



## Denmark's differentiated tax regime for online gambling and land-based games still stands

On Sept. 26, 2014, the EU General Court issued two rulings on Denmark's differentiated tax regime for online gambling and land-based games. The applicants had challenged the September 2011 decision of the European Commission that a differentiated tax regime for online gambling and land-based games is compatible with the rules of EU internal market. The EU General Court dismissed both appeals, holding that the applicants lacked the necessary legal interest in bringing proceedings. It is a misconception that Denmark's differentiated tax regime for online gambling and land-based games is approved by the EU General Court. The court did not rule on the merits of these cases, both appeals were dismissed on procedural grounds. This means that the decision of the European Commission regarding Denmark's differentiated tax regime still stands. The question, however, of whether a differentiated tax regime may be imposed by national EU Member States is still open for debate.

### **Decision of the European Commission**

In 2010, Denmark introduced a new legislative proposal on gaming duties. The law provides for a number of taxation rates for gaming, depending on whether it is offered online or offline. Online operators pay a tax of 20 percent of gross gaming revenues whereas the current land-based operators are taxed as much as 70 percent.

By its decision of Sept. 20, 2011, the European Commission found that the imposition of a lower tax on online gaming constituted State aid on operators of those games established in Denmark. The commission approved this measure and found that the aid is compatible with the internal market. This was because the positive effects of the liberalization of the Danish gaming sector outweigh potential distortions of competition.

### **EU General Court**

Dansk Automat Branche forening and Royal Scandinavian Casino Århus brought actions against the European Commission's decision to approve the Danish taxation model for online and land-based gambling. The EU General Court dismissed both appeals, holding that the applicants lacked the necessary legal interest in bringing proceedings.

According to the fourth paragraph of Article 263 TFEU, the applicants have the capacity to bring proceedings if the contested decision is of direct and individual concern to the applicants or if the contested decision is of direct concern to the applicants and is a regulatory act that does not entail implementing measures (*see, to that effect, Telefónica v Commission, C 274/12 P*).

#### *Dansk Automat Branche forening*

The EU General Court held that Dansk Automat Branche forening had not proven an interest of its own, however, Dansk Automat Branche forening claimed that the action was still admissible because most of its members had legal standing, because their competitive position was substantially affected by the aid measure in question.

However, the EU General Court concluded that Dansk Automat Branche forening had not demonstrated that the consequences of the aid measure in question affected its members in their objective capacity as operators of offline games in Denmark any differently from any other economic operator in the same situation, nor demonstrated with sufficient evidence the extent of the potential impact of the aid measure in question on the economic situation of its members. The decision of the European Commission was therefore not of direct and individual concern to Dansk Automat Branche forening.

Secondly, the applicant submitted that the contested decision constitutes a regulatory act that does not entail implementing measures within the meaning of the fourth paragraph of Article 263 TFEU. This provision provides that it is possible to bring proceedings in this context if the regulatory act is 'of direct concern' to the individual seeking access to a court. The EU General Court held that where a regulatory act (for instance a decision of the European Commission) directly affects the legal situation of a natural or legal person without requiring implementing measures that person could be denied effective judicial protection if he did not have a direct legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act.

In this particular case, Dansk Automat Brancheforening members could have access to a court without being required to infringe the law, since the law on gaming duties came into force on Jan. 1 2012, a few months after the decision of the European Commission. In proceedings before the national court they could have pleaded the invalidity of the contested decision and caused the court to request a preliminary ruling from the Court of Justice pursuant to Article 267 TFEU (see, to that effect, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C 583/11 P and *Telefónica v Commission*, C 274/12 P). Therefore Dansk Automat Brancheforening's action does not fulfil the admissibility requirements laid down in Article 263 TFEU and lacked the necessary legal interest in bringing proceedings.

#### *Royal Scandinavian Casino Århus*

The Royal Scandinavian Casino Århus action was dismissed for similar reasons to the Dansk Automat Brancheforening case. The decision of the European Commission was not of direct and individual concern to Royal Scandinavian Casino Århus and Royal Scandinavian Casino Århus did not fulfil the admissibility requirements laid down in Article 263 TFEU concerning the arguments relating to the European Commission's decision constituting a regulatory act entailing implementing measures.

#### **To conclude**

As the EU General Court was not able to assess the merits of these cases because of the lack of standing of the parties involved, it could not provide clarity on whether a differentiated tax regime for online gambling and land-based games is compatible with EU internal market.

#### **Consequences for Dutch Online Gaming Liberalization Process**

The Dutch legislative proposal to open the market for online gaming provides a similar differentiated tax regime for online gambling and land-based games. Many parties, including advisory bodies such as the Council of State, have criticized the proposed legislation (see [Update to Dutch Online Gaming Liberalization Process](#)). Absent a clarifying ruling of the EU General Court on whether a differentiated tax regime for online gambling and land-based games is compatible with EU internal market, one of the key issues within the Dutch legislative proposal is still open for debate.

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This *GT Alert* was written by **Emilie van Hasselt**, **Peter van Langeveld**, **Martha Sabol**, **Reinier van de Steenoven**, **Hans Urlus**, and **Thomas van der Vliet**. Questions about this information can be directed to:

- > [Emilie van Hasselt](mailto:vanhasselte@eu.gtlaw.com) | +31 (0) 20 301 7354 | [vanhasselte@eu.gtlaw.com](mailto:vanhasselte@eu.gtlaw.com)
- > [Reinier van de Steenoven](mailto:steenoven@eu.gtlaw.com) | +31 (0) 20 301 7316 | [steenoven@eu.gtlaw.com](mailto:steenoven@eu.gtlaw.com)
- > [Martha A. Sabol](mailto:sabolm@gtlaw.com) | +1 312.476.5114 | [sabolm@gtlaw.com](mailto:sabolm@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

<b>Albany</b> +1 518.689.1400	<b>Denver</b> +1 303.572.6500	<b>New York</b> +1 212.801.9200	<b>Shanghai</b> +86 (21) 6391.6633
<b>Amsterdam</b> +31 (0) 20 301 7300	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Northern Virginia</b> +1 703.749.1300	<b>Silicon Valley</b> +1 650.328.8500
<b>Atlanta</b> +1 678.553.2100	<b>Houston</b> +1 713.374.3500	<b>Orange County</b> +1 949.732.6500	<b>Tallahassee</b> +1 850.222.6891
<b>Austin</b> +1 512.320.7200	<b>Las Vegas</b> +1 702.792.3773	<b>Orlando</b> +1 407.420.1000	<b>Tampa</b> +1 813.318.5700
<b>Boca Raton</b> +1 561.955.7600	<b>London*</b> +44 (0) 203 349 8700	<b>Philadelphia</b> +1 215.988.7800	<b>Tel Aviv^</b> +972 (0) 3 636 6000
<b>Boston</b> +1 617.310.6000	<b>Los Angeles</b> +1 310.586.7700	<b>Phoenix</b> +1 602.445.8000	<b>Warsaw~</b> +48 22 690 6100
<b>Chicago</b> +1 312.456.8400	<b>Mexico City+</b> +52 (1) 55 5029 0000	<b>Sacramento</b> +1 916.442.1111	<b>Washington, D.C.</b> +1 202.331.3100
<b>Dallas</b> +1 214.665.3600	<b>Miami</b> +1 305.579.0500	<b>San Francisco</b> +1 415.655.1300	<b>Westchester County</b> +1 914.286.2900
<b>Delaware</b> +1 302.661.7000	<b>New Jersey</b> +1 973.360.7900	<b>Seoul<sup>∞</sup></b> +82 (0) 2 369 1000	<b>West Palm Beach</b> +1 561.650.7900

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