

Chapter 2

National Gambling Regulation: National, International and European Constraints

2.1 Sectorial Quasi-Exemption or Liberalisation?

Publications on European gambling issues often take either the side of state monopolies or that of private operators. Haltern accurately noted that most of the literature on this topic has been produced by lobbyists and practitioners, and therefore has not necessarily enhanced the quality of the debate and thoroughness of argumentation.¹ Furthermore, ideological views or economic ties regularly colour the drafting of contributions of the debate or of comments on judgments. Commentators often advocate that courts either grant a sectorial *quasi-exemption* of national gambling regulation from EU law or a *liberalisation* of gambling markets based on the supremacy of EU law.²

The heat of the debate is not surprising given the *significant monetary stakes* for both private and state operators. A broader view reveals that the controversial nature of this debate is not specific to gambling. It is to be expected that economic regulation in areas involving high stakes is controversial and that stakeholders in such areas aggressively defend their own interests. The sectors of energy and telecommunication are good examples.³

¹Haltern, U., *Gemeinschaftsrechtliche Aspekte des Glückspiels*, Schriften zum europäischen Recht, vol. 129, Magiera, S., Merten, D., Niedobitek, M., et al. (Eds.), Berlin: Duncker & Humblot, 2007, at 9.

²Concurring: Fink, M., and Rübenstahl, M. (2007). “Placanica & Co. – ”Rien ne va plus“ – Das Ende der Anwendbarkeit von § 284 StGB und der Abschied vom Sportwettenmonopol?”, *European Law Reporter*, 7–8, 275–290, at 275.

³Larouche, P., “Introduction – A View From the Outside” in *The Regulation of Gambling: European and National Perspectives*, Littler, A., and Fijnaut, C. (Eds.), Leiden: Martinus Nijhoff Publishers, 2007, pp. 1–7, at 1. For a discussion of parallels between the energy and gambling sectors, cf. Kramer, T. (2007). “Gambling and Energy in the Internal Market”, *ERA Forum*, 8(3), 1–8.

It may be tempting to consider European Union law and national law as antagonistic – as if the application of one excluded the other.⁴ Therefore, it is necessary to move past the apparent controversy and consider the actual legal bases, which come from primary and secondary EU law and case law. Gambling services are an economic activity to which the Treaties apply,⁵ in particular the Internal Market provisions. According to the Treaty on the Functioning of the European Union (‘TFEU’), Internal Market issues are one of the areas in which *shared competences* apply.⁶ Considering this division of powers, conflicts over the ‘right balance’ between Union and Member States’ interests are unsurprising. Apart from this interaction at European level, gambling regulation involves constraints from further legal orders.⁷

2.2 Constraints Under National Law

As EU law currently stands, European gambling law is foremost a matter for *national law*. National legislators in Europe have opted for very different gambling regimes, ranging from the total prohibition of certain games to liberal licensing systems.⁸ Nevertheless, their regulatory choices are subject to certain constraints, which apply irrespective of those from EU law. National gambling laws must respect the *national constitutional order*. Constitutional provisions and their interpretation by the courts generally recognise certain fundamental principles and fundamental rights. The principle of proportionality is one such principle. While legislators are generally free to choose the goals of state activities, many European constitutional orders adhere to the idea that the means to reach these goals must be proportionate.⁹ In addition, modern democracies also protect a number of

⁴For a contribution that seems to suggest an antagonistic constellation in WTO law, cf. Ruse-Kahn, H.G., “‘Gambling’ with Sovereignty: Complying with International Obligations or Upholding National Autonomy” in *Economic Law and National Autonomy*, Kolsky Lewis, M., and Frankel, S. (Eds.), Cambridge/New York: Cambridge University Press, 2010, pp. 141–166.

⁵C-275/92 *Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 35.

⁶Art. 4(2)(a) TFEU.

⁷For the aspect of conflicting laws, cf. Hörnle, J., and Zammit, B., *Cross-Border Online Gambling Law and Policy*, Cheltenham UK/Northampton, MA: Edward Elgar, 2010.

⁸For an overview of national gambling regulations, cf. Gambling Compliance, *Market Barriers: A European Online Gambling Study 2012*, 2012; Gambling Compliance, *Market Barriers: A European Online Gambling Study*, Gambling Compliance 2009; Planzer, S. (Ed.), *Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997–2010*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045073, 2011; Littler, A., and Fijnaut, C., *The Regulation of Gambling: European and National Perspectives*, Leiden: Martinus Nijhoff Publishers, 2007.

⁹Cf. e.g. Federal Constitution of the Swiss Confederation of 18 April 1999, ‘Swiss Federal Constitution’, SR 101, Art. 5(2): “State activities must be conducted in the public interest and be proportionate to the ends sought.”

fundamental rights. Governments can limit these rights only under certain conditions. Limitations must usually have a legal basis, be justified by a legitimate public interest and be proportionate.¹⁰

Accordingly, the wish of gambling operators to offer gambling services and of gambling consumers to use these services may be protected to some extent under the national constitutional order. As a matter of fact, constitutions regularly protect under various different notions the fundamental right to *choose an occupation* and to *pursue an economic activity*.¹¹ National gambling regulation needs to take into account these safeguards of individual rights. This illustrates that even under mere national law, governments and parliaments are not completely free in their regulatory choices and administrative decisions but bound by legal obligations stemming from constitutional law.¹² The well-known judgment of the *German Constitutional Court* regarding the unconstitutionality of the Bavarian gambling monopoly is an illustrative example.¹³ Often, these constitutional guarantees run in parallel to EU law. Ennuschat correctly noted the commonality between the judicial test of the Court of Justice regarding EU law aspects and the judicial test of the German Constitutional Court regarding constitutional law aspects.¹⁴

¹⁰For example Art. 36 *ibid.*:

“1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

3 Any restrictions on fundamental rights must be proportionate.

4 The essence of fundamental rights is sacrosanct.”

¹¹For example Art. 27 *ibid.*:

“1 Economic freedom is guaranteed.

2 Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.”

¹²Art. 5 *ibid.*: “1 All activities of the state shall be based on and limited by law.”

¹³BVerfG, 1 BvR 1054/01, *Verfassungsmässigkeit des deutschen Sportwetten-Monopols*, Judgment of 28 March 2006.

¹⁴Ennuschat, J., “Aktuelle Entwicklungen in der Rechtsprechung von EuGH und BVerfG” in *Gesellschafts- und Glücksspiel: Staatliche Regulierung und Suchtprävention – Beiträge zum Symposium 2005 der Forschungsstelle Glücksspiel*, Becker, T., and Baumann, C. (Eds.), Schriftenreihe zur Glücksspielforschung, Frankfurt am Main: Peter Lang Europäischer Verlag der Wissenschaften, 2006, pp. 69–74, at 74. Moreover, national law may allocate the power to regulate gambling at the *national (federal), regional (state) or local (municipal) level*. In Germany and Spain for instance, the regional authorities have far-reaching competences in relation to gambling (‘Länder’, ‘comunidades autónomas’); cf. for Germany: Hofmann, J., and Spitz, M., “Germany” in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 107–119; cf. for Spain: Asensi, S., and Serebrianskaia, A., “Spain” in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 303–314. In the UK, city councils can license casino operations: Littler, A. (2007). “The Regulation of Gambling at European Level: The Balance to be Found”, *ERA Forum*, 8(3), 357–371, at 359; cf. also Harris, J., and Hagan, J., “United Kingdom” in *Gaming Law: Jurisdictional Comparisons*, Harris, J. (Ed.), London: European Lawyer Reference Series (Thomson Reuters), 2012, pp. 331–346. Similarly, games of chance in Switzerland fall mostly under the competences of the federal authorities

2.3 Constraints Under Public International Law

The regulatory choices of national authorities are further affected by obligations under international law.¹⁵ In addition to the compulsory rules of public international law (*ius cogens*), states enter further obligations by ratifying bilateral or multilateral agreements. In relation to the regulation of gambling, treaties from two fields of law can contain provisions that may impact national gambling regulation: *trade* agreements and *human rights* treaties. With regard to the EU and EEA Member States, the relevant trade-related obligations mainly stem from EU and EEA law and WTO law, in particular the *GATS*.¹⁶ Relevant human rights obligations primarily stem from the *European Convention on Human Rights* ('*ECHR*'). This book focuses on the case law under the EU Treaties and the EEA Agreement (see Sect. 3.4.5 *if.*). However, the experience of a limitation of national choices in regulating gambling is not specific to the Internal Market as WTO proceedings against the United States showed.¹⁷

2.4 Interplay of EU Law and National Gambling Regulation

According to the TFEU *shared competences* apply in Internal Market affairs.¹⁸ This also applies to gambling services, which constitute an economic activity falling within the scope of the Treaties.¹⁹

whereas lotteries, sports betting and games of skill fall under the competences of cantonal authorities; cf. the recently amended Art. 106 of the Federal Constitution of the Swiss Confederation of 18 April 1999; for a contribution, cf. Pérrard, L., *Monopole des loteries et paris en Suisse: État des lieux et perspectives – Remise en question du monopole détenu par les opérateurs de loteries et paris*, Cahier de l'IDHEAP, vol. 236/2008, Chavannes-Lausanne: Institut de hautes études en administration publique, 2008.

¹⁵ For example Art. 5(4) Federal Constitution of the Swiss Confederation of 18 April 1999: "The Confederation and the Cantons shall respect international law."

¹⁶ For a comparison of gambling services under EU and WTO rules, cf. Geeroms, S.M.F., "Cross-Border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?" in *Cross-Border Gambling on the Internet – Challenging National and International Law*, Swiss Institute of Comparative Law (Ed.), Zurich/ Basel/Geneva: Schulthess, 2004, pp. 143–180 as well as Diaconu, M., *International Trade in Gambling Services*, Global Trade Law Series, Alphen aan den Rijn: Kluwer Law International, 2010.

¹⁷ AB-2005-1 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R. For a brief introduction to the implications of WTO law for national gambling regulation, the proceedings against the US and the regulatory regime of Antigua, cf. Hörnle, and Zammit, *Cross-Border Online Gambling Law and Policy*, at 69 *et seq.* and 175 *et seq.* For the broader context of the battle between the US and online gambling jurisdictions, cf. Cooper, A.F., *Internet Gambling Offshore: Caribbean Struggles Over Casino Capitalism*, Houndmills/Basingstoke/Hampshire: Palgrave Macmillan, 2011.

¹⁸ Art. 4(2)(a) TFEU.

¹⁹ C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 19 and 30.

Article 2(2) TFEU notes regarding this constellation:

“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

It follows that EU Member States can exercise their legislative competence regarding the regulation of gambling. As Union law stands, it is still almost exclusively national law that directly regulates gambling (see Sect. 4.2). However, due to the *supremacy of EU law* and the requirement that Member States ensure fulfilment of their obligations arising from the Treaties, national law must be in line with the Treaty obligations, in particular the fundamental freedoms.²⁰ Consequently, the question is not which set of law applies – national or European – but rather *how the two sets of laws interact, and how the constraints of EU law impact national laws*.²¹ If national law conflicts with EU fundamental freedoms, the Member State concerned must show that its conflicting law serves a legitimate *public interest objective*. Moreover, the public interest must be *balanced* with the interest in an effective implementation of EU law (namely, proportionality). The answers to this balancing exercise cannot be found in the Treaties but in the case law, which is briefly outlined in the next chapter.

²⁰ Art. 4(3) TEU.

²¹ For the impact of EU law on national gambling regulation in France and Germany, cf. Heseler, F., *Der Einfluss des Europarechts auf die mitgliedstaatliche Glücksspielregulierung : Frankreich und Deutschland im Vergleich*, Schriften des Europa-Instituts der Universität des Saarlandes. Rechtswissenschaft, Baden-Baden: Nomos, 2013.