the onus placed on any Member State that seeks to impede Maltese operators from offering their games within their jurisdiction through the internet. Although the Court stated that the mere fact that an operator lawfully offers games of chance via the internet in another Member State (e.g. Malta), where it is "in principle already subject to statutory conditions and controls", cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime (see paragraph 69 above), it is a corollary of this statement that where the statutory conditions and controls are not only applied "in principle" but also "in effect", then the Court's view could be somewhat different to that expressed in the Bwin case.

3. Besides the above considerations that relate directly to the case under review, it must not be forgotten that the Commission has instituted infringement procedures against a number of Member States which have created or attempted to create legal or administrative obstacles to the provision of remote gaming services across borders. This suggests that where the monopolies are being promoted or protected other than for purely charitable purposes (as was ostensibly the case in the *Santa Casa*), there would appear to be very little chance for the Member State creating the restriction to succeed in implementing its restrictive measures;

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**Zammit & Associates - Advocates** is one of Malta's leading legal practices actively involved in e-commerce and remote gaming law. The firm offers a full spectrum of services including company registration, preparation and review of remote gaming licence applications prior to submission and on-going support for operators establishing their operations in Malta.