

Significance of the DocMorris decision of the BGH of 17.07.2025 for the gambling industry

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In its judgement of 17.07.2025¹, the Federal Court of Justice (Bundesgerichtshof, BGH) made a groundbreaking decision on the requirements for justifying encroachments on fundamental freedoms under EU law. The decision of the BGH could have far-reaching implications for the justification of restricting measures, interfering with fundamental freedoms of gambling providers.

I. Background to the DocMorris decision of the BGH

The proceeding before the BGH was based on a competition law dispute in the area of pharmaceutical law. The plaintiff, a Bavarian pharmacy association, had taken legal action against discount campaigns by a Dutch mail-order pharmacy – well known in Germany under the brand DocMorris. In the plaintiff's opinion, discounts granted by the defendant DocMorris to its German customers were in breach of the fixed prices for medicinal products in force at the time under the German Medicinal Products Act (Arzneimittelgesetz). Based on this, the BGH found that the defendant was not bound by the German fixed prices for medicinal products, as this violated the free movement of goods pursuant to Art. 34 TFEU. According to the BGH, the German legislator had not sufficiently determined and proven the health protection pursued by the fixed prices for medicinal products within the meaning of Art. 36 TFEU. Therefore, the encroachment on the free movement of goods of the Dutch mail-order pharmacy associated with the restricting fixed prices could not be justified.

II. Categorisation of the decision

In its judgement, the BGH makes generally applicable statements on the justification of interferences with fundamental freedoms that go far beyond the case it decided. The BGH emphasises that it is up to the Member States to prove in each individual case, that a restricting measure, interfering with a fundamental freedom is appropriate and necessary.² This proof must be based on objectively suitable data.³ Specifically, the BGH requires recourse to statistical data or data with comparable significance.⁴ The legislator, who bears the burden of proof, must base its prognosis decision on such data.⁵ At the same time, the BGH clarifies that the courts may not limit their review of a restrictive regulatory measure to a 'mere validity check of the legislative considerations', but must examine 'the validity of the evidence presented'.⁶ According to the BGH, these principles on the burden of proof and evidence even apply without restriction in the area of health policy measures that are intended to prevent risks to public health in accordance with the precautionary principle ("Vorsorgeprinzip").⁷

III. Transferability to German gambling law

The statements of the BGH in its DocMorris decision are not limited to the area of pharmaceutical law. They represent generally applicable criteria for the justification of state interferences with fundamental freedoms guaranteed under EU law. The requirements developed by the European Court of Justice (ECJ) on the free movement of goods pursuant to Art. 34 TFEU and confirmed by the BGH regarding the justification of interference can therefore also be applied to German gambling law and the interference with the fundamental freedoms of gambling providers associated with gambling regulation.

Regulatory decisions in the area of gambling, such as the requirements of the Inter-State Treaty on Gambling (Glücksspielstaatsvertrag, GlüStV 2021), interfere with the fundamental freedoms of the providers concerned. In this respect, the providers' freedom of establishment and freedom to provide services, which are protected under Art. 49 and 56 TFEU, are regularly affected.⁸ These interferences also require justification. In this respect, the ECJ examines whether a justification pursuant to Art. 52 (1) TFEU can be considered,⁹ which provides for restrictions in favour of health protection, or for other overriding reasons in the public interest, such as consumer protection.¹⁰

Based on this, the federal states justify the current gambling regulation with the objectives set out in Section 1 sentence 1 GlüStV 2021, all of which are aimed at consumer and health protection. However, according to the established case law of the ECJ, the mere invocation of corresponding objectives is not sufficient to justify interference with the freedom of establishment and the freedom to provide services.¹¹ In the area of gambling, the ECJ recognises that gambling regulation is one of the areas in which there are considerable moral, religious and cultural differences between the Member States and that the Member States have a wide discretion in determining the level of consumer protection and social order that they deem most appropriate.¹² Nevertheless, the ECJ obliges the Member States to ensure, that their measures, restricting gambling offers, actually correspond to the aim of reducing opportunities to gamble and limiting activities in this sector in a coherent and systematic manner.¹³ In this context, it is the responsibility of the Member State that has implemented the restrictive measure, to provide evidence for the justification of the measure.¹⁴

In view of the fundamental equality of the fundamental freedoms, no lower requirements can be placed on this provision of evidence than in the context of the free movement of goods examined by the BGH pursuant to Art. 34, 36 TFEU. Even if the ECJ has not yet expressly required Member States to submit an impact assessment for their regulatory measures in the area of gambling regulation, the ECJ requires Member states to provide an "*global assessment of the circumstances in which restrictive legislation [...] was adopted and implemented*", when submitting evidence for the justification of restrictions in the gambling sector.¹⁵ Such an global assessment can naturally only be based on meaningful facts and objectively suitable data, such as the statistical data used

by the BGH as an example. The previous case law of the ECJ regarding restrictive measures in the gambling sector can therefore be interpreted, solely in such a way that a restrictive gambling regulation – analogous to the statements of the BGH – must be based on a sufficient data basis.

This interpretation is also supported by the circumstance, that only facts can be proven. If the ECJ requires the Member States to provide evidence for their restrictive gambling regulation, the Member States must ultimately provide facts that substantiate the proportionality of the gambling regulation. This is precisely what the BGH requires, although the wording does not refer to "facts", but rather to "data" that can be used as evidence.¹⁶ This in fact means the same thing. That the BGH further requires statistical or at least equally meaningful data,¹⁷ is a matter of course under the rule of law. After all, evidence can only be provided with facts or data that have at least a certain significance. The statements of the BGH are therefore also applicable to the burden of proof of the Member States for their gambling regulation, which is recognised by the ECJ in established case law.

IV. No other assessment in consequence of the decision of the OVG Magdeburg of 23.07.2025

Almost at the same time as the BGH, the Higher Administrative Court (Oberverwaltungsgericht, OVG) Magdeburg, in its ruling of 23.07.2025,¹⁸ addressed the question of whether the gambling supervisory authority – in the specific proceedings the GGL – must base the ancillary provisions it imposes in a gambling licence on scientific or empirical evidence. As a result, the Magdeburg judges denied a corresponding obligation. At first glance, the decision of the OVG Magdeburg appears to contradict the principles established by the BGH just a few days earlier. On closer inspection, however, this is not the case: Firstly, the decision of the OVG Magdeburg, issued in its proceeding over preliminary injunctions, was based on a different depth of examination than the judgement, passed by the BGH as an appeal instance. The OVG summarised that the provisions of the GlüStV 2021 are based on empirical studies.¹⁹ However, it did not make any statement on the content and significance of the individual studies or their validity in relation to the specific ancillary provisions issued – which, however, will be necessary in the main proceedings. In terms of content, it should also be noted that the OVG Magdeburg formulates a standard for proving the justification of a state interference with a fundamental freedom that corresponds to the BGH and the ECJ.²⁰ The OVG only rejects a comprehensive burden of proof based on empirical studies or scientific findings for reasons of effective risk prevention if and insofar as there is a factual situation that cannot be clearly clarified at the moment of decision.²¹ In this case – but logically only then – the appropriateness of a measure does not require unequivocal empirical proof of the effectiveness of the measure.²² Furthermore, it cannot be inferred from these statements of the OVG Magdeburg that the acting Member State would be completely exempt from providing evidence for the appropriateness and necessity of a measure, but only that results of other investigation methods

than empirical or scientific investigations can also be used as a basis for the risk prognosis. This is in line with the statements of the BGH in connection with the precautionary principle. Accordingly, although risk management must in principle also be possible in an environment of scientific uncertainty, it cannot exempt a Member State from providing evidence of necessity in each individual case.²³

V. Significance of the decision for gambling regulation

The requirements presented by the BGH in connection with the case law of the ECJ regarding the provision of evidence in the context of interferences with fundamental freedoms are also important for gambling regulation. The case law is particularly relevant for legislative measures that have more or less "grown historically" and for which no meaningful data exists to date. This applies, for example, to the separation requirements²⁴ and minimum distance regulations²⁵ in terrestrial gaming operations. However, gambling supervisory measures must also be measured against the standards set by the BGH. As numerous providers have filed administrative court actions against the restrictions on their advertising opportunities, including the granting of bonuses and discounts, it is to be expected that the administrative courts dealing with these cases will in future take a stance on the case law of the BGH and the requirements for the justification of encroachments on fundamental freedoms set out therein.

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1. Docket number: I ZR 74/24. ↗

2. BGH, judgement of 17.07.2025, I ZR 74/24, para. 41, 51 according to juris, with recourse to ECJ, judgement of 19.10.2016, C-148/15, cited according to juris. ↗

3. BGH, judgement of 17.07.2025, I ZR 74/24, para. 51 according to juris. ↗

4. BGH, judgement of 17.07.2025, I ZR 74/24, para. 42 according to juris. ↗

5. BGH, judgement of 17.07.2025, I ZR 74/24, para. 40 f., 52 according to juris. ↗

6. BGH, judgement of 17.07.2025, I ZR 74/24, para. 43 according to juris. ↗

7. BGH, judgement of 17.07.2025, I ZR 74/24, para. 49 according to juris. ↗

8. Instead of many: ECJ, judgement of 22.01.2015, C-463/13 ("Stanley Bet"), para. 46 according to juris. ↗

9. Via the reference in Art. 62 TFEU, Art. 52 (1) TFEU also applies in the area of freedom to provide services in accordance with Art. 56 TFEU. ↗

10. ECJ, judgement of 22.01.2015, C-463/13 ("Stanley Bet"), para. 47 f. according to juris. ↗

11. Instead of many: ECJ, judgement of 23.12.2025, C-333/14 ("Scotch Whiskey Association"), para. 59 according to juris. ↗

12. ECJ, judgement of 08.09.2016, C-225/15, para. 39 according to juris. ↗

13. ECJ, judgement of 08.09.2010, C-46/08, paras. 65 and 85 according to juris. ↗

14. ECJ, judgement of 28.02.2018, C-3/17, para. 59 f. according to juris. ↗

15. ECJ, judgement of 30.04.2014, C-390/12, para. 52; judgement of 28/02/2018, C-3/17, para. 64 according to juris. ↗

16. BGH, judgement of 17.07.2025, I ZR 74/24, para. 42 according to juris. ↗

17. BGH, judgement of 17.07.2025, I ZR 74/24, para. 42 according to juris. ↗
18. Docket number: 3 M 56/25. ↗
19. OVG Magdeburg, decision of 23.07.2025, 3 M 56/25, BeckRS 2025, 19946, para. 32, with reference to OVG Magdeburg, decision of 19.12.2023, 3 M 87/23, para. 16 according to juris. ↗
20. OVG Magdeburg, decision of 23.07.2025, 3 M 56/25, BeckRS 2025, 19946, para. 34. ↗
21. OVG Magdeburg, decision of 23.07.2025, 3 M 56/25, BeckRS 2025, 19946, para. 35. ↗
22. OVG Magdeburg, decision of 23.07.2025, 3 M 56/25, BeckRS 2025, 19946, para. 35. ↗
23. BGH, judgement of. 17.07.2025, I ZR 74/24, para. 50 f. according to juris. ↗
24. See, for example, Section 21 (2) GlüStV 2021, according to which no sports betting may be brokered in a building or building complex in which an arcade or casino is located. ↗
25. This refers to minimum distance regulations in accordance with the gaming arcade regulations of the federal states, for example in accordance with Section 16 (3) AG GlüStV NRW. ↗

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