

## VAT exemption may be restricted to certain types of betting and gaming

### [Leo-Libera GmbH \(C-58/09\)](#)

*The ECJ has held that Member States are permitted to determine which betting and gaming activities are exempt for VAT purposes. However, the ECJ made it clear that this discretion is fettered by the principle of fiscal neutrality such that similar betting and gaming activities must not be treated differently. This decision will be of interest not only in the context of betting and gaming operators, but also for the additional insights into the principle of fiscal neutrality and its interaction with discretions afforded to Member States.*

### **Background**

The Taxpayer operates a gaming hall equipped with gaming machines. The tax authority rejected the Taxpayer's complaint that those transactions were exempt. The German legislation implementing the betting and gaming exemption did not include transactions relating to gaming machines as exempt.

In Germany, most types of betting and gambling are subject to VAT and only certain betting (on racing and lotteries) is VAT exempt. The German legislation in question in this case is that which remains following the removal of provisions which were ruled incompatible with EU law in the case of Linneweber (C-453/02).

Following an appeal to the German courts, the following question was referred to the ECJ:

*"Is Article 135(1)(i) of Council Directive 2006/112/EC ... to be interpreted as meaning that Member States are permitted to have a rule under which only specified forms of (race) betting and lotteries are exempt from tax, and all 'other forms of gambling' are excluded from the tax exemption?"*

### **Held**

"Article 135(1)(i) of the VAT Directive must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the exemption from VAT provided by that provision allows those States to exempt from tax only certain forms of gambling."

Whilst Member States can therefore exercise a discretion to determine which forms of betting and gaming are exempt, that discretion is fettered in that similar forms of gambling, which may be regarded as in competition with one another, cannot be treated differently. In this particular

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case, the ECJ considered that the relevant national legislation did not treat similar forms of gambling differently.

### **Implications**

This case is interesting not only in the context of betting and gaming operators, but also for the additional insights into the principle of fiscal neutrality and its interaction with discretions afforded to Member States. The Court has reaffirmed that where Member States have a discretion to restrict the scope of exemption, the Member State has to respect the fiscal neutrality principle and thus avoid situations where similar transactions are treated differently.

UK taxpayers have already been advised that the UK betting and gaming exemptions may have breached the principle of fiscal neutrality in the context of the Rank Plc litigation. That litigation is itself subject to a reference to the ECJ. It appears clear that the Rank proceedings at the ECJ will need to consider how "similarity" is to be determined in the context of betting and gaming activities.

The Court appears to have taken into account the social legislative background to betting and gaming in noting that Member States have a discretion to prohibit certain activities or to adopt rigorous procedures for controlling them. Such social legislative issues in the sector have also been subject to several references to the ECJ in the context of freedom to provide betting and gaming services across the EU.

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