

THE CHALLENGES AND ECONOMIC IMPLICATIONS OF CROSS-BORDER ONLINE GAMBLING IN EUROPE – A CRIMINAL LAW APPROACH

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Abstract. *The very fast development of the online environment, in the context of different regulation policies of the European Union member states on online gambling, raises difficult problems for the criminal investigation of online gambling crimes that are committed cross-border. Currently there is a fervent concern at European level for gradually eliminating cross-border restrictions as regards gambling (with its subcategory, online gambling), but the criminal aspect of the matter and, most important, its economic implications, is not, at the moment, seen as a point of particular interest for specific regulation or discussion. The research developed in this paper is of theoretical value, meaning to underline and propose a possibly economically favorable approach to the matter stated above.*

Keywords: online gambling crimes, cross-border, judicial cooperation, economic impact.

Jell code: K42, L83

1. Introduction

Creating a vision regarding the desired future situation is one of the most common methods for planning and introducing the changes in organisation. There is no bigger force that can lead an organisation through excellence, to medium and long term success, but a vision of future considered a mental construction that people have the power to turn into reality. In a world in which few services are not also provided online, gambling does not depart from the rule. Today, almost any of the traditional games of chance provided by gambling operators can also be exploited as online games, forming the commonly accepted notion of online gambling. As with any of the services that can be defined as an economic activity, one of the main characteristics that govern the online gambling industry is their operation inside a market, defined mainly (and ideally) by free and fair competition.

This further brings diversity in service providers (online gambling operators) and consumers' possibility to choose the provider that best suits their needs.

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As the European Union bred, national markets of goods and services had to begin to coexist inside the Single Market, which meant observing the principles of the European Union Internal Market, of which two are of interest for the current research: the freedom of establishment and the freedom to provide services. The different regulations of EU member states on gambling have failed, up to now, to ensure that the economic activity of gambling is subjected unrestrictedly to these two freedoms. Of course, the restrictions imposed to gambling operation, usually comply with the conditions determined by the European Court of Justice case law (applicability in a non-discriminatory manner; justification by imperative requirements in the general interest; adequacy for securing the attainment of the objective which they pursue; limitation to what is necessary in order to attain it) [11], or are not always brought to analysis by the European Court of Justice.

In the context of the above stated, the current tendency and concern, at European level, are towards eliminating the national restrictions regarding cross-border gambling operation. The research developed in this paper will only bring to attention aspects concerning online gambling, this being the side of the gambling activities where the cross-border restrictions are usually most strict. This pursuit means mainly to apply the two essential freedoms of the Internal Market to the activity of online gambling, so that, for example, citizens of any member state may access and participate in online gambling provided by operators established in a certain member state.

Yet, any freedom (especially with regard to participating in an economic activity, but also generally) is essentially defined by the fact that it comes with corresponding restrictions, which are mainly: the need to respect the practice of the same freedom by other subjects, and the need to comply with a certain activity operation conditions. This analysis, when discussing about online gambling, starts from the fact that some of the member states' legislation provides that in regulating the gambling activity, there are certain public policy aspects that need to be considered, like for example: public health (gambling addiction), public order (circumstantial criminality – organized crime, violence generated by addiction to gamble), public safety (preventing addiction and ensuring public health). What we mean by this is that the freedom/right to participate in/organize gambling activities is usually rather strictly conditioned, so that the corresponding restrictions for practicing the right are noticeable.

The present paper is not intended to compare member states legislations, nor to explain the entire legislative and operational background of online gambling, and is meant to propose a sort of theoretical model for the tendency to eliminate European borders in this domain, to draw attention to an essential approach open for further research. The most important way of obtaining a harmonious exercise of a certain freedom is building proper mechanisms for sanctioning its breach, and

this includes the criminal law side of any domain. This is the binary system upon any state/society is built: citizen's rights have material and legal boundaries, whose crossing is sanctioned by civil, criminal or disciplinary liability, or as contravention. There is no reason why the attempt to establish the European Union as a state should be excepted from this principle, even if the actual means by which the sanctions would be imposed are indirect, through the hand of justice of every state. What the theoretical study conducted in this paper proposes to show is that in eliminating the national borders with respect to the legislations on online gambling a very important place of interest should be occupied by a concern towards establishing a specialized, friendly (easy to access and use) regulatory framework on judicial cooperation in criminal matters and towards training the national judicial representatives on this matter. As it will be developed later, this will also include EU authorities' opinions and recommendations for measures to be taken by member states inside their internal regulations.

2. Why online gambling

Obviously, all types of gambling are to be considered economic activities, and all must be subjected to the Single Market principles and freedoms. But for online gambling, the efforts of the EU institutions for laying the groundwork for harmonized and coherent member states legislations are the most intense. In this direction, the following acts have been adopted: European Parliament resolution of 15 November 2011 on online gambling in the internal market, European Parliament resolution of 10 March 2009 on the integrity of online gambling, European Parliament resolution of 10 September 2013 on online gambling in the internal market, Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European framework for online gambling – 23.10.2012, Green Paper on Online Gambling in the Internal Market (2011). Also, relevant to the present study is also the Cooperation Arrangement between the gambling regulatory authorities of the EEA Member States concerning online gambling services (2015), by which the signing authorities agree upon certain provisions regarding the direct and easy information exchange, and which shows that not all the EU member states have specifically assigned authorities in charge of controlling and supervising gambling operation. The rapid growth of the online gambling market was pointed out since the adoption of the Green Paper on Online Gambling in 2011, which also acknowledges the fact that online gambling is a “phenomenon that has multiple dimensions” [5].

Further studies on the growth and dimension of the European online gambling market have been developed, of which we mention the one conducted by the European Gaming and Betting Association, with data up to May 2016, which shows that this specific market occupies approximately 17% of the total gambling market, and also that it is the largest market for online gambling worldwide, with a Gross Gaming Revenue (stakes minus winnings) of 16.5 billion euro in 2015 [6].

The strong preoccupation at European level can be explained by examining the statement of reasons for adopting each of the documents mentioned above. Thus, it is considered that higher risks (and more difficult to control) arise from online gambling than in the case of traditional, land-based, gambling organized and practiced in gambling venues, because it is harder to control the effected level of addiction or minors participating in gambling, but also the risk of committing money laundering is higher, all these risks coming from the online environment's ubiquity and fast technological development.

This brings us to the aspect that was meant to be highlighted through the present study, that of the economic impact of the cross-border criminality in the domain of online gambling, which requires attention and thorough analysis in the process of legislation harmonization. First, we'll set an example, for a better understanding of what cross-border restrictions on online gambling mean, and what possible implications would eliminating them have: in Romania, all gambling operators (including the online gambling operators) must be authorized by the regulatory gambling authority (the National Office for Gambling) or their authorization in another state must be submitted to recognition by this office, and also all payments must be done through a payment service provider that has been issued a license by the National Office for Gambling (Romanian authority); most important, Romanian law does not permit (sanctions as a contravention) a private person to participate in online gambling activities that are not authorized by the National Office for Gambling. Hence, there is a restriction for foreign online gambling operators that cannot legally offer their services in Romania unless they are issued a license by the national authority, which is not a formal step, and which even requires assigning a representative of the operator that has a permanent residence or establishment in Romania. By removing this restriction, any Romanian citizen would be allowed to participate in online gambling provided by any operator that is legally functioning according to the legislation of another member state.

As internet is everywhere and online gambling sites can be accessed from all around Europe (and not only), certain national economy problems must be addressed. First of all, since the EU didn't yet adopt binding regulations specifically on gambling, the licensing/authorization of the gambling operators systems are not forbidden. So the main observation that can be made is that when

talking about cross-border online gambling, the state where the operator resides is the one that collects the license/authorization fees and the income taxes while the state where the gambling participant resides has to deal with the economic implications of the harms done by gambling: crimes committed by compulsive gamblers in order to obtain incomes for gambling, unemployment caused by addiction to gambling and the criminality that follows, school leaving by minors participating illegally in gambling and also juvenile crime caused either by minors entering an unfavorable medium, or by gambling addiction in children. These factors may have domino effects spread throughout generations.

The analysis becomes even more interesting if we look at the fact that for example Romania, following the Letter of formal notice – infringement no. 2013/4216 of the European Commission, has added new provisions to the legislation on online gambling, including establishing a Public Interest Foundation with funds constituted of annual transfers from licensed gambling operators. According to Emergency Ordinance no. 77/2009 (modified as stated before), the purpose of these funds includes programs for the protection of minors in gambling and for prevention and treatment of gambling addiction.

The situation is not entirely the same when dealing with money laundering, as the economic cross-effects that two member states implicated in cross-border online gambling will feel are a lot more complex. There is also the cybercrime domain which is not to be neglected and which can cause severe damages, for the online gambling operator but also for the private gambling participants, and since they are also part of a society and tax payers, the effects of these damages can obviously affect the national economy, possibly leading even to the bankruptcy of an operator and chain reactions inside the national market. What is subject to interest for the present study is not the security measures that can be taken to prevent such damages from happening, but the measures that must be taken after their causing, for recovering them?

What all these scenarios want to show is that preliminary analysis and investigations towards developing a harmonized European regulatory framework necessarily take into account not only the immediate possibly harmful effects of online gambling, but also the long-term impact of it. Thus, the measures proposed as a first step in developing the above mentioned regulatory framework must not only answer the question “What should be done to prevent and minimize the harmful outcome?” but also the question “What is to do if the prevention fails and the harmful outcome happens?”. Of course, this theory can be applied not only to the domain of online gambling, but to any domain subjected to regulation, but harmonization of the online gambling European regulations is a very live issue currently, and its impact on the national European economies may probably be proportional to the market size.

One could argue that the national online gambling market offer is rich enough and the services provided (types of games) are the same services offered by operators from other countries, so that people don't need to be legally allowed to participate in gambling cross-border, or that operators don't need to be legally allowed to provide services outside the borders of the state that issued their license. But offers also come with a qualitative side, which, in the case of online gambling, means the online security level ensured by the operator, the measures taken to prevent addiction (including advertising, alerts on the time spent online, self-ban possibility) [10] and minors participating. Also, game conditions may differ regarding probability mathematics. Operator on the other hand could have an interest both to obtain licenses in states where conditions are less restrictive or fees are lower, and to provide services to states where citizens would be more likely to be interested in gambling (sociology and anthropological researches).

3. Theoretical model: judicial cooperation in criminal matters

The term "model" was chosen because this study appears to be closest to theoretical modeling from the point of view of the research method, proposing a theory/model for explaining a fragment of the ideal harmonized European regulatory framework on online gambling, that of the possible national cross-border economic damages that can be caused by crimes related to online gambling. The discussion presented in the current paper can also be applied today, with reference to crimes related to cross-border illegal online gambling, but the purpose of the study is to provide a new approach for the hypothetical future harmonized framework on this domain, hoping to help build a durable and stable European legal framework.

Since, at least for the moment, national identities still exist (and have not been integrated to disappearance into European identity) [4], the EU cannot adopt binding regulations on substantial criminal law. So, the only field in which the EU authorities can actively step in and create a unified framework is the procedural one, which at European level means the cooperation in criminal matters and the joint trainings of the national authorities' representatives. In our opinion, a European legal framework specifically applied to judicial cooperation in criminal matters concerning gambling is strictly necessary (the most important point of interest being online gambling, but evidently the two types of gambling would not be separately treated in the case of such regulation). Such a requirement does not appear as far-fetched since we are not dealing with an ordinary trans-boundary online domain, but with one which also directly and explicitly implies elements such as public health (protection of minors, addiction prevention) and circumstantial criminality (what we call circumstantial criminality are the crimes caused by addiction to gamble or to an unfortunate affecting of minor's development by gambling).

A regulation on this type of cooperation between member states would include joint investigation teams working procedures, but also and most importantly easy and direct ways of cooperation for conducting electronic searches and computer forensic examinations by experts or specialists, for seizing goods, and ways of rapidly transmitting information. Furthermore, procedures on recovering damages could be useful. All this is needed because of the risk of quick loss of evidence due to the ubiquitous nature of internet. For direct information exchanges member states have begun to develop a conventional framework, as it was mentioned before, so that would only have to be verified and ratified by as many member states. In terms of joint trainings, the idea proposed by the current study introduces the notion of authorized experts on games of chance. The necessity of this service comes from one of the main characteristics of any judicial system, which is the fact that in investigating /judging a case, the investigator cannot possess knowledge of all domains implied in the process of finding out the truth, but has to draw upon specialists in certain areas to better understand the matter that must be investigated. With regard to online gambling, if in the case of some of the cybercrimes, the expertise of a computer science expert is enough (for example in the case of denial of service attacks), in the situation of a online gambling fraud, the computer science expertise must be combined with knowledge on probability with relation to games of chance and the programming of gaming software. And since the software works pretty much the same for any gambling sites, joint trainings for experts are not inapplicable. This type of expertise can also be considered for land-based gambling, in the field of gambling equipment. Such expertise and research, conducted for establishing the notion of authorized experts on games of chance may also lead to discovering new methods for preventing online gambling fraud and cybercrime.

Conclusions

The present study was meant as a theoretical speculation, proposing an approach for modeling the long-term effects of a unified European legal framework on online gambling concerning cross-border criminality in connection to it. The theoretical research is open to further and more in-depth study which in the end would result in a more detailed and practical guide for elaborating a harmonized framework on the type of cooperation proposed in the last section. But what is of utmost importance is that the possible economic damages caused by criminality in the cross-border online gambling domain have to be part of the European concern in unifying regulations, as, in our opinion, the economic benefits of a trans-boundary freedom to provide online gambling services may be overturned by the economic loss caused by the issue brought to attention through this study. None of the ideas proposed by this study (legal framework specifically applied only to judicial cooperation in criminal matters concerning gambling; authorized experts on games of chance) have been approached as the level of our research concluded, so that they provide fertile ground for further approach.

REFERENCES

- [1] M. Arendts, *A View of European Gambling Regulation from the Perspective of Private Operators*, The Regulation of Gambling: European and National Perspectives, Martinus Nijhoff Publishers, p. 41-52, (2006).
 - [2] A. Blaszczyński and all, *Do advertising and promotions for online gambling increase gambling consumption? An exploratory study*, (International Gambling Studies, p. 394-409, 2014).
 - [3] J. Banks, *Online Gambling and Crime. Causes, Controls and Controversies*, (Ashgate, 2014).
 - [4] C.I. Rada, *European Identity Vs. National Identity? The Crisis of Identification in the European Union*, Globalization and intercultural dialogue: multidisciplinary perspectives, Vol. I, Arhipelag XXI Press, p. 114-128, (2014) <http://www.upm.ro/gidni/GIDNI-01/Pol/Pol%2001%2013.pdf>.
 - [5] Green Paper on Online Gambling in the Internal Market (2011) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0128&from=EN>.
 - [6] <http://www.egba.eu/facts-and-figures/market-reality/>.
 - [7] <http://www.rombet.com/uploads/legislation/Emergency-Ordinance-No-92-2014.pdf>.
 - [8] http://ec.europa.eu/growth/sectors/gambling_en.
 - [9] Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling available online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0478&from=EN>.
 - [10] <http://www.egba.eu/media/1204-EGBA-Manifesto-on-a-sustainable-EU-policy-for-online-gambling.pdf>
 - [11] Gambelli Case C-243/01: <http://curia.europa.eu/juris/celex.jsf?celex=62001CJ0243&lang1=en&type=TEXT&ancre=>
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