

CMS România: ECJ rulings attempt to strike balance in EU gambling sector

In the absence of harmonised EU gambling legislation, member states have the discretion to decide the level of protection granted to gambling consumers in their respective jurisdiction, according to the culture, religious and social values, consumer behaviour and the dynamics of the local market of each. However, an important factor in the gambling regulatory framework across Europe is the supremacy of EU law and the precedence principle, based on which gambling requirements enacted by a member state should not affect the integrity of rights provided under EU law. The European Court of Justice (ECJ) has been called upon more than thirty times to review whether national gambling regulations are compliant with EU principles.

This article explores the impact of ECJ rulings on the ability of each member state to chart its own course vis-à-vis gambling.

Background

It is domestic authorities who assess how the local regulatory framework on gambling should be tailored (e.g. whether it is necessary to restrict gambling-related activities and to what extent; what control mechanisms should be put in place; and what protective measures for players should be implemented).

The various domestic approaches to gambling across Europe reveal a multitude of liberal systems in countries such as Portugal, Romania and the Czech Republic that also include rules designed to protect children and compulsive gamblers from exposure to the game. However, recently more and more member states are considering additional restrictions to enhance consumer protection and limit the harmful effects of gambling in the face of increasing demand for gambling, and in particular the rise of online gambling.

An overview of regulatory developments across Europe shows a trend towards more restrictive gambling regulations, as indicated below:

UK – banned the use of credit cards for gambling to provide additional protection for vulnerable people;

Italy – banned all forms of gambling-related advertising and sports sponsorships;

France – created a new gambling regulator with an extended scope, additional powers and increased resources;

Sweden – restricted specific types of football betting, including limiting football betting for top-level games of club matches and national teams;

Norway – gave its national media authority the power to issue orders to prevent or impede access to illegal advertising in television or audio-visual ordering services;

Greece – restricted online gambling by implementing an age limitation for players and severely restricting advertising of RNG games.

While gambling requirements continue to rise at national levels, an important factor in the gambling regulatory framework across Europe is the supremacy of EU law by reference to domestic law of member states. In the gambling sector, the most common concern from the perspective of EU law regards the free movement principles (i.e. the freedom to provide gambling services).

Generally, if a national court rules that a national restriction is not in line with EU law, EU law will preclude that

national restriction (i.e. the national restriction will no longer take effect in that particular case). If, however, a national court finds the EU law to be ambiguous, equivocal or unclear, it may seek a preliminary ruling from the ECJ and will be bound to observe the ECJ's ruling.

As for the gambling sector, the ECJ was called upon more than 30 times to review whether national gambling regulations are compliant with EU principles. Below are the key takeaways from the most relevant ECJ preliminary rulings in the gambling sector, which may serve as guidelines for member states when moving forward with gambling requirements.

National restrictions must be in the general interest and only limit gambling activities in a consistent and systematic manner

The concept of "overriding reasons relating to the public interest" cited in most of the ECJ rulings listed below is based on Articles 43 and 49 of the EC Treaty. This concept allows member states to enact restrictions to free movement principles, provided those restrictions are justified by virtue of a connection, even on an occasional basis, with the exercise of official authority or on grounds of public policy, security or health. In addition, national restrictions may also be allowed as a derogation, provided they are duly justified by overriding reasons in the public interest.

As for how the national courts should read these provisions, the ECJ has provided an extensive interpretation and has consistently acknowledged in cases Gambelli 2003, Carmen Media Group 2010 and Pflieger 2014, that restrictions set at the national level must be suitable for achieving the objectives of the restrictive legislation in that they must serve to limit gambling activities in a consistent and systematic manner.

In Admiral Casinos & Entertainment AG 2016, the ECJ provided a more nuanced interpretation for the meaning of "in a consistent and systematic manner", ruling that the legislation in question must meet the declared objectives "not only at the time of its adoption, but also thereafter". In other words, the assessment of the original purpose of restrictive national legislation must go one step further and target all existing and future effects of the legislation.

National restrictions must be appropriate, proportional and non-discriminatory

In Stanleybet International 2013, with reference to Liga Portuguesa de Futebol Profissional and Bwin International 2009, the ECJ ruled that restrictive measures imposed at the national level "must satisfy the relevant conditions of proportionality and non-discrimination".

In Pflieger 2014, the ECJ goes further by ruling that member states hold the burden of proof and must supply national courts, which have been called on to rule on the matter, with the evidence to conclude that the domestic measure does indeed comply with the principle of proportionality. In order to determine the standard of proof required in such cases, member states should refer to ECJ case-law for guidance.

As a result, if national restrictions are challenged with EU law and a national court finds that a restriction affects the EU law in terms of proportionality and non-discrimination (e.g. by finding that the domestic law's underlying purpose does not represent a social problem justifying state intervention), the court must conclude that the national restrictions imposed are incompatible with EU law.

Maximising public revenue does not in itself justify restrictions

In Schindler 1994, the ECJ examined one of the most prolific member state arguments (i.e. "gambling as a source of income") and found that, even if gambling contributes significantly to the financing of public interest activities, this rationale cannot be regarded as proper justification.

Furthermore, in Gambelli 2003, the ECJ ruled that “in so far as the authorities of a Member State incite and encourage consumers to participate in gambling 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”. On the same note, in Berlington 2015, the ECJ held that the objective of maximising public revenue is “an incidental benefit” for the budget of the member state concerned, and ruled that this alone cannot permit a restriction of the freedom to provide services.

Conclusion

Based on its case-law to date, the ECJ shows a clear commitment to protect the freedom of services within the EU including the freedom to provide gambling services, all while attempting to strike a balance between operators’ rights to enter new EU markets and the sovereign authority of member states to implement control mechanisms in the gambling sector. National regulators are expected to consider this guidance from the ECJ and enforce gambling legislation along these lines.

Further legal developments in the gambling sector may occur in the near future and should be monitored by gambling operators and gambling-related services providers alike.

For detailed information on how these ECJ rulings could affect your gambling-related business, please reach out to your regular CMS contact or CMS experts **Ana-Maria Nistor** and **Sorin Predescu**.