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### An Online Gaming Ruling of the Court of Justice of the European Union

By [Professor Marketa Trimble](#)

On September 15, 2011, the Court of Justice of the European Union ("CJEU") issued a preliminary ruling that concerns online gaming (Jochen Dickinger and Franz Ömer, C-347/09). CJEU preliminary rulings do not decide the merits of cases, but provide binding interpretations of European Union ("EU") law based on questions submitted to the CJEU by national courts of the EU member states. Although it will be necessary to wait for a national (in this case Austrian) court to render a decision on the merits in the case, the preliminary ruling sheds light on the conditions for online gaming regulation that may be permissible under EU law.



The questions submitted by the Austrian court to the CJEU for a preliminary ruling concerned an Austrian law that creates a monopoly on online gaming in Austria. According to the law, online gaming may be offered in Austria only under a government-issued concession, and only one such concession may exist at any given time. Organizing online games of chance for commercial purposes without the concession may lead to criminal prosecution, which is what happened in the case at issue. In their defense, the defendants argued that the creation of a monopoly was inconsistent with EU law.

The CJEU faced a difficult decision in the case, as the EU takes pride in its grant of four paramount freedoms, one of which is the freedom of movement of services. In this case the online gaming website at issue was operated under a valid license from another EU member state – Malta, and placing limitations on providing services licensed in one EU member state in another member state curtails this freedom. Furthermore, the EU's competition (antitrust) law evidences the seriousness with which the EU views monopolies. In this case the preliminary ruling had to be rendered at a time when national regulators are searching for adequate regulatory approaches to online gaming; so far unity in these approaches has not been reached at either the EU or national levels.

The CJEU decided that the Austrian law creating the monopoly "constitute[d] a restriction on the freedom to provide services guaranteed" by EU law; however, the court noted that derogations from the principle of the freedom to provide services may be made in the public interest. The CJEU recognized a number of possible grounds to justify the application of the derogation in the case of online gaming, such as the protection of consumers and society. Because moral, religious, cultural, and economic factors that impact states' decisions on gaming regulation differ from state to state in the EU, the CJEU is of the opinion that these factors justify states' discretion in their individual policies on online gaming. As long as the objectives of an EU member state in the area of online gaming require the creation of a monopoly, a monopoly may be in the public interest, and therefore compatible with EU law.

The case now returns to the Austrian court (Linz District Court), which with the guidance of the CJEU's preliminary ruling will determine whether the Austrian law on concessions to online gaming operators follows the kind of objectives that would warrant a derogation from the principle of the freedom to provide services. If the Austrian court finds that the Austrian law is contrary to EU law, criminal prosecution of the two defendants will be

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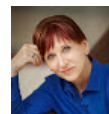
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