

*Bochum Conference  
on Gambling  
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# European gambling policy

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# Jahrestagung für Glücksspiel und Gesellschaft



## EU Law and taxation of gambling



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## Agenda

- I. Introduction
- II. Taxation: Value Added Tax
- III. Attention: State Aide Law
- IV. Pending cases (VAT and gambling)
- V. Conclusion



# EU Law and taxation of gambling

## I. Introduction

- The power to tax is in the hands of the Member States, with the EU having only limited competences.
- **Article 113 TFEU:** allows provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.
- **Art. 115 TFEU:** allows directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.



## II. Taxation: VAT

- **Art. 135 (1)(i) VAT directive:** “Member States shall exempt the following transactions: betting, lotteries and other forms of gambling, *subject to the conditions and limitations laid down by each Member State.*”
- **Art. 401 VAT directive:** “...this Directive shall not prevent a Member State from maintaining or introducing taxes ... on betting and gambling, ... or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes...”



## II. Taxation: VAT and problems

- (1) indirect consumption tax
- (2) base of taxation
- (3)** direct effect of Art. 135 (1)(i) VAT directive?
- (4)** selective taxation possible?
- (5)** principle of neutrality in VAT law



## II. Taxation: VAT

- Direct effect of Art. 135 (1)(i) VAT directive?

According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly.



## II. Taxation: VAT

### Direct effect of Art. 135 (1)(i) VAT directive?

- **CJEU, C-58/09 par. 39:** Article 135(1)(i) of Directive 2006/112 must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for by that provision allows those States to exempt from that tax only certain forms of gambling.
- **CJEU, C-592/15 par. 23:** It must therefore be considered that, by referring to 'certain cultural services', Article 13A(1)(n) of the Sixth Directive does not require the exemption of all cultural services, so that the Member States may exempt 'certain' of them while subjecting others to VAT.





## II. Taxation: VAT

### Direct effect of Art. 135 (1)(i) VAT directive?

- **CJEU, C-488/18 par. 34:** "... notwithstanding the use of the word 'certain' to describe the supplies constituting the transaction to be exempted, Member States are obliged to exempt 'all' services closely linked to sport or physical education would be liable to extend the material scope of the exemption beyond that word, contrary to the Court's case-law stating that the terms used to specify the exemptions in Article 132(1) of that directive are to be interpreted strictly."
- **Result:** no direct effect of Art. 135 (1)(i) Vat directive



## II. Taxation: VAT

### Selective taxation and the principle of neutrality

#### – Limitation of a selective exemption?

- The Member States thus have, subject to the requirement to observe fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of a exemption of VAT to concrete and specific aspects of a category if the law allows a selection (see the jurisprudence of the Court concerning reduced tax rates).



## II. Taxation: VAT

### – **Neutrality and discretion of the legislator:**

- In order to assess whether **services are similar**, account must primarily be taken of the point of view of an average consumer. Services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those services, and those supplies can therefore, from the point of view of the average consumer, **be exchanged one for the other**.



## II. Taxation: VAT

### – **Neutrality and discretion of the legislator:**

- The decision as to whether goods or services are similar from the point of view of a consumer entails by definition a degree of discretion. It is the democratically elected legislature that is primarily responsible for discharging the discretion to make legislative decisions.
- So that judicial review of compliance with the condition to observe fiscal neutrality must be limited to review as to manifest errors.



## III. Attention: State Aid Law

- **Art. 107 TFEU:** “Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”
- **Tendency at the Commission in the past:** Every differentiation in national tax law might be a possible state aid.
- **Literature:** different tax rates (VAT vs. VAT exempt but taxed with special gambling tax) are a state aid.



## III. Attention: State Aide Law

- **Core point: Selective advantage**

- The first step is to identify the ordinary or ‘normal’ tax system applicable in the Member State concerned (the ‘reference framework’).
- The second step is to judge, on the basis of that ordinary or ‘normal’ tax system, whether the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators which, in the light of the objective pursued by the ordinary system, are in a comparable factual and legal situation.
- If a derogation from ‘normal taxation’ has been established, the last step is to assess whether the derogation is justified.



## III. Attention: State Aide Law

### **(!) selective advantage in tax law:**

A measure that differentiates between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation and is, therefore, a priori selective, does not, however, constitute State aid within the meaning of Article 107(1) TFEU where the Member State concerned is able to demonstrate that the differentiation is justified since it flows from the nature or overall structure of the system of which it forms part.

**(ECJ, judgement of 26th april 2018 – C-233/16, para. 42)**



## III. Attention: State Aide Law

### **(!) selective advantage in tax law - justification:**

Thus, those activities will have fewer adverse effects on the environment and on town and country planning than the activities of establishments liable for the tax in question.

That factor **may be such as to justify the distinction adopted in the contested legislation** in the main proceedings, which, accordingly, would not result in selective advantages being given to the retail establishments concerned.

**(ECJ, judgement of 26th april 2018 – C-233/16, par. 59 and 60)**





## III. Attention: State Aide Law

### **New tendency (CJEU, C-596/19, par. 43):**

- As regards the fundamental freedoms of the internal market, the Court of Justice has held that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, meaning that the application of progressive taxation falls within the discretion of each Member State. The same is true in the field of State aid.
- It follows that, outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy.... This includes ... the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event.
- Those characteristics constituting the tax therefore, in principle, define the reference system or the 'normal' tax regime, from which it is necessary, in accordance with the case-law referred to in paragraph 37 of the present judgment, to analyse the condition relating to selectivity.



## III. Attention: State Aide Law

### **New tendency (CJEU, C-705/20, par. 58 seq.):**

- On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid.
- This includes, in particular, the determination of the **basis of assessment** and the **taxable event**.
- As the Advocate General observed, in essence, in point 59 of her Opinion, deciding which foreign taxes may be set off against domestic tax liability and under which conditions such set-off is possible is a **decision of a general nature** which falls **within the discretion of the Member States in determining the characteristics constituting the tax**.



## III. Attention: State Aide Law

### **New tendency (CJEU, C-885/19 P, par. 70 and 71):**

- In that context, it must be stated, in the first place, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State.
- In the second place, outside the spheres in which EU tax law has been harmonised, **it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the ‘normal’ tax regime,** from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment and the taxable event.



## IV. Pending cases (VAT and gambling)

- **C-741/22 (BE):** question of **selective VAT exemption** of some online gambling (national online lottery vs. online games of chance offered by private operators,) and **state aid**
- **C-73/23 (BE):** question of **selective exemption** (only gambling which is provided electronically is taxed under VAT while gambling which is not provided electronically remains exempt from VAT)



## V. Conclusion

- It is up to the Member states (MS) to tax gambling.
- MS can tax with VAT or not -> principle of neutrality does not force to exempt all or tax all gambling services.
- Decisive is the exchangeability of the service in the view of a final customer under respect of the discretion of the legislator.
- The VAT directive itself shows that online services and “normal” service are different.
- Online gambling is not the same service as “offline” gambling.
- That means, that the VAT-directive allows a selective exemption / selective taxation.
- This selection cannot be a selective advantage in the sense of Art. 107 (1) TFEU.





# EU Law and taxation of gambling

Thank you for your attention

