INTERZERO (C-254/23): Is Waste Management the New Gambling in EU Free Movement Law?

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Did Slovenia infringe EU free movement law, fundamental rights, or EU general principles by adopting a new extended producer responsibility (EPR) scheme? In its 10 July 2025 *INTERZERO* (C-254/23) judgment, the Court of Justice provides the Slovenian Constitutional Court with guidance in addressing that question. Going beyond what is required by the Waste Framework Directive 2008/98/EC (WFD), Slovenia obliged producers placing certain products on the market, such as medicine, tyres and batteries, to establish or contract a single monopolistic non-profit organisation to take care of their collective EPR obligations, particularly the collection and treatment of those products at the waste stage.

In *INTERZERO*, the Court of Justice examines Slovenia's new EPR scheme in light of an intricate web of overlapping legal regimes: the Waste Framework Directive, Articles 49, 56, and 106 TFEU, the Services Directive, Articles 16 and 17 of the Charter, and the principles of legal certainty and protection of legitimate expectations. In a whopping 227-paragraph judgment – especially relative to AG Collins' more concise 84-paragraph Opinion – the Court sheds light on the implications of these overlapping legal instruments, leaving some key questions unresolved, while provoking new legal questions.

Slovenia's New Extended Producer Responsibility Scheme

Extended producer responsibility schemes are one of the tools Member States have at their disposal to comply with their obligations under the WFD, most notably the obligation to take measures to prevent waste and ensure that waste is prepared for reuse, recycling, or other recovery operations. EPR schemes shift the responsibility for waste collection and treatment of a specific product from domestic waste management systems and to the producers placing the product on the market. In this way, for example, tyre producers can be required to establish a system for the collection and processing of used tyres, thereby preventing them from entering the regular domestic waste stream.

Under the old Slovenian Law on the Protection of the Environment (the ZVO-1), producers could fulfil these EPR obligations either individually or collectively through a producer association or a commercial company authorised for that purpose. Thus, taking the example of used tyres, under the ZVO-1, some tyre producers could set up return and waste treatment systems for the products they themselves put onto the market, while others might have relied on product associations or commercial companies to set up collective systems.

Slovenia, however, decided that the ZVO-1 was in need of amendment, not only to correctly transpose the Waste Framework Directive as amended by Directive 2018/851, but also because its EPR scheme had proven

insufficiently effective. In 2022, Slovenia adopted the new Law on the Protection of the Environment (the ZVO-2), which ended the fragmentation of EPR schemes. The ZVO-2 assigns a single authorised non-profit organisation (ZVO-2 operators) to oversee the EPR obligations of all producers for a single product category. While the producers of 51% of the products placed on the market are obliged to establish and hold shares in the ZVO-2 operator, other producers can either join or conclude contracts with the ZVO-2 operator. Collective EPR organisations established under the old ZVO-1 system (ZVO-1 operators) will lose their authorisation, unless they become the authorised ZVO-2 operator, and contracts concluded to comply with ZVO-1 EPR obligations will cease to have effect.

The Preliminary Questions of the Slovenian Constitutional Court

A group of waste management operators, ZVO-1 operators, and producers subject to the EPR obligations initiated a procedure for constitutional review before the Slovenian Constitutional Court. Harbouring doubts about the conformity of the ZVO-2 scheme with EU law, the Constitutional Court suspended the ZVO-2 and referred ten preliminary questions to the Court of Justice.

On 10 July 2025 the Court of Justice issued its (elaborate) response, which can roughly be divided into two main parts. One part of the judgment investigates whether the various aspects of the ZVO-2 EPR scheme, such as the grant of an exclusive right to a single ZVO-2 operator, comply with EU free movement law, the Waste Framework Directive, fundamental rights law and EU general principles. The other part concerns the question of whether ZVO-2 operators qualify as undertakings entrusted with services of general economic interest (SGEI). Below, without attempting to discuss all elements of the lengthy judgment exhaustively, these two main parts will be addressed in turn.

Untangling the Web of Applicable Legal Regimes

One might wonder how it is possible that a 227-paragraph judgment follows AG Collins' 84-paragraph opinion. The reason for this lies in the diverging approaches to whether the different applicable legal regimes – the Services Directive, Articles 49, 56 and 106 TFEU, Articles 16 and 17 of the Charter and EU general principles – merit separate consideration. AG Collins applies the Services Directive, the TFEU, and the Charter together, implying that those legal regimes require the same, or at least a highly similar, legal analysis. The Court of Justice, however, provides a more systematic analysis by providing a separate examination of most of the legal regimes. To that end, first, the different restrictive elements in the ZVO-2 are matched to the respective applicable legal framework. Then, the lawfulness of the restrictions is considered separately for the free movement provisions on the one hand, and the Charter and EU general principles on the other, leading to a significantly longer read.

When matching the restrictive elements of the ZVO-2 to the applicable legal regimes, the Court goes on to solve one of the remaining semi-open questions on Article 15 Services Directive: what to do when a requirement appears neither on the list of prohibited requirements of Article 14 nor on the list of suspect requirements of Article 15(2)? The Court finds that, in this case the obligation of the producers of 51% of the products on the

market to set up a ZVO-2 operator, should be assessed under Article 49 TFEU (para. 96). Although consistent with the wording of Article 15 Services Directive, the finding emphasises the fragmentation of the regulation of the freedom of establishment and is not without consequences. Whereas Articles 14 and 15 do not require a cross-border element, Article 49 TFEU does.

Exclusive Rights and a Wide Margin of Discretion in the Services Directive

In its substantive analysis, the Court of Justice examines the various restrictions outlined in the ZVO-2. A particularly interesting read is provided in the Court's analysis of the exclusive right granted to ZVO-2 operators. Starting off with Article 15 Services Directive, the Court finds that the exclusive right is non-discriminatory and justified by the protection of the environment and public health (paras 119-123). So far, no surprises.

Continuing with the proportionality assessment, however, the Court finds a remarkably wide margin of discretion in the proportionality test. Referring repeatedly to its gambling case-law, the Court of Justice considers that, when pursuing a particularly high level of protection of the environment and public health, Member States may consider that granting an exclusive right to a single entity under strict public control is necessary (para. 134). In that light, the set of less restrictive measures proposed by the applicants is quickly discarded (para. 135). The question of whether codes of conduct, qualitative conditions or an independent agency monitoring EPR obligations would be preferable over an exclusive right, in principle, falls within Slovenia's margin of discretion, the Court concludes (para. 136). What the applicants should have put forward to challenge the necessity of the exclusive right is largely left in the dark. The Court seemingly draws only one clear red line: the establishment of a monopoly must genuinely seek to ensure a particularly high level of protection (para. 137). Thus, in other words, the protection of the environment and public health may not just be a guise to monopolise the market. Not exactly a legal standard that will put European capitals on high alert.

The application of gambling case law to the *INTERZERO* case raises interesting questions more generally. Gambling services were left out of the Services Directive because of their 'specific characteristics', most likely by Member States wishing to protect their wide margin of discretion to regulate gambling services. It is therefore noteworthy that, at least insofar as it concerns requirements rather than authorisations, the fact that services are covered by the Services Directive does not preclude Member States from enjoying the broader, gambling-like margin of discretion.

Moreover, whereas the margin of discretion to regulate gambling services is connected to the type of service rather than the justification, in *INTERZERO* the broad margin of discretion seems to be connected to justification – the protection of the environment and public health – rather than the type of service. Does this mean that the wider margin of discretion must be applied as soon as the protection of the environment or public health is invoked? The Court's *Danish Bottles* (C-302/86) judgment would suggest that is not the case. Or could there just be something very particular to waste that gives rise to a broad margin of discretion? Looking back at the *Walloon Waste* (C-2/90) judgment, that might just be the case.

Similar But Not the Same: The Right to Conduct a Business, the Right to Property, Legal Certainty, and Legitimate Expectations

After concluding that the ZVO-2 is (probably) not precluded by Article 15 Services Directive, the Court continues with a separate analysis of Article 16 of the Charter (the right to conduct a business) and Article 17 of the Charter (the right to property), and the principles of legal certainty and the protection of legitimate expectations (para. 139). The fact that the Court of Justice proceeds to a separate assessment of the Charter is noteworthy in its own right. In *Pfleger* (para. 60) and *Global Starnet* (para. 50) the Court deemed a separate examination of Articles 16 and 17 of the Charter unnecessary after having applied Articles 49 and 56 TFEU. Although not the first time the Court proceeds to a separate examination, it remains unclear what sets *INTERZERO* apart from *Pfleger* and *Global Starnet*. Thus, further clarification would have been welcome.

One can speculate, however, that in *INTERZERO* the Court may have deemed separate examination necessary because the case concerns the amendment of a pre-existing scheme. The Court seems to suggest that the Charter, in light of the principles of legal certainty and legitimate expectations, imposes slightly different conditions on legislative amendments than Article 15 Services Directive does. Most notably, in contrast to its examination under Article 15 Services Directive, in the Court's examination of the Charter and the principles of legal certainty and legitimate expectations, it contemplates whether the establishment of the monopoly may be excessively burdensome to ZVO-1 operators (para. 153). The Court considers that this could be the case, because as a consequence of the establishment of the monopoly, ZVO-1 operators could have their authorisations revoked and their contracts all but terminated. Therefore, the Court of Justice rules that the Slovenian Constitutional Court should assess whether the (costly) investments made by ZVO-1 operators and the foreseeability of the changes in the ZVO-2 should have warranted a (longer) transitional period and/or compensation to ZVO-1 operators (paras 154-159).

One may wonder, however, whether a separate examination was strictly necessary in this case. Yes, the right to property and the protection of legitimate expectations seem more directly connected to (unexpected) changes in legislation and annulment of licenses and contracts by means of legislation. Nevertheless, the proportionality *stricto sensu* test may have offered an equally suitable basis for considering the potentially excessive burden for ZVO-1 operators of the new regime.

The Qualification as an SGEI of the Services Provided by ZVO-2 Operators

A final noteworthy aspect of the *INTERZERO* judgment is the assessment of whether the services provided by ZVO-2 operators may qualify as an SGEI. A relevant question, based on Article 106(2) TFEU and Article 15(4) of the Services Directive, is whether the free movement provisions apply insofar as they obstruct the performance of SGEI.

Would the Court of Justice finally explicitly recognise 'market failure' as a prerequisite for the entrustment of an SGEI? The European Commission held so on numerous occasions, the General Court could not have

been clearer in *Colt Télécommunications* (para. 154), and AG Sharpston came to the same conclusion in *Elaine Farrell* (C-413/15, para. 90), as have AG Bot in *Commission* v. *Hungary* (C-171/17, para. 76) and AG Collins in *INTERZERO* (para. 28). The Grand Chamber, seemingly unable to come to a shared conclusion on the matter, sticks to the old adage that SGEI exhibit 'special characteristics' compared to other economic activities and focuses on the formal entrustment, however (para. 65). How these elusive 'special characteristics' should be identified, remains unclear.

Or so it seems, as the market failure test may well be implicitly present in the *INTERZERO* judgment. When the Court of Justice concludes that the services provided by ZVO-2 operators exhibit 'special characteristics', it notes that this is the case in so far as effective waste management can only be ensured when the EPR services are provided by a single organisation (para. 69). In other words, the reason why the collective fulfilment of EPR obligation services may qualify as SGEI is that, without public intervention, the services serving the public good would not be provided under the same conditions in terms of quality. That certainly sounds a lot like the test AG Sharpston once described as 'the market failure test': would the services serving the public good not be supplied or only be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access by the free market in the absence of public intervention? Given that a market failure test by any other (or no) name smells just as sweet, *INTERZERO* raises the question: is the label 'market failure test' simply too controversial for the Grand Chamber, or is it the test itself?

Concluding Remarks

All in all, the *INTERZERO* judgment largely favours Member States' discretion over the free movement of service providers. The Court finds that requirements other than those enumerated in Articles 14 and 15 Services Directive are not prohibited but scrutinised in light of Article 49 TFEU. A particularly broad, gambling-like, margin of discretion is granted to Slovenia to pursue environmental and public health goals, and, although the market failure test does seem to be implicitly present in the Court's reasoning, it is not made explicit. The million-euro question is, however, how broadly the findings of the *INTERZERO* judgment should be applied. The judgment's wording implies a more general application of the wide margin of discretion in cases where Member States invoke public health and the protection of the environment. At the same time, the conclusions of *INTERZERO* may very well be proof of the special position of waste management in EU internal market law, begging the question: is waste treatment the new gambling?

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