

Deregulation in the Field of Games on Chance/on-line Gambling – in Favour of Citizens

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Abstract— When we discuss the games on chance regulatory framework, we cannot miss one of its major parts: the on-line gambling issues. The regulation of this area is of outmost importance because of its social impact, such as protection of minors, protection of consumers, large possibility of addiction problems and money laundering. At the moment, there is no compliance with these rules at the European Union (EU) level. The only source of secondary law in this area, at the moment, is the European Court of Justice case law. Problems with on-line gambling have been rising permanently since the Internet became more and more popular. This area has been one of the fastest growing industries in the past ten years. Along with that, the questions of cross-border gambling issues are arising as well. Gambling is recognized as one of the fastest growing social problems. This article explores the possibility of protecting citizens/consumers from bad influences that are caused by on-line gambling. We are certain that one of the possibilities is to comply and regulate the rules dealing with this issue. The EU Law gambling sector is regulated by the rules of free movement of services and, according to those provisions, the operators are authorized to provide services from one European member state to another. The Member states can restrict that freedom only by overriding reasons in the public interest. According to the recent trends, the restrictions imposed to on-line gambling by each member state vary from being lawful to being illegal. This article gives an overview of the current situation in the EU legislation and stresses out the suggestions on what type of regulation is the best for EU citizens.

Keywords— games on chance; on-line gambling; EU regulation; freedom to provide services; EU law.

I. INTRODUCTION

This paper is focused on on-line gambling, bearing in mind that, in most European Union member states, a restrictive regime governs the gambling, consisting of prohibitions, state operations, monopolies or restrictive licensing regimes, depending on the type of gambling [1].

Games on chance are of special interest for the states and, of course, for the citizens. Regarding the state, there is

a benefit from the high income that comes from the taxes, but, on the other hand, it should be regulated and supervised. Closely connected to the games on chance are potential criminal issues like money laundering, addiction and illegal activities. In Europe, after a decade of market liberalization, which has been specially underlined through the technological development, organizing the games on chance is still exempt from the scope of Services directive on the Internal Market. This means that the EU member states are entitled to organize and, therefore, to restrict that freedom only by overriding reasons in the public interest (like consumer protection), public health and prevention of fraud under the subsidiary principle. Also, the Treaty on the Functioning of the European Union (TFEU) [6] principles of equal treatment, non-discrimination and proportionality should be taken into consideration when justifying the restrictions of free movement.

There are currently two different regimes of the national regulatory framework within the member states applied in the area of gambling: one based on licensed operators providing services within a strictly regulated framework and another on a strictly controlled monopoly (state owned, or otherwise) [7]. Different regulatory regimes applied to various traditional forms of off-line gambling can cause situations of legal uncertainty, which, among possible regimes, can be applied to on-line gambling [1]. According to the recent trends, restrictions imposed to the online gambling in each member state vary from being lawful to being illegal. In six member states, on-line gambling is illegal (Cyprus, Germany, Estonia, Greece, the Netherlands and Poland) and seven member states impose prohibitions on specific types of on-line gambling, such as on-line casinos and on-line games (Belgium, France, Finland, Hungary, Lithuania, Portugal and Slovakia) [8]. Some jurisdictions also distinguish home state providers established on their territory and foreign providers, and the regulation may apply only to home state providers or only to foreign providers, or to both [1]. The regulators are also entitled to make a distinction between gambling services provided domestically only and services provided to

residents in foreign jurisdictions (outgoing services). Some regulators prohibit gambling services from being provided domestically, but allow gambling operators established on its territory to provide such services to foreign jurisdiction only (outgoing services) [3]. These differences are described in the Table I, where the regulatory matrix for different situations within the games on chance regulatory framework is given. The situations detected differ whether the service is provided by home state or foreign providers and also for whom the service is provided, whether for home state or for foreign consumers.

TABLE I. REGULATORY MATRIX

Regulatory matrix		
	<i>Home state providers</i>	<i>Foreign providers</i>
Home state consumers	Home state services prohibition/monopoly /license	Incoming services prohibition/license
Foreign consumers	Outgoing services Prohibition/license/	Xxx

Traditionally, land based casinos have been restricted to particular territory and the regulatory controls have been applied to that territory, which is not possible to achieve with on-line gambling [16].

The prohibition aims at preventing the risk of social harms, such as gambling addiction, gambling by minors, association with crime and money laundering, consumer fraud. From the economic point of view, the restrictions usually form barriers of entry and possibility to operate on the market for on-line gambling. The result is reduced supply. According to the authors, the restrictions are only effective in minimizing the supply if they are effectively enforced and enforcement may be hampered by the gambling operator avoiding the operation from abroad, lack of resources and/or technological circumvention [19].

Gambling as a state monopoly is always under (or must be under) control of activities and taken steps are usually in favour of accomplishing the regulatory objectives [1]. The “monopolist” is usually under the regulation forced to give a part of his profits for founding charitable, cultural and sporting activities. The problem arising in practice is that state lotteries, for example, are state owned companies and it is questionable and must be very well regulated how to organize these founding, bearing in mind strict rules on competition and state aids.

When regulating on-line gambling, a few policy choices have been developed in order to limit the gambling on state monopoly, to charitable entities, outright prohibition, to license the private gambling operators on liberalized market [1]. Usual practice in member states is to prohibit gambling, except to extend expressly allowed by the law [5].

This article is structured in four sections. The structure is following a development of regulation in the area of games on chance, with special emphasis at on-line gambling. The

article describes practice of the ECJ and gives an overview of the EU current regulatory activities in the area.

II. ECJ CASE LAW

One of the most important regulators in the area of games on chance at EU level is the European Court of Justice. The period after the judgement in the Gambelli case (Case C-243/01 Criminal Proceedings against Pier Giorgio Gambelli and others [2003] ECR I-13031) [9], that was a turning point for the period that came after, we can realize the ECJ practice development in accordance with growing liberalization of the services in the area of games on chance. The reasons for justification of restrictions that were accepted by the ECJ in the period before the Gambelli case are not accepted any more. The margin of discretion for the member states in relation to restrictions for the free provision of services in this area is tightened up [18].

After a number of judgements in the previous period, ECJ in Gambelli case underlined that restrictions deriving from the national legislation, which prohibits the activities even through collection of bets in the area of sport, are considered as restriction that can be justified only by taking into account its goal and proportionality. For the first time, the ECJ underlined the thesis that restrictions, which were imposed by the member states, could not be justified if the same member state at the same time is pursuing a policy of substantial expansion of betting and gaming at national level. If participation in lotteries, games of chance and betting are encouraged by a member state aiming at deriving the benefit for itself, that state cannot rely on a need to uphold the public order in order to justify the restrictive measures.

If the member state gains profit from those activities, then that profit has to be acquired as only an incidental and not as a primary benefit. The ECJ states that the restrictions may be justified if they are required for consumer protection and for the preservation of social order, taking into account moral, religious and cultural factors and moral and financial consequences for individuals and society.

Furthermore, the main objective of such restrictions must reflect an overriding reason of general interest, such as a reducing of gaming opportunities. The procurement of finances for public funds, on the other hand, cannot constitute justification. The restrictions may not go beyond what is necessary to attain that objective and must be applied in a non-discriminatory manner.

In the Gambelli case, the ECJ states that it is for the national court to consider whether the principle of non-discrimination has been complied with, and whether, in practice, the conditions for running betting operations can be more easily satisfied by home state operators than by foreign operators. If so, those conditions are discriminatory.

This justification of the national measures that cannot be justified only by reasons from the Art 46 TEC (now Art 52 TFEU) or by the reasons from the ECJ case law, is

developed by a detailed analysis of such restriction from the aspects of proportionality and not going beyond necessary to attain the objective. This analysis that began with the Gambelli case was developed in a number of judgements that followed.

In Placanica case (Case C-338/04 Criminal Proceedings against Placanica and Others [2007] ECR I-01891) [10], one of the most important judgements in the area of on-line games in that period, the ECJ judgement concerned legality of criminal sanctions for persons in Italy that dealt with collection of bets without possessing a licence and police authorizations for the company that had registered seat outside the member state (Italy). The ECJ points out that legislation, which prohibits – on pain of criminal penalties – the pursuit of activities in the betting and gaming sector without a licence or a police authorisation issued by the State, places restrictions on the freedom of establishment and the freedom to provide services. However, those restrictions can be justified by moral, religious or cultural reasons, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming. Anyhow, the restrictions must nevertheless satisfy the conditions concerning their proportionality.

III. HARMONIZATION ACTIVITIES AT EU LEVEL

Beside the fact that the judgements of the ECJ are the source of secondary law and give solutions to the problems in this field, an inconsistent application at the national level gives legal uncertainty [1]. The EU Commission makes an effort to harmonize national laws in the area of on-line gambling that has been abandoned and the Commission has made steps in bringing the infringement proceedings against the EU member states when there are inconsistencies in the national regulation systems (The European Commission has taken steps against the Netherlands with respect to sports betting, Sweden with respect to poker tournaments and sports betting, Germany with respect to Internet gambling and advertising prohibitions, France and Greece with respect to sports betting, Denmark, Finland and Hungary with respect to sports betting and Austria and Italy concerning casino advertising and sports betting).

The Resolution of European Parliament on the Integrity of on-line gambling [11], besides the fact that ECJ case law considers gambling as a service of an economic activity, states that those are activities of a very special nature, due to the social and public order and health care aspects linked to them. The Resolution emphasizes that pure internal market approach is not appropriate because of highly sensitive matter and requires of the Commission to pay special attention to the views of ECJ. That leads to the third period of ECJ practice case law. In that period, the ECJ is coming back again to the principles that are similar to the principles from the period before the Gambelli case. In the area of freedom to provide services in the gaming sector, the member states again recall the public interest as a

justification for their restrictions in the area of free provision of services that are provided by the citizens from other states and, at the same time, they are encouraging those activities organized by the state aiming at securing the profits for the state [4].

If the national measure, which restricts free movement, is not discriminatory on the basis of nationality or the place of establishment, i.e. it is equally applicable on home state and foreign services providers, then its restrictions can be justified by the list of public policy reasons. The restrictions defined by the member states can be imposed as licences or authorizations or in a way of giving exclusive right for organizing the games on chance like state monopoly. Or, it can even be completely prohibited to organize the games on chance in a certain state. Just a need for efficient regulation in the area of games on chance deems for the supervision by the state on their territory. National authorities in the gaming sector have to provide licensing at the transparent, objective and non-discriminatory criteria in line with ECJ case law and control, if service providers comply with specific demands for licensing, and to provide regulatory framework through efficient measures at the national level [12].

From the ECJ case law it is obvious that the restrictions can be justified by overriding public interest requirements such as consumer protection, preventing overspending, preventing gambling addiction, preventing fraud and other crime, preserving public order and barring gambling from being a source of private profit. However, the Court has also held that financial objectives such as providing for the financing of charitable and cultural purposes or increasing tax revenues were not legitimate grounds for justifying restrictive measures [2].

IV. CONCLUSION

We cannot expect that the regulation of games on chance at European level will enable total liberalization of the games on chance market. However, member states should stop to recall overriding public interest reasons as justifications in the sector of games on chance and, at the same time, covering the real goal of their regulation, which is a protection from the foreign concurrence.

In fact, the number of procedures that the Commission has taken in the last period against the member states because of their non compliance with European law and restrictions in the area of games on chance, leads to this conclusion(http://ec.europa.eu/internal_market/services/gambling_en.htm). The Swiss Institute Study [5] was prepared as a model for harmonization of laws in that sector at the European Level, giving a detailed analysis of the national jurisdictions that regulate games on chance within the EU member states.

This analysis shows that the regulation framework in the area of games on chance is mainly governed by the

legislation which aims to protect public interest. To achieve the goal of protecting the public interest, member states often impose regulatory and other obstacles for provision of services in the area of games on chance that are contrary to the European Law.

According to the authors, when considering the cross-border on-line gambling, as there are different cultures on gambling issues in the EU, besides the regulations, there must be common political solutions as well. Measures to prevent negative consequences of gambling must be provided (The Swiss Study indicates that the risk of developing compulsive gambling is 5-7 times higher if you play poker on the computer than if you go in the ordinary casino). So, there is a reason why the on-line gaming operators must comply with the regulatory framework of the state where the consumer lives and, as stated before, there should be a political, rather than legal, clarification how to solve the problems on the European on-line gaming market [15].

Regarding the role of authority on the Internal Market, the Internal Market Information System (IMI) has already indicated good results as a flexible tool for administrative cooperation between member states. Thus, it should be considered whether IMI is right for administrative cooperation on gambling, which can provide cross-border exchange of information between public authorities. It is already used for two areas of professional qualifications and services. The benefits of IMI can be seen as benefits for member states and benefits for competent authorities. The benefits for member states are: no IT costs, adaptable to any administrative structure, secure transfer of data, compliant with data protection rules, single system to manage. For competent authorities: easy-to-use, no language problems, direct link within the EEA, clear procedure and fast response, help desk support, training material. In the area of gambling, IMI can work for administrative cooperation on gambling. There are several examples of possible cooperation, such as exchange of information on licence holders mutual assistance in case of suspected fraud, notification of national conditions imposed on licence holders and alerts in cases of unlicensed operators (illegal practice). The basic requirements for administrative cooperation through IMI include: there must be an agreement in the area of cooperation, there should be a legal basis for exchange of personal data, identification of authorities involved and technical adaptations to the IMI system (IMI, DG for internal market and services, market, www.imi.net).

The conclusion should be, by taking into consideration all the aforementioned, that the answer can be given after a detailed economic analysis of regulatory framework and the cost-benefit analysis which should lead for a more balanced approach or, in other words, to see whether a measure goes beyond what is necessary to achieve the specified policy aims.

As the authors stated before in this article, in the area of off-line gambling/ the tendencies are in the line with market liberalization and for the on-line gambling we need regulations. It is far more difficult to supervise and control on-line games on chance and effects of on-line gambling on consumer regarding the time of use, age of consumer and incomes of service provider. In that context, as we have already concluded, a special state policy is required concerning the consequences on the consumer. This service may have a common policy at EU level, as well as the realisation at member states level.

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