

The creation and application of gaming licence case law

Over the last five years, the Court of Justice of the European Union (CJEU) has pronounced several decisions on gaming licences, setting out a system of detailed rules. These criteria are now settled case-law and are quoted by the CJEU and national courts, as Martin Arendts, Attorney at Law at Arendts Anwälte, explains.

In six major decisions, the CJEU developed criteria on how gambling licences should be awarded under EU law. After a decision on the infringement procedure against Italy with regard to horse betting licenses in 2007¹, the CJEU (then ECJ) had to deal with referral cases. The Sporting Exchange decision concerned the licensing of gambling operators in the Netherlands². In September 2010, the CJEU had to look into requirements for licensing procedures in referral cases from Germany (Carmen Media Group decision³) and from Austria (Engelmann decision⁴). In two more recent judgments, the CJEU revisited the situation in Austria (Dickinger decision⁵) and Italy (Costa decision⁶).

These criteria can be regarded as settled case-law. In its Garkalns decision, regarding the licensing of an arcade in Latvia⁷, the CJEU cited the obligation of transparency. Several national courts have referred to the criteria of the CJEU. The Administrative Court of Justice of the EEA Member State Liechtenstein declared the licensing procedure for a casino null and void, quoting the Costa and Engelmann decisions⁸. In August 2012, the Administrative Tribunal of Upper Austria cited the CJEU and referred a new case to the CJEU⁹.

Freedom and principles

Betting and gaming are not regulated by secondary EU law¹⁰. However, primary EU law, here the fundamental freedoms and the basic legal principles, apply to gaming. According to the settled case-law of the CJEU since its Schindler decision¹¹, services with regard to gaming services are economic activities under EU law. From the basic freedoms and the principles of equal treatment and non-discrimination, the CJEU developed a detailed obligation of transparency. According to the CJEU, 'the public authorities which grant betting and gaming licences have a duty to comply with the fundamental rules of the Treaties and, in particular, with Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency'¹². Even if only a single licence is issued, the Member State has to give regard to the requirements arising from the freedom to provide services, the principle of equal treatment and the obligation of transparency, when granting a licence¹³.

The CJEU also reviews the freedom of establishment. In the Engelmann decision, the CJEU held that the condition that persons wishing to operate gaming establishments must adopt the legal form of a public limited company is a restriction on freedom of establishment. Such a condition prevents operators who are natural persons and undertakings which, in the country they are established, have chosen another form from setting up a secondary establishment¹⁴.

Principle of proportionality

According to EU law, requirements for licence-holders, which infringe fundamental freedoms, have to be proportionate. Restrictions must

satisfy the principle of proportionality. National legislation is appropriate for achieving the objective invoked only if the means used are consistent and systematic¹⁵. The CJEU, in its Dickinger decision, pointed to the fact that the requirement for a share capital¹⁶ may be of use in order to ensure a financial capacity on the part of the operator to guarantee that he is in a position to meet obligations. However, the restriction imposed must not go beyond achieving the aim¹⁷. Also, the prohibition of setting up branches outside the Member State is not justified¹⁸. The withdrawal of a licence is only proportionate to combat criminality, if it is based on a judgment which has the force of *res judicata* and concerns a serious offence¹⁹. The long duration of a concession constitutes a restriction on the exercise of the freedom to provide services and the freedom of establishment²⁰. A duration of 15 years for a casino licence is only justified if the licence-holder needs time to recoup the investments required to set up a gaming establishment²¹. Such a duration would not be proportionate for games of chance that do not require premises.

Effectiveness & judicial review

The CJEU connects material law with procedural law as it points to the obligation of the competent authorities to exercise their powers in a transparent manner, so that the impartiality of procedures can be monitored. When a licensing system is introduced in a Member State, such a licensing system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to the fundamental freedoms²².

Anyone affected by a restrictive measure must have a judicial remedy available to them²³. National law must ensure the protection of the rights of operators and tenderers. Those rules must not be less favourable than those governing similar domestic situations²⁴. They must not make it excessively difficult to exercise the rights conferred by EU law²⁵. A court can only effectively review a licensing procedure, if all relevant documents are available.

Obligation of transparency

The obligation of transparency must be met before a Member State can award licences because the effects of the award on undertakings established in other Member States are the same as those of a service concession contract²⁶. According to the CJEU, the licensing procedure has to be transparent and must be based on objective, non-discriminatory criteria known in advance²⁷.

A duty of transparency shall enable the concession-granting public authority to ensure that the principles of equal treatment and non-discrimination are complied with²⁸. The whole licensing procedure must be transparent. Therefore, 'the concession-granting authority has to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed.'²⁹ The absence of transparency for the purposes of the grant of concessions infringes fundamental freedoms³⁰. Not only gaming operators from other Member States, but also potential market entrants, must have the possibility to know the licensing criteria. In order for the impartiality of the authorisation procedures to be monitored, the competent

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authority has to base each decision on reasoning which is accessible to the public. The authority has to state precisely the reasons for which authorisation has been refused³¹.

Licensing requirements and selection criteria have to be published to be known in advance. There is no obligation to publish the tender of a gaming licence in the Official Journal of the EU³². However, without a pan-European publication, the strict transparency requirements cannot be fulfilled. According to the CJEU, it 'is essential to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority.'³³

The obligation of transparency implies that all conditions and rules of the procedure must be drawn up in a clear, precise and unequivocal manner. The CJEU deducts from the principle of legal certainty 'that rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings'.³⁴ Therefore, it raises doubts whether a reference to 'any other offence liable to breach the relationship of trust with the AAMS' can be understood by a reasonably informed tenderer exercising ordinary care³⁵. Conditions that can be interpreted differently are not precise. So, a provision in a model contract with 'two alternative outcomes based on radically different interpretations' is unclear³⁶.

Prohibition of discrimination

The principle of equal treatment requires that all potential tenderers be afforded equality of opportunity and implies that all tenderers must

be subject to the same conditions³⁷. The grant of a concession, in the absence of transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, contrary to the principle of equal treatment and the prohibition of discrimination, and constitutes indirect discrimination³⁸. The obligation on concessions to operate gaming establishments in national territory constitutes a restriction on freedom of establishment³⁹. If requirements for a licence can more easily be fulfilled by applicants located in the awarding Member State, this could also be indirect discrimination.

Equal treatment

In its Costa decision, the CJEU expressly requires a level playing field for established licence-holders and new applicants. The unlawful exclusion of certain operators can only be remedied by allowing new licence-holders to engage in activity under the same conditions as existing operators⁴⁰. The obligation for new licence-holders to observe a minimum distance between existing establishments protects the market position acquired by operators already established⁴¹. Financial stability or return on past investments cannot be accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom⁴².

Liechtenstein

The Administrative Court of Liechtenstein had to review the licensing procedure for the single casino licence granted under the Liechtenstein Gaming Act. The court held that the procedure did not fulfil these criteria and declared the licence null and void⁴³. The

deadline for the licence application was 31 March 2011. An evaluation sheet with selection criteria was notified with the government in April 2011, but not published. The two applications received were ranked according to the points scheme. The applicant who was not awarded the licence filed an action against the decision.

The Administrative Court of Liechtenstein quoted the Costa decision and applied the criteria of the CJEU. The fact that the weighting of the selection criteria was determined retroactively infringed the requirement of 'criteria known in advance'⁴⁴. The applicants could not foresee how the criteria were evaluated. The suspicion caused by the non-objective determination of selection criteria, could amount to a breach of the prohibition of discrimination⁴⁵. The court concluded that the licensing procedure infringed the principle of equal treatment and the obligation of transparency⁴⁶.

Austria

In August 2012, the Administrative Tribunal of Upper Austria raised doubts whether the Slot Machines Act of Upper Austria (and the licensing procedure) was in conformity with EU law and constitutional law. The Tribunal referred two cases to the Austrian Constitutional Court⁴⁷. The Tribunal, *inter alia*, questioned the justification of the maximum three licences awarded according to the act. The Tribunal also referred a case to the CJEU for a preliminary ruling⁴⁸. The Tribunal posed four questions and asked for a clarification of the principle of proportionality with regard to gaming and the justification of a (quasi-)monopoly for gaming services. In this aspect, it also wants the CJEU to explain the rule of law principle, underlying Article 16

Charter of Fundamental Rights of the EU, and/or the fairness and effective remedy rule according to Article 47.

Germany

The Liechtenstein and Austrian cases show that the current licensing procedure in Germany, in which 20 sports betting licences shall be issued under the new Interstate Treaty on Gambling, will not survive the inevitable judicial review. There is no factual basis for the maximum amount of 20 licences. Even more essential is the fact that the detailed licensing criteria have not been published yet, although the deadline for applications was 12 September 2012. The European Commission has already criticised the fact that the licensing criteria were not clear and should be specified in the tender⁴⁹. However, the tender document only referred to an 'information memorandum' with more detailed criteria, especially for the five concepts to be elaborated by the applicants in the second step of the procedure. This information memorandum has not been published yet, so not all material information is known in advance, as required by the obligation of transparency. Even the 'reasonable informed tenderer' could not evaluate his chances. Some of the required documents for the application are not available in all Member States, which might be regarded as indirect discrimination. The principle of equal treatment is clearly infringed by the fact that the former monopoly operators can use their distribution network of 26,000 agencies, while new licence-holders will be allowed to have only limited betting shops.

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1. ECJ, C-260/04, Commission v Italy.
2. CJEU, judgment of 3.6.2010 - C-203/08.
3. CJEU, judgment of 8.9.2010 - C-46/08.
4. CJEU, judgment of 9.9.2010 - C-64/08.
5. CJEU, C-347/09, Dickinger and Ömer.
6. CJEU, Costa & Cifone, C-72/10, C-77/10.
7. CJEU, judgment of 19.7.2012 - C-470/11.
8. Liechtenstein, 31.5.2012, VGH 2012/030.
9. Oberösterreich, VwSen-740121/2/Gf/Rt.
10. An exception is only the obligation of the Member States according to directive 98/34/EC which lays down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, cf. with regard to gaming CJEU, Fortuna (C-213/11), Grand (C-214/11) and Forta (C-217/11) and C-31/12 - Wojciech Ziemiński and Andrzej Kozak.
11. CJEU, Schindler, C-275/92, para. 25. Confirmed in Carmen Media Group para. 40.
12. Costa decision, para. 54.
13. Sporting Exchange decision, para. 46.
14. Engelmann decision, para. 28.
15. Costa decision, para. 63.
16. Austrian Gambling Act: an applicant for the single lottery licence must have a paid-up nominal/share capital of at least EUR 109 m.
17. Dickinger decision, para. 77.
18. Cf. Dickinger decision, para. 88.
19. Costa decision, para. 81.
20. Engelmann decision, para. 46.
21. Cf. Engelmann decision, para. 48.
22. Sporting Exchange, para. 49; Carmen Media Group, para. 86; Engelmann, para. 54.
23. Sporting Exchange decision, para. 50.
24. Costa decision, para. 51.
25. Costa decision, para. 51.
26. Engelmann decision, para. 53.
27. Sporting Exchange, para. 50; Carmen Media Group, para. 87; Costa, para. 56.
28. ECJ, C-260/04, para. 24.
29. CJEU, Engelmann, para. 50, Sporting Exchange, para. 40 and 41.
30. Engelmann decision, para. 56.
31. Garkalns decision, para. 43.
32. The licensing procedure under the new German Interstate Treaty on Gambling published in the Official Journal on 08.08.2012.
33. Costa decision, para. 73.
34. Costa decision, para. 74.
35. Costa decision, para. 79.
36. Costa decision, para. 87.
37. Costa decision, para. 57.
38. Engelmann decision, para. 51.
39. Engelmann decision, para. 32.
40. CJEU, Costa, para. 52.
41. Costa decision, para. 58.
42. Costa decision, para. 59.
43. VGH Liechtenstein, VGH 2012/030.
44. VGH Liechtenstein, para. 5.1.
45. VGH Liechtenstein, para. 5.2.
46. VGH Liechtenstein, para. 5.3.
47. UVS Oberösterreich, VwSen-740042/5/Gf/Rt and VwSen-700050/6/Gf/Rt.
48. UVS Oberösterreich, VwSen-740121/2/Gf/Rt.
49. European Commission, letter of 20.March 2012 in the notification procedure 2011/0188/D.