Chapter 6
Scope of Application in EU Gambling Law

This chapter briefly examines different dimensions of the scope of application. First, do gambling-related facts bring that matter within the scope of application of EU law? Second, which fundamental freedoms apply to the field of games of chance? Finally, when do the games in question qualify as games of chance?

With regard to the first dimension, the Court of Justice can decide on substance only if the facts of the case fall within the scope of the EU Treaties. Whether this is the case may be disputed and a controversial issues. The Court of Justice has repeatedly chosen a wide interpretation of the scope of application of EU law.[1]

Initially, counsels of several governments were of the view that gambling services did not fall within the scope of EU law. In their opinion, lotteries were not an *economic activity* and thus fell outside the scope of EU law.[2] They argued that such activities had been traditionally prohibited or operated under the direct control of public authorities. Yet, it must have been obvious, also in the early 1990s, that gambling offers represent economic activities and cannot be seen as a mere application of public order law.[3] In *Schindler*, it was further argued – somehow inconsistent – that lotteries did not serve an economic purpose, but their nature related in fact to

[1] Cf. e.g. C-260/89 Elliniki Radiophonia Tiléorassi AE ('ERT') and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas et alii [1991] ECR I-2925; C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689; C-71/02 Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH [2004] ECR I-3025; C-60/00 Mary Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.

[2] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 16–17: Belgium, Germany, Ireland, Luxembourg, Portugal were of this view. By contrast, Spain, France, the UK and the Commission took the view that the facts in *Schindler* related to 'services' and constituted an economic activity, thus falling within the scope of EU law.

[3] Stein, T., and von Buttlar, C., "Europarechtliche Konsequenzen eines begrenzten Lizenzierungsmodells für die (private) Veranstaltung von Sportwetten" in *Aktuelle Probleme des Rechts der Glücksspiele*, Ennuschat, J. (Ed.), Munich: Verlag Franz Vahlen, 2008, pp. 81–111, at 83.

S. Planzer, *Empirical Views on European Gambling Law and Addiction*,
Studies in European Economic Law and Regulation 1, DOI 10.1007/978-3-319-02306-9_6,

recreation and amusement.[4] Without extensive elaboration on this point, the Court of Justice made it clear "that the importation of goods or the provision of services for remuneration […] are to be regarded as "economic activities" within the meaning of the Treaty."[5] According to the Court, the importation of lottery tickets fell within the scope of intra-Union trade in services.

Member States further argued that gambling activities were regularly organised by public authorities and solely in the public interest; accordingly, EU law could not apply. This argument could not be convincing in that other activities are also operated in the public interest by public authorities. Nevertheless, they fall within the scope of EU law, in particular 'services of general economic interest'.[6] Moreover, if the aforementioned recreation or amusement character of gambling activities were to exclude them from the scope of the Treaties, a large part of the tourism and entertainment industry would fall outside the scope of EU law as well. In retrospect, the reliance on the recreational nature of gambling stands in contradiction to another argument raised by Member States. Some governments tried to liken gambling activities to *illicit products* such as drugs.[7] The Court of Justice dismissed this argument since (licit) lotteries seemed to be commonplace among Member States. In *Schindler* and numerous subsequent cases, governments argued a *'peculiar nature'* of gambling services based on public morality concerns and risks relating to addiction and crime. This view of a peculiar nature of gambling and its comparison to illicit products, such as drugs, does not fit the argument of gambling as a recreational activity.

With regard to the second dimension, the Court of Justice regularly had to decide *which fundamental freedom(s)* would be applicable. In theory, the provisions of all fundamental freedoms may apply to gambling activities. If the legislation of a Member State required casinos to exclusively employ nationals or staff that had resided for a minimum duration in that jurisdiction, the provisions on the free movement of persons would be concerned. Similarly, the free movement of capital can also be affected. In *Liga Portuguesa*, the Court considered its applicability in the context of an online operator that was prohibited to provide services in Portugal and prevented from sponsoring the Portuguese football league. The Court held that "any restrictive effects […] on the free movement of capital and payments would be no more than the inevitable consequence of any restrictions on the freedom to provide services."[8]

---

[4] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 16.

[5] Ibid., para. 19.

[6] Art. 106(2) TFEU. Services of general economic interest can for instance relate to public hospitals and similar public infrastructure.

[7] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 31–36.

[8] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 47.

Gambling issues can also relate to the free movement of goods since gambling devices constitute goods. The Court of Justice confirmed in *Läärä* that the provisions regarding the free movement of goods could apply to the importation of slot machines.[9]

However, the cases before the Court of Justice have almost exclusively been examined with the provisions relating to the freedom to provide *services* and the freedom of *establishment*.[10] Even though the involved gambling devices constitute goods, their role regularly relates to the provision of gambling services. In *Schindler*, the Court found that the sending of advertisement, lottery application materials and lottery tickets were not ends in themselves. Their sole purpose was to enable UK residents to participate in the German lottery, and this constellation was to be assessed under the provisions of the freedom to provide services.[11] These provisions protect not only the service providers' interest in offering their services but also the consumers' interest in accessing these services.[12] In cases relating to land-based forms of gambling, the facts may often fall within both the scopes of the freedom to provide services and the freedom of establishment.[13] When several fundamental freedoms are concerned, the Court of Justice regularly assesses the facts only with the provisions of one fundamental freedom. It explained its approach in *Liga Portuguesa*:

> Where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it.[14]

In cases relating to *online* gambling, the freedom to provide services is regularly the sole fundamental freedom concerned. Due to the inherently cross-border nature of online activities, these operators do not need to seek establishment in various jurisdictions:

> […] the mere fact that a provider of games of chance marketed over the internet makes use of material means of communication supplied by another undertaking established in the host Member State is not in itself capable of showing that the provider has, in that Member

[9] C-124/97 Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State) [1999] ECR I-6067, paras 20–26.

[10] Freedom of establishment: Arts 49 TFEU and 31 EEA; freedom to provide services: Arts 56 TFEU and 36 EEA.

[11] C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, paras 17–25. This view was shared by Spain, France, the UK and the Commission.

[12] Cf. *ex multis* the gambling case C-176/11 HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen [2012] nyr, para. 18.

[13] For a delimitation of the two concepts in a gambling case, cf. C-470/11 Garkalns SIA v Rigas dome [2012] nyr, paras 23–32.

[14] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa [2009] ECR I-7633, para. 47. Cf. further for this point C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521, para. 34.

> State, a fixed establishment similar to an agency […]. [F]or there to be establishment within the meaning of the Treaty, a commercial relationship […] must make it possible for the operator to participate, on a stable and continuous basis, in the economic life of the host Member State, and must thus be such as to enable customers to take advantage of the services offered through a permanent presence in the host Member State, which may be done by means merely of an office managed by a person who is independent but authorised to act on a permanent basis for the operator, as would be the case with an agency […].[15]

Even if the operator decides to set up certain computer support infrastructure, such as *servers*, and make use of *computer support services* of a provider established in the host Member State, the provisions relating to the freedom to provide services still apply.[16]

Finally, the question remains to be examined under which conditions games qualify to be assessed *in the light of precedent on gambling services*. This issue is of importance because the Court of Justice has granted wide discretion to national authorities in relation to gambling issues. The Court has granted a special status only to certain games, namely *games of chance*.

According to the Court of Justice, these games are characterised by a strong element of *chance* (as opposed to skill) and money is wagered on an uncertain outcome. Moreover, these games have to show a minimum of *economic importance and functional independence* from other purposes. The Court of Justice denied in *Familiapress*[17] that prize competitions, like crossword puzzles in the press, amounted to 'gambling'. Such games were not comparable to the 'special features' of lotteries, as noted in *Schindler*. Opposed to large-scale lotteries involving a high risk of crime or fraud, prize competitions were small scale and less was at stake. They did not constitute an economic activity in their own right but were simply part of the editorial content of a magazine.[18] Moreover, the prize competitions did not constitute games of chance but rather involved a strong skill component. Finally, consumers did not wager money to participate.[19]

---

[15] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 34–38. Cf. also C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automatenservice Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069; C-338/04, C-359/04 and C-360/04 (Joined Cases) Criminal Proceedings against Massimiliano Placanica, Christian Palazzese, Angelo Sorricchio [2007] ECR I-1891; C-243/01 Criminal Proceedings against Piergiorgio Gambelli et alii [2003] ECR I-13031.

[16] C-347/09 Criminal Proceedings against Jochen Dickinger and Franz Ömer [2011] ECR I-8185, paras 34–38.

[17] C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689.

[18] Ibid., paras 20–23. With regard to the criterion of an 'economic activity in its own right' in the context of teleshopping, cf. C-195/06 Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF) [2007] ECR I-8817, paras 37–38.

[19] In its jurisprudence, the CJEU also dealt with a particular form of prize draws that was held to adversely affect the health of consumers. An import–export company had announced on its website

Similarly, the Court did not rely on precedent from the gambling jurisprudence in *Commission versus Greece*. The relevant games regarded electrical, electromechanical and electronic games. They did not show the aforementioned characteristics and were *inter alia* not played for the prospect of winning money. Consequently, the Court concluded that the findings from earlier gambling cases could not be used in this case[20] and applied a stricter proportionality review than in the gambling cases.[21]

The *Omega* judgment is sometimes mentioned in the context of the gambling case law.[22] However, the comparison is only valid – to some extent – in that the Court referred in *Omega* to moral, religious and cultural considerations as it did in *Schindler* and subsequent gambling cases.[23] For the rest, *Omega* differed significantly. First of all, it did not involve games of chance but games of (doubtful) *skill*. In addition, the controversy in *Omega* related *exclusively* to strong public morality concerns, namely in relation to human dignity. It will be explained in the next chapter why public morality is not similarly concerned regarding games of chance in comparison to games where people play at killing other people.

This chapter discussed three dimensions of the scope of application of EU law. The Court of Justice held in *Schindler* that lottery services fell within the scope of application of EU law. It recognised that lotteries and in subsequent cases other forms of gambling constituted *'economic activities'* within the meaning of the Treaties. While in theory all fundamental freedoms can apply to gambling activities, the freedom to provide *services* and the freedom of *establishment* are most likely to apply. In the *online sector*, mostly the freedom to provide services is applicable. Finally, the precedent on gambling only applies to certain games, namely *games of chance*. Additionally, these games must show a *minimum economic importance* and *functional independence*; this excludes, for instance, prize competitions like crossword puzzles in the press.

---

a monthly prize draw with the chance of winning medicinal products (Ginseng extract powder). According to the CJEU, the relevant EU secondary law prohibited such promotions: C-374/05 Gintec International Import Export GmbH v Verband Sozialer Wettbewerb eV [2007] ECR I-9517.

[20] C-65/05 Commission v Greece [2006] ECR I-10341, paras 36–37.

[21] Concurring: Doukas, D., and Anderson, J. (2008). "Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded". *Yearbook of European Law, 27*, 237–276, at 255.

[22] Cf. e.g. Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union*, Chap. 2, at 969 fn 3, and at 979.

[23] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609, para. 37.