

PORTUGAL

Vieira de Almeida



Tiago Marreiros Moreira and Filipa Relvas

Gambling in Portugal: A potential breach of freedom

Tiago Marreiros Moreira and Filipa Relvas of Vieira de Almeida evaluate the reasons behind Portugal's differing tax strategies for land-based and online gambling activities.

The Portuguese framework

The Portuguese tax regime for online gambling has been established by Decree-Law No. 66/2015 of 29 April. This regime offers different taxation rules among the diverse forms of gambling activities, namely in what defines the difference between land-based and online game providers.

Since the entry into force of this Decree-Law, online gambling operators are subject to a special tax treatment, namely in the method used to calculate the tax. Online 'fixed odds' sports betting companies are subject to tax on their turnover – and the applicable tax rate – online gambling companies may be taxed at a maximum rate of 35% (as introduced by Portuguese State Budget Law for 2020). This special regime for online gambling activities creates an unfavourable framework for these operators.

Article 56 of the Treaty of Functioning of the European Union

From an EU perspective, gambling services fall outside the scope of the Directive 2006/123/EC, which regulates services in the internal market. Thus, the licensing of such services should be made in accordance with the Treaty of Functioning of the European Union (TFEU), namely in light of the freedom to provide services (Article 56) given that it is clear that gambling games are considered services for the purposes of this provision (*Schindler* and *Läämä* cases).

Therefore, any licensing regime of gambling services within the EU should be in line with the freedom to provide services under Article 56. Likewise, there will be a breach of such fundamental freedom if the licensing regime provides for a less favourable treatment of non-residents when compared with residents of a member state.

A potential breach of Article 56

This said, the point is: Is the Portuguese tax regime on online gambling games currently in line with the freedom to provide services? We believe the answer is negative, as better explained below.

The Portuguese tax framework provides for a different taxation system for land-based gambling when compared to online gambling activities, which are subject to a higher taxation. Therefore, a higher tax on online gambling than on land-based gambling certainly affects non-residents more than residents, since most of the operators in the Portuguese online gambling market are foreign entities. Such a difference in treatment constitutes a restriction to the freedom to provide services.

To be considered as discriminatory, the measure must provide a less favourable treatment between services that are placed in a comparable situation. In this specific case, the European Commission has already confirmed that land-based and online gambling services are comparable activities, as online gambling is just another distribution channel of the same activity.

At this point, it should then be assessed if the discrimination is justified and proportional under EU Law. In accordance, regarding all economic activities which have not been harmonised – such as gambling – the member state responsible for the restriction in question must demonstrate that it is necessary in order to achieve the declared objective and that such an objective could not be achieved by less restrictive measures. In the specific case of gambling services, there is a whole typical concern: the protection of recipients of the services and the protection of the society against game addiction, fraud, crime and malpractice. However, the general interest that justifies the discrimination cannot be of economic nature, such as the maximisation of public revenue or the need to protect the market position of existing operators.

In our view, there are arguments to sustain that the Portuguese tax regime for online gambling games was introduced to protect public revenue. Thus, the high taxation in this increasingly popular sector leads to the maximisation of public revenue, since land-based providers are more motivated to perform their services – as they are not subject to the special tax regime. In contrast, the online gambling services companies (normally non-residents) are not willing to operate in Portugal given the high taxation that their profits will be subject to. Or even if such operators still want to practice their services, the public revenue will continue to be maximised given the high taxes in the sector.

In summary, the high taxation on the online gambling sector may be justified by public order reasons. However, the existing system is evidently not necessary nor proportionate. In fact, the high taxation constitutes a restriction of the freedom to provide services since it produces an effect comparable to that of prohibiting performing the services. In other words, the restrictive character of the special tax regime for online gambling sets a different level of protection between land-based and online gambling, to a point where it creates a disincentive for non-resident online gambling services providers to carry out their activities in the Portuguese market.

Vieira de Almeida

T: +351 213 113 485 and +351 213 113 400

E: tm@vda.pt and fir@vda.pt