

NEWS

# CASE CJEU C-440/23 ON CROSS-BORDER

The present article examines the legal implications of **Case C-440/23, FB v European Lotto and Betting Ltd**, with particular focus on its relevance for online gambling operators active within the European Union. The judgment is a significant addition to the case law of the Court of Justice on the relationship between national gambling regulation and the freedom to provide services under Article 56 TFEU, especially in the context of cross-border online gambling services offered to consumers in another Member State.

## PROCEEDINGS BEFORE THE MALTESE COURT

The case originates from a dispute involving a player resident in Germany who, between 5 June 2019 and 12 July 2021, participated in online slot-machine games and placed bets on lottery draw results through two gambling operators established in Malta and licensed by the Maltese Gaming Authority. Both operators directed their services to the German market.

At the time, German law prohibited the offering of such online gambling services without a national authorization, whereas the operators in question held only Maltese licences. Following financial losses, the player brought a civil claim before the German courts seeking repayment of the amounts lost, arguing that the underlying gambling contract was void under German law.

While those proceedings were pending, the player assigned his claim to a third party, which subsequently initiated proceedings in Malta against the two operators in order to recover the same losses. In the context of that action, the Maltese court decided to stay the proceedings and refer a number of questions to the Court of Justice for a preliminary ruling.

## THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

The case illustrates, once again, the tension between the internal market framework and the broad discretion that Member States retain in the field of gambling. In an area that remains largely unharmonized at EU level, and in which considerations of consumer protection, public policy and social order continue to play a central role, the judgment provides further guidance on the extent to which a Member State may restrict or prohibit certain forms of online gambling, even where the operator is lawfully licensed in another Member State.

The ruling is also important from a private-law perspective. It addresses whether Article 56 TFEU prevents the application of national rules under which a consumer may rely on the nullity of a gambling contract and seek restitution of losses incurred under an online gambling arrangement that was prohibited in the consumer's Member State. The judgment therefore has practical significance not only for questions of market access, but also for the civil consequences that may follow where operators offer services into jurisdictions in which those services are not permitted.

The request for a preliminary ruling was made by the First Hall of the Civil Court of Malta, which asked the Court of Justice of the European Union (“CJEU” or “the Court”) to rule, in essence, on the following questions:

- *Whether a general prohibition in the consumer's Member State on online slot games, justified by objectives of consumer protection and the safeguarding of social order through the channelling of gambling into supervised systems, is compatible with the freedom to provide services where:*
  - a. the operator holds a valid licence issued in another Member State for the provision of those services;
  - b. the consumer's Member State permits comparable gambling activities where they are offered on a land-based basis rather than online; and
  - c. the consumer's Member State permits certain forms of online gambling, such as sports betting, while prohibiting online slot games or lottery-related products.



- *Whether the principles governing the freedom to provide services preclude the legal consequences arising from such a prohibition, including, among others, the nullity of the gambling contract and the availability of civil claims for recovery, notwithstanding the later introduction of a licensing regime by the Member State concerned.*

## CJEU'S CONSIDERATIONS AND IMPLICATIONS FOR GAMING OPERATOR

As a response to the request made by the First Hall of the Civil Court of Malta, the CJEU proceeded to answer the posed questions.

Regarding the first issue, the Court found that Member State had ample discretion to regulate gaming in their jurisdiction, in contrast with the limits imposed on other matters. The Court understands that the implications of gaming regulation are deeper and broader, due to the moral, cultural and social aspects of gaming, and how public policy and social order are affected by said aspects.

The CJEU declares that legislation aimed at controlling online gaming to combat parallel markets and channel the provision of services into regulated circuits is legitimate, as the risks posed by the online gaming market are notable, and greater than the risks associated with gaming in physical establishments. Therefore, **the Court settles that EU law cannot preclude national legislation prohibiting online slots and casino games, when such legislation is aimed at preserving public interest and social order.**

In relation to such conclusions, the CJEU resolves the second question accordingly. The Court finds that, as the laws prohibiting specific online gaming are not precluded from application, consumers can invoke their own national laws and the corresponding consequences and legal actions in line with Rome I Regulation. The Court also reiterates that Member States are free to introduce changes to national regulations without any prejudice to the effects of previous norms.

From a systemic perspective, this aspect of the judgment is particularly noteworthy. Where direct enforcement against illegal operator, especially those established offshore, may prove complex or ineffective, the recognition of civil-law remedies in favour of consumers operates as an indirect but powerful enforcement mechanism. By enabling players to reclaim losses incurred in unlawful gambling arrangements, national legal systems effectively enlist consumers themselves as actors in the broader effort to deter and disincentivise illegal gambling markets.

In practice, this implies that European law cannot preclude the applicability of national law and its effects, meaning that **consumers can bring forth claims based on the national law of their Member State** and seek remedies on those grounds. Specifically, the CJEU states that there is no preclusion to the nullity of contracts that are in breach of national law and no preclusion to the claims seeking restitution on the effects of said contract.

From a practical and compliance perspective, the judgment makes clear that operators offering services cross-border must verify, on a jurisdiction-by-jurisdiction basis, whether the relevant gambling products may lawfully be offered in the target market and implement effective controls to prevent access from prohibited jurisdictions. Where operators accept players from Member States in which the relevant online gambling activity is prohibited, they may face not only regulatory exposure, but also civil claims based on the nullity of the underlying contract and the recovery of losses. The ruling therefore confirms that, in addition to public enforcement, private litigation constitutes a material legal risk for operators active in legally fragmented markets.



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