Neutral Citation Number: [2018] EWHC 3111 (Admin)

Case No: CO/1118/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE GREEN

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Between :

THE QUEEN
on the application of
(1) EU LOTTO LIMITED
(2) LOTTOLAND EUROPE LIMITED
(3) MULTI LOTTO UK LIMITED — **Claimants**

-and-

SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT — **Defendant**

-and-

(1) THE GAMBLING COMMISSION
(2) CAMELOT UK LOTTERIES LIMITED — **Interested Parties**

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Martin Chamberlain QC and Malcolm Birdling (instructed by Joelsons) for the **Claimant**
Andrew Sharland QC, Rupert Paines and Daniel Isenberg (instructed by **the Government Legal Department**) for the **Defendant**
Jonathan Moffett QC and **Christopher Knight** (instructed by **the Gambling Commission**) for the First Interested Party
Dinah Rose QC and Daniel Cashman (instructed by **Linklaters LLP**) for the **Second Interested Party**

Hearing dates: 24th, 25th and 26th July 2018

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Judgment Approved

LORD JUSTICE GREEN

A. The Issue

1. This is the judgment of the Court to which we have both contributed. There is before the Court a rolled-up application for permission to claim judicial review and, if granted, the hearing of the claim. We grant permission and deal with the case upon its substantive merits. This case concerns national lotteries. These have been commonplace since they were first introduced in the 17th century. Until 1993 large scale lotteries were prohibited. The National Lottery etc. Act 1993 ("the 1993 Act") altered this. It established the National Lottery as a means of supporting various sporting, cultural, community and other organisations' interests. In this jurisdiction the National Lottery was launched in 1994. Betting on the outcome of (as opposed to participating in) lotteries evolved as a secondary form of gambling almost from the outset. This case concerns a prohibition on such secondary gambling.

2. The Claimants challenge the decision of the Secretary of State to lay the Gambling Act 2005 (Operating Licence Conditions) (Amendment) Regulations 2018 ("the 2018 Regulations") before Parliament in the exercise of powers conferred pursuant to sections 78 and 355(1) of the Gambling Act 2005 ("GA 2005). This extends the prohibition on gambling on the outcome of the National Lottery.

3. In the UK gambling on the outcome of the National Lottery is prohibited by section 95 GA 2005. One of the games offered by the National Lottery is "EuroMillions". This is a multi-national lottery spread across a number of different states in Europe. With the advent of the internet and the growth of on-line gambling, betting companies have found a way around the prohibition in section 95. The 2018 Regulations came into force on 6th April 2018 and seek to close what is said to be a "loophole" which permits the circumvention of section 95 by betting companies offering to UK consumers betting on the outcome of EuroMillions run from <u>outside</u> of the UK. The new measures insert a new Regulation 4 into the Gambling Act 2005 (Operating Licence Conditions) Regulations 2007 ("Regulation 4"). This has the effect of preventing the holder of a betting operating licence from offering bets on the outcome of a non-UK EuroMillions draw or "… *on the outcome of a EuroMillions lottery, regardless of the name given to that lottery or how that lottery is described in any jurisdiction*", to consumers in Great Britain.

4. The Claimants include companies engaged in the provision of gambling services who have been prevented by Regulation 4 from continuing to offer what had, in the past, been a lawful product to their customers in this jurisdiction by providing them with the opportunity to bet on the outcome of non-UK EuroMillions draws. They argue that: "*The effect of the 2018 Regulations is to prevent the Claimants from offering that service on pain of breach of the criminal law. Similarly, the Claimants' British customers have been deprived of the choice to access these products.*"

5. Three main arguments have been advanced by the parties to this case which can be summarised as follows:

   (i) **Issue I – Is Regulation 4 prohibited by Article 56 TFEU**? Do the 2018 Regulations impose an unlawful restriction on the Claimant's freedom to provide services contrary to Article 56 TFEU which prohibits restrictions on the freedom to provide services within the European Union unless

justified on established policy grounds. It is common ground that, *prima facie*, Regulation 4 engages the prohibition on measures restricting the provision of services within the EU; the real issue is whether that restriction is justified on public policy grounds.

(ii) **Issue II – Was the consultation unfair and therefore unlawful**? The Claimants argue that the Secretary of State failed to conduct a fair and lawful consultation concerning the introduction of Regulation 4 because he omitted from the consultation any reference to the need to ensure, so far as possible, that gambling on the outcome of the National Lottery did not lead individuals towards harder and more harmful forms of gambling such as betting. It is said that this objective, upon which weight is *now* placed by the Secretary of State, was not identified in the course of the consultation and the inevitable consequence is that that consultees directed their representations to the stated objectives but not this unidentified objective. In the event the consultation was unfair and therefore unlawful.

(iii) **Issue III – Do the Claimants have locus to bring this claim for judicial review?** A third issue arose concerning the *locus* of two out of the three Claimants to seek judicial review. The Defendant contends that the Second and Third claimants do not have *locus* because: (i) in relation to the Second Claimant based in Gibraltar Article 56 TFEU does not apply to situations confined in all respects within a single Member State and since Gibraltar has been declared (in a recent ruling of the CJEU) to be part of the United Kingdom services between Gibraltar and the UK are not services as between Member States and hence those companies have no right to seek to apply Article 56 to their activities; and (ii) in relation to the Third Claimant it has not yet applied for any betting licences in the UK and its position is too remote from any activity that would be caught, even potentially, by Article 56 TFEU.

6. Underlying the present dispute is a tension between two contrasting values: on the one hand the freedom to engage in legitimate business activity across the EU market; and on the other hand, social policy concerns as to gambling even in the UK where gambling has not been outlawed on religious or moral grounds.

7. Article 56 TFEU is an important economic freedom to provide services. The Claimants contend that the 2018 Regulations result in an unlawful and disproportionate restriction on their freedom to provide services in the EU market. The Secretary of State accepts that *prima facie* Regulation 4 amounts to a restriction on such trade but says that the restriction is justified on legitimate and recognised public policy grounds. In considering the issue of justification it is necessary to keep in mind that the margin of appreciation or discretion that the State undoubtedly has is, in this case, narrowed given that the UK (unlike some other states) has not set its face against all gambling on religious or moral grounds. That said, this narrowed margin does not preclude insulating the National Lottery and giving it a special status. Gambling is not a harmonised area of EU activity and the UK is, within reason, entitled to make a choice as to the extent and nature of regulation based upon social policy grounds. But an important caveat is that the real justification for a restriction on legitimate business activity – even in the area of gambling

– cannot consist of purely economic or disguised anti-competitive grounds and it must be proportionate.

8. In our judgment the justifications advanced by the Secretary of State in evidence and in submissions to this Court establish a legitimate policy basis for Regulation 4. It meets the proportionality test laid down by the law for the evaluation of such restrictions on free trade. Moreover, the outright prohibition in Regulation 4 is the least restrictive measure which could effectively satisfy and achieve the lawful objectives which underpin it. For these reasons we are of the clear view that Regulation 4 is compatible with Article 56 TFEU.

9. The reasoning behind this conclusion is sufficient to dispose of the Claimants' second ground concerning consultation. However, we would not in any event have accepted the Claimants' objections to the consultation process performed by the Secretary of State which led to the draft Regulation 4 being laid before Parliament.

10. Finally, in relation to the objection raised by the Secretary of State as to the *locus* or standing of two of the Claimants to the bringing of this claim, we do not need to resolve this dispute because it is common ground that at least one of the Claimants does have a proper legal standing to bring this claim. The point is thus academic. Nonetheless, our provisional view was that the Claimants had the better of this argument. We did not hear full argument on this issue but, for reasons we summarise in this judgment (at section E below), we would have been loath to conclude that any of the Claimants lacked standing to bring the challenge.

B. <u>The Facts</u>

(i) The distinction between games and betting

11. Gambling can take three basic forms: lotteries, betting, and gaming. Lotteries entail entering into a draw for the chance to win a prize which is funded from ticket sales. They are normally considered to be one of the "softer" forms of gambling since they involve less risk of harm to players than other forms of gambling and are used to fund good causes.

(ii) The National Lottery

12. There is an important distinction to be drawn between playing <u>in</u> a lottery and betting <u>on</u> the outcome of a lottery. Lotteries have been operated for centuries and ancillary or parasitic gambling on the <u>outcome</u> of lotteries has also been commonplace. In the early 19th century state lotteries in the UK were ended because parasitic gambling on the outcome of the lottery became so rife that they, in effect, undermined the very lottery itself.

13. As observed (cf paragraph [3] above) it has been impermissible to bet on the outcome of the National Lottery since its inception. This was provided for by section 18 of the 1993 Act which amended Schedule 1 to the Betting, Gaming and Lotteries Act 1963 and made it a ground to cancel or refuse to renew a bookmaker's permit if the operator received or

negotiated a bet on the outcome of a lottery forming part of the National Lottery. The GA 2005 repealed this provision and replaced it with section 95:

> "95. Betting on the National Lottery
>
> (1) This section applies to—
>
> (a) a general betting operating licence,
>
> (b) a pool betting operating licence, and
>
> (c) a betting intermediary operating licence.
>
> (2) A licence to which this section applies shall, by virtue of this subsection, be subject to the condition that *nothing may be done in reliance on the licence in relation to a bet on the outcome of a lottery which forms part of the National Lottery*".
>
> (Emphasis added)

14. Section 4 of the 1993 Act concerns the overriding duties of the Secretary of State and the regulator (the Gambling Commission) and provides:

> "The Secretary of State and … the Commission shall each exercise their functions under this Part in the manner they consider the most likely to secure –
>
> that the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety, and
>
> that the interests of every participant in a lottery that forms part of the National Lottery are protected.
>
> Subject to subsection (1), the Secretary of State and the Commission shall each in exercising those functions do their best to secure that the net proceeds of the National Lottery are as great as possible. …"

15. Section 5 provides for a single operator to be licensed to run the National Lottery. The licence is awarded by competitive tender and is time-limited. The Second Interested Party (Camelot) is the current licensee and its licence continues until 2023. Under its licence Camelot is granted only a right to operate the National Lottery, and for each specific lottery promoted as part of the National Lottery it must apply for separate licences (under section 6 of the 1993 Act).

16. The First Interested Party, the Gambling Commission, has, since 2013, had the responsibility for regulating the National Lottery.

(iii) "EuroMillions"

17. "EuroMillions" is a lottery forming part of the National Lottery and it is licensed to Camelot. Critically, for the purposes of this litigation, it is a co-ordinated lottery based on a common single draw. It is promoted and licensed locally in nine European jurisdictions and it operates under common game rules. It was established on 7th February 2004 by Camelot in cooperation with the French and Spanish lottery operators. Camelot operates EuroMillions under a licence from the Gambling Commission in the UK and the Isle of Man. EuroMillions is now offered by operators in: Austria, Belgium, France, Ireland, Luxembourg, Portugal, Spain, Switzerland and the UK (and the Isle of Man). The numbers are drawn in a single draw taking place in Paris at 8.45pm every Tuesday and Friday nights. The results are processed to determine all of the prizes won in the draw across the participating countries. A person wins if their chosen numbers have been drawn. The funds are divided between the operators to enable each operator to pay the prizes due in respect of the tickets sold by that operator and the prizes are then duly paid.

(iv) Distinction between the National Lottery and remote betting regulation

18. "Betting" is regulated under the GA 2005. Section 9(1) defines "betting" as making or accepting a bet on "*(a) the outcome of a race, competition or other event or process, (b) the likelihood of anything occurring or not occurring, or (c) whether anything is or is not true*".

19. If a betting operator does not have a physical licensed bookmakers' premises, the operator is required to obtain a remote betting licence, enabling that operator to accept bets online from consumers. Remote betting operators are subject to standardised licensing conditions promulgated under section 75 GA 2005. They are set out, in conjunction with a statutory code of practice, in the Gambling Commission's Licence Conditions and Codes of Practice ("LCCPs"). These are outcome-focused thereby leaving discretion for operators as to the manner in which they satisfy the requirements.

20. This scheme of regulation differs from the prescriptive nature of licences governing the operation of the National Lottery. These differences are said, in essentially unchallenged evidence on behalf of Camelot, to be due to "*…the National Lottery's greater scale, higher profile, lower age-limit (16 rather than 18) and the attraction of potentially life-changing prizes*". It follows that Camelot is subject to different and greater scrutiny than remote betting operators. It is argued that these differences amount to "*clear blue water*" between the regulation of the National Lottery and other forms of gambling which therefore includes gambling on the outcome of the National Lottery.

21. The Secretary of State identified the following differences in written submissions:

> "There are a suite of protections that seek to maintain the 'clear blue water' between TNL [ie the National Lottery] and other, harder forms of gambling; both by limiting the activities of other entities, and by limiting TNL's own activities.… the SoS sets out the position…in summary form:
>
> By s. 95 Gambling Act 2005 ("**GA 2005**"), bets may not be taken on the outcome of TNL;
>
> By s. 16 National Lottery etc. Act 1993 ("**NLA 1993**"), it is an offence for a person advertising other lotteries, competitions or games to give the false indication that it is a lottery part of, or connected to, TNL;

> By regs 4-7 National Lottery Regulations 1994 ("**NLR 1994**"), TNL tickets cannot be sold (a) in the street; (b) in bookmakers; (c) in vending machines; or (d) door-to-door;
>
> By s. 11 NLA 1993, the SoS has powers to direct the Gambling Commission as to its licensing functions in relation to TNL. These have been exercised to impose a number of limits on TNL…;
>
> The TNL licence is <u>only</u> a licence to provide TNL. No other forms of gambling are permitted.
>
> The licence moreover contains strict player protections…. This includes the application of a player protection strategy in relation to all Camelot products (including online instant win games)…;
>
> Greater consumer transparency is required of Camelot than of other commercial operators…;
>
> TNL is subject to particular intense Parliamentary and regulatory oversight…;
>
> The monopoly-based model allows for tighter regulation and limitations on the frequency of draws …
>
> There are special procedures to ensure TNL's security, reliability and durability … including protection of player funds and prize-winners …
>
> TNL has a heightened control environment, including detailed reporting obligations to the Gambling Commissioner and strict player confidentiality requirements …; and requirements in relation to preventing underage play….
>
> Numerous measures (including s. 95) therefore keep TNL <u>separate</u> from other forms of gambling; to maintain TNL's status as a soft, mass-participation, form of gambling that is distinctive and tasteful, and <u>distinguished</u> from other types of gambling (in part, so as to minimise the risk that TNL players move on to other types of gambling). These are all matters of which the Claimants would have been very well aware of: the special position of TNL is a basic facet of the gambling ecosystem, and one which the Claimants had identified and actively exploited."

22. The Second Interested Party and operator of the National Lottery, Camelot, in its skeleton, summarised the differences as follows:

> **"Prevention of excessive play:** Camelot is required to adopt, maintain and implement a strategy to prevent excessive play on the National Lottery, which must be approved by the Commission and annual reviews of that strategy must be

submitted to the Commission. The game design of each section 6 lottery is reviewed and approved by the Commission, including (*inter alia*) consideration of player protection. In contrast, remote betting operators are merely required to put in place policies and procedures to promote socially responsible gambling and to respond to indications of problem gambling, make information available on responsible gambling and how to get help with problem gambling, and allow (and have procedures for) players to implement self-exclusion. There is no individual Commission review or approval of game or product design.

Protection of player funds and prize-winners: Camelot must provide winners of prizes exceeding £50,000 with appropriate sources of legal and financial advice; it must implement measures to protect the identity of prize-winners; and, it must enter into arrangements to secure players' funds. (For EuroMillions, there is a specific reserve fund, the use of funds from which must generally be approved by the Commission.) Remote betting operators must ensure that customer funds are held in a separate client bank account, but are otherwise not subject to similar obligations to assist and protect winners, nor to ensure security of their money on account or prize funds.

Consumer transparency: the terms and conditions, rules and procedures for each National Lottery game must be approved by the Commission, and Camelot may not change them without the Commission's prior written consent; Camelot must make such amendments to its terms and conditions, rules and procedures as the Commission may require to protect players; and, Camelot must adopt, maintain and comply with guidance documents for players, including a Player Guide, a Service Guide and a Subscription Guide. Remote betting operators are not subject to any prior scrutiny or approval of game design. Remote betting operator player guides are required only to set out the core elements for the acceptance and settlement of bets, and to ensure that terms are not unfair terms, and that the betting slip contains the operator's name and contact details.

Commercial controls to verify the supply chain and prevent commercial encouragement of play: Camelot may not offer discounted or free tickets without the consent of the Commission, unless it accounts for the full value of the ticket in its payments to the Secretary of State. It must ensure that tickets are not given away on the basis of money lent. Before paying a prize, Camelot must carry out, and require all distributors to carry out, such identity and other security checks as it deems reasonable and appropriate in relation to the amount of the prize. Also, the Commission can set limitations on the number of, or amounts spent on, tickets purchased remotely, and Camelot must use its best endeavours to ensure these limitations are applied by its interactive systems at all times.

Camelot also may not use any new method of distribution of sales without the Commission's prior written approval. Remote betting operators are required merely to prevent systematic or organised money lending between customers.

Heightened control environment: Camelot must agree on performance standards for customer service with the Commission. It must observe player confidentiality requirements to maintain, and ensure its contractors maintain, confidentiality in respect of the identity of any winner or any winning syndicates. Camelot must establish and apply qualitative criteria for selecting retailers and monitor their compliance. It must set up a control environment to ensure compliance with corporate governance, reporting requirements, information duties, audit requirements, internal controls and risk management. It must submit its articles of association and financing arrangements, and any material amendment to them, to the Commission. And, Camelot may not engage in any other activities other than the operation of the National Lottery, or undertake any ancillary activities, without the consent of the Commission. Remote betting operators are subject to less onerous requirements (to which Camelot is also subject): they must have in place complaints handling procedures and must notify the Commission about the outcome of a dispute referred to ADR, they must comply with advertising codes of practice / the Industry Code for Socially Responsible Advertising and must comply with data protection / data security obligations.

Prevention of underage play: Camelot must have a strategy to prevent underage play, which is approved by the Commission, and which is subject to random checks to ensure the appropriateness of the controls. Camelot is required to undertake covert checks on its retailers to detect underage play; and it is obliged to suspend the promotion of, or sale of tickets or subscriptions for, any lottery promoted as part of the National Lottery where the Commission considers that the lottery resulted, or is likely to result, in underage play. While remote betting operators are required to have in place a policy designed to prevent underage play, and to monitor the effectiveness of these policies, they are not subject to the further requirements identified above.

Age limits: The National Lottery can be played from age 16, but bets can be placed only from age 18. [The Defendants argue] that the different age limits demonstrate that the regulation of betting in relation to children is *stricter* than that for the National Lottery. This is a mischaracterisation of the situation. Rather, the National Lottery is a safer and more strictly regulated and protected activity than betting and may accordingly be offered to younger participants.

> **Good causes:** Pursuant to the licence under section 5 of the 1993 Act, Camelot is obliged to pay a proportion of the proceeds of the National Lottery into the National Lottery Distribution Fund, which are distributed to Good Causes pursuant to Part II of the 1993 Act. For every £1 of ticket sales in 2015/16, 25% was paid to Good Causes, and a further 12% was paid by way of lottery duty. Neither obligation applies to remote betting operators."

(v) The "loophole" in section 95

23. Evidence has been served on behalf of the Secretary of State and Interested Parties as to the emergence of what is said to be exploitation of a loophole in section 95 in that it did not prevent licensees from offering in <u>this</u> jurisdiction gambling based upon the <u>non</u>-UK "EuroMillions" even though in substance the non-UK "EuroMillions" game and its UK counterpart are one and the same. That evidence can be summarised as follows:

    (i) The Secretary of State says that EuroMillions comprises nine discrete lotteries offered in nine countries, one of which is the UK EuroMillions. But in real terms it has one draw and one prize fund. The Claimants offer bets not on the UK EuroMillions lottery but on the lotteries in other countries notwithstanding that such non-UK EuroMillions lotteries use the same draw and prize fund as the UK EuroMillions: the same numbers lead to the same prizes. In substance UK EuroMillions and non-UK EuroMillions are the same lottery.

    (ii) In 2014 the Department for Digital, Culture, Media and Sport ("DCMS") put out a call for evidence. This focused on concerns "*of potential consumer confusion between products and markets that have previously been distinct*" and whether consumers might wrongly believe that bets placed with companies (such as the Claimants) offering gambling on the outcome of the National Lottery were "*in support of good causes*".

    (iii) In late 2014 the Second Interested Party (Camelot), in response to the DCMS call for evidence, instructed ICM Unlimited to investigate whether consumers were confused by gambling operators taking bets on the outcome of EuroMillions. Camelot submitted the research results to DCMS. These showed that 61% of survey respondents believed that betting on non-UK EuroMillions involved actual participation <u>in</u> the EuroMillions draw. Only 14% of consumers correctly identified that buying a EuroMillions ticket via a betting operator was actually a bet on EuroMillions in a foreign country.

    (iv) In March 2015 the Culture Media and Sport Committee of the House of Commons noted, in their report into "Society Lotteries", a particular concern expressed by the Government about consumer confusion and the erosion of the '*clear blue water*' demarcating the National Lottery from other forms of gambling and its impact on gambling behaviour: "*The government is also worried that the confusion between the lottery and other forms of gambling online may attract young adults (aged 16 or17) who are permitted to take part in lotteries but not gaming or betting*" (Report paragraph [78]). The Committee (at paragraph [79]) cited evidence submitted by Camelot which exemplified the sorts of promotion undertaken by the on-line sector which led to confusion:

> "Camelot offered a number of examples of games, including 'MyLotto24.co.uk', run by Tipp24, which bets on the outcome of EuroMillions and German Lotto games with the chance of winning multi-million pound jackpots. Tipp24 also offers to bet on the outcome of the German Lotto game on behalf of sports clubs, foundations and charities: this is known as Lotto Network and is marketed to consumers under titles such as Arsenal Lotto or Aston Villa Lotto, which, Camelot argued, makes it appear to be a lottery-type game with a large jackpot. Camelot noted that Lotto Network was promoted to clubs as "a forward-thinking alternative to the traditional lottery model": in contrast to the latter's 'uncompetitive' prizes and capped annual incomes, Lotto Network is said to offer "supercharged multi-million-pound jackpots", no upfront fees or licences, and 26% of the revenue of the game. Other examples were the Jackpot Millions game (in which the Health Lottery was the marketing partner for Lotto Network), Cashcascade, Health Lottery Bet (a partnership between the Health Lottery and Coral to bet on the outcome of the Health Lottery, offering a jackpot of £1 million); and Health Jackpot (a bet on the outcome of the German Lotto game launched by the Health Lottery under a licence granted by the Alderney Gambling Control Commission)."

The Committee agreed with the concern expressed "…*that the evolution of online gambling is removing the distinction between lotteries and betting*". We note that a concern which was therefore being expressed was a fear that young people might be induced to move from playing the National Lottery into harder forms of gambling. In argument before us this was referred to as the "lead-in" risk. The Committee recommended that the Gambling Commission advise the Government on proposals made by Camelot to restrict lottery betting and also on measures designed to reduce consumer confusion. In paragraph [85] the Committee stated that a reason behind the case for reform of the law was the "… *value of society lotteries to the charitable and voluntary sector*".

(v) In October 2017 survey evidence was submitted to DCMS by Jackpot.com. This reinforced concerns in the mind of Government as to the lack of any clear understanding by consumers of the subtle difference between "*playing*" <u>in</u> a lottery and "*betting"* <u>on</u> the outcome of a lottery. The survey recorded that 49.31% (the largest number) of respondents stated that what they liked most about jackpot.com was that they could "*play* their favourite lottery and the second most popular reason was that they could "*play*" <u>other</u> lotteries. The survey was also significant in that it indicated that there was a circa 28% confusion rate amongst consumers.

24. In this respect we should record three matters: (i) the Claimants do not challenge the conclusion that there is some material level of confusion which arises out of the offering by them of gambling based *on* EuroMillions; (ii) the Claimants do not challenge either the privileged statutory position of the National Lottery as a sole provider or the policy which underlies section 95; and (iii), notwithstanding (ii) Mr Martin Chamberlain QC, for the

Claimants, accepted that if his principal argument based upon Article 56 TFEU was correct as it applied to Regulation 4 then it could impact adversely generally upon the legality of section 95.

(vi) The Consultation and Impact Assessment

25. The March 2017 DCMS consultation paper on a proposal to close the section 95 loophole and the accompanying draft Impact Assessment referred to a number of policy considerations which were said to be behind the proposal. We summarise these concerns as follows: (i) a concern that the offering of gambling on the outcome of the National Lottery could adversely impact upon the quantum of funds available for good causes; (ii) the risk that such secondary offerings could lead to consumer confusion; and (iii), the risk that the loophole eroded the "clear blue water" which existed between the regulation of the National Lottery and that which applied to other forms of gambling. We note that notwithstanding the concerns expressed to the House of Commons Select Committee (see paragraph 23(iv) above) there was not, at this point, any attempt to justify the proposed legislation upon the basis that given consumer confusion the proposal obviated the risk of gamblers being induced to move from soft to harder forms of gambling – the so-called "lead-in" risk.

26. The consultation paper stated:

> "Betting on these EuroMillions draws is clearly contrary to the spirit and intention of section 95, which seeks to preserve a distinction between betting and The National Lottery".
>
> "We are concerned that these bets are muddying the 'clear blue water' between betting and The National Lottery and resulting in consumer confusion. … The [Gambling] Commission has advised that in practice they are concerned that the distinctions [between playing the National Lottery and betting on its outcome] are subtle or technical and therefore capable of being easily lost on the average consumer (for example, small changes in wording from 'play' to bet'), particularly where the EuroMillions name is used. They are concerned that consumers are at risk of being confused, even if operators are technically compliant with the law and Gambling Commission guidance referred to above."
>
> "Betting operators can offer bets on EuroMillions that capitalise on the 'life-changing' prize levels offered by The National Lottery, without any obligation to return funds to good causes. Some bets are offered at a lower price than the current cost of a EuroMillions ticket. The Gambling Commission consider that there is a latent risk that consumer spend may be diverted from true lottery products … there is a risk that EuroMillions sales, and consequently National Lottery good cause returns, may decrease."

27. The accompanying draft Impact Assessment was in similar terms.

(vii) The evidence received in response

28. The Government received 52 responses: There were 10 lottery operators or representative groups; 7 lottery distributors; 8 voluntary and community sector organisations; 5 retailers or retail groups and 5 betting operators. Responses were therefore from either charities and "good causes" who, naturally enough, were concerned at any commercial activity (by the Claimants or others of a similar ilk) which risked undermining the funds available for distribution, or, from service providers, who objected to any narrowing of their commercial freedom. There was though support for the proposal to prohibit betting on non-UK EuroMillions draws with 32 respondents "*strongly"* agreeing and only 6 either "*somewhat*" or "*strongly*" disagreeing. On the issue of consumer confusion 23 respondents considered that there was potential for confusion between playing the National Lottery and betting on EuroMillions products; only 2 respondents did not consider there to be any risk of confusion. Many respondents were of the view that the "*good cause*" aspects of the National Lottery offerings were an important reason why they chose to play and that many of those who engaged in EuroMillions betting would do so under the mistaken belief that a proportion of their stake would go to "*good causes*".

29. In relation to the clear blue water rationale for closing the loophole the Secretary of State points to evidence from respondents (such as the Association of Charity Lotteries in the European Union – ACLEU) who drew a distinction between playing lotteries, which do not lead to addiction, and other forms of betting, which do.

30. Evidence was submitted by the Claimant, Lottoland. It submitted research which suggested that its activities did not exert any statistically significant impact on EU EuroMillions ticket sales and that National Lottery revenues were affected by other extraneous forces. Lottoland also set out the steps that it had already taken to educate consumers and it expressed its commitment to work with regulators to increase awareness and transparency and reduce confusion. These steps would include such measures as amending terminology used in promotions; making references to "bet" in marketing and online; including an on-line "bet slip"; adding an information page and video to its website; and, providing appropriate training to employees; including a disclaimer on every page of the website; and introducing compliance guidelines and checks. In relation to the figure of 61% for rates of confusion which had been put forward by Camelot, Lottoland disagreed and on the basis of its own independent research put the figure at circa 28%.

31. The main proposal advanced by Lottoland was for a 2-year review period during which the prohibition would not be introduced. In that period Lottoland would commit to do everything possible so that by the end of the review period there was a significant reduction in customers who might to some extent demonstrate a level of difficulty in understanding the difference between playing the National Lottery and betting <u>on</u> the National Lottery.

(viii) The Government response

32. In the wake of the Consultation the Defendant published a response in November 2017 entitled "*Consultation Response: Prohibiting Third Party Betting on Non-UK EuroMillions Draws*". In the executive summary it was stated: "*We intend to introduce a new licence condition .... This will ensure that these draws receive the same level of*

protection in relation to funds for good causes raised by The National Lottery as is the case for UK EuroMillions draws". It also stated that the practice of offering bets on non-UK EuroMillions: "… *runs counter to the spirit and intention of section 95 of the Gambling Act, which seeks to maintain the clear blue water between the National Lottery and commercial gambling products, thereby protecting returns to good causes*". The prohibition would not however apply to other international lotteries, such as the Irish Lottery or New York State Lottery since these did not raise funds for UK good causes and accordingly operators would be able to offer bets on them under the Gambling Act 2005.

33. The Secretary of State relies upon the consultation responses to contend that there was "*overwhelming*" support among consultation respondents for the proposal to prohibit betting on non-UK EuroMillions. A theme of the responses on consumer confusion was that "*the good cause aspect of the National Lottery was one of the reasons why consumers chose to play – and so consumer choice issues arose where consumers were betting on EuroMillions, under the mistaken belief that a proportion of their stake would go to good causes*". There was, it is argued, strong support for closing the section 95 loophole.

34. In Chapter 1 of the Consultation Response, headed "*Proposal to prohibit betting on non-UK EuroMillions draws*", the Defendant observed:

> "As outlined in the consultation document, we consider that betting on non-UK EuroMillions draws is contrary to the intention and spirit of section 95 of the Gambling Act and the established principle that operators should not be permitted to offer bets on the National Lottery. This provision seeks to preserve a distinction between betting and The National Lottery to protect returns to good causes and prevent consumer confusion. Our position was supported by the majority of consultation respondents.
>
> The prohibition is designed to be consistent with section 95. It addresses existing consumer confusion and protects against potential future losses to good cause returns. The risk of consumer confusion and impact on good cause returns is discussed in detail in relevant chapters … below …".

35. In Chapter 2, concerning "*Impact on Good Causes*", the following was stated:

> "Lottoland have provided evidence which suggests that at present their product has no statistical impact on EuroMillions UK sales. They also suggested there may be a potential positive correlation between the two products. However, we do not consider that there is sufficient evidence to determine a complementary relationship. The correlation could be due to an external factor which influences sales of both (e.g. more people bet or play lotteries when inflation rates are low, or differences in pricing between products).
>
> We note also that Lottoland, like some other operators which offer this product, is a relatively new entrant to the UK market.

> We remain concerned that should betting on EuroMillions expand and become widespread amongst other operators, there is a risk that EuroMillions sales, and consequently National Lottery good cause returns, may decrease, as noted in the initial impact assessment.
>
> Given the lack of available data on probable impact, we cannot conclude that this would be inevitable, however the Gambling Commission has advised this is a potential growth market for gambling operators. The Gambling Commission note the increased profile of operators offering this product, and we are aware that some operators put considerable resource into marketing their betting on EuroMillions products. Indeed, in their response Camelot note the cost to them of defending key brand terms has risen significantly as a result. Camelot note that these funds could otherwise could have been spent on marketing initiatives to increase good cause revenues.
>
> The current evidence base is not conclusive on the future impact on lottery revenues (and therefore the returns to good causes) attributable to betting on lotteries. However, we consider that the imposition of a condition which prevents the holder of a betting operating licence from offering bets on National Lottery outcomes (including a UK EuroMillions draw [sic]) is justifiable on both a principled and precautionary basis and is consistent with the existing ban on EuroMillions UK draw in section 95 of the Gambling Act".

36. Chapter 3 was entitled "*Consumer Confusion*". It considered both the Camelot and the Lottoland assessments of the risk of confusion. The section refers to the Camelot 2014 survey results which suggested levels of consumer confusion at 61% and the Lottoland analysis of 2017 which suggested a 28% figure. In the light of this the Defendant remained "*concerned*":

> "…there is potential for customer confusion in this area. Even where proactive steps have been taken, figures provided suggest at least almost a third of consumers remain unable to distinguish between the two products. This suggests that implementation of regulatory guidance, and existing trademark and unfair competition law is not sufficient to overcome the similarity in product look and feel, and confusion resulting from use of the EuroMillions name itself".

37. In Chapter 4, addressing "Business Impact", the Response estimated the cost of the Government's proposal to business at £4.5m - £5.8m pa, with its best estimate was £5m. Transition costs would be £0.2m in the first year.

38. The Government did not specifically identify the need to curb or obviate "lead-in" risk as a relevant justification for the prosed legislation.

(ix) The loophole closed: The Gambling Act 2005 (Operating Licence Conditions) (Amendment) Regulations 2018

39. The 2018 Regulations inserted the new Regulation 4 into the 2007 Regulations, in these terms:

> "Condition to be attached to betting operating licences
>
> 4. (1) The condition specified in this regulation is attached to each betting operating licence, including a betting operating licence issued before this provision comes into force.
>
> (2) The condition in this regulation is that nothing may be done in reliance on a betting operating licence in relation to a bet –
>
> on a EuroMillions draw, or
>
> on the outcome of a EuroMillions lottery, regardless of the name given to that lottery or how that lottery is described in any jurisdiction.
>
> (3) The condition applies only in relation to a bet which is or would be made (whether in person or remotely) by a person who is in Great Britain when the bet is or would be made.
>
> (4) The condition does not apply in relation to the outcome of a lottery which forms part of the National Lottery.
>
> (5) Where the condition is attached to a betting operating licence which was issued before this provision comes into force, the condition applies to that licence from the date on which this provision comes into force.
>
> (6) The condition will cease to apply if none of the lotteries which form part of the National Lottery is a EuroMillions lottery.
>
> (7) In this regulation –
>
> 'betting operating licence' means a general betting operating licence, a pool betting operating licence or a betting intermediary operating licence;
>
> 'EuroMillions draw' means a draw in relation to a EuroMillions lottery;
>
> 'EuroMillions lottery' means any lottery for which the prizes are allocated by a single draw made periodically by or on behalf of Services Aux Loteries En Europe SCRL, a société coopérative á responsibilité limitée ".

C. <u>Issue I: Is Regulation 4 prohibited by Article 56 TFEU?</u>

(i) ***The issue.***

40. We turn now to Issue I. The Claimants argue that the prohibition on betting on the National Lottery is an unjustified restriction upon the provision of services within the EU and therefore prohibited under Article 56 TFEU. Article 56 TFEU prohibits restrictions on the freedom to provide services within the Union:

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".

41. It is common ground that the prohibition is subject to exceptions. Article 56 falls within Chapter 3 of the TFEU. Article 62, which is also in Chapter 3, states: "*The provisions of Article 51-54 shall apply to the matters covered by this Chapter*". Article 52 states: "*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by the law, regulation or administrative actions providing for special treatment of foreign nationals on grounds of public policy, public security or public health*".

42. The issues arising for determination are thus (i) whether Regulation 4 amounts *prima facie* to a restriction on the provision of services within the EU which is prohibited by Article 56; (ii) if it is whether it is justified in principle by an objective justification recognised in EU law; and (iii), whether, if so, the restriction meets the test of proportionality (which itself is a question broken down into a number of constituent parts).

(ii) ***Does Regulation 4 amount to a prima facie restriction upon the provision of services prohibited by Article 56 TFEU*?**

43. We start by addressing whether Regulation 4 amounts (*prima facie*) to a restriction on the free movement of services prohibited by Article 56 TFEU. There is a fair amount of common ground as between the parties as to the law. The following propositions are not in dispute:

    (i) The prohibition in Article 56 is engaged where any national measure is "*liable to hinder or make less attractive*" the exercise of the fundamental freedom to provide services within the EU: see eg Case C-55/94 *Gebhard* [1995] ECR I-4816 (*"Gebhard"*) at paragraph [37].

    (ii) The provisions of the TFEU (and its predecessors) relating to freedom to provide services apply to the organisation of lotteries: see eg Case C-42/02 *Lindman* [2003] ECR I-13519; and Case C-243/01 *Gambelli* (6th November 2003) (*"Gambelli")* at paragraphs [52]-[54].

    (iii) The freedom to provide services is for the benefit of both providers and recipients of services: eg *Liga Portuguesa de Futebol Profissional v Departmento de Jogos da Santa Casa da Misericordia de Lisboa* Case C-42/07 (8th September 2009) at paragraphs [51]-[54], and *Gambelli* (*ibid*) at paragraph [55].

44. There is also agreement that *in principle* Regulation 4 amounts to a restriction on the freedom to provide services as understood by Article 56 TFEU. We do not therefore need to delve into this issue in detail save to observe that it is plain that the services provided by the Claimants in connection with betting are "*services*" for the purposes of Article 56. Further, the effect of Regulation 4 is to prohibit companies from outside of the UK (which includes at least one of the Claimants) from providing facilities which enable persons in the United Kingdom to bet on the outcome of EuroMillions games even when organised from outside of the United Kingdom. The restriction is thus "*liable to hinder or make less attractive*" the exercise of the fundamental freedom to provide services within the EU. For this reason, Regulation 4 does restrict the provision of services and *prima facie* Article 56 applies.

(iii) The test to be applied: Proportionality or manifest inappropriateness?

45. We turn now to consider whether any of the policy exceptions to Article 56 arise. Case law is clear that a measure which violates Article 56 in the field of gambling may, in principle, be justified on various public interest grounds, including that of consumer protection: see eg Case C-275/92 *Customs & Excise Commissioners v Schindler* [1994] ECR I-1039 at paragraphs [53]-[63] ("*Schindler*"). In Case C-390/12 *Pfleger* (30th April 2014) ("*Pfleger*") the Court stated at paragraph [14]: "*According to the Court's established case-law, restrictions on games of chance may be justified by overriding requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling…".* It is common ground that in law the burden of proof lies upon the Member State (here the Defendant) seeking to justify the restriction on the free movement of services.

46. Before we proceed to examine the justifications advanced to uphold the restriction on the provision of services we need to set out our conclusions on the test to be applied.

47. In their written submissions the parties advanced what, at first blush, appeared to be different tests. As the oral argument however evolved the submissions coalesced and the differences of principle became less pronounced. It is convenient to start by summarising how the arguments were first advanced.

48. The Claimants argued that the test was the proportionality test where the margin of appreciation and the intensity with which the Court scrutinised the facts were fact and context sensitive. In Case 55/94 *Gebhard (ibid*) the CJEU (at paragraph [37]) identified the components of the tests:

> "National measures liable to make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

49. This test was endorsed by the Supreme Court in *R (Lumsdon) v Legal Services Board* [2016] AC 697 ("*Lumsdon*") at paragraphs [52ff]. There the Court explained that the practical application of the proportionality test was fact and context specific and those

circumstances governed both (i) the intensity of the review process to be applied to the evidence by the Court and (ii) the breath of the margin of appreciation or discretion to be accorded to the Member State. The Claimants argue that on the facts of this case the surrounding context implies both a close and detailed scrutiny by judges of the evidence and also the according to the Secretary of State of a narrow margin of appreciation.

50. The Defendant argued initially that the test was one of "*manifest inappropriateness*": The Court would only interfere if the measure in dispute fell below that, in practice, low threshold which presupposed a concomitantly low standard of proof for the decision maker to meet to justify a measure. A "*less strict approach*" fell to be taken to restrictions on Article 56 TFEU in the sphere of gambling because (*per* the Supreme Court in *Lumsdon* at paragraph [37]) it is a context where "*an unregulated economic activity would be harmful to consumers*" and where "*national regulatory measures are influenced by national traditions and culture*". The Secretary of State endorsed the statement of the High Court in *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport and others* [2014] EWHC 3236 (Admin) ("*Gibraltar Betting*"), which pre-dated *Lumsdon*, at paragraphs [102]-[105]:

> "… the Court of Justice has over many years expressed considerable ambivalence towards gambling. …
>
> The ambivalence stems from an appreciation that in its essential nature gambling involves a depletion of consumer resources…
>
> This is not an area where the ordinary libertarian instincts of the Court to encourage free and unfettered trade are discernible. As already observed … the Court has stated that free competition in relation to gambling tends towards consumer harm not benefit. …
>
> This ambivalence felt by the Court, and reflected in jurisprudence for over two decades, translates into a reluctance by the Court to dictate to the Member States how they should legislate in this field. More especially the Court has repeatedly confirmed that Member States have a "…wide measure of discretion to determine what is required in order to ensure consumer protection and the preservation of order in society." … Measures which, broadly pursue, consumer protection or crime suppression objectives are legitimate. Member States which adopt licensing regimes with these objectives in mind enjoy a wide margin."

51. At paragraph [91] of *Gibraltar Betting* the Court had noted that the CJEU had: "… *made clear that whilst traditionally measures designed to reduce or curtail competition would be unacceptable, in the specific context of gambling, competition in its unbridled form tended to increase consumer welfare problems (e.g. addiction) and that therefore measures taken to restrict competition could be categorised as consumer orientated.*"

52. The above highlights why at the outset it seemed that the parties were advancing two different tests, with easily-met manifest inappropriateness on the one side, and hard(er)-

edged proportionality on the other. As the arguments developed the position however became more nuanced. All counsel accepted that at base the test was one of proportionality, but they differed in the breadth of the margin of appreciation to be accorded to the decision maker and also as to the way in which the test was to be applied on the facts.

53. In our judgment the test in a case such as the present is proportionality, and not one based upon "*manifest inappropriateness*". There are a number of reasons for our conclusion.

54. First, proportionality is a general principle of EU law enshrined in the Treaties. Article 3(6) Treaty on European Union ("TEU") states: "*The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties*". This has been construed as indicating a proportionality test. Article 5(4) TEU states: "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*".

55. Second, the four-part test described in *Gebhard* (see paragraph [48] above) was approved of by the Supreme Court in *Lumsdon* (see paragraph [49] above). The Court also indicated, referring to *Gibraltar Betting*, that the field of gambling was one which fell within the general proportionality test:

> "37. Proportionality as a ground of review of national measures, on the other hand, has been applied most frequently to measures interfering with the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, for example because the subject-matter lies within an area of national rather than EU competence, a less strict approach is generally adopted. That also tends to be the case in contexts where an unregulated economic activity would be harmful to consumers, particularly where national regulatory measures are influenced by national traditions and culture. An example is the regulation of gambling, discussed in *R (Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport)* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28."

56. Third, although in *Gibraltar Betting* the Court did refer to the *manifest inappropriateness* test it also endorsed the proportionality approach. The *manifest inappropriateness* test

came from the earlier ruling of the Court of Appeal in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437 ("*Sinclair Collis*"). In *Gibraltar Betting* the Court, whilst favouring the proportionality test, endeavoured to square the circle and explain why the *manifest inappropriateness* test could be seen as a part of the proportionality regime. In *Lumsdon* the Supreme Court made clear that the test was not that in *Sinclair Collis*: *ibid* paragraphs [75] – [82]. It follows that the Defendant cannot justify Regulation 4 upon the basis that it is not manifestly inappropriate. The proportionality test has been applied in later cases: cf *British American Tobacco and others v Secretary of State for Health* [2016] EWHC 1169 (Admin) ("*BAT*") at paragraphs [405ff] and in particular [448]-[449]; *Transport for London v Uber London Limited and others* [2018] EWCA Civ 1213 at paragraphs [25ff] ("*TFL*") paragraphs [26ff]. As we have already recorded Mr Sharland QC for the Secretary of State, in his oral submissions, ultimately accepted that the test to be applied was the proportionality test.

57. The Supreme Court in *Lumsdon* held that according to the jurisprudence proportionality as a general principle of EU law involved a consideration of two broad questions. First, whether the measure in question was suitable or appropriate to achieve the objective pursued (the Appropriateness test). Second, whether the measure was necessary to achieve that objective, or whether it could be attained by a less onerous method (the Necessity test). Each of these questions implicitly contains other questions. The first question necessarily involves identifying the objective pursued and determining whether it was a legitimate objective in and of itself to pursue. If the objective was illegitimate it could hardly be rendered legitimate simply because the means adopted to achieve that (*ex hypothesi*) illegitimate end were "a*ppropriate*". A Court ruling upon the issue must in fact consider (i) the aims of the measure and its legitimacy; (ii) whether the measure in question is *suitable* or *appropriate* to achieve the (legitimate) aims pursued; and (iii) whether the measure is *necessary* to achieve that objective, i.e. determining whether if there is a choice of equally effective alternative measures which would achieve the aim that the least restrictive measure has been adopted.

58. In oral argument various points arose as to the practical application of this test to the facts. There is a growing body of case law which sets out the approach to be adopted. We summarise our conclusions on these points as follows:
    (i) **Using the most up to date evidence**: The Court must apply the proportionality test upon the basis of the most up to date evidence: BAT *ibid* at paragraphs [436] – [437]; *TFL* (*ibid*) paragraph [40]; *Scotch Whiskey Association v Lord Advocate* [2017] SLT 1261 at paragraph [64].
    (ii) **The right of the State to advance ex post facto justifications**: The Court is not limited to the evidence that existed as of the date of the relevant decision being impugned in the judicial review. The Court may apply an *ex post facto* approach: *BAT* (*ibid*) paragraph [426]- [437]; *TFL* (*ibid*) paragraph [40] *Lumsdon* (ibid) paragraph [58]. The Secretary of State is not therefore necessarily confined to the justifications for the measure which were advanced as relevant as of the date of the decision in question.
    (iii) **The intensity of judicial scrutiny**: The intensity of the scrutiny by the Court of the evidence will be fact and context sensitive but may well be close and detailed: *Lumsdon* (*ibid*) paragraphs [44], [56] and [61]; *Gibraltar Betting* (*ibid*) paragraphs [96]-[98]; BAT (*ibid*) paragraph [442].
    (iv) **The extent to which actual evidence is required**: The extent to which actual evidence is required will also be context sensitive: See *Lumsdon (ibid)* at paragraphs [44] – [56]), applied by the Court of Appeal in *Routier v HMRC*

[2017] EWCA Civ 1584 at paragraphs [15] and [99] – [102]. In the latter case it was held (in a tax case) that because the CJEU had in a series of prior cases laid down what sorts of justification could and could not be treated as justifiable there was no need for the State to, in effect, re-invent the wheel and adduce new evidence to establish that which the CJEU in the past had already affirmed in principle. In other cases there may be a much greater need for the parties to adduce detailed evidence.

(v) **Avoiding an excessively schematic approach**: The starting point of the analysis is the rationale of the underlying rule and its context. But the classification of cases under different headings is no more than a convenient and useful *aide* to analysis. In *Lumsdon* the Court thus emphasised that it was important to avoid an excessively "*schematic*" approach:

> "34. … the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question".

This approach was followed in *BAT* (*ibid*) paragraphs [433ff]. The judicial process of determining the breadth of the margin of appreciation is not a precise or exact science.

(vi) **No fixed rules as to the types of evidence needed**: There are no canonical rules as to the nature of the evidence that will be appropriate: see *BOSCA et ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) at paragraphs [234] – [244] for an analysis of the approach to be adopted towards the review by a court of evidence, and paragraph [272] for acknowledgment that the evidence can be quantitative and/or qualitative.

(vii) **Close scrutiny of evidence in ex post facto cases**: In cases where an *ex post facto* justification is advanced the Court will scrutinise the evidential underpinning with particular care: *TfL ibid* paragraph [41] citing *Re Brewster* [2017] 1 WLR 519 at paragraph [50]. In argument Mr Martin Chamberlain QC, for the Claimants, argued that in an *ex post facto* case the margin of appreciation attributed to the State was narrowed or even non-existent. We accept that heightened judicial scrutiny applies but we do not accept that this implies that the margin of appreciation otherwise attributable to the state disappears or is necessarily significantly modified. There is no logical reason why that margin should be curtailed beyond that which would apply from the application of the normal rules, simply because a justification is first advanced before a court rather than when the measure was first promulgated. The reason that the Court will apply a more rigorous evidential scrutiny is because this will be the first time that the argument has been forensically tested and (as in the present case) it may not have been the subject of a consultative exercise or any form of

Parliamentary scrutiny. In such a case it is appropriate that the Court should roll its sleeves up and examine the justification and its evidential foundations with considerable care. But this exercise is conceptually quite different to the identification and application of the due and proper margin of appreciation. A court might thus roll its sleeves right up yet still conclude that a significant margin of appreciation be accorded to the decision maker. This is a significant constitutional point as was recognised by the Court, when a similar issue arose, in *BAT* (*ibid*) at paragraphs [630] – [632]. The proportionality test is thus a test which can be applied with considerable flexibility and for this reason it does not involve the court usurping the legitimate function of the decision maker or legislature.

(iv) Analysis: The Appropriateness test - Is Regulation 4 justified by an objective recognised in EU law?

59. We now move from the articulation of the principles to be applied to their application to the facts. The nub of the dispute concerns the justifications advanced for the restriction. The issues here are (i) to identify the justifications relied upon by the Secretary of State and then (ii) to decide whether each such justification is admissible and valid in law and on the evidence as possible justifications. As explained above we must consider the reasons advanced by the Secretary of State at the time the decision was taken to promulgate Regulation 4, but also any new justifications advanced subsequently.

60. We start by summarising the submissions of the parties.

- *Submissions of Secretary of State and Interested Parties*

61. Over time the weight attached to different policy grounds by the Secretary of State has varied. Before the Court the Secretary of State articulated the justifications for the restriction in terms, which referred to: (i) the desire to eliminate confusion; (ii) the desirability of maintaining regulatory "*clear blue water*" between the *sui generis* regime for regulation of the National Lottery and that for gambling generally; and (iii), the need to avoid lead-in risk. The Minister downplayed the desirability of preserving funds for good causes. The Secretary of State argued in written submissions:

> "The Secretary of State, in making the Regulations, was pursuing two plainly legitimate aims eliminating, to the greatest extent possible, customer confusion in relation to playing the UK Euromillions lottery on the one hand and betting on the same draw and numbers (by way of a bet on a non-UK EuroMillions lottery) on the other; and maintaining "clear blue water" between playing the National Lottery and betting on the outcome of the National Lottery. Such a clear distinction is important to protect the special status of the National Lottery, including the need to ensure, so far as possible, that the playing of the National Lottery does not lead individuals towards other forms of gambling such as betting".

Although described as two aims the reference to obviating lead-in risk is an additional ('third') aim.

62. These aims and objectives are then elaborated upon as follows:

> "**Consumer confusion**: the Regulations were aimed at "the concern (raised in many of the consultation responses) that a significant proportion of consumers believed that they were consuming one product (entry into a lottery draw), but were in fact consuming a very different one (a wager on the outcome of the lottery)". Although lottery betting and playing a lottery appear different from a consumer perspective, they are substantially different. Consumers are entitled to be placed in an informed position – both as to the nature of the product they are purchasing, and as to where their money is going (particularly when, as the consultation highlighted, the contribution of lottery playing to good causes is a factor in consumer decisions to play the lottery. Despite the steps taken by operators, a substantial level of consumer confusion remained – 28-29% on Lottoland's own "robust" evidence. Both the SoS and the Gambling Commission also note the concern that commercial operators - including Lottoland and Multilotto - have taken steps the effect of which is to perpetuate such confusion, even while presenting themselves as willing to work to address such matters.
>
> **Clear blue water**: the special position of the National Lottery (summarised above) demands that it be "insulated from commercial gambling and should provide strong safeguards for consumers". The National Lottery is regulated differently, and more intensively, from other forms of gambling. The s. 95 prohibition forms part of that wider scheme of protection. The effect of non-UK EuroMillions betting was to muddy that 'clear blue water' between the National Lottery and other forms of gambling, and to undermine the intention of s. 95. As Ms Carney explains, "[a]n important aim of the Regulations was simply to close this anomalous loophole, and thereby to uphold the Parliamentary intention behind the 2005 Act".

63. In relation to the desirability of minimising the diversion of funds to be distributed to good causes in pleadings and submissions these were not abandoned but were downplayed:

> "The Secretary of State, of course, accepts that the possible impact on good causes was also taken into account when deciding to make the Regulations – not because such gambling was threatening those returns, but on a precautionary basis. The Secretary of State was properly entitled to take this into account. The desire to protect good causes cannot be the sole factor for regulating a particular aspect of gambling, but it is nonetheless relevant to justification: Schindler at [60]. This is common ground … such, it is to be counted alongside other legitimate objectives in justifying a particular interference with the freedom to provide gambling services. It is clear beyond doubt that it was not the sole factor in the decision to make the

> Regulations; it was one consideration, alongside two other legitimate objectives. As Ms Carney explains, "[h]ad good causes returns been a primary concern, the Regulations would have prohibited betting on all lotteries and not just betting on non-UK EuroMillions".

64. We have already set out (see paragraph [38] above) that at no point prior to this litigation, during the consultation period or its aftermath did the Secretary of State seek to justify placing Regulation 4 before Parliament upon the basis of a need to eliminate "lead-in" risk. In oral submissions Mr Sharland QC for the Secretary of State accepted that the justification based upon the desirability of preventing those who *played* the Lottery from being induced to move on to engage in other harder forms of gambling was <u>not</u> a policy that found expression in the consultation paper or in the subsequent response of the Secretary of State to the consultation responses. It was thus accepted that this was a "*new*" point which had emerged only in the course of the litigation. As we have set out, in principle, it is permissible for the Defendant to seek, before this court, to justify Regulation 4 upon the basis of this "*new*" reason.

65. The manner in which the lead-in justification arose is as follows. In evidence submitted to the House of Commons Select Committee in March 2015 the Minister and officials had raised concerns as to the risk that persons, and in particular young people such as 16 and 17-year olds who were permitted to play the National Lottery, could be induced into moving from playing the Lottery to other harder forms of gambling which were widely and actively promoted on the Lottoland website. This was a concern which was different to that arising purely out of the risk of confusion though it was true that the lead-in risk could be affected or accentuated where there was confusion. The Select Committee recorded these concerns in some detail in its Report and made a recommendation which was essentially supportive of the concerns raised: See generally paragraph [23(iv)] above. Nonetheless, at the time of the Consultation this was seen as a largely theoretical concern and it was not subsequently expressly advanced as a justification for the proposed closing of the loophole. It is right however to record that it was nonetheless a real concern that lay in the minds of officials at the time. It was described to us in court the following way. The National Lottery main draw (Lotto) is run twice per week and if a player loses the stake there is no chance (at least not for several days) to seek to recoup that loss by repeat playing. But other on-line gambling opportunities are run very frequently, in some cases as often as every few minutes. This means that a young person who loses money betting on the outcome of the National Lottery can "*chase the losses*" by keeping playing with the risk that he or she then runs up potentially ever greater losses.

66. In the course of this litigation witness statement evidence was served on behalf of the Claimant companies seeking to address why the restriction in Regulation 4 would cause them significant economic loss and was disproportionate. Evidence was given by Mr Easterbrook (the UK Managing Director of ELL in Gibraltar) in a statemented dated 16th March 2018 and Mr Biro (CEO of Multilotto, in Malta) also in a statement dated 16th March 2018. Mr Easterbrook explained (at paragraph [45]) that the measure would cause financial loss: "*This is because EuroMillions is a lead-in product, which attracts and retains customer who then go on to place bets on other international lotteries and gaming products*". Regulation 4 would have a "*severe impact on the UK business*" and, in turn, on the overall valuation of the Lottoland Group. It could lead to job losses. Mr Biro

made similar points. He added that it could *"... lead to Multilotto suffering even more severe financial losses, in the short, medium and long term*". The Secretary of State relied upon this evidence as tangible support for concerns about "lead-in" risk. Subsequently in a further statement served on 25th June 2018 Mr Easterbrook sought to contextualise and limit his earlier evidence. He now says that having reviewed the evidence the migration from soft games to hard betting is "*relatively small*" (about 8%). The migration or "*cross-selling*" is mainly to other forms of soft betting. Mr Sharland QC for the Secretary of State pointed out that the way in which this qualification was crafted seemed extremely strategic and without full disclosure of all the relevant data and internal documentation behind the statement this attempt at damage limitation and containment was unconvincing. Moreover, Mr Biro has not sought to modify his statement which thus stood as originally drafted in its unqualified form.

67. For the Secretary of State, Ms Carney, Head of Gambling and Lotteries within DCMS, in witness statement evidence cites and relies upon the evidence from Mr Easterbrook and Mr Biro as support for the proposition that betting on EuroMillions has a lead-in effect to other harder forms of betting. These concerns become: "… *particularly acute in circumstances where ... the Claimants' own evidence states that their EuroMillions products are a lead-in to their other betting and gaming products, which include not only lottery betting products but also harder gambling products such as casino style games*".

68. Mr Sharland QC invited the Court to infer from this: that the lead-in risk was tangible; that it could exert significant economic effects; and, importantly, that it reflected the Claimants' group's business model which was to use gambling on the National Lottery as a form of bait for other harder forms of betting. He also argued that it was necessarily to be taken to be part of the Claimants' strategy to target those (vulnerable) individuals who played the National Lottery, including 16 and 17-year olds. Ms Carney explained that this candid acknowledgement by the Claimants' senior executives heightened the Government's concerns and now provided the solid evidence needed to turn what was (hitherto) a somewhat theoretical but unevidenced concern into one with real force and immediacy to it.

- Conclusion on the objectives relied upon by the Secretary of State

69. Pulling the threads together it follows from all the above that there are four objectives now relied upon by the Secretary of State to justify Regulation 4, which includes the three articulated during the process leading up to promulgation of Regulation 4 (which includes protecting funds for good causes), and the new need to obviate "lead-in" risk which (on the Secretary of State's case) assumed tangible support from the Claimants' own evidence. We therefore treat these four justifications as reflecting the Secretary of State's case for the purpose of this Court applying the proportionality test.

70. In our judgment each of these four justifications is capable in law of amounting to a valid reason for imposing a restriction upon the free movement of services within the EU. We set out our conclusions on each of these justifications below both in terms of their admissibility as a relevant justification and also as to the weight to be attached to each. We start with those which were raised during the consultation process.

71. **Confusion**: First, the elimination of confusion. The starting point is that the protection of consumers is very well established as a policy basis for restricting the provision of gambling services under Article 56 TFEU: See eg Case C-275/92 *Schindler* [1994] ECR I-1039; (*ibid*); Case C-124/97 *Läärä* [1999] ECR I-6067; and Case C-67/98 *Zenatti* [1999] ECR I-7289. In *Gambelli* (*ibid*) at paragraph [67] the CJEU summarised the position as follows:

> "67. First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner."

72. In our judgment a policy which seeks to ensure that consumers gamble in an informed and transparent manner is self-evidently a valid justification. Since it will be relevant to a consumer's choice of whether to gamble, and if so with whom, that a portion of the money placed will go to good causes, it is equally relevant to ensure that service providers enable that choice to be made upon a fair and transparent basis and, therefore, to take steps to eradicate confusion which impinges upon the fairness and transparency of the decision to gamble.

73. Mr Moffett QC, for the Gambling Commission, advanced a series of arguments about the practical realities of the on-line betting operators' business models. The points that he made seemed to us to have real force and nothing which we have seen in the Claimants' evidence comes close to meeting the points made in this respect. These considerations reinforce our basic conclusion about the justifiability of consumer orientated measures to remove confusion. We summarise Mr Moffett's submissions in the following way. He argued that there was an "*inherent risk*" of confusion arising out of the manner in which the on-line sector operated which flowed from three considerations. First, betting *on* lotteries (as opposed to participating *in* them) was unusual since it was a parasitic or derivative business. Few consumers were aware of or understood the secondary nature of the service being provided to them. Second, betting *on* the National Lottery had the same or similar look and feel to playing or participating *in* the National Lottery. The bets are offered in a similar way and, indeed, the basis of the Claimants' business was to ape the National Lottery to the greatest degree possible with the consequence that a consumer betting *on* the Claimants' on-line services would be facing a product which simulated the National Lottery and felt just like participating and playing *in* the National Lottery. This "*look and feel*" similarity was exacerbated by the fact that the on-line operators chose (quite deliberately) to maximise the equivalence with, and (it follows) chose not to differentiate themselves from, the National Lottery. The fact that the service being offered is on-line also heightens the similarity since the distinction between particpating *in* the National Lottery and betting *on* the National Lottery is almost invisible on-line in a way that it would not be if the consumer had to walk into a betting shop and place a physical bet. Third, EuroMillions is very familiar to consumers. The National Lottery is the biggest gambling opportunity in the UK and EuroMillions is the second most popular draw-based game operated by Camelot. There is thus very strong brand recognition and

popularity. It is strongly in the interest of the on-line operators to seek to trade on that powerful brand and it follows that it maximises their profits if there is confusion in the consumer's mind.

74. As observed we see powerful force in these points. They underline our conclusion that the preservation of the risk of confusion is almost inherent to the on-line operators' business models and we take note of the evidence of Mr Easterbrook and Mr Biro (see paragraphs [66]–[68] above) as to the importance of "lead-in" which is in our judgment facilitated and enhanced by confusion. In such circumstances when one of the statutory duties on the regulator is to promote fairness in gambling it is our view that a measure adopted to curb confusion and enhance transparency is an important objective which can be relied upon to justify a restriction on the provision of services.

75. As to the evidence, Mr Chamberlain QC did not demur from the proposition that there was evidence of confusion. At the very least his own clients' evidence established that there was confusion amongst about 28% of those who did play on his clients' sites; and this therefore did not take account of the state of knowledge of new and potential customers who had yet to use the site. If we were to take the evidence of Camelot then the figure exhibiting confusion is very much higher (see paragraph [23(iii)] above). We do not need to address all of the many criticisms which each party has made as to others' evidence. On any view there is evidence of substantial confusion and, for the reasons given by Mr Moffett QC, the preservation and exploitation of confusion is seemingly built-in to the Claimants' business model.

76. In conclusion the Secretary of State is justified in relying upon consumer confusion as a reason justifying restrictions on betting on the National Lottery. To the extent that this conclusion turns upon issues of the margin of appreciation then we are of the view that the law confers upon the Secretary of State a relatively broad margin, notwithstanding that the UK is not a state where gambling and betting are prohibited wholly or substantially on moral or religious grounds.

77. **The maintenance of clear blue water**: The second justification is the maintenance of "*clear blue water*" in the regulatory regimes for the National Lottery and those for other forms of gambling. We have set out the ways in which the two regimes are different at paragraphs [18] – [22] above. The fact that there are two quite different legislative regimes is a deliberate policy choice made by Parliament which has stood for many years without challenge. Indeed, even in the present case there is no clear case advanced to the effect that there is no lawful basis for the maintenance of the two different regimes. Case law makes clear that Member States may take such policy decisions even if they have the incidental effects of curbing one course of gambling relative to another, and that holds good even though the UK has not taken the view (that some other states have) that gambling should be outlawed for moral or religious reasons. It follows in our judgment that since the initial drawing of a distinction between the regulatory regimes for the National Lottery and other forms of gambling lies within the right of Parliament to draw; then the maintenance of that same line must also, in principle, be lawful. In *Gibraltar Betting* (*ibid*) the main statutory objectives which lay behind the GA 2005 were summarised as follows:

> "134. The main objectives set out during the legislative process (and which I infer were accepted by Parliament) were as follows:
>
> a) To better satisfy the statutory licensing objectives in section 1 GA 2005.
>
> b) To improve the consistency of the application of the Act to all operators providing services in the UK.
>
> c) To enable the Gambling Commission to obtain more comprehensive information about the market and the operators providing services to the UK market so as to achieve better supervision and protection of consumers.
>
> d) To protect consumers by increasing transparency about regulation and thereby avoiding the risk that consumers are misled or confused.
>
> e) To ensure that social problems arising out of gambling are addressed more fully and effectively.
>
> f) To ensure that all operators bear social and financial responsibility for the adverse social consequences of remote gambling.
>
> g) To ensure that all operators bear similar regulatory costs."

78. It was not suggested in that case that any of these objectives were invalid. Many apply to section 95 and in particular (a), (b) (d) and (e). For the reasons given by the Defendant and Interested Parties we accept that there are important policy considerations which justify maintaining clear blue water between the regulatory regimes. If the basic (*a priori*) policy premise for section 95 is valid then that is a strong reason for justifying closing any loopholes. The social policy choice made by the UK to accord a special status to the National Lottery involves maintaining "*clear blue water*" between the National Lottery and all other forms of gambling. That is not (as was submitted by the Claimants) an empty slogan, still less a slogan designed to disguise anti-competitive measures. It is reflected in section 95 GA 2005 which the Claimants have chosen not to challenge.

79. **Preservation of funds for good causes**: The third ground advanced is the preservation of the National Lottery as a source of funds for good causes. It is clear to us that at the outset this was an important consideration for the Government. This is apparent from the Consultation Document and the Government's response to it (see paragraph [26] – [35] above) and it is not without all relevance that the concern expressed about lead-in risk before the House of Common Select Committee in 2015 (see paragraph [23](iv)] above) was also, at least in part, about the preservation of funds for good causes. Subsequently, other considerations began to loom large (such as the need to reduce the risk of consumer confusion) and as the litigation has progressed the issue of funds for good causes as a justification has shrunk until in his oral submissions before the Court Mr Sharland QC almost (but not quite) ignored it. We understood why this evolved approach has been taken. It is because of the uncertainty in the law as to the relevance, if any, that economic grounds can play as justifications for restrictions on free trade. Indeed it is an important

plank in Mr Chamberlain QC's argument that the preserving funds for good causes justification is an illegitimate economic argument and did, in truth, play the major part in the Government's thinking (and other grounds are devoid of real substance). If, he argues, that is so and it is an unlawful reason in law then this holes the Government's justification case below the water-line. For this reason, the Secretary of State has been anxious to seek to uphold Regulation 4 upon the basis of *other* considerations thereby avoiding the risk that if this Court were to hold that an economic policy based upon funding for good causes was unlawful, the Regulation would be tainted and could fall.

80. In our judgment this extreme analysis does not reflect the law. The Secretary of State was entitled to attach *some* weight to the desirability of protecting the National Lottery because of its contribution to good causes. We set out below our conclusions on the law relating to economic grounds for restrictions on the otherwise free provision of services.

81. First, in principle (and *prima facie*) it is not open to Member States to refer to purely economic grounds as a reason for undermining the free movement of services.

82. Second, however, it is now established that whilst an economic interest cannot in itself justify a restriction and must not amount to the "*real*" or "*primary*" justification for a measure it can still be relevant if (a) it is the sort of economic justification that is accepted in law as having at least *some* value and (b) it amounts to an incidental beneficial consequence.

83. Third, a policy which stipulates that profits from gambling be allocated to humanitarian and socially beneficial causes (including sport and culture) is, even if economic in nature, "*not irrelevant*" and can be taken into account. There are now a number of judgments of the CJEU which establish these principles. In *Zenatti* (*ibid*) the Advocate General considered that if the "*primary objective*" of a measure was to channel funds into a privileged body that would not count as a valid justification:

> "32. Thus, the grant of special or exclusive rights through a restrictive system of licences or concessions may be consistent with such a policy of limitation of supply, provided this is adopted in pursuit of a genuine diminution in gambling opportunities and in the stimulation of demand through advertising. It would not be acceptable, on the other hand, if the grant of licences or concessions were simply a means of channelling the proceeds of virtually unrestricted demand into the coffers of the national authorities or of bodies engaged in public-interest activities. A Member State may not, in my view, engage either directly or through certain privileged bodies in the active promotion of officially organised gambling with the primary objective of financing social activities, however worthy, under the guise of a morally justified policy of control of gambling. This would, as I have already said, constitute a merely economic objective. It is, however, for the national court to determine whether this condition is satisfied in the case of the Italian market for betting on sporting events, in the light of the actual practice of UNIRE and that of the bookmakers to whom UNIRE has granted concessions. If it is so satisfied, the

> exclusion from the Italian betting market of undertakings such as SSP and the defendant, which do not appear even to have applied for a concession, may be deemed to be a justified restriction on their freedom to provide services".

84. The reference to "*primary objective*" is important. In the judgment the Court (having observed at paragraph [35] that the public interest objectives had to be considered "*as a whole*") recast the Advocates General's negative conclusion into one which defined the permitted and relevant scope of economic considerations:

> "36. However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services."

85. In this paragraph the phrases "*incidental*", "*not irrelevant*", "*not the real justification*" and "*in itself*" all, when read in context, assume that some types of economic consideration can be accepted and <u>are</u> relevant; and this can only by attributing to that consideration certain secondary weight in the assessment of the evidence "*as a whole*".

86. Subsequent cases adopt a similar line. For instance, in Case C-153/08 *Commission v Spain* [2009] ECR I-9735, the Court observed at paragraph [43]:

> "Concerning, third, the Kingdom of Spain's argument that the income received by the bodies and entities whose games of chance benefit from the exemption in question is used to finance socially-useful infrastructure and projects, it should be noted that the Court has already held that, *although it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public interest activities,* that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services… It is moreover apparent from the Court's case-law that economic grounds are also not included among the grounds in Article 46 EC [ie the precursor of Article 52 TFEU] which could justify a restriction of the freedom to provide services guaranteed by the Treaty…".

87. Mr Chamberlain alighted upon the phrase "*from the outset*" in paragraph [36] of *Zenatti* above and argued that this meant that if an economic ground (or indeed any ground) had not been present <u>throughout</u> it was irrelevant. This is, in our view, far too heavy a burden of significance to attach to these stray words. In any event as we have already set out

subsequent case law of the CJEU has made clear (as has settled case law in this jurisdiction) that the Court must look at the most up to date evidence and argument and this means that a decision maker can invoke grounds of justification not advanced before (as the Defendant does in relation to the lead-in risk). At all events, on our review of the evidence, the preservation of funds has been part of the justification since the outset.

88. Fourth, if pure economic grounds (which do not therefore qualify for even partial recognition) are part of the policy mix this means only that they must be excluded when the Court assesses justification. In *Gibraltar Betting* the Court excluded from the proportionality reckoning considerations said to be purely economic: See paragraphs [152] – [153]. The economic considerations in question were: "… *that the present system operates against the interests of the British economy by providing incentives for operators to base themselves abroad; the concern expressed by trade unions that remote gambling undermines businesses and employment within the United Kingdom and that consideration should be given to the outright prohibition of remote gambling; and, the concern of domestic service providers that foreign operators were subject to less stringent regulatory regimes and thereby enjoyed an unfair competitive advantage in the GB market*." These economic considerations were not of a type that the CJEU had recognised as valid justifications for restriction. The mere fact that there were some purely economic considerations that had been argued to have played a part in the Government's thinking did not, however, serve to disqualify the Government from relying upon such other valid policy considerations as existed: See paragraph [153]. Reference was made in argument before us to the judgment of the EFTA Court in Case E-3/06 *Ladbrokes Ltd v Government of Norwa*y [2007] CMLR 12. This judgment is of persuasive value. The Court rejected an argument that the presence of an economic argument rendered invalid other possible justifications: see paragraph [47]. The Court observed, pragmatically, that legislation often pursues several objectives simultaneously. The Court, citing the consistent jurisprudence of the CJEU, recognised that the motive of financing benevolent or public interest activities would not "*in itself*" be regarded as an objective justification and could not constitute the "*real*" justification, "*but*" could act as a beneficial consequence which was incidental: See paragraph [46]. We construe this judgment as indicating only that if the consideration is purely economic then it must be ignored; and if this is the case the Court must assess justification by reference to other justifications which remain including economic considerations which are recognised as being relevant in an incidental or secondary way.

89. We turn now to the actual weight that we should attach to this ground. The Secretary of State initially relied upon the precautionary principle which states that where a public interest concerns the protection of the public from possible or future harm the decision maker may justifiably take a decision to act now rather than to await further evidence. Measures taken to protect the public from dangers to health are a prime example; the State does not have to await the accrual or manifestation of actual harm before acting and it can act to forestall that adverse eventuality. As a matter of logic there is no reason why good government should not involve precautionary measures in a range of different policy fields beyond health. In *Lumsdon* the Court accepted for instance (at paragraph [115]) that the precautionary approach could be applied by regulators of the legal professions in the field of standards of criminal advocacy. "*A precautionary scheme of this kind provides a high level of public protection, precisely because it involves an individual assessment of each provider wishing to practise at an upper level, and it places a corresponding burden on those affected by it. Whether such a level of protection should*

be provided is exactly the sort of question about which the national decision maker is allowed to exercise its judgment within a margin of appreciation ..."

90. The appraisal of the level of risk arising calls for the exercise of judgment on the part of the decision maker and, as such, it imports an appropriate margin of appreciation: *Lumsdon* (*ibid)* paragraph [116]. In *Gibraltar Betting* (*ibid*) the Court endorsed the use of the precautionary principle in a case involving the protection of consumers from the consequences of on-line gambling. A criticism had been levelled at the evidence base relied upon by the Defendant in that case. The Court rejected the criticism on the basis of the actual evidence bearing in mind the precautionary nature of the measures in issue: See (*ibid*) paragraphs [155]-[157].

91. In any given case there is inevitably a correlation between the remoteness of the risk being protected against and the cogency of the evidence required to justify intervention. The more remote the risk the more cogent must be the evidence of risk. Consistent with this in *Lumsdon* (*ibid*) the Court explained that "*the risk assessment could not be based on purely hypothetical considerations*" (*ibid* paragraph [57]. Later the court (*ibid* paragraphs [58] and [59] stated:

> "58. In a case concerned with an authorisation scheme designed to protect public health, the court required it to ensure that authorisation could be refused only if a genuine risk to public health was demonstrated by a detailed assessment using the most reliable scientific data available and the most recent results of international research: *Criminal Proceedings against Greenham and Abel* (Case C-95/01) [2004] ECR I-1333, paras 40-42. As in *Commission of the European Communities v Kingdom of the Netherlands,* the Court acknowledged that such an assessment could reveal uncertainty as to the existence or extent of real risks, and that in such circumstances a member state could take protective measures without having to wait until the existence and gravity of those risks were fully demonstrated. The risk assessment could not however be based on purely hypothetical considerations. The approach adopted in these cases is analogous to that adopted in relation to EU measures establishing authorisation schemes designed to protect public health, as for example in the *Alliance for Natural Health* case, discussed earlier.
>
> 59. It is not, however, necessary to establish that the measure was adopted on the basis of studies which justified its adoption: see, for example, *Stoß v Wetteraukreis* (Case C-316/07) [2010] ECR I-8069, para 72".

92. The high-water mark of the point in the present case is the Secretary of State's case that there is no existing risk of the Claimants' services actually undermining funds available for good causes. The ground is based upon the assumption that the Claimants, if the loophole is not closed, will expand this sort of secondary gambling service and that there is hence a growing risk that in due course there will be some material risk to the funds available for good causes. As such the justification for regulation is precautionary. We consider that this analysis is in principle perfectly sound. But it does rather suggest that

as a justification for Regulation 4 it should attract only relatively limited weight. In our judgment it can be taken into account, but it attracts less probative value than other considerations. We would make clear that were we to have excluded this consideration altogether then we would have *still* have found that Regulation 4 was justified on consumer protection and clear blue water grounds.

93. **Avoidance of lead-in risk**: We turn lastly to the issue of "lead-in" risk. In our judgment this was not a matter that was consulted over or which played any part in the decision to promulgate Regulation 4.

94. The argument has resonance only as a "new" point which arises by virtue of the fact that the Claimants have challenged Regulation 4 and in so doing have themselves raised the lead-in point in their evidence and made clear that it is commercially important to them and their business model. Mr Sharland QC accepted that in substance this is a "new" point. We can though for the reasons already given see no objection to this matter now being raised by the Secretary of State.

95. We categorise the lead-in argument as a classic consumer protection justification of the sort specifically referred to by the CJEU in its consistent case law. It is an argument that is closely related to the consumer protection and "*clear blue water*" arguments. It takes those arguments a step further and identifies an additional adverse consequence of confusion and the elision of the two regulatory regimes, namely the inducement of potentially young and vulnerable adults into partaking of harder and higher risk forms of gambling. What gives this argument potent force is the acceptance by the Claimants' own senior executives that their business model relies materially upon the lead-in effect: See above. This Court is entitled to draw from this that the risk of a lead-in effect arising from confusion is a real and important risk. We can assume that the Claimants meant what they said; we can also infer that it reflects their considered view having been tendered in witness statements to which statements of truth are attached. We take account of Mr Easterbrook's attempt at contextualisation (see paragraph [66] above) but we are far from convinced by this. But in any event, it does not weaken the essential point which is that lead-in risk must be treated as a valid and evidence based concern which the Secretary of State is entitled to raise now as a justification for Regulation 4.

96. We find that Regulation 4 is justified by consumer protection and "clear blue water" alone. These were in the Defendant's mind when the measure was placed before Parliament in draft. Our conclusion on lead-in effect serves to reinforce our conclusion.

97. Our overall conclusion on justification is that, albeit to varying degrees, each of the grounds raised by the Secretary of State stands as a valid justification for Regulation 4. This is not a case where, in the final outcome, we have had to decide the case by reference to the margin of appreciation. We observe only that whilst there are limits on the margin to be attributed to the Defendant it can nonetheless be fairly be described as relatively broad. In *Gibraltar Betting* the Court concluded that a "*relatively generous margin of discretion*" was to be extended to the Member State when assessing proportionality in the field of gambling (*ibid* paragraph at [115]). We should explain that the margin of discretion is, technically, to be accorded to Parliament in this case since it was Parliament, by the affirmative resolution procedure, that adopted the Regulation, and not the Secretary of State. However, we are also entitled to infer (see *BAT* paragraphs

[53], [90] and [149]) that the reasons which led the Secretary of State to lay the draft before Parliament were those which Parliament accepted and the Secretary of State has locus to act in these proceedings for the Crown. No one has adduced any evidence which contradicts this inference. And indeed since we have taken account of the most up to date evidence, some of which was not therefore available to Parliament when Regulation 4 was adopted, we have had to consider the margin of appreciation of the State as a whole.

(viii) Analysis: The Necessity test – the existence of alternative less restrictive means

98. The second limb of the proportionality test entails considering whether there are alternative less restrictive means of achieving the (*ex hypothesi*) legitimate objectives behind Regulation 4 than were actually deployed in the challenged measure.

- *Claimants' submissions*

99. The Claimants submit as follows. First, once any purported justification based upon the need to preserve the revenues of the National Lottery in order to fund good causes is taken out of consideration (because in their argument it is an unlawful and inadmissible consideration) all that is left is the risk of confusion. As to this there are many other less restrictive means available to reduce or eradicate any consumer confusion than an outright prohibition. The Gambling Commission has powers under the GA 2005 to regulate the activities of the Claimants in any way in which it sees fit which might include the imposition of conditions on operating licences pursuant to sections 77 and 79 GA which would require the Claimants to advertise and market their services directed at differentiating them from National Lottery products. Second, and alternatively, the Defendant could legislate to impose such conditions on all licensees, subject to a review period (suggested to be 2 years) with a view to determining after 2 years whether consumers were still confused. This was a possibility that one of the Claimants mooted during the consultation but which the Defendant ignored since his officials presented him with a binary choice between an outright ban and doing nothing which therefore ignored the Claimant's intermediate suggestions. Third, it was wrong to suggest that the Claimants' only proposal during the course of the consultation was the preservation of the status quo for two years. Lottoland's consultation response made clear that its willingness to work with Government was open ended: "*there is more to do and Lottoland is committed to working with Government, the Gambling Commission, the ASA and all interested parties in order to increase awareness with respect to lotto betting. Lottoland commits to do everything possible so that by the end of a 'review period' there is a significant reduction in customers that might, to some extent, demonstrate a level of difficulty in understanding the difference…".* Fourth, any such further licence conditions would operate in conjunction with existing means under domestic law to prevent any, or any significant, "*consumer confusion*" under intellectual property law (trademarks, passing off etc) and the ASA regime on advertising standards. The Gambling Commission was well placed to regulate and enforce less restrictive measures and Camelot was astute to police conduct it believed gave rise to such confusion. Fifth, as to concerns about links between betting on non-UK EuroMillions and "*more harmful*", harder, forms of gambling there were a panoply of alternative (and less restrictive) means of achieving this objective. However, the Defendant had failed to identify this concern in the course of the consultation process and consultees did not therefore address possible alternatives to an outright ban.

- *Submissions of the Secretary of State*

100. The Secretary of State rejects these arguments. None suffice to address the issue of consumer confusion. There are limits on the efficacy of regulation by the Gambling Commission. Regulatory steps have "*reduced the risk of confusion [but] have not and cannot eliminate it*". The position of the Gambling Commission is that the Claimants' *ex post facto* suggestions would not be effective. None of the measures suggested were in any event raised during the consultation which itself followed an extensive process of policy formulation and regulatory engagement with gambling companies. Further the Claimants do not suggest that any less restrictive measure could be adopted in relation to the '*clear blue water*' issue which relates to prevention of consumers from slipping inadvertently into harder forms of gambling.

- *Analysis and conclusion*

101. We are clear that the outright prohibition in Regulation 4 is the appropriate response and that no lesser measure would have been equally effective. This is a conclusion which flows from the facts. We were persuaded by the arguments of Mr Moffett QC for the Gambling Commission on this. His point can be encapsulated shortly. The essential choice is between (i) an *ex ante* prohibition which is, because of its absolute nature, clear and certain and incapable of serious doubt as to its scope and which can be enforced through criminal sanction which is or should be a powerful incentive to compliance; <u>or</u> (ii) a series of partial restrictions and curbs on conduct (such as advertising and promotion) which may be far from clear and certain and which can only be enforced *ex post facto* through drawn-out regulatory or legal proceedings which might take years.

102. Mr Moffett elaborated upon what he said were the downsides of the latter, *ex post*, approach from the perspective of the Gambling Commission. These were: first, that the Commission was not resourced or geared up to <u>monitor</u> all of the vast amount of on-line activity that is found on the internet and accordingly a great deal of harmful conduct would pass by undetected; second, the Gambling Commission did not have the resources to devote to large scale <u>enforcement</u> which would also imply that a great deal of unacceptable conduct would go unchallenged; third, even if the Gambling Commission did decide to investigate and enforce such proceedings these processes were <u>protracted</u> and could take years to complete and in the interim harmful conduct might continue unchecked. In short measures of the sort mooted by the Claimants would be ineffective to address the real and pressing need for consumer protection. These points had to be seen in the context of the realities of life viz., that the basic business model of the on-line operators was such that they needed to push the boundaries to the absolute maximum to optimise the lead-in effects. They had no incentive to comply.

103. We see the force in these arguments. It is telling, in our view, that the Claimants suggest a prospective 2 year review when it was always open to them unilaterally to introduce palliative measures so that they could establish with real evidence what the effect of these measures was. We are not in any event attracted to the idea of a wait and see review period; it simply pushes the issue into the "long grass".

104. This is an area where the Defendant's margin of appreciation is relevant. By definition the analysis is counterfactual with the Court having to compare and contrast mooted less

restrictive alternatives as against the extant (challenged) restriction. Case law provides some guidance on how the test is to be applied in practice:

(i) A measure will be disproportionate if "*it is clear that the desired level of protection could be attained equally well by measures which were less restrictive*": *Lumsdon* paragraph [66], emphasis added.
(ii) The burden of proof lies with the decision maker, but it is not to be applied mechanically and there is no duty on the decision maker to prove positvely that no other measure could be as effective: *Lumsdon* at paragraph [63]; *BAT* (*ibid*) paragraph [659]; *Scotch Whisky* (*ibid*) paragraph [55].
(iii) The decision maker is not required "*in [his] evidence to consider every possible alternative, including those that were never suggested by consultees*": *TfL* at paragraph [37];
(iv) The mere assertion that some other measure is equivalent and less intrusive is not sufficient: *BAT* (*ibid*) at paragraph [662]. And equally the fact that some other measure can be envisaged is not enough: *BAT* (*ibid*) paragraphs [660]-[662].
(v) It is relevant that a measure is "*general, simple, easily understood and readily managed and supervised*": *BAT (ibid)* at paragraph [661].

105. In conclusion, and having regard to all of the tests referred to above, we accept that on the evidence only an outright ban would be effective in addressing the real and substantial public interest concerns that the Secretary of State has raised. We do not consider that the mooted less restrictive measures would be as effective as the ban. We therefore conclude that the Secretary of State was well within his margin of discretion in deciding to choose an outright prohibition and not any less extreme restrictive measure.

106. It flows from all of the above that the first ground of challenge fails.

Issue II: The Consultation

107. We turn now to the second ground raised by the Claimants. We deal with this briefly. The Claimants' consultation challenge boiled down to a complaint that, at the time of the consultation, the Secretary of State took into account the unrevealed "lead-in" risk as a justification for Regulation 4, namely that non-UK EuroMillions betting was leading consumers into harder forms of gambling. Such a reason should have been disclosed to consultees but was not. This breached the elementary principle of fairness which governs the conduct of consultations as set out in cases such as *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 and which established that consultees should be accorded a fair opportunity to respond to all of the decision-maker's concerns which therefore had to be articulated in the consultation paper. We accept the Claimants' submissions as to the importance of a fair consultation process being adopted. We part company with the Claimants insofar as we reject their contention that the consultation was unfair.

108. This argument fails for a number of reasons. First, the Claimants' argument assumes that the lead-in point was an operative reason behind Regulation 4 at the time of its promulgation by Parliament. On the evidence we do not accept this. In our judgment whilst the point had been given an airing (before the House of Common Select Committee) it was only appreciated as having real force when the Claimants served their own evidence in this litigation which demonstrated that, far from being a somewhat theoretical concern, it was an important part of the Claimants' business model. For this

reason, it was a genuinely new point and not a hidden concern. Put another way when the Consultation started this was not a point that needed to be consulted over. Second, given that it is a "*new*" point it has passed beyond the realms of consultation and is now a matter for this Court to assess as part of the overall proportionality assessment. This we have done as set out above. We have taken into account all of the Claimants' arguments and evidence.

109. This ground of challenge fails.

E. Issue III: Locus under Article 56 TFEU

110. We turn finally to the issue concerning *locus*. During the hearing we questioned whether this was an issue which should take up the time of the Court since (i) the Secretary of State accepted that at least one of the Claimants had *locus* and (ii) the substantive issues were all fully argued before the Court.

111. We have decided that it is unnecessary to spend time addressing an issue which is academic and we take the matter summarily. Had it mattered, we would have been inclined to accept the Claimants' submissions. First, on any view, the Third Claimant had undisputed standing which means that the issue is academic: see *Gibraltar Betting* (*ibid*) paragraph [207]. Second, the "standing" point goes nowhere in that had the First Claimant transferred its business to the Second Claimant, as it contemplated, the Second Claimant would plainly have enjoyed standing; the effect of the Standing Issue – if the Secretary of State had succeeded – could only have been productive of further and unnecessary proceedings. Third, given the relationship between the First and Second Claimants and their undisputed business plans, we are satisfied that each of the First and Second Claimants in any event had sufficient standing to proceed. Fourth, the issue of law- who has the present right to invoke the direct effect of Article 56 TFEU- may not equate to the broader question who has the *locus* to claim judicial review in relation to an issue concerning Article 56 TFEU. The right in public law to seek declaratory relief relating to an important point of public law is not limited to those who may rely on a directly effective provision of EU law: See *Gibraltar Betting* (*ibid*) paragraph [208]. Of course, had the Claimants prevailed then the Court would have been required to consider carefully what relief was appropriate: See *Gibraltar Betting* (*ibid*) paragraphs [216]-[220] and cases cited thereat. At that point the question of the legal status of the Claimant and the basis upon which it has *locus* could well have been relevant to the particular relief granted.

F. Overall Conclusion

112. For the reasons given we grant permission to claim judicial review but we reject the claims on their substantive merits and upon the evidence. The claims therefore fail.