2.1 Sectorial Quasi-Exemption or Liberalisation?

Publications on European gambling issues often take either the side of state monopolies or that of private operators. Haltern accurately noted that most of the literature on this topic has been produced by lobbyists and practitioners, and therefore has not necessarily enhanced the quality of the debate and thoroughness of argumentation. Furthermore, ideological views or economic ties regularly colour the drafting of contributions to the debate or of comments on judgments. Commentators often advocate that courts either grant a sectorial quasi-exemption of national gambling regulation from EU law or a liberalisation of gambling markets based on the supremacy of EU law.

The heat of the debate is not surprising given the significant monetary stakes for both private and state operators. A broader view reveals that the controversial nature of this debate is not specific to gambling. It is to be expected that economic regulation in areas involving high stakes is controversial and that stakeholders in such areas aggressively defend their own interests. The sectors of energy and telecommunication are good examples.

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It may be tempting to consider European Union law and national law as antagonistic – as if the application of one excluded the other.\textsuperscript{4} Therefore, it is necessary to move past the apparent controversy and consider the actual legal bases, which come from primary and secondary EU law and case law. Gambling services are an economic activity to which the Treaties apply,\textsuperscript{5} in particular the Internal Market provisions. According to the Treaty on the Functioning of the European Union (‘TFEU’), Internal Market issues are one of the areas in which \textit{shared competences} apply.\textsuperscript{6} Considering this division of powers, conflicts over the ‘right balance’ between Union and Member States’ interests are unsurprising. Apart from this interaction at European level, gambling regulation involves constraints from further legal orders.\textsuperscript{7}

\subsection*{2.2 Constraints Under National Law}

As EU law currently stands, European gambling law is foremost a matter for \textit{national law}. National legislators in Europe have opted for very different gambling regimes, ranging from the total prohibition of certain games to liberal licensing systems.\textsuperscript{8} Nevertheless, their regulatory choices are subject to certain constraints, which apply irrespective of those from EU law. National gambling laws must respect the \textit{national constitutional order}. Constitutional provisions and their interpretation by the courts generally recognise certain fundamental principles and fundamental rights. The principle of proportionality is one such principle. While legislators are generally free to choose the goals of state activities, many European constitutional orders adhere to the idea that the means to reach these goals must be proportionate.\textsuperscript{9} In addition, modern democracies also protect a number of

\textsuperscript{5}C-275/92 Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 35.  
\textsuperscript{6}Art. 4(2)(a) TFEU.  
\textsuperscript{9}Cf. e.g. Federal Constitution of the Swiss Confederation of 18 April 1999, ‘Swiss Federal Constitution’, SR 101, Art. 5(2): “State activities must be conducted in the public interest and be proportionate to the ends sought.”}
fundamental rights. Governments can limit these rights only under certain conditions. Limitations must usually have a legal basis, be justified by a legitimate public interest and be proportionate.\(^\text{10}\)

Accordingly, the wish of gambling operators to offer gambling services and of gambling consumers to use these services may be protected to some extent under the national constitutional order. As a matter of fact, constitutions regularly protect under various different notions the fundamental right to choose an occupation and to pursue an economic activity.\(^\text{11}\) National gambling regulation needs to take into account these safeguards of individual rights. This illustrates that even under mere national law, governments and parliaments are not completely free in their regulatory choices and administrative decisions but bound by legal obligations stemming from constitutional law.\(^\text{12}\) The well-known judgment of the German Constitutional Court regarding the unconstitutionality of the Bavarian gambling monopoly is an illustrative example.\(^\text{13}\) Often, these constitutional guarantees run in parallel to EU law.

Ennuschat correctly noted the commonality between the judicial test of the Court of Justice regarding EU law aspects and the judicial test of the German Constitutional Court regarding constitutional law aspects.\(^\text{14}\)

\(^{10}\) For example Art. 36 ibid.:
1 Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
2 Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
3 Any restrictions on fundamental rights must be proportionate.
4 The essence of fundamental rights is sacrosanct.

\(^{11}\) For example Art. 27 ibid.:
1 Economic freedom is guaranteed.
2 Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.”

\(^{12}\) Art. 5 ibid.: “1 All activities of the state shall be based on and limited by law.”

\(^{13}\) BVerfG, 1 BvR 1054/01, Verfassungsmässigkeit des deutschen Sportwetten-Monopols, Judgment of 28 March 2006.

2.3 Constraints Under Public International Law

The regulatory choices of national authorities are further affected by obligations under international law. In addition to the compulsory rules of public international law (ius cogens), states enter further obligations by ratifying bilateral or multilateral agreements. In relation to the regulation of gambling, treaties from two fields of law can contain provisions that may impact national gambling regulation: trade agreements and human rights treaties. With regard to the EU and EEA Member States, the relevant trade-related obligations mainly stem from EU and EEA law and WTO law, in particular the GATS. Relevant human rights obligations primarily stem from the European Convention on Human Rights (‘ECHR’). This book focuses on the case law under the EU Treaties and the EEA Agreement (see Sect. 3.4.5 i.f.). However, the experience of a limitation of national choices in regulating gambling is not specific to the Internal Market as WTO proceedings against the United States showed.

2.4 Interplay of EU Law and National Gambling Regulation

According to the TFEU shared competences apply in Internal Market affairs. This also applies to gambling services, which constitute an economic activity falling within the scope of the Treaties.


15 For example Art. 5(4) Federal Constitution of the Swiss Confederation of 18 April 1999: “The Confederation and the Cantons shall respect international law.”


18 Art. 4(2)(a) TFEU.

Article 2(2) TFEU notes regarding this constellation:

“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

It follows that EU Member States can exercise their legislative competence regarding the regulation of gambling. As Union law stands, it is still almost exclusively national law that directly regulates gambling (see Sect. 4.2). However, due to the supremacy of EU law and the requirement that Member States ensure fulfilment of their obligations arising from the Treaties, national law must be in line with the Treaty obligations, in particular the fundamental freedoms. Consequently, the question is not which set of law applies – national or European – but rather how the two sets of laws interact, and how the constraints of EU law impact national laws.

If national law conflicts with EU fundamental freedoms, the Member State concerned must show that its conflicting law serves a legitimate public interest objective. Moreover, the public interest must be balanced with the interest in an effective implementation of EU law (namely, proportionality). The answers to this balancing exercise cannot be found in the Treaties but in the case law, which is briefly outlined in the next chapter.

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20 Art. 4(3) TEU.
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