

The System of Licences and Permits for Organization of Online Gambling: Penalties for Violations of National Legislation Establishing a System of Licences and Permits for the Operation of Games of Chance

Judgment of the Court of Justice of the European Union of 22 June 2017 in the Case *Unibet International Ltd. v. Nemzeti Adó- és Vámhivatal Központi Hivatala*, C-49/16¹

Article 56 TFEU precludes national legislation that establishes a system of concessions and licences for online gambling in a way that discriminates against EU foreign operators

Article 56 TFEU precludes national legislation that establishes a system of concessions and licences for the operation of online games of chance if it provides for non-discriminatory rules, applied, however, in a non-transparent manner that prevents or impedes access to the EU market by foreign operators.

Article 56 TFEU precludes the application of sanctions resulting from violations of the EU legal order by national legislation establishing a system of concessions and licences for the organization of games of chance.

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Commentary

1. Subject Matter of the Proceedings

The ruling commented on here was issued following a request for a preliminary ruling on the interpretation of Article 56 Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47) (hereafter: TFEU) prohibiting all restrictions on

¹ ECLI:EU:C:2017:491.

the freedom of provision of services within the European Union. The referring court wondered whether, in light of the Court's case law on the interpretation of Article 56 TFEU in the field of gambling, national legislation, such as Hungarian legislation, which does not create a monopoly in the gambling market and which guarantees market operators a theoretical opportunity to enter the Hungarian gambling market, but the application of which still prevents market operators from offering their services, could be compatible with the Treaty.

2. Factual Grounds and Hungarian Law

Unibet International Limited (hereafter: Unibet) was a Malta-based company whose activities included arranging games of chance online. For this purpose, it held licences issued by several Member States. The company offered online games of chance in Hungary, without having obtained a licence for such activities. Following inspections of the content of the websites operated in Hungarian by Unibet, the Hungarian tax authority found that the websites allowed access to content that constituted games of chance within the meaning of Hungarian legislation on arranging games of chance, while Unibet did not have the licences required in Hungary. Following this violation, the Hungarian tax authority issued two decisions, first ordering that access to Unibet's websites be temporarily blocked from Hungarian territory, and then imposing a fine on Unibet. Unibet subsequently challenged the decisions, claiming that the requirements formulated in Hungarian legislation render Unibet in practice incapable of obtaining licensee status, which is a prerequisite for the issuance of an online gambling licence.

According to Hungarian regulations in effect as of the date of the first administrative decision under Articles 3(1)(a) and 3(3) of the Gaming Act, the right to organize lotteries and pari-mutuel betting, with the exception of horse racing totalizators and betting brokers, was reserved exclusively to the state gaming operator.

However, the state could cede the right to operate games of chance to third parties for a certain period of time based on a concession agreement. Such a concession contract could be entered into after the publication of a tender notice by the competent minister (Article 4(1) of the Gaming Law in conjunction with Article 5(1) of the Concessions Law) or without a tender procedure, with a "credible gaming operator" (Article 4(6) of the Gaming Law in conjunction with Article 10/C(2) of the Concessions Law).

"Credible gambling operator" within the meaning of Article 37(30)(d) of the Gambling Act meant an operator that had been operating gambling in Hungary for at least ten years. In addition, the operator should have had a share capital of at least HUF 200,000,000 (Article 29/D of the Gaming Act).

The referring court found that no tender proceedings have ever been conducted in this matter.²

² Opinion of Advocate General Maciej Szpunar delivered on 5 April 2017, C-49/16, ECLI:EU:C:2017:270, paragraphs 7–11.

At the stage of the second decision complained of, the national legislation had been partially liberalized, without causing any real change in the legal position of foreign entities wishing to participate in the Hungarian online gambling market.

According to Article 3(3) of the Gaming Law, as amended, the organization of online games of chance was no longer reserved exclusively to a state gaming operator. "Credible gambling operator" within the meaning of Article 37(30)(d) of the Gambling Act meant an operator that had been operating a gambling business in the state that issued the gambling licence for at least three years. In addition, it should have had a share capital of at least HUF 50 million (Article 29/D of the Gaming Law).³

According to Unibet, the company found itself in the position of being unable to conclude a concession agreement, regardless of which of the two procedures provided for in national regulations it would have attempted to follow.

The fact was noteworthy that the Minister of Economy did not issue a tender under the concession award procedure, thus depriving Unibet of the opportunity to participate in the first procedure. On the other hand, it did not have the opportunity to submit an offer to the minister in order to conclude a concession agreement reserved for "credible" operators within the meaning of Hungarian regulations, since it did not meet the legal criteria for qualifying as a "credible" gambling operator within the meaning of national regulations. In addition, the issuance of the second decision coincided with the entry into force of legislation that changed the definition of a "credible" gambling operator; thus, Unibet did not have enough time to develop a detailed offer.⁴

3. Proceedings before the Court of Justice of the European Union (CJEU)

All these circumstances led the national court to decide to suspend the proceedings and referred the following questions for a preliminary ruling:

- 1) Is Art. 56 TFEU to be interpreted as precluding a national measure under which a Member State's national legislation, which provides for the announcement of a tender for the award of a concession, if necessary, or the acceptance of a tender submitted for the purpose of obtaining a concession, provides a theoretical possibility for any operator meeting the conditions laid down by law – including an operator with an establishment in another Member State – to obtain a concession for the provision of online gambling services that have not been liberalized, either through a tender procedure or by submitting a bid, while in fact the Member State in question does not issue a tender for the award of the licence, nor does the service provider have the practical possibility of submitting a bid, and yet the authorities of the Member State find that the service provider has committed an

³ *Ibid.*, paragraphs 13–15.

⁴ Judgment of the Court of 22 June 2017 in the Case *Unibet International Ltd v. Nemzeti Adó- és Vámhivatal Központi Hivatala*, C-49/16, ECLI:EU:C:2017:491, paragraphs 23–25.

infringement of the law by virtue of providing services without a licence permit and impose an administrative penalty as provided by law (temporary blocking of access and a fine in the event of a repeat infringement)?

- 2) Does Article 56 TFEU preclude a Member State from introducing hierarchically superior legislation from the point of view of national law granting online gambling operators the theoretical possibility of providing online gambling services on a cross-border basis, when, in the absence of hierarchically inferior implementing legislation in the Member State, such operators are not in fact able to obtain the necessary licences from the authorities to provide the services?
- 3) If the court hearing the case in the main proceedings finds, in light of the answers to the previous questions, that the national measure is contrary to Article 56 TFEU, will that court act in accordance with EU law if it considers both the infringement found in the decisions of the Member State's authorities for providing services without authorization and the administrative penalty imposed for that infringement (temporary blocking of access and a fine) to be contrary to Article 56 TFEU?

At the outset of its analysis of the preliminary questions raised, the Court recalled the rich case law⁵ that outlined the basic standards for the compatibility of national gambling legislation with EU law.⁶ As emphasized by the TFEU, Article 56 of the TFEU requires the abolition of any restrictions on the freedom to provide services, even when those restrictions are applied indiscriminately to both national service providers and service providers from other Member States, if they are capable of prohibiting, impeding, or making less attractive the activities of a service provider established in another Member State where, according to the legislation, it provides the same services. National legislation that prohibits the operation of games of chance without a licence previously issued by the administrative authorities constitutes a restriction on the freedom to provide services guaranteed under Article 56 TFEU (see, similarly: *Pfleger and Others*, 30 April 2014, C-390/12, ECLI:EU:C:2014:281, paragraph 39 and the case law cited therein).⁷

Particularly in the gambling services market, however, restrictions on the freedom to provide services and freedom of establishment are permissible because of the need to protect an overriding social interest.⁸ This position was extensively discussed in the CJEU's judgment in Joined Cases C-338/04, C-359/04 and C-360/04 *Massimiliano Placanica, Christiano Palazzese and Angelo Sorricchio*.⁹ At the time, the Court stated that if public participation in non-legalized forms of gambling is a significant social problem,

⁵ S. Philippsohn, "Landmark Cases in Internet Gambling," *Gaming Law Review* 1999, vol. 3, no. 3, p. 331; D. Barwański, "Zasady świadczenia usług w zakresie gier hazardowych w prawie Unii Europejskiej," *Folia Iuridica Wratislaviensis* 2014, vol. 3, no. 1, p. 139 ff.

⁶ M. Lewandowicz, *E-hazard. Studium z komparatystyki prawniczej*, Warszawa 2013, p. 66.

⁷ Judgment of the Court of 22 June 2017 in the Case *Unibet International Ltd v. Nemzeti Adó- és Vámhivatal Központi Hivatala*, C-49/16, ECLI:EU:C:2017:491, paragraphs 32–33.

⁸ M. Lewandowicz, "Wybrane aspekty nowelizacji ustawy o grach hazardowych w świetle prawa unijnego," *Europejski Przegląd Sądowy* 2017, no. 8, p. 15.

⁹ CJEU judgment of 6 March 2007, ECLI:EU:C:2007:133.

the expansion of monopoly services may be justified by the state's desire to channel the public's propensity to gamble into a controlled path. In light of the state's policy of preventing the use of gambling for criminal activities by expanding the range of gambling services provided by state-owned entities on the one hand, and by reducing the number of licences for purely commercial gambling services on the other, it may be justified in limiting the provision of services. This thought was further developed in the *Liga Portuguesa* judgement,¹⁰ in which the Court stated that entrusting the operation of gambling to an entity subject to the highest state authority may be an appropriate measure to ensure consumer safety against the fraudulent activities of gambling operators. Exclusivity for the provision of online gambling services can be considered a necessary measure to achieve the goal of preventing crime. Indeed, a Member State does not have the same means of control over foreign online gambling operators not established in that Member State, but providing services at a distance.

Restrictions adopted by individual Member States within the scope of Article 56 TFEU may be considered justified on the grounds of overriding social interest¹¹ if the protection measures adopted are: proportionate, and therefore do not go beyond what is necessary to achieve the intended objective; non-discriminatory¹² in the sense that the same market and regulatory rules are applied to domestic as well as foreign gambling operators; and are part of a coherent and systematic policy.¹³

In order to justify legislation that derogates from a fundamental freedom, the Court's well-established case law requires that the system of concessions and licences for the operation of games of chance be based on objective and non-discriminatory criteria known in advance, which frame the discretion of national authorities, so that they do not use it arbitrarily.¹⁴

Public authorities that award concessions are bound by compliance with the obligation of transparency. Without necessarily implying an obligation to hold a tender procedure, this obligation of transparency on the awarding authority, which applies when a service concession is likely to be of interest to an undertaking based in a Member State other than the Member State in which it is awarded, requires that

¹⁰ CJEU judgment of 8 September 2009 in the Case *Liga Portuguesa de Futebol Profissional, Bwin International Ltd, formerly Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, ECLI:EU:C:2009:519.

¹¹ E. Skrzydło-Tefelska, "Nowe wyroki TS w sprawie organizacji gier hazardowych, cz. I," *Europejski Przegląd Sądowy* 2013, no. 1, pp. 37–38.

¹² J. Łacny, "Gry hazardowe w Internecie – ustępstwo wobec swobód rynku wewnętrznego?," *Europejski Przegląd Sądowy* 2012, no. 1, pp. 15–21.

¹³ G. Skowronek, *Prawne aspekty hazardu*, Wrocław 2012, p. 99; A. Zawadzka-Łojek, "Zróżnicowanie obszarów wrażliwych. Test proporcjonalności w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej dotyczącym hazardu" [in:] *Skutki braku notyfikacji przepisów technicznych ustawy o grach hazardowych dla wymiaru sprawiedliwości Rzeczypospolitej Polskiej*, ed. M. Taborowski, Warszawa 2016, pp. 470–471.

¹⁴ CJEU judgment of 4 February 2016 in the Case *Ince*, C-336/14, ECLI:EU:C:2016:72.

all potential bidders be guaranteed an adequate level of publicity to open the service concession to competition and to control the impartiality of its award procedures.¹⁵

In addition, the principle of legal certainty, a corollary of which is the principle of the protection of legitimate expectations, requires that legal rules be clear and precise, and their effects predictable, especially when they entail adverse consequences for individuals and businesses.¹⁶

4. Conclusions from the Proceedings before the CJEU

Considering the totality of the circumstances of the case, including, in particular, the established case law,¹⁷ the Court concluded that the Member State's provision that gambling operators should carry out the activity of operating games of chance in the territory of Hungary for at least ten years creates a difference in treatment based on nationality, as it discriminates against gambling operators based in another Member State *vis-à-vis* domestic operators who can more easily meet this requirement.¹⁸

The invocation of a single general interest objective is not sufficient to justify such a difference in treatment. In the absence of a reason why the need to carry out gambling activities in the territory of the host Member State more than in the territory of another Member State, and for a period of at least ten years, serves the intended objectives, such a provision must be considered discriminatory and contrary to Article 56 TFEU.

As for the obligation to carry out gambling activities on the territory of a Member State for a period of three years, it does not create an advantage for the host Member State and can be justified by a general interest objective. However, it is necessary that the rules of market access be applied transparently to all bidders. The obligation of transparency, flowing from the principle of equality, is in this context essentially aimed at ensuring that all interested parties can decide to bid in tenders on the basis of all relevant information, and at excluding any risk of favoritism and arbitrary treatment on the part of the awarding authority. This obligation, therefore, means that all the terms and conditions of the bidding process should be written in a clear, precise and unambiguous manner. This will allow, first, all reasonably informed and ordinarily diligent bidders to understand their exact scope and interpret them in the same way, and second, it will circumscribe the concession authority's discretion and enable it to actually verify that the bids meet the criteria to which the tender in question is subject.

¹⁵ CJEU judgment of 9 September 2010 in the Case *Engelmann*, C-64/08, ECLI:EU:C:2010:506, paragraphs 49, 50.

¹⁶ CJEU judgment of 6 October 2015 in the Case *Berlington Hungary and Others*, C-98/14, ECLI:EU:C:2015:386, paragraph 77.

¹⁷ J. Łacny, "Swoboda państw członkowskich w zakresie regulowania gier hazardowych – przegląd orzecznictwa TS," *Europejski Przegląd Sądowy* 2010, no. 12, pp. 37–47.

¹⁸ Similarly, in the judgment of 6 October 2003 in the Case *Gambelli and Others*, C-243/01, ECLI:EU:C:2003:597.

However, this requirement is not fulfilled by national legislation, according to which the legal prerequisites for exercising the powers of the Minister of Economy during such proceedings, as well as the technical conditions to be met by gambling operators when presenting their offer, have not been defined with sufficient precision.

Consequently, the Court held that Article 56 TFEU must be interpreted to preclude national legislation that establishes a system of licences and permits for the operation of online games of chance if it contains discriminatory provisions against operators established in other Member States, or if it provides for non-discriminatory provisions, but applied in a non-transparent manner or implemented in a way that prevents or impedes candidacy by certain bidders established in other Member States.

5. Polish Gambling Law in Light of EU Standards

In Poland, the Gambling Act was amended by a law on 15 December 2016. The purpose of the amendment was to reduce the incidence of harmful social and economic effects of gambling, by reducing the occurrence of the “gray zone” phenomenon in the gambling environment and by ensuring the highest possible level of protection of players from the negative effects of gambling, by raising the level of public awareness of the dangers of using illegal services of gambling operators. The extension of the state monopoly on the organization of online gambling (in addition to betting) is part of a coherent and systematic security policy in the sphere of gambling services, and the established restrictions on the freedom of movement of services are justified by considerations of protecting the overriding social interest.¹⁹

EU member states enjoy the option of adopting their own policies as to the content of gambling legislation.²⁰ The Court’s jurisprudence to date makes it possible to formulate predictions as to what the legislator should do in order to ensure the compliance of national legislation with the TFEU. However, as can be seen from the Unibet judgment, this is not a simple task.

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¹⁹ M. Lewandowicz, “Wybrane aspekty nowelizacji...,” p. 14.

²⁰ S. Biernat, “Działalność gospodarcza poddana reglamentacji w świetle orzecznictwa Trybunału Sprawiedliwości (na przykładzie prowadzenia gier hazardowych),” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 2018, no. 114, p. 427.

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Summary

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The System of Licences and Permits for Organization of Online Gambling: Penalties for Violations of National Legislation Establishing a System of Licences and Permits for the Operation of Games of Chance

The ruling, in Case C-49/16, addresses the question of whether legislation that does not create a monopoly in the gambling market and which guarantees market players a theoretical opportunity to enter the Hungarian gambling market, but the application of which still prevents market players from offering their services, can be compatible with the Treaty on the Functioning of the European Union (TFEU). The Court ruled that the interpretation of Article 56 TFEU precludes national legislation that establishes a system of concessions and licences for the operation of online games of chance if it contains discriminatory provisions against operators established in other Member States, or if it provides for non-discriminatory provisions, but applied in a non-transparent manner or implemented in a way that prevents or impedes candidacy by certain bidders established in other Member States.

Keywords: on-line gambling, freedom of provision of services, licences and concessions.

Streszczenie

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System licencji i zezwoleń na organizację gier hazardowych online – kary za naruszenia krajowego ustawodawstwa ustanawiającego system licencji i zezwoleń na prowadzenie gier losowych

Orzeczenie w sprawie C-49/16 dotyczy pytania, czy przepisy, które nie tworzą monopolu na rynku gier losowych i gwarantują podmiotom działającym na rynku teoretyczną możliwość wejścia na węgierski rynek gier losowych, lecz w praktyce uniemożliwiają im oferowanie swoich usług, mogą być zgodne z postanowieniami Traktatu o funkcjonowaniu Unii Europejskiej. Trybunał orzekł, że wykładnia art. 56 TFUE stoi na przeszkodzie ustawodawstwu krajowemu, które ustanawia system koncesji i zezwoleń na urządzenie gier losowych online, jeżeli zawiera ono przepisy dyskryminujące operatorów posiadających siedziby w innych państwach członkowskich lub jeśli przewiduje ono przepisy niedyskryminujące, stosowane jednak w sposób nieprzejrzysty lub wykonywane w sposób, który uniemożliwia lub utrudnia kandydowanie przez niektórych oferentów posiadających siedziby w innych państwach członkowskich.

Słowa kluczowe: hazard online, swoboda świadczenia usług, koncesje i zezwolenia.