

# Malta's attempt to undermine the European Union's legal order

■ Dr. Benedikt M. Quarch, M.A.

In numerous court cases, gambling losses resulting from illegal online gambling are successfully reclaimed by the players themselves or commercially acting assignees due to violation of Section 4 (4) German Gambling Treaty (GlüStV 2012).<sup>1</sup> The claims are based on § 812 para. 1 p. 1 Alt. 1 German Civil Code (BGB) and § 823 para. 2 German Civil Code (BGB) in connection with § 4 para. 4 GlüStV 2012 and § 284 para. 1 German Penal Code (StGB). As many gambling operators have their headquarters in Malta, the island state felt compelled to take action and passed a law on 12th June 2023 to prevent enforcement against gambling providers.<sup>2</sup> Specifically, the Maltese Parliament added an Art 56A to the Gaming Act<sup>3</sup> (the Malta Gaming Act) through the Amendment Act No 55/2023,<sup>4</sup> which states that as part of the principle of public policy (ordre public), no measures can be taken against the provision of gambling services if that action is lawful in Malta and the providers hold a Maltese licence. In addition, the principle of public policy requires Maltese courts to refuse to recognise and/or enforce foreign judgements in Malta on the basis of a complaint to that effect.

As a member of the European Union, Malta is bound by the legal acts of the Union. Pursuant to Article 288 UA 2 TFEU, this also includes EU regulations, which are directly binding on the Member States. Those are therefore not permitted to standardise exceptions or exemptions from a regulation through national law.<sup>5</sup> Legal acts that are contrary to EU law are not ineffective, but must remain inapplicable in the case of a dispute and can be challenged by way of infringement proceedings pursuant to Art. 258 et seq. TFEU.<sup>6</sup>

Art. 56A Gaming Act is in significant conflict with the Brussels Ia Regulation. Articles 36 and 39 of the Brussels I Regulation provide that judgments given in one Member State are recognised and enforced in the other Member States without further ado. Upon application (Art. 36(2), 46 Brussels Ia Regulation),<sup>7</sup> a ground for refusal under Art. 45 Brussels Ia Regulation can be established. Since the question of when a judgment is enforceable is determined by the law of the issuing state (cf. Art. 39 of the Brussels



The Mediterranean country is home to many online gambling operators.

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Regulation), enforcement in the target state may not be refused on the grounds that it violates an obstacle to enforcement under its own national law. Thus, the State of Malta has no power to determine by national law which foreign judgments are enforceable domestically, in any way supplementing the provisions of the Regulation. The newly introduced Art. 56A Gaming Act is therefore in breach of the Brussels Ia Regulation as it denies domestic recognition and enforcement of foreign judgments.

According to Art. 41 of the Brussels Ia Regulation, the law of the enforcing state is subsidiarily applicable with regard to the enforcement procedure. However, the provision of Art. 56A Gaming Act does not constitute an arrangement of the enforcement procedure, but concerns the enforceability of titles with a certain content, and thus prevents the effective application of the provisions of the Brussels Ia Regulation in the sense of Union law's effet utile.<sup>8</sup> This assessment is not changed by the fact that the provision does not directly prohibit the recognition and enforcement of foreign judgments against online gambling providers, but attempts to standardise a general ground for refusal pursuant to Article 45 (1) a) of the Brussels Ia Regulation through the definition of public policy. As an absolute exceptional provision, the public policy provision is to be interpreted very narrowly and

only used as an alternative in absolute special cases to correct otherwise unacceptable contradictions with essential legal principles of the target state.<sup>9</sup> However, Art. 56A Gaming Act is neither based on such a fundamental principle of the legal order, which the recognition of judgments against online gaming providers could run counter to, nor is it limited to the correction of unacceptable results in a few cases.

Apart from that, the rule is unlikely to be applied even if it would be effective. Article 45(1) (a) of the Brussels I Regulation provides that recognition of a judgment of a Member State shall be refused if such recognition would be

## ► Der Autor



**Dr. Benedikt M. Quarch, M.A.,** Entrepreneur and lawyer, founder and CEO of the LegalTech-Company RightNow, founding editor of LegalTech magazine, Juve 40 unter 40 (2023), Forbes 30 unter 30 (2020).

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manifestly contrary to public policy in the Member State addressed. It is true that national law determines what is subject to public policy.<sup>10</sup> However, due to its exceptional and catch-all character, the norm cannot be used for all deviations from the procedural or substantive law of the target state. Rather, it is only applied to compensate for obviously unacceptable contradictions to fundamental principles of the legal system, which is not the case with Art. 56A Gaming Act.

Since the law is already the subject of a complaint under Union law, which was recently submitted to the European Commission, a cla-

rification of the legal situation can be expected soon.<sup>11</sup> Union law will prevail.

### Endnotes

1 OLG Dresden, Urteil vom 27.10.2022 (Az. 10 U 736/22) – BeckRS 2022, 30706; OLG München Hinweisbeschluss vom 4.8.2022 (Az. 18 U 538/22) – BeckRS 2022, 29939; OLG Köln Urteil vom 31.10.2022 (Az. 19 U 51/22) – BeckRS 2022, 37044; OLG Hamm, Urteil vom 21.3.2023 (Az. I-21 U 116/21) – BeckRS 2023, 8297; OLG Frankfurt a.M., Hinweisbeschluss vom 8.4.2022 – 23 U 55/21 – BeckRS 2022, 12872; OGH (AUT), Urteil vom 17.02.2022 (Az. 9 Ob 79/21) – BeckRS 2022, 7127; OGH (AUT), Beschluss vom 27.04.2022 – 9 Ob 26/22x) – BeckRS 2022, 13103 m.w.N.

2 <https://www.tagesschau.de/wirtschaft/malta-gluecksspiel-100.html>.

3 available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=NIM:202103956>.

4 available online at [https://parlament.mt/media/122833/act-xxi-](https://parlament.mt/media/122833/act-xxi-gaming-amendment-act.pdf)

[gaming-amendment-act.pdf](#).

5 ECJ, Judgment of 13.02.1979, Rs. 101/78 para. 3 ff; Geismann, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, Art. 288 para. 34.

6 Karpenstein, in: Grabitz/Hilf/Nettesheim, Recht der EU, Art. 258 AEUV Rn. 29, 61 ff; Ehrlicke, in: Streinz, EUV/AEUV, Ert. 258 AEUV Rn. 34.

7 Neumayr, in: BeckOK ZPO, Art. 39 Rn. 15.

8 ECJ, Judgment of 14.3.2013, C-415/11 para. 50 ff; cf. ECJ, Judgment of 26.10.2006, C-168/05 para. 24; ECJ, Judgment of 6.10.2009, C-40/08 para. 38; Gottwald, in: MüKo ZPO, Art. 41 Brussels Ia-Reg para. 1.

9 Stadler/Krüger, in: Musielak/Voit ZPO, Art. 45 EuGVVO marginal no. 3.

10 Gottwald, in: MüKo ZPO, Art. 45 Brussels Ia Regulation marginal no. 12.

11 [https://www.europarl.europa.eu/doceo/document/E-9-2023-001722\\_DE.html](https://www.europarl.europa.eu/doceo/document/E-9-2023-001722_DE.html).