Which Ends Justify the Means? Justifying National Restrictions to the Free Movement of Gambling Services in the European Union

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1 Gambling and Its Regulation in the Context of EU Law

European Union Member States' legal regimes in the field of gambling are strongly influenced by the fundamental freedoms outlined in the Treaty on the Functioning of the European Union. Global gambling industries seeking to operate in EU member states and the wider European Economic Area where many of these rules also apply are well served to study the case law of the Court of Justice of the European Union which interprets these treaty provisions. This body of rulings provides detailed guidance on the circumstances in which restrictive national gambling regulation may be challenged before national courts.

The EU has wide-ranging powers to approximate the laws of Member States. One of the most prominent examples is the power to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' (Treaty on the Functioning of the European Union, TFEU, Article 114). Internal market regulation can in principle extend to areas where a direct regulatory competence might otherwise be excluded. Well-known examples of this dynamic involve internal market rules governing tobacco products that are in practice decisively shaped by public health considerations (Weatherill, 2011). Without an internal market dimension, prohibitions in the public health-inspired regulation would only be possible in a sub-EU level national or regional context. However, when rules can be said to have as their object the

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functioning of the internal market, EU-level regulation is permitted even if those internal market rules are outright bans which are decisively shaped by public health considerations (see especially CJEU, C-380/03). EU Internal market legislation extends in practice beyond the EU: Non-EU states can become bound to implement the same or similar rules as members of the EEA or as parties to international agreements that require their application in those states (Nordberg & Johansson, 2016).

Gambling is, in principle, subject to EU internal market legislative powers. Public health and public policy considerations could by analogy be significant drivers of EU-level gambling regulation just as they have decisively shaped EU internal market regulation linked to tobacco control (see for example Directive, 2014/40/EU). However, when the internal market is regulated by specific legislative instruments, gambling services are often excluded from their scope. Thus, when the EU required new national restrictions on services to be notified and approved by the Commission in Directive, 2006/123/EC, Article 2 of the Directive specifically excluded gambling services. While gambling services are increasingly provided as information society services, Article 1 of the information society service Directive, 2000/31/EC contains an exclusion specific to gambling services. When the geo-blocking of commercial services from other Member States became governed by Regulation 2018/302, it incorporated the exclusions the Services directive and therefore did not apply to gambling services. There are some notable exceptions: because the technical regulations Directive 2015/1535 and its predecessors did not exempt gambling services, draft restrictions that apply specifically to information society services are notifiable to the Commission (see Commission Staff Working Document, 2012, chapter 4.2; CJEU, C-275/19; CJEU, C-711/19). Equally, some rules are issued in the form of non-binding recommendations rather than binding internal market rules. In 2014 the Commission issued recommendations on the protection of consumers founded on Article 292 TFEU (administrative cooperation) rather than proposing binding internal market consumer legislation as envisaged in Articles 114 and 169(2) TFEU (Commission Recommendation, 2014). The choice of measure consistent with national divergences in the protection of consumers in the field of gambling and illustrates that the Union exercises its legislative powers in areas of shared competence in line with the principle of subsidiarity.

There are some examples of EU-level regulation that applies also to gambling. This will have an effect on the extent to which Member States can legitimately claim to be pursuing similar aims. In early case law Member States have pleaded among others the need to protect the public from criminal activity. When EU-level rules achieve these aims, national regulation becomes redundant and may no

longer be applied. Thus, when gambling became subject to EU-level money laundering rules (for example in Directive 2015/849), Member States could no longer plead additional national rules on the basis that they sought to combat money laundering (CJEU, C-344/13, paras 41–43). Conversely, as gambling regulation is not approximated, EU law does not generally require the mutual recognition of national gambling (CJEU, C-316/07, paras 112–116; CJEU, C-660/11 & C-8/12, para 40; CJEU, C-347/09, para 98.).

In the absence of detailed secondary legislation that would harmonise gambling regulation at the EU level, EU law typically treats gambling as a service provided in a cross-border context or subject to the freedom of establishment (see for example CJEU, C-275/92, para 25). The overwhelming majority of EEA states at the time of writing employ some type of licencing system, whilst only Finland and Norway maintain monopolies (see also Borch; Järvinen-Tassopoulos, this volume). Article 49 of TFEU prohibits 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State', whereas Article 56 prohibits 'restrictions on freedom to provide services within the Union … in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.' It is also possible, albeit rare, for such rules to be subject to the Treaty freedom of movement for citizens (TFEU, Articles 20–21), workers (TFEU, Article 45), goods in Articles 28–30 (see CJEU, C-124/97) or capital (TFEU, Articles 63–65). These rules are collectively referred to as the 'fundamental freedoms' (see Barnard, 2019).

Many EU-level norms which govern gambling thus take their form as judgments of the Court of Justice of the European Union that interpret these two articles. The Court has explained its general approach paragraph 37 of its Gebhard judgment (CJEU, C-55/94):

National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. [para 37].

2 The Role of Courts and Administrative Authorities in Applying EU Gambling (De-)regulation

EU member states have widely accepted the Court's rulings on the primacy (e.g., CJEU, 6/64) and direct effect (e.g., CJEU, 2/74, and CJEU, 33/74) of the Treaty provisions governing the fundamental freedoms (Botman & Langer, 2020). In practice, national courts can be expected to disapply national rules that are found contrary to EU law. A significant amount of EU legal norms governing gambling are expressed in judgments of courts where this set of conditions is applied to national measures which restrict gambling services. This concrete evaluation of national measures typically takes place in national legal systems when national courts are presented with arguments that they should disapply national rules applicable to gambling services because they are contrary to the Treaty freedoms. If a restriction is found to be unjustified, national courts and administrative authorities are bound to give direct effect to many EU rules including the free movement of services and freedom of establishment.

As a point of departure, rules that are contrary to EU law must be disapplied (CJEU, C-409/06, para 69; CJEU, C-186/11 & C-209/11, para 38; CJEU, C-336/14, para 53). When gambling regulation restricts a fundamental freedom contrary to the Treaty, EU law also prohibits penalties imposed on actors breaching those rules (CJEU, C-3/17, para 67; CJEU, C-49/16, para 64). This does not automatically liberalise markets (CJEU, C-336/14 para 54), but EU law permits reorganising a monopoly in order to ensure that it complies with EU law (CJEU, C-186/11 & C-209/11, para 46; CJEU, C-336/14, para 54).

When national courts apply EU law, the courts can either interpret the Treaty rules themselves or ask for a binding interpretation from the Court of Justice of the European Union under the preliminary reference system in Article 267 TFEU. Courts from which there is no judicial redress are bound to do so unless the interpretation is clear or has been given in previous case law (CJEU, C-283/81; CJEU, C-26/62), and national courts must ask the CJEU questions when they suspect EU law to be invalid (CJEU, C-314/85). Because preliminary reference case law tends to be translated widely into the official languages of the Union by the Court itself, many of the pronouncements of the CJEU in particular are well-known. There is only limited horizontal evidence at EU level of how national courts apply those rulings in practice.

The EU also has a centralised enforcement system under Articles 258–260 TFEU, in which the Commission or Member States may bring infringement actions against Member States that fail to fulfil their obligations as Member States, for example by maintaining restrictions that the Commission considers

contrary to the Treaties. The Commission historically pursued such cases on an ad hoc basis, but the speed and rate at which it pursues these actions vary depending on the resources and interest of the Commission. It is not bound to bring proceedings (see CJEU, C-247/87) nor do Member States often bring proceedings against other Member States. EU-level control of gambling regulation has at best been variable until online gambling became a regulatory priority for the Union. In 2011, the Commission issued a green paper assessing the EU market in online gambling (European Commission. Green Paper, 2011) and followed up with an embryonic gambling policy in its 2012 Communication 'Towards a comprehensive European framework for online gambling' (European Commission, 2012; and the accompanying Commission Staff Working Document, 2012). As part of its new policy in 2013 the Commission took stock of existing complaints and launched infringement proceedings against a wide range of Member States which it considered to have unlawfully restricted cross-border gambling services (European Commission. Press release, 2013). This led to a number of reforms and in 2017, the Commission closed remaining infringement proceedings en masse, stating that the internal market in online gambling was no longer one of its policy priorities (European Commission. Press release, 2017). At the time of writing, EU-level interest in regulating gambling remains muted, although the Commission has continued to publish studies which evaluate the legal or practical feasibility of some regulatory tools (Hörnle et al., 2019).

General Principles of EU Free Movement Law Applied to Gambling

The focus of EU-level gambling regulation thus remains the case law of the Court of Justice of the European Union which interprets the fundamental freedoms to provide cross-border services on a temporary basis and the freedom to establish a business in another Member State. The Court provides definitive interpretations of EU law which are then expected to be applied to divergent national contexts. CJEU judgments can in some circumstances offer national courts guidance on how that interpretation may be applied, but in principle the application of the law to specific circumstances should be left to national courts, as the CJEU powers under Article 267 TFEU are limited to statements on the interpretation and validity of EU law itself (see Broberg & Fenger, 2014; Borman & Langer, 2020; CJEU, C-375/17). The principles enunciated by the Court can be very general in nature. However, they are given in response to specific regulatory and factual circumstance prevailing in the Member State and judgments are not always easy to transpose to a different national regulatory context. Thus, the ultimate outcome depends a great deal on how national courts apply these in individual cases.

The overall principles are very general in nature. Where national gambling regulation restricts cross-border trade, those rules are open to challenge in national courts and national administrative authorities on the basis that they are contrary to directly effective Treaty freedoms. The case law of the Court of Justice has established that the EU legal concepts of 'services' and 'restriction' are wide in scope and thus tend to govern all national rules that could make the exercise of cross-border freedoms less attractive (CJEU, C-55/94, para 37). According to the CJEU, it is settled case law that all measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU must be regarded as restrictions on the freedom of establishment and/or the freedom to provide services (C-222/15 CJEU, C-225/15, para 37; CJEU, C-463/13, para 45, CJEU, C-3/17, paras 23 & 38). The concept of 'restriction' covers rules governing how gambling machines can be made available to consumers (CJEU, C-124/97), the organisation of games of chance themselves (CJEU, C-3/17, para 38), how licences may be awarded (CJEU, C-375/17, para 56), rules that concern how bets may be transmitted to off-shore operators (CJEU, C-243/01; CJEU, C-336/14), rules governing the tax treatment of winnings (CJEU, C-344/13; CJEU, C-42/02; CJEU, C-153/08), prohibitions on advertising (CJEU, C-176/11; CJEU, C-447/08 & C-448/08), rules making games available via the internet (CJEU, C-156/13), rules governing gambling monopolies and their supervision (CJEU, C-124/97), and measures which affect how operators may act abroad (CJEU, C-186/11 & C-209/11). These measures all have in common the fact that they make offering a service less attractive and therefore constitute restrictions to the freedom to provide services and the freedom to establish.

National rules tend to fulfil this condition. Therefore, in EU free movement law, the legality of national rules turns on whether they are justifiable with a legitimate aim and whether the restriction of the freedom is proportionate to those aims (CJEU, C-338/04, C-359/04 & C-360/04 para 48; CJEU, C-42/07, para 59). Here, too, it can be difficult to separate interpretation from application. Typically, the CJEU provides guidance on which aims are possible but leaves the assessment of their proportionality to national courts. When national courts make references, the assessment of the facts and determining which objectives national measures pursue, is left to national courts (for example CJEU, C-156/13, para 24).

3 Which Reasons Can Justify National Restrictions on Gambling Services?

The case law of the Court of Justice examines numerous justifications put forward by national regulators when the compatibility of national rules with EU treaty freedoms is called into question. The case law has a unifying theme. The Court of Justice consistently observes, in line with its conventional jurisprudence on such justifications, that purely economic justifications such as protecting the public purse cannot be used to justify restrictions of the fundamental freedoms (Barnard, 2019, p. 477; but compare to Arrowsmith, 2015). This places gambling regulators in the difficult position of, on the one hand, needing to rely on other reasons to restrict cross-border gambling services and on the other, where a licence or monopoly system is in place in the Member State, avoiding references to the need to strengthen the financial position of the monopoly or licence providers. Measures which have that effect must be justified with reference to other aims and must be proportionate to those aims. The fiscal or economic effects of those measures must be incidental. In this respect it is difficult to measure to what extent national practice truly complies with that requirement. There is little case law where the suitability or proportionality of national measures is evaluated at EU level, and in line with its powers under Article 267 TFEU, the CJEU should, and typically does, leave the assessment of national measures to national courts, which refer questions to it. The circumstances of the preliminary reference case law nevertheless highlight measures, which are not dismissed out of hand, and types of justifications that can be relied on to justify those restrictions.

The Treaty text governing the fundamental freedoms have not been substantially amended since the 1957 EEC Treaty. As these provisions currently stand in the Treaty on the Functioning of the European Union, the free movement of services and the freedom of establishment, as well as the freedom of movement for workers, share three treaty justifications or derogations: public policy, public health, and public security (TFEU, Articles 52 and 45(3)). A separate, and somewhat more extensive, set of Treaty derogations applies to the free movement of goods (TFEU, Article 30), another to the free movement of capital (CJEU, C-64/08, paras 32–24). Even the most extensive of these lists is limited and fails to capture the full breadth of reasons why Member States might in today's economic and social climate wish to impose restrictions on gambling services. The Treaties also contain rules which exempt the exercise of official authority (TFEU, Article 51) and employment in the public service (TFEU, Article 45(4)).

The Court has generally stated that directly discriminatory restrictions may only be justified with reference to Treaty derogations (CJEU, C-344/13, para 43;

CJEU, C-375/14, paras 25–26). Examples of this type of rule include requirements to establish in the state where the service is provided (CJEU, C-64/08, paras 32–24; CJEU, C-3/17) and tax treatment which differentiates between domestic and inter-state winnings (CJEU, C-153/08, paras 36–68). Conversely, rules that provide for equal treatment irrespective of origin are not discriminatory (CJEU, C-124/97 para 28), nor is legislation which differentiates between services based on their objective characteristics. (CJEU, C-275/92 paras 49–51). In some cases, the Court allows monopoly regulators to impose restrictions that would not be allowed where those restrictions merely protect licence holders (CJEU, C-3/17, para 36; CJEU, C-42/07, para 72).

For those restrictions that are not overtly protectionist, the Court has accepted a wide range of justifications that are not expressed in the Treaty, which it labels 'overriding reasons in the public interest'. In addition to these judicial exceptions, states may also rely on the Treaty derogations. This case law, originally developed in the context of goods (CJEU, C-120/78), has since been transposed to services and the other freedoms (CJEU, C-288/89) The list of potential justifications is extensive and open. However, the true limits of Member State justifications lie in the prohibition of primarily economic aims, and the requirement that restrictions are proportionate to the aims which they pursue.

4 Do Restrictions Pursue Primarily Economic Aims?

Both monopoly and licence regulators are placed in a somewhat awkward position by the dogmatic approach of the CJEU to economic justifications. According to the 'established' case law of the CJEU, the gains made by public, non-profit or public interest causes cannot legitimately be used to justify restrictions on gambling services. The economic aspects of restrictions can only be an incidental beneficial consequence and may not be the primary justification (CJEU, C-275/92; CJEU, C-179/14, para 167 with references). Contributions made to public interest aims may not be the true reason for restrictions (CJEU, C-67/98, para 36). For this reason, the CJEU has rejected contributing to rural development by financing horse breeding (CJEU, C-212/08 paras 45–46 & 51–52), increasing (CJEU, C-98/14, paras 60–61) or maintaining the tax income of the state (CJEU, C-243/01, para 61). Restrictions which benefit the public purse can, however, be justified if it primarily seeks to achieve other overriding reasons in the public interest (CJEU, C-98/14, para 61; CJEU, C-67/98 para 36; CJEU, C-243/01, para 62). Although the European Parliament has suggested recognising the economic dimensions of gambling services, (European Parliament, 2016, para 57),

this is not yet a feature of EU regulation or the case law of the CJEU. Instead, the Court has accepted, or at least tolerated, aims that may have substantial economic impacts but which are overtly justified with reference to other aims.

In the gambling case law, the central issue concerns the tension between harm reduction, which underlies many gambling policies, and the possibility that this can also pursue economic aims. Restrictions may seek to channel gambling into lawful and supervised activity, and that for this reason it is legitimate also to pursue a policy of controlled expansion, even where the overarching purpose of regulation might be to reduce harm (cf. Borch, this volume). This can justify expanding the types of games offered, a certain level of regulated advertising, and establishing new channels for distributing those games (CJEU, C-338/04, C-359/04 & C-360/04 para 56). Even the most harmful games need not be prohibited where a Member State considers that exclusive rights channel gambling into the regulated system, that this enables the reduction of fraud and crime, and that this ensures profits channelled to public interest objectives (CJEU, C-124/97, para 37). There is, however, a fine line between controlled expansion and encouraging gambling in a way that endangers the objectives of gambling restrictions (for example CJEU, C-258/08; CJEU, C-243/01). If authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify restrictive measures (CJEU, C-243/01, para 69). There must also, in fact, be an unlawful or unregulated competing gambling market for channelling measures to be justified (for example CJEU, C-98/14, para 71 with references). Thus, where competing unregulated gambling services are effectively restricted, for example by electronic means, measures to channel demand will be more difficult to justify.

National courts and administrative authorities retain a substantial role in evaluating whether any particular measure should be deemed permissible channelling of demand or the kind of encouragement to gambling, which invalidate justifications to national restrictions (for example CJEU, C-338/04, C-359/04 & C-360/04, paras 54–58). There are, however, some cases where the Court gives strong guidance on this point. For example, in Engelmann (CJEU, C-64/08, paras 37–38), the CJEU considered that a requirement to establish in the Member State, in which the licence was held, was not proportionate. Although the Member State sought to justify this with reference to a need to supervise the activities of the undertaking, the CJEU considered that this can also be ensured using less intrusive means.

5 Only Evidence-Based Policy can be Justified

The EU (de)-regulatory framework requires Member States to pursue an evidence-based policy. This is because it is, in principle, for the Member State relying on a restriction to plead an overriding reason on the public interest, and to also show that its regulation is proportionate to the aims which it seeks to achieve.

It is striking, that even though national courts might intuitively be thought sympathetic to national regulatory aims, preliminary references regularly question whether national measures are in fact justified with reference to legitimate aims (for example CJEU, C-390/12; CJEU, C-186/11 & C-209/11, para 17; CJEU, C-347/09, para 59). For example, German courts have considered that the intensive advertisement campaigns of monopoly operators and regulatory policies that encouraged participation in highly addictive games left outside the scope of the monopoly meant that the monopoly could not be pursuing the public interest in a consistent and systematic way. (CJEU, C-336/14, para 27; CJEU, C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 & C-410/07, paras 22–25 & 35–38; CJEU, C-409/06, para 23). Similarly, in Pfleger (CJEU, C-390/12, para 16), an Austrian court found that the authorities had not demonstrated that the national monopoly genuinely sought to combat crime and protect gamblers, rather than merely maximise state income. The enormous advertising budget of the state monopoly suggested to the national court that the monopoly policy could not be limited, as case law required, solely to controlled expansion. Thus, national courts and administrative authorities could cast doubt on whether the measures in fact pursue the aims which are claimed as justifications.

An additional level of control exercised by courts in particular takes place when courts evaluate whether restrictions to fundamental freedoms are proportionate. Under the principle of proportionality, applied generally to restrictions of free movement, national measures must be both suitable for attaining the objectives and also the least restrictive measures that will achieve those objectives (CJEU, C-98/14, para 64). Proportionality may amount to an insurmountable evidentiary burden. It could be difficult to demonstrate, that the measures are the least restrictive measures to achieve those aims. The Court requires that Member States relying on an overriding interest demonstrate that the restriction is proportionate to this interest (CJEU, C-333/14 para 53–58 with references). This is especially problematic for monopolies, which must be justified with reference to particularly strict regulatory supervision (CJEU, C-212/08, para 58), which is consistent and systematic (CJEU, C-212/08, para 62). Proportionality control at national level is not explored well in transnational literature, not least because

a horizontal EU-level evaluation requires identifying, obtaining, and translating national judgments, which apply preliminary reference rulings, but also that possibly substantial body of case law in which references are not made.

6 Conclusions

Whenever legislation pursues multiple objectives, it may be necessary to determine which of those objectives should prevail in any given conflict situation. In the absence of EU-level legislation, treaty freedoms are currently the main mode of EU-level gambling regulation. EU free movement rules require Member States to justify restrictions to gambling services and demonstrate why those restrictions are proportionate. The Court of Justice of the European Union has generally rejected overtly economic justifications. In its gambling case law, controlled expansion is permitted because it seeks to channel demand to regulated offerings. However, when restrictions to cross-border services seek primarily to achieve economic aims, such justifications cannot succeed before the Court of Justice. The proportionality of restrictions to cross-border services must be assessed on a case-by-case basis. It is for the Member State restricting such services to demonstrate that its regulations are suitable for achieving the stated aims and no more restrictive than required in order to achieve those aims.

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