

WHEN LEGAL GAMBLING IS BANNED - IN 2011 THE CROWDING OUT EFFECT OF ANTI-LEGAL GAMING MEASURES WAS UNPREDICTABLE. TODAY, IT CAN'T BE IGNORED - GIOCONEWS, APRIL 2014.

In 2011, the crowding out effect of anti-legal gaming was unpredictable. Today, it can't be ignored.

Because of the counter-action to territorial proliferation of measures aimed at restricting legal gambling, we often have to get confronted with exceptions like, for example, the fact that Constitutional Court already ruled on this matter.

Although we are aware of the existence of a precedent represented by the popular Constitutional Court's judgment 300/2011, about Law n. 13/2010 of Bolzano's County on gaming, we are also aware of the existence of other judgments like Regional Courts judgments or the Council of State decisions, that in contrast with other judgments, have somehow safeguarded the territorial entities' competences. What we are asking, at the same time, is to be conscious about the fact that the subject must be faced by way of highlighting different and important aspects.

What, today, needs to be highlighted is that past judicial records don't take into consideration distorted consequences of anti-legal gaming measures. Among these consequences, the so called crowding out effect of legal gambling within the territory stands out. It consists of a complete restriction of legal gaming within an area targeted by the measure, restriction of which we become aware when we actually implement the distance, laid down by the law, from the sensitive spots identified. This happens because of two reasons: either the banning range spreads across a too wide area or there is an excessive number of types of sensitive spots, to the point where the restricted areas overlie each other, covering the entire target area (being it a municipal, county or regional area). Essentially, the crowding out effect is a concrete prohibitionist consequence that results from the aim of the measure, which simply is the regulation of the legal gaming distribution on the territory. This is absolutely reprehensible, because of the lack of consistency between the local regulations' objectives and the resulting effects. Moreover, it is completely forbidden to limit, at a local level, neither voluntary nor involuntary, what is allowed by the national legislation.

Someone would claim that the crowding out effect, whether known from the beginning, could have probably instilled doubts about what the Constitutional Court stated in the above-mentioned judgment of 2011. The Court affirmed the legitimacy of the anti-legal gambling County Law, because this measure was considered as "*not ascribable to the State legislative competence, related to public order and security; this subject (...) abides by crimes prevention and public order protection*". Moreover, the Court pointed out that not the effects but the law's ratio of the regulation should be considered and "the events in question pertain to situation which do not necessarily pertain to criminally relevant actions".

Probably the Court, pressured on such issue, considered only that the voluntary or involuntary crowding out effect of legal gaming was suitable for favoring the replacement of legal gambling with an offer of illegal gaming that would have answered the existing gaming demand. Maybe the Court should have considered that allowing the entrenchment of illegal gaming offer meant allowing (not stemming! not preventing!) crimes to be committed, crimes that would be reiterated and repeated (from the illegal gambling offer till laundering, from tax evasion for amounts that exceed the threshold of any kind of

criminal action on the territory). The Court should have considered such a circumstance not as a simple effect of the regulation, but as a defect embedded in it.

After considering all this, what can we do today to limit such phenomenon? The crowding out effect plays a fundamental role in the controversies about anti-legal gaming measures. It represents a further fundamental aspect to be considered in order to limit such measures.

In fact, the crowding out effect is suitable to affirm that issued measures do fall under the competences that the judicial system assigned to local entities: no legal subject, apart from the State, can assume the power to completely ban the practice of a legitimate activity regulated by the State, within its own territory. It would also be vain to prove that the intention of the authority was to regulate and not to prohibit legal gaming, to safeguard the measure.

In addition, the crowding out effect can become fundamental when dealing with issues of constitutional legitimacy of the presumed regional laws. As an example, we can mention the damage imposed on art. 41 of the Constitution that safeguards the freedom of enterprise. Where the crowding out effect of an anti-legal measure is demonstrable, it is hard not to raise a question of legitimacy: in this case, the freedom of enterprise can demonstrably be frustrated because the "burden imposed to private individuals" cannot be considered as proportionate. This effort can be better defined as a radical maiming of business activities, their complete eradication at a local level. In other words, a serious impediment of business freedom, safeguarded by art. 41 of the Constitution, becomes real causing undeniable damages to all the workers in the sector, in terms of ousting their own activities from the target areas and lack of economic return on their investments. Furthermore, administrative law often intervened in order to raise awareness on the issue of safeguarding freedom of enterprise.

Last but not least, the crowding out phenomenon gradually affects a biggest number of territories, not only municipalities but also counties and regions. This is the result of a legislative work which was not appropriately planned, on a national scale, planning which had been appealed by the Balduzzi's Decree, following the parameters highlighted in the previous issues of the magazine. The results of the spread of this phenomenon are creating and will continue to create effects over general interests, which has pushed the legislator to highlight the need of a uniform treatment of this issue over the entire national territory.

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