

Anonymised version

C-440/23 - 1

Case C-440/23

Request for a preliminary ruling

Date lodged:

14 July 2023

Referring court:

Prim'Awla tal-Qorti Ċivili (Malta)

Date of the decision to refer:

11 July 2023

Applicant:

FB

Defendants:

European Lotto and Betting Ltd

Deutsche Lotto Und Sportwetten Limited

CIVIL COURT, FIRST HALL
COURTS OF JUSTICE, MALTA

[OMISSIS]

Order of reference to the [OMISSIS] Court of Justice of the European Union
in accordance with Article 267 [TFEU] [OMISSIS] in the proceedings
[OMISSIS]:

[OMISSIS]:

FB [OMISSIS]

v.

European Lotto and Betting Ltd
[OMISSIS]
&
Deutsche Lotto Und Sportwetten Limited
[OMISSIS]

The Parties

The parties in these proceedings are FB (the plaintiff) [OMISSIS] and

European Lotto and Betting Ltd [OMISSIS] and Deutsche Lotto Und Sportwetten Ltd [OMISSIS] (the defendants).

The basis for the request

- 1 The parties are in dispute over the recovery of lost stakes. The plaintiff is claiming losses from assigned rights, which arose from playing online slots and from playing (secondary) lotteries.
- 2 According to German law ([OMISSIS] [Paragraph] 4 (1) and (4) GlüStV), a permit is required to organise gambling in Germany. The organisation of gambling without a German permit is prohibited. The regulation in the version valid at the time read:

"Section 4 (1): Public games of chance may only be organised or brokered with the permission of the competent authority of the respective country. Organising games of chance without such permission (unlicensed gambling) and participating in payments in connection with unlicensed gambling are prohibited.

Par. 4: The organisation of public games of chance on the Internet is prohibited.

Par. 5: "By way of derogation from Para. 4, the Lander may, in order to better achieve the objectives of § 1, permit the self-distribution and brokerage of lotteries as well as the organisation and brokerage of sports betting on the Internet..."

- 3 [OMISSIS] Section 134 of the German Civil Code [BGB] reads:

"A legal transaction that violates a statutory prohibition is void, unless the law provides otherwise."

- 4 [OMISSIS] Paragraph 812 BGB reads:

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"Whoever obtains something without legal cause by the performance of another or in any other way at his expense is obliged to surrender it to him."

- 5 The defendant offers online slots as well as lottery services under a licence issued by the Maltese Gaming Authority (MGA). The defendant offers lotteries to customers online in a similar manner to those offered by state operators. The customer can place a bet on the outcome of a number draw. However, the defendant does not organise its own number draws, but enables customers to place a bet on the outcome of the number draws of other lottery providers. This service is known in Germany as a '[OMISSIS] secondary lottery [OMISSIS]'. Thus, the players' experience is similar.
- 6 The plaintiff claims that the defendant provided its services to the cedent '[OMISSIS] illegally [OMISSIS] because it did not have an additional German [OMISSIS] licence. According to him, the violation of the German prohibition to organise games of chance without [a] German permit leads to the nullity of the contracts according to [OMISSIS] Paragraph 134 BGB. The defendant therefore had to refund all lost stakes according to [OMISSIS] Paragraph 812 BGB (unjust enrichment).
- 7 The defendant is of the opinion that [OMISSIS] it is excluded from a German permit for online slots as well as for (secondary) lotteries in violation of its right to free movement of services. The court could therefore not use the failure to fulfil the administrative formality of '[OMISSIS] permit [OMISSIS] to its disadvantage. [OMISSIS] Its service had not been '[OMISSIS] illegal [OMISSIS] in Germany. The prohibition of the organisation of online slots and online (secondary) lotteries without a German permit may not be applied. The defendant claims that the cedent is acting in abuse of rights and in bad faith. The defendant holds that such a [OMISSIS] claim [from a player] for the refund of losses against a Malta-licensed operator necessarily constitutes an abuse of rights and bad faith on the [part] [OMISSIS] of the player. The plaintiff disagrees on this point and relies on the jurisdiction of all German Higher Regional Court[s] which have not [thus far] followed this argument in any of the [cases involving] player claim[s] [OMISSIS].
- 8 German law applies to the contractual relationship between the parties. Pursuant to [OMISSIS] Paragraph 812 of the [OMISSIS] BGB [OMISSIS], it is possible to reclaim what another party has obtained without legal cause through performance or in any other way. Under German law, the organisation of games of chance is prohibited without a German permit. According to German case law, these § 4 par. 1 and par. 4 GlüStV are prohibition laws in the sense of § 134 BGB. The nullity of the individual gambling contracts therefore leads to the obligation to [re]pay [OMISSIS] lost stakes.
- 9 However, it is questionable whether the freedom to provide services and the prohibition of abuse of rights recognised by the Court of Justice [preclude]

[OMISSIS] a claim [of] [OMISSIS] unjust enrichment in a case with the special features mentioned.

- 10 A distinction must be made between online (“virtual”) slots and online (secondary) lotteries. The area of virtual slots and the area of lotteries were regulated differently during the relevant period.

I. **On losses from online slots**

- 11 For the area of online slots and all other online casino games (roulette, blackjack, online poker, etc.), a German permit was necessary, but not available. However, private and state providers could obtain licences for this segment at the terrestrial level practically at will. In Germany, slot machines are omnipresent, both in gaming halls and restaurants as well as in numerous [c]asinos.¹ Since 2012, online lotteries and sports betting have been permitted.
- 12 At the end of 2019, the federal states agreed at the executive level to amend the State Treaty on Gaming and to lift the total ban on all online casino games. The draft of an amended State Treaty was notified to the EU Commission in May 2020. It states in [OMISSIS] [Paragraph] 4 para 4:

[OMISSIS]A licence for public games of chance on the internet may only be granted for the self-distribution and brokerage of lotteries, the organisation, brokerage and egg-distribution of sports betting and horse betting as well as the organisation and self-distribution of online casino games, virtual slot machine games and online poker.[OMISSIS]

- 13 By way of explanation, the Communication to the Commission states:

*[OMISSIS]The German Länder have agreed on the attached draft State Treaty on Gambling 2021 as a follow-up regulation for the period from 1 July 2021. The draft contains a further development of the content of gambling regulation in Germany, whereby the previous objectives of the State Treaty on Gambling (§ 1) are retained **unchanged** and at the same time it is to be **made possible for private providers under strict conditions to offer certain further online gambling games - previously prohibited in Germany** - in order to offer players a legal, secure alternative to the games offered on the black market. ... The state monopoly on lottery events (§ 10) ... will essentially be maintained.’ [OMISSIS]*

- 14 On 8 September 2020, the heads of the state and senate chancelleries passed a resolution on gambling in the transition period until 1 July 2021. The resolution concerns how to deal with providers of such unlicensed gambling, which was generally prohibited at the time but will be licensable from 1 July 2021. It states:

¹ <https://www.spielbanken.com/deutschland/>

[OMISSIS] *Until 30 June 2021, enforcement against unauthorised gambling offers will be concentrated on those providers for whom it is foreseeable that they will also want to evade probable future regulation. [...] The Länder will take action against these providers of unauthorised gambling.* [OMISSIS]

- 15 On this basis, on 30 September 2020, the supreme gambling supervisory authorities of the Länder announced so-called Joint Guidelines regarding offers of online slots and online poker without (additional) German permit. [OMISSIS] These state:

[OMISSIS] *In view of the legal situation, which is expected to change on 1 July 2021, offers of virtual slot games and online poker that are currently not yet eligible for a licence - the self-distribution and the organisation - are generally among the circumstances that will not be taken up in the enforcement of gambling law if they fulfil the following requirements that have been recognised by the Länder as technically feasible.* [OMISSIS]

- 16 A list of requirements followed. Subsequently, the German Länder did not proceed against providers of online slots for lack of a German permit.
- 17 The defendant argues that the previous total ban on online casino games could not have been justified by the objectives stated in the State Treaty under § 1 ('[OMISSIS] Objectives [OMISSIS]). A justification is not possible because the federal states, thus the responsible regulator for [g]aming, themselves do not consider the former total ban as mandatory. By notifying the draft of an amended State Treaty to the Commission, the federal states responsible for gambling regulation had made it clear that the objectives of the State Treaty could be realised with the milder intervention of a system of prior official authorisation. Because the objectives of the State Treaty remained identical in the change from a total ban to a system of permits, the replacement of the total ban proves that it could not have been mandatory for the realisation of the objectives of the GlüStV even before the change in the legal situation came into force on 1 July 2021.
- 18 The defendant further argues that a total ban on online casino gambling cannot be considered suitable in the sense of the justification requirements of the Court of Justice to achieve the objectives of the State Treaty. This is because the objective of the State Treaty is not a total ban on casino games, but the steering of the "natural gambling instinct" of the population into orderly and supervised channels. If, however, under German law there are no '[OMISSIS] orderly and supervised [OMISSIS] channels for the given demand for online casino games (the so called "*natural gambling instinct*" within the wording of § 1 GlüStV), the total ban is indisputably unsuitable to realise the objectives of the State Treaty.
- 19 The defendant argues that the justification of the previous total ban on online slots on basis of the objectives of the State Treaty is also contradicted by the

announcements of the federal states responsible for gambling regulation of September 2020 ('[OMISSIS] *circular resolution* [OMISSIS] and '[OMISSIS] *joint guidelines* [OMISSIS]) With these pronouncements, the Federal States had also declared that, in their view, there is no compelling requirement in the public interest to justify a restriction of the freedom to provide services based on the lack of a German licence.

- 20 In addition, the defendant argues that the claim for repayment of lost stakes based on unjust enrichment cannot be a justified restriction on the freedom to provide services because the conduct of the plaintiff and the cedent (i. e. the original player) is abusive of the law. The cedent [OMISSIS] wanted and received a flawless game of chance from a licensed and officially supervised provider. The Maltese regime protects the player from fraudulent schemes. An additional German licence would not bring any advantage to the player. In particular, the player's account was placed under the fiduciary management of the provider. Moreover, according to Maltese law, there is a right to immediate payout of credit balances and Malta has a functioning court system.
- 21 The plaintiff shares the defendant's view at least to the extent that, in his view, a decision by the Court of Justice on the questions raised is necessary to achieve legal certainty and legal clarity for his business model.
- 22 However, the plaintiff also refers to the case law of German courts. In many player lawsuits, practically all German courts would consider the total exclusion from a German licence for online slots as a justified interference in the freedom to provide services of providers already licensed and supervised by the authorities in their EU country of domicile.
- 23 From the perspective of the referring court, the defendant's argumentation cannot be dismissed out of hand. However, the correct interpretation of Union law in a case with the present particularities is not so obvious that the court can decide solely on basis of the previous case-law of the Court of Justice.

II. For the part of the claim relating to online lotteries, the following applies:

- 24 During the relevant period, a licence for online lottery operation could be applied for lotteries (§ 4 (5) GlüStV). However, the defendant, as a private provider, was excluded from such a licence for organi[s]ing online lotteries. Under German law the granting of a licence for lotteries was limited to state-controlled providers (§10 par. 2 and 6 GlüStV).
- 25 This exclusion of private providers from a licence for lotteries has been the subject of fierce disputes between the state authorities and private competitors before German courts for many years. While the private lottery providers claim that the state reservation for lotteries is not justified by compelling requirements in the sense of the objectives of the State Treaty, the state providers point out that the state monopoly for lotteries must remain for the protection of the players.

- 26 However, the Administrative Court of Munich ruled in a 2017 decision that the state lottery monopoly pursuant to Section 10 (2) and (6) GlüStV arguably violates the freedom of services and is not justified by compelling requirements of the common good.²
- 27 In addition, an expert opinion questioning the justification of the lottery monopoly in the case of the authorisation of online casino games notified by the federal states in spring 2020 is publicly available³. The expert opinion had been commissioned by the authorities. It doubted whether the argument of fraud and manipulation would then still be sufficient to justify a state monopoly on lotteries.
- 28 [OMISSIS]
- 29 As far as the [OMISSIS] [referring court] can see, since 2017 all German courts have left open the question of whether the state reservation (lottery monopoly) is justified in proceedings concerning the legality of secondary lotteries of the Defendant or other providers. Since 2017, all courts have based their argumentation on the fact that the defendant does not organise lotteries in the sense of the definition of the State Treaty, but bets on the outcome of other lotteries. It was never considered that these bets are licensed and supervised in another [M]ember [S]tate. German courts argue that it would be justified by the objectives of the State Treaty to exclude betting on the outcome of state lotteries from the possibility of obtaining a licence.
- 30 An example for this argumentation is quoted from a judgment of OLG Koblenz from 2019.⁴

[OMISSIS] (108) The secondary lotteries operated by the first defendant are also not a lottery within the meaning of section 3(3) GlüStV, but a bet within the meaning of section 1 sentence 3 GlüStV. Accordingly, the game of chance offered by the defendant, is not subject to the lottery monopoly pursuant to § 10 par. 6 GlüStV, so that the question of the unlawfulness of this provision under Union law does not need to be decided in the present case.

... There is no reason for a referral to the Court of Justice of the European Union pursuant to Article 267 TFEU. This is because the question referred by the plaintiff is not relevant to the decision. In the present case, the internet ban pursuant to § 4 (4) GlüStV is decisive. In contrast, the lottery monopoly stipulated in the State Treaty on Games of Chance has no relevance. The secondary lottery offered by the 1st defendant is not affected by the lottery monopoly stipulated in the State

² <https://www.isa-guide.de/isa-law/articles/170610.html>

³ https://cdn.businessinsider.de/wp-content/uploads/2020/01/191107_Kurzgutachten-Ruttig.pdf

⁴ <https://landesrecht.rlp.de/bsrp/document/JURE190009319>

Treaty on Games of Chance. As already explained, a secondary) lottery is not to be qualified as a lottery, but as a bet. A state monopoly does not exist for this form of gambling, which is organised on the internet. ... [OMISSIS]'

- 31 In a case brought by the defendant before the Higher Administrative Court of the Federal State of Saarland,⁵ the court also left open the question of whether the state reservation of lotteries is justified under EU law and formulated in the lead sentence:

[OMISSIS] Betting on the outcome of lotteries - so-called secondary lotteries – do[es] not fall under the lottery concept of § 3 para. 3 sentence 1 GlüStV [OMISSIS]'.

- 32 Subsequently, the court only examines whether the exclusion of private organisers from a licence for organizing (secondary) online lotteries is justified under § 4 par. 4 GlüStV. The Higher Administrative Court affirms this with the following considerations:

'[OMISSIS] The object of the prohibition of § 4 para 4 GlüStV is not secondary lotteries as such, but the organisation and brokerage of games of chance of all kinds via the internet. The fact that this prohibition was opened up by paragraph 5 of the provision with regard to sports betting under strict conditions for an experimental phase does not lead - as the Federal Administrative Court convincingly explained - to an incoherence of the entire gambling market, if only because of the reservation of experimentation. It is true, however, that the specific risk potential of lotteries is, according to general knowledge, to be assessed as lower than the risk potential of for example, slot machines or horse betting, for which the granting of a licence is possible in principle according to the legal situation, whereby with regard to horse betting it must be added that according to Section 27 (2) sentence 2 GlüStV even the organisation and brokerage on the internet can be permitted. Nevertheless, the plaintiffs view based on this ignores the background of the new regulation of § 4 (5) GlüStV. ... [OMISSIS]'

- 33 The referring court has doubts as to whether this interpretation of Union law and this judicial practice is suitable to constitute a justified restriction on the freedom to provide services. It is difficult to understand why, in the case of a service which is identical for the consumer, a distinction should be made between a tip with a state provider on the outcome of a lottery organised by the state and a bet with a private organiser regulated in another Member state on the outcome of that same state lottery.

⁵ <https://recht.saarland.de/bssl/document/MWRE190001485>

- 34 The licensed secondary lottery in Malta is regulated in the same framework as betting and thereby falls under a significantly stricter regulation than the underlying lotteries in Germany which are seen as less dangerous gambling products by the gambling state treaty.
- 35 In any case, it is questionable whether this distinction can be used to justify the fact that no German licence is available for private (secondary) lotteries by the objectives of the State Treaty named in [P]aragraph 1 GlüStV. If, according to Union law, the consumer's point of view is decisive, it seems difficult to reconcile the right to free movement of services with treating the same service differently. This applies even more because the online casino games, which are probably more addictive, should no longer be subject to a total ban from the point of view of the federal states responsible for gambling regulation in order to achieve the objectives of the State Treaty.
- 36 [OMISSIS]
- 37 [OMISSIS]

Questions

- 1.) *Is [Article] 56 TFEU to be interpreted to the effect that the infringement of the freedom of services by a general prohibition of online slots in the member state of the consumer (state of destination) towards online casino operators that are licensed and regulated in their state of origin (Malta) cannot be justified by compelling reasons of the common good,*
- *if the [M]ember [S]tate of destination is at the same time permitting similar land-based gaming ubiquitously with licensed slots in arcades and restaurants for private operators, more intense gaming in land-based casinos, licensed national [l]ottery operations by state lotteries in more than 20,000 agents shops that addressing the public, and*
 - *allowing licensed online gaming operations for private sports betting and horse betting operators and for private online lottery brokers selling the products of the state owned lotteries and other licensed lotteries,*
- while that same [M]ember [S]tate - contrary to [OMISSIS]judgments [of the Court of Justice in] Deutsche Parkinson (C-148/15, par 35), Markus Stoß (C-316/07) and Lindman (C-42/02) — did apparently not provide scientific evidence showing that there are specific dangers in these games that significantly contribute to achieving the goals pursued by its regulation, in particular the prevention of problematic gaming, and*

that in view of these dangers restricting the prohibition to online slots - in contrast to all the gaming offers that are allowed for online and land-based slots - can be considered suitable, mandatory and proportionate to reach the regulatory goals.

- 2.) *Is Article 56 TFEU to be interpreted as precluding the application of a total ban on online casino gambling contained in Paragraph 4 (1) and (4) of the German Interstate Treaty on Gaming ("GlüStV") if the German gambling regulation (State Gambling Treaty, "GlüStV"), according to its § 1, does not aim at a total ban of gambling, but at [OMISSIS] "steering the natural gambling instinct of the population into orderly and supervised channels as well as counteracting the development and spread of unauthorised gambling in black markets" and a considerable demand from players for online slots exists?*

- 3.) *Is Article 56 TFEU to be interpreted in such a way that a general ban of online casino offers cannot be applied if*
 - *governments in all federal states of this [M]ember [S]tate have already agreed that the dangers of such online gambling offers can be combated more effectively via a system of prior official approval than by a total ban and*
 - *have drafted and agreed on a future regulatory framework by a corresponding state treaty that replaces the total ban by a system of prior approval,*
 - *and in anticipation of this future regulation, decide to accept corresponding gambling offers without a German permit subject to compliance with certain requirements until German licenses are issued,*

although according to [OMISSIS]Winner Wetten [(C-409/06)] Union law may not be temporarily suspended.

- 4.) *Is Article 56 TFEU to be interpreted to the effect that a [M]ember [S]tate (of destination) cannot justify a national regulation with compelling reasons of the common good, if*
 - *that regulation prohibits consumers to place licensed cross-border bets in another [M]ember [S]tate (of origin) on licensed Lotteries in the member state of destination that are permitted and regulated there and*
 - *if the lotteries are licensed in the member state of destination and the regulation aims to protect players and minors*

- *and if the regulation of the licensed betting on lotteries in the member state of origin also aims to protect players and minors and provides the same level of protection as the regulation of lotteries in the state of destination?*
- 5.) *Is Article 56 TFEU to be interpreted to the effect that this rule precludes the recovery of stakes lost in the course of participation in (secondary) lotteries based on the asserted illegality' of transactions because of the lack of a licence in the member state of the consumer, if*
- *such a licence for private (secondary) lotteries is excluded in the law,*
 - *and that exclusion is justified by the national courts with an asserted difference between a tip placed with a state operator on the outcome of a lottery organised by a state and a bet with a private organiser on the outcome of a state lottery?*
- 6.) *Is Article 56 TFEU to be interpreted to the effect that it precludes the recovery of stakes lost in the course of participation in (secondary) lotteries based on the asserted illegality of transactions because of the lack of a licence in the member state of the consumer if*
- *there is an exclusion of such a licence for private (secondary) lotteries in the law*
 - *and if that exclusion in favour of state lottery organisers is justified by the national courts with an asserted difference between a tip placed with a state operator on the outcome of a lottery organised by a state and a bet with a private organiser on the outcome of a same state lottery?*
- 7.) *Is Article 56 TFEU and the prohibition of abuse of rights ([OMISSIS] Niels Kratzer [C-423/15])) to be interpreted as precluding the claim for reimbursement of lost stakes based on the lack of a German permit and unjust enrichment where the organiser is licensed and supervised by the authorities in another Member State and the player's claim assets and claims to payment are secured by the law of the Member State in which the organiser is established?*

[OMISSIS]