

Award in Gaming Law

Lecture Title: Online Gambling in the EU

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Diploma in Law (Malta)



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Agenda

- (1) Online gambling in the EU;
- (2) An overview of the status of online gambling across different EU member states;
- (3) The question of harmonisation across the EU;
- (4) The freedom of establishment and the freedom to provide services within the sphere of online gambling;
- (5) The exceptions to the freedom of establishment and the freedom to provide services and applicable case law.



Online Gambling in the EU



Online Gambling in the EU

- No sector-specific EU-wide legislation.
- EU countries are free to create their own regulatory framework, provided that they comply with the fundamental freedoms established under the Treaty on the Functioning of the European Union (“TFEU”).



An overview of the status of online gambling across different EU member states



Jurisdiction	Regulated Products	System	No. of licensees	Requirements/Restrictions	Mutual Recognition
Malta	Casino, lotteries, betting and skill games (landbased and online)	Dual system: (i) monopoly system (National Lottery); and (ii) licensing system (both B2Cs and B2Bs are subject to licensing). Other authorisations are also applicable.	Uncapped (except for operation of NL Games, and to a certain extent landbased casinos)	<ul style="list-style-type: none"> Established in the EU/EEA; Minimum share capital requirements; Key functions holders; Fit & proper test; Financial, operational & statutory requirements; Post-licensing compliance obligations; Licences fees & taxes; Player protection obligations. 	Yes (Recognition Notice)
Estonia	Casino, lotteries, betting and skill games (landbased and online)	Dual system: (i) monopoly system (lottery); and (ii) licensing system (only B2Cs are subject to licensing).	Uncapped (except for lottery which is reserved to a state-owned company)	<ul style="list-style-type: none"> Shareholders/UBOs/management must satisfy criteria (criminal, bankruptcy, breach of laws); Private or public limited companies (in the case of lotteries only organised by a public company with a min. share capital of €1M and all shares held by the state); Minimum share capital requirements of €1M (games of chance and lotteries); of €25,000 (games of skill); €130,000 (betting); Restrictions on advertising; Taxes, duties and state fees. 	No
Spain	Casino, lotteries and betting (landbased and online) Skill games are not regulated	Regulation/powers divided between the state and the regions. Dual system: (i) oligopoly system (lottery games, sport and charity pool betting entrusted to 2 incumbent operators); (ii) licensing system (landbased and online. The latter through a public call for online gaming licence applications).	<ul style="list-style-type: none"> The number of casinos authorised in a region, and which can be operated by the same operator, are limited; Gambling arcades can be limited in number (depending on the region); No limitation on the number of online gaming licences (but subject to public call either <i>ex officio</i> or request of interested party). 	<ul style="list-style-type: none"> Casino operators must be duly incorporated in Spain; Online gaming companies must have an address in an EEA MS; Minimum share capital requirements; Shareholders/directors/top-level management must undergo a suitability analysis; Deposit of financial guarantees; Compliance with tax and social security obligations; Licensee/management must not be involved in crime/bankruptcy/non-compliance with laws and regulations; Advertising: at state level there's a requirement for operators to be authorised; at regional level certain restrictions apply. 	No

Jurisdiction	Regulated Products	System	No. of licensees	Requirements/Restrictions	Mutual Recognition
Italy	Casino, lotteries and betting (online and landbased)	Dual system: (i) monopoly system (single concessionaire for Italy's National Lottery); and (ii) licensing system (through concessions following a call for public tender. B2B offerings don't require a licence).	Capped (tender process which are launched with inconsistent timings)	<ul style="list-style-type: none"> Any form of direct/indirect advertising is forbidden (only informative communications are allowed); Provision of guarantee for commitment of gaming activity; Proof of financial sustainability; Licence fees and taxes. 	No
The Netherlands	Casino and betting (landbased and online) Online lotteries are prohibited	Dual system: (i) oligopoly system (one landbased casino operator, two betting shop operators, and one lottery operator); (ii) licensing system (only B2Cs are subject to licensing).	<ul style="list-style-type: none"> Capped (for landbased casinos operators, lottery operator); Uncapped for online licences. 	<ul style="list-style-type: none"> Established within the EU/EEA; Operators are subject to an "active duty of care" to prevent problem gambling; Licence handling fee of €48,000; Taxes; Advertising restrictions. 	No
Cyprus	Casino (landbased) and betting (landbased and online) Online casino websites are totally prohibited	Dual system: (i) monopoly system (one landbased casino); (ii) licensing system (for landbased and online betting only).	Uncapped	<ul style="list-style-type: none"> Established in Cyprus or abroad and has a branch in Cyprus; Minimum share capital of €500,000; Bank guarantee of €550,000; Obligations and restrictions for advertising betting. 	No
Non-EU Jurisdiction					
The United Kingdom	Casino and betting (landbased and online) Except for the National Lottery, commercial lotteries are prohibited and other lotteries can only be operated for charitable purposes	Dual system: (i) monopoly system (British National Lottery); (ii) licensing system (landbased and online).	Uncapped (except in the case of the British National Lottery)	<ul style="list-style-type: none"> LCCP imposes extensive conditions upon licensees in the fields of social responsibility, AML, consumer fairness and transparency, responsible advertising and obligations to comply with various technical standards; Personal licences for key personnel; Integrity and probity investigations on applicant; Extensive disclosure of beneficial ownership; Financial suitability tests; Licence fees & taxes; Marketing & consumer protection restrictions. 	No

The freedom of establishment and
the freedom to provide services
within the sphere of online
gambling



Freedom of Establishment

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 49, the Treaty on the Functioning of the European Union



Freedom to Provide Services

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited 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.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 56, the Treaty on the Functioning of the European Union



Does online gambling fall within scope of these fundamental freedoms?

- The CJEU ruled for the first time in the Schindler Case (C-275/92) that:
 - the organisation of all games of chance or gambling such as lotteries can be considered an economic activity since there is a particular service provided for remuneration and an intention to make a cash profit; and
 - the notion of “*services*” within the meaning of Articles 56 TFEU applies not only to activities allowing users to participate in gambling, but also to the activity of promoting gambling.
- In Gambelli and Others (C-243/01) the CJEU further confirmed that services offered by electronic means are also covered by these freedoms.



Exceptions to the freedom of establishment and the freedom to provide services and applicable case law



Exceptions arising out of Articles 51 and 52 TFEU

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

(Article 51, TFEU)

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

(Article 52, TFEU)



Case Law



Three Part Test

Restrictions must be:

1. in pursuit of a legitimate public interest in conformity with goals set out within the framework and functions of the EU;
2. indistinctly applicable and non-discriminatory;
3. proportionate to the legitimate public interest which the MS seeks to protect.



Schindler (C-275/92)

Facts

German lottery agents importing lottery tickets and advertising within territory of the United Kingdom were accused of breaching UK legislation.

Defence

The defendants had right to pursue their activity in virtue of the freedom to provide services established by the TFEU.

Schindler (C-275/92)

National legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services.

The TFEU provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.



Zenatti (C-67/98)

Facts

Mr Zenatti acted as an intermediary in Italy for a London-based company SSP Overseas Betting Ltd. He provided Italian customers of the company with information on foreign sports events, information on bets and bank transfer forms were sent via fax or internet to the English bookmaker.

A restrictive tendering procedure was formulated restricting the number of licences for taking of such bets with regards to mentioned sports events.

The Criminal Code deemed the unlicensed operation of accepting bets as a criminal offence, for which Zenatti was held liable by the Questore di Verona.

Zenatti (C-67/98)

The TFEU provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.



Gambelli and Others (C-243/01)

Facts

Gambelli and other defendants belonged to an organisation of Italian agencies linked to an English bookmaker.

They were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State.

The activity was considered to be incompatible with the monopoly on sporting bets enjoyed by one operator, which constitutes an offence under Italian legislation.

Gambelli and Others (C-243/01)

The CJEU ruled that national legislation which prohibits, on pain of criminal penalties, the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular on sporting events, without a licence or authorisation from the MS concerned, constitutes a restriction on freedom of establishment and the freedom to provide services.

It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.



Engelmann (C-64/08)

Facts

Austrian legislation allowed the Federal Minister for finance to issue a total of 12 concessions permitting holders to operate gambling establishments, granted upon fulfilment of 2 pre-requisites: that the concessionaire must be a public limited company having its real seat in Austria and that the company is subject to supervision by the Ministry.

The 12 concessions were held by a single entity, Casino Austria AG. These were originally granted to the company for a max. period of 15 years but there had been no public call for tenders prior to the grant of these concessions.

Engelmann, a German national, was found guilty of unlawfully organising games of chance within the Austrian territory. He admitted that he never sought to obtain a concession since he could not fulfil the conditions (he did not have a public limited company with its seat in Austria).

Engelmann (C-64/08)

- The Austrian government argued that the underlying reason for the condition imposed was to allow for the effective supervision and for the prevention of illicit activities carried out for criminal and fraudulent purposes.
- The CJEU ruled that the categorical exclusion giving arbitrary privilege to a single commercial entity is disproportionate and exceeds what is necessary in the fight against crime. The CJEU stressed that privileged measures go against the principle of equal treatment and the prohibition of discrimination on the grounds of nationality.



Sebat Ince (C-336/14)

Facts

At the time, the German market had been regulated by an Interstate Treaty on gambling which prohibited private providers from offering public sports bets and games of chance, setting up a general state monopoly.

In 2013, the Federal Administrative Court in Germany ruled that the state monopoly violated EU law and was therefore inapplicable.

The Interstate Treaty was amended allowing up to 20 private providers to receive a sports betting licence, but the licensing process was beset with problems, and was challenged by unsuccessful candidates. As a result, no licenses were issued.

Ms Sebat Ince, a Turkish woman living in Germany, operated a sports betting terminal in Bavaria brokering sports bets for an Austrian provider without holding the required German authorization.

The unauthorized provision of sports betting services to German players was prohibited by German gambling law and considered a criminal offence and Ms Ince was charged by German public prosecution authorities.

Sebat Ince (C-336/14)

Article 56 TFEU must be interpreted as precluding a MS from penalising the unauthorised intermediation of sporting bets on its territory on behalf of an economic operator holding a licence to organise sporting bets in another Member State:

- (i) where the issue of an authorisation to organise sporting bets is subject to the obtaining of a licence by that operator in accordance with a procedure for the award of licences, such as that at issue in the main proceedings, if the referring court finds that that **procedure does not observe the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency**; and
- (ii) to the extent that, despite the entry into force of a national provision permitting the grant of licences to private operators, application of the provisions establishing a public monopoly regime with regard to the organisation and intermediation of sporting bets, deemed by the national courts to be contrary to EU law, has persisted in practice.

Monopoly, Licence Systems and Dual Systems

- Both the conferral of exclusive rights to operate gambling to a single body and the attribution of licences have been recognised by the CJEU as potentially proportionate measures in order to reach the objectives of limiting exploitation of the human passion for gambling and to avoid the risk of crime and fraud related to gambling.
- It is also possible that a MS subjects certain types of games of chance to a public monopoly, while others are subject to a system of authorisations granted to private operators (*Stanleybet vs Italy*; C-375/17).



Stanleybet vs Italy (C-375/17)

Facts

Proceedings instituted by online gambling operator, Stanleybet (i.e. Stanley International Betting Ltd, a company registered in the United Kingdom, and Stanleybet Malta Ltd., its subsidiary established in Malta).

Stanleybet argued that it had been prevented from participating in the tender for the concession for management of the Lotto, for which it deemed the concession to be in breach of EU law.

The Italian government argued that, the choice for a sole concessionaire model was *“a response to the need to channel the game into a controlled system and to an approach of responsible management by restricting competition within that particular market”*.

Stanleybet vs Italy (C-375/17)

- The sole concessionaire model constitutes an obstacle to the freedoms guaranteed in Articles 49 and 56 TFEU. However, these can be justified by overriding reasons in the general interest.
- Undistorted competition is liable to have detrimental effects, owing to the fact that operators would be led to compete with each other in inventiveness to make what they offer more attractive than what their competitors offer, and thereby to increase consumers' expenditure on gaming and the risks of their addiction.
- The fact that a MS has a sole concessionaire model for the exploitation of lotto games in contrast to the regulation of other games of chance, is not, in itself, capable of affecting the suitability of such a sole concessionaire model for achieving the objective for which it was established, according to the CJEU.



Unibet (C-49/16)

Facts

The Hungarian authorities established that Unibet was providing, on Hungarian-language internet sites, services relating to games of chance even though it did not hold the licence required in Hungary to carry on such an activity.

The authorities ordered that access be temporarily blocked from Hungary to Unibet's internet sites and imposed a fine on that company.

Unibet thereupon brought an action before the Administrative and Labour Court, Budapest, Hungary) seeking the annulment of those two decisions on the ground that the Hungarian legislation underlying them was contrary to the principle of the freedom to provide services.

Unibet took the view that, although, during the periods in dispute, operators established in other Member States could, theoretically, have been granted a licence in Hungary to organise online games of chance (as the provision of such services was not reserved to a State monopoly), it was in practice impossible for them to obtain such a licence.

Unibet (C-49/16)

Article 56 TFEU must be interpreted as precluding national legislation which introduces a system of concessions and licences for the organisation of online games of chance if it contains discriminatory rules with regards to operators established in other MS OR if it lays down rules which are not discriminatory but which are applied in a manner which is not transparent, or so as to prevent or hinder application from certain tenderers established in other MS.



Mutual Recognition and Passporting

- There is no obligation imposed on MS to unconditionally recognise a licence issued outside their territory, a situation which can be attributed to the lack of harmonisation in the sphere of betting and gaming (*Betfair judgment: C-203/08*).
- This does not imply that applicants are bound to go through the entire process again.
- MS licensing regimes need to take into account and conditionally recognise EU-licensed operators who have already fulfilled 'essentially the same' licensing conditions in another Member State.



Conclusions



Conclusions

- The provision and use of cross-border gambling services constitutes an economic activity that falls within the scope of the fundamental freedoms of the TFEU.
- Restrictions on the freedom of establishment and the freedom to provide services are prohibited.
- The CJEU recognises EU MS' rights to restrict the cross-border supply of certain gambling services where necessary to protect public interest objectives.
- MS must demonstrate the suitability, proportionality and necessity of the measure in question and that the public interest objectives are being pursued in a consistent and systematic manner.
- No obligation of mutual recognition of authorisations or licenses.

The question of harmonisation across the EU – debate to follow





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GROUP DISCUSSION: Should online gambling be harmonized at EU level?

**Q&A session – any questions
on the course sessions and/or
assignment titles?**



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