The Regulation of Gambling

European and National Perspectives

Edited by Alan Littler and Cyrille Fijnaut

MARTINUS NIJHOFF PUBLISHERS

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PREFACE

Cyrille Fijnaut

This book is the final result of a colloquium on the European and national perspectives of the regulation of gambling that took place on 23 November 2005 at the Faculty of Law, Tilburg University, the Netherlands. This colloquium in its turn is part of a research programme that has been financed since 2004 by the Dutch State Lottery on the regulatory aspects of gambling in Europe. The offer of this company, one of the oldest in the Netherlands, to build up such a research programme did not come out of the blue. At the end of the 1980s I became heavily interested in this issue in the framework of my research on organised crime, particularly concerning the ways in which this form of serious crime can be controlled. One of the examples of how this could be done is by regulating the markets concerned. Already at that time the gambling market was one such example.

It nearly goes without saying that the great book of J. Skolnick, *House of Cards The Legalization and Control of Casino Gambling* (Little Brown & Co, Boston, 1978), on the regulation of gambling in Nevada was a big eye-opener in this context. In the early 1990s, I became convinced of the relevance and importance of this example of regulating a vice market. This followed my stay at the hotel casino 'The Nugget' in Reno, where I spent sometime with, amongst others, the famous American sociologist Gary Marx, who was also very interested in issues of social control. Subsequently I established a research group at the Law School of the Erasmus University Rotterdam to study the supply and demand sides of gambling and the regulating role of the state. This project generated the book: A. Van 't Veer, H. Moerland and C. Fijnaut, *Gokken in drievoud. Facetten van deelname, aanbod en regulering – Gambling in threefold. Facets of participation, supply and regulation* (Arnhem, Gouda Quint, 1993).

On the basis of this experience I was quite happy to catch up again the topic of regulation of gambling ten years later, in particular why it had become again – like in the early 1990s when the European Commission considered whether gambling should be regulated at the Community level and published the still interesting report *Gambling in the Single Market* – an important European issue. This also explains the set up of the ongoing research programme. One part of it is related to the European legal issues in connection with the regulation of gambling and

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is the domain of Alan Littler. The second part concerns the economic side of the regulation debate in Europe and is dealt with by Tom Coryn. Last but not least, the third part covers the problem of illegal gambling and is dealt with by Toine Spapens. Apart from myself, Pierre Larouche and Eric van Damme, colleagues from the Faculty of Law and Faculty of Economics respectively and the directors of the Tilburg Law and Economics Center (TILEC) are also heavily involved in the management of the programme. We do not deal with problem gambling and gambling addiction, but concentrate entirely on the regulatory issues.

Part of the programme is an annual colloquium on some aspects of the regulation of gambling. The 2005 colloquium was the first conference we have organized on this topic. It focused upon the European and national perspectives of the regulation of gambling. Currently the regulation of gambling falls into the hands of national authorities in the European Community, yet whether this will remain the status quo is unclear. Case-law from the European Court of Justice arising out of preliminary references concerning the freedom to provide services shows that the Member States are not completely free in this field.

Although the European Parliament recently opposed the view of the European Commission that gambling services should be included in the Services Directive, one might well expect that this will not be the end of the story. One of the reasons for this is of course that numerous lobbying organizations representing the opposite ends of the spectrum are also highly active in this field at the European level. Discussions as to the appropriate role of the European Union also take place within Member States, with different sectors and operators offering different views. Furthermore, the national authorities of Member States take divergent approaches when compared to each other.

For these reasons the colloquium brought together the European debate with the European Commission, representatives of private operators and state lottery operators, and legal experts representing four Member States, to discuss the current situation and possible future developments. The morning session was devoted to the European perspectives, while the afternoon session covered the perspectives of the Member States.

Finally I would like to thank Ms Marjolijn Verhoeven of the Faculty of Law for the wonderful support she gave us with regard to the organisation of this colloquium and Ms Lindy Melman of Brill Publishers for her great interest in the publication of this book. It goes without saying that we are in particular very grateful towards the participants of the colloquium from so many European countries: Belgium, Czech Republic, Denmark, Finland Germany, Latvia, the United Kingdom and of course the Netherlands. They made this colloquium what it was: a European dialogue on one of the important and interesting issues of our time in the European Union.

CONTENTS

List of Abbreviations

AG	Advocate General
All E.R.	All England Reports (England and Wales)
ARGO	Association of Remote Gambling Operators
AVS	Address verification service
BACTA	British Amusement Catering Trade Association
BHB	British Horseracing Board
CMLR	Common Market Law Reports
col.	Column
DCMS	Department for Culture, Media and Sport (UK)
DLTB	Deutscher Lotto- und Toto-Block
EEA	European Economic Area
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
EFTA	European Free Trade Association
ENGSO	European Non-Governmental Sports Organization
EU	European Union
EWCA	England and Wales Court of Appeal Decisions
EWHC	(Admin) High Court, Administrative Court (England and Wales)
FDJ	La Française des Jeux (France)
GATS	General Agreement on Trade in Services

GBD	General Betting Duty (UK)
GICT	Gambling Industry Charitable Trust
HC	House of Commons (UK)
HL	House of Lords (UK)
IGGBA	Interactive Gaming, Gambling and Betting Association
IMCO	Committee for the Internal Market and Consumer Protection (European Parliament)
ISP	Internet Service Provider
L.J.	Lord Justice (UK)
LLR	Licensing Law Reports (England and Wales)
MP	Member of Parliament
MEP	Member of the European Parliament
NLC	National Lottery Commission
NLCB	National Lottery Charities Board (UK)
NLDF	National Lottery Distribution Fund (UK)
Novib	Nederlandse Organisatie voor Internationale Bijstand (Netherlands (Dutch) Organisation for International Development Cooperation)
O.J.	Official Journal (of the European Union)
OFT	Office of Fair Trading (UK)
OLDF	Olympic Lottery Distribution Fund (UK)
p.	page
para.	paragraph
PMU	Pari Mutual Urbain (France)
RGA	Remote Gambling Association
RIGT	Responsibility in Gambling Trust
SENS	Stichting Exploitatie Nederlandse Staatsloterij (Dutch State Lottery) (The Netherlands)
SI	Statutory Instrument (UK)

TGI	Tribunal de Grande Instance (France)
WLR	Weekly Law Reports (England and Wales)
WOK	Wet op de kansspelen (Gambling Act) (The Netherlands)
WTO	World Trade Organisation
vol.	Volume

Introduction – A View from the Outside

Pierre Larouche

From the vintage point of the interested observer with a keen interest in economic regulation[1] but no special knowledge of the intricacies of gambling, the current discussions surrounding the application – and even the applicability – of EC law to gambling rekindle memories from times past. Indeed, in recent times a number of other economic sectors – telecommunications, media, energy, transport, but also banking and insurance – went through a phase of intense debate characterized by a mix of criticism and apprehension towards EC law. Typically, in the end, both the criticism and the apprehension turn out to be exaggerated, and the tension is resolved as the sector loses its 'exceptionality' and is brought into the fold.

The gambling sector appears now to be going through such a phase. Presumably, then, the debate could benefit from some of the experience gained in other sectors. This contribution aims to provide constructive remarks at a more general level.

First of all, it is very tempting to succumb to the temptation of seeing EC law and national law in an antagonistic, black and white perspective. The debate then turns around whether the regulation of gambling will stay at the national level or be moved to the EC level. The application of EC law to the gambling sector would then amount to depriving Member States of their ability to regulate gambling. There is no middle ground in this view.

This view would appear to find support in some declarations and positions taken by actors in the debate. For instance, private operators want to rely on EC law to 'break open' national markets, arguing that many parts of national gambling regulation violate EC law and must be abandoned. Ultimately, they would like to see EC law influence gambling regulation more intensively, either

1 Economic regulation is understood as the area of law which is concerned with intervention by public authorities in order to shape or police the workings of the economy, including competition law and sector-specific regulation (in sectors such as electronic communications, energy, banking, etc.)

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via the inclusion of gambling in the proposed Services Directive[2] or the adoption of sector-specific secondary EC law.[3]

On the other hand, some incumbents are arguing that the current national gambling laws should by and large escape the application of EC law.

It is wise to beware of the spin put on events and pronouncements of Community institutions by parties to what is an intense lobbying and legal match. Economic regulation can be and is instrumentalized for private ends by both sides. The real challenge for the academic observer is to keep a global view of EC law and try to discern, from an autonomous, non-instrumentalized perspective, where the law can and should go.

It is trite to say that the starting point for any examination of EC law is the EC Treaty itself. Nevertheless, certain arguments sometimes give the impression that the consequences of that basic proposition have been lost. The EC Treaty contains no provision concerning gambling as such, and therefore there is no legal basis for the EC to regulate gambling for the sake of regulating gambling.

Rather, EC law applies to, and impacts upon, gambling because of a number of features evidenced by gambling but not unique to it by any means. First of all, it is not disputed that gambling is an economic activity, irrespective of its other characteristics. As such gambling falls under the ambit of the EC Treaty provisions on the internal market and on competition law. This implies that State measures concerning gambling must respect the four freedoms underlying the internal market, in particular the freedom to provide services and the freedom of establishment. Furthermore, State measures cannot distort competition on the market. Finally, gambling operators, whether they hold a monopoly or not, whether they are in private or public hands, are subject to EC competition law. EC law therefore applies to gambling incidentally and not because of any express EC competence to regulate gambling.

Via the internal market and competition law, the EC pursues a number of policy objectives which are set out upfront at Articles 2 and 3 EC, including economic development and competitiveness via unhindered trade flows and undistorted competition.

At the same time, national gambling regulation also pursues certain policy objectives which are not necessarily specific to gambling either. As recognized in

2 Gambling is now excluded from the ambit of the Directive in the Amended proposal for a Directive on Services in the Internal Market (Services Directive), COM (2006)160 (4 April 2006), Recital (10f) and Article 2(2)(ce).

3 See for instance the press release of the European Betting Association and Remote Gambling Association, *Exclusion of Gambling from the Services Directive: It is now time for the Commission to act* (16 February 2006), available at <www.eu-ba.org>.

case-law,[4] these objectives include consumer protection, prevention of fraud and other criminal activities and more generally public order. Gambling regulation is a specific expression of these objectives, in the context of moral and psychological (addiction) concerns with respect to gambling. Note that, under EC law, these policy objectives are considered to pertain to Member States first and foremost, as is reflected by their inclusion in the list of grounds of exception to the four freedoms[5] (in the case of public order) or in the list of 'imperative requirements' which can justify a limitation through an indistinctively applicable measure (in the case of consumer protection).[6]

It would therefore be inaccurate – at the very least – to conceive of the current debate as a conflict of jurisdiction to regulate gambling, which would then have to result in jurisdiction landing at either the national or EC level. Rather, the EC and Member States each pursue certain policy objectives, which brings each of them to intervene in gambling. When EC and Member State law collide, the conflict must be solved by reference to basic principles of EC law, including the supremacy of EC law but also subsidiarity.

There can thus be no question of the competence to regulate gambling being 'taken away' from Member States through the application of EC law. Of course, Community institutions, using the legal bases found in the EC Treaty, in particular Articles 47, 55 and 95 EC, can decide to enact secondary EC legislation which would harmonize the regulation of gambling at the EC level or more generally ease the provision of services by strengthening mutual recognition and home-country control principles. In such a case, however, Member States, directly via the Council and indirectly via the European Parliament, will take an active part in the enactment of such legislation and will thus positively decide to bring the whole or part of gambling regulation at EC level. Whether gambling is to be included in the proposed Services Directive, for example, is not somehow pre-ordained; it is a political matter for the Community institutions to decide.

In the following paragraphs, we will leave aside harmonization via secondary EC law, however. We will rather focus on how the various ways in which the State can intervene in the economy in the pursuit of its own public policy objectives are assessed under primary EC law, i.e. under the EC Treaty.[7]

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4 Including the oft-cited **Case C-243/01**, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

5 Articles 46 and 55 EC in the case of the freedom of establishment and the free movement of services.

6 See among others, **Case C-55/94**, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165.

7 Since this contribution focuses on State measures, the application of EC competition law to the gambling sector will not be explored further.

For that purpose, let us generally classify State intervention according to whether its impact on the economy (i.e. the amount of 'displacement' it causes) is heavier or lighter and whether it takes a legal or financial/economic form, resulting in the following matrix:

	Heavier intervention	*Lighter intervention*
Financial / economic	State-owned firms	Subsidies
Legal	Monopoly rights	Regulation

Heavier intervention thus encompasses both the use of State-owned firms[8] and the conferment of monopoly rights on firms, whether State-owned or privately owned. In cases of heavier State intervention, Article 86(1) EC applies to confirm that State measures in relation to State-owned firms and holders of monopoly rights cannot breach the Treaty.[9] In practice, the two types of intervention often go hand in hand, i.e. the holder of a monopoly right will also be a State-owned firm. The application of Article 86(1) EC so far has focused on monopoly rights more so than State ownership.[10] Since the beginning of the 1990s, Article 86(1) EC became more incisive as the ECJ developed its 'automatic abuse' line of case-law.[11] Whereas beforehand the creation of a legal monopoly as such did not breach the Treaty, the ECJ has now acknowledged that under certain circumstances, a legal monopoly can be set up so as to encompass other activities which could be provided under competition[12] or so as to be unable to meet demand for its services.[13] In such cases, the Member State actually organizes the monopoly in a way that the legal monopolist is automatically led to abuse its dominant position and thus breach Article 82 EC.[14] Conferring a monopoly which is organized in

8 Whether created from scratch or through the nationalization of existing firms.

9 It will be recalled that the firms themselves are and remain subject to EC competition law.

10 Monopoly rights qualify as 'exclusive rights' within the terminology of Article 86(1) EC. This provision also applies when Member States confer 'special rights', i.e. restrict market access to a limited number of companies, not chosen according to open, transparent and non-discriminatory procedures.

11 See for a more recent example which summarizes this line of case-law, Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] ECR I-8089.

12 Case C-320/91, *Criminal proceedings against Paul Corbeau*, [1993] ECR I-2533.

13 Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, [1991] ECR I-1979.

14 The extension of the monopoly to other services could be seen as a form of tying (Article 82(d) EC), whereas the inability to satisfy demand could be seen as a limitation of production within the meaning of Article 82(b) EC.

such a fashion is thus in and of itself a breach of Article 86(1) read in conjunction with Article 82 EC. The monopoly would then have to be lifted. The only escape is Article 86(2) EC: the monopoly will be allowed to remain if it is necessary to enable its holder to discharge its obligations concerning services of general economic interest under economically acceptable conditions.[15] EC law therefore imposes relatively tight constraints on legal monopolies, which must be limited to what is strictly necessary to fulfill the public policy objectives for which they were created and which must not be set up in such a way that the holders of the monopoly will automatically be led to abuse their dominant position. This does not seem unfair, however, given that heavier forms of State intervention in the economy such as the creation of monopoly rights are the most likely to endanger the fulfillment of the policy objectives of the EC.

In contrast, EC law is more lenient with the lighter forms of State intervention, i.e. the grant of subsidies[16] and the use of economic regulation. The latter is an available option in order for Member States to meet public policy objectives as regards gambling. Under this scenario, interested firms are free to enter the market, but they do so under various constraints arising out of regulatory enactments at national level, as regards for instance allowed and prohibited forms of gambling, control over addiction, taxation, etc.

When it comes to economic regulation, the evolution of EC law in comparably regulated sectors points to EC law becoming a form of discipline on Member States. The concept of 'impact on trade between Member States' which is meant to circumscribe the ambit of the four freedoms has consistently received a wide interpretation, so much so that the four freedoms will end up applying to almost all State measures.[17] The focus then shifts away from issues of applicability of EC law towards the substantive conditions for the application of the provisions of the EC Treaty. The application of EC law is then no longer a matter of preventing Member States from taking certain measures from a limited set (measures which discriminate against goods, services, persons or capital from other Member States), save for limited exceptions. Rather, it is a matter of ensuring that a much broader set of national measures (the so-called 'indistinctively applicable' measures), most of which pursue legitimate aims, do not adversely effect the

15 Typically by allowing for cross-subsidization among the various products or services under monopoly, as in *Corbeau*, *supra*, note 12.

16 Subsidies will be left out of consideration here, given that the gambling sector is generally not in need of subsidies.

17 This concept is also present in EC competition law. Its recent evolution was chartered at a symposium '*De EU: de interstatelijkheid voorbij?*' (Amsterdam, 14 November 2005), proceedings to be published.

internal market.[18] Since EC law applies to 'indistinctively applicable' measures, the justification for and aim of such measures, as well as their proportionality, become key to their assessment under EC law.

Similarly, under the less developed line of case-law applying Article 3(g) and 10 EC read in conjunction with Article 81 or 82 EC, Member States are prevented from using national measures as a cover for cartels or abuses of dominant position which would be prohibited if they were entered into by private operators.

The above shows that EC law comes to assume a 'control' function over national law, providing citizens and firms with the ability to question the real motivation of State action as well as the choices made as to policy, instruments, enforcement, etc. Over time, as case-law evolves, Member State action becomes in practice subject to 'good governance' requirements imposed via EC law,[19] including for instance openness, transparency, and non-discrimination amongst operators and customers.[20] EC law becomes a force to promote better administration and to fight shadowy operations and favoritism. It provides a vehicle for a healthy – but not fatal – dose of skepticism towards Member State action.

In the end, thus, when it comes to lighter forms of intervention such as economic regulation, EC law is then best seen as a form of discipline or constraint imposed on Member States. They retain a large measure of freedom in pursuing a large range of national public policy objectives, as long as they do so within such disciplines, which are aimed at ensuring that the policy objectives of the EC are also attained to the greatest extent possible. The application of EC law then aims not so much to divide and distribute powers and competences, but rather to reconcile EC and national public policy objectives to the greatest extent possible.

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18 This is the famous '*rule of reason*' approach launched with Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* [1979] ECR 649 ('*Cassis de Dijon*') for the free movement of goods, and later on extended to the other freedoms as well: for services and establishment, see *Gebhard*, *supra*, note 6.

19 For a nice example of how the application of EC law translates into such requirements, see the line of case-law beginning with *Telaustria*, whereby the ECJ derived from Articles 43 and 49 EC a principle of 'transparency' to be applied to public work contracts and concessions which fall outside the scope of secondary EC legislation on public procurement: Case C-324/98 *Telaustria Verlags GmbH and Telefondadress GmbH v Telekom Austria AG* [2000] ECR I-10745; Case C-231/03, *Consorzio Aziende Metano (Coname) v Commune di Cingia de' Botti*, not yet reported; Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen*, not yet reported; and Case C-410/04, *AssociazioneNazionaleAutotrasporto Viaggiatori (ANAV) v Commune di Bari*, not yet reported.

20 EC law already contains a general principle of non-discrimination according to nationality (Article 12 EC), to which further grounds have been added at Article 13 EC with the Treaty of Amsterdam. We are here dealing with another dimension of the non-discrimination principle which is peculiar to economic regulation, namely non-discrimination amongst competing economic operators or amongst their actual or potential customers.

Taking both heavier and lighter forms of intervention together, the thrust of EC law is then to bring Member States, as much as possible, towards lighter forms of intervention, which are less heavily constrained through EC law because they are more easily compatible with the general economic policy objectives of the EC.

This book is dedicated to going beyond the general remarks made above, towards a more elaborate and sophisticated understanding of the interplay between EC law and national gambling regulation. The first contributions look at the evolution of EC law from various perspectives, namely those of the European Commission (Peter Kerstens), of private gambling operators (Martin Arendts), of national lottery operators (Tjeerd Veenstra) as well as a more academic perspective (Alan Littler). The next set of contributions chronicles how national gambling laws are developing under the shadow of EC law: two academics are discussing Dutch (Nick Huls) and British (David Miers) regulation, whilst French and Belgian law are viewed through the eyes of a practitioner (Thibault Verbiest). Sofie Geeroms seeks to bring together all of these contributions in her closing remarks.

GAMBLING POLICY – THE EU DILEMMA

*Peter Kerstens**

1 Purpose of the Presentation

The purpose of my presentation is not to set out the ultimate truth about gambling or whether and how it should or should not be regulated. At this very stage I am not in a position either to make statements or predict future policy or give the European Commission's line on complaints relating to gambling and the freedom to provide services of the freedom of establishment, pending before the Commission. The reason for this is quite simple. The Commission's line is yet to be determined. No decisions have been made about the next steps to be taken on the complaints a number of operators have sent to the Commission. This presentation aims at highlighting a number of personal reflections that have emerged with me in my work at the European Commission being confronted with gambling related questions at the EU level.

2 Source of Political and Legal Controversy

Questions relating to how gambling and games of chance should or should not be regulated at EU level are not new. For the better part of the 1990s the Commission has in one way or the other, at times more actively than at others, looked at issues that can be placed under the heading gambling or games of chance. This work has involved studies, conferences, consultations, legislative proposals, enforcement of community law and involvement in court cases. This work has always been controversial, and remains so to date.

It would appear that in most Member States, gambling and gaming policy per se are not controversial. It rather is the potential changes in policy and changes to the status quo that are controversial. In the European Union, these (potential)

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* Any views expressed are those of the author. They can in no way be construed as representing the views of the European Commission.

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changes appear to emerge from two sources. On the one hand technical and market developments lead to the development of new products, selling methods and thus business opportunities, either for incumbents or new operators that change the status quo in a given market, be it to reattribution of market shares or by growing the overall market for gambling and gaming products. This market development can trigger political discussion on whether the regulatory framework needs to be adapted. A second source of potential change to the status quo is EU policy to promote the development of the single market. This policy is perceived as changing the status quo in Member States.

Invariably strong calls for the respect of subsidiarity, based on national, social, economic and cultural specificities are put forward as reasons for emphasising that gambling policy should be national policy. It is often said that perspectives and rules on gambling vary considerably. This is undoubtedly the case. Yet if we look at national rules and licensing requirements we also see a strong commonality in purpose and objectives. Most regulators appear to be caught in the triangle formed by the need to control excesses, the need to enable non-problematic supply and demand and the desire to preserve the role of gambling and games of chance as a basis for financing social objectives, charities, sports, the arts, etc. While this leads to different approaches in how gambling is regulated, there is no doubt that all national rules and regulations have common threads such as:

- protection of minors;
- controlling addiction and compulsive behaviour;
- financing the public purse/tax objectives;
- financing charities, arts, culture or sports;
- proper supervision/fairness and transparency in the rules of the game;
- fighting illegal activity such as money laundering;
- control of advertising;
- etc.

The fact that all national rules and regulations reflect some or all of these objectives, could lead us to believe that the development of Single Market based on a widely supported European perspective would not be difficult. Experience shows the contrary.

A possible basis for explaining this apparent contradiction may be found in the fact that the aim of national policies is not first and foremost to promote gambling and gaming as an economic activity, but to restrict it in one way or the other. When 25 Member States all have rules and regulations that in various ways aim at restricting or controlling an activity, finding common ground on how

to allow free movement of the activity and freedom of establishment between these Member States becomes a real challenge.

3 A Sense of Urgency

While the issue we are confronted with are not new, finding a solution to the long-standing questions appears to becoming more pressing than before. Why is this so? Three reasons come to mind:

1) As the single market develops further across the economy, the fact that for certain sectors single market disciplines such as the free movement of services or the freedom of establishment are not guaranteed or are restricted is seen more and more as an anomaly by those who want a single market for gambling related services; there is little doubt that gambling is an important economic activity with substantial cross-border potential. Turnover figures run in the billions of Euros. This is hard to ignore. Cross-border markets have been developed for markets with significantly less economic potential, so why leave this market untouched?

2) Information and communication technology developments make that people become more aware of and have easier access to services that are available in other countries or on-line but that are not available in the home state. As the possibility to offer and use services across borders develops, the existence of (regulatory) barriers is felt more strongly.

3) Developing jurisprudence from the European Court of Justice (ECJ) and national courts applying European legislation. This development is in itself a result of dissatisfaction with the situation described in the above two points.

4 A Permissive or Restrictive Approach?

At the European level, there is a temptation to say that Member States that restrict gambling should deregulate the market, or the other way around. This is a value judgement that should not be confused with Treaty principles. The Commission's role and duty is in seeking the promotion and respect of the latter.

It is clear that gambling services are services as defined in Article 50 of the Treaty. Consequently, a duly licensed service provider established in a Member State should in principle be able to benefit from Internal Market rules. They are also covered by Article 49 of the Treaty, but restrictions can be justified.

Whether or not a Member State restricts gambling on its territory is within the limits of the Treat at the end of the day a matter for that Member State

to decide. The real issue from a European Community law perspective is that Member States must be consistent, proportionate and non-discriminatory in their policies on gambling. For example, Member States cannot invoke the need to restrict its citizens' access to gambling if at the same time public authorities in that Member State incite and encourage people to participate in lotteries, games of chance and betting.

Confronted with the reality that a greater sense of urgency seems to be developing on addressing the dilemma created by on the one hand the requests for a single market for gambling services and on the other hand the requests for preservation of national perspectives on gambling, the question emerges whether moving forward is necessary and if so, how.

Two different avenues can be envisaged: On the one hand there is action via the ECJ, either on through references for preliminary ruling (here there is no direct role for the Commission as the decisions to refer a matter to the ECJ are taken by national judges) or through Article 226 procedures initiated by the Commission on the basis of complaints received or on the Commission's own initiative. Complaints by market operators require the Commission to take a view on whether or not it considers there is a breach of Community law. If so, it must seek to correct these breaches through infringement procedures. The Commission has already initiated proceedings against Denmark through a letter of formal notice last year and against Sweden and Greece regarding the importation of gaming machines. At this stage the Commission is continuing its investigation and assessment of other complaints. When all relevant elements have been assessed the Commission will decide whether or not infringement procedures must be opened on the complaints currently pending.

But infringement procedures and Court proceedings do not in themselves lead to a single market for gambling services. Courts can decide on whether Community law is breached or provide guidance on interpretation, but there is no certainty. Court jurisprudence to date does not represent an automatic guarantee to free movement for gambling services. It does impose and clarify the proportionality test for restrictions that Member States seek to impose. Whether the court will develop this further remains to be seen.

The second avenue is the regulatory route. A body of opinion takes the view that a Single Market for gambling activities requires a legislative solution, rather than let courts decide. As with all legislative solutions this requires that sufficient common ground between a workable majority of Member States and MEPs exists or can be build. We have pointed out earlier that while Member States pursue similar objectives experience shows that it is far from a foregone conclusion that a sufficient degree of consensus is available to pass legislation. Gambling is included in the Commission's proposal for a Directive on services. The Commission's proposal foresees that all gambling services fall within the scope of the proposed Directive, but the country of origin principle would not

apply to them. But the chapters on establishment that pursue administrative simplification would apply. Also the provisions on cross-border administrative co-operation would apply. Both in the European Parliament and in the Council there are voices seeking to exclude gambling from the proposal. Once the full Parliament will have voted, the Commission will draw conclusions from this.

There are also suggestions to harmonise gambling legislation. Is this the way forward? It is too early to tell. Past experience does not necessarily predict the future as circumstances may have changed. With a view to assessing further policy options a study is being carried out that looks at the legal and economic situation for 8 different categories of services:

- betting services;
- bingo services;
- casino services;
- gambling services operated by and for the benefit of recognised charities and non-profit making organisations;
- services related to gambling machined that can be placed in locations other than in licensed casinos;
- lottery services;
- media gambling;
- promotional games.

Studies like this one provide a clearer picture of the policy options available. This in itself assists in making proper policy choices. Which choices will be made can only be determined once all the elements are on the table. For the time being the jury is out but all bets are open.

Has the ECJ's Jurisprudence in the Field of Gambling Become More Restrictive when Applying the Proportionality Principle?

Alan Littler

1 Introduction

On a number of occasions beginning with the case of *Schindler*,[1] the European Court of Justice (hereinafter: ECJ) has been the battlefield for national measures regarding gambling to mix with the fundamental freedoms establishing the internal market of the European Community. Even after the ECJ has rendered six judgments it is not entirely clear how this discussion will settle, and indeed in view of the ongoing debate regarding the liberalisation of services in the internal market,[2] it may be a good while yet before national operators gain a suitable degree of legal certainty at the European level.

The case-law of the ECJ regarding gambling has arisen out of national authorities regulating gambling activities at the national level, and such regulation has had a restrictive effect on the provision of gambling services by operators established in another Member State. The extent to which national authorities can restrict supplies will be discussed in this contribution and this will be referred to as their 'margin of discretion'.[3]

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1 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Shindler and Jörg Schindler*, [1994] ECR I-1039.

2 As evident in the Working Document on the proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004)0002, 13 January 2004. Rapporteur: Evelyne Gebhardt, Committee on the Internal Market and Consumer Protection, European Parliament, 21 December 2004.

3 I have chosen to use the term 'margin of discretion' although a variety of other terms can be found. An example of this can be found in Straetmans, G., 'Case C-6/01, Anomar v. Estado português, Case C-243/01, Piergiorgio Gambelli; and C-42/02 Diana Elisabeth Lindman', *Common Market Law Review*, 41 (2004), 1409-1428 at p. 1417 where the following phrases are used to refer to the same phenomenon; '... the *latitude* granted to the

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Following preliminary references from national courts, the ECJ has been called upon to determine the extent to which national authorities may restrict the provision of gambling services originating in another Member State. Debate exists as to whether this margin has been diminished by the case-law of the ECJ. Part of the ECJ's assessment of the restrictions in question involves considering whether the restriction is proportionate in its effect to the aim it is intended to achieve.

This contribution questions whether the evolution of the ECJ's consideration of proportionality has left Member States with a reduced margin of discretion in maintaining and enacting restrictions on the cross-border supply of gambling services. In considering this issue I will try to identify whether the ECJ has become more familiar with the issues of this sector, or whether the reasoning of the ECJ simply reflects the circumstances of each case.

In order to fully understand the approach of the ECJ I will firstly aim to provide a definition of gambling since this is an activity which can take many forms and be subject to differing policy objectives and forms of regulation. Secondly, having elucidated a definition of gambling, I will then consider the context in which the debate occurs to highlight the factors which have brought this issue to the attention of the ECJ. Thirdly, since the ECJ has chosen to deal with questions surrounding the provision of gambling as an issue falling under the freedom to provide services, a brief overview of the case-law surrounding this freedom will be given.

In dealing with national restrictions on the cross-border supply of gambling the principle of proportionality has proven to be of particular importance in relation to the margin of discretion enjoyed by the Member States. Therefore, the approach of the ECJ to the principle of proportionality in its general freedom to provide services case-law will be highlighted. Fourthly there will be a discussion of the principal cases in this field, which are considered to be *Schindler*,[4] *Läärä*,[5] *Zenatti*,[6] *Anomar*,[7] *Gambelli*[8] and *Lindman.*[9] This discussion will aim to draw

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Member States to organize the lottery and gambling markets', 'Member States' *discretion* in lottery and gambling markets'; and 'the margin of *appreciation* of the Member States'. [Emphasis added].

4 Supra note 1.

5 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäyä (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-6067.

6 Case C-67/98, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289.

7 Case C-6/01, *Associaçã Nacional de Operadores de Máquinas Recreativas (Anomar) and Others* v. *Estado português*, [2003] ECR I-8621.

8 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

9 Case C-42/02, *Diana Elisabeth Lindman* v. *Skatterättelsenämnde*, [2003] ECR I-13519.

a conclusion as to whether through its interpretation and application of the proportionality principle the ECJ has reduced the margin of discretion enjoyed by Member States.

2 Defining Gambling: An Important Issue

At the outset, it is useful to define what is encompassed by the 'gambling sector'. Gambling covers a variety of activities, and this is illustrated by the subject matter of the cases themselves. Preliminary references arising out of cases concerning lotteries, betting, slot machines and other gaming machines have all arrived in Luxembourg. Furthermore given the rapid expansion of the Internet since the mid-1990s, bringing about virtual casinos and other forms of on-line gambling, the number of instances in which provisions of national law concerning gambling conflict with EC law, or national laws of other Member States, is bound to increase.[10] 'Gambling' has been subject to numerous definitions by a variety of authors. A very general definition was given by a United Kingdom Government Royal Commission in 1978:

> 'Almost everyone knows intuitively what gambling is – buying the chance of making money; taking a calculated risk because of the potential reward; engaging in an action or series of actions resulting in a favourable, unfavourable or neutral outcome; and so on.'[11]

While the ECJ has never been called upon to give a definition of gambling, it refers to what it calls 'games of chance'. As described in *Schindler* the operators of such games:

> '... enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out.'[12]

Thus, common to all forms of gambling, the participant provides the operator of the game with consideration in the form of a stake. The operator provides in

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10 See Verbiest, T. & Keuleers, E., 'From Gambelli to Placanica and the Service Directive', *World Online Gambling*, January 2005, 3, who allude to such circumstances with '[t]he changes are that the regulatory models adopted by the United Kingdom, Malta and Slovakia will lead to serious Internal Market distortions, underlying the need for a European initiative in the field of remote gaming services'.

11 *Final Report of the Royal Commission on Gambling* (Chairman, Lord Rothschild, London, H.M.S.O., 1978, Cmnd. 7200) at 1.2, as quoted in Miers, D., *Regulating Commercial Gambling: Past, Present and Future* (Oxford: Oxford University Press, 2004), at p. 2.

12 Supra note 1, para. 27.

return the chance that a sum of money or another prize may be won, through a lottery as in the case of *Schindler*, or another method of determining an outcome by chance, such as a slot machine, as was the case in *Läärä*.[13] Once that outcome is known, the operator either provides the participant with the winnings they are entitled to, or nothing. Regardless of whether the participant wins any prize, participants pay and play for the chance of winning a particular prize.

Nevertheless, some forms of gambling can be said to involve a certain degree of skill, although they are still predominantly determined by chance. This is the case for instance of betting. As was recognised by the ECJ, in *Zenatti*:

> '... bets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake.'[14]

This distinction is not without significance. Many legal systems entail substantial differences in the manner in which a game is treated based on its skill/chance components. An example of this can be found in numerous cases arising in the courts of England and Wales regarding the ban on lotteries.[15] Many games in which people can gamble fall between being a game of pure skill and a game of pure chance, as illustrated by Lord Halisham when he reviewed earlier cases in *News of the World Ltd* v. *Friend*.[16] While it is not within the remit of this contribution to consider how the 25 Member States distinguish between games of chance and games of skill (if all Member States do in fact make such a distinction), it is worth considering that such a grey area has a potentially large impact upon any future internal market for gambling services. If the criterion of skill/chance is used to determine the legality of certain games, and thus whether they can be subject to such an internal market, the national criteria used could restrict the volume of services which can be legally offered within the internal market.

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13 Supra note 5.

14 Supra note 6, para. 18.

15 For example: *Caminada* v. *Hutton* (1891) 17 Cox C.C. 307, *Blyth* v. *Hulton & Co Ltd* (1908 72 JP 401, *Scott* v. *DPP* [1914] 2 KB 868, *Readers Digest Association* v. *Williams* [1976] 1 WLR 1109 and *Imperial Tobacco* v. *A-G* [1980] 2 WLR 466. This point has also been discussed on numerous occasions in the USA, for example: *In re Allen* 59 Cal.2d, 377 P.2d 280 (1961) where the Supreme Court of California considered that 'the test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.'

16 [1973] 1 WLR 284, at p. 251: 'But a lottery being a distribution of prizes by lot or chance, it came to be held that, even if quite a modest degree of skill entered into the decisive test, the competition escaped [the ban on lotteries]. [...] On the other hand, competitions, the final result of which was determined by chance were lotteries and therefore, illegal, even though a degree of skill was required to winnow out all but the final competitors.'

As is evident gambling not only occurs in various forms but increasingly it involves multiple jurisdictions simultaneously.

3 The Context of the Contemporary Policy Debate

Various forms of gambling taking place at a national, European and international level provide an infinite number of potential conflicts of national law. At these various levels three principal factors give rise to the possibility of conflict and are a source of debate. These factors, which will be briefly dealt with in turn, are; i) legislation, ii) technology, and iii) general policies of the European Union.

3.1 Legislation of the Member States

Differing national legislation, reflecting differing national policy objectives, is of considerable importance to this debate in the context of the cross-border provision of gambling services in the Community's internal market. The scope for legal conflict in this (still) un-harmonised sector is considerable, with 25 different gambling regimes offering a seemingly indefinite number of legal conundrums. Furthermore, the *acquis communautaire* of the European Community constitutes another potential source of legal uncertainty for the providers of cross-border gambling services. The complexity of this field has been recognised at the international level, with the OECD noting:

> 'Both mobile gambling and adult entertainment implicate a variety of government policies and regulations targeted to protection of minors and restrictions on gambling.'[17]

3.2 The Impact of Technology

The potential for conflict arising out of differing national policies[18] is further exacerbated by the impact of technology, particularly the internet, upon this field. Gambling activities no longer have to take place in a casino or betting shop, but increasingly in the privacy of an individual's home via the internet, or even as a form of entertainment for a tired commuter via their mobile phone. Such online or mobile gambling is not hindered by geographical boundaries.

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17 OECD: Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy; Working Party on the Information Economy, *Digital Broadband Content: Mobile Content New Content for New Platforms*, DSTI/ICCP/IE(2004)14/FINAL, 3 May 2005, p. 50.

18 Gamblinglicenses.com states that there are '76 jurisdictions offering some form of online gaming license', <www.gamblinglicenses.com/licensesDatabase.cfm> (accessed on 30 March 2006).

Consequently this form of gambling does not sit neatly with jurisdictional boundaries. This creates numerous grounds for legal uncertainty, for consumers and operators alike as shown by the flotation on the London stock exchange in June 2005 of the online poker operator, PartyGaming. Although based in Gibraltar, the vast majority of clients were resident in the USA, where online gambling is most probably illegal.[19] The threat of legal action against US based support companies of PartyGaming led to unfounded predictions that the company would not float on the exchange, or that the value of the company would not be as great as early predictions suggested.[20] Nevertheless, it still floated for an expected £4.76bn.[21]

3.3 The General Policies of the European Union

Not only does the potential for conflict arising from a lack of harmonisation arise in the internal market, but also from wider debates surrounding services, and in particular the 'Services Directive'.[22] As proposed by the Commission, gambling would be subject to a temporary derogation from the application of the Directive up until 2010 at the latest.[23] However this has been rejected by the European Parliament.[24] One of the most fundamental aspects of the proposed Directive was the country of origin principle[25] which would mean that the service provider would be bound by the regulations of the home Member State when providing services to a destination Member State.

Such a development in the gambling sector would surely move gambling issues up the political agenda. Also it could end a legal lacunae existing in relation to

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19 Kollewe, J. & Foley, S, 'Online gaming shares plummet as US lawmakers threaten clamp-down', 15 February 2006, *The Independent* <www.independent.co.uk>.

20 Cobain, I., 'Revealed: poker game partners and certain winners in £4.8bn net float', 16 June 2005, *The Guardian* <www.guardian.co.uk> (accessed on 30 March 2006).

21 'Public takes punt on Partygaming', 30 June 2005, *BBC News*, <news.bbc.co.uk/1/hi/business/4636595.stm> (accessed on 30 March 2006).

22 Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2 final, 13 January 2003.

23 Article 18 of the proposed Services Directive.

24 Amendment 59 of the Draft Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2, 25 May 2005, Rapporteur: Evelyne Gebhardt, Committee on the Internal Market and Consumer Protection, European Parliament. This was formalised by the European Parliament's first plenary reading of the proposed Directive, see: European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)) 16 February 2006.

25 Article 16 of the proposed Services Directive.

the E-Commerce Directive,[26] which provides for the country of origin principle for information society services. Although the Directive does not apply to online gambling[27] it aims to establish an internal market for many forms of electronic service. Consequently, no measures exist at the Community level to ease the burden upon those wishing to provide cross-border gambling services, let alone those of an electronic nature, as illustrated by Geeroms:

> '... the legal cross-border supply of online gambling activities is almost impossible within the European Union, considering the variety of applicable legislations in question.'[28]

Given the numerous legal regimes to which gambling is subject within the internal market and the impact of technology, it is inevitable that a number of questions have arisen before the ECJ. Moreover, the response of the ECJ to gambling problems must not be seen in isolation, but in the wider context of debate surrounding gambling at the Community level.

4 Tackling the Freedom to Provide Services and the Proportionality Principle

To review the ECJ's consideration of the proportionality of the national measures in question, the proportionality test must first be defined, in particular as it relates to the freedom to provide services. As shall be seen, since *Schindler*[29] the ECJ time and time again treated the various questions related to gambling as falling under the Article 49 freedom to provide services (and accessorily also under freedom of establishment, see *Gambelli*).

Article 49 of the Treaty establishing the European Community (hereinafter 'EC Treaty') establishes equal access for service providers established in one Member State to provide services to persons resident in another Member State,

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26 Article 3, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. 2000 L 178/1.

27 Article 1(5)(d) of the Directive on electronic commerce.

28 Geeroms, S.M.F., 'Cross-Border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?', Swiss Institute of Comparative Law, *Cross-Border Gambling on the Internet Challenging National and International Law*, (Zurich: Schulthess, 2004), 143-180.

29 Supra note 1, paras. 27-28: 'The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out. Those services are normally provided for remuneration constituted by the price of the lottery ticket.'

as illustrated by the case of *van Binsbergen*[30] in which the ECJ considered the freedom to provide services in terms of discrimination (as conferring a right to equal treatment). This freedom is subject to the three grounds of exception (public policy, security and health) contained within Article 46 EC, but their scope is limited. Much as happened for the free movement of goods in *Cassis de Dijon*,[31] the ECJ in *van Binsbergen*[32] established a 'rule of reason' for the free movement of services as well. *Van Binsbergen* concerned a rule that applied without distinction between domestic and non-domestic services. Even though the rule in question appeared not to (explicitly) infringe Article 49 EC it did in fact restrict the provision of services by non-nationals in the particular Member State to a far greater extent than for nationals of the Member State. Such rules shall hereinafter be referred to as being indistinctly applicable and it is these to which the rule of reason approach applies.[33] Therefore restrictions on the provision of services must have an 'objective justification',[34] and the role of proportionality in that inquiry is evident: the ECJ refers to 'measures which are less restrictive' in its *van Binsbergen* judgment.[35]

The test of proportionality can be deconstructed into three elements; as reflected in the Opinion of Advocate General van Gerven in *Gourmetterie*, when he stated that the proportionality test breaks down into:

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30 Case 33/74, *Johannes Henricus Maria van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299, para. 10.

31 Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

32 Supra note 30.

33 The fact that Article 49 EC covered indistinctly applicable national rules is evident from the Cases C-288/89, *Stichtung Collectieve Antennevoorziening Gouda and others* v. *Commissariaat voor de Media* [1991] ECR I-4007 and C-76/90, *Manfred Säger* v. *Dennemeyer and Co. Ltd* [1991] ECR I-4221. The fact that the gambling cases discussed in this article, apart from Lindman, concerned indistinctly applicable measures is clearly evident from the reasoning of the ECJ. See: *Schindler* paras. 43 & 44; *Läärä* para. 28; *Zenatti* para. 27; *Anomar* para. 75; and in *Gambelli* the ECJ left this question to the national court to determine, in para. 70.

34 *van Binsbergen* supra note 30 at para. 14. Other terms used in this context are; 'overriding reasons' Case C-272/94, *Criminal proceedings against Michel Guiot and Climatec SA*, [1997] ECR I-3899, para. 11; 'imperative requirements' Case C-3/95, *Reisebüro Broede* v. *Gerd Sandker* [1996] ECR I-6511, para. 28; 'imperative reasons' Case C-222/95, *Société civile immobilière Parodi v. Banque H. Albert de Bary et Cie* [1997] I-3899. This is contrary to the position concerning the free movement of goods where indistinctly applicable measures fall beyond the scope of Article 28 EC according to Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [1993] ECR I-6097.

35 *Ibid*, para. 16.

> 'the existence of a causal connection between the measure adopted and the aim pursued ..., and secondly that there is no alternative to it which is less restrictive of the free movement of goods. The second requirement is concerned with the existence of a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective pursued thereby and its actual attainment.'[36]

This is supported by Jans,[37] who rephrased these three elements as meaning that the measure must be:

- firstly *suitable*, that there exists the requisite causal connection between the measure and the aim pursued;
- secondly *necessary* in that the measure is the most unrestrictive means by which to obtain the desired aim; and
- thirdly *proportionate sensu stricto,* i.e. the effect of the measure is not out of proportion with the objective to be achieved.

Nevertheless, the ECJ does not always consider all three elements explicitly, as will become evident from the cases concerning gambling.

Furthermore, at least two other factors have a bearing upon the ECJ's application of the proportionality test in gambling related cases. These factors, which will be dealt with in turn, are i) the possibility of a double regulatory burden being placed upon the (prospective) service provider, and ii) whether the restriction in question is a reflection of a Member State's position on a moral issue.

Firstly, the ECJ should consider, in accordance with its earlier case-law, whether there is a danger of the service provider being subject to a double regulatory burden. If the provider is regulated in the Member State of establishment ('home Member State'), then the ECJ will not consider favourably the Member State where the service is provided ('destination Member State') requiring the provider to comply a second time with comparable conditions.[38] This double regulatory burden issue is linked to that of mutual recognition whereby the authorities of the destination Member State should recognise the existence, and any possible equivalence with, the regulatory measures prevailing in the home Member State of the service provider. Furthermore, it was clearly stated in *Webb* that the freedom to provide services may only be restricted by provisions, which:

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36 Case C-169/89, Opinion of AG Van Gerven, *Criminal proceedings against Gourmetterie Van den Burg*, para. 8.

37 Jans, H., 'Proportionality Revisited', *Legal Issues of Economic Integration* 27/3 (2000), 239-265.

38 I will use the term 'host Member State' in the context of cross-border establishment and 'destination Member State' in the context of cross-border supply of services.

> '... are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.'[39]

This was reaffirmed in a number of cases, including *Guiot & Climatec*[40] where restrictions to the freedom to provide services could only be justified by overriding requirements of public interest by the host Member State in as far as that particular interest was not safeguarded by rules to which the service provider was subject to in the home Member State. A few years later, the ECJ clarified this point in *Arblade*.[41] In having established that the particular interest is protected by rules of the home Member State, in order for restrictions on the free movement of services to be justified and in addition to overriding reasons relating to the public interest, it must also be assessed whether:

> '... the same result can be achieved by less restrictive rules.'[42]

Evidently, this amounts to the application of the necessity element of the proportionality test. This clearly illustrates the link between the possibility of finding the existence of double regulation and measures that a Member State may impose upon a service provider established in another Member State. If the destination Member State requires the service provider to meet numerous conditions which are already complied with in the provider's home Member State, then it is highly unlikely that it is necessary for the destination Member State to impose them a second time, or similar conditions. Such a burden is likely to deter service providers providing services outside their home Member State, and thus hinder the development of cross-border supplies of services.

In fields lacking harmonisation Member States must recognise the adequacy of regulation and supervision provided by other Member States. Such recognition can either mean that a Member State does not impose any restriction on a supplier (mutual recognition) or that if it insists on the application of a local standard it is done in the least restrictive way possible (functional parallelism).[43]

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39 Case 279/80, *Criminal proceedings against Alfred John Webb*, [1981] ECR 3305, at para. 17.

40 Supra note 34, para. 11.

41 Joined Cases C-369/96 & C-376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL* and *Bernard Leloup, Serge Leloup ans Sofrage SARL*, [1999] ECR I-8453.

42 Ibid, para. 39.

43 See Weiler, J.H.H, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in Craig, P. and De Búrca, G. *The Evolution of EU Law*, (Oxford: Oxford University Press, 1999), 349-376.

Both of these methods rely upon home state control, which in the context of gambling was discussed by the ECJ in the case of *Gambelli*,[44] which will be dealt with subsequently.

Secondly, it should be borne in mind that the approach taken by the ECJ is likely to be tainted by its aversion to appearing to take a stance upon issues of morality. As highlighted by Kelly[45] cases which have reached Luxembourg stemming from 'policy concerns such as for cultural heritage or the desire to guard a particular moral standard' will see the ECJ appear 'more cautious in its analysis and seems to allow that the range of justificatory national interests may be wider and more flexible.'[46] A well-known example of this is found in *Grogan*,[47] which concerned the ECJ having to consider the topic of abortion in the context of free movement of services. Such a cautious attitude clearly prevails as regards gambling as well, as the ECJ noted in *Schindler*:

> 'Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity is practised legally.'[48]

However, in its *Omega* judgment the ECJ did not shy away from discussing the relationship between the fundamental right to human dignity and the fundamental freedom to provide services which arose out of the supply of equipment for a laser-based 'killing game'.[49] It is against the background of the ongoing debate in the free movement of services and proportionality against which the cases which specifically concern gambling shall be discussed.

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44 Supra note 8.

45 Kelly, G. M., 'Public Policy and general interest exceptions in the jurisprudence of the European Court of Justice: Towards a 'European' conception of values and rights?', *European Review of Private Law*, 4 (1996) 17-40.

46 Ibid, p. 25.

47 Case C-159/90, *Society for the Protection of Unborn Children Ireland* v. *Grogan*, [1991] ECR I-4685, paras. 19 and 20 which read: 'SPUC [the Society for the Protection of Unborn Children], however, maintains that the provision of abortion cannot be regarded as a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.

Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.'

48 Supra note 1, para 32.

49 Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9069.

5 Case Discussion

As referred to in the introduction, there are six principal cases related to gambling which have been dealt with by the ECJ, namely *Schindler*, *Läärä*, *Zenatti*, *Anomar*, *Gambelli* and *Lindman*. These shall be discussed in chronological order detailing the facts and the manner in which the ECJ considered the issue of proportionality and the consequent margin of discretion which was left to the Member States.

5.1 Schindler

The first case to focus on gambling was *Schindler*,[50] which is recognised as giving Member States a considerable margin of discretion in determining whether measures restricting the provision of gambling services are proportionate.[51]

Two German independent agents for the Süddeutsche Klassenlotterie attempted to promote the lottery to residents in the United Kingdom by mailing application forms for the lottery from the Netherlands. This occurred in 1990 (prior to the establishment of the National Lottery), at a time when only small-scale lottery lotteries were permitted under the Lotteries and Amusement Act 1976. The materials used by the two agents were seized, and the legality of that seizure was then contested by the agents as being incompatible with Article 28 EC, or Article 49 EC in the alternative. In essence the High Court of Justice in London submitted a preliminary reference to the ECJ, asking whether such an importation of advertisements and tickets into a Member State with the view to residents therein participating in a lottery of another Member State amounted to the exercise of the free movement of goods, or that of services. If one of these freedoms was at stake the High Court then sought advice as to whether the national measure would constitute an obstacle to the freedom to provide goods or services, and if so, whether it could be justified.

Referring to *Saeger*,[52] the ECJ readily found the UK prohibition to amount to an obstacle to the freedom to provide services, since the ban prohibited the provision in the UK of a service which was lawfully provided by a provider located in Germany, contrary to Article 49 EC. Since the ban applied without

50 Supra note 1.

51 Allen, B., 'Ladies & Gentlemen, No More Bets Please: ECJ – Markku Juhani Läärä (et al) v. Kihlakunnansyyttäjä (Jyväskylä) Suomen Valtio, Case C-124/97, not yet reported', *Legal Issues of Economic Integration* 27/2 (2002), 201-206.

52 Case C-76/90, *Saeger* v. *Dennemeyer*, [1991] ECR I-4221, para. 12 where the ECJ stated that the then Article 59, now 49; '... requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it *applies without distinction* to national providers of services and to those of other Member States, when it is *liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides *similar services*.' [Emphasis added].

any distinction as to the nationality or place of establishment of the would-be provider, this allowed the ECJ to consider whether the ban could be justified under the services equivalent of the 'rule of reason' as developed in *Cassis de Dijon*.[53] Since the ECJ considered the prohibition as being indistinctly applicable, it was not limited to the public policy grounds listed in Article 46 EC, and thus had far greater room from which it could deliver a politically acceptable ruling.

When considering such 'overriding public interest considerations' the ECJ recognised that lotteries have a 'peculiar nature', which is the result of three particular factors:

1. their moral, religious and cultural aspects;
2. the high risk of crime or fraud; and
3. the incitement to spend which may lead to damaging consequences for the player and society.

A further characteristic, the ability to generate revenue for benevolent or public interest activities, was recognised by the ECJ but was found not to provide a ground for an objective justification on its own.[54] The fact that Article 49 EC cannot be restricted by reasons of an economic nature was a well-established principle at the time of this ruling, particularly in light of *Bond van Adverteerders*.[55] As suggested by Hatzopoulos this could be a result of the 'peculiar nature' of this sector and the political fine line the judges had to tread.[56]

Yet these four characteristics, taken together, led the ECJ to conclude that Member States have considerable scope in which to determine whether lotteries should be prohibited or restricted, as long as the prohibition on the import of materials from abroad was necessary and did not constitute an unjustified interference with the freedom to provide services.

The ECJ considered that the prohibition was necessary, but failed to engage in a proper discussion of the proportionality of the measure.[57] While the ECJ may

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53 Supra note 31.

54 Supra note 1, paras. 59-61.

55 Case 352/85, *Bond van Adverteerders . The Netherlands*, [1989] ECR 2085.

56 Hatzopoulos, V., 'Case C-275/92, Her Majesty's Customs and Excise v. Gerhart and Jörg Schindler', [1994] ECR I-1039, *Common Market Law Review*, 32 (1995) 841-855, at p. 852.

57 *Schindler* was considered in detail by the English High Court in the *International Lottery in Liechtenstein* case (*R.* v. *Secretary of State for the Home Department ex parte. International Lottery In Liechtenstein Foundation and Electronic Fundraising Company Plc*, High Court (Queen's Bench Division), 14 June 1999, *Common Market Law Review*, 3 (1999), 304). Justice Moses felt that the ECJ had not considered the proportionality of the restrictions because the objective justifications (para. 60) justified the wide margin of discretion

have failed to deal with this issue,[58] Advocate General Gulmann was evidently well aware that the proportionality principle should apply fully to this sector:

> '[the] decisive questions are thus in my view in any event whether the interest of society invoked by the States are so fundamental that in the area in question they can justify the existing restrictions and whether the rules in question are objectively necessary in order to achieve the objective pursued and are also reasonable in relation to that objective.'[59]

At the time of the offence, no national lottery existed in the UK. Yet, by the time of the case, one had been established by the *National Lottery Act 1993*. Furthermore small-scale charitable lotteries, and other forms of gambling were also permitted at the time of the offence, but were distinguished from large-scale lotteries on the basis of them differing according to 'their object, rules and methods of organization from those large-scale lotteries'.[60] By failing to consider whether the measure was suitable, or the least restrictive means to achieve the public interest justifications put forward by the UK, the ECJ provided the national authorities with a seemingly unimpeded margin of discretion in determining restrictions applicable to the supply of gambling services.

Furthermore, the relevance of the judgment is highly questionable. In the time between the Schindler brothers' alleged offences and the delivery of the judgment the *National Lottery Act 1993* had come into force. Against this background, the prohibition of lotteries by those lawfully established and providing such a service in another Member State was discriminatory. Whether such a measure could be justified would have to be considered on the grounds of 'public policy, public security or public health'.[61] All those Member States with national lotteries could well question the practical relevance of this ruling. Perhaps the judges were aware that the UK was no longer going to be very much in the minority by the time the judgment would be delivered, and saw this as a reason to disengage themselves from the potentially politically sensitive proportionality discussions.

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enjoyed by the national authorities. National authorities were, according to the High Court, relieved from adhering to earlier case-law.

58 Supra note 55, p. 845.

59 Case C-275/92, Opinion of Mr Advocate General Gulmann delivered on 16 December 1993, *Her Majesty's Customs and Excise* v. *Gerhart Schindler and Jörg Schindler*, at para. 79.

60 Supra note 1, para. 51.

61 Article 46 EC.

In the subsequent two cases of *Läärä*[62] and *Zenatti*[63] the ECJ had the opportunity to provide some clarity to the 'often criticized outcome of *Schindler*'.[64]

5.2 Läärä

The *Läärä*[65] case arose out of criminal proceedings brought against Mr Läärä for having operated slot machines in Finland. National law provided that only a single public-law body may be granted a licence for operating slot machines. In this case the machines which Mr Läärä operated without a licence were provided by a company incorporated under English law, Cotswold Microsystems Ltd. The Vaasan Hovioikeus stayed proceedings so to ascertain whether in light of *Schindler*, Articles 28, 49 and 50 EC precluded national legislation such as that restricting the operation of slot machines to a single undertaking, in view of the public interest grounds the legislation sought to uphold.

In considering the proportionality of the restriction in *Läärä* the ECJ referred to *Schindler* and to the wide margin of discretion afforded to Member States. The ECJ concluded that the assessment of proportionality of a measure in one Member State cannot be influenced by the fact that other Member States may have a less restrictive gambling policy. For as along as there are no Community harmonisation measures in this field, the restriction is to be assessed solely by reference to the objectives of the national authorities and the degree of protection that they intend to provide.[66] Proportionality is thus to be considered at a purely national level; respecting the variety of approaches to such a morally divisive issue. It will be recalled that the ECJ stated in *Schindler* that the morality of gambling would not be something upon which the ECJ would pass judgment.[67]

Nevertheless the ECJ went on to state in paragraphs 60-61 of that judgment that it would not be possible to disregard the moral aspects of lotteries in order to determine the appropriate margin of discretion for national authorities. While not only contradicting itself, the ECJ appeared to lay the ground for a European 'norm' in this field. If moral issues were not to be cast to one side by the ECJ, then the extent to which they may or may not form an element of the review of the proportionality was not clear. By stating that the proportionality of a restriction is to be determined by the objectives (i.e. the moral values) of the particular Member State in question, and not the (less) restrictive measures

62 Supra note 5.

63 Supra note 6.

64 Straetmans, G., 'Case C-124/97, Läärä and Case C-67/98, Zenatti', *Common Market Law Review*, 37 (2000), 991-1005, at p. 991.

65 Supra note 5.

66 Supra note 5, para. 36.

67 Supra note 1, para. 32.

of other Member States, an important clarification was offered in *Läärä*. Differing moral values of numerous Member States clearly have no role to play in determining the proportionality of a measure enacted in other Member States. This would appear to stem the jurisprudential development of a Community norm in this field. To end any remaining doubt regarding this point, the ECJ referred to *Schindler* in *Omega* explicitly stating that it did not intend to create a 'general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.'[68]

However this may cause problems in cases where a double regulatory burden exists, such as in the case of *Webb*[69] where 'comparative inquiries seemed to form part of the analysis of whether the restrictive measure was (a) justified and (b) proportionate.'[70] It could be rather contradictory for a national court to have to assess the national measure in question in light of solely the moral values of the Member State in which it is located while at the same time being obliged (depending upon the prevailing facts) to consider the degree of regulation and supervision provided by another the service provider's home Member State.

Nevertheless a national court can readily prevent this dilemma from posing a significant problem. A court within the host Member State can consider whether the degree of protection which its national regulations aim to provide correspond to the degree of protection afforded by the home Member State. Should the degree of protection afforded by the two Member States be comparable, the court within the host Member State should be satisfied with the degree of control maintained by the home Member State. This does not imply the harmonisation of national policy objectives but merely amounts to the mutual recognition of the equivalence of protection afforded by different national regulatory regimes. In the event that the host and the home Member State afford different degrees of protection then the measure in question of the host Member State is more likely to satisfy the proportionality test since the degree of protection which it aims to secure is not being upheld elsewhere.

Such an approach avoids the imposition of moral values and policies originating in the home Member State of a gambling service provider being imposed upon the host Member State. Yet, at the same time, comparable moral values and policies would be recognised where appropriate, thus reducing barriers to the cross-border provision of gambling services.

Returning in substance to the aim of the national measure in question, the ECJ noted that the fact that slot machines are not prohibited does not negate

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68 Supra note 49, para. 37.

69 Supra note 39, para. 20.

70 O'Leary, S., and Fernández-Martín J.M., 'Judicially-Created Exceptions to the Free Provision of Services' in Andenas, M. and Roth, W.-H. *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2002), 163-196 at p. 181.

the public interest objectives the national measures seek to uphold. Indeed Straetmans notes that the proportionality of the measure is strengthened by the fact that the monopolist is under the control of the State to whom it has to pay the proceeds from the slot machines.[71] The ECJ then dealt with the issue whether a compulsory code of conduct would be preferable to the granting of an exclusive operating right. While recognising that the two means would uphold many of the objectives of the Finnish state the ECJ noted that given the 'risk of crime and fraud' an exclusive right was more 'effective in ensuring that strict limits are set to the lucrative nature of such activities'. In effect, it would seem that this outcome did nothing to diminish the margin of appreciation granted to national authorities in the case of *Schindler.* Indeed, O'Leary and Fernández-Martín consider that the ECJ leaves the Member States to 'verify the proportionality of their own protectionist and restrictive measures' which is 'simply not good enough.'[72]

5.3 Zenatti

Shortly after *Läärä*, the ECJ considered *Zenatti*,[73] a case arising out of the criminal prosecution of Mr Zenatti for having acted as an intermediary in Italy for a licensed bookmaker established in the United Kingdom. Mr Zenatti operated an information exchange through which Italian customers of the English bookmaker could place bets on foreign sports events. Under Italian law, sports betting was limited to the outcome of events under the supervision of the National Olympic Committee or to the results of horse races. Following tendering procedures the arrangements for the taking of bets could be entrusted to private entities. Since the Italian law did not provide a total ban on sports betting (contrary to the situation in *Schindler*), the Consiglio di Stato requested a preliminary ruling to ascertain whether Italian law, as it affected the free movement of services, could be justified in light of social-policy concerns and the prevention of fraud.

The treatment of the proportionality issue in *Zenatti* is without doubt in the same line as the 'marginal assessment'[74] which occurred in *Läärä*. In this case the ECJ restates that measures restricting the provision of betting services in Italy must be suitable to achieve the public interest objectives and not go beyond what is necessary. No guidance was offered as to any outer boundaries applicable to the test of necessity. Unlike *Schindler* where at the time in question lottery transactions were wholly prohibited, the Italian law in question restricted betting transactions to 'certain bodies under certain circumstances'. Again the

71 Supra note 63, p. 997.

72 Supra note 68, p. 188.

73 Supra note 6.

74 Supra note 63, p. 1001.

ECJ reiterated the large margin of discretion enjoyed by national authorities, and only adds a small proviso (and a fairly obvious one) to the margin as developed in *Schindler* and *Läärä*. It merely adds that the national legislation must be 'genuinely directed' at the objectives in question. This condition though would only appear to be another means to state that the measure must be suitable to obtain the desired aim. While references to necessity and indirectly to suitability are apparent, it is left to national authorities to determine whether their measures comply with these aspects of proportionality (and no guidance is given to the referring court).

The prevailing degree of self-restraint thus far is perhaps not entirely surprising given the nature of the service being provided, that of gambling. Moreover in none of the cases considered so far did the ECJ deal with the suitability of the restrictions in question, in relation to the form of gambling to which the particular restriction applied. While it is conceivable that restricting the provision of sports betting through government controlled channels may help in combating crime and fraud, it does nothing to diminish the ability of an individual player to run up high levels of personal debt, and thus why therefore only public concessionaires should be permitted to run betting services as was the case in Italy, becomes less clear. In this respect, the UK bookmaker in *Zenatti* was subject to rigorous control in the Member State of establishment, which would have reduced the ability of the bookmaker to engage in, or be otherwise involved with, criminal and fraudulent activity. Yet the existence of, and compliance with, such controls did not appear to be a factor the ECJ consider worthy of explicit reference when guiding the national court in its assessment of the proportionality of the Italian restriction. As is common in these gambling cases, the ECJ does not refer to all the constituent elements of the proportionality test, and thus it may not be unusual that the suitability of the measure is not commented upon. Simultaneously, due to the existence of supervision in the home Member State in this case, the ECJ appears to contradict its own case-law regarding double regulation.

Rather strikingly, the ECJ does not appear to take into consideration the fact that each of the cases involves a different type of restriction and a different form of gambling. Regarding the form of the restriction *Schindler* concerned a total prohibition on the provision of large scale lottery services. UK legislation permitted small-scale charitable lotteries with stakes which:

> '...may be comparable to those in large-scale lotteries and even though those games involve a significant element of chance they differ in their object, rules and methods of organisation from those large-scale lotteries which were established in Member States other than the United Kingdom...'.[75]

75 Supra note 1, para. 51.

Large-scale lotteries such as the Süddeutsche Klassenlotterie were not in a comparable position with small-scale lotteries permitted by the UK legislation at the time. *Läärä* involved slot machines, which did not involve such large stakes, and neither did the Finnish legislation provide for a total prohibition of the provision of the service. Rather the supply of slot machines was limited to a single public body for the purpose of collecting money for charitable purposes. The operator was permitted a certain degree of remuneration however. Even less stringent perhaps than the restriction in *Läärä*, was that in *Zenatti* whereby the activity in question, sports betting was permitted under Italian law. The organisation of betting on sporting events depended upon the operator being registered as a data transmission centre and possessing the appropriate licence for sports betting. In light of these difference vis-à-vis the restriction and form of gambling in question, one might have expected the ECJ to indicate how this could affect the consideration of the proportionality of those restrictions.

Such a point did not escape the attention of Advocate General Fennelly in his Opinion in *Zenatti*.[76] Having referred to the 'personal, social, moral and economic consequences of gambling of all kinds' which were the basis of Italy's arguments in *Zenatti* and the ECJ's acceptance of that type of claim in *Schindler*, AG Fennelly pointedly noted:

> 'Such arguments may, of course, apply with greater or lesser force depending on the type of gambling to which they are applied. Thus, for example, the disproportion between the stake and the potential winnings is much greater in the case of lotteries than betting.' [77]

AG Fennelly then noted the significant difference between the legislative regime in question in *Zenatti* compered to that in *Schindler*.[78]

Furthermore, the ECJ did not take into account the fact that *Läärä* and *Zenatti* involved different forms of gambling compared to *Schindler*. Consequently, gambling with slot machines is apparently comparable with (large-scale) lotteries regarding moral, religious and cultural aspects, the risk of crime and fraud due to the size of the stakes and prize paid to winners, and by providing an incitement to spend which has damaging consequences for the individual and wider society.[79] It is highly arguable whether all forms of gambling will have the same negative

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76 Case C-67/98, Opinion of Advocate General Fennelly, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289.

77 Ibid., para. 23.

78 Ibid, para. 24.

79 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäyä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para. 15 and Case C-67/98, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289, para 19.

affects which Member States try to guard against. Thus it is rather surprising that the ECJ does not appear to make any distinction to this effect in considering the proportionality of the measures in question.

Thus, even after two cases following *Schindler* Member States are free to exercise 'value judgments … within the very wide margin of discretion accorded to them by the Court.'[80]

5.4 Anomar

Slot machines were at issue again in *Anomar.*[81] A national association of companies involved in the marketing and operation of gaming machines sought a declaration that Portuguese law relating to the operation and playing of games of chance or gambling did not comply with Community law. The Tribunal Cível da Comarca de Lisboa referred numerous questions to the ECJ, which in substance provided the Court with the opportunity to review and confirm its earlier case-law.

In dealing with the justifications for indistinctly applicable restrictions in Portuguese law under fire in *Anomar*, the ECJ stuck to the well rehearsed approach taken in *Schindler*, *Läärä* and *Zenatti*. The legislation under consideration in *Anomar* was substantially similar to that in *Läärä.* There was nothing to give the ECJ any reason to change the direction the jurisprudence at this time was flowing in.

5.5 Gambelli

It is at this stage that a number of commentators[82] in the field noted a shift in the ECJ's approach with the case of *Gambelli*.[83] Indeed Straetmans notes that along with *Lindman Gambelli* provided the ECJ with the 'opportunity to set the record straight and clarify the outer limits of [that] Member States' discretion'.[84] However it is arguable that the ECJ's ruling in this case is more a reflection of the Court reaching a stage of maturity in dealing with cases arising from

80 Supra note 63, p. 1001.

81 Supra note 7.

82 Mancini, Q., 'The Future of Online Gambling in Italy in the Wake of "Operation Blackjack" and the Day After the *Gambelli* Ruling', *Gaming Law Review*, 8/2, (2004), 131-133; Straetmans, G., 'Case C-6/01, Anomar v. Estado português, Case C-243/01, Piergiorgio Gambelli; and C-42/02 Diana Elisabeth Lindman', *Common Market Law Review*, 41 (2004), 1409-1428 at p. 1422; Verbiest, T. & Keuleers, E. 'Gambelli Case Makes it Harder for Nations to Restrict Gaming', *Gaming Law Review*, 8/1 (2004), 9-13; Verbiest, T. & Keuleers, E., 'From Gambelli to Placanica and the Service Directive', *World Online Gambling*, January 2005, 3; Verbiest, T. 'Post-Gambelli caselaw: a European overview', *World Online Gambling*, May 2004, 7-11.

83 Supra note 8.

84 Supra note 3, p. 1421.

the regulation of gambling, and that this maturity is shown through various clarifications which this case offers.

The defendants in *Gambelli* belonged to a widespread network of Italian agencies linked via the internet to a bookmaker established in the United Kingdom, which was subject to rigorous control by the UK authorities, as well as to various duties and taxes. The defendants were charged with having collaborated in Italy with the bookmaker for the purpose of collecting bets, which was deemed incompatible with the monopoly enjoyed by the National Olympic Committee and the National Union for the Betterment of Horse Breeds. The defendants operated data transmission centres under commercial agreements with the bookmaker and had received due authorisation to operate these transmission centres from the Ministry for Post and Communications. Nevertheless an order for the provisional sequestration of their property was made. The defendants challenged that order, and the Tribunale di Ascoli Piceno stayed the proceedings to send a request for a preliminary ruling from the ECJ. It sought to ascertain whether Italian law was compatible with Articles 43 and 49 EC, given that the penalties at stake made it impossible for lawfully constituted undertakings to operate economic activities in the Italian gaming and betting sector.

In contrast with the earlier gambling cases, the ECJ did not pronounce whether it considered the national provisions in question to be applicable without distinction. Instead, this was left to the national court to determine.[85] Nevertheless, the ECJ took the opportunity to offer the Tribunale di Ascoli Piceno guidance in assessing the proportionality of the restrictions, should it indeed find that the provisions were indistinctly applicable. In doing so, the ECJ reduced the margin of discretion that it had so far allowed the Member States to enjoy. Before leaving the issue of whether the provisions were indistinctly applicable, a change in the approach of the ECJ can perhaps be foreseen by reference to more general case-law. This change can be seen beginning in paragraph 65, referring to the cases of *Kraus*[86] and *Gebhard*,[87] by stating that the measure:

> 'must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it.'

Such wording reduces the discretion granted to Member States compared to *Schindler, Läärä* and *Zenatti,* particularly since specific reference was subsequently made to the fact that the bookmaker was already subject to control and penalties in the Member State of establishment, and that the Italian data transmission

85 Supra note 8, para. 75.

86 Case C-19/92, *Dieter Kraus* v. *Land Baden-Württemberg*, [1993] ECR I-1663, para. 32

87 Case C-55/94, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para. 37.

centres were legitimately registered as such. This represents the ECJ beginning to apply the *Webb*[88] and *Guiot & Climatec*[89] line of case-law regarding double regulation to the gambling sector. Consequently the national court is required to take into account the fact that the gambling service supplier is '... subject in his Member State of establishment to a regulation entailing controls and penalties ...'.[90] Rigorous control, duties and taxes imposed by the UK authorities were clearly not to be disregarded by the Italian authorities (and court in this instance).

Moreover, the ECJ did not 'take refuge behind the empty rhetoric of Member States'[91] as in the previous cases, and dealt directly itself with the suitability of the national measure in question. Having referred to the requisite justification by imperative requirements in the general interest as enunciated in *Schindler*, *Läärä*, and *Zenatti*, the ECJ further reduced the margin of adiscretion enjoyed by national authorities by requiring that the measures must 'also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.'[92] Explicit reference was then made to proposed legislation for expanding betting and gaming to generate further revenue for good causes. In doing so, the Italian authorities had eroded the possibility of relying on the need to reduce betting opportunities for public order concerns, so as to justify restrictive measures and the related penalties. It would thus appear that if the national authorities do not follow a systematic and coherent policy, they reduce the extent to which they can rely upon the objective justifications.

Such a conclusion is not surprising in light of the suitability element of the proportionality test. Should a measure not be in line with the overall policy objectives pursued by a particular national authority, then that measure is less likely to be suitable for the achievement of those objectives. Therefore, the need for individual measures to conform to an overall policy could be seen as the ECJ adding substance to the reference to 'genuinely directed' in *Zenatti*. In practice,

88 Supra note 39.

89 Supra note 34.

90 Supra note 8, para. 73. However, prior to this ruling, the English High Court in the *International Lottery In Liechtenstein* case considered whether the regulatory regime applicable to the lottery based in Liechtenstein was equivalent to that governing the United Kingdom's National Lottery. Following the Opinions of the Advocate Generals in *Schindler* and *Zenatti* the English High Court concluded that requiring the Liechtenstein regulatory regime to be equivalent to that prevailing in the United Kingdom was not disproportionate, since national authorities are permitted to determine the extent to which gambling activities are supplied within their Member State.

91 See Straetmans, supra note 80, p. 1422.

92 Supra note 8, para. 67.

this is likely to reduce the scope for national authorities within their margin of discretion to enact measures with the primary aim of limiting the provision of gambling services from providers established outside their Member State, while allowing for, or even promoting, the provision of such services by operators established within their jurisdiction.

This would not appear to be a seismic shift in the approach of the Court to gambling, but the judges taking the opportunity to clarify earlier gambling case-law by reference to well established case-law regarding the free movement of services. After all this was the fifth case to arise regarding restrictions to the cross-border provision of gambling services, so the ECJ may well have felt that the time was ripe to take a definitive stance on the issue.

5.6 Lindman

Following merely a week later in the footsteps of *Gambelli* is the case of *Lindman*.[93] Ms Lindman, a Finnish national purchased a winning lottery ticket while on holiday in Sweden, for the Swedish lottery. Under Finnish law the lottery organiser bears the tax burden, for games conducted in Finland. However, the winnings from the Swedish lottery were regarded as earned income, chargeable for income tax, and various other taxes. Had Ms Lindman participated and won a Finnish lottery then the winnings would not have been subject to any taxation. Having failed to have this tax assessment overturned, Ms Lindman appealed to the Åland förvaltningsdomstolen which referred to the ECJ the question as to whether such a tax rule would be precluded by the application of Article 49 EC.

According to the ECJ, objective justifications must be 'accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted'.[94] Arguably an analysis of appropriateness is part of the wider proportionality test, reflecting the suitability of the measure in question. However, no guidance is given as to how this analysis should be performed.

Furthermore, the ECJ felt confident enough to point to the fact that no evidence had been presented to indicate 'a particular causal relationship between such risks [e.g. crime and fraud] and participation by nationals of the Member State concerned in lotteries organised in other Member States.'[95] Does this imply that national authorities are required to explicitly illustrate a causal relationship between the concern and the restrictive measure, or does it merely reflect that the measure in question should be appropriate/suitable? Unlike previous cases, which dealt with measures which did not discriminate on the basis of nationality,

93 Supra note 9.

94 Ibid., para. 25.

95 Ibid, para. 26.

the Finnish tax treatment of winnings enjoyed by a Finnish national from a Swedish lottery was clearly discriminatory.

In contrast to the earlier gambling cases, this restriction on the supply of gambling services would have to be justified on the basis of the grounds provided by Article 46 EC. As highlighted by Straetmans,[96] it cannot therefore be merely a coincidence that no reference is made to the 'broad margin of discretion' as in previous cases. The approach of the ECJ when dealing with such discriminatory measures appears to be strict. As part of the freedom to provide services, residents of Member States must be able to receive them.[97] In this respect proportionality plays a role in determining whether '… Member States may not restrict directly or indirectly access to foreign based services' since 'European citizens should have a free, but monitored, access to legally authorised gaming platforms.'[98]

Whether *Lindman* can truly be considered as reducing the margin of discretion in afforded to the Member States following *Gambelli* is highly doubtful, in light of the fact that *Lindman* can be distinguished on the basis that the measure in question was undoubtedly discriminatory in nature.

6 Conclusions

Having rendered six decisions arising out of preliminary references from national courts faced with balancing national restrictions to the cross-border provision of gambling services with the freedom to provide services, the ECJ has developed a line of case-law where the manner in which the principle of proportionality has been treated is of fundamental importance. In each case this treatment has determined the margin of discretion that Member States were afforded in their regulation of gambling services. While it may be evident that the margin of discretion as enjoyed by national authorities (and the use of which assessed by national courts) is restricted in *Gambelli* compared to *Schindler*, it cannot be said for certain that the ECJ has followed a consistent approach to the problem of restrictions on the cross-border provision of gambling services.

Tracing the treatment of the principle of proportionality and hence the margin of discretion through these six cases reveals a reduction of this margin after a period of an apparent lack of direction marked by the first four cases.

The foundation for all subsequent rulings can be found in *Schindler*; whereby the ECJ recognised the right of the Member States' to prohibit or restrict the

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96 See Straetmans, supra note 80, pg 1427.

97 As established in Joined Cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone* v. *Ministero del Tesoro*, [1984] ECR I-377.

98 Verbiest, T. & Keuleers, E., 'Advocate General backs passive cross-border gaming', *World Online Gambling*, June 2003, p. 13.

cross-border provision of gambling services so long as that the prohibition or restriction did not amount to an unjustified interference with the freedom to provide services. Without having provided any guidance to the Member States, the ECJ afforded the national authorities a considerably wide margin of discretion.

This margin was not reduced in the case of *Läärä* that stated that an assessment of proportionality cannot be influenced by the gambling policies of other Member States. It must be recalled that this is not necessarily an invitation for Member States to disregard the principle of proportionality and maintain or enact any restrictive provision they wish. On the contrary, and potentially contradictorily, the national authorities must respect the ECJ's case-law regarding double regulation, which requires consideration of the gambling policies of other Member States.

Again, the ECJ left the margin of discretion wide-open in the following case of *Zenatti* when it added to *Schindler* and *Läärä* that the national restriction must be 'genuinely directed' at the objectives which the legislation pursued. In doing so the ECJ again failed to reconcile its reasoning with the case-law on double regulation. By this stage the ECJ had come across three different forms of gambling, i.e. (large-scale) lotteries in *Schindler*, slot machines in *Läärä* and sports betting in *Zenatti*. At this stage it can hardly be claimed that the ECJ had gained familiarity with the issues involved in gambling related cases since it had failed to discuss how the form of gambling involved could influence the assessment of the proportionality of the national restriction. So far, the national authorities were still left with a considerable margin of discretion in which they could maintain and enact measures to restrict the cross-border supply of gambling services.

With *Anomar* not giving rise to any restriction on the margin of discretion, this fell to the case of *Gambelli* where the ECJ made reference to the case of *Gebhard* and eventually the judges fell in line with ECJ's own case-law concerning double regulation. Furthermore, as a sign of familiarisation with the sector, the ECJ required that the Member States follow a systematic and coherent policy with regards to gambling. Such change in approach undoubtedly increased the number of hurdles that a national restriction must pass to be found proportionate. Consequently, the margin of discretion enjoyed in *Schindler* was clearly reduced. Unfortunately, the case of *Lindman* did not provide the ECJ with an opportunity to reiterate the approach in *Gambelli* due to the discriminatory nature of the restriction in question.

It remains to be seen whether the ECJ will further clarify, and thereby restrict the still substantial margin of discretion enjoyed by the Member States following *Gambelli.*

As described when establishing the context in which these cases occurred it is pertinent to consider the wider debate surrounding the Services Directive. The European Commission is keen to see that gambling services are not excluded permanently from the remit of this legislation designed to open up the internal

market in the provision of services. However, this is something the European Parliament vehemently opposes. The ECJ does not operate in a vacuum and the outcome of this debate, and indeed the very fact that it is taking place may have an impact upon the outcome of pending cases related to gambling.[99]

It has been remarked that the ECJ's vision of the internal market '... is characterised by regulatory pluralism rather than uniformity'.[100] As is clear from contrasting the cases of *Schindler* and *Gambelli*, through the use of proportionality and the narrowing of the margin of appreciation, the ECJ has been able to direct the host Member States to recognise the controls imposed on gambling service providers by their home Member State. Until the debate on the Services Directive is finalised, the ECJ can opt to create further legal certainty for the providers of cross-border gambling services by continuing to define the margin of discretion afforded to Member States through approaching the principle of proportionality in the same manner as in *Gambelli*.

99 Cases C-260/04, *Commission* v. *Italy*; C-338/04, *Placanica*; C-359/04, *Palazzese*; and C-360/04, *Sorricchio.*

100 Bernard, N., 'Discrimination and Free Movement in EC Law', *International and Comparative Law Quarterly* 45 (1996), 82-103, at p. 102-3.

A View of European Gambling Regulation from the Perspective of Private Operators

Martin Arendts[1]

1 Gambling – The Last Reservation for Monopolies in the European Union?

In the European Union barriers to national markets and national monopolies are gone. This concerns not only cassis and wine, but also complex an incorporeal products and services you cannot touch, but you have to trust. Financial products and services (which might pose serious financial dangers to customers) can now easily be offered in all Member States with a 'European passport' (thereby expressly confirming the country of origin principle). Consumer protection is dealt with by strict and very detailed regulation. If you look at the Financial Services Action Plan (FSAP) of the European Commission,[2] the completion of an integrated internal market for financial products and services seems to becoming closer. Financial products are increasingly offered in cross-border situations. Even old-established monopolies, like state monopolies for postal services and telecommunication, are by-gone or bound to vanish thanks to the European Union.

Yet is it really the case that all barriers to cross-border services and all national monopolies are really gone? Unfortunately not. A turnover of several billion Euros in lotteries, sports betting and all other kinds of gambling (among them gaming machines, scratch cards and poker) – indeed a very large and steadily growing business segment – remain in the hands of such state monopolies. Most of the European lottery and sports betting market is dominated by monopolies that realise a yearly turnover of more than Euro 50 billion. Only a few Member States allow private operators to offer sports betting, the United Kingdom being

1 The author expresses his personal opinion on the subject.

2 Communication from the Commission – Implementing the framework for financial markets: action plan, COM(1999)232, 11 May 1999.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 41–52
 ISBN 90-04-15459-0. Printed in the Netherlands.

the one with the longest tradition (and with several publicly listed companies). Even fewer Member States allow private operators to offer online casinos (e.g. Malta).

The European Court of Justice ('ECJ') already held 1994 in its *Schindler* decision[3] that the importation of promotional material for a lottery and tickets into one Member State with a view to the participation by residents of that Member State in a Lottery operated in another Member Sate relates to a service within the meaning of Article 49 the EC Treaty. Since 1994 the ECJ has confirmed several times that gambling services are, of course, economic activities within the scope of the EC Treaty, the gambling market is at present far away from forming a real internal market. There are highly fragmented regional and national markets and regional and national monopolies for games of chance or special forms of gambling (lotteries, gaming machines, sports betting etc.). In some Member States, the state itself is offering gambling products or has mandated a state-authorised (and mostly state-owned or state-controlled) operator to do so. While upholding its monopoly, these Member States are trying to bar foreign private operators (and sometimes even state-authorised operators) from other Member States access to the market.

Under Community law, this is quite problematic. Not only the freedoms to provide services and the freedom of establishment are restricted. This behaviour is also problematic with regard to the competition rules of the EC Treaty, especially when state operators are acting 'in concert' or as a hard-core cartel, and with regard to the regulation of state aids and state monopolies. The German Federal Court of Justice, in its *Faber* decision,[4] already held a few years ago that the cartelising of state operators in the Deutscher Lotto- und Toto-Block ('DLTB') was problematic. The German Cartel Authority (Bundeskartellamt)[5] recently pointed out that the remaining private competition had to be protected. According to the Cartel Authority, the Deutscher Lotto- und Toto-Block must not dictate conditions of the distribution of lottery materials.

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3 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039.

4 Bundesgerichtshof, decision of 9th March 1999 – KVR 20/97, GRUR 1999, 771.

5 www.bundeskartellamt.de/wDeutsch/index.shtml

2 Barriers against the Cross-Border Offering of Gambling Services by Private Operators

2.1 Member States vs. Private Operators

While technical barriers are gone thanks to the Internet, in addition to pre-existing legal barriers, new ones have been constructed, mainly to protect national monopolies (and the proceeds from these monopolies to the exchequer or for good causes). In recent years, there have been several cases where criminal proceedings have been initiated against licensed operators who were established in one Member State and offered services in another Member State (one against Stanley International Betting Ltd and its Italian agents leading to the famous *Gambelli* decision of the ECJ[6]). Bank accounts of Austrian bookmakers were frozen in Germany based on the argument that offering cross-border sports betting from Austria to Germany constitutes 'illegal gambling', a serious criminal offence.[7] Some public prosecutors were even ordered by the Ministry of the Interior to disregard the *Gambelli* decision and initiate criminal proceedings against managers of foreign bookmakers and also against owners and even normal employees of betting shops in Germany. With regard to betandwin, a listed company, the public prosecution service argued that giving away footballs and football t-shirts with a logo of this licensed bookmaker already amounts to a criminal offence, as advertising 'illegal gambling' is punishable.[8] According to German law, even customers are committing a criminal offence according to Article 285 of the German Criminal Code. Procedural measures were taken against several hundred German customers by the public prosecution service (forcing their banks to give evidence about the identity and address of the customer), although there is no published case where a customer was finally convicted.

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6 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

7 Art. 284 para. 1 German Criminal Code (Strafgesetzbuch) postulates that anyone holding an unlicensed game of chance incurs a penalty. The degree of the penalty varies from a fine to imprisonment for up to five years for commercial (that is for profit seeking) purposes. The punishable act is not gambling itself, but enabling others to gamble by operating, holding or making gambling available. Protective purpose is the public control of gambling respectively of the commercialisation of the natural passion of gaming.

8 Art. 284 par. 4 German Criminal Code. According to this provision anyone advertising for public gambling incurs a penalty ranging from a fine to one year imprisonment. The provision of Art. 284 para. 4 German Criminal Code requires that a gambling business without 'administrative license' is being advertised for. The Bundestag stated in the legislative materials that this provision is meant to prevent 'foreign gambling operators from conducting their advertising activities on the German market by third parties resident in Germany'.

Under national law gambling is quite often seen as morally questionable and socially undesirable. The German Federal Court of Justice once argued: 'The legal and moral order dislikes gambling.' This approach is somehow questionable. Recent studies show that 70-90% of the adult population has made use of gambling services in some way or another. Most people seem to enjoy playing and also playing for money. Sports betting can be entertaining and has become a normal leisure activity for quite a lot of people.

Not only morality, but also financial reasons do play a role. Money from gambling is traditionally used for 'good causes'. This has the notion of a 'sin tax' for an undesirable, but – alas – popular activity. However, this money, economically a kind of monopoly dividend, would have otherwise been derived from tax. It is my impression that it sometimes looks like a shadow budget not thoroughly controlled or not controlled at all by parliament (as in the case of tax money whose use can be easily traced). Good causes also blur the boundaries and the justification of public policy. The use of such revenues casts doubt over the real motives of national legislators and state operators behind maintaining a monopoly. The reduction of gambling opportunities is perhaps a front for more politically sensitive motives.

2.2 State Operators vs. Private Operators

Apart from the existence of national monopolies, also state operators are trying to bar foreign operators. The DLTB,[9] from my point of view a hard core cartel, is preventing cross-border offering with all means. Alongside intensive political lobbying members of the DLTB sued almost all private operators from other Member States who were targeting German residents, invoking unfair competition and breach of trademarks arguments. On the 26 November 2003, for example, Ladbrokes was forced to close down its German language internet sites, following a judgement in favour of Westlotto, the state gambling operator of North Rhine-Westphalia. The same happened to William Hill. Both bookmakers can no longer accept bets or wagers from German residents. Ladbrokes also had to fight in Dutch courts.

Over the last years, obviously fearing a fall of the monopoly (correctly the monopolies of the 16 German states), the DLTB trademarked all relevant terms, like 'Lotto' and 'Toto' (which are simply abbreviations of the generic terms 'lottery' and 'totalisator'). The German Federal Court of Justice (Bundesgerichtshof) recently upheld the cancellation of the trademark 'Lotto'.[10] It also found the

9 An association of the 16 German state operators and state-authorised gambling operators, legally a partnership under the German Civil Code (Gesellschaft bürgerlichen Rechts). See www.lotto.de

10 Bundesgerichtshof, decision of 19 January 2006 – I ZB 11/04.

advertisement slogan used by the Free State of Bavaria[11] 'Oddset, the sporting bet with fixed quota, only by Lotto' to constitute misleading advertisement, pretending that sports betting was only offered by the state operators, and forbade it.[12]

2.3 Lobbying by Private Operators

Nevertheless, the cross-border provision of gambling services, especially sports betting, has become more and more important. Millions of Europeans are already playing online and placing their bets on the Internet or in betting shops ('data transmission centres' as in the *Gambelli* decision[13]), which are acting as agents for a licensed bookmaker in the UK, Gibraltar, Austria or Malta. Customers of private operators are attracted by better odds, lower commissions and/or higher winnings compared to games offered by state monopolies.

Private operators have also decided to take action at the political level. Industry organisations, like the European Betting Association (EBA),[14] founded in 2004, and the Remote Gambling Association (RGA),[15] have started to lobby the European and national institutions as the state operators and their associations, like the European State Lotteries and Toto Association, have done over the last decades. They are also fighting new restrictive national legislation, like section 66 of the Italian Finance Act 2006 which is aimed at making it even more difficult for foreign operators to enter the Italian gambling market.[16]

Reacting to the market foreclosure, several private operators and also associated services (media, sports, charity and tourism) have submitted complaints to the European Commission. The complainants alleged that the relevant Member State has not complied with Community law by separating the national market from the internal market and effectively prohibiting the freedom to provide services. Verifying these complaints, the Commission as 'Guardian of the Treaty' opened infringement procedures against Denmark and Greece in 2004. The Commission has sent letters of formal notice and delivered reasoned opinions. On 4 April 2006, the European Commission has sent letters of formal notice to seven EU Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and

11 One of the German states which offers gambling directly by a public authority, the Bayerische Staatslotterieverwaltung.

12 Bundesgerichtshof, decision of 28 October 2004 – I ZR 59/02.

13 Supra note 6.

14 See www.eu-ba.org

15 See www.rga.eu.com

16 See EBA News Release, *Entering into force of the Italian Finance Act 2006 – The Italian State introduces once again illegal restrictions on the national gambling market – Green light for the Commission to put an end to these violations* (26 January 2006). Available at www.eu-ba.org/downloads/EBA_pressrelease_ItalianFinanceAct06_26.01.2006.pdf (accessed on 10 April 2006).

Sweden), requesting information on national legislation and measures restricting the supply of sports betting services.[17] The Commission will use the information to review its compatibility with the free movement of services. The Commission will check in particular whether the restrictions on the free movement of services are justified by the protection of the general interest and whether the measures are proportionate and non-discriminatory. The Commission has for sometime examined the situation, based on complaints by several bookmakers who were effectively barred from entering various national markets.

With regard to the EFTA Member State Norway the situation has developed even further. The EFTA Surveillance Authority decided to take the Norwegian Government before the EFTA Court, considering that the granting of a gaming machine monopoly to its State controlled operator Norsk Tipping would violate European Economic Area (EEA) law (which also grants the freedom to provide services). The Surveillance Authority brought an action against Norway on 13 March 2006, after the Norwegian government had failed to comply with a reasoned opinion of the Authority.[18]

3 Case Law by the European Court of Justice and the Status Quo

3.1 No Secondary Legislation

While gambling has become a highly controversial political topic, gambling is still not regulated by secondary Community law (directives and regulations). Although gambling was included, albeit with a temporary derogation, in the Commission's proposal for a Services Directive,[19] it was ultimately removed following the first plenary reading of the European Parliament.[20] Also gambling was excluded from the Directive on Electronic Commerce.[21]

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17 European Commission Press Release (IP/06/436) *Free movement of services: Commission inquires into restrictions on sports betting services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden* (4 April 2006). Available at: <www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/436&format=HTML&aged=0&language=EN&guiLanguage=en>.

18 Case E-1/06, EFTA Court, Action brought on 13 March 2006 by the EFTA Surveillance Authority against the Kingdom of Norway.

19 Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2 final, 13 January 2003.

20 European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)) 16 February 2006.

21 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J.

So, at present, there is no European gambling regulation, but only case law with regard to the freedoms provided for by the EC Treaty and criteria developed by the ECJ. This means that the country of origin principle does not apply to gaming operators, although the ECJ, in its *Gambelli* decision, referred to the regulation entailing controls and penalties in the Member State of establishment of the bookmaker.[22]

3.2 The Criteria of the European Court of Justice

In its *Zenatti*[23] decision the ECJ held that the Member States were authorised to regulate their gambling market themselves. But the ECJ did not give the Member States a free hand to completely monopolise their gambling markets thereby excluding providers from other Member States. The ECJ rather held that it is the discretion of the national authorities to restrict licensing as long as this does not constitute a form of discrimination and to judge whether these restrictions are necessary because of imperative reasons of general public interest.

In its *Zenatti* and *Gambelli* decisions the ECJ indicated the kind of reasons which do and which do not justify such restrictions. In this context the ECJ explains that restrictions are only permitted as far as they are justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. Furthermore, invoking public order reasons was not possible, as far as state authorities incited and encouraged consumers to participate in gambling to the benefit of the public purse. Restrictions on the freedom to provide services are acceptable form the point of Community law only to the extent that they are linked with the regulatory and protective policies the Member States apply because of the specific risks of gambling. Economic grounds are not included among the grounds under Article 46 EC or among the overriding public interest considerations which may justify restricting a freedom guaranteed under the Treaty. A fall in revenue cannot justify restrictions on the freedom to provide services.

3.3 Application of the Criteria on the State Operators

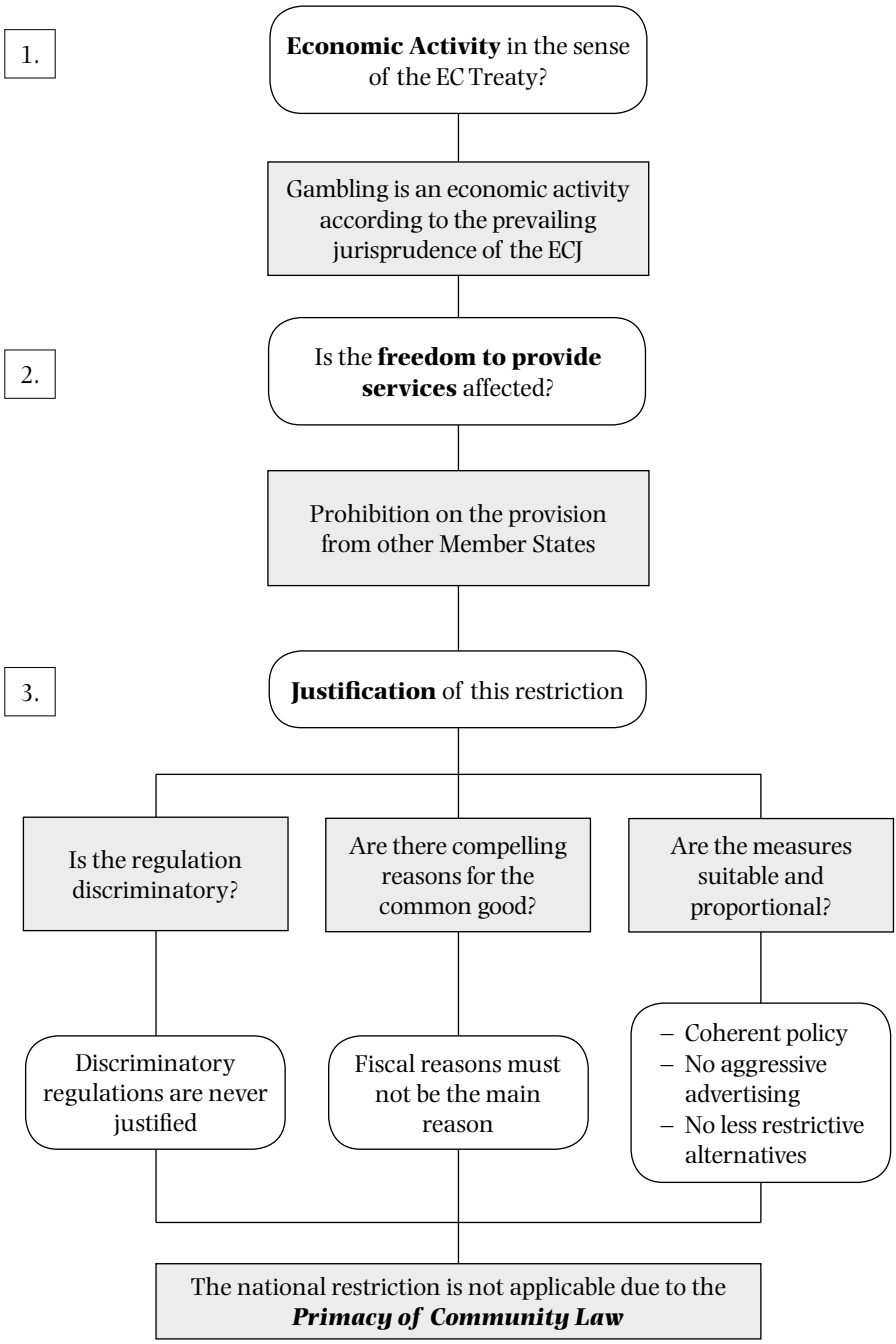
Most state and state-authorised lotteries and betting operators posted growing turnover and profit figures over the last decades. However, this fact alone does not prove that the state operators actively encourage gambling activities. Also advertising, product innovation, expansion to new sales channels (e. g. the

2000 L 178/1.

22 Supra note 6, at para. 74.

23 Case C-67/98, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289.

Examination of the provision of sports betting under European Law



distribution of gambling products in supermarkets and at fuel stations) have to be taken into consideration.

Most state operators market their gambling products as a normal leisure activity. The German Federal Constitutional Court, in its decision of 28 March 2006, expressly pointed to this inconsistency.[24] Over the long term, all state operators have increased their turnover and thus the overall amount of money spent by customers on gambling has grown.[25] The state operators enlarged their offer constantly by offering new products. New customer groups were addressed.

Advertising by the state gambling providers is substantial, and can be greater than that of private operators. In Germany, more than 2% of the turnover is being spent for advertising ODDSET (including sponsoring). Advertising campaigns of the state operators mostly target non-gamblers or casual gamblers. The commercials try to motivate ordinary citizens. Analysing the advertisement for the state gambling products, the German Federal Constitutional Court, in its earlier hearing in the same case on 8 November 2005, referred to illegal product placement on TV. From the Court's point of view the aggressive advertisement of state operators was not as much a problem but more the fact that gambling was being presented as normal and socially acceptable (which does not fit the argument of gambling being socially undesirable).

State operators also use all available distribution channels. In Germany, there are almost 27,000 *Annahmestelle*[26] (in comparison there are only about 12,000 post offices in Germany). Customers can use the Internet or a mobile phone to place bets or wagers.

In conclusion: Nearly all state operators have, at least in some respect, gone too far and allowed turnover/profit-orientation to predominate over their key objective of limiting and controlling gambling.[27] In the Italian market for example, lottery operators are publicly traded companies focusing above all on shareholder value and most likely not on the limitation of gambling.[28]

This inconsistency means that the restrictions of the basic freedoms of the EC Treaty cannot be justified. Several national courts have held that Member States with monopolies did not care about the real reduction of gambling opportunities.

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24 Bundesverfassungsgericht (Federal Constitutional Court), 28 March 2006, 1 BvR 1054/01.

25 Media & Entertainment Consulting Network (MECN), *The European Union and its Impact on State-Licensed Gambling Monopolies – Do gambling monopolies still focus on limiting gambling behaviour or will they lose their status as monopolies?* (Munich/London, 2004), p. 23.

26 Where customers can purchase the gambling products of the state operators.

27 Supra note 25, p. 33.

28 Supra note 25, p. 33.

In 2005, the Administrative Court of Breda ruled that the State monopoly held by Holland Casino was in breach of Article 49 EC Treaty.[29] The Court considered that the Dutch state does not carry out a policy aimed at protecting customers and highlighted the lack of consistently reliable recent research on gambling addiction, as well as the intensive marketing policy of Holland Casino. The Dutch State cannot rely on the general interest argument to justify restrictions and to make it impossible for private operators to access the Dutch market. Therefore, the Court ordered the Dutch State to reassess the licence application of the French casino group, notably in light of the *Gambelli* decision.

The consistency test, in terms of German constitutional law, has also been used by the German Federal Constitutional Court in its recent landmark decision on sports betting.[30] Fiscal reasons were found to be irrelevant in upholding a monopoly, both under Community law and German constitutional law.

The decision of the Federal Constitutional Court will probably change the gambling market quite dramatically in the longer run, although the state monopoly was upheld for a transitional period. However, the state monopoly in its current form was clearly held to be unconstitutional. Fiscal reasons, even for the promotion of sports, cannot justify the state monopoly. The current legal situation and exercise was held to be incompatible with the German constitution. The regulation was not coherent and sports-betting was effectively marketed as a 'generally harmless leisure activity', this being mainly motivated by (irrelevant) fiscal reasons.

According to the Constitutional Court, the state monopoly with regard to sports betting can only be justified by fighting gambling addiction effectively – something that has not been practised by the state operators thus far.

Instead of declaring the act at the centre of the case – the Bavarian Act on Lotteries (Bayerisches Staatslotteriegesetz) – to be null and void, the Federal Constitutional Court ordered the legislator to change the law. The law governing sports betting must be reconsidered and amended before the end of 2007. The legislator may choose between two ways to regulate sports betting. It may either keep the state monopoly, but with clear limitations for marketing and sales, or it may liberalise the market by opening it up to private operators (thus abandoning the state monopoly).

Until then ODDSET, the sports betting offering of the state operators, must not advertise anymore, but the state operators may only report factually on the state betting offer. The state operators are also not allowed to introduce new products.

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29 Rechtbank Breda (Administrative Court of Breda), *Compagnie Financière Régionale* v. *Ministers van Justitie en Economische Zaken*, 2 December 2005, LJN AU7389 / 03/1868 WET.

30 Supra note 25.

Initially, state operators were pleased with the decision, since they hoped that politicians were committed to maintaining the monopoly. The state operators rightly expected that the states would try to close down the existing betting shops collecting bets for private operators (mainly from Austria, Malta, Gibraltar and the UK). In my opinion, the consequences of the decision for the gambling market will not be so enjoyable for the state operators in the long term. Ultimately, a state monopoly accommodating all forms of gambling (except betting on horse races), as in Germany, can only be justified by preventing gambling addiction, the only common welfare criteria left according to the decision of the Federal Constitutional Court. Following the Constitutional Court's reasoning, one has to call either for a reduction in state advertising (with only the bare information about the product to be promoted to customers) or allow private operators access to the market.

4 European Gambling Regulation – Quo Vadis?

Clearly, securities regulation (mentioned above) is decades ahead of a European regulatory framework for gambling. This is strange as some gambling products, like spread betting and financial bets, are comparable with financial products and insurances. The interest paid on a special savings account which depends on the number of goals a football club scores appears to be a form of sports betting.[31] At the moment, there is no mature and thoroughly worked-out legal concept for the regulation of gambling services on the European level.

In the present era of globalisation, national monopolies are out-dated. Recent case law has shown that outlawing private operators will not work in the longer run. There is a simple truth about betting and other forms of gaming: you can make it illegal, but you cannot make it unpopular. Prohibiting all private operators also poses a quite practical problem. You can only regulate (and effectively tax, which is sometimes even more important for the state) what is legal.

Monopolies probably would also not be able to survive in the market, if the state operator really had to comply with the *Gambelli* criteria (consistency of public policy, no discrimination, proportionality of restrictions). From my point of view, the German Constitutional Court pointed out the alternative of a very restricted monopoly mainly because of its respect for the legislator. Being inefficient as well as pushing customers towards Internet betting operators, a 'castrated' monopoly with limited sales and a prohibition on advertising would probably only pretend to constitute a real option. As the Federal Constitutional

31 HypoVereinsbank, a German bank owned by Unicredit, offers such an account. The interest depends on the number of goals FC Bayern München scores.

Court raised the conditions this high, the state offer would not be able to survive in the market.

If you look at financial services, highly regulated services can be offered in a very competitive and reliable way. However, a prerequisite for this is a level playing field for all operators. Liberalisation of the gaming market would benefit the customers. Competition would mean higher pay-outs. Customers would also be encouraged to have a closer look at the products and to compare between the different ones on offer.

The funding of good causes and sports is not necessarily jeopardised. Private companies could raise even more money for good causes by being more cost-efficient. Opening the market to well-regulated competition between Community licensed operators may provide a more diverse and plentiful range of funding opportunities.

From my point of view, the main aim should be to safeguard honest and fair gaming. The 'Swiss way' of creating an independent supervisory authority seems reasonable. The German Constitutional Court also argued for an independent authority. The Constitutional Court did not seem to be comfortable with the idea that the finance minister was really willing to reduce gambling opportunities (and revenues for the exchequer).

So, from my point of view, a change of the status quo is inevitable. The European Union might play a decisive role. It is unlikely that Member States will adopt, on their own initiative, fair betting regulations in the near future. So the European Commission should propose harmonised rules in this field, which would meet the same consumer protection and public order objectives as under exclusive rights systems. With harmonised rules betting and gaming can be conducted in a fair, crime-free and socially responsible way.

State Licensed Lotteries and Toto Companies in the Legal and Political Debate in the European Union

Tjeerd Veenstra

1 The Importance of Lotteries and Toto Companies

European Lotteries is the association that represents the state licensed lotteries and toto companies in Europe. It has more than 70 members in more than 40 countries. In the 25 member states of the European Union (EU) there are about 50 members. Turnover is approximately €70 billion a year. Net profit for the state and good causes exceeds €25 billion a year.

To give an example: sports benefit from roughly 10 % of these revenues. This means that over €2 billion per year is available for the support of National Olympic Committees, sports organizations, the building of sports facilities, etc. It therefore provides a continuous, indispensable structural financing of sports in Europe by lottery money. And so it does for other sectors in civil society.

The members of European Lotteries are all operating a mix of types of games such as number-lotteries, lotto, instant lotteries, keno and sports betting under a restrictive legal and regulatory regime.[1] In general they all act under the principle of a monopoly system with one or more licenses. Under these state controlled conditions they offer consumers a reliable, responsible and fair opportunity to gamble or to bet. The revenue from these activities benefit society, either via the state exchequer, where it is often earmarked for civil society or sent directly to the good causes themselves. European Lotteries considers this to be the 'European lottery model'.

1 The author does not perceive any differences in the principles regarding policy and regulation between lotteries and other forms of gambling.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 53–67
 ISBN 90-04-15459-0. Printed in the Netherlands.

2 The Relationship between the European Union and its Member States

In the EU, games of chance are regulated, in the absence of EU legislation, at the national level. All EU Member States have imposed strict limitations on gambling activities in order to control and to limit the supply of gambling on their territory, to guarantee that gamblers receive a fair treatment when gambling, to protect consumers and especially (potential) vulnerable gamblers and to ensure that revenue of gambling is to a certain extent used for public benefit. An additional motivation to strictly regulate these activities is their vulnerability to various forms of criminal activity including money laundering.

Gambling operations offered in a EU Member State without a license in that jurisdiction are regarded as illegal. Moreover, Member States have the right to prohibit or restrict games offered from other EU jurisdictions, also if provided by means of new media such as internet, interactive television, mobile betting, etc.

The previous considerations do however not imply that Member States can do what they want with regard to the regulation of gambling activities. The case law of the European Court of Justice (ECJ) confirms that national restrictions on gambling services must reflect a real concern to pursue a restrictive gambling policy.

3 The Framework of the European Community Treaty

The position of the lotteries is connected with Articles 43 and 49 of the European Community (EC) Treaty and more specifically by exceptions created for gambling services by the case-law of the ECJ. It provides until now a solid base for the lotteries.

In the early 1990's there were indications that the European Commission strove for a liberalization of the gambling sector and considered whether or not harmonization of national gambling rules was necessary. However, the Member States unanimously supported the view that no action should be taken at EC level. In Edinburgh during the EC summit of 12 December 1992 the European Council decided not to regulate gambling at the EC level. It was their opinion that gambling, with reference to the subsidiarity principle, is unsuitable for EC legislation and is better dealt with at the national level. Therefore the European Commission stopped its plans to regulate gambling at the EC level.

We see a remarkable resemblance with the recent proposal of the European Commission for a Directive on Services (January 2004), and the initiative of the European Commission to carry out a study by the Swiss Institute for Comparative Law. Based on that study the European Commission wants to assess (again) whether it should present a proposal for harmonized EC wide rules on gambling services. I come to that later on.

4 The Case-Law of the European Court of Justice

In general the ECJ has consistently accepted that national legislation which confers exclusive rights to certain undertakings to offer gambling services does, as such, not constitute a violation of the EC Treaty. This legislation must however be justified by objectives of social policy and consumer protection and aimed at limiting the harmful effects of gambling activities. Furthermore the restrictions must be non-discriminatory and proportionate to these objectives.

The reasoning which also explains more or less the typical character of gambling services can mainly be found in the opinions and judgments of only two cases: the *Schindler* case in 1994[2] and the *Läärä* case in 1999.[3]

The specific character of the services was expressed in the Opinion of Advocate-General Gulmann with regard to the *Schindler* case.[4] We can conclude that the aim of the EU to stimulate prosperity in Europe by applying the principles of free movement and free competition has no relevance with regard to lotteries.

Therefore European Lotteries always stresses upon the fact that gambling services can never be regarded as a normal economic activity and, as a consequence, should not be submitted to the principles of a free market approach. The view that it is not possible to regard gambling as a normal economic activity stems from a number of factors. Firstly, gambling is an irrational activity, and secondly it is one where the consumer is unable to estimate the quality-price relationship. In this sense, the consumer cannot estimate the chance of receiving any return (in the form of winnings) from the stake which they have placed, and it is this part of the gambling process which allows for gambling addiction to take hold. Thirdly, gambling represents a form of monetary circulation whereby many people contribute to the flow, but very few receive anything in return, which allows some people to cheat the system at the expense of those who contribute to it.

Advocate-General Gulmann already pointed at the risk of overheating the market if such principles should be applied.[5] That opinion is confirmed in the *Schindler* judgment where it is said that:

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2 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Shindler and Jörg Schindler*, [1994] ECR I-1039.

3 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäyä (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-6067.

4 Case C-275/92, Opinion of Mr Advocate General Gulmann delivered on 16 December 1993, *Her Majesty's Customs and Excise* v. *Gerhart Shindler and Jörg Schindler*.

5 References to such 'overheating' can be found in paras. 37, 49 and 101 of the Advocate-General's Opinion, *ibid*. For example, para. 37 reads: '... [I]n practice the Member States regulate, at least to a certain extent, lotteries in such a way that the "supply" is restricted. The purpose is said to be to protect consumers against the dangers inherent in excessive participation in gambling by individuals (gambling fever) and the means used include, in

> 'Lotteries are an incitement to spend, which may have damaging individual and social consequences.'[6]

Furthermore it is said that:

> 'Given the moral, religious or cultural aspects of lotteries, Member States want to restrict or even prohibit gambling activities and want to prevent having these be a source of private profit.'

This argument confirms the differences between countries with regard to their moral, religious and cultural background. This is the only reasoning for the differences in policy. These differences are also reflected in, for example, the turn over per capita between member states.

The *Läärä* judgement confirmed the acceptability of those differences by declaring that it is not relevant that other jurisdictions have adopted a different (sometimes more liberal) approach.[7]

Both judgments also refer to the risk of crime and fraud. In *Schindler* we read that:

> '... lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale.'[8]

And in *Läärä* it is said that 'given the risk of crime and fraud' there are no alternatives (such as taxation, to ensure that the funds collected are used for the public good) to a non-profit making approach that are equally effective to ensure:

> 'that strict limits are set to the lucrative nature of such activities.'[9]

According to the ECJ there seems to be, in our view, a preference for a non-profit approach which is in line with another statement in the *Schindler* judgment where it is said that, 'although not an objective justification as such, lotteries are an important contributor for the financing of good causes and public interest activities.'[10]

In our view the non-profit approach is the best *instrument* or *tool* for the government to control gambling services. Furthermore, private companies would

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particular, restricting the number of undertakings which may operate lotteries, restricting the number of lotteries that may be offered and restricting the number of draws.'

6 Supra note 2, para. 60.

7 Supra note 3, para. 36.

8 Supra note 2, para. 60.

9 Supra note 3, para. 41.

10 Supra note 2, para. 60.

have to comply with the same strict regulatory conditions which include that all revenue will be returned to society. The only possibility to make a profit is to save on the operational costs of complying with the regulatory conditions. This would act as a discouragement for private companies. The *Schindler* judgment, referring to the specific characteristics of lotteries:

> 'justified national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.'[11]

The *Läärä* judgement added that:

> '... the answer to be given to the national court must be that the Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public body exclusive right to operate slot machines, in view of the public interest objectives which justify it.'[12]

It can be concluded that the above mentioned opinions and judgements can be read as instructions and regulations for (what we call) a European lottery model. The question that is of interest is twofold:

1. Do the members of European Lotteries and their respective governments meet the justification grounds for the exemptions of Articles 43 and 49 EC Treaty?
2. What is in that regard the latitude of the Member State?

The first question can only come to a provisional conclusion. We see an ongoing interest and attention by our opponents (such as bookmakers) which has lead to an overwhelming amount of court cases in several member states. But on the other hand there are already up to five post-Gambelli judgments from the highest courts of Belgium, Finland, Italy, the Netherlands and Sweden, which have all confirmed that national the restrictions in question were compatible with the EC Treaty and the latest jurisprudence of the ECJ. It is likely that more countries will follow.

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11 Ibid, para. 61.

12 Supra note 3, para. 43

An indication for an answer on the second question is also already given. First of all previous jurisprudence was confirmed in the *Gambelli*[13] and *Lindman* judgments in 2003.[14] There can be no mistake about that. But there was also a message of the ECJ by giving guidelines for the Italian court as to how to assess the Italian case:

- Restrictions are only acceptable if they reflect a concern to bring about a genuine diminution in gambling opportunities;
- The financing of good causes or the state constitutes an incidental beneficial consequence of the national restrictions;
- National restrictions are not justifiable if the Member State has actually expanded and stimulated gambling on its territory.

Prior to *Gambelli* the ECJ confirmed the prerogative of the Member States to establish their gambling policies as they saw fit. However, starting with *Gambelli* the ECJ requires that the national implementation of the gambling policies matches the stated objectives.[15]

There is still confusion about how the national courts and subsequently the national governments should interpret the ECJ's requirements, since these requirements are not yet clear as to what is acceptable or not. Furthermore, it is unclear if differences between the Member States are acceptable. For example: to what extent is promoting gambling products acceptable? Sometimes it seems that advertising is not at all acceptable. It may amount to inciting people to gamble but on the other hand governments want to promote legal, reliable and socially acceptable gambling products. Where do you draw the line between informing and inciting? Differences in the advertising cultures between the Member States should be take into account; are these acceptable or not? Therefore we need further clarification of the existing jurisprudence. In our view the currently pending *Placanica* case before the ECJ might be helpful.[16]

Meanwhile the *Gambelli* judgment was promoted by our opponents as a victory that has put an end to the monopoly system. Despite this, to put it

13 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

14 Case C-42/02, *Diana Elisabeth Lindman* v. *Skatterättelsenämnde*, [2003] ECR I-13519.

15 This can be considered as the proportionality principle, which consists of the following three points: (i) that the measure is suitable; (ii) that the measure is necessary; and (iii) the measure is *proportionate strictu sensu*. This is discussed in greater detail in the contribution by Littler A., *Has the ECJ's Jurisprudence in the Field of Gambling Become More Restrictive When Applying the Principle of Proportionality?*

16 The Cases C-338/04, C-359/04 and C-360/04 *Placanica and others* will be consolidated. The oral hearing before the ECJ took place on 7 March 2006.

friendly, remarkable interpretation of the judgment we recognize however the importance of it.

We see these judgements as a very strong signal that the EU governments must have a cohesive, effective and restrictive policy towards gambling. Should for example financial motives have become the main priority, then it is absolutely clear that the protected status that we now have will not survive the test of Article 49 EC Treaty.

Therefore we consider these judgments as a blessing. It puts us in the right mood and position for an assessment of our own policies. And so we will do.

5 The Battle Before National Courts

Presently there is an ongoing battle in the different courts around Europe. It is there where the position of state licensed lottery and toto companies is attacked by remote gambling operators and/or bookmakers, who often deliberately infringe national law. Therefore I like to elaborate shortly about one of those cases: the De Lotto versus Ladbrokes case.

In recent years the Dutch lottery company De Lotto has taken legal action against various illegal internet bookmakers.[17] De Lotto's claims have – in all cases – been based on the assertion that the bookmakers and other remote gambling operators conducted themselves wrongfully towards De Lotto because they offer games of chance in the Netherlands, via their websites or telephone service, without having a Dutch licence pursuant to the Act on Games of Chance.

Among the bookmakers that De Lotto addressed, many agreed not to direct their websites any more to the Netherlands. This is possible using the so-called geo location software. However, other bookmakers such as Ladbrokes refused to cease their activities in the Netherlands.

17 Cases involving De Lotto, and other cases include: *De Lotto / Ladbrokes*, Rechtbank Arnhem 27 January 2003, LJN: AF3374; *Holland Casino / Peak c.s.*, Rechtbank Utrecht, 31 July 2003, LJN: AI0977; *De Lotto / Ladbrokes* Gerechtshof Arnhem, 2 September 2003, LJN: AJ9996; *SENS / Stargames*, Rechtbank Utrecht, 18 September 2003, LJN: AK4749; *De Lotto / Parbet c.s.*, Rechtbank Zutphen, 9 February 2004, LJN: AO3551; Gerechtshof 's-Hertogenbosch, 2 March 2004, LJN: AO5141; *Incoll / Fortis*, Rechtbank 's-Hertogenbosch, 1 June 2004, LJN: AP6957; *De Lotto / Interwetten*, Gerechtshof Arnhem, 24 November 2004, LJN, AR7476; *De Staatsloterij / Stargames*, Gerechtshof Amsterdam, 6 December 2004, published on <www.solv.nl>; *De Lotto / Ladbrokes*, Hoge Raad, 18 February 2005, NJ 2005/404; *De Lotto / Ladbrokes*, Rechbank Arnhem, 31 August 2005, LJN AU1924; *De Lotto / Mr. Bookmaker*, Rechtbank Arnhem, 21 November 2005, LJN AU8824. Dutch case-law reports can be found at the following site: <www.rechtspraak.nl>.

The legal framework regarding games of chance in the Netherlands is more or less comparable with other countries. It prohibits the opportunity to operate games of chance in the Netherlands without a licence.

The courts in the Netherlands, up to the Supreme Court, have ruled without exception that the offering of internet and telephone gambling is in violation of national law. The Supreme Court ruled that the games were offered in the Netherlands, because Dutch residents access the bookmaker's websites to participate in games of chance generally from their (private) computers in the Netherlands and are therefore able to participate from the Netherlands.

Furthermore, the Netherlands is specifically addressed on the websites of the bookmakers, as evidenced by the fact that the Netherlands is included in the list of countries on the website and that the bookmakers offer the opportunity to bet on (inter alia) Dutch sporting events.

Also, the bookmaker's argument that they are not offering betting in the Netherlands because the games are organized in the United Kingdom and where the server is located (country of origin principle) has failed on every occasion. According to established case law in the Netherlands the offering of games of chance also includes the place where consumers are able to participate. Gambling services via internet are expressly excluded from the E-commerce Directive.[18]

De Lotto has been successful in court. We have now a favourable judgement in the short term injunction procedure at the Supreme Court. And also the judgment in the case on the merits at the District Court of Arnhem in August 2005 was positive. It is hard to believe that there is still an appetite among our opponents to go on and have an appeal. But Ladbrokes wants to continue and seems for what ever reason very optimistic.

Another signal of the ongoing battle against us is that our opponents are now also frequently using the instrument of filing complaints against Member States at the European Commission.

6 The Political Dossier of the Proposed Directive on Services

The most interesting and influential political dossier is the Proposal for a Directive on Services in the Internal Market ('Services Directive').[19]

In November 2005 the so called IMCO Committee of the European Parliament (the Committee for the Internal Market and Consumer Protection), has come

18 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. 2000 L 178/1.

19 Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2 final, 13 January 2003.

to a vote on the text and compromise amendments regarding the proposal. It is clear that the Committee has voted in favour of an exclusion of the gambling services, including lotteries, from this Directive. European Lotteries is absolutely positive that in the plenary vote, in February 2006, the majority of MEP's will follow the lead of their colleagues in the IMCO Committee.[20]

What is the position of European Lotteries with regards to this proposal of the European Commission? We have asked our legal advisors to advise us and draft a position paper. [21] The proposal of the European Commission is economy driven, so as to facilitate the further development of the Internal Market which implies removing legal barriers between the Member States. The most obvious legal instrument for this is harmonization. However, European Lotteries is not convinced about the possibility and necessity of harmonization. Harmonization has to include measures to deal with questions of public order, which differ in all the Member States. The Member States have adopted limitations to the supply of gambling, but these limitations are not identical (due to the socio-cultural differences between the Member States).

It is our belief that the Member States will not be satisfied if such a harmonization measure is limited to minimum harmonization. This process will require *full* harmonization that deals with issues such as taxation, type and volume of games, licensing, pay-out ratio, public health, protection of minors, measures against money laundering and other crime etc.

It is hardly impossible with reference to the specific nature of gambling services to achieve either full or minimum harmonization. any compromise would lead to deregulation which would amount to an irreversible step towards liberalization of this sector.

European Lotteries is against such liberalization as this would lead to a significant increase of the number of gambling operators and will thus have numerous negative social consequences. Therefore we requested the Rapporteur, Mrs. Evelyne Gebhardt, and the other Members of the European Parliament to exclude gambling services from the scope of the Directive. Meanwhile, the

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20 The plenary vote has indeed confirmed the position of the IMCO committee. Thursday 16 February 2006 the majority of the European parliament voted in favour of an exclusion of the gambling services from the Services Directive.

21 The position of European Lotteries in the following political issues have been expressed in two documents, which I refer to throughout my paper.

A. Services Directive: Comments on report by Rapporteur Evelyne Gebhardt and frequently asked questions. May 6 2005, and:

B. The proposed Services Directive and its impact on the liberalization of games of chance. Position paper European Lotteries 4 November 2004.

The (text of) documents have been drafted by Vlaemminck & Partners, Gent, Belgium, legal advisors of European Lotteries.

European Parliament has voted in favour of the amendment which excludes gambling from the scope of the proposed Services Directive.[22]

In our view the proposed Services Directive is the first step in the liberalization of games of chance in the European Union. The European Commissioners did accept some safeguards in the proposal but, nevertheless, these adaptations do not prevent an opening of the national games of chance markets.

Recital 35 of the proposed Services Directive does not require Member States to abolish their lottery monopolies. However, under the mutual evaluation procedure, Member States are required to motivate certain barriers to cross-border establishment, e.g. rules by which gambling services are restricted to a state monopoly. In the event of a negative assessment, the mutual evaluation procedure could therefore oblige Member States to allow gambling operators to set up businesses on their territory if they operate under a license from another Member State.

Under Article 18 of the European Commission's proposal, gambling services are only temporarily excluded from the free movement of services chapter until such time as there is harmonization at EU level. As soon as the country of origin principle becomes applicable, Member States would no longer be entitled to stop the cross-border provision of remote gambling services (via the internet, interactive television, etc).

What will be the impact of the proposed Services Directive on our sector? In our view the liberalization of the EU gambling sector will lead to an overheating of the market (with reference to Advocate-General Gulmann in the *Schindler* case).

The major factor keeping gambling addiction rates low is that there are strict limitations on the number of gambling opportunities available to consumers. If gambling services legally organized in one Member State must be accepted in all other Member States (country of origin principle) or if gambling operators would be entitled to set up businesses in other Member States, there would no longer exist a limitation of supply and it would be no longer possible to maintain a restrictive gambling policy at the national level. The current monopoly model or exclusive right model provides for a restrictive gaming policy and a better control of the market.

The proposed Services Directive will open up the national gambling markets. The liberalization of the European gambling sector will enhance cross-border

22 Amendment 80 Article 2, paragraph 2, point c f (new) extends the exceptions to the scope of the Directive, so to exclude: '(cf) gambling activities that involve wagering of a stake with pecuniary value in games of chance, including lotteries, casinos and betting transactions.' European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)) 16 February 2006.

competition and will, consequently, increase the number of gambling opportunities and the pay-out to the consumers.

The opening of the national markets will also result in intensive competition between the gambling operators for market shares. This will result in increased pay-outs and more aggressive games in order to get a bigger market share. And as a consequence this will lead to a toning down of the public order objectives.

Although gambling services constitute economic activities within the meaning of the EC Treaty, they are *not ordinary economic activities as their development is not desirable for reasons of public order*. The European Commission clearly recognized the special status of games of chance (e.g. transitional derogation for gambling in Article 18 and recital 35 concerning the maintenance of lottery monopolies) in its proposal, but it did however not exclude gambling from the scope of the Directive.

For the vast majority of the Member States, the regulation of gambling activities is a matter of public order, requiring a very strict structural policy. The main function of a state lottery is to canalize the gambling desire away from the illegal environment towards a legal gaming environment.

The mission of a state lottery operator is not to offer gaming. It is to offer responsible gaming, namely gaming organized for the purpose of canalizing the gaming desire in order to restrict the risk of crime and fraud and to prevent social disorder. The opening of the national gambling markets would jeopardize these public order objectives to a considerable extent.

In its plea against the preservation of the current national regulation of games of chance, the European Commission puts emphasis on the recent case law of the ECJ. The European Commission argues that some Member States are not pursuing a coherent gambling policy by restricting cross-border competition on the one hand whilst allowing their state licensed operators to actively stimulate gambling.

In *Gambelli*, the ECJ held that the Member States cannot invoke public order concerns to justify national restrictions if they are not following such a coherent gambling policy. European Lottery fully agrees with this interpretation.

However, in the absence of a coherent gambling policy (e.g. by not limiting the number of gambling opportunities), this cannot imply that all national restrictions must be abolished. It is absurd that a Member State would be obliged to completely deregulate its gambling market in case its gambling policy is not restrictive enough. This is absolute nonsense. Instead, European Lotteries would welcome that Member States adopt a more restrictive gambling policy in order to tackle the excesses. Such approach requires a more structural approach, not limited to an internal market assessment, rather than a random indication of the Member State's ability to limit the number of gambling opportunities.

The liberalization of the EU gambling sector will result in tax competition between the different Member States, which was already pointed out by Advocate-General Gulmann in the *Schindler* case.

According to ordinary market principles it is obvious that the demand for games of chance is sensitive to changes in tax rates. A reduction of the betting taxes will lead to an increase in the demand for games of chance, and, consequently, will spark a rise in problem gambling. Gambling revenues and taxes should not go to a limited number of non-restrictive countries whilst the other Member States bear the social costs for increased problem gambling.

It is interesting to observe what already happens at this moment which gives a view on the real motives of the private companies. There is even blackmail: if you not levy a lower tax my company will move to another country. Or competition, for example Malta competing with the UK about tax rates for gambling services.

7 Raising Money for Good Causes

The Services Directive presents a major challenge to the ability of state lotteries to raise money for their good causes. State lotteries allocate a substantial amount of their profits to good causes. It is estimated that more than €25 billion of state lottery and toto company funds were distributed indirectly, through the Exchequer, or directly to public institutions and foundations in Europe, active in the field of culture, welfare, sports, education, scientific research, national heritage, environment, nature, humanitarian aid etc. Members of European Lotteries contribute for example also to the implementation of European ecological projects, such as the Habitat Directive.[23]

Through centuries European society has benefited from lottery money. A severe loss of these funds as consequence of liberalization will *never* be compensated by the private industry.

It is important to focus for example on the economic impact of our activities. Employment is here a relevant issue. First of all: the employment in the gambling sector itself. Do we really understand what impact the development of remote gambling in a liberalized world will have on that?

But what about the employment provided by lottery money that goes to our beneficiaries. We were talking about more than €25 billion revenue. A major part of that is directly spent on labour. Hundreds of thousands of workers in Europe are dependent on lottery revenue. And what ever the private remote gambling operators and bookmakers will offer: they will *never* compensate that loss. The

23 Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora O.J. 1992 L 206/7.

relevant question is here why our European society should feel obliged to abstain, and give it in the hands of a few private consortia. For what reason?

Important stakeholders such as the International Olympic Committee,[24] the European Foundation Centre,[25] UNI-Europe[26] and significant others recognize all this and support us in the defence of our system.

It must of course be acknowledged that the raising of money for good causes and for the state cannot in itself justify a restrictive policy. The ECJ has recognized however that there is no better way of ensuring that gambling is conducted properly, given the risk of crime and fraud, than by granting only, for example, one license to a strictly controlled State body and requiring it to pay over the proceeds of its operations to public interest purposes.

8 Is There Need for Action at EU level?

At the EU summit in Edinburgh of 12 December 1992, the European Council decided not to regulate gambling at the EU level, as it found that gambling given the principle of subsidiarity, is unsuitable for EC legislation and is better dealt with at a national level. We are now again facing a proposal of the European Commission which embraces the (de)regulation of gambling at EU level. But until now the European Commission has not provided any evidence that there are clear benefits to regulate gambling at EU level and thus to deregulate the European gambling sector.

The question for our opponents is with which approach would they be satisfied with? One consisting of harmonization? European Lotteries does not believe this to be the case. The aim of our opponents is very clear: a complete liberalization of the gambling services.

Another remark that has to be made is that the European Commission approaches the regulation of gambling from a purely internal market perspective. The objective of the Services Directive is to remove the barriers to the freedom of establishment for service providers in the Member States and the free movement of services between Member States. European Lotteries welcomes this approach with regard to normal economic activities, but it is not suitable for sensitive activities such as gambling.

European Lotteries does not favour a purely internal market approach which would result in the application of the mutual recognition principle to gambling. Due to the diverging approaches (a restrictive approach followed by the vast majority of the Member States which conflicts with the liberal approach of a

24 <www.olympic.org>.

25 <www.efc.be>.

26 <www.union-network.org/>.

small minority of the Member States) European Lotteries does not regard mutual recognition as a realistic option.

The regulation of gambling at the EU level is not only an issue concerning the internal market, but spans a broad range of other European policy departments, including taxation, justice and home affairs, consumer and health protection and employment.

For example, it is a fact that private gambling operators from liberal jurisdictions are paying less tax compared to other restrictive jurisdictions. Some gambling operators are operating from offshore in tax heavens. For reasons of public order, state lotteries cannot and do not want to become involved in a race to the bottom on price competition. In order to rule out these social concerns, European Lotteries welcomes the harmonization of gambling tax rules.

Gambling services involve also a high risk of fraud and abuse for criminal activities such as money laundering and organized crime. In addition, action is required to stop the provision of gambling services by illegal internet gambling operating in offshore jurisdictions outside the European Union.

Furthermore deregulation would definitely trigger problem gambling and gambling addiction.

And as stated before it is clear that many direct and indirect employment opportunities depend on state lotteries.

9 Conclusion

The leading question is: *Will Europe be better off if gambling services are liberalized?* The proof for this statement must come from the opponents of the present restricted European lottery model, which could be more constructive than merely claiming discrimination under Article 49 EC.

The opinion of European Lotteries is that the current monopoly and exclusive right model provides for a restrictive gambling policy and a better control of the market. The possible changes discussed above put at risk this delicate equilibrium and would give rise to more social concerns.

A liberalization of gambling will lead to a proliferation of games, more opportunities to gamble and to an uncontrollable incitement of gambling among the punters. And that will be a necessary requirement for the private companies to survive in a market where the competition will be severe. Due to the principles of the free market they will be forced to offer higher odds, higher pay out and expand the possibilities for betting. Punters will be pushed to spend more and bet or gamble more frequently.

This could also lead to a situation where the European market, because of the severe competition, will be dominated within a few years by for example 3 to 5 consortia. These consortia will be based in EU member states or elsewhere, where the lowest tax rate and the highest form of deregulation are offered.

The mission of the writer of this article is to sustain what he calls the 'holy trinity' with regard to the regulation of gambling, which consists of:

1. *National governments*, which are in full control of their gambling policy and regulation.
2. *Lottery companies* acting on the basis of a license or monopoly and according to the terms and conditions of their governments.
3. *(European) society*, represented by the state and organizations in the field of health care, sports, culture, welfare, science, education, environment etc. as the sole beneficiary of lottery revenue.

Dutch Gambling Law and Policy: An Untenable Parochial Approach

Nick Huls

1 Introduction

The aim of this paper[1] is to evaluate the attempts of the Dutch government to maintain strict boundaries around the Dutch gambling market. Paragraph 1 will outline the legal background to the regulation of gambling in the Netherlands, including the basis of current policy. This will be followed in paragraph 2 of a description of the key players in this field the various levels of government which are involved. Subsequently paragraph 3 considers the political climate prevailing in the Netherlands at the time of writing before attempting to make a rational analysis of the existing state of affairs, in paragraph 4. After a brief overview of recent case law in paragraph 5 a few critical concluding remarks are offered.

2 The Legal Aspects of Gambling Regulation[2]

Gambling regulation in the Netherlands dates back to 1726. The regulation of gambling in the Netherlands dates back to 1726. Traditionally, lotteries have been a popular way for governments to quickly raise capital. When capitalism was still in its infancy, gambling and speculation were closely linked.[3] During

1 Huls, N.J.H., '*God dobbelt niet: realiteiten en mythen van kansspelregulering'* ('God does not play dice. Myths and realities in Dutch gambling policies'.). Inaugural address at Erasmus University Rotterdam, 14 May 2002. (The Hague: Boom Juridische uitgevers, 2002).

2 For a history of Dutch gambling regulation, see, van't Veer, A., *Spelregels*, Ph.D thesis, Erasmus Unversity Rotterdam (Deventer: Gouda Quint, 1998). and Kingma, S., *Het Gokcomplex. **Verzelfstandiging van vermaak***, Ph.D thesis, Universiteit van Amsterdam) (Amsterdam: Rozenberg Publishers, 2002)

3 Schama, S., *The embarrassment of riches, Dutch culture in the Golden Age* (New York: Knopf, 1987).

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 69–79
 ISBN 90-04-15459-0. Printed in the Netherlands.

the progressive industrialisation of the nineteenth and twentieth centuries, gambling was regulated under criminal law in the form of public indecency laws.[4] It was then considered part of the vice industry, along with prostitution, alcohol and drugs.

Since then, the history of gambling regulation has been characterised by a constant tussle between definitions of legality and illegality. Every attempt to regulate gambling in the Netherlands has created its own illegality, as it were. Over the years, there have been many legal challenges on what precisely constitutes a game of chance (the outcome of which cannot be influenced by the players) and what constitutes a game of skill. As a result lawyers have managed to create a world of their own which is consequently difficult to enforce.

Yet it is not just the *legal* definition of gambling that poses a problem: the *social* definition is also a thorny issue. Gambling operators highlight the excitement of gaming and its convivial aspects. The anti-gambling lobby and people such as social workers emphasise the risk of financial loss and the exploitation of human weakness. The rise of the Internet has increased the importance of technology and has made gambling more accessible, which in turn poses new problems for the regulator.

Since 1964, gambling in the Netherlands has been regulated by the Gambling Act (*Wet op de kansspelen*, 'WOK'). This Act was, and still is, based on the principle of 'canalisation'. In other words, since a total ban on gambling would not be feasible and there is always a risk of criminal exploitation, the government is trying to channel people's compulsion to gamble towards more positive ends. Legal gambling is therefore permitted, preferably provided by a state monopoly, and the profits are channelled to the Treasury and to (nationally defined) good causes.

3 Key Players on the Dutch Gambling Market

3.1 The Supply Side

The national lottery Stichting Exploitatie Nederlandse Staatsloterij (SENS) is the oldest monopoly-holder on the Dutch gambling market. In 1976, following pressure from the tourism sector for the provision of casinos, it was joined by Holland Casino, also a state monopoly. Holland Casino now has 12 outlets in the Netherlands, with another two due to be opened shortly.

The football pools and the sports tote have been operating since 1961, and both have now moved away from the voluntary sector to become professional draws. The Lotto supports the world of sport (65% of their net results) and culture

4 Zedelijkheidswetgeving.

(35%). In 1994, the national lottery also converted its scratch card scheme into a commercial operation.

The lottery world has been given an additional boost with the creation of Novamedia, a company founded by a group of idealists from the Third World movement who succeeded in forging a link between lotteries, charities and the leisure industry, notably television. Boudewijn Poelman, who was initially a fund-raiser for the Netherlands Organisation for International Development Cooperation (NOVIB), gained a reputation as a capable ethical entrepreneur by linking the popularity of gambling with a desire among consumers in wealthy industrialised countries to help the less fortunate. His company forged strong links between organisations such as *Natuurmonumenten* (the Dutch nature conservation charity) and NOVIB on the one hand, and media tycoon Joop van den Ende and the Tros broadcasting company on the other. Under the slogan 'You take a chance, they get a chance', people were encouraged to do something which was essentially wrong (gambling), while at the same time achieving something good (helping the poor or protecting wildlife and the countryside). This combination of altruism and egoism proved highly successful in many respects.

In 1986, this purely commercial approach was also applied to amusement arcades. The profits generated by these organisations were channelled directly to the operators and policy was decentralised to the local authorities. Supervision of this part of the industry was transferred to the private sector (Verispect). Bingo and promotional gambling (such as monthly car raffles) and phone-in competitions are now also subject to certain restrictions.

In recent years, legal gambling has continued to grow by approximately 8 per cent per annum. This growth has levelled off slightly over the past two years due to the recession; the turnover now stands at EUR 2 billion a year. There is also an illegal sector, whose turnover was estimated at a half-billion euros at the beginning of 2001.[5]

3.2 The Dominance of National Government

The State's approach to gambling is highly fragmented and is a classic example of compartmentalisation in the government. The Ministry of Finance is interested in the revenue generated by the tax on gambling and assumes responsibility for the national lottery. The Ministry of Economic Affairs sees Holland Casino as a way of making the Netherlands more attractive as a holiday destination. The Ministry of Justice is responsible for enforcing gambling laws and issuing licences. The Ministry of Agriculture has traditionally been involved as a caretaker manager for the racing tote. The Ministry of the Interior is responsible for the public order

5 Ernst & Young Forensic Serivces, *Verkeerd Gokken. Oriënterend onderzoek naar aard en omvang van illegale kansspelen in* Nederland (The Hague/Amsterdam: 2001) p. 73 et seq.

aspects of gambling. The Ministry of Health, Welfare and Sport assumes political responsibility for sport-related matters and wants to see the sports world retain its income from the tote and lotto so that it is not forced to rely on government subsidies. However, this same Ministry is also responsible for public health, and therefore for measures to combat gambling addiction. This effectively means that while one arm of the Ministry supports increased revenue from gambling, the other wants to see a reduction in compulsive gambling.

The task of regulating gambling is entrusted to a government which has long been hampered by a lack of horizontal coordination. This was highlighted in 1991 by the Haars Commission Report, which painted a stark picture of the lack of communication and coordination between ministries. Unfortunately, the government Supervisory Body (College van Toezicht op de kansspelen) created in 1996 to oversee improvements in this area was not given sufficient funding or powers to be fully effective. It has become a toothless watchdog.

We are therefore left with the unedifying spectacle of inward-looking ministries which are in competition with each other and prefer to align themselves with the sectors they are most familiar with. To ward off subsidy applications, civil servants tend to do everything they can to maintain the status quo. The Gambling Act (WOK) is a textbook example of what Rosenthal refers to as 'bureaupolitism'.[6]

In the recent past however, things have improved a little bit, as the Ministry of Justice tries to coordinate the policies involved, on the eve of a complete new legal framework that is supposed to be published shortly.

3.3 The Role of Local Authorities

Local authorities also compete with each other to attract casinos as a way of putting themselves on the map (e.g. Haarlem and Zandvoort). Some of the larger municipalities clearly feel that the presence of a grand and luxurious Holland Casino outlet is vital to give them the standing they require.

The sums of money that slot machine operators are willing to pay to open a gambling outlet occasionally lead to a lack of political transparency as well. In Den Helder, for example, one council was forced to stand down because it had been too eager to accept plans and proposals tabled by an operator. The towns of Zwolle and Huizen recently held referenda in which the local population voted against the opening of a gambling outlet, and at the beginning of October there was a political outcry in Tilburg due to dirty dealings involving free tickets linked to the issuing of a licence for a second amusement arcade.

Current policy on gambling in the Netherlands is extremely hybrid in nature and is moreover based on a number of outdated assumptions. For example, the

6 Rosenthal, U., *Bureaupolitiek en bureaupolitisme, om het behoud van een competitief overheidsbestel,* (Alphen aan de Rijn: Samson H. D. Tjeenk Willink, 1988).

Dutch have long since ceased to be careful savers, and are increasingly incurring greater amounts of personal debt. The traditional picture of the risk-averse Dutch citizen is increasingly being replaced by that of the eager consumer who is keen to play a full part in a society defined by mass consumption.

In any case, the remaining objections to gambling are rapidly being swept aside by the sophisticated and aggressive advertising strategies employed by the supply side. The turnover generated by the gambling industry has risen sharply and it is now evolving into a commercial sector like any other. It is therefore no longer tenable for the Netherlands to pursue a restrained gambling policy, in view of the massive amounts being spent on advertising by the licence holders. There is a strong demand among affluent Dutch consumers for new forms of leisure pursuits with a built-in element of chance.

4 The Politics of Dutch Gambling Regulation

It is mainly those individuals representing the small right-wing Christian parties who are promoting a strong ethical policy on gambling, chiefly to combat addiction. However, it is very difficult to explain why the most addictive forms of gambling, namely amusement arcades and casinos, can be commercially exploited and furthermore there is no restriction on the sale of scratch cards. It is precisely because the government benefits so substantially from the proceeds of these addictive activities that an aura of hypocrisy surrounds the Dutch Gambling Act, in that while restraint is preached on a Sunday, the tills are allowed to ring solidly throughout the rest of the week.

Dutch gambling policy is a forum in which a passionate minority to the left and right of centre set the tone of the debate. The small Christian parties defend the Puritan standpoint with vigour: gambling is an evil which is against God's will. These minorities base their unremitting criticism on the principle of 'canalisation'. Groen Links (the environmentalist party) and SP (the socialist party) are particularly critical of the profiteering and laundering that is traditionally associated with gambling and are calling for robust state intervention. They are in favour of a ban on advertising that promotes gambling, like those promoting cigarettes and alcohol.

None of the major political parties has a clearly defined position on gambling. The centre-right Christian Democrats (CDA) are sympathetic to calls for a restrictive policy, but also have close links with civil society organisations, which are heavily dependent on income from gambling. The left-of-centre Labour Party (PvdA) has no traditional sympathies with gambling, which is seen as encouraging unearned income, a practice without foundation in socialist principles. Yet this party also has strong links with the charities that benefit from gambling revenue. Finally, the right-wing VVD party has no fundamental objections to a commercial

gambling sector, provided its negative side-effects (compulsive gambling, crime) are limited. The VVD is also prominently represented in the charity sector.

A strong tie has arisen between the government and the charities that benefit from gambling. In an attempt to ward off reliance on subsidies, the government is giving the lotto and other good causes increased scope for gambling in the form of higher prices, a larger number of draws and new promotional campaigns. Income from the gambling industry is regarded as a painless tax. After all, by betting on the outcome of sports competitions, matches and races, consumers are voluntarily helping to finance a public good**.**

However, the drawback to all this is that gambling operators have the government in a stranglehold, something which is referred to in the theory of political regulation as 'capture'.[7] Not without some justification, MP Klaas de Vries described the charity sector as 'a ruling class which is siphoning off public money.'[8]

5 An Evaluation of Dutch Policy

There is a yawning gap between the legal provisions that are set down on paper and the social reality of the gambling world. The new Gambling Act that is now under consideration is therefore an excellent opportunity to improve coordination between the two. However, if this is to work, a completely new course must be set, both by the legislator and by the courts.

The most important step will be to draw up modern policy principles to substantiate the new Act. The restrictive policy being prescribed by Justice Minister Piet Hein Donner is based on the paternalistic principle of 'canalisation', which is no longer appropriate in a society that now accepts gambling as a normal form of leisure activity. This policy has a weak democratic legitimacy in an age of citizenship, civil society and populism. The government should therefore have more confidence in the capacity of citizens to exercise discretion. What is more, the existing policy upholds the status quo, in which the spoils are divided up between the State of the Netherlands and Dutch-registered charities. New entrants to the market barely get a look-in.

Existing licence holders have such a strong hold over the government that any policy aimed at discouraging gambling lacks credibility. The gambling sector spends a noticeably large amount of money on advertising. The most addictive form of gambling – amusement arcades – is a purely commercial operation.

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7 A. I. Ogus, *Regulation, legal form and economic theory.* (Oxford: Clarendon Press, 1994), p. 57-58.

8 Parliamentary Papers 24 036 and 25 557 nos. 295 p. 3, general debate of 26 March 2004.

Within Holland Casino, turnover in this sector is growing faster than in any other, with slot machines now accounting for half of all sales.

Existing government policy is preventing the growth of the lottery market, which gives existing recipient charities an unfair advantage and is unnecessarily paternalistic towards Dutch citizens. My view is that Dutch consumers should be allowed to decide for themselves whether they buy a lottery ticket with a view to betting on the results of the Italian A-Soccer series, supporting Dutch cancer research or promoting efforts to alleviate hunger in the southern Sahel. The Dutch government cannot operate a restrictive gambling policy while at the same time funding the Treasury and associated good causes by means of a growing gambling industry.

I feel that the government is playing a morally unjustifiable double game, in that it is encouraging the evil it claims to be combating. In a previous function, the present Minister of Justice, Piet Hein Donner, admitted that the justification for the government's policy on gambling was based on weak arguments. He described it as 'accelerating and braking at the same time', which was, he concluded, no way to keep a vehicle on the road.[9] But now that he is the Minister, he is doing precisely that. His restrictive policy is causing double damage: it is preventing the bona fide gambling sector from expanding while at the same time undermining the credibility of the government's role as an independent supervisory authority.

Gambling is a booming business in the modern mass consumption society. In view of its close links with the mass media, the mobility of consumers and the existence of a European market, the gambling industry is likely to expand into a single EU-wide market. The Netherlands has now grown too small for glamorous entrepreneurs like Joop van den Ende and Boudewijn Poelman, our equivalents of Richard Branson. John de Mol senior was recently presented with an award for his contribution to European culture. These exploiters of Dutch popular culture are capable of mobilising vast numbers of consumers. I see no reason, therefore, why the government should prohibit them from widening their activities to the European stage and enabling our national lotteries (including the Dutch national lottery) to evolve into pan-European players. After all, they are respectable entrepreneurs who, while they have more than half an eye on their own profits, are nevertheless legal and above board. What is more, lotteries are not addictive.

My view is that the government's attempts to restrict its policy to national level are little more than a rearguard action. All this will do is keep our national operators artificially small so that when a European market does evolve, they will become easy prey for foreign acquisitions. I also believe that the government

9 Donner, J.P.H., *'Overheid en kansspelen'*, in: *De Raad voor de casinospelen. Een slotaccoord.* (The Hague: 1995) p. 15-19.

should give up its stake in Holland Casino, since the role of gambling operator is unbecoming to it. After all, even the Dutch state does not operate brothels or gin distilleries, nor does it make its own cannabis or cigarettes. Moreover, the decision to give Holland Casino a monopoly on legal gambling via the Internet smacks of unfair competition. I would therefore like to propose that the government sells its stake in Holland Casino and that the company should be floated on the stock exchange.

The first new policy principle should be a more hands-off government. However, this needs to be complemented by a second policy principle, namely an active government which protects its citizens by supervising the gambling operators. The government must take a step back in one area while taking two steps forward in the other one. Only when it no longer has a direct interest in the revenue generated from gambling will it be free to pursue a more distant yet morally credible policy.

The Netherlands needs a strong, independent and specialised supervisory authority like the UK with the ability to respond quickly and effectively to aggressive, dishonest and criminal operators.[10] This will require substantial investments in conscientious supervision. The government must collaborate with the legal gambling sector to devise an active policy to discourage gambling, especially where it is addictive and where it affects vulnerable groups. Public funding must be used to pay for independent scientific research, both on the nature and scope of gambling addiction and on ways to provide effective help for addicts.

There is also considerable work to be done at EU level. Since all the Member States share most of the aims of gambling policy, the EU would benefit by drafting a set of minimum EU-wide standards. If Holland Casino's policy on handling addiction is as good as is claimed, we can also use it to achieve positive results at EU level. The Dutch government could raise this question in the context of the proposed EU Services Directive.

6 The Direction of Recent Case-Law

The Gambling Act (WOK) is enforced by the courts. The distinction between gambling and games of skill has kept lawyers extremely busy. An extensive body of case law has grown up around pyramid schemes and Holland Casino's main rival, Golden Ten.

The Dutch courts are now hearing cases brought by foreign operators (lotteries and casinos) wanting to gain access to our market. Disputes concerning the legality of e-gambling have also prompted many legal actions. So far, the

10 Miers, D. '*Regulating Commercial Gambling. Past Present and Future'.* (Oxford: Oxford University Press, 2004).

Dutch courts have upheld the government's attempts to keep the gambling market strictly national. The government's ambiguous standpoint on gambling is also reflected in the various different cases being brought before the courts. Ironically, it is not the supervisory authority – namely the government – that is so vigilantly protecting its citizens, but other interested parties such as the lotto and the national lottery, which are trying to get the courts to keep would-be rivals out of the Dutch market. Recently, the lotto won cases against Ladbrokes and Bettfair, while SENS (the national lottery) won a case against Stargames, a German lottery ticket seller.

On 18 February, the Supreme Court ruled that Internet gambling providers are also covered by the Gambling Act (WOK) and that the restrictions this Act imposes on the free traffic of services does not conflict with the jurisprudence of the European Court of Justice with respect to Article 49 EC.[11]

There was a brief glimmer of hope for the foreign operators when, during an interim judgement of 2 June 2004, the district court in Arnhem put a number of penetrating questions to Minister Donner on the tenability of his policy. However, in a final ruling on 31 August, the court backed down to a considerable extent.[12]

One of the Minister's arguments was that his policy sought to discourage public demand for gambling. He said he would not be expanding the lotteries for charity any further and had decided against privatising Holland Casino. He had also rejected plans by the national lottery to organise a GSM lottery, and had forbidden Holland Casino to sponsor a television programme. In a particularly spectacular move, he had also forced Holland Casino to withdraw its sponsorship of Dutch football's Premier League. Holland Casino's annual report also accepts the fact that under existing government policy, the company is no longer able to evolve into a leading European gambling organisation.

The court in Arnhem accepted the Minister's answers, the more so since it saw its role as confined simply to performing a preliminary screening. Even an investigation as to whether government policy was genuinely restrained was, the court felt, 'beyond the scope of a civil procedure'.

While it is true that the European Court of Justice has so far left intact national gambling policy aimed at social goals, the *Gambelli* case has raised aspects which should give the Dutch legislator and courts food for thought. For example, the European Court is no longer satisfied with good intentions alone. The motives for discouraging gambling and combating fraud must be convincing. There must be a real need to prevent social problems. National courts must ensure that

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11 *Ladbrokes* v. *De Lotto*, Hoge Raad 18 February 2005, RvdW 2005, 34 (LJN AR 4841) C03/306HR.

12 *De Lotto* v. *Ladbrokes*, Rechtbank Arnhem 31 August 2005, case no. 98631/HA ZA 03-606.

the measures designed to exclude foreign operators are non-discriminatory. If a national government is encouraging consumers to gamble in order to boost public finance, then under the so-called principle of proportionality it can no longer plead its national monopoly as an excuse.[13]

7 Conclusion

In March 2000, a Committee on Deregulation chaired by myself proposed giving political primacy for gambling policy to the Ministry of Justice. The government accepted this proposal. In our final report, *Nieuwe ronde, nieuwe kansen*,[14] we argued in favour of a purely economic policy for gambling. Our view was that the gambling market should be treated as a market like any other, in which anyone who satisfied the strict requirements of reliability and professional competence should be issued with a licence to operate a lottery or a casino. We also argued in favour of admitting foreign operators to the Dutch market. Our Committee felt that the government need do no more than provide consumer protection, guarantee transparency and a level playing-field, pursue an active policy to combat gambling addiction and exercise strict supervision to prevent crime.

I still believe that these are the principles under which a new Gambling Act should be drafted. The increasing importance of the Internet further strengthens this view. The gambling industry should be regulated in the same way as any other sector. The government should give up its dual role of gambling operator and regulator, since this leads to untenable policy conflicts.

As it is, we are already seeing some unpleasant side-effects, such as overly commercial directors who want to engage in activities which the government is unwilling to allow or the exorbitant salaries paid to the directors of Holland Casino, as if it were a private enterprise with competitors.

Our suppliers should therefore be floated on the stock exchange and be given the opportunity to become a genuinely European player. By actively promoting its own anti-gambling policy more widely, Holland Casino could help to spearhead a European policy on gambling prevention. The postcode lottery could be allowed to evolve freely into a European lottery to fund good causes, in partnership with similar lotteries in other Member States. The lotto and the national lottery should

13 Shortly after the Colloquium on the Regulation of Gambling the Administrative Court of Breda rendered a judgment in favour of a French casino operator challenging Dutch restrictive policies. See *Compagnie Financière Régionale* v. *Ministers van Justitie en Economische Zaken*, 2 December 2005, LJN AU7389 / 03/1868 WET.

14 MDW-werkgroep, *Nieuwe ronde, nieuwe kansen.* Eindrapport van de MDW-werkgroep Wet op de kansspelen (New round, new chances. Final report of the MDW-work group on the Gambling Act) (The Hague: 2000).

be merged to create a powerful national (Orange) provider whose profits would be used to benefit sports and culture in the Netherlands. Commercial exploiters of amusement arcades and gambling outlets which are operating at supra-local level should be given a national licence.

An effective and powerful regulator is needed to ensure that both domestic and foreign operators run their businesses fairly in the Netherlands, both with respect to consumers and with regard to crime prevention.

Minister Donner believes that he can maintain a dyke around the Dutch gambling sea. However, I am already aware that his successor will recognise that we must not turn our backs on Europe. A wise international policy will involve supporting our bona fide national operators in their desire to expand into Europe. We can then restrict our own national policy to exercising a robust and professional supervision and to actively combating addiction in those forms of gambling to which the vulnerable are susceptible.

A British View of European Gambling Regulation

David Miers[1]

1 Introduction

The purpose of this paper is to analyse British perspectives on the respective roles of the national government and of the European Union in the regulation of commercial gambling. Commercial gambling, for this purpose, embraces both the variety of strictly profit-seeking enterprises, typically casino gaming, bingo and sports betting, together with their e-versions, and the semi-private and public lotteries that have as their objective the promotion of some 'good cause'. These semi-private lotteries typically comprise a range of charity and sports lotteries. Public lotteries comprise those that may be promoted by a local authority, and, of far greater significance, the monopoly that is the National Lottery.

In approaching this task we must recognise some key changes that have taken place since *H.M Customs* v. *Schindler* was decided a dozen years ago.[2] The first is the imminent change in the regulatory landscape that will follow the full implementation of the Gambling Act 2005. This Act does not apply to the regulation of the National Lottery, but there are here, secondly, important proposed structural changes. Thirdly, and a matter that has driven recent judicial activity in both national courts and the European Court of Justice (hereinafter 'ECJ'), is the potency of technological change to effect cross-border provision of gambling services. That has, fourthly, generated uncertainty about either the desirability or the capacity of existing European law to manage a legal regime that will satisfy the sometimes competing, sometimes common, interests of 25 national governments, the Commission, the regulators, the various commercial sectors and, not least, those EU citizens who gamble.

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1 I wish to thank Clive Hawkswood, Jo Hunt and Howard Johnson for their comments on the draft version, and Elke Klapproth for research assistance. The usual disclaimer applies.

2 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Schindler and Jorg Schindler* [1994] ECR I-1039.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 81–126
 ISBN 90-04-15459-0. Printed in the Netherlands.

Following this introduction, my paper is in three parts. The first summarises the present and potential EU regime governing the provision by a commercial operator in one Member State of gambling services to the citizens of another. The second reviews the essential elements of the new regulatory regime for Great Britain contained in the Gambling Act 2005, together with the steps that have been taken for its implementation. This section commences with a short overview of the commercial salience of the British gambling market in 2005 and draws attention to the position of the National Lottery. The third section comments on some important developments within this market that are the consequence of the recent application of European law and examines the changing regulatory landscape within the EU. I draw attention as appropriate to the perspectives of the various actors within the British market to these actual and proposed extensions in the European Union's reach over the provision of commercial gambling services between Member States.

2 The Basic Picture

Both of the two potential areas of European law that seek to regulate the provision of gambling services across Member States, the Electronic Commerce Directive and the Draft Services Directive, have posed points of concern for the British market. Although neither for the time being is applicable to it, the former expressly excluding gambling services and the latter being only in draft form until May 2006, for some operators, they have represented obstacles to their commercial aspirations in other Member States. For those who prefer a protected market, they pose a threat in the predictable loss of that protection. For the UK government and regulators, the proliferation in particular of e-gambling services poses opportunities and threats, having both fiscal and regulatory impact, which we shall explore in the course of this paper. The actual area of control comprises Articles 49-55 of the EC Treaty, which seek to secure the free movement of services.[3] But since the *Schindler* case their application by the Court and by national courts to the supply of cross-border gambling products has created both legal and commercial uncertainty,[4] conditions that frustrate British operators who regard their products as much the most competitive in Europe.

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3 The *Schindler* case clearly established that gambling is an economic activity that comprises the supply of services within the meaning of Article 50; *op. cit.*, paras. 25-36. Article 43 (freedom of establishment) is also relevant; but the European case law has to date largely concerned Articles 49 and 50 (formerly [59] and [60]).

4 For example, the Dutch courts' decisions that the UK bookmaker, Ladbrokes, could not lawfully accept bets from Dutch gamblers either by phone or on its internet site. Ladbrokes did not have a gambling licence in the Netherlands, where only the state-owned gambling company, de Lotto, could hold licences. District Court, The Hague, 27 January 2003, at www.rechtspraak.nl.

The Directive on Electronic Commerce 'seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States'[5], to which it applies the country of origin principle.[6] This principle of positive integration carries a low regulatory risk where the country of origin's own regulatory regime is at least as robust as a country of destination would itself impose. But in the absence of European wide consensus about the characteristics of such a regime, gambling is a 'sensitive area' to which Member States continue to apply the country of destination principle.[7] Thus, by Article 1.5(d), the Directive does not apply to 'gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions.'[8] Member States are therefore entitled, though only on the grounds recognised by EU law, to stop or to restrict the cross-border provision of Internet and telephone gambling services, even though these services are provided by an operator established in and licensed by another Member State. This leaves open the formal possibility that individual Member States might agree, on the principle of mutual recognition, to recognise their lawfulness. This may additionally be subject to permissible double regulation where the country of origin's licensing does not protect a legitimate interest of the country of destination. But given the support for the exclusion of such services, in particular amongst those Member States where commercial gambling is provided by licensed monopolies that are in whole or part controlled by the state, typically for the purpose of securing revenues, this is highly unlikely.

In the light of the policy towards remote gambling that it has since adopted and to which the Gambling Act 2005 gives effect, the UK government, by contrast, might, as we shall see later, be expected to be more accommodating

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5 By Directive 1998/48 laying down a procedure for the provision of information in the field of technical standards and regulations O.J. 1998 L 217/18, e-gaming is an information society service in respect of which any national regulation must be notified to the Commission.

6 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') O.J. 2000, L 178/1, Article 1. Article 3.1 provides that 'each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.' Article 3.2 provides that 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'

7 DCMS, *The Future Regulation of Remote Gambling: A DCMS Position Paper* (April 2003), paras. 114-115.

8 This exclusion 'does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.' (recital, para 16).

about cross-border e-gambling provision.[9]

Article 16 of the Draft Services Directive likewise required Member States to recognise the country of origin principle in respect of the economic activity within its coordinated field.[10] Consistent with the approach taken in the e-commerce Directive to 'sensitive areas', Article 18.1(b) provided for a 10 year derogation in favour of gambling activities that adopted its wording *verbatim*. But following the 2005 Heads of Government summit in Lisbon in April 2005, which noted the unforeseen expansion of online gambling and the concerns contained in the review of the e-commerce Directive,[11] the potential application of the country of origin principle to gambling services came under pressure. This pressure was exerted in part by the European sports federations (ENGSO), who were concerned that the liberalisation of national gambling markets would lead to a substantial decrease in income for sports from state licensed national lotteries. Apart from direct support for sporting organisations, this income, they observe, also enables them to contribute to education, training and qualifications, health, employment and social integration, objectives included in the Nice Declaration on Sport adopted by Heads of State in 2000.[12] These views are shared by a large number of EU sports ministers who supported amendment 3a in Article 3 to exclude gambling activities altogether.

This is, of course, contentious.[13] We may note, first, that ENGSO does not for this purpose include any of the four UK Sports Councils, all of which receive funding

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9 DCMS, *The Future Regulation of Remote Gambling: op. cit.,* para. 4.

10 Committee on the Internal Market and Consumer Protection, Draft Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 – 2004/0001 (COD) 2005/C221/20 (8 September 2005).

11 The Directive requires its application to be re-examined every two years after 17 July 2003 to determine whether its terms require adaptation in response to technological developments. The first review was published on 21 November 2003. This remarked on the increasing number of Member States' complaints to the Commission concerning cross-border gambling activities, and in particular on the proceedings in the *Gambelli* case; see below section 4.3.3.

12 See ENGSO (European Non Governmental Sports Organization) statement on the EU directive proposal 'Services in the internal market', www.euractiv.com/29/images/common_position_engso_lottery_final_tcm29-139483.pdf (Accessed on 30 March 2006).

13 A parallel case is the response of the European State Lotteries and Toto Association to the revision of the Television without Frontiers (TWF) Directive. Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities O.J. 1989 L 331/51). The Association's position aligns with others who wish to see gambling services excluded from the requirements of the internal market. See European State Lotteries and Toto Association, Observations on the Issues Paper concerning 'Rules Applicable to Audiovisual Content Services, www.european-lotteries.org (September 2005).

from the National Lottery.[14] But it is the British commercial operators who have developed remote gambling services and who were critical of the e-commerce exclusion who were particularly opposed to this proposal. Substantially represented by the Remote Gambling Association,[15] their case is that those Member States who support it do so not for any of the reasons that have been accepted by the European Court as justifying restrictions on the free movement of services, but to protect their domestic monopolies and revenues.[16] There are three reasons why this proposal presents difficulties for the UK government. First, the phrase 'games of chance' as used in the exclusion has a restricted statutory meaning which in particular marks it off from participating in a lottery. Based on earlier legislation, section 6 of the Gambling Act 2005 provides that 'gaming' means 'playing a game of chance for a prize'. Section 6(2) provides that a 'game of chance' includes games that involve both an element of chance and of skill, or an element of chance that can be eliminated by the exercise of 'superlative skill', but does not include a sport. The element of skill distinguishes games of chance from lotteries, in which, section 14 adapting a long-established common law definition, the allocation of prizes relies 'wholly on chance'. An exclusion that speaks of 'gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions' therefore conflicts with the domestic legislation, if its purpose is to include lotteries and betting transactions within the scope of the phrase 'games of chance'.[17]

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14 Following a number of changes to the number of 'good causes' funded by the Lottery, and of the apportionment of funds to them, the Sports Councils now receive 16.66% of the National Lottery Distribution Fund. In 2004/05 this amounted to M£291.9; Committee of Public Accounts, *Managing National Lottery Distribution Fund balances* (HC 408, 2005-06), Figure 1. Their use of these funds is not without its critics; HC Debates, vol. 437, col. 1243W (21 October 2005).

15 The Remote Gambling Association (RGA) came into operation on 1 August 2005, formed by a merger of the Association of Remote Gambling Operators (ARGO) and the Interactive Gaming, Gambling and Betting Association (IGGBA). It represents the interests of remote gambling companies who are licensed and operating within the European Economic Area (EEA). Its members all run online gaming businesses from various jurisdictions and all but one of them also run betting operations from the UK and Ireland. See www.rga.eu.com/.

16 See the RGA's document, *Fair, Honest and Safe: the case for cross-border gambling in the EU*, para. 8; www.rga.eu.com.

17 Neither the common law nor the statutory definitions of 'betting' refer to the role of chance in the determination of the bet. The Act does not define 'bet', but does (section 9) define 'betting'. This means making or accepting a bet on 'the outcome of a race, competition or other event or process', on the likelihood of anything occurring or not, or of being true or not. It is thus possible to bet on the outcome of a lottery (but by section 95 it is unlawful to bet on the outcome of a lottery promoted as part of the National Lottery) or of a game of chance.

Secondly, even if 'lotteries and betting transactions' are intended to be examples of 'gambling activities' and not of 'games of chance', the proposal's terms do not differentiate public from (taxed) private sector beneficiaries. Within the British regulatory structure, lotteries are, with some minor exceptions, unlawful where they are promoted for private gain. The National Lottery is the pre-eminent example within the UK of a lottery intended to fund public goods. The government recognises the importance to a number of Member States of state sponsored gambling opportunities, 'and it is evident that [it] values the National Lottery in the same way.'[18] As we shall see later, the Gambling Act maintains some of the earlier prohibitions on foreign lotteries. These have the effect of protecting the Lottery and its monopoly supplier, Camelot; the government can continue to justify them on the grounds that the Court first accepted in *Schindler*, and that it has elaborated since.

Thirdly, and by contrast, the government's position on private sector provision of e-betting and e-gaming is in principle permissive, subject to regulation. In this respect, it is close to the commercial sector. The exclusion of gambling services altogether therefore conflicts with its 'vision of a global market where a well regulated British based industry is able to establish itself as a world leader', under whose kitemark remote gambling providers currently operating outside the UK might wish to relocate.[19] It might therefore seem perverse to those whom the UK government seeks to persuade of the value of a market in its regulation, that it should simultaneously sign up to a proposition that excludes e-gambling from the country of origin principle. The policy tension to which its contrasting positions on the National Lottery and the regulation of e-gambling give rise meant that the government was unable to support it.

The potential scope of these Directives remained, for some time, a matter of speculation, with decisions concerning the Draft Services Directive not expected until well into 2006. Nor, when agreed, was it scheduled to take effect until 2010. For the present, and in a number of respects also a matter of speculation, is the scope of Articles 49-50 (formerly Articles 59-60) concerning Member States' action to restrict operators in other Member States from supplying their gambling services across their borders. The starting point is *H.M Customs* v. *Schindler*. Acting under their powers in section 1 of the Revenue Act 1898, in April 1990 HM Customs seized a number of lottery advertisements whose importation into Great Britain from the Netherlands had been arranged by the

18 'Nevertheless, even there, the Government has not sought to prevent UK citizens from having access to similar online lotteries abroad.' DCMS, *The Future Regulation of Remote Gambling, op. cit.*, para. 111.

19 DCMS, *The Future Regulation of Remote Gambling, op. cit.*, para. 107. The e-gambling market grows exponentially. A useful overview published in 2005 is Dredge, S., *Mobile Gambling*, Informa Telecoms & Media, www.informatm.com.

defendants on behalf of *Suddeutsche Klassenotterie*. This was unlawful by virtue of sections 1 of the Lotteries and Amusements Act 1976 as amended, which confined lawful lotteries to those provided by that Act or by the National Lottery Act etc 1993, and 2(1), which created an offence of importation. In response to HM Customs' application to the High Court for a declaration that the seizure was lawful, the court referred six questions to the European Court. In essence, three matters fell for decision. The first two presented little difficulty. The distribution of lottery tickets and advertisements constituted an economic activity that fell within either Article 28 (goods [30]) or 50 (services [60]) of the Treaty: the Court concluded that lottery activities are not 'goods' but that they are 'services'. Secondly, the United Kingdom's restrictions on the importation of lottery material from another Member State constituted an obstacle to the freedom to provide these services (Article 49). The key question was whether these restrictions were justified by concerns of social policy and of the prevention of fraud. For reasons that will be considered in section 4.3, and where I will deal with its subsequent interpretation, the Court concluded that they were.

3 Regulating Commercial Gambling in Great Britain

3.1 Commercial Salience

In 2002/03, when the Department for Culture, Media and Sport (DCMS) published its Draft Gambling Bill, HM Customs and Excise estimated gross spending on all forms of gambling in Great Britain to be B£39.3. This was an increase over the previous year, which, in 2003/04 showed a much bigger rise to B£53.4.[20] These increases have been driven almost wholly by the change in the taxation of bookmakers in 2001 from a turnover tax (general betting duty) to a gross profits tax, which has changed the dynamics of the industry.[21] Given the long-standing structural difficulties in comparing bettors' spend as between its various sectors, this can only be an informed estimate. A harder figure is the tax paid by the industry, which in 2003/04 amounted to B£1.35.[22]

These figures include spending on the National Lottery, which was M£4,766 in 2004/05. Since its launch in 1994 it has generated over B£18 for the good

20 National Audit Office, *HM Customs and Excise: Gambling Duties* (HC 188, 2004-05; 14 January 2005), para 1. The *Report of the Gaming Board for Great Britain 2004/05* (2005; HC 227), para. 1.3, drawing on figures prepared by a commercial organisation, gave a total of B£63.8 for 2004/05.

21 See section 4.1. Expenditure on betting was M£10,120 in 2000/02, rising to M£18,761 (the year of the change in the tax base) to M£32,264 in 2003/04.

22 National Audit Office (2005), *op. cit.*, para 1.

causes.[23] Of all gambling media, participation in the Lottery is by far the most popular. The 1999 survey, *Gambling Behaviour in Britain,* found that within the preceding year, 72% of respondents had participated in some form of gambling at least once, of whom 90% (65%) had engaged in the Lottery online draw. The next most popular was fruit machine gambling, at 14% of respondents.[24] Introducing the Bill, the Secretary of State observed: '[E]ach year, some [8] million people visit the country's [628] bingo clubs. Each month, an estimated 4 million Britons log on to a gambling website. Each week, more than 1 million people bet on horse races. Last year, visitors to casinos staked £4 billion. If the national lottery is included, 70 per cent. of the population gamble regularly.'[25]

3.2 The Implementation of the Gambling Act 2005

With a few exceptions, notably those concerning 'ambient gambling',[26] the government accepted all 176 of the recommendations made by the *Gambling Review Report* that was published in 2001.[27] Central to these recommendations is the creation of the Gambling Commission, a new regulatory agency having responsibility for virtually the entire commercial gambling market in Great Britain.[28] Established by Part 2 of the Gambling Act 2005, the introduction of this 'unified regulator' therefore addresses one of the main weaknesses of the regime that has been in place for the past 40 years, the fragmentation of enforcement responsibility across a range of agencies. The exceptions are spread betting, which remains under the control of the Financial Services Authority, and

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23 National Lottery Commission, *Regulating the National Lottery: Annual Report and Accounts 2004/05* (2005; HC 198), p. 24.

24 Sproston, K., Erens, B. and Orford, J., *Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey* (London: National Centre for Social Research, 2000), Table 3.1. This figure disguises a wide variation as between male (20%) and female (8%) respondents. See also Orford, J., Sproston. K., Erens, B., White, C. and Mitchell, L., *Gambling and Problem Gambling in Britain* (Hove and New York: Brunner-Routledge, 2003), pp. 23-39.

25 T. Jowell MP (Secretary of State for Culture, Media and Sport) HC Debates, vol. 426, col. 27 (1 November 2004). Bracketed figures are taken from *Report of the Gaming Board for Great Britain 2004/05, op. cit.,* paras. 1.5 –1.6.

26 HC Debates, vol. 429, col. 557W (12 Jan 2005). 'Ambient gambling' describes 'gambling which is incidental to another non-gambling activity'; e.g., low-stake gaming machines in cafes and taxi cab offices; DCMS, *Gambling Review Report* (Cm 5206, 2001), para . 23.9 (hereafter *Gambling Review*).

27 For a full account, see Miers, D., *Regulating Commercial Gambling* (Oxford: Oxford University Press, 2004), chapter 16.2.

28 With the exception of 'chain gift' schemes (section 42), the Act does not apply to Northern Ireland.

the National Lottery, which remains under the supervision of its own regulator, the National Lottery Commission (NLC).[29]

Paraphrasing section 22 of the Act, the Commission must, in carrying out its functions, aim to pursue and, wherever appropriate, have regard to the licensing objectives, and must aim to permit gambling in so far as it thinks such permission is reasonably consistent with the pursuit of those objectives.[30] By section 1, those licensing objectives are:

(a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;

(b) ensuring that gambling is conducted in a fair an open way; and

(c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

The Act is framework legislation, establishing the regulatory agency and the main parameters of control, omitting much of the detail to be found in the three main Acts that it replaces.[31] The government intends that the Act will be gradually implemented over a two-year period, and be fully operational from September 2007.[32] In August 2005 the Secretary of State made the Commencement Order for the Gambling Commission.[33] Part 2 imposes a variety of tasks, one of which (section 23) requires it to publish a statement setting out the principles it will apply in exercising its functions, and in particular how the Commission expects that they will assist its pursuit of the licensing objectives.[34] Section 24(1) requires the Commission to issue codes of practice 'about the manner in which

29 Section 10 excludes bets that are regulated under section 22 of the Financial Services and Markets Act 2000. On the National Lottery, see *infra*.

30 Gambling Act 2005, Explanatory Notes, www.opsi.gov.uk/acts/en2005/2005en19.htm, para. 94. (Accessed on 30 March 2006).

31 Even so, it is a substantial piece of legislation, comprising 362 sections and 18 Schedules; It replaces the Betting, Gaming and Lotteries Act 1963, the Lotteries and Amusements Act 1976, and the Gaming Act 1968.

32 R. Caborn MP (Minister for Sport and Tourism) HC Debates, vol. 434, col. 9 (13 June 2005).

33 The Commission came into operation on 1st October 2005. The Gambling Act 2005 (Commencement Order No. 2 and Transitional Provisions) Order 2005, 2005/2455. The Order also brought into force the 'key concepts' contained in Part 1; namely, the definitions of 'gambling', 'gaming', 'betting' and 'lottery'. The Commission supersedes the Gaming Board for Great Britain, established by the Gaming Act 1968. See *Report of the Gaming Board for Great Britain 2004/05, op. cit.*, pp. 9-10.

34 A draft for consultation was published on 17 October 2005. See www.gambling commission.gov.uk.

facilities for gambling are provided'.[35] We consider further in section 4.3.5.3 one particular code requirement.

In these requirements of the Commission the Act reproduces the same features of social regulation that have been in place since the 1960s. But it differs in one fundamental respect. In contrast to the regime that it replaces, which in essence sought to control an inevitable but unwanted commercial activity, it is, as section 22(b) explicitly provides, the Commission's duty to *permit* gambling opportunities where what is proposed is 'reasonably consistent' with the licensing objectives. Hitherto the issue of both gaming and betting office licences, for example, has been subject to a test related to the expected demand for the proposed facilities, and it has been possible to site casinos only in certain areas of Great Britain. In pursuit of the government's market philosophy, that unnecessary barriers to customer access and new entrants to the industry should be removed, section 72 *prohibits* the Commission from taking these matters into account when determining whether to grant the relevant operating licence.[36] The question to be considered below is how this philosophy, which is to 'create a more open and competitive gambling sector' and to give 'better choice for consumers and enhanced opportunities for business both in the UK and abroad', affects the cogency of its position on the European Union's expectations.

3.3 The Position of the National Lottery

Section 15 of the Gambling Act provides that 'participating in a lottery which forms part of the National Lottery is not gambling for the purposes of this Act.' The two regulatory regimes are not, however, entirely separate. By section 264, none of Part 11 of the 2005 Act, which regulates lotteries, applies to the National Lottery, but section 15(1) provides for two sets of circumstances in which the 2005 Act does apply. The first covers cases where a person 'cheats at gambling', and the second removes the legal disability that has traditionally affected the enforcement of gambling contracts.[37] As it is clearly the case that their regulatory concerns will intersect, section 31 provides that the

35 The government expects the Commission to publish licence conditions for casinos and codes of practice 'by around June 2006'; R. Caborn MP, HC Debs., vol. 436, col. 29W (4 July 2005).

36 Nor can it impose a condition on these licences that the premises are run as a club or by restricting its use to club members (section 87). A casino can maintain itself as a club, but the '24 hour' (formerly 48) rule contained in the Gaming Act 1968 that applied to casino membership as an obstacle to spontaneous gaming was revoked with effect from 1 October 2005. As a result of this relaxation and of the increase in the number of casinos (20) under the amended regime there has been a substantial rise in the number of first time visitors.

37 See further section 4.3.5.1.

Gambling Commission must consult the NLC where it becomes aware of a matter concerning the exercise of its functions on which the Commission is likely to have an opinion. And Schedule 3 to the 2005 Act amends section 4 of the 1993 Act to impose a reciprocal duty on the NLC. Ready examples are problem gambling and player protection, each of which falls both within the Gambling Act's licensing objectives and the equivalent 'overriding' statutory duties on the NLC to exercise its functions in the manner it considers most likely to secure (section 4(1)):

(a) that the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety, and

(b) that the interests of every participant in a lottery that forms part of the National Lottery are protected.

There will also be more technical concerns, such as whether a particular activity is to be treated as a lottery or as betting, or, subject to the convoluted provisions in section 15(3), as a lottery or gaming.[38]

There continues to be some concern about both the future regulation of the Lottery, as well as the conditions of the competition for the next licence, which the NLC expects to take place in 2007, allowing for a smooth transition before the commencement of the third licence in February 2009. Both matters were considered at length at the time that DCMS was preparing the Gambling Bill, generating both a series of consultation and decision documents from DCMS and some parliamentary interest.[39] In the case of the former, the question is

38 Section 15(4) provides that participating in a lottery that forms part of the National Lottery is not to be treated as either 'pool betting' (section 12) or 'betting' (sections 9 and 11) even though that participation would satisfy those definitions. And where it would satisfy the definition of 'gaming' (section 6), that participation shall be so treated only if the player 'is required to be participate or be successful in 'more than three processes before becoming entitled to a prize' (section 15(3)). This is a reference to 'complex lotteries' defined by section 14(3) as lotteries where prizes are allocated by a series of processes, the first of which relies wholly in chance. This is intended to catch arrangements under which the player pays for a chance allocation of, say, a 'lucky number', but which then requires him to exercise skill or judgment before winning a prize. This is a lottery unless more than three processes are involved, in which case it is gaming. But if the first process does not rely on chance, then it is not a lottery, whatever else it might be. Paragraph 3 of Schedule 3 amends section 20 of the 1993 Act so that it has the same meaning of 'lottery' as in the 2005 Act. Apart from regulation, the designation has tax implications; see *Prize Provision Services* v. *Revenue and Customs* (Unreported, V&DTr 18 August 2005).

39 DCMS, *Review of Lottery Licensing and Regulation* (July 2002), *National Lottery Licensing and Regulation, Decision Document* (July 2003); Culture, Media and Sport Select Committee, *National Lottery Reform* (2003-04; HC 196-I), 64-94, 88; Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill* (2003-04; HL 63-I, HC 139-I), paras. 62-67. For a full account, see Miers, *op. cit.*, chapter 16.4.2

whether there should be a single regulator for both the National Lottery and the private commercial gambling market. The primary attractions of a single regulator are that there would be economies of scale and that it would have an expert and informed view across the whole sector, for example as to children's access to gambling facilities. The two main arguments in favour of the *status quo* stem from their differing statutory functions. First, unlike the Gambling Commission, the NLC's functions are not confined to regulation but require it, subject to its two other prior regulatory duties, to ensure that 'the net proceeds of the National Lottery are as great as possible'. Therefore, secondly, to combine the regulation of the Lottery with that of the rest of the gambling sector would give rise to irreconcilable conflicts of interest. This is because whereas the Gambling Commission's statutory duty is to permit gambling where it is consistent with the licensing objectives, a single regulator having the NLC's duties would always have to consider the impact of that permission on the Lottery's receipts. DCMS concluded that the Lottery's regulation should remain with the NLC, at least until the 2009 licence competition is completed.

The second concern is that unless the terms under which the third operating licence is awarded differ from those applicable for the second, there will be no competition, because there will be no competitors to Camelot. This, too, is a complex issue, in which alternative bidding and licensing arrangements might neutralise the incumbent's apparent competitive advantages (their extent has been a matter of disagreement). DCMS' position is to work on the basis that there will continue to be a single section 5 licence to run the Lottery, but to introduce the flexibility that if no effective competition should take place, the NLC may make alternative licensing arrangements. Plan B requires amendment of the 1993 Act, provided for in the National Lottery Act 2006.[40] For its part, in 2005 the NLC began a 'competition project' that invited comment on three matters, encouraging competition, levelling the playing field, and aligning incentives, as a means of creating the conditions for an effective competition.[41]

3.4 Creating New Lotteries within the National Lottery

Section 15 of the 2005 Act reminds us that there is no single National Lottery, but by section 1 of the 1993 Act, the 'National Lottery' comprises all those

40 Clause 6 and Schedule 1. See the Explanatory Notes www.opsi.gov.uk/acts/en2004/2004en25.htm, paras 12-17. (Accessed 30 March 2006).

41 National Lottery Commission, *A Lottery for the Future: a discussion paper* (January, 2005), *A Lottery for the Future: summary of responses and areas for further analysis* (July 2005), p. 16. One of potential barriers to entry has been the arguably limited time (seven years) within which an applicant can realise a reasonable return on its investment both before and after the competition. The 2005 Bill provides that the licence 'may not exceed 15 years', effectively doubling the current period.

individual lotteries promoted under its authority. It is unnecessary for our purposes to review the range of lotteries that have been promoted since 14 November 1994 or the amendments that have been made to the good causes originally specified in that Act.[42]

But it is of present interest to note the government's addition of a further good cause, the Olympic Lottery. This is provided for in the Horserace Betting and Olympic Lottery Act 2004, and was actuated by the IOC's decision to award London the Olympic and Paralympic Games in 2012. This good cause is unusual in that unlike all other good causes, where lottery receipts are held by the National Lottery Distribution Fund (NLDF) prior to their allocation to one of the distributing bodies, Olympic Lottery receipts will be held by a separate body, with its own Olympic Lottery Distribution Fund (OLDF). In terms of the fiscal equity of Lottery funding of semi-public goods, of particular interest is the Secretary of State's power to redirect money from the NLDF (to the detriment of the other good causes though having consulted them) to the OLDF.[43] The reason for present interest is the government's wish to ensure that there is no competition for the lottery pound from elsewhere in the European Union.

4 The Impact of European Law on the British Market

In section 2 I focused solely and briefly on those aspects of European law that do or might exert jurisdiction over the restrictions imposed by one Member State on commercial operators in another from supplying gambling services to its citizens. Before I consider the interpretation of Articles 49 and 50 in particular, it should be observed that substantive European law of course affects both domestic private and public sector contractual arrangements concerning gambling services within a Member State. I will discuss in some detail one instance of this effect, not just because of its intrinsic interest to those affected, but because its also broadens

42 There were five distributing bodies specified in section 23 of the National Lottery etc Act 1993: the Arts Councils, the Sports Councils, the National Heritage Memorial Fund, the National Lottery Charities Board (NLCB) and the Millennium Commission. Each received 20% of the moneys held by the National Lottery Distribution Fund (NLDF). A sixth distributing body, the New Opportunities Fund was added in 1998. The National Lottery Act 2006 gives legislative effect to the administrative merger in 2004 of the New Opportunities Fund with the NLCB (also known as the Community Fund) into the Big Lottery Fund, which, with the dissolution of the Millennium Commission, will receive 50% of NLDF receipts. The three remaining original good causes (the Arts, Sport, and the National Heritage) now receive 16.66% each.

43 Given the predicted costs of staging the Olympics, the diversion is likely to be in the order of M£750, with an equivalent sum to be raised by the Olympic Lottery.

the context within which the European Union's influence on the commercial sector in Britain should be seen.

4.1 The Value and the Use of Pre-race Data

As in the 1990s, 'it remains the Government's view that commercial agreements between the relevant parties provide the appropriate long-term basis for the funding of racing.'[44] Currently, racing is principally supported from two sources, for both of which the government has responsibility, even if it is the punter who ultimately funds them. The Horserace Totalisator Board (the Tote) is a public body with a statutory monopoly over pool betting on horse races which provides direct support for racing in the form of levy payments, direct payments to racecourses, and race sponsorship.[45] I say a little more on this arrangement later. The second is the Horserace Betting Levy Board. Established a year after the legalization of betting offices in 1960, the Levy Board's statutory objectives are to improve breeds of horses, to advance veterinary science, and to improve horseracing. Every year, following earlier negotiation with the relevant stakeholders, it fixes a Levy Scheme that traditionally strives to achieve a balance between the needs of racing and the ability of bookmakers to pay, and following the change from general betting duty (GBD),[46] is based on bookmakers' gross profit range.[47]

The Levy has always been an unsatisfactory proxy for the market value of the racing product, and has long been the object of contention between the racing

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44 R. Caborn MP, HC Debates, vol. 432, col. 29WS (18 March 2005).

45 In 2004 these contributions totalled M£11.7. See Horserace Totalisator Board, *Annual Report and Accounts 2004* (2005), pp. 21 and 44.

46 During the 1990s a number of British bookmakers relocated to Gibraltar in order to avoid paying GBD on the bets they negotiated from Great Britain. This posed a significant threat to HM Customs and Excise's capacity to recover that duty; the risk being in the region of M£50. 'The starkest example of the impact of e-commerce in this area is in bookmaking and, from the Government's standpoint, the general betting duty charged on bets made with a bookmaker' (Inland Revenue and HM Customs & Excise, *Electronic Commerce: The UK's Taxation Agenda* (1999, chapter 7.3) www.hmrc.gov.uk/e-commerce/ecom3.htm. The threat was addressed by the abolition of GBD in favour of a tax on gross profits. This has proved to be highly successful, from the standpoints of both the bookmakers and the Treasury. Because it no longer taxes the volume of betting, 'it has reversed the trend'; see National Audit Office (2005), para 33. At the height of the exodus, one bookmaker was convicted under section 9 of the Betting and Gaming Duties Act 1981, which served a revenue protection purpose, for advertising by means of a Teletext broadcast; *Victor Chandler International* v. *Commissioners of Customs and Excise* [2000] 2 All E.R. 315. By section 340 of the 2005 Act, sections 9 to 9B of the 1981 Act will cease to have effect.

47 In 2004/05 the Levy Board contributed a total of M£106.3, of which M98 were payments by bookmakers. See Horserace Betting Levy Board, *2004-05 Annual Report* (2005), p. 9.

industry, represented since the early 1990s by the British Horseracing Board (BHB), and the bookmakers. There is no need to recall that debate here.[48] What we need to understand is the absolute centrality to both sets of arrangements of pre-race data. 'This is the essential data concerning an individual race and the horses running in it that a bookmaker needs to take bets on a race. This is a key asset, as all bookmakers need this data.'[49] Its commercial value has stemmed from the control that the BHB and the Jockey Club jointly exert over racing *via* their Orders and Rules of Racing. One of these seeks to prevent racecourses from independently exploiting their own race data, thus giving the BHB an effective monopoly over its supply to anyone who wishes to use it.

This was one of three matters that the Office of Fair Trading (OFT) pursued in its enquiry following its issue in April 2003 of a Rule 14 Notice that the BHB and Jockey Club's practices concerning race fixtures and data were anti-competitive.[50] The OFT's preliminary conclusion under Chapter 1 of the Competition Act 1998 both stunned the racing industry and generated a planning blight while the BHB and Jockey Club sought to show that they fell within one of the exemptions. Its confirmation would have exposed racing to the full rigour of the market, an outcome that would have called in question the survival of the financially vulnerable of Britain's 59 racecourses. In the event, in June 2004 the BHB reached a preliminary agreement with the OFT that allowed racing to continue much as before.[51] In the case of its 'key asset', worth M£12 in 2004, the OFT agreed that the BHB could continue to sell race data centrally, rather than having to deal with each racecourse individually. But in order to separate the BHB's governance role over race data from its role as seller, the latter was to be managed by a new body, British Horseracing Enterprises.

The commercial value of pre-race data to the racing industry has to date been underpinned by the legal certainty that it is only the BHB (or its commercial

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48 See Miers, *op. cit.*, chapter 16.3.1.

49 Office of Fair Trading, *The British Horseracing Board and the Jockey Club: a summary of the OFT's case* (2003), para. 4.8. See www.oft.gov.uk/nr/rdonlyres/aec00594-01eb-44b8-aa54-11b3f8f4e273/0/oft654.pdf'

50 www.oft.gov.uk/news/press+releases/2001/pn+26-01.htm

51 www.oft.gov.uk/news/press+releases/2004/101-04.htm. The other two matters concerned their control over racecourses' allocation of fixtures and the content of their programmes, and the Rules governing the allocation of prize money. The OFT agreed that fixtures will continue to be coordinated by the BHB, although in an effort to introduce both competition with the all-weather tracks and to promote its identity, jump racing fixtures will from 2006 be separated from flat racing. The OFT also agreed that the BHB can continue to coordinate fixtures so as to take account of horses' different class and distance requirements. But here too there will be an element of competition, as the long established rule that no racecourse may stage a fixture if another track within a 50 mile radius has one scheduled that day is revoked.

arm, BHE), that has the right to sell it. A yet greater threat than that initially posed by the OFT enquiry, described by *The Times*' chief racing journalist as 'devastating' in its implications,[52] is the decision of the Court of Appeal in July 2005, *British Horseracing Board (BHB)* v. *William Hill*.[53] This case concerned the question whether William Hill, one of the 'big three' bookmakers, could lawfully use BHB's pre-race data that it had obtained from newspapers and an information service for subscribers that had themselves obtained it under licence from the BHB. None of these various sources had any right to sub-licence the database information they had purchased from BHB, nor did they purport to do so. It was the BHB's case that William Hill's use of its pre-race data infringed its rights under the Database Directive.

Directive 96/9/EC was adopted in 1996 and implemented in Great Britain in the Copyright and Rights in Databases Regulations 1997.[54] The 'database right' aims to protect, not the content, but the substantial qualitative or quantitative investment in the creation and maintenance of the database. It is a protection that lasts for 15 years from 1 January in the year following its completion. The investment contemplates not only the time and money in creating the database, but also the intellectual effort in obtaining, verifying or presenting its contents. Article 7(1) requires Member States to provide a right for the maker to prevent the extraction or re-utilisation of those contents. For this purpose the repeated extraction of even insubstantial parts of the database contents is unlawful if that repetition conflicts with the normal exploitation of the database, or unreasonably prejudices the maker's legitimate interests.

The matter was first heard in the High Court in 2001, where Laddie J. accepted the BHB's case and granted an injunction. William Hill appealed; the Court of Appeal was inclined to support the decision, but accepted its argument that the Directive was in a number of respects unclear and referred these to the European Court. The central question was whether the investment of time and money in gathering in and checking the contents of the BHB database amounted to an 'investment in the obtaining and verification of the contents of the database' in which the lists that the BHB created appear.[55] The Court ruled that they did not.

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52 *The Times*, 14 July 2005, p. 73.

53 [2005] EWCA Civ 863.

54 Council Directive (EC) 96/9 on the legal protection of databases O.J. 1996 L 77/20; Copyright and Rights in Databases Regulations 1997, SI 1997/ 3032.

55 The BHB database contains 'a huge amount of data accumulated over the years in the database, including the details of over one million horses' Jacob L.J. [2005] EWCA Civ 863 [6]. These details concern their owners and trainers, jockeys, fixture lists, course conditions, entries and runners. This information is made available to the broadcast

> 'Investment in the selection, for the purpose of organising horse racing, of the horses admitted to run in the race concerned relates to the creation of the data which make up the lists for those races which appear in the BHB database. It does not constitute investment in obtaining the contents of the database. It cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.'[56]

The racing industry's reaction to this ruling was one of massive dismay. The right to sell pre-race data lay at the centre of the BHB's planning. Its *Modernisation of British Racing* had persuaded OFT to reach its accommodation with the BHB about its role in the future of racing.[57] The government's response was to acknowledge that it would not be possible for the BHB to proceed with its plans, and accepted the recommendation of an independent review group that the Levy be extended beyond its scheduled termination in 2006 until 31 March 2009.[58]

Applying its ruling, the Court of Appeal rejected BHB's argument that the ECJ had misunderstood the factual basis of its claim. The flaw in its case was to rely on the process by which the BHB finally reached its officially published list. The purpose of the Directive was to protect the final database, not the process by which it was reached, and thus the investment in that process. What was protected was the unique information contained in the database whose nature had changed with the stamp of official approval.[59]

> 'The purpose of the protection of the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.'[60]

It may have been expected, but the Court of Appeal's 'brutal' decision threatens a period of severe financial and commercial disruption. There is no immediate

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media on the day of a race, and to bookmakers the day before. The database is therefore being constantly updated, at a reported cost of about M£4 a year.

56 Case C-203/02 [2005] RPC 234 [38].

57 See www.britishhorseracing.com/images_horseracing/media/The_Modernisation_of_British%20Racing.pdf

58 The review group is chaired by Lord Donoghue and comprises the BHB and the Levy Board. The Order extending the Levy until 2009 was made under Part 2 of the Horserace Betting and Olympic Lottery Act 2004. See HC Debates, vol. 432, col. 29WS (18 March 2005).

59 [2005] EWCA Civ 863 [28]-[30], Jacob L.J.

60 Case C-203/02 [2005] RPC 234) [31], relied on by Pill L.J. [2005] EWCA Civ 863 [47].

threat to racing, but it does threaten the BHB's own financial base.[61] In the longer term it shifts the balance of power to the bookmakers and the racecourses, which, in the absence of any new arrangements with the BHB,[62] will be able to strike their own deals for the sale of pre-race data. In this relationship it is the commercial power of the big three bookmakers that is likely to prove decisive in the negotiations with many small and vulnerable courses.[63]

The decision also creates potential problems for other organisations that enjoy a monopoly over the sale of match data, notably professional football. And as with horseracing, the loss of legal control over pre-match data implies disruption in its regulation. In their data licensing arrangements with betting operators, the football authorities include a code of practice covering integrity issues.[64] In some cases these licensing arrangements have ended and not been renewed. It may be that the vast majority of betting on sport in Britain is conducted lawfully, but there are concerns about the potential for the manipulation of the information on which bets may be placed, even where that information is managed by a credible organisation. Concerns about the use of inside information are particularly acute in the case of betting exchanges, dealt with below. The point to be made here is that absent such credible management, the opportunities for 'unfair' betting, as the Gambling Act aims to target, become both more frequent and less easy to proceed against. The government is concerned, and continues to explore the wider impact on sport of the EC database directive.[65]

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61 On the day following the Court's decision, *Attheraces*, the broadcasting consortium, with whom the BHB had made a 10-year agreement in 2001 to televise racing, sought an injunction to prevent the BHB from acting on its threat to stop the Press Association supplying its pre-race data to them. An interim injunction was granted. See Usher, T., 'Intellectual property rights and bookmakers', Association of British Bookmakers, www.abb.uk.com/index.cfm?thispage=press. The injunction was made final in late 2005.

62 The review group chaired by Lord Donoghue considered and reported in 2005 on three options: the longer term continuation of the Levy, a voluntary levy, or some new commercial arrangement. These options are under consultation at the time of writing; *The Times*, 11 January 2006, p. 104. At some cost, the BHB could invest sufficient additional 'organisational' sophistication that would bring the database within the scope of the Regulations, or that would amount to the author's 'own intellectual creation' for the purposes of the Copyright, Designs and Patents Act 1988.

63 The bookmakers' wish to ensure an uninterrupted supply of races on which to bet will favour the all-weather tracks, to the potential detriment of the variety of racing; *The Times*, 15 November 2005, p. 80.

64 DCMS has promoted 'Integrity in sports betting: a 10 point plan' whose three general principles are: 'to protect the integrity of betting on sport; to safeguard participants and consumers; and to develop relationships with sporting regulators, betting operators, statutory organisations and Government Departments'. www.culture.gov.uk/global/publications/archive_2005/.

65 T. Jowell MP, HC Debates, vol. 432, col. 146W (7 April 2005).

4.2 The Broader Picture

The judgment 'that the BHB could not exclusively exploit its most valuable asset undermines the blueprint for the new commercial reality in a post-levy world.'[66] It also seriously compromises the government's long-held intention to transfer responsibility for the funding of racing from public to private commercial arrangements. This intention extends to the abolition of the Tote, entailing the sale of its fixed odds and pool betting activities to the private sector. This, too, is a matter that attracts the attention of European law.[67]

The Horserace Betting and Olympic Lottery Act 2004 provides that, as a preliminary to its sale, the Tote's assets will be transferred to a company wholly owned by the Crown.[68] It is intended that the sale should be to a single private operator, a group of racing interests that calls itself the Racing Trust.[69] The government notified the European Commission in May 2004 of its plans for the sale of the Tote, and provided additional information in September. This concerned its valuation, ownership, the future relationship between the Tote and racing, the proposed exclusive licence, the conditions of the sale and the nature of the pool betting market. In March 2005 the government was asked to provide details of why it believed that any aid involved in the sale of the Tote would be compatible with the principles of free competition. The government also sought to place the sale of the Tote within the broader picture of the liberalisation of the gambling market in Britain that it was pursuing under the Gambling Act 2005. Evidently these various responses have not fully met the Commission's concerns,[70] and in June 2005 it announced that it would be opening a formal investigation into the sale under Article 88(2). An adverse decision would constitute a serious setback for the government's policy.

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66 Ashling O'Connor, *The Times* 16 November 2004, p. 75.

67 Another matter, which is not explored here, are the potential compliance issues with competition law arising from the statutory limits on the number of 'regional' (one), 'large' (eight) and (new) 'small' (eight) casinos (s. 175(1) of the Gambling Act 2005. Section 175(8) permits the Secretary of State to substitute other maximum limits. See HC Debates, vol. 426, col. 378W (4 November 2004).

68 This is because of the Tote's unusual legal status as a statutory corporation that no one actually owns.

69 This is not a trust in the legal sense. The 'Trust' would own the Tote and could, for example, sell it. The government would surely anticipate that by the use of clawback provisions to ensure that it shares in any early windfall from a sale.

70 It is understood that the government has valued the Tote for sale at M£200, whereas an open market sale, which would include its 450 betting shops could be worth twice that figure The content of the government's response will be released to the public domain, subject to commercial confidentiality, when the Commission has completed its investigation R. Caborn MP HC Debates, vol.434, col. 583W and 435, cols. 1059W and 1389W (8, 22 and 28 June 2005).

4.3 The Legality of Restrictions on Cross-Border Gambling Services

4.3.1 The Schindler *Case*

Schindler established the proposition that a Member State could employ non-discriminatory restrictive measures, justified on the grounds of social policy and to prevent fraud, to maintain prohibitions against gambling services provided to its nationals by an operator in another Member State. When that case was decided the British lottery market comprised a range of semi-private and local authority promoted lotteries, all subject to a strict legislative regime. This restricted lotteries to the activities of non-profit making organisations and was expressly designed to eliminate the potential for fraud, a feature that the European Court had specifically noted of the restrictions imposed by every Member State.[71]

This market was fundamentally altered with the enactment of the National Lottery etc Act 1993. During the preceding three decades government policy was one of close social regulation that had restricted the small-scale lottery market to essentially semi-private activities designed to benefit specific causes or groups. By contrast, the quite deliberate purpose behind the National Lottery was to establish a private sector monopoly whose surplus would purchase public goods: the 'good causes'. In view of this change, the UK's absolute prohibition on foreign lotteries could now be seen as an anti-competitive measure designed to protect the National Lottery's monopoly. The ECJ had considered and rejected the suggestion that because it permitted football pools, bingo, and small-scale lotteries whose promotion could equate to a large lottery, the UK's prohibition on large-scale lotteries was discriminatory. This was because these permitted forms differed 'in their objects, rules and methods of organisation' from those large-scale lotteries that had been established in Member States 'other than the United Kingdom *before the enactment of the [1993] Act*'.[72] This conclusion prompted the question whether *Schindler* applied only where the Member State prohibited all large lotteries, whatever their provenance within the EU. It was considered in *R* v. *Secretary of State for the Home Department ex p (1) the International Lottery in Liechtenstein Foundation and (2) Electronic Fundraising Co sub nom Millions2000* (the *Millions2000* case).[73] The High Court decided that *Schindler* was not so limited. Perhaps the key passages in the European Court's judgment read:[74]

> 'it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in the Member States. The

71 *Schindler*, *op. cit.*, para. 54.

72 *Schindler, op. cit.*, paras 47-52, 51, emphasis added.

73 [2001] LLR 356, [1999] 3 CMLR 304.

74 *Schindler, op. cit.*, paras 60-61.

> general tendency of the Member States is to restrict, or even prohibit, the practice of gambling to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.'

Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries were operated, the size of stakes, and the allocation of the profits they yield. In those circumstances it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

Following these observations, Moses J. considered that the UK retained the 'sufficient degree of latitude' to determine how best to protect lottery consumers and social interests more generally. The court noted that the regulatory requirements in Liechtenstein were not equivalent to those required of the licensed operator (Camelot) under the 1993 Act, and were inadequate to address the risks to those consumers that the UK government considered appropriate. Accordingly there was no breach of Article 49.

4.3.2 The Territorial Reach of the Gambling Act 2005

The Gambling Act limits the opportunities for operators lawfully to provide 'facilities for gambling', defined in section 5, either by way of export from or import into Great Britain. To understand these limitations, it is necessary, first, to recognise the structure of control created by the Act. The provision of gambling facilities is 'the fundamental concept' in the Act,[75] underpinning the offences in Parts 3 and 4, and the licensing requirements of Parts 5, 6 and 8. In essence, by section 33(1), any such provision is unlawful unless it is authorised by an operating licence or covered by a specific exception within the Act. It is not necessary for present purposes to detail the 10 operating licences specified by section 65(2),[76]

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75 Gambling Act, Explanatory Notes, *op. cit.*, para 38.

76 The operating licence licenses the supplier. In addition, persons performing management or operational functions must possess a personal licence (Part 6), and the premises must

or the six principal exceptions specified in section 33(2). Secondly, the provisions concerning the remote advertising of facilities targeted at persons in Great Britain (importation) have taken account of developments within the Internal Market since *Schindler* was decided. Finally, because lotteries are regulated both by way of operating licence and exemption, the Act's limitations in their case are effected differently to those dealing with all other gambling facilities.

4.3.2.1 Exporting Gambling Facilities

The Act makes provision for two cases in which an operator exports gambling facilities from Great Britain. By section 44 it is an offence if anyone does anything in Great Britain or uses remote gambling equipment situated there, for the purpose of inviting or enabling a person in a 'prohibited territory' to participate in remote gambling. 'Remote gambling' is defined in section 4(1) as 'gambling in which persons participate by means of 'remote communication'. Remote communication means the Internet, telephone, television, radio or 'any other kind of electronic or other technology for facilitating communication.' The phrase 'prohibited territory' is undefined. It is for the Secretary of State to specify by order what countries or places will be designated for this purpose. The holder of a general betting operating licence who invites players from outside Great Britain to bet over the internet will therefore commit an offence when the Act is fully in force if the Secretary of State has so designated the countries in which those players live.

It should be stressed that this provision is a reserve power, to enable the government to review and amend its policy to promote a market in remote gambling regulation to replace the 'unintended and erratic' impact of legislation affecting the Internet.[77] Mindful of that policy, the Secretary of State's decision will depend on how other countries respond to the global development of e-gambling.[78] Potential targets are countries that themselves permit unregulated sites to be maintained in their jurisdiction. But while the terms of section 44

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also be licensed (Part 8).

77 DCMS, *The Future Regulation of Remote Gambling, op. cit.,* para. 109. 'For instance, no on-line casino site has been able to be established lawfully in the United Kingdom, but residents here are free to play on overseas sites, and those sites can accept bets from here without breaking any British laws. In contrast, betting sites can be sited in Great Britain.' *Report of the Gaming Board for Great Britain 2004/05, op. cit.,* para. 1.18.

78 In reaching this decision the following factors are likely to be relevant: 'the development of the global gambling market; the laws which other countries establish to permit, constrain or prohibit the use of remote gambling; the practical measures employed by those countries to secure compliance with such laws; and the extent to which it is possible to reach international agreements about the cross-border use of the internet for gambling; Gambling Act, Explanatory Notes, *op. cit.* para 171.

might contemplate such extension, it is inconceivable that the government would put any Member State on the list.[79]

Notwithstanding the statement in section 33(1) of the general offence of providing facilities for gambling otherwise than sanctioned by the Act, section 33 does not apply to lotteries, which are wholly governed by Part 11. But the structure of control created there is the same. By sections 258 and 259 the promotion or facilitation of a lottery is unlawful unless the promoter or facilitator acts in accordance with the terms and conditions of an operating licence or it is an exempt lottery. Part 11 applies to anything done in Great Britain in relation to a lottery. But section 265 also provides that it has no application in cases where the only persons who become participants in it are outside Great Britain and there is no-one in Great Britain who possesses tickets with the intention of selling or supplying them to other people in Great Britain. A person 'facilitates' a lottery who, for example, prints its tickets. A British printer of lottery tickets for use elsewhere in the EU commits no offence if he reasonably believes that they would only be sold abroad (section 265(3)).

4.3.2.2 Importing Gambling Facilities

There are a number of provisions concerning the importation of gambling facilities into Great Britain, which can be taken to include advertising such facilties. In the case of non-remote gambling, section 36(2) provides that section 33 applies only if anything done in the course of the provision of the facilities is done in Great Britain. In that case it is irrelevant that the facilities are provided inside, outside, or partly inside and partly outside the United Kingdom. Section 36(1) also provides that it is irrelevant that the facilities are provided wholly or partly by means of remote communication. A person in Great Britain who did not hold a 'general betting operating licence' and who invited bets on information about Australian horse races would therefore commit an offence.

By contrast, an overseas site can accept bets from British players (remote gambling) but commits no offence in Great Britain. The Gaming Board regarded this and the other anomalies surrounding remote gambling as unsatisfactory,[80] and under the Act the overseas site will be amenble to extra-territorial British jurisdiction if it situates 'at least one piece of remote gambling equipment' in Great Britain (section 36(3)). The Act extends, for example, to a Maltese provider of remote gambling facilities if the provider has located in Great Britain equipment that stores information relating to a player's participation in the gambling. This is so whether or not the facilities are provided to people in Britain or elswhere in

79 As it would also be in the case of the USA; see Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill, op. cit.*, para 584.

80 *Report of the Gaming Board for Great Britain 2004/05, op. cit.*, para. 1.18.

the world, and is an offence that the government is likely to act against. In the absence of that 'one piece' no offence is committed. As is presently the case, the British player would commit no offence who played on a remote site, whether or not the provider was caught by section 36, as section 36(5) excludes his own personal 'equipment'.

Advertising gambling facilities is covered by Part 16. This provides that the Secretary of State may regulate the form, content, timing and location of any advertisements for gambling (section 328). Section 330 makes it an offence to advertise unlawful gambling, and section 331(1) provides that a person commits an offence who 'advertises foreign gambling other than a lottery.' As we have just seen, lotteries are regulated by Part 11. By section 259(2) a person 'facilitates' a lottery who 'advertises a specified lottery.' If the Schindlers were now to do no more than arrange for the advertisement of a foreign lottery in Great Britain they would commit no offence. There would be little point in doing so because no ticket for such a lottery could lawfully be sold to a person there. This is because foreign lotteries are not 'exempt' lotteries under the Act, and by section 98, no operating licence could be issued in respect of one. A person who did anything in Great Britain in relation to that unlawful lottery, for example, by advertising it, would commit an offence under section 259(2).[81]

By contrast with lotteries, it *is* an offence to do no more than advertise 'foreign gambling' in Great Britain. For this purpose, Part 16 first defines what is meant by that expression, and then distinguishes the manner in which it is advertised: remote and non-remote. Foreign gambling is gambling that either physically takes place in a non-EEA state, for example, a casino in the United States, or is gambling by remote means that is not regulated by the law of any EEA state.[82] Section 331(3) provides that Gibraltar shall be treated as an EEA state, which means that the gambling operators who are based there will be permitted to advertise in the United Kingdom, and the section gives power to the Secretary of State to specify other places and countries to be so treated. As in the case of section 44, the purpose is to facilitate e-gambling between states where it can be properly regulated in the country of origin.

The non-remote advertising of foreign gambling means physical advertisements such as flyers or posters. The Act here aims to address another of the anomalies concerning remote gambling. In this case, 'while it is illegal to operate online gaming from a British base, offshore operators are free to advertise their services

81 By section 330(1) it is an offence to advertise unlawful gambling. But neither does this section apply to 'anything done by way of promoting a lottery' (section 330(3)).

82 This is defined in section 353: 'A State which is a contracting party to the Agreement on the European Economic Areas signed at Oporto on 2nd May 1992 (as it has effect from time to time).'

in print and many have done so in newspapers and on billboards.'[83] Moreover, the content of such advertising can be objectionable, and the government was keen to remedy the absence of any regulatory leverage. Advertisers will therefore commit an offence where the advertising takes place wholly or partly in the United Kingdom.

The provisions concerning remote advertising are more complex, as they have to accommodate the requirements of the Internal Market. Remote advertising for the purposes of the offence in section 331 requires the advertisement to be targeted at persons in Great Britain. This comprises providing them with or sending a communication (whether or not this is 'remote communication' as defined by section 4(2)), or making data available to such persons. However, in broad terms, Part 16 (in particular sections 328 and 330) does not apply to remote advertising targeted by an advertiser in an EEA state at persons in Great Britain, whether by means of television or an information society service. In the case of television advertising, section 333 is intended to preclude the application of Part 16 to a broadcaster who is regulated by another EEA state. By section 333(5) Part 16 will only apply if the broadcaster is under the jurisdiction of the United Kingdom for the purposes of the TWF Directive,[84] or is not an EEA state. Similarly, Part 16 will only apply to advertising that constitutes an information society service where the provider is located in the United Kingdom for the purpose of the e-commerce Directive, has been notified that the conditions for derogation in Article 2(2) have been satisfied in relation to that provider, or is established in a non EEA state.[85]

4.3.3 The Gambelli *Case: Post* Schindler *Developments*

The principles established in *Schindler* inevitably filled the vacuum left by the European Council's 1992 decision that commercial gambling was unsuitable for Community legislation and according to the principle of subsidiarity that it was better regulated at the national level. Equally inevitable has been the sequence of challenges to them, as both operators and Member States have sought either to open or to restrict access to cross-border gambling markets. Until the *Gambelli* case those principles remained largely intact, both the Court and the Commission reiterating their integrity. 'The power to determine the extent

83 'This cannot be allowed to continue and the new legislation will at the same time open up this avenue of advertising for licensed British operators and close it down for non-EEA operators.' DCMS, *The Future Regulation of Remote Gambling, op. cit.,* para. 126. See also *Report of the Gaming Board for Great Britain 2004/05, op. cit.,* para. 1.22.

84 Directive 89/552/EEC; see above section 2.

85 Section 333(6)-(8). Directive 2000/31/EC; and see above section 2. In the case both of television and information society services, at least one piece of the remote gambling equipment must be situated in Great Britain (section 333(9)).

of the protection to be afforded by a Member state on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61d of the *Schindler* judgment.'[86] In answer to a question in the European Parliament in 2000 concerning the regulation of gaming arcades, the Commission confirmed that the public interest considerations implicit in national regulation designed to combat crime and fraud were compatible with the principle of the freedom to provide services. This was so notwithstanding that such regulation prevented some economic operators from gaining access to these services.[87]

By contrast, the *Gambelli* case appeared to disturb what from the operators' perspective, is the protectionist tenor in these decisions.[88] Gambelli and 137 other defendants operated offices in Italy where they collected sports bets and transferred them via the Internet to the British bookmaker Stanley Leisure. Because only state-licensed undertakings could offer sports betting, criminal proceedings were initiated against the defendants for taking unlawful bets. Their defence was that the Italian legislation infringed the principles of freedom of establishment and of the free movement of services. The Italian court referred the matter to the European Court.

The Advocate General's opinion that the Italian state-licensed monopoly did not act to control or limit gambling, but to protect the state's interest in generating income prompted considerable speculation about the imminent demise of state-licensed monopolies and the beginning of a liberalised European gambling market. Adopting his opinion the Court did open the possibility that a Member State could not restrict a licensed operator in another from supplying cross-border gambling facilities,[89] at least where the restriction was based on the country of destination's own financial interests. But in simultaneously reinforcing the

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86 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd.* v. *Kihlakunnansyyttäjä, Suomen Valtio* [1999] ECR I-6067, para 35. In the *Zenatti* case the Court held that the reasoning in *Läärä* and *Schindler* applied also to multiple operator (sport) gaming environments where the government keeps control over the operators and the (sport) games, and that the benefits are not used for private enrichment. The Court also confirmed that the raising of money for good causes, or for the State, cannot in itself justify a restrictive policy. Case C-67/98, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289.

87 Written Question E-2275/99 by Vittorio Sgarbi (PPE-DE) to the Commission (13 December 1999) O.J. 2000 C225E/83.

88 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

89 On freedom of establishment, the Court found that in so far as the Italian rules governing invitations to tender 'make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction'; *op. cit.*, para. 48.

basic principle of national regulation, the Court also confirmed both in general and particular terms the conditions under which restrictions could be imposed that would not offend EU law. The following sections analyse those conditions of negative integration with particular reference to the British market.[90]

4.3.4 General Conditions Affecting National Restrictions

National restrictions cannot be justified for fiscal reasons. The National Lottery and the horserace betting levy finance social activities through the specific taxation of gambling facilities. But such restrictions as are imposed by the 1993 and the 2005 Acts on who can be licensed to provide these facilities may be regarded, in the Court's words, as only 'an incidental beneficial consequence and not the real justification for the restrictive policy adopted.' Put more directly, 'the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 and does not constitute a matter of overriding general interest' that would justify restrictions on operators from other member states.[91] From a UK perspective, that justification is to be found in the statutory duties imposed on the National Lottery and Gambling Commissions to protect consumers, to prevent fraud and to minimise participation by vulnerable persons, notably children. These duties are discussed in more detail later.

Of particular interest is the Court's view that restrictions must 'reflect a concern to bring about a genuine diminution of gambling opportunities.'[92] Public policy concerns for limiting the participation of foreign undertakings in the national gambling market cannot be invoked by Member States if they themselves encourage consumers to participate in gambling.[93] By contrast with its earlier policy concerning lotteries, the government's intention for the National

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90 On the decision's wider impact within the EU, see Verbiest, T., *'Remote gambling: the EU legal framework'*, and Vlaemminck, P., *'Where does Europe want to end: the Gambling story.'* One consequence of this uncertainty is the Study of Gambling Services in the Internal Market of the European Union that was commissioned by the Services Unit II of the Directorate General for the Internal Market of the European Commission. Its overall objective is to assess whether each of the existing barriers imposed by the laws of the Member States to restrict free movement of gambling services in the Internal Market could be held to be justifiable according to existing principles of European Law. See Sychold, M., *'Study of Gambling Services in the Internal Market of the European Union: one aspect of current European Developments'*, published in April 2006. All three papers were given at the European Association of Gambling's *6th European Conference on Gambling Studies and Policy Issues* (Malmo, Sweden, 2005); www.easg.org/.

91 *Gambelli*, *op. cit.*, para 61.

92 *Gambelli*, *op. cit.*, para 69.

93 The national court 'also considers that it cannot ignore the extent of the apparent discrepancy between the national legislation severely restricting the acceptance of bets by foreign Community undertakings ... and the considerable expansion of betting and

Lottery was, as noted earlier, precisely to give the British public the opportunity to engage in a lottery capable of delivering 'life changing' jackpots. There was also a strong element of competition with existing European state lotteries: 'the general public's desire to play the lottery will still be satisfied – eventually by playing foreign lotteries, whose sole purpose is to improve the quality of life of the citizens of other countries.'[94] Since November 1994 the Lottery has become a normal feature of everyday life. This process has been massively aided by the extensive advertising that the Lottery is permitted, in contrast with (and to the irritation of) the rest of the commercial gambling sector. Prime among its media exposure are the bi-weekly programmes on BBC television, a facility that remains contentious.

In addition to its vigorous advertising, Camelot regularly launches new lottery products. A decade ago the National Lottery comprised one weekly online game (the 6/49 *Lotto* game) and a variety of scratchcard games under the collective banner, *Instants*. In 2005 there were five 'domestic' on-line games drawn bi-weekly, together with *EuroMillions*, launched in February 2004, which, in addition to the UK, comprised eight participating countries by October that year. *Scratchcards* (renamed from *Instants* in 2003) is governed by a class licence, as is the new group of Interactive Instant Win Games (IIWGs), launched in 2004. Many of these games can now be played by mobile phone.[95] All of these innovations are designed to respond to changes in the market for lottery products, partly to counter lottery fatigue and partly to maintain the Lottery's competitive position as against other gambling products. In these respects the National Lottery resembles the Advocate General's description in *Gambelli* of state monopolies behaving much like any private sector economic actor. Unlike them, the restrictions in the Gambling Act on the promotion of lotteries in Great Britain are not intended to reduce the *quantity* of gambling opportunities, but to ensure their *quality*. Thus when *EuroMillions* was expanded to include six new countries in addition to the original three (France, Spain and the UK), the NLC required amendments to the Lottery Operators' Agreement, taking into consideration, for example, player protection issues and game procedures. As

gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues'; *Gambelli, op. cit.*, para. 22.

94 K. Baker MP (Secretary of State for the Home Department) HC Debates, vol. 217, col. 713 (25 January 1993). The public's desire was never demonstrated in the accompanying White Paper.

95 See generally National Lottery Commission, *Regulating the National Lottery, op. cit.* 'Class' licences mean that Camelot does not have to seek the Commission's approval for new games that fall within their agreed structure and conditions. This is bureaucratically efficient, as well as enabling Camelot to respond quickly to demand.

we shall see later, these are central to the Commission's regulatory oversight over Camelot's activities.

They are also central to the work of the Gambling Commission. As noted, it is the government's intention to remove barriers to entry to the commercial gambling market and within a robust regulatory regime, to encourage competition for the gambling pound. Within this regime it will be possible for operators based elsewhere in the EU to obtain remote gambling licences. This is not reducing the quantity of gambling opportunities, but so far as the Act disqualifies some from other Member States from providing them, it does so to ensure that the regulatory imperatives are met.

Substantive justification for national restrictions may also be grounded on 'moral, religious, and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting.' The prevention of financially harmful consequences for the gambler has been one of the principles underlying the quality controls that have been a feature of the regulatory regimes that have been in existence for the past forty years. These generally seek to eliminate or to exclude the financially rapacious operator from the market, and, more particularly, notably in casino gaming, to impose conditions on players' access to credit. These quality controls will continue under the Gambling Act, and indeed have been reinforced, not least because some operators who previously enjoyed a lighter regulatory touch, on- and off-course bookmakers, will be subject to the same levels of regulation as all others. So far as moral considerations might be relevant, it was most emphatically not the British government's wish 'to revive any moral objection to an activity that 'has become an everyday part of the way in which millions of people choose to spend their leisure.'[96] The central question is how best to achieve regulatory discipline and a degree of competition that gives players opportunities to gamble but without their gambling becoming dysfunctional. This discipline is intended to meet the Act's three underlying objectives: 'to protect children and the vulnerable, to ensure that gambling is conducted in a fair and open way, and to keep gambling in this country crime-free.'[97]

Finally, we should note that the Court requires that there must be proportionality in the national restrictions that are imposed on the provision of gambling services. In as much as they are based on the particular grounds that is has approved, the restrictions must be suitable for achieving their objectives, and must serve

96 DCMS, *Draft Gambling Bill: The Policy* (2003) Cm 6014-Iv, Foreword and para. 5.11. Such factors continue to play a part in the debate on the extent to which the market should be free to determine the supply of gambling facilities. See Joint Committee on the Draft Gambling Bill, *Draft Gambling Bill, op. cit.*, Volume II, Evidence DGB 9, 13, 30 and 45, and T. Jowell MP, HC Debates, vol. 426, col. 27 (1 November 2004).

97 T. Jowell MP, HC Debates, vol. 426, col. 26 (1 November 2004).

to limit betting activities in a 'consistent and systematic manner'.[98] The UK is well placed to argue that its restrictions, which apply equally to domestic and foreign operators, and are therefore non-discriminatory, meet this test.

4.3.5 Particular Conditions Affecting National Restrictions

In broad terms, the UK government's gambling policy comprises three elements: to maintain the integrity of the National Lottery's competitive position, to promote competition in the rest of the commercial sector, and to create a market in e-gambling regulation. It can justify the restrictions that apply to operators based in other Member States (or anywhere else) on the ground that they set standards that aim to ensure the quality of the product. Where other Member States' regimes are less robust, it is justified in maintaining an exclusionary position as against operators located there. For British operators seeking access to its market, a Member State would have to show that the legitimate interests that it seeks to protect, for example, concerning consumer protection or public order, were not already protected by provisions applicable to them under the country of origin's law. Their case is that as they have to date been subject to a demanding regime which will become more so when the 2005 Act is fully in force, no Member State can justifiably object to them.[99] The regime is therefore simultaneously the key to British operators' supply of cross-border gambling services to other Member States and the lock that the UK government can exert against others that are less robust.

The particular conditions discussed in this final section may be viewed from one of two standpoints, depending on the effect of the national restriction on the freedom to provide services. Where it discriminates between the nationals and non-nationals of the regulating State it may be justified if it meets one of the exceptional grounds set out in Article 46: public policy, public security or public health. Where it does not expressly so discriminate, but nevertheless does in fact restrict the provision of services by non-nationals, EU law requires that restriction to be objectively justifiable if it is not to contravene Article 49. The starting point for the four-stage test laid in the *van Binsbergen* case is that the restriction (measure) gives effect to a legitimate aim.[100] This aim can be conceived in similar terms to those exemplified by Article 46, as addressing such matters as

98 *Gambelli*, *op. cit.*, para 67.

99 In *Gambelli* the Court found that *Stanley Leisure*, the British bookmaker involved with the case, 'is subject to rigorous controls in relation to the legality of its activities'; *op. cit.*, para. 12. See the case argued by RGA, www.rga.eu.com.

100 Case 33/74, *Johannes Henricus Maria van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] ECR 1299. See Littler, A., *Has the ECJ's Jurisprudence in the Field of Gambling Become More Restrictive When Applying the Principle of Proportionality?*, in this volume.

consumer protection, combating crime, fraud, money laundering, and preventing problem gambling and its social consequences. The following sections will consider key elements of these matters as they apply in Great Britain.

4.3.5.1 Consumer Protection

Consumer protection has been a central element in particular in the case of casino gaming since the current regime was established in 1968. Although not expressed in quite that language, the policy repeatedly figures in past Home Office and Gaming Board reports. 'Players should know what to expect and be confident that they will get it and not be exploited.'[101] In the Gambling Act this becomes the second of its licensing objectives: that of 'ensuring that gambling is conducted in a fair and open way'. In its Report for 2004/05 the Gaming Board commented that this 'fully familiar' objective 'will cause no surprise or dismay in the regulated industry. They recognise that ... fair and open gambling is intrinsically desirable as well as necessary to maintain the industry's reputation and prosperity.' [102]

A central tenet of modern consumer protection regimes is the promotion of the 'informed consumer' who exercises choices based, for example, on mandatory information disclosure rules. In the present context this means the publication of 'easily understandable information [that] is made available by operators to players about, for example: the rules of the game, the probability of losing or winning, and the terms and conditions on which business is conducted.'[103] Historically, a number of the consumer protection controls that have operated within the casino market are of significance in that their purpose has not been to *enhance*, but to *eliminate* choice for the player. But many of them are intended to *inform* choice. On this view, gamblers who fail to inform themselves of the conditions and consequences of their betting preferences will command little sympathy if they later complain. Implicit in the Gambling Act is a recognition

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101 *Report of the Gaming Board for Great Britain 2004/05, op. cit.,* Appendix A4. This statement figures in all of the Board's previous Reports.

102 *Report of the Gaming Board for Great Britain 2004/05, op. cit.,* p. 5.

103 Gambling Commission, *Statement of Principles on Licensing and Regulation: Consultation Document* (2005) para 1.6. 'One of the core elements of good gambling regulation is player protection. That applies as much to remote gambling as elsewhere. Indeed, given the relative lack of transparency of remote gambling operations, it is must be even more of a precondition. An underlying principle of the planned gambling reforms is informed adult choice. In online gaming for instance that means that information is made available to the player and the information must be as accurate as possible. That includes rules of play, game representation, and rates of return.' DCMS, *The Future Regulation of Remote Gambling, op. cit.,* paras. 33-34. Compare the industry funded Australian Gambling Council, *Informed Choice in Gambling* (2005), www.austgamingcouncil.org.au/PDF/AGC112005.pdf.

that an 'appropriate degree of protection for consumers' is based on a balance between the accurate and transparent publication of the rules of the game, and the responsibility that consumers bear for their gambling choices.[104]

Under the Act, supply-side controls will largely rely on the conditions that will attach to the operating and personal licences that are required for the lawful provision of gambling facilities, and on the terms of the Commission's Codes of Practice, notably that specified in section 24(2)(a).[105] Similar controls are to be found in the current regime, dealing with such matters as advertising, the publication of the results of events and competitions on which commercial gambling takes place, and strict compliance with the regulations governing gambling machines, equipment and software. Having far more extensive powers than the Gaming Board, the Commission will be able to investigate breaches and, where appropriate, apply sanctions or use its powers to initiate a prosecution (sections 117-121).[106] Underlying these measures is the powerful reinforcement in sections 69-71 of those quality controls that have been a central feature of the regime that has governed the regulation of casino gaming since 1970. Applicants for operating licences who cannot satisfy the Commission as to their integrity, competence and financial circumstances are unlikely to regard consumer protection as a high priority.

Two innovations contained in the Act are the creation of an offence of 'cheating' and the Commission's power to void bets, both of which may be seen as consumer protection measures. A person, who may include a licensed operator or one of its employees, commits an offence if he 'cheats at gambling' or 'does anything for the purpose of enabling or assisting another person to cheat at gambling.' Section 42 provides that cheating may 'consist of actual or attempted deception or interference' in connection with the process by which gambling is conducted. This would catch a casino dealer who deceived a player at the blackjack table in order to benefit another. And as the offence applies to the National Lottery, a retailer who interfered with a winning ticket so as to deny the winner but to return it to Camelot as such, and pocketing the prize would commit the offence.[107] By sections 336-338 the Commission has power

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104 The quoted phrase is taken from section 5 of the Financial Services and Markets Act 2000, which regulates spread betting and is a striking parallel. The section provides that in securing this statutory objective the regulator must take into consideration, among other factors, 'the general principle that consumers should take responsibility for their decisions.'

105 This requires the Commission to issue a code describing the arrangements an operator should make to ensure that gambling is conducted 'in a fair and open way'. See further section 4.3.5.3.

106 Gambling Commission, *op. cit.*, para 1.6.

107 Section 15(2)(a). Section 42 does not define 'cheat' whose meaning the Explanatory Notes indicate will take its 'normal, everyday meaning', *op. cit.* para. 163. This reflects

to void bets that are 'substantially unfair'. Unfairness may be the result of information asymmetry that has been deliberately engineered, for example in betting exchanges. We consider this further in section 4.3.5.2.

Gaming and wagering contracts that suffer from no legal objection other than their nature have since 1845 been unenforceable at law.[108] One of the Gambling Act's most interesting features is the repeal in section 334 of this longstanding disability. A competitive market is one in which, on the assumption that is operating efficiently, suppliers and consumers ought to be able to rely on the law to enforce the decisions that they have made. Under the new regime, the consequences of these decisions will assume legal force, and might therefore be regarded as a demand-side control that balances the responsibilities on operators against those of their consumers to inform themselves and to take avoiding action where it would be prudent to do so.

Consumer protection figures prominently in the regulation of the National Lottery. Section 4 of the 1993 Act obliges both the regulator and the Secretary of State to ensure that the Lottery is conducted properly and that the interests of its participants are protected. These two duties are lexically prior to the third duty, the maximisation of its proceeds. 'We are committed to maintaining our leadership in the consumer protection field and to setting a high standard of consumer protection as new lottery products develop.' This finds expression in a number of initiatives concerning the publication of game information and managing player complaints.[109] Camelot's licence conditions require that it take steps in respect of these matters. These are contained in its Player's Guide, which deals with the provision of game information at points of sale, player eligibility, ticket availability, retailer services, prize claims and privacy. A particularly important feature is its development of a Game Design protocol, by

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the government's wish that, in prosecuting and punishing cheats, the Commission and the courts will be able 'to deal with the full range of culpable conduct'; HC Debates, vol. 432, col. 107WS (4 April 2005). The section provides that it is immaterial whether the person is successful; an inept cheat will also commit the offence.

108 This therefore includes all gaming contracts and all bets with bookmakers, on and off-course. The Gaming Act 1968 as amended provided that cheques given in exchange for gaming tokens, or as a single consolidating cheque given in exchange for a number of others given during the previous period of gaming were enforceable. By contrast, pool betting and totalisator transactions are not regarded in law as 'wagers', since the individual players are not betting against one another, but for a share of a money prize to which they all contribute.

109 National Lottery Commission, *Annual Report and Accounts 2001/02* (2002 HC 977), pp. 21-22, *Regulating the National Lottery, op. cit.*, p. 19, and *Information Note 1: Consumer Protection*.

which Camelot addresses such consumer protection matters as game design, frequency and process.[110]

4.3.5.2 Combating Crime, Fraud and Money Laundering

Like consumer protection, these have long been regulatory objectives for the casino gaming market. 'Gambling is an activity which involves the circulation of large sums of money. In any type of play, for instance in a casino or on a gaming machine, the amount of money which passes backwards and forwards between the player and the operator can be many times the initial stake which is gambled. With so much movement of money, gambling, if not properly controlled is susceptible to fraud, money-laundering and other criminal activity and malpractice.'[111] Under the 2005 Act the first licensing objective is 'preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime.'[112]

This objective is to be met, again like consumer protection, first by the application of the licensing procedures contained in Part 5 of the Act. As with the Gaming Board, these give the Commission extensive powers 'to maintain rigorous pre-entry screening to ensure that those offering facilities for gambling or working in the industry are honest and competent, and to examine the corporate control structures of operators to enable it to identify and satisfy itself of the integrity of controllers and others relevant to the operation of the gambling.' Thereafter the Commission will require operators to comply with its Codes of Practice, compliance that by sections 116-121 it may review, and if found wanting, punish, for example by the suspension or revocation of the licence, or by a financial penalty. There can be a number of victims of these white-collar crimes: the individual player, the operator, and the state, all of whom may suffer financial loss. Lotteries are notoriously susceptible to criminal intervention, and their history is littered with fraud and defalcation. A problem peculiar to the British market has been the structural difficulties associated with separating lawful competitions from unlawful lotteries, which in practice often closely resemble one another. The Act aims to address these definitional issues,[113] but the general offences that it

110 See Camelot, *Social Report Summary 2005*, p.5.

111 *Report of the Gaming Board for Great Britain 2004/05, op. cit.*, Appendix A2. Similar statements figure in all of the Board's previous Reports.

112 I do not deal with the strand of the first licensing objective that relates to preventing gambling from being a source of disorder. This is a matter of local law enforcement and it is for the licensing authorities to determine what conditions they will impose on premises licences. But the operator's breach of those conditions does raise regulatory issues, and Commission can consider whether the operating licence should be reviewed to confirm that the operator continues to be suitable to offer facilities for gambling.

113 Section 11 and Schedule 1.

creates also apply more directly to lottery scams and the like. On the matter of its general prosecution policy, the Commission's initial view is that its primary focus 'should be on activities carried out by those who are facilitating illegal gambling; on the measures that operators can take to combat those who may be using gambling as a means of disposing of illegally-obtained assets; and on crimes that directly affect other punters' chances.'[114]

A particularly good example of the last of these concerns the integrity of Internet and telephone betting on horse races via betting exchanges. These exchanges enable individuals to bet against one another through facilities offered by the exchange operator.[115] For this service the operator extracts a commission from the winner, leaving the two bettors to settle. Designated 'betting intermediaries' by section 13(1) of the Act, they will, like bookmakers, be subject to regulation by the Gambling Commission. Online betting lends itself to the manipulation of the odds, especially where a bettor has access to information that is not publicly available. That may be derived from a variety of sources, and where that includes trainers and jockeys, is obtained in breach of the Jockey Club's rules. Betting exchanges facilitate insider trading, though unlike the Stock Exchange, it is not illegal. Nevertheless, they exacerbate racing's vulnerability to corrupt practice. As in the past the integrity of horse racing continues to be threatened by race fixing (such as doping, 'non-triers', pulling the horse, or running it over a less favourable line) and corruption. A series of controversial races and of betting coups in March 2004 prompted widespread allegations of corrupt practice between jockeys, trainers, and owners, and the use of betting exchanges. These controversies extended into 2005.[116]

The Jockey Club's Regulatory Board has sought to combat the use of betting exchanges by those whom it licences.[117] Of equal importance is Commission's potential role in prosecuting 'cheats'. 'Cheating at gambling' can include those who supply insufficient, false or misleading information in relation to a race, or who believed or ought to have believed that the race to which the bet related

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114 Gambling Commission, *op. cit.,* p. 04.

115 See for example Betfair, www.betfair.com.

116 *The Times*, 23 March 2005, p. 27; 23 June 2005, p. 77.

117 The Jockey Club has established an independent Horseracing Regulatory Authority which will have responsibility for the regulation of horseracing. At the time of writing, it has established a Panel of Enquiry into the use of inside information. www.thejockeyclub.co.uk/clean/cleanframeset.html. The High Court recently confirmed the Court of Appeal's earlier decision in *R* v. *Disciplinary Committee of the Jockey Club, ex p the Aga Khan* [1993] 1 WLR 909, that the Club is not amenable to judicial review. This is so notwithstanding that its disciplinary functions may seriously affect a jockey's livelihood. In *William Mullins* v. *Board of Appeal of the Jockey Club* [2005] EWHC 2197 (Admin) the court rejected the argument that the Club's position as a private body having regulatory powers had changed following the commencement of the Human Rights Act 1998.

was or would be conducted in contravention of industry rules (section 336(4)). In this case, it is the Jockey Club's Rules of Racing. The Commission's powers to investigate and prosecute need to be seen alongside those exercised by sports regulators,[118] and touch also on the exercise of its powers to void bets. But on the matter of either this licensing objective or that relating to consumer protection, whether this *ex post facto* action is likely to remedy the damage that insider trading does to the integrity of horseracing and betting is open to question. Nor is it only British punters who are potential victims. Those elsewhere in the EU who bet on British betting exchanges might similarly be swindled.

In the 1990s the Gaming Board agreed a Code of Practice with the industry which was amended in 2003 to give effect to the Second EU Money Laundering Directive.[119] This obliges operators to identify players who purchase more that £2500 of gambling tokens.[120] In addition to the identification of members, the 2003 Regulations now require casino operators to verify the identification of members' guests.[121] This requirement will be carried forward into licence conditions and Codes imposed by the Commission. Even in their absence, operators have responsibilities under the Proceeds of Crime Act 2002 to report suspicious transactions. The duties on operators under that Act will be no different from that on other businesses, but the Commission will consider whether gambling offers particular opportunities for disposing of the proceeds of crime that, to meet its objectives, the Commission should take steps to reduce. Like other matters concerning its principled approach, the Commission is consulting as to the nature of those steps. In general, money laundering has not been a problem in the British market. On the contrary, larger operators, for example, those in the Remote Gambling Association, are confident that by reason of the auditing and banking systems that apply to them, remote gambling provided by the larger operators is one of the least attractive routes for money launderers to consider.

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118 Where the operator is the victim of a cheat, the Commission might expect operators themselves to take a robust line and, where practicable, make it clear that cheats will be prosecuted by them, in the same way that some retailers deal with shoplifters. 'Equally, in relation to the conduct of sports people and of sporting events, we are clear that the prime responsibility for regulation must rest with the appropriate sporting body and not with the Gambling Commission.' Gambling Commission, *op. cit.*, p. 05.

119 Directive 2001/97/EC on the prevention of the use of the financial system for the purpose of money laundering, O.J. 2001 L 344/76.

120 Report of the Gaming Board for Great Britain 2004/05, *op. cit.*, para. 2.32, At the time of writing the *Code of Practice relating to the Prevention and Detection of Money Laundering in Casinos* was being revised in anticipation of the Third Directive.

121 Financial Services (Money Laundering) Regulations 2003, SI 2003 No 3075.

They therefore argue that there is no justification in Member States' objections that are based on this ground.[122]

4.3.5.3 Social Responsibility: Problem Gambling and Gambling by Children

> '[F]or the first time, anybody who is licensed to run gambling premises will be obliged to pursue social responsibility as a condition of their operating licence.'[123]

The Court's third approved justification is based on the ground of **public health**, of which preventing problem gambling and the protection of vulnerable players are prime instances. Both can be subsumed within the broad notion of the socially responsible provision of gambling facilities, a notion to which, for the very good reason that it is in their commercial self-interest, British operators now subscribe. This section considers briefly the background to the statutory recognition that social responsibility has acquired before dealing with its application to children and to problem gamblers.

The National Lottery etc Act was the first occasion on which a body regulating gambling was given any protective duty concerning the gambler. The Gaming Board had informally encouraged the industry to accept the notion of the socially responsible provision of gambling facilities, but had no statutory role in this respect. In part because of the Board's influence, British operators shifted during the 1990s from a position of denying that there was a 'problem' with the increasingly deregulated gambling market, save for a very few gamblers, to an acceptance that their practices must cater for those whose gambling has become dysfunctional. The operators' acceptance of responsibility for their products became, in effect, part of the price of the government's promotion of the changes introduced by the 2005 Act. The price assumed literal form in the Gambling Industry Charitable Trust (GICT), set up in response to the *Gambling Review*'s recommendation that the industry voluntarily contribute at least M£3 over three years for the purpose of conducting research into and supporting the treatment of problem gambling.[124] GICT is now the Responsibility in Gambling

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122 RGA., *Fair, Honest and Safe : the case for cross border gambling in the EU* (March 2005), at para. 12.6. Available at www.argo.org.uk/shopping/images/Fair%20Honest%20Safe.pdf .

123 T. Jowell MP, HC Debates, vol. 426, col. 30 (1 November 2004).

124 The government also expects that in exchange for creating the right conditions for operators to thrive in a regulated on-line gambling market, that they will adopt a co-operative approach. 'Ideally this will manifest itself in a shared commitment to the principles of good regulation, but as a minimum it must expect compliance with licence conditions and the adoption of socially responsible practices.' DCMS, *The Future Regulation of Remote Gambling, op. cit.*, para. 16.

Trust (RIGT).[125] For its part, the government has acted on the *Gambling Review*'s connected recommendation, that the Act contain a reserve power to impose a statutory levy.[126]

As noted earlier, section 24 of the Gambling Act requires the Commission to issue codes of practice about the manner in which facilities for gambling are provided. One such code must describe the arrangements that operators are to make for the purpose of:

- ensuring that gambling is conducted in a fair and open way;
- protecting children and other vulnerable persons from being harmed or exploited by gambling, and;
- making assistance available to persons who are or may be affected by problems related to gambling.

The Act is explicit both about operators' compliance with such codes and the statutory recognition now given to the socially responsible provision of gambling facilities. Section 82(1) provides that 'an operating licence shall by virtue of this section be subject to the condition that the licensee ensures compliance with any relevant social responsibility provision of a code of practice issued under section 24.' The importance of this obligation cannot be understated. Failure to comply will be grounds for review and possible sanction. Social responsibility is, as the Secretary of State observed, 'the key principle, the test of each element of the Bill.'[127] It takes the Gambling Commission into new territory where it may well proceed cautiously, at least initially. And for this reason too, although it exerts regulatory control over them, it will be heavily reliant on operators both for advice about how to design new responses to gambling problems and for their implementation. This reliance is already evident. The Commission has made it clear that it intends to rely on RIGT for the delivery of a number of key policies. The Commission will carry out regular studies to measure the prevalence of gambling and problem gambling in Great Britain, but it conceives its research role more narrowly than the Trust, which has three strands to its work: research, treatment and education. In relation to the third, the Commission has acknowledged its role in making information available to the public about gambling, but

125 See www.rigt.org.uk/about.asp. The Trust has established an independent Research Panel, of which the author is a member. Views expressed in this paper are entirely personal.

126 Section 123. The levy would be used, *inter alia*, to provide financial assistance for projects related to addiction to gambling and other forms of harm or exploitation associated with gambling. This continuation of hypothecated revenues in gambling requires Treasury consent (section 123(3)).

127 T. Jowell MP, HC Debates, vol. 426, cols. 26 and 30 (1 November 2004).

it does not consider that this should be further developed into a particular role in educating children about gambling. 'If there is work to be done in this area, it is our current view that the lead should rest with the RIGT.' [128]

Many elements in the gambling industry have publicly endorsed their own commitment to the Commission's agenda, and thereby their social responsibility credentials,[129] though some might question the wisdom of an arrangement that so conspicuously relies on those who are to be regulated.[130] One obvious difficulty is the recurring problems with the financing of this voluntary scheme, which largely centre on operators' differing perceptions of their products' contribution to dysfunctional play and on the absence of any formal leverage against free riders and the unwilling. In its final Report, the Gaming Board applauded what the industry had achieved through the Trust, such as providing annual grants in excess of M£1 to the two main charities (GamCare and the Gordon House Association). And in an unusual public display of sensitivity to the funding

128 Gambling Commission, *op. cit.,* p. 07. The first of the prevalence studies is scheduled to commence in mid 2006. The intention is to update the 1999 survey; Sproston *et al., op. cit.*

129 BACTA, the trade association representing the gaming machine market, which a decade ago was suspicious of, if not hostile to, the notion of social responsibility, has introduced a new accreditation scheme for its members. www.bacta.org.uk/. RGA's objectives include: 'To encourage social responsibility within the betting and gaming industry, effected through various means including support for charities and initiatives to help those who have gambling problems.' And the Association of British Bookmakers has a similar commitment: www.abb.uk.com/index.cfm?thispage=social.

130 Miers, *op. cit.* chapter 16.2.1(c). A rather different question concerns the underlying justification for imposing a levy on operators who are behaving as any licensed organisation does in pursuit of commercial objectives that the government has consciously sanctioned. An analogy is the proposed levy on premises licensed under the Licensing Act 2003 to sell alcohol at any time of the day or night to pay for the costs incurred by local communities forced to tolerate and clear up after the drunks who 'fall out of those premises to cause upset, fight, vomit and urinate on the street'. Campbell, D., 'Alcohol related disorder and the problem of social cost' [2005] *Public Law* 749-63, 758. The proposed levy is, Campbell argues, an unjustifiable application of welfare economics. Consider his argument, substituting 'gambling' for 'alcohol'. 'In the abstract, some idea of what is involved in this justification can be given. If one can identify the number of incidents of alcohol-related disorder, if one can assess in monetary terms the harm these incidents cause, if one can assess the extent to which alcohol caused these incidents and so caused the harm, and if one can assess in monetary terms the costs of avoiding or dealing with these incidents; one can then make a cost-benefit decision to take whatever measures one decides to take. If one decides upon the mandatory contribution, if one can levy the contribution in proportion to the extent that the business levied caused the harm, then the contribution might have ... justification. [But] each step of this justification involves such considerable or insuperable difficulties as to make [it], taken at face value, a sort of a joke.' *Ibid.*, p. 760.

problems for those whom it regulated, the Board noted that 'those who have contributed are concerned about the load that might fall on them because others refuse to do so under a voluntary scheme.' It added its hope that the government would not need to resort to the levy.[131] Given the Commission's declared reliance on RIGT, the tensions that would inevitably accompany the introduction of the levy can be guaranteed to present obstacles to the completion of the Trust's own agenda.

Children

The Gambling Act is explicit about the safeguards that operators must observe with regard to gambling by children. With limited exceptions, the intention is that children and young people should not be permitted to gamble and should be prevented from entering those gambling premises which are adult only environments. At the general level, the first strand of the third licensing objective is to protect children 'from being harmed or exploited by gambling.' More particularly, Part 4 contains a number of provisions regulating the extent to which children (those under 16 years of age) and young persons (16-17) may become involved in gambling, whether in terms of participation, entry into licensed premises, or employment. Section 46 provides that it will be a criminal offence to invite, cause or permit a child or young person to gamble. There are some exceptions to this, notably that young persons may lawfully participate in lotteries, including the National Lottery, and the football pools.

There is a substantial literature on this matter, which continues to generate debate and, for some, disquiet. It is not necessary to rehearse the many contentious issues here, although one merits brief mention. This concerns children's access to what the Act categorises as Category D gaming machines, those with the lowest staking and prize values. They have traditionally been sited in a variety of licensed gambling premises, but also in non-gambling venues, such as fish and chip shops and minicab offices. Many critics have argued that their widespread availability is damaging to children, and urged the government to limit them to designated gambling premises that will be supervised on pain of the loss of the licence. Having first rejected this call, the government relented, and has withdrawn these machines from these non-gambling venues. To the continuing dsimay of some, however, they remain accessible to children in pemises licensed under the Act.[132]

131 *Report of the Gaming Board for Great Britain 2004/05*, *op. cit.*, para. 1.28.

132 T. Jowell MP, HC Debates, vol. 426, col. 39 (1 November 2004). It is of interest to note that although the government rejected the Gambling Review's recommendation concerning ambient gambling, it was precisely on this ground that DCMS eventually made its decision. See generally Miers, *op. cit.*, section 16.3.4(a).

In pursuit of this licensing objective, the Commission has identified a number of matters such as advertising, access to gambling premsises, door supervision, internal segregation of gambling from other facilities provided on the premises, supervision of gaming machines in gambling premises that are not restricted to adults, and staff training that it wishes to take forward with local authorities and operators.[133] Suitably adapted, these are matters that have been actively pursued by the National Lottery Commission and by Camelot for the past decade. As noted in section 3.3, the Gambling Commission is obliged to consult the NLC on matters of common concern. Underage gambling is clearly one such, and while much more could be said about children's access to the Lottery,[134] two points may be made.

First, Camelot has for some years run a scheme called 'Operation Child' in which 'mystery shoppers' who appear to be under 16 years of age attempt to or do buy tickets from Lottery retailers. Those who sell are then subject to a further series of such tests, cumulative failure resulting in the loss of their contract with Camelot. Unlike operators subject to the 2005 Act, Lottery retailers are not licensed, and breaches of the 1993 Act have a low salience for the police. Accordingly it is the commercial rather than a legal sanction that encourages compliance. Another difference is that unlike local authority trading standards departments, whose test purchasing Operation Child mimics, Camelot is obliged to use persons over 16 years of age, else it would be complicit in the offence. By contrast, section 64 of the 2005 Act provides that neither the child nor the 'enforcement officer' (Commission employees appointed in that general role) commits an offence who is engaged in an 'enforcement operation'.

Secondly, there being in the government's view 'no more important area' than to keeping children away from harm than the Internet,[135] operators seeking remote gambling licences from the Gambling Commission will need to demonstrate precisely how they intend to exclude children from play.[136] The Remote Gambling Association's own Code of Practice makes such provision, and

133 Gambling Commission, *op. cit.*, pp. 06-07. BACTA, the trade association representing the gaming machine market, has introduced proof of age requirements to be used by its members.

134 Miers, *op. cit.*, section 14.5.1.

135 T. Jowell MP, HC Debates, vol. 426, col. 39 (1 November 2004).

136 An operator commits no offence under section 33(1) who provides remote gambling facilities to persons in the UK unless he has one piece of remote equipment in Great Britain (s. 36(3)). But the offence (s. 56) of inviting a child or young person 'to gamble' (defined in s. 3) is just that, to which s. 36(3) does not apply. This country of destination approach enables the Gambling Commission to take action, but which in practice will be difficult.

here, too, Camelot has installed age verification systems that prevent children accessing its interactive games.[137]

Problem Gambling

Problem gambling has been a primary focus of the social responsibility agenda for some years. While the National Lottery etc Act requires the interests of every participant to be protected, problem gambling is not here a major issue. But it is closely associated with dysfunctional play in casinos, on machines, and in betting offices. As commented earlier, the Gaming Board has had no formal role in this matter, and has welcomed the change that the Act has brought about.[138] The second strand of the third licensing objective speaks of protecting 'vulnerable persons' from being harmed or exploited by gambling. The Act does not define 'vulnerable', nor will the Commission. But for regulatory purposes it will assume that it includes people who gamble more than they want to or beyond their means, 'or who may not be able to make informed or balanced decisions about gambling due to a mental impairment, alcohol or drugs.'[139] Operators' compliance with this objective is a matter of general application. Quite specific is the obligation on the Commission, when considering an application for a 'non-remote casino operating licence' (that is, a land-based casino), to have regard to the applicant's 'commitment' to protecting vulnerable persons and making assistance available to those who might be affected by gambling problems (section 70(3)).

These purposes do not, however, extend to the treatment or care of those who have gambling problems, which are almost entirely met by two private sector charities, GamCare and the Gordon House Association.[140] As noted earlier, both are funded in part by the gambling industry, with whom they now have a strong shared commitment to anticipate and alleviate dysfunctional gambling. This may take the form, for example, of casinos and licensed betting offices displaying GamCare literature. This is the kind of arrangement that the section 24 social responsibility code is almost certain to require. Other operator initiatives might include interventions by staff or arranging for self-banning. Many of the other targets, such as staff training, the introduction of reality checks (such as clocks and breaks in play) and controlling the speed of play remain to be developed. Some controls, such as those that limit credit facilities and inducements have been the subject of statutory control under the Gaming Act or Codes agreed

137 For the National Lottery see www.national-lottery.co.uk/player/p/home/home.do. See also RGA www.rga.eu.com/, para. 13.5, and DCMS, *The Future Regulation of Remote Gambling, op. cit.*, paras. 48-67.

138 *Report of the Gaming Board for Great Britain 2004/05, op. cit.*, para. 1.26.

139 Gambling Commission, *op. cit.*, pp. 06-07.

140 See their websites, www.gamcare.org.uk/ and www.gordonhouse.org.uk/.

between the Board and the industry. But section 81, which deals with credit and inducements, envisages that subject to their licence conditions, operators other than non-remote casino and bingo licensees, will have increased commercial legroom. In the case of these two classes, the existing prohibitions on granting credit for gaming continue. In common with many other aspects of the social responsibility code, achieving the appropriate balance between compliance with the licensing objectives on the one hand and operator's competitive tendencies on the other will attract close attention.[141]

4.4 Conclusion

Commending the Gambling Bill to the House, the Secretary of State said: '[G]ambling is a legitimate industry that requires fair and proportionate regulation. It is an industry where the freedom to operate is important, but only when the public are properly protected. The Bill will protect the public at a time when technology threatens to overwhelm us with new, poorly regulated gambling opportunities. It provides vital new powers to protect children and put an end to socially irresponsible practices. It puts Parliament and the regulators back in control, with the power to toughen controls and the evidence on which to act. Crucially, it puts power firmly in the hands of local communities.' It is also the government's more particular wish that offshore online gambling sites will 'return to this country to operate in a proper regulatory framework that protects both the interests of individual players and ensures that children cannot play on the internet.'[142]

Whether the UK will become a 'world leader in the field of online gambling' and a remote gambling site of choice remains a matter of conjecture.[143] The government is alert to operators' commercial imperatives, and there is a very high degree of consensus between them that the regulatory framework established by the Gambling Act 2005 offers the opportunity of achieving an acceptable balance between the interests of both consumers and operators. The question for remote gambling operators is whether the apparent incentive of being regulated

141 The Commission's role in maintaining this balance attracted what from DCMS' perspective was unwelcome public attention as a result of remarks made by its Chairman concerning the intensity of the Commission's regulatory intervention in the expanded casino market. See *The Times*, 3 January 2006, pp. 1, 2 and 17, and 4 January 2006, pp. 6 and 16.

142 T. Jowell MP, HC Debates, vol. 426, cols. 39 and 31 respectively (1 November 2004).

143 DCMS, *The Future Regulation of Remote Gambling, op. cit.*, para. 133. The Gaming Board reports that it continues to receive 'large numbers' of enquiries about remote gambling. These range from small scale enterprises to run by a single individual to major companies, some offshore, seeking advice about whether they can locate in Britain. *Report of the Gaming Board for Great Britain 2004/05, op. cit.*, para. 1.20.

by 'the most modern and the toughest regulatory regime for gambling anywhere in the world'[144] outweighs the disincentives both of being so closely regulated and of an adverse and currently uncertain tax environment.[145]

For those who remain or elect to be regulated under the Gambling Act, and indeed for the British government,[146] any uncertainties that flow from the Court's and national courts' interpretation of Articles 49-55 continue to present obstacles to their commercial aspirations. But there is also consenus between them on the matter of the UK's position *vis a vis* the application of EU law. This is that the existing and potential regulatory detail provides levels of operator integrity, consumer protection, and social responsibility that are quite sufficient both to meet any challenge by another Member State as to their adequacy in terms of the Court's approved justifications and to challenge them to justify their own national restrictions.

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144 T. Jowell MP, HC Debates, vol. 426, col. 42 (1 November 2004).

145 There are two considerations. The first is the duties that bear differentially on different sectors of the market, under review at the time of writing. The second is the impact of VAT, which has bearing outside the EU. Changes to Gaming Duty came into effect on 1 October 2005. The Gaming Duty (Amendment) Regulations 2005. SI 2005 No. 1727.

146 'Due respect will have to be paid to [the 'handful' of ECJ decisions], but it is far from clear how they could be applied to a comprehensive British based remote gambling industry offering its services on a global basis. It would be perverse if British remote gambling products were freely available all around the world, but because of case law not within the EU.' DCMS, *The Future Regulation of Remote Gambling, op. cit.*, para. 118.

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French and Belgian Views of the European Gambling Regulation

Thibault Verbiest

1 What is European Gambling Regulation?

1.1 The Treaty and the European Court of Justice Case-law

1.1.1 The Legal Basis: The Freedom of Establishment and the Freedom to Provide Services

Under European law, gambling services should be considered as services in accordance with the meaning of Article 50 of the Treaty establishing the European Communities (hereinafter the 'EC'). Indeed, the Treaty does not distinguish gambling services form other services. For this reason and in principle, all services must be considered in the same way:

Article 43 EC provides that, in the absence of specific legitimate justifications, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.

Article 49 EC prohibits restrictions on the freedom to provide services within the Community for nationals of Member States who are established in a Member State of the Community other than that of the person for whom the services are intended.

Article 49 EC also includes the right to receive services across borders. As it is not forbidden in most Members States to play an 'unauthorized' game, the cross-border reception of gaming services by consumers can become an important argument. This article of the Treaty thus guarantees that a service provider, duly licensed and monitored in one Member State, is allowed firstly to offer and promote its information society services in other Member States of the European Union. Secondly the service provider is permitted to accept stakes from residents of other Member States. Indirectly this also implies the right to receive and consume services across borders.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 127–159
 ISBN 90-04-15459-0. Printed in the Netherlands.

Article 46 EC provides that the aforementioned provisions of the Treaty and measures taken in pursuance thereof should not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. A Member State can therefore only impose restrictive measures in strict compliance with the limits set out in the Treaty, in particular Article 46 EC, and the case-law of the European Court of Justice (hereinafter the 'ECJ').

1.1.2 The Case-law of the European Court of Justice

According to the standing case-law of the ECJ,[1] restrictions can only be maintained and enforced on the condition that they are:[2]

- Not discriminatory, unless justified under Article 46 EC;
- Imposed as part of a consistent and proportional national policy;
- Justified by imperative reasons of general interest, notably to curb the harmful individual and social effects of gambling and gaming;
- Necessary and proportionate; the national restriction must guarantee the achievement of the objective pursued and must not go beyond that which is necessary.

1.1.2.1 *Schindler*, *Läärä* and *Zenatti* (1994-1999)

In the *Schindler* case the ECJ stated that lotteries were to be considered as 'services' within the meaning of Article 50 EC *(ex 60)* given the fact that they have a peculiar nature.[3] A Member State can restrict or prohibit lotteries from other Member States provided those restrictions are not discriminatory on the ground of nationality. Restrictions which are based on overriding public interest considerations cannot be regarded as measures involving an unjustified interference with the freedom to provide services.[4]

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1 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Schindler and Jörg Schindler,* [1994] ECR I-1039; Case C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State),* [1999] ECR I-6067; Case C-67/98 *Questore di Verona* v. *Diego Zenatti,* [1999] ECR I-7289.

2 Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and Others*, [2003] ECR I-13031, para. 65.

3 Supra, note 1, para. 59.

4 See *Schindler*, supra, note 1. para. 57 which reads: '... to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure

The *Läärä* case addresses the issue of less restrictive measures. According to Mr Läärä the public interest objectives relied on to justify the exclusive right are not pursued in practice and could be attained by less restrictive measures, such as regulations imposing the necessary code of conduct on operators.[5] According to the ruling, the provisions of the Treaty do not preclude legislation such as the Finnish legislation, which grant exclusive rights to run the operation of slot machines.

The *Zenatti* case states that restrictions may be justified to the extent that they serve imperative requirements in the general interest, which should reflect the diverse characteristics of each Member State, including their social and cultural attitudes to gambling.[6] The raising of funds for socially useful projects was not on its own an acceptable justification for such a restriction, because of its economic character. The protection of consumers from fraud was an acceptable public interest objective, but only if the national court established that they were not sufficiently protected by the rules applicable to the foreign bookmakers. It was permissible to restrict the provision of betting services on social policy grounds, in order to counter its harmful moral and financial effects. The restriction must be proportional to the aim that is to be achieved and must not go beyond what is necessary to achieve that objective.

1.1.2.2 *Gambelli* and *Lindman* (2003)

In its November 2003 *Gambelli*[7] and *Lindman*[8] judgments, the ECJ confirmed the right of Member States to impose restrictions to the cross-border provision, promotion and reception of gambling services. The ECJ, however, clearly states that these restrictions must meet certain strict requirement.

On grounds of the *Gambelli* and *Lindman* decisions, it can be defended that:

– In the absence of a '*consistent gaming policy*', Member States must stop invoking imperative reasons of public order to justify restrictions, particular in relation to public funding, while the actual objective pursued is the protection of the national markets from foreign competition;[9]

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that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.'

5 *Läärä*, supra note 1.

6 *Zenatti*, supra note 1.

7 *Gambelli*, supra note 2.

8 Case C-42/02, *Diana Elisabeth Lindman* v. *Skatterättelsenämnde*, [2003] ECR I-13519.

9 *Gambelli*, supra note 1, paras. 62 and 69. Also see the answer given by Mr. Bolkestein on behalf of the Commission on Parliamentary question E-3126/03 of MEP Astrid Thors, 18 December 2003.

- To the extent that the ECJ leaves the decision to a national court, it gives clear '*guidelines*' on how the latter should *in concreto* use its discretional power to interpret the facts of the case;[10]
- The level of protection offered by the country of establishment and the control exercised over the gaming operation, should be taken into consideration when the authorities of the country of destination assess the proportionality and necessity of the restrictive measures *(country of origin principle)*;[11]
- Member States must prove that *the risks* for the consumers in relation to the cross-border provision and consumption of gaming services *are clear and present*;
- Member States must submit to the competent authority *statistical or other evidence* proving that the adopted restrictions are appropriate and proportionate.[12]

1.2 Secondary EU Law and Commission Initiatives

Considering the fact that the gaming sector is a fast growing economic industry with a lot of spin-off activities, the European Commission is more and more aware that it must take an initiative to distortions of the prevent Internal Market. In addition, the European Commission has recognized the *de facto* cross-border character of remote gaming services and thus their pan-European impact.

In this regard, particular attention must be paid to the *Review of the Electronic Commerce Directive*[13] and *the Proposal for a Services Directive*.[14] In relation to the latter initiative, we underline that for the first time the right of consumers to receive services across borders is recognized in a regulatory instrument.

1.2.1 The Electronic Commerce Directive

The Electronic commerce Directive of June 2000 sets out a blanket horizontal legal framework to guarantee the free movement of information society services

10 *Gambelli*, supra note 1, para. 75.

11 *Gambelli*, supra note 1, paras. 12 and 73. See also Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, O.J. 2000, L 178 and the proposal of the European Commission for a Directive on services in the Internal Market; COM (2004) 0001, 14 January 2004.

12 *Lindman*, supra note 8, paras. 25 and 26.

13 Directive 2000/31/EC, supra note 11.

14 Commission proposal for a Directive of the European Parliament and of the Council on services in the Internal Market, Brussels, COM(2004) 2 final, 13 January 2004.

throughout the European Union. Besides the fundamental freedom to provide 'e-services', the Directive also contains certain principles relating to e-commerce contracts and intermediary liability.

1.2.2 Article 3: Internal Market Clause

One of the fundamental principles of the Electronic Commerce Directive is the guaranteed free movement of information society services between the Member States, the so-called *internal market clause* found in Article 3. This states:[15]

> '1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field;
>
> 2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'

Similar to the principle laid down in Article 49 EC, *i.e.*, the freedom to provide services throughout the European Union, information society services may not be subject to another control than the one exercised by the competent authorities of the country of origin. Furthermore, the authorities of the country of destination, must consider the protection offered in the country of origin as adequate (the principle of mutual recognition).

In addition, the Directive defines the place of establishment as the place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where websites or servers are situated or where the operator may have a mailbox. By virtue of this principle a remote gaming operator, established and regulated in the United Kingdom or Gibraltar, would be allowed to offer its services to European citizens, this without being submitted to additional requirements imposed by other Member States, *e.g.*, the need to obtain an additional national gaming license.

1.2.3 Exclusion of Games from the Scope of Application

Nevertheless, Article 1.5 of the Electronic Commerce Directive does exclude games 'which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions', from its scope of application.

The only reasonable explanation for the exclusion may be found in the case-law of the ECJ and the intention of the Member States to maintain a tight control

15 Supra note 11.

over gaming operations, *i.e.*, impose a restrictive gaming policy and safeguard a source of state revenue.

It can be, however, advocated that in the future the Electronic Commerce Directive will be of application or at least will have some kind of influence over the gaming sector.

1.2.4 Review of the Directive

Every two years, beginning in July 2003, this Directive must be reviewed and if necessary adapted to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and the proper functioning of the internal market.

In this view, the European Commission published on 21 November 2003 its first report on the application of the Electronic Commerce Directive, indicating that the application of the internal market principle of the freedom to provide services to electronic commerce is already 'having a substantial and positive effect'.[16] Furthermore, in its press release of the same day, the European Commission stated that:

> 'online gambling, which is currently outside the scope of the Directive, is a new area in which action may be required because of significant Internal Market problems – see for example Case C-243/01 of the European Court of Justice (ECJ press release CJE/03/98), concerning criminal proceedings in Italy against persons collecting Internet bets on behalf of a bookmaker legally licensed in the UK.[17] The Commission will examine the need for and scope of a possible new EU initiative. In addition, the Commission is examining a number of complaints it has received concerning cross-border gambling activities.'[18]

As in the Report on the State of the Internal Market Strategy for Services,[19] the

16 First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Brussels, COM (2003) 702 final, 21 November 2003.

17 European Commission Press Release (IP/03/1580) *E-commerce: EU law boosting emerging sector* (21 November 2003). Available at: www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1580&format=HTML&aged=1&language=EN&guiLanguage=en. (Accessed on 8 April 2006).

18 The case referred to is the abovementioned *Gambelli* case, see supra note 1.

19 European Commission, *The State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services*, COM (2002) 441 final, Brussels, 30 July 2002.

Commission (again) identified the gaming market as a market characterized by serious problems and where an initiative may be required.

In particular, it must be underlined that some Member States have restricted the exclusion of gambling services from the scope of the Directive (as provided for in Article 1(5) to the internal market clause.[20] Consequently, service providers established in these countries can evoke the other dispositions of the electronic commerce directive, notably the safe harbors for intermediary service providers.

Unsurprisingly perhaps, the number of complaints filed before the European Commission concerning gambling services has increased considerably in 2005. Complaints have been received against Greece, Germany, Italy, Denmark, the Netherlands, Belgium, France, Sweden and Finland.

Finally, it is stated that in a number of Member States[21] new regulatory initiatives are under way in areas such as online gambling. These initiatives give rise to the risk of regulatory fragmentation and/or distortions of competition. For this reason, the European Commission will closely monitor these policy and regulatory developments in order to identify possible needs for Community action. The case being, such actions will be considered in the second report on the application of the Electronic Commerce Directive.

1.2.5 Proposal for a Directive on Services in the Internal Market

On 13 January 2004, the European Commission presented a proposal for a Directive to create a real Internal Market for services, including gambling services.[22] The overall objective of this proposal was to ensure the free movement of services and to dismantle existing barriers to the cross-border provision and reception of services.

1.2.5.1 First Proposal: January 2004 – COM (2004) 2 final

The Freedom to Provide Services across Borders

In line with Article 3 of the Electronic Commerce Directive, *i.e.*, the so-called Internal Market clause, the proposed Directive aims to implement 'the country of origin principle', whereby a service provider legally operating in one Member State should be allowed to market and provide its services in others, this without having to comply with further rules.

20 Namely Spain, Austria and Luxembourg.

21 Namely Malta and the United Kingdom.

22 Footnote 14.

However, for certain 'sensitive areas', including gambling services, the proposed Directive foresees in an exception to the country of origin principle and provides for the possible development of specific rules by 2010.

In Article 40, it is stated that:

> 'The Commission shall assess, by [one year after adoption] at the latest, the possibility of presenting proposals for harmonisation instruments on the following issues:
>
> (...)
>
> b) gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions in the light of a report by the Commission and a wide consultation of interested parties'.

Furthermore, the proposal also requires the Member States to screen, through the process of mutual evaluation of barriers to cross-border establishment of service providers, those rules by which certain gambling services are restricted to certain types of providers, usually a state monopoly.

The Freedom to Receive Services across Borders

In relation to the cross-border consumption of services, the proposal acknowledges the existence of a right to receive services, *e.g.*, consumers in a business-2-consumer (B2C) context, to purchase services in other Member States than the Member State of residence or establishment.

In its Article 20, it is stated 'Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State'.

This article – and underlying principle of prohibited restrictions – is contemplated by a principle of non-discrimination.[23] By virtue of Article 21, Member States shall ensure that:

- The recipient *is not made subject to* discriminatory requirements based on his/her nationality or place of residence;
- *The general conditions of access to a service do not contain discriminatory provisions relating to the nationality or place of residence of the recipient.*

In application of these principles, it can be advocated that legal or de facto restrictions preventing consumers to participate in games organized by a duly

23 To be noted that a similar principle is already inscribed for service providers in Article 46 of the Treaty of Rome.

authorized operator established in another Member State, are not completely compatible with European Community law.

In this view, national decisions requiring foreign EU based operators to exclude residents of its jurisdiction from opening accounts or imposing on them an obligation to install geo-location software or other filtering technologies on their gaming platform, could be reconsidered.

However, one must be cautious and emphasize that the Proposal excludes gaming services from the country of origin principle. Therefore and even if it does not do the same for the reception of services, it can be defended that – till 2010 – all sensitive areas will be excluded form this Directive.

1.2.5.2 The Gebhardt Draft Reports – April 2005

On 19 April 2005, Rapporteur Evelyne Gebhardt, Member of the European Parliament (MEP) presented the first part of her draft report on the Services Directive proposal to the Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament.[24] The first part of her draft report addresses the most controversial parts of the proposal: the scope of the Directive and the country of origin principle. The report proposes major amendments to the Commission's proposal. A second part covering the rest of the Directive was presented at the end of May 2005.[25]

The Scope

MEP Gebhardt's amendments aim at clarifying the scope of the Directive by distinguishing commercial services from services of general interest. Regarding the scope of the proposal, an Article 3a is introduced in order to *exclude gambling activities*.

Article 3a of the proposal stipulates that: 'This Directive shall not apply to gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions, nor shall it cover access to activities for the judicial or extra-judicial recovery of debts.'

Article 40 of the Commission's first proposal,[26] stating that gambling activities are temporary excluded from the country of origin principle, is deleted. In contrast with the first proposal, gambling activities are now completely excluded for the scope of the directive!

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24 Committee on the Internal Market and Consumer Protection draft report part I, on the proposal for a directive of the European Parliament and of the Council on services in the Internal Market, 8 April. 2005: www.europarl.eu.int/comparl/imco/services_directive/050408_pr_gebhardt_en.pdf.

25 See 1.2.5.3.

26 Supra note 14.

The Principle of 'Mutual Recognition'

Regarding the country of origin principle, Gebhardt MEP stated it was not a pan-European approach to open the Internal Market for services in the EU. She preferred the guiding principle to be focused on *mutual recognition*. The principle of mutual recognition would in her view contribute to the abolition of artificial barriers, and service providers should comply with the rules of the destination country (i.e. that of the consumer).

By virtue of Amendment 5, the Report introduces the 'mutual recognition principle' by which 'an economic operator who performs a service in a Member State in accordance with the law of that Member State may offer the same service without hindrance in another Member State'. This principle has a large scope of exclusion: it does not apply to legal or contractual provisions of the country of destination in various fields such as *consumer protection*, environmental protection or labour law.

Moreover, the country of destination may object to the performance of a service by a provider who is established in another Member State in accordance with the law of that Member State, if:

- Such an objection is founded on reasons of general interest, particularly of social policy, consumer protection;
- The rules under which such objection is brought are proportionate, generally applicable and business-related in nature;
- The interest in question is not already protected by provisions applicable to the service provider in his country of origin.

Furthermore, the country of destination is responsible for supervising the provider and the services provided by him, in close cooperation with the service provider's Member State of origin.

1.2.5.3 Last Version of the Gebhardt Report: Part I and II (25 May 2005)[27]

Exclusion of Gambling

As mentioned, the Amendment 59 removes gambling from the scope of the Directive.

It states that:

> 'This Directive shall not apply to gambling activities which involve wagering a stake with pecuniary value in games of chance, *including*

27 Committee on the Internal Market and Consumer Protection draft report, on the proposal for a directive of the European Parliament and of the Council on services in the Internal Market, 25 May 2005: www.europarl.eu.int/meetdocs/2004_2009/documents/pr/568/568225/568225en.pdf.

> *lotteries* and betting transactions, nor shall it cover access to activities for the judicial or extra-judicial recovery of debts.'

The amendment is justified on the following grounds:

- '(8d) Gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions, should be excluded from the scope of this Directive in view of the existing provisions in many Member States *which provide that profits made by a lottery* may only be used for certain purposes, in particular those of *general interest*, or that they may be required to be *paid* into the State budget. (*new recital 8 b*)';
- The ECJ has left it up to the Member States to decide what restrictions to impose on the freedom to provide these services for the purposes of maintaining the social order and consumer protection (justification, amendment 59).

Gambling is thus excluded firstly in order to protect society at large, and in particular consumer interests, and secondly to finance public budget or other causes.

As far as the protection of society it is true that the ECJ has recognized that Member States have the right to impose restrictions to the cross-border provision of gambling services. However, it is not mentioned in the IMCO reports that this right is not an absolute one, and that the ECJ has recognized that restrictions must meet certain requirements, notably those contained in the *Gambelli* and *Lindman* decisions (cf. consistent gaming policy).

With regard to the re-allocation of profits and public-funding, already in the 1994 Schindler judgment, the ECJ held that the re-allocation of profits yielded from gambling activities could not *as such* be a ground to override the fundamental freedom to provide services in the European Union.

> 'A final ground which is not without relevance, *although it cannot in itself be regarded as an objective justification*, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.'

This principle was confirmed by the ECJ in all other cases relating the cross-border provision and reception of gambling services.

In *Zenatti*, the ECJ held that a restriction on the cross-border provision of gambling services:

> 'will be acceptable *only if, from the outset,* it reflects a concern to bring about 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.'[28]

Furthermore in *Gambelli*, the ECJ stated that:

> 'with regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue *is not one of the grounds* listed in Article 46 EC and *does not constitute a matter of overriding general interest* which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services.'[29]

Similar decisions were made in other sectors, not merely in the gambling sector.

It can be concluded from the standing case-law of the ECJ that the restriction of cross-border gambling to secure (public) revenues is not a justified ground to override the freedom to provide/receive services across borders. For this reason, it can be advocated that the main argument to exclude gambling from the proposal for a Services Directive is in breach of, or at least not very consistent, with the case-law of the ECJ.

Country of Origin vs. Country of Destination & Mutual Recognition

The new amendments reduce the scope to land-based services (cf. definition of country of destination) and exclusion of e-commerce (cf. the exclusion of Article 1.5 of the Electronic Commerce Directive). In light of this perhaps it is necessary to focus on the second review of the Electronic Commerce Directive.

To a certain extent both principles have the same objective: preventing a service provider being subject to different regulatory regimes and controls. In contrast to the country of origin principle, as for instance contained in Article 3 of the Electronic Commerce Directive, the principle of mutual recognition requires a case-by-case assessment of the *equivalence* of regulations in the country of origin and the country of destination (cf. given definition).

According to the new Article 16 of the proposed Services Directive, the country of destination may impose restrictions on the cross-border provision, provided that:

- Restrictions are based upon grounds of public interest;
- The interest in question is not already protected by provisions applicable to the service provided in his country of origin.

It can be derived from ECJ case-law that when the protection offered in the country of origin is equivalent and pursues similar objectives, it will be difficult

28 Supra note 1, para. 36.

29 Supra note 2, para. 61.

to impose additional restrictions.

In *Schindler*, Advocate General Gulmann stated in his Opinion that:

> 'It follows from the case-law of the Court that the State of destination cannot insist that its own rules be complied with by foreign providers of services if the considerations underlying those requirements are already taken into account by the provider's own legislation (principle of equivalence).
>
> In this instance it can certainly be argued that the principle of equivalence is difficult to apply ...
>
> However that objection is merely one of form. First of all, it is possible in this respect to make a comparison with the protection afforded by the United Kingdom to consumers in connection with local lotteries and similar gambling activities such as football pools and also now with the protection that will be afforded to consumers in connection with the new national lottery.
>
> Second, it is established that the rules applying to and the controls exercised over the Sueddeutsche Klassenlotterie offer a high degree of protection against abuse.
>
> It has, moreover, not been argued in the course of these proceedings that there is a greater risk of abuse in connection with the Sueddeutsche Klassenlotterie than is considered acceptable for comparable gambling activities in the United Kingdom.'[30]

In *Gambelli*, both the ECJ and the Advocate General referred to the 'to rigorous controls exercised in the country of establishment'.

Nevertheless there are several other points requiring further attention:

- The regime for 'services of general interest' versus. 'commercial services' (cf. the qualification of gambling as a service of general interest *Läärä*);
- In Annexe I C reference is made to '*Sporting and other recreational services*' (as covered by the Directive). In this view, we refer to the CPC qualification of betting as part of subclass 96492(Gambling and betting services), part of Division: 96 – Recreational, cultural and sporting services.[31]

The Internal Market and Consumer Protection Committee of the European Parliament voted on the Gebhardt Report on 21 November 2005,[32] supporting

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30 Case C-275/92, Opinion of Mr Advocate General Gulmann delivered on 16 December 1993, *Her Majesty's Customs and Excise* v. *Gerhart Shindler and Jörg Schindler*, paras. 94 and 95.

31 United Nations, Statistical Papers, Series M. No. 77, *Provisional Central Production Classification*, 1991.

32 European Parliament Press Release *Free movement of services: Services Directive* (17 October

the removal of gambling from the scope of the proposed Directive. This was further confirmed by the first plenary reading in the European Parliament of the proposed text on 16 February 2006.[33]

1.2.6 Study on Gambling Services in the Internal Market

In January 2005, the European Commission has demonstrated its intention to reform the EU gambling market by appointing the Swiss Institute of Comparative Law, based in Lausanne, to conduct a study on the impact of laws regulating online and off-line gambling services on the functioning of the Internal Market.

The precise purpose of the study is:

- To evaluate how the differing laws regulating online and offline gambling services as well as games and certain types of promotional games have an impact upon the smooth functioning of the Internal Market;
- To evaluate whether those laws restrict economic and employment growth associated with such gambling services.

The Swiss Institute has been chosen since it has quite some experience with gaming and gambling legislation. In 2004, the Institute published a study on online cross-border gambling, covering issues like licensing, cross-border regulation, legal framework at European and international level, self regulation, consumer protection, money laundering and taxation.[34]

The new study will form the basis of a European Commission decision on whether or not to include gambling under its general proposal to harmonize regulation of services (Service Directive) or whether it needs a gambling specific EU regulatory instrument.

As things are standing today, the Swiss Institute's report preliminary findings comprises:

- a structure of the European market;
- a summary of the types of legal barriers;
- a framework of European law and;
- tentative conclusions.

2005). Available at: www.europarl.eu.int/news/expert/infopress_page/056-1037-277-10-40-909-20051004IPR01036-04-10-2005-2005 – false/default_en.htm.

33 European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)) 16 February 2006.

34 Swiss Institute of Comparative Law (ed.), *Cross-Border Gambling on the Internet: Challenging National and International Law* (Zurich, Schultess, 2004).

1.3 Conclusions

It is likely that there will be a sector specific act based on the Swiss Institute's study and that gambling will not be covered by the Services directive.

Pressure is growing on the Commission to take action. The number of complaints sent to the Commission on national gambling restrictions have increased significantly.

It has received two complaints against France by two Maltese bookmakers and received one recently by a German law firm against the Belgian 'Loterie Nationale'.

Moreover, the European Commissioner for Internal Market & Services, Charlie McCreevy recently launched a strong attack on national gambling monopolies during a visit to Sweden.

Moreover in 2005 the European Commissioner for the Internal Market and Services, Charlie McCreevy launched a strong attack on national gambling monopolies while on a visit to Sweden. This has been followed by the Commission's decision to commence infringement proceedings against seven Member States (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden) in April 2006. These proceedings concern the compatibility of national measures on sports betting with Community law, in particular the free movement of services.[35]

2006 promises to be an important year for the gaming industry.

2 France

Prior to examining the French view of the European gambling regulation, a description of the French regulatory framework for gambling is necessary.

2.1 The French Regulatory Framework for Gambling

In France, a restrictive gaming policy is based upon the following acts:

- The Act of 21 May 1836 on lotteries;[36]
- The Act of 12 July 1983 on games of chance;[37]

35 European Commission Press Release (IP/06/436) *Free movement of services: Commission inquires into restrictions on sports betting services in Denmark, Finland, Germany, Hungary, Italy, the* Netherlands and Sweden (4 April 2006). Available at: www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/436&format=HTML&aged=0&language=EN&guiLanguage=en.

36 Loi du 21 mai 1836 sur les loteries prohibées.

37 Loi 83-628 du 12 juillet 1983 interdisant certaines appareils de jeux.

– The Act of 15 June 1907 on casinos;[38]
– The Act of 2 June 1891 on horse races;[39]

It must be noted that the principles set out in this framework are specified in secondary legislation.

2.1.1 Games of Chance

Under French law, the notion of a 'gaming establishment' or a 'gaming house' ('*maison de jeux de hasard*') is important. Indeed, by virtue the 1983 Act on casino games and 1907 Act on the exploitation of casinos, an unauthorized operation to which the public is freely admitted is illegal provided that:

– The operation involves a gaming house;
– This gaming house is open to the public; and
– Games of chance take place on the premises.

When applied to virtual or remote casinos, the two latter conditions do not seem to pose any particular problem.

According to the standing French jurisprudence and doctrine, games of chance are games in which chance prevails over skill.[40] If on the contrary, skill prevails over chance, the game will be qualified as a competition and no authorization is required.[41]

The interpretation of the notion of 'gaming house' in an online environment is not always very clear. Although the exploitation of a gaming house is considered as a criminal offence, stand-alone computers or other equipment do not necessarily meet the definition of 'gaming house' in its initial physical or land-based meaning. [42]

Yet French courts sometimes adopt an 'evolutive' interpretation of criminal law. In cases where they are called upon to pass judgment on acts that legislators could not have imagined when issuing the text of the Criminal Code, in particular concerning information society services as remote gaming services, a court must

38 Loi du 15 juin 1907 réglementant les jeux dans les casinos des stations balnéaires, thermales et climatiques et dans les casinos installés à bord des navires immatriculés au registre international français.

39 Loi du 2 juin 1891 réglementant les courses de chevaux.

40 It should be underscored that gaming machines and bingos are considered as games of chance.

41 The Act of 15 January 1907, restricts the organization of games of chance to private circles and casinos established in sanatoria or to touristic regions with more than 500.000 residents (the so-called 'Chaban Amendment' of 5 January 1988).

42 3G cell phone or PDA with internet access facilities.

seek to establish the actual intention of the legislator, *i.e.*, determine the *ratio legis* or the purposes of the legislation concerned.[43]

If it concludes that the legislator would without any doubt have intended to ban the act if it could have imagined its existence, the court then must ensure that it can be reasonably understood in the legal definition.[44] Under these conditions, it is reasonable to believe that, if the legislator could have imagined the existence of remote casinos, providing similar gaming possibilities as land-based gaming houses, it would have intended to ban this operation or 'establishment'.

In addition, this notion has always been interpreted by French doctrine and jurisprudence as being any 'fixed establishment where gambling is practiced with the three-fold character of habit, continuity and permanence'.[45] According to this definition, a remote casino could be qualified as a 'gaming house', which, in a permanent and habitual manner and from a fixed 'establishment', or location, organizes games of chance. Therefore and by virtue of the theory of ubiquity,[46] the persons responsible for cyber casinos, *e.g.*, located in the Caribbean, may fall within the scope of the French criminal law and can be prosecuted by French authorities.[47]

2.1.2 Lotteries

In application of the 21 May 1836 Act[48] all lotteries offered to the French public are prohibited,[49] provided that the following three constitutive elements are present:

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43 In this regard it should be emphasized that remote gaming services do meet the requirements to be qualified as information society services. By virtue of the Directive 1998/34/EC, as amended by Directive 98/48/EC, information society services are defined as services i) normally provided for remuneration at a distance, ii) conducted by electronic means and iii) executed at the individual request of a recipient of services, *i.e.*, the gambler: Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. L 204 , as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998.

44 Court de Cassation, France, 21 January 1969, Bull. Crim, nr. 38.

45 P. Bouzat, Rev, Sc. Crim., 1974,114 legal note under Cass. crim., 28 June 1973

46 Cf. Infra on the yahoo case.

47 Cf., Infra on International aspects.

48 This act was recently modified by the so-called Perben II: Loi no. 2004-204 portant adaptation de la justice aux evolutions de la criminalité, et comportant des dispositions s'appliquant aux infractions commises à l'aide des nouvelles technologies de l'information et de la communication. (Act 2004-204 adapting the justice system to the evolutions of crime and containing provisions applying to offences committed with the help of new information and communication technologies).

49 Article 1 of the French Law of 21 May 1836.

- The offer is made to the public. If the lottery can be accessed from a public website, or even from a remote platform that can be accessed with a password, this requirement is met;[50]
- The intention is to make a profit;
- The outcome of the lottery is random;
- There is a stake involved.

Nevertheless, the Act of 21 May 1836 foresees in a double exception.

On the one hand, exceptions are foreseen for charitable lotteries, promotional lotteries[51] and lotteries organized by the Française des Jeux. On the other hand, it should be stressed that free lotteries cannot be qualified as prohibited lotteries. In this regard, if the lottery does not have any negative financial implication for the player, *e.g.*, cost reimbursement or without fees or stakes, the 1836 Act on lotteries cannot be applied.

In relation to the exception for Française des Jeux, it should be noted that this operator is authorized to offer its products, in principle lotteries and betting activities on sports events other than horse races, on the internet.[52] As to the latter kind of betting activities, the Act of 2 June 1891 reserves betting on horse races to the local PMUs, provided that the Minister of Agriculture has granted a license. The PMUs are already authorized to offer their betting services via iDTV and the internet.[53]

2.1.3 Liability of Intermediary or Affiliated Service Providers

Even though the focus is often on the gaming operators, one may not forget that other persons provide services which contribute to the gaming operation.

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50 Cf. supra on the notion of public games of chance.

51 It should be noted that the European Commission has unfolded its intention to lower the barriers on cross-border promotional games. Cf., the amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market. Brussels, 25 October 2005, COM(2002) 585 final 2001/0227 (COD). In this proposal 'promotional game' is defined as 'the temporary offer to participate in a game, in which the winner is designated *primarily by chance and no fee is required* to participate and where participation is not subject to a prior obligation to purchase or to order the provision of a service. Such promotional games shall not include gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.'

52 www.fdjeux.com. Also see Règlement général des jeux de la Française des Jeux offerts par internet (general terms and conditions for the games organized by the Française des Jeux on the internet).

53 Paris Mutual Urbain. www.pmu.fr/pmu/html/fr/index2.html.

Moreover, authorities may decide that it is more effective to act against local intermediary service providers than to prosecute a gaming provider, in particular when the latter is established outside their jurisdiction.[54]

In this regard, one should not only consider technical intermediaries, as for instance hosts or communication providers, but also more traditional service provides such as financial institutions, marketing agencies and software developers.

In application of the rules governing criminal complicity, a service provider can only be held liable as a accomplice provided that he knowingly assisted, or helped in any way, in the commission of a legal infraction, *e.g.*, the unauthorized organization of a game.[55]

In addition, it should be noted that gaming specific regulation may foresee independent criminal offences. As such, the recently modified act on lotteries,[56] makes it an offence to distribute – or to facilitate the distribution – of tickets, to announce, to display or to make public by any other means the existence of a forbidden lottery.

Therefore, a marketing agency carrying out promotional activities for, *e.g.*, a UK licensed bookmaker, can be prosecuted for committing an independent criminal offence or as an accomplice in an 'illegal' betting operation. According to a similar reasoning, a financial institution, a software developer or a manufacturer of gaming terminals can be held liable in the event they knowingly contributed to the organization of a non-authorized gaming operation.[57]

For technical intermediaries, the question is more complex. To know the circumstances under which they can be held liable for referring to, hosting of or giving access to a remote gaming platform, one should consider the general civil and criminal liability regime and the specific liability exemption for some technical intermediaries.

In one of the first French decision on ISP liability, the so-called *Estelle case*, a Paris Court ordered a French web hosting provider to pay 'provisional' damages, for having accepted to host in an anonymous manner a site which had published online photos of the model Hallyday in the nude.[58] In another case, the lower

54 Cf., infra on the execution of decisions in the European Union.

55 Article 121-7 of the French Criminal Code.

56 The Perben II Act of 9 March 2004.

57 In relation to P2P technology, reference can be made to the decision of the Amsterdam Court of Appeal of 28 March 2002 in the KaZaA case. In its decision the Court held that KaZaA was not responsible for the illegal swapping of mp3 files and that its technology as such was not illegal. This decision was confirmed by the Dutch Supreme Court on 19 December 2003.

58 Tribunal de Grande Instance, Paris, Madame Estelle H. c/ Monsieur Valentin L. et Daniel, 6 June 1998, www.juriscom.net/jpt/visu.php?ID=383.

court of Nanterre condemned the hosting provider because they failed to monitor the sites they hosted for potentially illegal material.[59]

To the extent that it is almost impossible for an ISP to monitor the enormous and constant flow of information, this earlier case-law is now questionable.

In the first place, these decisions are in contradiction with the system of responsibilities endorsed by the European institutions within the framework of the Electronic Commerce Directive.[60] This Directive institutes a system of conditional immunity for communication (access) and hosting providers when they do not have an actual knowledge of the possibly illegal material. Furthermore, access and hosting providers are exonerated of all obligations in the matter of surveillance or active search for infringements.[61]

Secondly, more recent decisions of several French authorities are more in line with these so-called 'safe harbors' and have recognized that technical intermediaries cannot always be held liable for illegal operations carried out through their systems. [62]

In a case relating to a racist website, the District Court of Paris underlined that the web host had promptly disabled access to the racist website and that only the editor of the website was liable for the content of the website.[63] It should be noted that the French Association of Access and Internet Service providers adopted a code of conduct concerning the hosting of certain particular 'illegal' contents.[64]

In relation to search engines a similar reasoning was followed. On 12 May 2003, the District Court of Paris stressed that Wanadoo automatically indexed and stored keywords in its databases. These keywords were chosen by the website editor and not by Wanadoo. Furthermore and based upon this judgment, it can be

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59 Tribunal de Grande Instance, Nanterre, Lynda L. c/ Sté Multimania, Sté France Cybermédia, Sté SPPI, Sté Esterel (aff. Lynda L.), 8 December 1999, www.juriscom.net/jpt/visu.php?ID=329

60 To be noted that at the time the Directive was only a proposal. Nevertheless, the principles in the field of liability of intermediary service providers were already clear. Article 12-14 of the Electronic Commerce Directive.

61 Article 15 of the Electronic Commerce Directive.

62 It must be underscored that France still has to transpose this Directive into national law. Thibault Verbiest, '*Projet LEN: le Sénat vote en deuxième lecture*', www.droit-technologie.com, 13 April 2004.

63 Tribunal de Grande Instance, Paris, *J'ACCUSE !*, 26 May 2003.

64 AFA, (Association des Fournisseurs d'Accès et des Services Internet), Charte des prestataires de services d'hébergement en ligne et d'accès à Internet en matière de lutte contre certains contenus spécifiques, (Charter of online service and internet access providers in the fight against certain specific content), June 2004, www.afa-france.com/charte_contenusodieux.html. Also see the decision in the FRONT-14 case and the need of self-regulation. Tribunal de Grande Instance de Paris, *J'accuse vs. Wanadoo*, 30 October 2001.

defended that the operator of a search engine does not have a positive obligation to monitor the nature of the contents it is referring to.[65]

More recently, Google France was condemned for the unauthorized use of trademarks in its 'Adwords' and 'Premium Sponsorship' programs. In this case, the District Court of Nanterre held that Google was more than just an intermediary provider, but in addition to its ordinary search functions, used third party trademarks for commercial purposes.[66]

Eventually, reference can be made to the above mentioned Electronic Commerce Directive.

2.2 France and European Law

In the event the gaming operation is carried out from another Member State, but is directed at the French public, French authorities will try to prevent the service provider from offering or marketing its services in France. In this regard, the ECJ has recognized that Member States may impose restrictions to the freedom to provide gaming services throughout the European Union.

However, as mentioned earlier, such restriction must respect certain conditions and limits. Therefore and to know to what extent French authorities can impose restrictions on the (cross-border) provision of remote gaming service, one must consider the recent *Gambelli* decision and the parliamentary report on gaming in France. [67]

The key question is thus to know to what extent the French gaming policy is consistent. If the answer to this question is negative, it will be difficult for French authorities to defend the restrictions imposed to the cross-border provision of gaming services.

2.2.1 The Trucy Report

An answer to this question can be found in the report of a parliamentary commission on games of chance and skill in France of 12 February 2002. [68]

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65 Tribunal de Grande Instance de Paris, référé (summary proceedings), 12 May 2003, Loire c/ M.G.S. et SA Wanadoo Portails.

66 Tribunal de Grande Instance de Nanterre, référé (summary proceedings), 13 October 2003, Sté Viaticum et Sté Luteciel c/ Sté Google France.

67 See also, Verbiest, T. and Keuleers, E., *Gambelli makes it harder for nations to Restrict Gaming*, Gaming Law Review, Volume 8, Number 1, 2004.

68 Informative Report of the National Commission for finance, budget control and accountancy, Senate, 2001-2002, No. 223. Hereinafter the 'Trucy Report'. Rapport d'information fait au nom de la commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation sur la mission sur les jeux de hasard et d'argent en France, par M. François Trucy, Sénat, session ordinaire de 2001-2002, No. 223.

In this report, the Commission for Finance of the French Senate thoroughly examined the regulatory and market situation for the three main gaming operators in France, *i.e.*, the Française des Jeux, the PMUs and the casinos. According to the Trucy Report, the French gaming policy is characterized by:[69]

- A partial vision that endorses state protection and restrictions, but fails to provide an effective and satisfying answer to compulsive gambling[70] and the dynamism of the gaming market;
- The ambivalent position of the French state. On the one hand, the organization of gaming activities can be questioned for several (moral) reasons, while on the other hand, these activities are an important resource of revenues. Moreover, the French state is regulator and majority shareholder of one of the main operators, the Française des Jeux;
- The absence of regulatory initiative: the regulatory framework for games seems to be out-dated and unncessarily complicated. The French state, guard and beneficiary, seems to limit itself to the limitation of the offer and to maintaining the financial and legal status quo;
- A restrictive policy and high taxes also include certain risks for the further development of the sector and may lead to the emigration of certain operators or the development of illegal activities.

Therefore and based upon the report, it can be said that: [71]

- The gaming sector is regulated in a fragmented and un-coordinated way which has implications on the presence (or absence) of a consistent gaming policy;
- The inefficiency of this fragmented policy is most manifestly demonstrated by two elements. Firstly by the absence of single public authority competent to monitor the sector. Secondly by the total absence of a public program to counter the negative consequences of compulsive gambling, one of the corner stones of a responsible gaming policy;
- The ambivalent role of the French state and the important amount of public funds harvested by this restrictive gaming policy.

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69 Trucy report, p. 336, '*Les jeux de hasard et d'argent en France, L'Etat croupier, le Parlement croupion ?*'.

70 For further information on this point, reference is made to Chapter III, point 1.B, p. 244-263, '*Une approche critiquable*'.

71 See notably Chapter III, point 1.B. and pages 275-276, pages 282 and 287.

2.2.2 National Case-law

2.2.2.1 Tribunal de Grande Instance de Paris, 8 July 2005

The Pari Mutual Urbain has won its first case against the online bookmaker Zeturf.[72] Zeturf is a bookmaker, duly registered and incorporated in Malta, providing French internet users the possibility to bet on horse races, whereas this type of gambling services falls under the exclusive right of the PMU. The case merits our attention for two important reasons.

Firstly, the case focused more on aspects of intellectual property and the exclusive rights of the PMU, and not on the cross-border provision and promotion of gambling services. In this regard, the Paris court does not assess the compliance of the French gaming policy with EC law.

Secondly, the Maltese bookmaker was in fact directly, at least indirectly, owned and controlled by the French company Eturf.

As (Z)eturf was infringing the rights of the PMU, the court followed PMU's requests and argumentation by ordering Zeturf to desist from its activities. In this regard, the case illustrates that the de-localization of a gambling operation is not that easy and that proper attention should be paid to the principles of Regulation 44/2001 concerning the execution of civil decisions throughout the European Union.[73] In particular, recital 10 of the Preamble to the Regulation states that the recognition and enforceability in a Member State of a judgment rendered in another Member State is not influenced by the possible domicile of the *judgment debtor* in a third country.

In the meantime, the decision has not yet been enforced since the procedural requirements in Malta have not yet been completed. Zeturf has announced that it would appeal the decision. If it does so, one of the main arguments in the appeal procedure should be the compliance of French gaming restrictions, as evoked by the PMU, with the requirements of European law.

2.2.2.2 Tribunal de Grande Instance de Paris, 2 November 2005

On 2 November 2005, the Tribunal de Grande Instance de Paris also issued an order condemning in summary proceedings the two companies hosting Zeturf's website.[74] The two Maltese webhosts were ordered to.

– Prevent the access to the site www.zeturf.com as long as online sports betting activity are offered, under a 1500 € penalty per day;

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72 Tribunal de Grande Instance de Paris, référé (summary proceedings), 8 July 2005.

73 Council Regulation (EC) No 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001, L 012.

74 Tribunal de Grande Instance de Paris, 2 November 2005.

– To pay a provisional indemnity of 30 000 € to the PMU.

An appeal has been lodged against the order. The case will be tried on 22 November in before the Paris Court of appeal.

2.2.2.3 Criminal Court of Nanterre, 12 November 2004

In this case, the Criminal Court of Nanterre condemned a French individual associated with the website www.kipari.com. This website was created in 2002 by a company called Euronet, located in New Jersey, and offered sports betting on French sports events, including football, rugby and horse racing. Following a complaint of La Française des Jeux (FDJ) and the pari-mutuel betting organization PMU, the Court of Nanterre ordered the company to stop taking bets from French residents.

2.3 Where from Here?

All these decisions can be criticized in light of the requirements of EC law as set out in *Gambelli*. As mentioned earlier, the French state has adopted an ambivalent attitude towards gaming services, harvesting huge amount of public funds on the one hand, while questioning the morality of gaming services on the other.

Even tough the French Supreme Court held in the 1997 Dellner case, that the restrictions imposed to the cross-border activities of a UK bookmaker were justified, the current French gaming policy does not meet the 2003 Gambelli and Lindman ECJ judgments. [75]

Two complaints have already been lodged to the European Commission against the French State by Maltese bookmakers on grounds of its non compliance with the free movement of services principle.

Pressure is growing on France to open up its gaming market. However, it is probable that things will remained unchanged until a sector specific Act is launched by the Commission.

3 Belgium

As will be shown hereunder, Belgium has applied EU law requirements rather partially and abstractly, though recent signs show an opening of the gaming market. Prior, a description of the Belgian gaming regulatory framework is necessary.

75 Cour de cassation, 22 May 1997, Dellner.

3.1 The Belgian Regulatory Framework for Gambling

In contrast to some countries of the European Union, the gaming sector in Belgium is not regulated by one all-encompassing act, but by a number of regulatory instruments that each impose proper conditions on the games covered.

In consequence, certain games, notably fixed odd betting on sports events other than horse races, escape sector specific regulation and can be organized without a bookmaker's permit.

With the exception of (pool) betting, this regulatory framework is relatively recent and basically consists of the Games of Chance Act 1999 and the National Lottery Act 2002.

In relation to these acts we will comment on some recent decisions of Belgian courts, in particular the decision of the Belgium Constitutional Court on the legality of the (former) exclusive right of the National Lottery to organize games by means of tools of the information society.

In addition, attention will be paid to the Gaming Board's interest to modify the Games of Chance Act 1999 and bring remote gaming, including fixed odd betting, under its umbrella.

3.1.1 Games of Chance and Casino Games – Act of 1999

Under the Belgian Games of Chance Act of 7 May 1999 ('1999 Act'), the organization and exploitation of games of chance is subject to the prior authorization of the Gaming Board, this is irrespective of the online character or not of the game.

The 1999 Act defines game of chance as any game requiring a stake and where there is an element of chance in determining the outcome, even if the latter condition is not predominant for the outcome of the game.

With this broad definition, the Belgian legislator wanted to end an ongoing discussion concerning the distinction between 'competitions' and 'games of chance'.

Under the former Games of Chance Act of 1902 and in absence of a statutory definition, case-law defined game of chance as any game in which chance prevailed over skill and combinations of intelligence. For this reason, competent authorities had to decide on the facts of each case whether 50% of more of chance was present in the game concerned or not. If they held that chance prevailed over skill, the organization of the game without proper authorization was illegal.

According to the current definition, from the moment chance is involved, even if the element of chance is secondary to that of skill, this first requirement of the legal qualification is met. In this view, one should recognize that even in the most innocent TV quiz, a certain degree of chance is involved and that such an event can be qualified as a forbidden game of chance from the moment a stake is involved (the second requirement).

Therefore and with some limited exceptions, any game involving a stake, *i.e.*, a monetary value, can be qualified as a game of chance under the 1999 Act.

In a case relating to a promotional game via SMS, the President of the Commercial Court of Tongeren held that:

> 'a player could only participate in the game by sending a SMS message from a mobile phone, connected to the network of a communications provider … This means that the SMS message is not only the technical requirement to participate in the game, but it is also required that this participation is done over the network of the communications provider concerned. Participation in the game with a mobile phone connected to the network of another communications operator or from a computer is not possible. For this reason, a participant has no other possibility than to purchase the communication service. In this view, reference must be made to competitions organized by reviews or journals. To participate in these competitions, one must buy the review or magazine concerned. This is not considered as a stake.'

This decision was confirmed on appeal. In its decision of 27 March 2003, the Antwerp Court of Appeal held that:

> 'even though chance was clearly present, the first senders of a SMS were rewarded, there was no stake involved to qualify the competition/game as a forbidden game of chance. The SMS message is nothing more than a technical carrier used to participate in the (promotional) game.'

This conclusion can be followed to the extent that the price a participant pays for the SMS corresponds to the normal market price. In the event the price of the SMS is, for instance, four times the current market price, it can be defended that the SMS no longer is just a technical carrier necessary to participate in the game. Indeed, as with 0900, 070 or other premium rate numbers, SMS becomes – in addition to the pure technical aspect – also an instrument to generate revenues for, *e.g.*, the organization of the game.

In summary, the Act of 7 may 1999 on games of chances ended the 'game of chance versus competition' debate. However, it also has some shortcomings which can be the object of a future reform, and these are discussed below.

In the first place, the key discussion has shifted towards the qualification of the 'stake'. To the extent that all games involve chance, only 'true free games' (i.e. those without any monetary input by the participants) avoid the criminal qualification of game if chance.

Secondly, betting activities on sports events are excluded from the scope of application of the 1999 Act. The old 1963 Act concerning sports betting is only applicable on pool betting, not on fixed odd betting. For this reason, it can be advocated that fixed odd betting is not regulated in Belgium. In absence of

any applicable regulatory instrument, there cannot be an obligation to obtain a prior bookmaker's permit issued by the competent authority. It is to be noted that in application of a statutory provision of tax law, the organization of betting activities on horse racing is subject to ministerial approval.

Thirdly, the 1999 Act is formulated in a technology neutral manner. Therefore, it is also applicable to games of chance organized by means of new technologies.

Nevertheless, it is unclear how this act will *de facto* apply in an online environment, notably the exclusion of certain players, application and enforcement of the Act in an international context, the conditions for obtaining a remote gaming license etc. In this perspective, the former Minister of Justice formulated a proposal to modify the 1999 Act of Games of Chance ('2001 Bill'),[76] which was commented by the Gaming Board (the 'Recommendations').

At the same time, a proposal to amend and modify the 1991 National Lottery Act was formulated. This initiative led to the enactment of the Act on the Rationalization of the Functioning and the Management of the National Lottery ('2002 National Lottery Act') of 19 April 2002 which initially granted the National Lottery an exclusive right to organize remote games – in the broadest meaning –in Belgium.

3.1.2 Reform of the 1999 Act on Games of Chance

Within the framework of the reform of the 1999 Act, one should make the distinction between the proposition made by the Minister of Justice (the 2001 Bill) and the initiatives undertaken by Gaming Board. In the first place, the Gaming Board formulated some recommendations on the 2001 bill.

However and considering the lack of political consensus, this regulatory initiative seems to be abandoned. Nevertheless, the Gaming Board has recently demonstrated a renewed interest to regulate gaming by means of distance communication.

3.1.2.1 The 2001 Bill on Games of Chance

Although the Bill intends to regulate gaming activities in a more comprehensive way, extending its scope of application to sports betting, it merely makes reference to new forms of gaming activities, this without providing for a particular set of rules.

76 Proposition de loi visant à modifier la loi du 7 mai 1999 sur les jeux de hasard, les établissements de jeux de hasard et la protection des joueurs. (Bill to modify the 7 May 1999 Act on games of chance).

Article 6 of the Bill contains the general principle in application of which the exploitation of a game of chance or the organization of sports betting by means of an internal or external communication network is prohibited.

However, the same article contains a three-fold exception:

- The general prohibition to offer online games, encompassing lotteries, games of chance and sports betting, does not apply to the National Lottery;
- An authorized bookmaker, *i.e.*, granted a sports betting license, can offer online betting services, provided that this service is offered in its office or at the place where the sports event is taking place;
- The prohibition will not be applicable when the online gaming service is offered freely or can only result in minor benefits.

3.1.2.2 The Recommendations of the Gaming Board

Although the Bill should be considered a first step in the right direction, the Recommendations of the Gaming Board contain a more elaborated regulation for online gaming activities. In its Recommendations concerning the Bill, the Board clearly states that the government should do more than 'rewrite' the 1999 Act and that it should also consider new phenomenon's, such as remote casinos.

Therefore, the new act concerning games of chance must cover online games and foresee an adequate legal framework, covering various aspects of online gaming, such as money laundering and the protection of gamblers.

Regarding the scope of application of the 1999 Act, the Gaming Board formulates two important recommendations:

- In the first place, by inserting in Article 2, §3 the words 'places or computer sites' the Gaming Board intends to end the discussion concerning the traditional interpretation of the notion of 'gaming house';
- In the second place, it defines a 'computer site' as the compilation of pages accessible via an internal or external telecommunication network and hosted on a server identified by an address.

Moreover, the Gaming Board formulates various recommendations concerning the regulation of online games via internet, intranets or any computer site. Eventually, it proposes requirements concerning the technical and administrative management of such an operation.

Besides a specific 'online license' (class G), an operator should also obtain a license for casinos (A license) or a bookmaker's license (F license). Although there is a general interdiction to cumulate various licenses, this implies that only (besides the National Lottery) 'real-world' bookmakers or casino operators can offer online gaming services to the Belgian public.

The combination of an online license with an offline license makes it easier to verify the identity of the operator, its shareholders and to investigate the solvency and transparency of the online gaming operation. Eventually, the web site must be hosted on a Belgian server, and the operation must be run from Belgian soil.

As to the protection of gamblers, the Gaming Board is aware of the underlying risks and dangers. Besides general protection rules, such as the exclusion of certain players, restriction to grant credit to players, transparency, technical control of the facilities, hotline, *etc.*, the Board advocates the adoption of specific measures.

In this regard, particular attention should be paid to the online identification of gamblers. Seen that certain categories or persons may not enter the premises of a casino, granting access or not to the private web pages of a remote casino is subject to such verification. In this regard, operators of remote casinos will have to adopt AVS or similar verification procedures.[77]

These systems may imply that operators can consult a database containing verified information, that are, *e.g.*, collected at the occasion of registration or provided for by Public authorities. Such a system is to be completed with a player's card on which personal information, such as gains and losses, can be registered. The Gaming Board additionally promotes the use of quality labels and advocates that the amount a player can loose is fixed to a maximum amount.

3.1.3 Lotteries – 2002 National Lottery Act

This Act, officially know as the Act on the Rationalization of the Functioning and the Management of the National Lottery, reforms the National Lottery into a public law enterprise and sets out its modus operandi. The dispositions of this act are complemented by a Contract executed between the National Lottery and the Belgium State.

The Act, as initially enacted, granted the National Lottery a monopoly for the organization of all sorts of remote games, including lotteries, games of chance and sports bets. This overall exclusive right was criticized for several reasons.

In the first place, there was an apparent contradiction between the exclusive right of the National Lottery to organize remote games of chance and the initiatives unfolded to modify the 1999 Act. By virtue of these initiatives, private operators could obtain a license to organize remote games of chance.

Secondly, the legality of the excusive right was challenged, this not only form a perspective of Belgium law, but also from a European law perspective.

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77 AVS (address verification service) is a fraud prevention system according to which the purchaser should complete a billing address which matches the billing address on file with their credit card company.

3.2 Belgian and European Law

In relation to European law, one should not only consider the freedom to provide services in the European Union, but also the regulation of the information society.

Although the electronic commerce Directive excludes gaming activities form its coordinated field, online gaming services are to be considered as information society services in the meaning of the notification Directive 1998/34/EC.

In application of the latter Directive, each not-excluded regulatory proposal concerning information society services has to be notified to the European Commission.

If a Member State does not notify, or does not do so in due time, the regulatory provision is, following the case-law of the ECJ, of no application, and thus unenforceable against individual gaming operators.

In the light of the foregoing, it can be understood that the Belgian House of Representatives modified the 2002 National Lottery Act. With the enactment of the Program Act of 24 December 2002, the overall monopoly of the National Lottery was abolished. Although the National Lottery maintained its monopoly for public lotteries, it only has a right to offer games of chance and sports bets.

In absence of an exclusive right to organize remote games of chance and sports bets, private operators can offer their gaming service on the Belgian market.

In addition two private operators lodged two complaints before the Belgian Constitutional Court on basis of legal principles of equality and non-discrimination. They considered that the Act implied a discriminatory and unjustified treatment of private operators.

3.2.1 Belgian Constitutional Court, 10 March 2004

On 10 March 2004, the Belgian Constitutional Court held that the 2002 National Lottery Act was partially infringing the Constitution and thus some of the dispositions were null and void. [78]

Moreover, this decision is interesting because the Constitutional Court also assessed its legality in light of Article 49 of the Treaty on the freedom to provide services in the European Union and the decision of the ECJ in the Gambelli case.

Although the Belgium Constitutional Court explicitly refers to the Gambelli decision and underscores that a Member State cannot invoke public order concerns, when at the same time it incites and encourages consumers to participate in games to the financial benefit of the public purse, it does not consider whether the exclusive right of the National Lottery *de facto* meets the requirements

78 Cour d'arbitrage, 10 March 2004, case no. 33/2004.

imposed by European Law, nor does it consider the consistency of the Belgium gaming policy.

In relation to the requirement of a consistent gaming policy the following remarks can be formulated.

In application of Article 23, 10 of the Consumer Protection Act of 14 July 1991, only the National Lottery is allowed to advertise its products or services. Other gaming operators, *e.g.*, a licensed casino operator, may not promote its services. In this perspective, it must be underlined that the National Lottery is also allowed to organize games of chance. Considering that the nature of the game does not depend on the operator organizing the game concerned, it must be stressed that a game of chance organized by the National Lottery is and remains a game of chance and should – form a consistency viewpoint – be subject to the same legal regime as the ones organized by private operators.

By the same token and in the event the National lottery organizes games of chance, it would only be consistent that the National Lottery complies with 1999 Act on Games of Chance. However, Article 39 of the 2002 National Lottery Act states that – with some exceptions – the 1999 Act shall not be applicable on games of chance organized by the National Lottery. Although the Belgian Government held that similar principles, notably in the field of responsible gaming, supervision and player protection, would be inscribed in a Royal Decree or in the contract, one must underline that in practice little has been done in this field.

In relation to the freedom to provide services, the Constitutional Court refers to the case-law of the ECJ, in particular the *Gambelli* case, and states that it can be expected that the restrictive measure contributes to the development of a consistent responsible gaming policy. The Constitutional Court does, however, not assess whether the imposed restriction is necessary to achieve the objective pursued and that it does in practice not go further than required.

In application of the recent *Lindman* decision of the ECJ, it can be advocated that the Belgium government would had to demonstrate with statistical or other evidence that the conditions and requirements were met.

Eventually, the Constitutional Court refers to the preparatory works of the Act and quotes that 'the objective pursued is absolutely not to incite people to play or to enlarge the market share of the National Lottery'. In addition to the comment made above, it must be underscored that the Contract of 26 March 2003 states that the National Lottery shall carry out adequate marketing campaigns and that 'considering the foreseen growth of its core activities, the National Lottery shall engage additional personnel in the field of sales, marketing and IT'.

In his answer to a parliamentary question, the competent federal minister said that that 'in order to keep its products and services attractive, publicity is a commercial necessity for the National Lottery'.

Furthermore and even more remarkable is the parliamentary question concerning personalized direct mails of the National Lottery. In these personalized

mailings, individuals are asked and incited to play twice a week for a certain amount of money. In addition and to facilitate the answer and participation of the addressee, a pre-paid envelope, bank instruction and participation bulletin were included in the personalized mailing.

Surprisingly and in contrast to the preparatory works of the 2002 Act, the competent Minister confirms that the objective of the Direct mail action of the National Lottery is to get new customers who do not have the habit to purchase a lottery tickets in one of the distribution points of the National Lottery.

Considering that remote gaming is only partially regulated in Belgium – fixed odd betting escapes any regulatory license condition – and the National Lottery is heavily advertising its products, notably the pan-European lottery *Euromillions*, it could be defended that the Belgian gaming policy *in concreto* does not meet the requirements imposed by European law.

3.3 Where from Here?

According to Belgium Gaming Board, it will be likely that the Gaming Board takes forward its initiative to regulate remote gaming in a more comprehensive and consistent manner. In particular, it will advocate that the scope of the 1999 Act on games of chance will be extended to all sorts of games, including betting activities, and that private operators can be granted a remote gaming license to offer and promote online casinos and games of chance.

4 General Conclusions

It can be concluded from the above mentioned that neither France nor Belgium are abiding by EU gambling rules.

France's policy runs contrary to the requirements set out by the ECJ in the *Gambelli* and *Lindman* decisions. As mentioned earlier, its position is an ambivalent one, questioning the morality of gaming operations on the one hand, while harvesting huge amounts of funds on the other. Other local actors have not shown more willingness to apply the *Gambelli* criterion.

French courts have so far not assessed the compliance of French law with European requirements, and have condemned EU gaming operators and their web hosters. No regulatory initiatives have yet been launched by the government to open up the gambling market. On the contrary, the national operators' monopoly has been extended to the online sector.[79] Moreover, the Perben Act makes it a criminal offence to advertise betting services.

79 Règlement Général des Jeux de la Française des Jeux offerts par internet ou terminal numérique du 05 avril 2002, pris en application du décret No.78-1067 du 9 novembre 1978 modifié par le décret No.97-783 du 31 juillet 1997, relatif à l'organisation et à

This restrictive gaming policy is at the moment challenged by EU bookmakers which have sent complaints to the European Commission against the French State on grounds of its non compliance with the principle of the freedom to provide services.

Belgium is showing more flexibility and willingness to open up the gambling market, but its policy is still inconsistent with EU law. Indeed, although the Constitutional Court referred expressly to Gambelli, it made a partial and abstract application of it. In particular, considering the fact that the National Lottery is heavily advertising its products, the Court should have made an *in concreto* verification of the compliance with Gambelli. In this respect, a complaint has recently been lodged to the Commission against the National Lottery's extensive marketing campaign.

The Belgian legislator has nevertheless taken a step towards an opening of the Gaming market: it recently notified a remote gambling Act to the Commission under the notification directive. The Act would enable EU gaming operators to obtain a licence to operate in Belgium, thus following the Gaming Board's proposal.

On the whole, pressure is growing on the Commission to force Member States to comply with European law requirements.

However, gambling operators might well have to wait until the Commission decides to launch a sector specific act regulating gambling and takes action against Member States, before France and Belgium are forced to make a real move in their favour.

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l'exploitation des jeux de loteries autorisés par l'article 136 de la loi du 31 mai 1933 (General Rules for Française des Jeux offering games by internet or telephone of 5 April 2002, and application of Decree no. 78-1067 of 9 November 1978 modified by Decree no. 97-783 of 312 July 1997 regarding the organization and operation of as lotteries authorized by Article 136 of the Law of 31 May 1933): www.fdjeux.com/files/reglementgeneral.pdf.

Closing Remarks

Sofie Geeroms[1]

Introduction

Time goes by. Gambling has yet been from the earliest days a source of drama.

In *Pique Dame* (Queen of Spades), Tchaikovsky's opera of 1890, Gherman, a commoner among fellow officers who were aristocrats, was obsessed about discovering the winning three-card sequence secret from the Countess so as to assure his success at the gambling table. He used the Countess' granddaughter Lisa, by declaring her his love, to gain access to the Countess. Instead of obtaining the secret from the Countess, Gherman frightened her to death. When Lisa learned of this deed and his obsession, she still wanted to forgive Gherman. But Gherman, no longer in need for Lisa, rejected her, following which she drowned herself in St- Petersburg's Winter Canal. Despite the Countess' death, Gherman learned the gambling secret from the Countess' ghost which one night revealed to him the eternal winning sequence of three cards. Once he had arrived at the casino, Gherman used the sequence and won twice. The third time, while intending to select the ace, the third of the winning three-card sequence secret, Gherman choose in his anxiety the queen of spades instead. Having lost everything, Gherman saw no other way out than stabbing himself to death.

To his brother Modest, Tchaikovsky wrote on March 3, 1890, the following about his hero:

> 'I finished the opera three hours ago … When I got to Gherman's death and the final chorus I was suddenly overcome by such commiseration with Gherman that I started to weep terribly. This eventually turned into a very pleasant sort of hysteria, by which I mean, it was so sweat to cry. Later I found out why I wept (never before have I spilled any tears over any of my heroes, and I am trying to determine why I suddenly had this desire). It seems that Gherman was not simply a means for me to write this or that kind of music, but that he is a real, alive and even likeable

1 All opinions expressed are those of the author and are not those of Eurojust.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 161–171
 ISBN 90-04-15459-0. Printed in the Netherlands.

> person … I think that my warm feelings towards the hero of the opera find a positive reflection in the music.'[2]

Tchaikovsky's writing provides a useful introduction to some insights surrounding gambling which motivate today's policymakers in their regulation of this activity. Tchaikovsky shows that the gambler can be anyone and that the gambler's motivations are embedded within human nature: at the end of the day we all enjoy the feeling of winning and to have some financial means which can bring us a degree of social advancement. Yet at the same time, Tchaikovsky illustrates how gambling can have a dramatic impact upon the gambler and his wider social environment.

In the context of the European Union, we face the question as to who should regulate gambling activities: should gambling belong to the regulatory powers of the EU or should it remain within the regulatory powers of the twenty-five national authorities? What is the appropriate legislative level and mix of legislative competences between the EU and the Member States to ensure that European citizens do not fall foul of the potential dangers Tchaikovsky describes? This hot political issue was addressed during this Colloquium.

The Colloquium on the European and National Perspectives of the Regulation of Gambling, organised by Professor dr. Cyrille Fijnaut, recently awarded a chair on the regulatory aspects of gambling in Europe, at Tilburg University, provided academics, practitioners and policymakers from both the national and European levels the opportunity to exchange views on the burning question as to who, in a EU context, should regulate gambling activities.

European Perspectives

General Regulatory Framework

Professor Pierre Larouche introduced us to the general regulatory framework to which gambling belongs. Surprising or not, that general regulatory framework is competition law. Competition law has yet a broader, nobler objective than an individual's desire to win. Professor Larouche subsequently explained that the question of who should regulate the matter within the EU context should not be seen in black/white terms or from an antagonist perspective. Both EC law and national law strive for the same objective of increasing trade in an efficient way. The accomplishment of the Internal Market should yield to an increasing level of welfare in the society in general. According to Professor Larouche, the

2 See OperaResource: <www.r-ds.com/opera/resource/piquedame.htm> (accessed on 31 January 2006).

real challenge consists then in finding an autonomous solution, whereby the Member States should ensure that the objectives of EC law are fulfilled.

Political and Legal Challenges for the EU

Mr. Peter Kerstens, of the cabinet of Commissioner Charlie McCreevy, the European Commissioner responsible for the Internal Market and Services, explained to us the political and legal challenges which the EU is currently facing concerning the field of gambling.

Following the same trend as Professor Larouche, Mr. Kerstens highlighted the strong commonalties existing between the Member States and Europe in their search for an appropriate regulation on gambling issues: both wish to protect minors, treat addictive behaviour, finance charitable bodies and good causes, and establish supervisory measures such as transparency and advertisement requirements. Despite the pursuance of similar goals both at the national and the European level, the regulation of gambling activities is not easy. One of the main issues for gambling regulators is the prevention of excessive gambling: Which legal framework is the most appropriate to ensure that supply meets demand, but does not excessively encourage demand?

Present tensions among the players in this field are caused by the threat, coming from the EU, that the current status quo whereby national rules control and maintain gambling activities, closing the market along national lines, instead of facilitating cross-border trade, could be changed. Indeed, as Mr. Kerstens pointed out, we cannot deny reality. Gambling activities are an important economic activity, which are not fully subjected to the forces of the Internal Market. No longer hindered by technical barriers, gambling activities are nowadays provided in a cross-border market, with a turnover of billions of Euros. In addition, the case-law of the European Court of Justice ('ECJ') on the matter does not narrow the gap between those with opposing views on the appropriate means of regulation.

Mr. Kerstens warned of the dangers of the Commission taking a policy value loaded judgement in this matter: the Commission should neither take a permissive role nor an anti-patronising view, nor a restrictive one based on the view that gambling activities are dangerous. Instead, the Commission should limit its role to the enforcement of the Treaty whether or not we agree with the outcome, imposing a free market but recognising the power for the Member States to install limits under certain conditions. Accordingly, the Commission remains faced with a conflicting reality: the power of the Member States to regulate the matter on the one hand, the complaints submitted against national gambling restrictions by private gambling operators on the other hand. Legal proceedings are not always appropriate for dealing with such complaints due to the highly political nature of the issue. And of course, as with all cases, the Commission may not win.

Legislative measures concerning gambling, as with all fields, require a consensus or at least a working majority. At the European level this ensured that gambling was implicitly included in the Information Society Services Directive.[3] However no consensus prevailed in favor of including gambling in the E-Commerce Directive[4] nor the proposed sales promotion regulation,[5] but ensured that gambling services were to be explicitly excluded from their scope of application instead. Likewise no consensus or working majority prevailed within the debate on the proposed Services Directive[6] to ensure the Commission's inclusion of gambling services remained following the European Parliament's first plenary reading of the proposed directive.

The Committee on the Internal Market and Consumer Protection (IMCO) of the European Parliament on 22 November 2005, while discussing the proposed Services Directive, confirmed that the bulk of competencies still remain firmly with the Member States. The Commission intended to subject gambling services to the country of origin principle, though a transitional derogation would apply for the first ten years of the Directive's application. According to the country of origin principle, the gambling service provider would be allowed to provide freely services across the EU market observing the national provisions of the Member State of origin. The European Parliament disagreed with this proposition. Instead of accepting a transitional derogation regime for gambling services from the country of origin principle for free movement of services, the IMCO of the European Parliament, led by Evelyne Gebhardt MEP, decided to amend the general scope of the proposed Services Directive so as to ensure that gambling activities are not covered by the Directive. One of the amendments[7] was formulated as follows:

> '(Recital 10b (new)) Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive, in view

3 Directive 98/48/EC amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services, O.J. 1998 L 217/18.

4 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. 2000 L 178/1.

5 Communication from the Commission on sales promotion in the Internal Market. Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market (COM(2001) 546 final – 2001/0227 (COD)), 2 October 2001.

6 Commission Proposal for a Directive of the European Parliament and the Council on services in the internal market, COM(2004) 2 final, 13 January 2003.

7 The amendments tabled by the European Parliament can be found in the Committee on the Internal Market and Consumer Protection's *Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market* (COM(2004)002 – C5-0069/2004 – 2004/0001(COD)), 15 December 2005.

> of the specific nature of these activities, which entail implementation by Member States of policies relating to public order and consumer protection. The specific nature of these activities is not called into question by Community case law, which simply requires national courts to examine in depth the reasons of public interests, which may justify derogations from the freedom to provide services or the freedom of establishment. In addition, given the considerable disparities in the taxation of gambling activities, which are at least partly related to differences in Member States' public order requirements, it would be totally impossible to establish fair cross-border competition between operators in the gaming industry without either first or simultaneously dealing with questions of fiscal cohesion between Member States, which are not addressed by this Directive and which are not part of this scope.'[8]

Several others amendments, all intended to exclude gambling activities from the scope of the Directive, justified such exclusions on the basis of several reasons. Public health, public order, morality, and consumer protection issues figure all among them, but also taxation issues. Several delegations of the various committees of the European Parliament whose opinions are represented in the Report of the Committee on the Internal Market and Consumer Protection referred to the considerable disparities in the Member States' taxation of gambling activities, reflecting in turn their different public policy concepts. Regulating gambling on a European level would necessary require a global approach whereby questions of fiscal and social cohesion should first be tackled so as to avoid relocation or a setting up of 'mailbox companies' in countries with the least demanding fiscal, social and environmental standards. Moreover, government supervision and national regulations are necessary in order to combat fraud and organised crime in this sector, other delegations argued.

Gambling activities must remain therefore with the regulating power of the Member States, the European Parliament concluded at its EU Services Directive discussion of 22 November 2005. At the first reading of the proposed Services Directive, which took place on 16 February 2006, the European Parliament accepted with 391 votes for (and 213 votes against) the EU Services Directive as earlier proposed on 22 November 2005 excluding gambling services from its scope of application. It follows that the Commission has to amend its initial proposition and has to refer subsequently the amended Service Directive to the Council as agreement is necessary in the present case among all three, the Commission, Parliament and Council.

Considering the acceptance of the amendments before the European Parliament, the question arises what role is then left for the EU? As Mr. Kerstens pointed

8 Ibid. Amendment 17, p. 15.

out, we cannot continue ignoring the absence of a consensus or even a workable majority on the subject matter. Should we then harmonise the market? This is another approach the Commission had – or still has – in mind. To that end, the existing economic and legal national barriers should be identified, a task they have procured with the Swiss Institute of Comparative Law, one of the first to have launched an academic debate on the legal issues of cross-border gambling.[9] The study, not completed at the time of the Colloquium, should mainly be used as a snapshot of the factual situation and not as a policy guide to decide whether gambling should be restricted or permitted. Recognising the quality and quantity of legal arguments on both sides, preference should go to a pragmatic approach of what is feasible.

The European Court of Justice's Case Law and the Proportionality Principle

To date, the case-law of the ECJ in Luxembourg does not stop the debate but fosters it even the more, giving victory for some but at the same time driving others to advocate for a bigger change. Mr. Alan Littler explained to us in detail the relevance of the proportionality principle to the regulation of gambling in the ECJ's case-law.

In the *Schindler* case,[10] the first gambling judgement in a sequence of many others, the ECJ qualified gambling activities as economic activities, and more in particular, as services. Moreover, the ECJ placed gambling under the freedom to provide services, one of the fundamental provisions upon which the Internal Market is founded. *Schindler* and subsequent judgements confirmed the power of the Member States to regulate the gambling market, though under certain conditions.

While *Schindler*, *Läärä*,[11] *Zenatti*[12] and *Anomar*,[13] have not been overruled, *Gambelli*[14] and *Lindman*[15] are the cases that, in fact, currently dominate the

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9 An earlier example of the Institute's work in this field being; Swiss Institute of Comparative Law (ed.), *Cross-Border Gambling on the Internet: Challenging National and International Law* (Zurich, Schultess, 2004).

10 Case C-275/92, *Her Majesty's Customs and Excise* v. *Gerhart Shindler and Jörg Schindler*, [1994] ECR I-1039.

11 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd* v. *Kihlakunnansyyttäyä (Jyväskylä) and Suomen valtio (Finnish State)*, [1999] ECR I-6067.

12 Case C-67/98, *Questore di Verona* v. *Diego Zenatti*, [1999] ECR I-7289.

13 Case C-6/01, *Associaçã Nacional de Operadores de Máquinas Recreativas (Anomar) and Others* v. *Estado português*, [2003] ECR I-8621.

14 Case C-243/01, *Criminal Proceedings against Piergiorio Gambelli and Others*, [2003] ECR I-13031.

15 Case C-42/02, *Diana Elisabeth Lindman* v. *Skatterättelsenämnde*, [2003] ECR I-13519.

gambling landscape. Highlighting proportionality and non-discriminatory requirements, the ECJ in *Gambelli* and *Lindman* has reduced the Member States' margin of discretion to enact and maintain an 'inward' looking gaming policies. Member States have to be consistent and non-discriminatory in their gaming policy settings. Following the *Gambelli* case, this means that a Member State cannot advertise gambling activities provided by its national monopoly provider and at the same time restrict the freedom to provide gambling services within its territory against those located in another Member State. *Lindman* required a Member State to show statistical evidence supporting the objective justifications relied upon to restrict the freedom to provide gambling services.

Having analysed the case-law of the ECJ in this specific regard, Mr. Littler concluded that the regulation of gambling activities should be brought in line with the more general case-law of the ECJ on the freedom to provide services within the Internal Market.

European Perspectives from a Private Operator's View

Mr. Martin Arendts, representing the interests of several private gambling operators, fully shared this view and pleaded for a full liberalisation of the gambling services market.

Private operators consider the provision of gambling services to be like any other business, Mr. Arendts explained. The argument that gambling activities are addictive in nature, justifying the restriction on the freedom to provide services is not convincing, considering the absence of state monopolies in the field of tobacco and alcohol which are also very addictive products in nature. Accordingly, Mr. Arendts argued, gambling activities should be, within an EU context, subject to the Internal Market rules as any other economic activity is. In addition, it is a fact that Member States act like ordinary private operators. The existing state monopolies are going too far and are outdated: they are as much as private operators profit driven and focussed on shareholder values.

Private operators continue therefore demanding pan-European regulation. Gambling activities should have been included in the E-commerce Directive as well in the proposed Services Directive, Mr. Arendts submitted. The barriers surrounding in Articles 43 and 49 EC Treaty should be removed. The EU has to recognise the trustworthy and efficient character of private companies regarding the generation of money for charities and their ability to deal with problem gamblers. Furthermore, customers would profit from a liberalised market because of greater transparency.

European Perspectives from a Public Operator's View

Public operators contest the latter. Mr. Veenstra, representing European Lotteries, gave the view of European gambling regulation from the perspective of a state lottery.

Mr. Veenstra, referred to the existing Articles 43 and 49 EC Treaty and the case-law of the ECJ excepting gambling services from its scope of application under certain conditions. In addition, Mr Veenstra referred to the decision of the European Council in Edinburgh of December 1992 which decided, on the basis of the principle of subsidiarity, not to regulate gambling activities at the EU level but to leave the matter for the Member States.

In the view of Mr. Veenstra, the gambling market should not be liberalised for it will result in an increase of the number of operators with an 'overheating' effect of the market. Gambling addiction can only be kept low if the supply-side is restricted, Mr. Veenstra argued. In addition, although recognising the high turnover of public operators, it is a fact that a substantial amount of the profit is further channelled to good causes.

Opponents and advocates to liberalising the gambling market continue this debate at the national level. Several cases are currently pending in national courts, whereby private or public operators seek to obtain judgements about the compatibility of certain national legislation with the terms of the EC Treaty.

In light of these developments, it was very interesting to learn of several national perspectives, such as those from the Netherlands, the UK, France and Belgium.

Member State Perspectives

The Dutch View

Professor Nick Huls explained to us the Dutch gambling law and policy and its 'untenable parochial approach'. As indicated by the terminology used, the Dutch approach is inward looking and reveals moral choices. Gambling activities are not banned but restricted so as to canalise the ever-existing compulsion to gambling.

Professor Huls regretted the fragmentation of the Dutch legislation, featured by a lack of horizontal co-ordination and communication between all policy makers involved at all the different – central, provincial and municipal – levels. In addition, he considered the national supervisory body as too bureaucratic and lacking in transparency. Most of all, Professor Huls was critical of the hypocrisy of the Dutch government in its gambling policy. There is, for instance, no restriction on the sales of scratch cards. On another level, restraint is preached while the government benefits substantially from the proceeds of these 'addictive' activities. One cannot but have the impression that a serious gap exists between the legal provisions and the Dutch social reality.

Concluding, Professor Huls considers the current national situation too patronising. The Dutch government should have more trust in its citizens' ability to restrict themselves from excessive gambling. In addition, the Dutch

consumer should be able to decide for himself when and where to play. Last but not least, bona fide operators should be given the chance to expand and to deal autonomously with the main related issues, such as, consumer protection, transparency, supervision to combating crime, and measures against gambling addiction. If the national players are performing a good job in this regard, why are they not allowed to do this at the EU Level too, Professor Huls queried.

The UK View

Professor David Miers provided us with information on the Gambling Act 2005. In contrast to the Dutch approach, the regulation of gambling activities is no longer a moral issue for the United Kingdom government. The main conviction has taken root that gambling activities cannot be regulated though a general ban. Yet this does not mean that the United Kingdom has completely liberalised the market. The United Kingdom wishes to preserve the national lottery, but no longer raises an objection against consumption abroad by its own citizens.

Professor Miers summarised the main difference between the new Act and previous legislation as follows: whereas before, gambling activities were regulated to control an inevitable but unwanted commercial activity, the Gambling Act 2005 imposes a duty to permit gambling activities when they are reasonably consistent with the licensing objectives. The licensing objectives are clearly set out under the new law and relate to the protective duty towards the problem gambler (social responsibility), to the duty to protect the consumer (fairness, transparency, operational and personal licenses) and to the duty to combat crime, fraud and money laundering.

The French and Belgian View

Mr Thibault Verbiest briefed us on the latest developments under the French and Belgian gaming laws.

The French regulatory framework regarding gaming resembles in a certain way the Dutch approach, in the sense that it is also ambivalent. The French State, on the one hand, still considers gambling activities as a moral issue. In this light, the Perben Act should be mentioned which qualifies the advertisement of betting services as a criminal offence. On the other hand, France harvests huge amounts of public funds from these 'immoral' activities.

To date, it seems that the French policymakers wish to maintain the status quo: the national operator's monopoly has even been extended to the online sector.

Belgian policymakers seem to choose rather for an approach whereby the gaming market could be opened. A new remote gambling Act, which the Belgian authorities have notified to the European Commission under the Information Society Services Directive, would enable EU gaming operators to obtain a license enabling them to operate within Belgium.

General Conclusions

Considering the diversity between the Member States' perspectives on the matter as well as the challenging issues involved, all clarified throughout this excellent brainstorming Colloquium, it becomes clear why the regulation of gambling remains the subject of political and legal discussions.

In determining the appropriate – EU and/or Member State – level and form of regulation in accordance with the principle of subsidiarity, considerations falling into three main categories need to be dealt with:

a) Protection of players: Gambling activities can conceal from the player the inherent risk of addiction to the particular game. Wherever the game is played or offered for play, the country of residence of the player must deal with all the negative social and economic aspects of gambling;

b) Criminal aspects of gambling operations: The involvement of enormous amounts of money makes gaming activities an attractive target for organised crime, especially money laundering and tax evasion;

c) Economic considerations: Gambling activities generate enormous profits, from which a substantial part is channelled to public funds in order to finance sports activities, cultural activities and charities. A liberalisation of the market would probably yield to a better allocation of means, in the sense that large private commercial undertakings would arise where larger gains can be won. But it would also imply a relocation of gambling service providers or setting up of 'mailbox companies' to those Member States with the most advantageous tax or social regimes, cutting off other Member States in their resources to fund sports, culture or charities.

A similar debate took place at the international level. In March 2003, the tiny Caribbean island nation of Antigua and Barbuda requested consultations with the United States Government concerning an alleged infringement of GATS (General Agreement on Trade in Services) commitments in the framework of the World Trade Organisation.[16] Antigua and Barbuda, home to a thriving online gambling industry, argued that the United States' unequal treatment between foreign and domestic gambling operators infringed its commitment to liberalise gambling services as stipulated under the GATS Schedules. As no negotiated solution was found, a WTO Panel was set up to rule on the alleged infringement of GATS rules. Both parties, the US and Antigua & Barbuda, have appealed the Panel's Report with the WTO Appellate Body. On 7 April 2005, the Appellate

16 See Geeroms, S.M.F., 'Cross-Border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?', Swiss Institute of Comparative Law (ed.), *Cross-Border Gambling on the Internet: Challenging National and International Law* (Zurich, Schultess, 2004) ' at p. 159.

Body drew up a lengthy report,[17] in parts confirming the Panel's findings, but occasionally also reversing some. With regard to the general exceptions to the liberalising principles as formulated under Article XIV of the GATS, the Appellate Body held that:

> 'the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures necessary to protect public morals or maintain public order, in accordance with paragraph (a) of Article XIV,[18] but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing, and, therefore, has not established that these measures satisfy the requirements of the chapeau.'[19]

The WTO Appellate Body decision, thus recognising the power of the WTO members to restrict the freedom to provide gambling services on the basis of the general exception of public morality and public order, reduced at the same time their members policy setting power in this regard by requiring a proportional and non-discriminatory approach. And is this not the very same outcome as reached by the ECJ?

From the debates during the Colloquium it is clear that the relationship between the ability of the EU Member States to guard against the undesirable effects of gambling as described by Tchaikovsky in his famous *Pique Dame* (Queen of Spades) opera and the ideals behind Europe's Internal Market has yet to be settled. The appropriate level for regulation, be it Member State or EU, will surely generate some interesting discussions in the coming years.

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17 Appellate Body Report of 7 April 2005, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, Website of the WTO: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> (accessed on 20 March 2006).

18 In its analysis under Article XIV(a) of the GATS, the Panel found that 'the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'. Regarding the notion 'public order', the Panel referred to the preservation of the fundamental interests of a society, as reflected in public policy and law. The Panel then, referred to the US Congressional Reports and Testimony. These reports had established that 'the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling'. (Panel Report of 10 November 2004, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> (accessed on 20 March 2006)). Accordingly, the Panel, upheld in this regard by the Appellate Body, found that the three US federal statutes are measures designed to protect public morals and/or to maintain public order within the meaning of Article XIV GATS. Idem, at p. 65 of 116.

19 Idem, at p. 80 of 116.

APPENDIX

CASE LAW OF THE EUROPEAN COURT OF JUSTICE*

Case C-275/92, Schindler

Judgment of the Court of 24 March 1994. – Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler. – Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division – United Kingdom. – Lotteries. – Case C-275/92.

European Court reports 1994 Page I-01039

Keywords

1. Freedom to provide services – Treaty provisions – Scope – Importation of lottery advertisements and tickets in order to enable residents of one Member State to participate in a lottery operated in another Member State – Inclusion

(EEC Treaty, Arts 59 and 60)

2. Freedom to provide services – Restrictions – National legislation prohibiting lotteries – Justification – Protection of consumers and maintenance of order in society

(EEC Treaty, Art. 59)

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* Case law of the European Court of Justice can be found at <www.curia.eu.int/>.

Littler & Fijnaut (eds), *The Regulation of Gambling: European and National Perspectives*, 173–254
 ISBN 90-04-15459-0. Printed in the Netherlands.

Summary

1. The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery conducted in another Member State relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty.

Lottery activities, as services normally provided for remuneration constituted by the price of the ticket, do not, even as regards the cross-border sending and distribution of material objects necessary for their organization or operation, fall within the scope of the rules on the free movement of goods. Nor do they fall within the scope of the rules on the free movement of persons, or of those on free movement of capital, which concern capital movements as such and not all monetary transfers necessary to economic activities.

Moreover, their classification as services is not affected by the fact that they are subject to particularly strict regulation and close control by the public authorities in the various Member States of the Community, since they cannot be regarded as activities whose harmful nature causes them to be prohibited in all the Member States and whose position under Community law may be likened to that of activities involving illegal products.

Finally, neither the chance character of the winnings, as consideration for the payment received by the operator, nor the fact that, although lotteries are operated with a view to profit, participation in them may be recreational, nor even the fact that profits arising from a lottery may generally only be allocated in the public interest, prevents lottery activities from having an economic nature.

2. National legislation which prohibits, subject to specified exceptions, the holding of lotteries in a Member State and which thus wholly precludes lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or through independent agents, in the Member State which enacted that legislation, restricts, even though it is applicable without distinction, the freedom to provide services.

However, since the legislation in question involves no discrimination on grounds of nationality, that restriction may be justified if it is for the protection of consumers and the maintenance of order in society.

The particular features of lotteries justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield, and to decide either to restrict or to prohibit them.

Parties

In Case C-275/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice of England and Wales (Queen's Bench Division) for a preliminary ruling in the proceedings pending before that court between

Her Majesty's Customs and Excise

and

Gerhart Schindler

Joerg Schindler

on the interpretation of Articles 30, 36, 56 and 59 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris, F.A. Schockweiler, G.C. Rodríguez Iglesias, F. Grévisse (Rapporteur), M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C. Gulmann,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Gerhart and Joerg Schindler, by Mark Brealey, Barrister,
- the Belgian Government, by Jan Devadder, Principal Director in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, and Ph. Vlaemminck, of the Ghent Bar,
- the Danish Government, by Joergen Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,
- the Greek Government, by Vassileios Kontolaimos, Assistant Legal Adviser, and Ioannis Chalkias, legal representative, of the State Legal Service, acting as Agents,
- the Spanish Government, by Alberto Navarro González, Director General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, State Attorney in the Legal Department for Matters before the Court of Justice, acting as Agents,

– the French Government, by Philippe Pouzoulet, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Hélène Duchène, Secretary of Foreign Affairs, acting as Agents,

– the Luxembourg Government, by Charles Elsen, Principal Government Adviser, acting as Agent, assisted by René Diederich, of the Luxembourg Bar,

– the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the United Kingdom, by Susan Cochrane, Treasury Solicitor's Department, acting as Agent, and David Pannick QC, of the Bar of England and Wales,

– the Commission of the European Communities, by Richard Wainwright, Legal Adviser, and Arnold Ridout, a United Kingdom civil servant on secondment to the Legal Service of the Commission, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the defendants, the Belgian Government, the German Government, the Greek Government, the Spanish Government, the French Government, the Irish Government, represented by Mary Finlay, Senior Counsel, acting as Agent, the Luxembourg Government, the Netherlands Government, represented by J.W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the Portuguese Government, represented by Luis Fernandes, Director of the Legal Service of the Directorate-General of the European Communities of the Ministry of Foreign Affairs, and Rogério Leitão, Professor at the Institute of European Studies of the University of Lusíada, acting as Agents, the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards, Barrister, and the Commission of the European Communities, at the hearing on 22 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1993,

gives the following

Judgment

Grounds

1 By order of 3 April 1992, received at the Court on 18 June 1992, the High Court of Justice of England and Wales (Queen's Bench Division) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty six questions on the interpretation of Articles 30, 36, 56 and 59 of the Treaty in order to determine whether national legislation prohibiting the holding of certain lotteries

in a Member State was compatible with those provisions.

2 Those questions were raised in the course of proceedings between the Commissioners of Customs and Excise (hereinafter "the Commissioners"), plaintiffs in the main proceedings, and Gerhart and Joerg Schindler concerning the dispatch of advertisements and application forms for a lottery organized in the Federal Republic of Germany to United Kingdom nationals.

3 Gerhart and Joerg Schindler are independent agents of the "Sueddeutsche Klassenlotterie" (hereinafter "SKL"), a public body responsible for organizing what are known as "Class" lotteries on behalf of four Laender of the Federal Republic of Germany. As such agents, they promote SKL lotteries and unquestionably sell tickets for those lotteries.

4 Gerhart and Joerg Schindler dispatched envelopes from the Netherlands to United Kingdom nationals. Each envelope contained a letter inviting the addressee to participate in the 87th issue of the SKL, application forms for participating in that lottery and a pre-printed reply envelope.

5 The envelopes were intercepted and confiscated by the Commissioners at Dover Postal Depot on the ground that they had been imported in breach of section 1(ii) of the Revenue Act 1898 in conjunction with section 2 of the Lotteries and Amusements Act 1976, before their amendment by the National Lottery etc. Act 1993.

6 Section 1 of the Revenue Act 1898 as then in force provided:

> "The importation of the following articles is prohibited, that is to say:-
>
> (i) ...
>
> (ii) Any advertisement or other notice of, or relating to, the drawing or intended drawing of any lottery, which, in the opinion of the Commissioners of Customs and Excise is imported for the purpose of publication in the United Kingdom, in contravention of any Act relating to lotteries."

7 Section 1 of the Lotteries and Amusements Act 1976 prohibits lotteries which do not constitute gaming within the meaning of the United Kingdom legislation on gaming (in particular the Gaming Act 1968), namely the distribution of winnings in money or money's worth on the basis of chance where money has been staked by the players. However, by way of exception to that prohibition, the law permits certain types of lottery, mainly small-scale lotteries for charitable and similar purposes.

8 According to the order for reference, the 87th issue of the SKL was prohibited by virtue of those provisions.

9 Section 2 of the Act of 1976 as then in force provided:

> "... every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere –
>
> ...
>
> (d) brings, or invites any person to send, into Great Britain for the purpose of sale or distribution any ticket in, or advertisement of, the lottery; or
>
> (e) sends or attempts to send out of Great Britain any money or valuable thing received in respect of the sale or distribution, or any document recording the sale or distribution, or the identity of the holder, of any ticket or chance in the lottery; or
>
> ...
>
> (g) causes, procures or attempts to procure any person to do any of the abovementioned acts,
>
> shall be guilty of an offence."

10 In proceedings brought by the Commissioners for condemnation of the items seized, Gerhart and Joerg Schindler, defendants in the main proceedings, argued before the High Court of Justice that section 1(ii) of the Revenue Act 1898 and section 2 of the Lotteries and Amusements Act 1976 were incompatible with Article 30, or in the alternative Article 59, of the Treaty since they prohibited the importation into a Member State of tickets, letters and application forms relating to a lottery lawfully conducted in another Member State.

11 The Commissioners contended that tickets and advertisements for a lottery did not constitute "goods" within the meaning of the Treaty, that neither Article 30 nor Article 59 of the Treaty applied to the prohibition on importation in the United Kingdom legislation since that legislation applied to all large-scale lotteries whatever their origin and that in any event the prohibition was justified by the United Kingdom Government's concern to limit lotteries for social policy reasons and to prevent fraud.

12 Considering that resolution of that dispute required an interpretation of Community law, the High Court of Justice stayed the proceedings and referred the following questions to the Court:

> "(1) Do tickets in, or advertisements for, a lottery which is lawfully conducted in another Member State constitute goods for the purposes of Article 30 of the Treaty of Rome?
>
> (2) If so, does Article 30 apply to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on

grounds of nationality and irrespective of whether the lottery is organized from outside or within the United Kingdom?

(3) If so, do the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 36 or otherwise, in the circumstances of the present case?

(4) Does the provision of tickets in, or the sending of advertisements for, a lottery which is lawfully conducted in another Member State constitute the provision of services for the purposes of Article 59 of the Treaty of Rome?

(5) If so, does Article 59 apply to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized from outside or within the United Kingdom?

(6) If so, do the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 56 read with Article 66 or otherwise, in the circumstances of the present case?"

13 Read in the light of the arguments adduced before it by the parties to the main proceedings and the reasons given in its order for reference, the question put by the national court is essentially whether Articles 30 and 59 of the Treaty preclude the legislation of a Member State from prohibiting, subject to exceptions, lotteries in its territory – as does the United Kingdom legislation – and consequently the importation of material intended to enable its residents to participate in foreign lotteries.

14 The first and fourth questions are put by the national court to ascertain whether the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State constitutes an importation of goods and falls under Article 30 of the Treaty or whether such an activity amounts to a provision of services which as such comes within the scope of Article 59 of the Treaty.

15 In those circumstances, those two questions should be considered together.

The first and fourth questions

16 In assessing whether Articles 30 and 59 of the Treaty apply, the Belgian, German, Irish, Luxembourg and Portuguese Governments argue that lotteries are not an "economic activity" within the meaning of the Treaty. They submit that lotteries have traditionally been prohibited in the Member States, or are operated either directly by the public authorities or under their control, solely in the public interest. They consider that lotteries have no economic purpose since they are based on chance. In any case, lotteries are in the nature of recreation or amusement rather than economic. The Belgian and Luxembourg Governments add that it is clear from Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities (Official Journal 1975 L 167, p. 22) that lotteries fall outside the scope of the Treaty except where they are operated by individuals with a view to profit.

17 The Spanish, French and United Kingdom Governments and the Commission argue that operating lotteries is a "service" within the meaning of Article 60 of the Treaty. They submit that such an activity relates to services normally provided for remuneration to the operator of the lottery or to the participants in it, but not covered by the rules on the free movement of goods.

18 Finally, the defendants in the main proceedings argue that their activity comes within the scope of Article 30 of the Treaty. They submit that the advertisements and documents announcing or concerning a lottery draw are "goods" within the meaning of the Treaty, that is to say in accordance with the Court's definition in Joined Cases 60 and 61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605 they are manufactured material objects.

19 Since some governments argue that lotteries are not "economic activities" within the meaning of the Treaty, it must be made clear that the importation of goods or the provision of services for remuneration (see on the latter point the judgments in Case 13/76 Donà v Mantero [1976] ECR 1333, at paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, at paragraph 10) are to be regarded as "economic activities" within the meaning of the Treaty.

20 That being so, it will be sufficient to consider whether lotteries fall within the scope of one or other of the articles of the Treaty referred to in the order for reference.

21 The national court asks whether lotteries fall, at least in part, within the ambit of Article 30 of the Treaty to the extent that they involve the large-scale sending and distribution, in this case in another Member State, of material objects such

as letters, promotional leaflets or lottery tickets.

22 The activity pursued by the defendants in the main proceedings appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.

23 The point relied on by Gerhart and Joerg Schindler, that on the facts of the main proceedings agents of the SKL send material objects into Great Britain in order to advertise the lottery and sell tickets therein, and that material objects which have been manufactured are goods within the meaning of the Court's case-law, is not sufficient to reduce their activity to one of exportation or importation.

24 Lottery activities are thus not activities relating to "goods", falling, as such, under Article 30 of the Treaty.

25 They are however to be regarded as "services" within the meaning of the Treaty.

26 The first paragraph of Article 60 of the Treaty provides:

> "Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

27 The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organized and the prizes or winnings to be ascertained and paid out.

28 Those services are normally provided for remuneration constituted by the price of the lottery ticket.

29 The services in question are cross-border services when, as in the main proceedings, they are offered in a Member State other than that in which the lottery operator is established.

30 Finally, lotteries are governed neither by the Treaty rules on the free movement of goods (see paragraph 24 above), nor by the rules on the free movement of persons, which concern only movements of persons, nor by the rules on free movement of capital, which concern only capital movements though not all monetary transfers necessary to economic activities (see the judgment in Case

7/78 Regina v Thompson [1978] ECR 2247).

31 Admittedly, as some Member States point out, lotteries are subject to particularly strict regulation and close control by the public authorities in the various Member States of the Community. However, they are not totally prohibited in those States. On the contrary, they are commonplace. In particular, although in principle lotteries are prohibited in the United Kingdom, small-scale lotteries for charitable and similar purposes are permitted, and, since the enactment of the appropriate law in 1993, so is the national lottery.

32 In these circumstances, lotteries cannot be regarded as activities whose harmful nature causes them to be prohibited in all the Member States and whose position under Community law may be likened to that of activities involving illegal products (see, in relation to drugs, the judgment in Case 294/82 Einberger v Hauptzollamt Freiburg [1984] ECR 1177) even though, as the Belgian and Luxembourg Governments point out, the law of certain Member States treats gaming contracts as void. Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity is practised legally (see the judgment in Case C-159/90 Society for the Protection of Unborn Children Ireland [1991] ECR I-4685, at paragraph 20).

33 Some governments stress the chance character of lottery winnings. However, a normal lottery transaction consists of the payment of a sum by a gambler who hopes in return to receive a prize or winnings. The element of chance inherent in that return does not prevent the transaction having an economic nature.

34 It is also the case that, like amateur sport, a lottery may provide entertainment for the players who participate. However, that recreational aspect of the lottery does not take it out of the realm of the provision of services. Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator. Lotteries are operated by private or public persons with a view to profit since, in most cases, not all the money staked by the participants is redistributed as prizes or winnings.

35 Although in many Member States the law provides that the profits made by a lottery may be used only for certain purposes, in particular in the public interest, or may even be required to be paid into the State budget, the rules on the allocation of profits do not alter the nature of the activity in question or deprive it of its economic character.

36 Finally, in excluding from its ambit lottery activities other than those conducted by individuals with a view to profit, Directive 75/368, mentioned above, did not thereby deny those activities the character of "services". The sole object of that directive is to make it easier, by way of transitional measures, for nationals of

other Member States to pursue specified activities as self-employed persons. Thus, neither the object nor the effect of the directive is, or indeed could have been, to exclude lotteries from the scope of Articles 59 and 60 of the Treaty.

37 Consequently, the reply to be given to the first and fourth questions should be that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty.

The second and third questions

38 It is clear from their wording that the national court's second and third questions are put only if the activity in issue in the main proceedings falls within the scope of Article 30 of the Treaty. Since that is not the case, those questions do not call for a reply.

The fifth question

39 The essence of the national court's fifth question is whether national legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State constitutes an obstacle to the freedom to provide services.

40 The Commission and the defendants in the main proceedings argue that, on any view of the matter, such legislation, being in fact discriminatory, restricts the freedom to provide services.

41 The Spanish, French, Greek and United Kingdom Governments accept that such legislation may restrict freedom to provide services even though it is applicable without distinction.

42 The Belgian and Luxembourg Governments submit that legislation such as the United Kingdom legislation does not restrict freedom to provide services because it is applicable without distinction.

43 According to the case-law of the Court (see the judgment in Case C-76/90 Saeger v Dennemeyer [1991] ECR I-4221, at paragraph 12) national legislation may fall within the ambit of Article 59 of the Treaty, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

44 It is sufficient to note that this is the case with national legislation such as the United Kingdom legislation on lotteries which wholly precludes lottery operators from other Member States from promoting their lotteries and selling

their tickets, whether directly or through independent agents, in the Member State which enacted that legislation.

45 Accordingly, the reply to the fifth question should be that national legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services.

The sixth question

46 The national court's sixth question raises the issue whether the Treaty provisions relating to the freedom to provide services preclude legislation such as the United Kingdom lotteries legislation, where there are concerns of social policy and of the prevention of fraud to justify it.

47 First, as the national court states, legislation such as the United Kingdom legislation involves no discrimination on the basis of nationality and must consequently be regarded as being applicable without distinction.

48 It is common ground that a prohibition such as that laid down in the United Kingdom legislation, which applies to the operation of large-scale lotteries and in particular to the advertising and distribution of tickets for such lotteries, applies irrespective of the nationality of the lottery operator or his agents and whatever the Member State or States in which the operator or his agents are established. It does not therefore discriminate on the basis of the nationality of the economic agents concerned or of the Member State in which they are established.

49 The Commission and the defendants in the main proceedings argue, however, that legislation such as the United Kingdom lotteries legislation is in fact discriminatory. They submit that, although such legislation prohibits large lotteries in the United Kingdom in an apparently non-discriminatory manner, it permits the simultaneous operation by the same person of several small lotteries, which is equivalent to one large lottery and further the operation of games of chance which are comparable in nature and scale to large lotteries, such as football pools or "bingo".

50 It is true that the prohibition in question in the main proceedings does not apply to all types of lottery, small-scale lotteries not conducted for private gain being permitted in the national territory and the prohibition being set in the more general context of the national legislation on gambling which permits certain forms of gambling similar to lotteries, such as football pools or "bingo".

51 However, even though the amounts at stake in the games so permitted in the United Kingdom may be comparable to those in large-scale lotteries and even though those games involve a significant element of chance they differ in their object, rules and methods of organization from those large-scale lotteries which

were established in Member States other than the United Kingdom before the enactment of the National Lottery etc. Act 1993. They are therefore not in a comparable situation to the lotteries prohibited by the United Kingdom legislation and, contrary to the arguments of the Commission and the defendants in the main proceedings, cannot be assimilated to them.

52 In those circumstances legislation such as the United Kingdom legislation cannot be considered to be discriminatory.

53 That leads to the question whether Article 59 of the Treaty precludes such legislation which, although not discriminatory, nonetheless as stated above at paragraph 45 restricts the freedom to provide services.

54 All the governments which have submitted observations consider that legislation such as that at issue is compatible with Article 59 of the Treaty. They argue that the legislation must be regarded as justified by overriding public interest considerations of consumer protection, prevention of crime, protection of public morality, restriction of demand for gambling and the financing of public interest activities. They consider, furthermore, that such legislation is proportionate to the objectives pursued thereby.

55 In contrast the Commission considers that although it is based on overriding public interest considerations a prohibition on lotteries such as that provided under United Kingdom law is not compatible with Article 59 of the Treaty since the objectives it pursues may be achieved by less restrictive measures.

56 The defendants in the main proceedings argue for their part that the reasons invoked to justify the prohibition at issue cannot constitute overriding considerations of public interest since legislation such as the United Kingdom legislation does not contain an equivalent prohibition of gambling of the same nature as large-scale lotteries.

57 According to the information provided by the referring court, the United Kingdom legislation, before its amendment by the 1993 Act establishing the national lottery, pursued the following objectives: to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.

58 Those considerations, which must be taken together, concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society. The Court has already held that those objectives figure among those which can justify restrictions on freedom to provide services (see the judgments in Joined Cases 110 and 111/78 Ministère Public v Van

Wesemael [1979] ECR 35, at paragraph 28; Case 220/83 Commission v France [1986] ECR 3663, at paragraph 20; Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, at paragraph 5).

59 Given the peculiar nature of lotteries, which has been stressed by many Member States, those considerations are such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State.

60 First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

61 Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

62 When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organized in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries.

63 Accordingly, the reply to be given to the sixth question must be that the Treaty provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.

Decision on costs

Costs

64 The costs incurred by the Belgian, Danish, German, Greek, Spanish, French, Irish, Luxembourg, Netherlands, Portuguese and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice (Queen's Bench Division, Commercial Court) by order of 3 April 1992, hereby rules:

1. The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a "service" within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty;

2. National legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services;

3. The Treaty provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it.

C-124/97, Läärä

Judgment of the Court of 21 September 1999. – Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State). – Reference for a preliminary ruling: Vaasan hovioikeus – Finland. – Freedom to provide services – Exclusive operating rights – Slot machines. – Case C-124/97

Keywords

Freedom to provide services – Restrictions – National legislation reserving the operation of slot machines to a public body – Justification – Consumer protection and maintenance of order in society

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC))

Summary

National legislation which grants to a single public body exclusive rights to operate slot machines in the national territory – and which thus directly or indirectly prevents operators in other Member States from themselves making slot machines available to the public with a view to their use in return for payment – constitutes an impediment to freedom to provide services, even if it applies without distinction.

However, in so far as such legislation involves no discrimination on grounds of nationality, that impediment may be justified on grounds relating to the protection of consumers and the maintenance of order in society. Although that legislation does not prohibit the use of slot machines but reserves the running of them to a licensed public body, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment. It is for those authorities, therefore, to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict. In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.

Parties

In Case C-124/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Vaasan Hovioikeus, Finland, for a preliminary ruling in the proceedings pending before that court between

Markku Juhani Läärä,

Cotswold Microsystems Ltd,

Oy Transatlantic Software Ltd,

and

Kihlakunnansyyttäjä (Jyväskylä),

Suomen Valtio (Finnish State),

on the interpretation of the judgment of the Court of Justice of 24 March 1994 in Case C-275/92 Schindler [1994] ECR I-1039 and of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC) and Article 60 of the EC Treaty (now Article 50 EC),

THE COURT,

composed of: P.J.G. Kapteyn, President of the Fourth and Sixth Chambers, acting for the President, J.-P. Puissochet (Rapporteur) and P. Jann (Presidents of Chambers), C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

– Mr Läärä and Oy Transatlantic Software Ltd, by P. Kiviluoto, of the Jyväskylä Bar,

– Cotswold Microsystems Ltd, by H.T. Klami, Professor at the University of Helsinki,

– the Finnish Government, by T. Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the Belgian Government, by J. Devadder, Director of Administration in the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, assisted by P. Vlaemminck and L. Van Den Hende, of the Ghent Bar,

– the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and C.-D. Quassowski, Regierungsdirektor in the same Ministry, acting as Agents,

– the Spanish Government, by L. Pérez de Ayala Becerril, Abogado del Estado, acting as Agent,

– the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the Austrian Government, by F. Cede, Ambassador in the Ministry of Foreign Affairs, acting as Agent,

– the Portuguese Government, by L. Fernandes, Director of the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, A. Cortesão Seiça Neves, of the same Service, and J. Ramos Alexandre, Inspector-General of Gaming in the Ministry of Economic Affairs, acting as Agents,

– the Swedish Government, by E. Brattgård, Departementsråd in the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,

– the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by M. Brealey, Barrister,

– the Commission of the European Communities, by A. Caeiro, Legal Adviser, and K. Leivo, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of: Mr Läärä and Oy Transatlantic Software Ltd, represented by P. Kiviluoto; Cotswold Microsystems Ltd, represented by H.T. Klami; the Finnish Government, represented by T. Pynnä; the Belgian Government, represented by P. Vlaemminck and L. Van Den Hende; the German Government, represented by E. Röder; the Spanish Government, represented by M. López-Monís Gallego, Abogado del Estado, acting as Agent; the Irish Government, represented by M. Finlay, SC; the Luxembourg Government, represented by K. Manhaeve, of the Luxembourg Bar; the Netherlands Government, represented by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by L. Fernandes and A. Cortesão Seiça Neves; the Swedish Government, represented by L. Nordling, Rättschef in the Legal Secretariat (EU) of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by J.E. Collins, assisted by M. Brealey; and the Commission, represented by A. Caeiro and K. Leivo, at the hearing on 30 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 4 March

1999,

gives the following

Judgment

Grounds

1 By order of 21 March 1997, received at the Court on 25 March 1997, the Vaasan Hovioikeus (Court of Appeal, Vaasa) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of the Court's judgment of 24 March 1994 in Case C-275/92 Schindler [1994] ECR I-1039 and of Articles 30, 36, 56 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 30 EC, 46 EC and 49 EC) and Article 60 of the EC Treaty (now Article 50 EC), with a view to determining whether national legislation reserving to a public body the right to run the operation of slot machines on the territory of the Member State concerned is compatible with those provisions.

2 Those questions were raised in proceedings between Mr Läärä, Oy Transatlantic Software Ltd, a company incorporated under Finnish law ('TAS'), and Cotswold Microsystems Ltd, a company incorporated under English law ('CMS'), appellants in the main proceedings, and Kihlakunnansyyttäjä (Jyväskylä) (Jyväskylä District Prosecutor) and Suomen Valtio (the Finnish State) concerning the operation of slot machines in Finland.

The national rules

3 In Finland, under Article 1(1) of the Arpajaislaki (1.9.1965/491) (Law No 491 of 1 September 1965 on gaming, in the version thereof in force at the material time), games of chance may be organised, with the authorisation of the administrative authorities, only for the purpose of collecting funds for charity or for another non-profit-making purpose provided for by law. According to Article 1(2) of the Arpajaislaki, games of chance, within the meaning of that law, include in particular casino activities, slot machines and other gaming machines or games in which, in exchange for a sum of money, the player may receive a cash prize, goods or other benefits of money's worth, or tokens to be exchanged for money, goods or benefits.

4 Article 3 of the Arpajaislaki provides, inter alia, for the issue by the administrative authorities to a public-law body of a licence for the operation, in return for remuneration, of slot machines and other gaming machines or for the carrying-on of casino activities, with a view to the collection of funds for various public interest initiatives as listed by that provision. Only one licence, valid for a specified period, may be issued to cover those activities.

5 Such a licence was issued to the Raha-automaattiyhdistys (Association for the Management of Slot Machines, hereinafter 'the RAY'), pursuant to Article 1(3) of the Raha-automaattiasetus (29.12.1967/676) (Regulation No 676 of 29 December 1967 on slot machines, in the version thereof in force at the material time). According to Article 6 of that regulation, the RAY is entitled, with a view to achieving its object of collecting funds to meet the needs referred to in Article 3 of the Arpajaislaki, in return for remuneration, to operate slot machines and to carry on casino activities, and also to manufacture and sell slot machines and amusement machines. Article 29 et seq. of that regulation lays down the conditions under which the net proceeds of the RAY's activities, the amount of which appears in the State budget, are to be paid over to the Ministry of Social Affairs and Health and then distributed amongst the organisations and foundations established to meet the aforesaid needs.

6 Under Article 6(1) of the Arpajaislaki, a person who without a licence organises games of chance for which a licence is required is liable to the imposition of a fine or a term of up to six months' imprisonment. In addition, according to Article 16(2) of Part 2 of the Rikoslaki (13.05.1932/143) (Finnish Criminal Law, in the version thereof resulting from Law No 143 of 13 May 1932), any device belonging to an offender or to a person on whose behalf or for whose benefit he has acted and which has been used in the commission of the offence or has been made or obtained solely for that purpose may be confiscated.

The main proceedings

7 It is apparent from the order for reference that CMS entrusted TAS, of which Mr Läärä is the chairman, with the running in Finland of slot machines known as 'AWP' machines, of the Golden Shot type, which, in terms of the contract between the two companies, remain the property of CMS. These machines contain rotating rollers bearing symbols which represent fruit. When the rollers stop turning, either by themselves or by the operation of a handle by the player, and the sequence formed by the symbols corresponds to one of the winning combinations, the machine delivers to the player winnings amounting to a maximum of FIM 200 (for a stake of between FIM 1 and FIM 5).

8 Criminal proceedings were brought against Mr Läärä, in his capacity as the chief executive of TAS, before the Jyväskylän Käräjäoikeus (Jyväskylä Court of First Instance) on a charge of having operated these machines in Finland without a licence. Supported by TAS and CMS, who were joined in the proceedings, he denied the offence with which he was charged, on the ground, in particular, that the prospects of winning offered by Golden Shot machines was not based exclusively on chance but also, to a large extent, on the skill of the player, with the result that those machines could not be regarded as gaming machines, and that the Finnish legislation was contrary to the Community rules governing the

free movement of goods and services. The Käräjäoikeus, rejecting his arguments, sentenced him to a fine and ordered the confiscation of the machines.

9 On appeal against that judgment by the parties concerned to the Vaasan Hovioikeus, that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> '(1) Is the judgment of the Court of Justice of 24 March 1994 in Case C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler to be interpreted in such a way that it may be regarded as analogous to the present case (compare the judgment of 6 October 1982 in Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health), and that the provisions of the EC Treaty should be interpreted in the present case in the same way as in the aforesaid case?
>
> If the answer to the first question is wholly or partly in the negative:
>
> (2) Do the provisions of the EC Treaty on the free movement of goods and services (Articles 30, 59 and 60) also apply to gaming machines of the type in issue here?
>
> (3) If the answer to the second question is in the affirmative:
>
> (a) do Articles 30, 59 or 60 or any other article of the EC Treaty preclude Finland from restricting the right to manage slot machines to the monopoly operated by the Raha-automaattiyhdistys (Public-Law Association for the Management of Slot Machines), irrespective of whether the restriction applies under that Law to domestic and foreign organisers of gaming alike, and
>
> (b) can that restriction be justified, having regard to the reasons set out in the Law on games of chance or the measures implementing that Law, or on any other grounds, by the principles contained in Articles 36 or 56 or any other article of the EC Treaty; in addition, is the answer to that question affected by the amount of the winnings which may be obtained from the machines and by the question whether the opportunity of winning is based on chance or on the player's skill?'

10 By those three questions, which should be examined together, the national court is asking whether, in the light of the judgment in Schindler, Articles 30, 59 and 60 of the Treaty are to be interpreted as not precluding national legislation such as that in force in Finland, which grants to a single public body exclusive rights to exploit the operation of slot machines, in view of the public interest grounds relied on in order to justify it.

11 Mr Läärä, TAS and CMS maintain that operating the slot machines at issue in the main proceedings is quite different – on account, in particular, of the

modest size of the stakes and prizes and their ultimate purpose, namely to provide amusement based on the skill of the player – from the organisation of large-scale lotteries with which the judgment in Schindler was concerned. In their view, the exclusive right conferred on the RAY is contrary to the provisions of the Treaty regarding the free movement of goods and services and competition, principally because the public interest objectives relied on to justify it are not pursued in practice and could be attained by less restrictive measures, such as regulations imposing the necessary code of conduct on operators.

12 The Finnish, Belgian, German, Spanish, Irish, Luxembourg, Netherlands, Austrian, Portuguese, Swedish and United Kingdom Governments and the Commission consider, by contrast, that the provisions of the Treaty do not preclude legislation such as the Finnish legislation, granting exclusive rights to run the operation of slot machines, since it is justified by considerations analogous to those accepted by the Court in Schindler. In the view of all those Governments, the games at issue in the main proceedings, which offer, in return for payment, the opportunity of winning cash prizes, constitute a form of gambling comparable to lotteries, in relation to which the Court has accepted that it is for the Member States, having regard to their specific social and cultural characteristics, to assess whether it is necessary to restrict or even prohibit the activities concerned in order to maintain order in society.

13 In paragraph 60 of the Schindler judgment, the Court drew attention to the moral, religious and cultural considerations which attach to lotteries, like other forms of gambling, in all the Member States. The general tendency of the national legislation is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. The Court also held that lotteries involve a high risk of crime or fraud, given the potentially high stakes and winnings, particularly when they are operated on a large scale. Furthermore, they are an incitement to spend which may have damaging individual and social consequences. A final ground which, according to the Court, is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

14 As is apparent from paragraph 61 of the judgment in Schindler, the Court held that those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

15 Although the judgment in Schindler relates to the organisation of lotteries, those considerations are equally applicable – as is apparent, moreover, from the very wording of paragraph 60 of that judgment – to other comparable forms of gambling.

16 It is true that, in its judgment in Case C-368/95 Familiapress v Bauerverlag [1997] ECR I-3689, the Court declined to equate certain games with lotteries of the type considered in Schindler. However, that case concerned competitions published in magazines in the form of crosswords or puzzles, giving readers who had sent in the correct solutions the chance of being entered in a draw from which a number of them were selected as prize-winners. As the Court noted, particularly in paragraph 23 of that judgment, such games, organised only on a small scale and for insignificant stakes, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

17 In the present case, by contrast, it is apparent from the information supplied by the national court that a game of chance is involved and that the machines at issue in the main proceedings offer, in return for a payment specifically intended to represent consideration for their use, the prospect of winning a sum of money. As has been pointed out by the majority of the governments intervening in the present proceedings, the relatively modest size of the stakes and prizes, on which the appellants in the main proceedings base their case, does not in any way preclude the possibility of earning considerable sums from the operation of such machines, particularly on account of the number of potential players and the tendency amongst most of them, given its short duration and its repetitive nature, to play the game over and over again.

18 In those circumstances, games consisting of the use, in return for a money payment, of slot machines such as those at issue in the main proceedings must be regarded as gambling which is comparable to the lotteries forming the subject of the Schindler judgment.

19 However, the present case differs from Schindler in a number of respects.

20 First of all, the lotteries at issue in Schindler are not activities relating to 'goods', falling, as such, under Article 30 of the Treaty; instead, they must be regarded as 'services' within the meaning of the EC Treaty (judgment in Schindler, paragraphs 24 and 25). Slot machines, by contrast, constitute goods in themselves which may be covered by Article 30 of the Treaty.

21 Next, whereas the national legislation at issue in Schindler prohibits the holding of lotteries on the territory of the Member State concerned, subject to certain exceptions laid down therein, the legislation at issue in the present case does not prohibit the use of slot machines but reserves the running of such machines to a public body holding a licence issued by the administrative

authorities ('the licensed public body').

22 Finally, as has been pointed out in certain of the observations submitted to the Court, other provisions of the Treaty, such as those relating to the right of establishment or the competition rules, may be applicable to legislation of the kind at issue in the main proceedings.

23 As regards the latter point, however, since the national court has merely added to the reference to Articles 30, 36, 59 and 60 of the Treaty in its third question the words 'or any other article of the ... Treaty', without providing any further details in that regard, either in the reasoning or in the operative part of its order, the Court is unable to rule on the question whether any provisions of the Treaty other than those relating to the free movement of goods and services preclude national legislation of the type at issue in the main proceedings.

24 First of all, as stated in paragraph 20 of this judgment, the provisions of the Treaty relating to the free movement of goods may be applicable to slot machines, which constitute goods capable of being imported or exported. It is true that such machines are intended to be made available to the public for use in return for payment. However, as the Advocate General has stated in point 19 of his Opinion, the fact that an imported item is intended for the supply of a service does not in itself mean that it falls outside the rules regarding freedom of movement (see, to that effect, Case C-158/94 Commission v Italy [1997] ECR I-5789, paragraphs 15 to 20).

25 It should be noted in that regard that national legislation of the kind at issue in the main proceedings may hinder the free movement of goods, inasmuch as the licensed public body is, in law, the only possible operator of slot machines intended to be used in return for payment, and has the right to manufacture such machines itself.

26 However, in the absence of adequate detailed information concerning the practical effect which the legislation in issue has on the importation of slot machines, the Court is unable, in the present proceedings, to rule on the question whether Article 30 of the Treaty precludes its application.

27 Second, as the Court held in Schindler in relation to the organisation of lotteries, the provisions of the Treaty relating to freedom to provide services apply to activities which enable users, in return for payment, to participate in gaming. Consequently, such activities fall within the scope of Article 59 of the Treaty, since at least one of the service providers is established in a Member State other than that in which the service is offered.

28 As the referring court points out, national legislation on slot machines such as the Finnish legislation prohibits any person other than the licensed public body

from running the operation of the machines in question; it therefore involves no discrimination on grounds of nationality and applies without distinction to operators who might be interested in that activity, whether they are established in Finland or in another Member State.

29 However, such legislation constitutes an impediment to freedom to provide services in that it directly or indirectly prevents operators in other Member States from themselves making slot machines available to the public with a view to their use in return for payment.

30 It is therefore necessary to examine whether that obstacle to freedom to provide services can be permitted pursuant to the derogations expressly provided for by the Treaty, or whether it may be justified, in accordance with the Court's case-law, by overriding reasons relating to the public interest.

31 In that regard, Articles 55 (now Article 45 EC) and 56 of the EC Treaty, which are applicable pursuant to Article 66 of the EC Treaty (now Article 55 EC), permit restrictions which are justified by virtue of a connection, even on an occasional basis, with the exercise of official authority or on grounds of public policy, public security or public health. Furthermore, it is clear from the Court's case-law (see, to that effect, Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 13 to 15) that obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it.

32 According to the information contained in the order for reference and in the observations of the Finnish Government, the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.

33 As the Court acknowledged in paragraph 58 of the Schindler judgment, those considerations must be taken together. They concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. The Court has already held that those objectives are amongst those which may be regarded as overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28; Case 220/83 Commission v France [1986] ECR 3663, paragraph 20; and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). However, it is still necessary, as stated in paragraph 31 of this judgment, that measures based on such grounds guarantee the achievement of the intended aims and do not go beyond

that which is necessary in order to achieve them.

34 As noted in paragraph 21 of this judgment, the Finnish legislation differs in particular from the legislation at issue in Schindler in that it does not prohibit the use of slot machines but reserves the running of them to a licensed public body.

35 However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment, recognised by the Court in paragraph 61 of the Schindler judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

36 In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.

37 Contrary to the arguments advanced by the appellants in the main proceedings, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.

38 The position is not affected by the fact that the various establishments in which the slot machines are installed receive from the licensed public body a proportion of the takings.

39 The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.

40 On that point, it is apparent, particularly from the rules on slot machines, that the RAY, which is the sole body holding a licence to run the operation of

those machines, is a public-law association the activities of which are carried on under the control of the State and which is required, as noted in paragraph 5 of this judgment, to pay over to the State the amount of the net distributable proceeds received from the operation of the slot machines.

41 It is true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.

42 In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue.

43 Accordingly, the answer to be given to the national court must be that the Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public body exclusive rights to operate slot machines, in view of the public interest objectives which justify it.

Decision on costs

Costs

44 The costs incurred by the Finnish, Belgian, German, Spanish, Irish, Luxembourg, Netherlands, Austrian, Portuguese, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Vaasan Hovioikeus by order of 21 March 1997, hereby rules:

The Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants to a single public

body exclusive rights to operate slot machines, in view of the public interest objectives which justify it.

C-67/98, Zenatti

Judgment of the Court of 21 October 1999. – Questore di Verona v Diego Zenatti. – Reference for a preliminary ruling: Consiglio di Stato – Italy. – Freedom to provide services – Taking of bets. – Case C-67/98.

Keywords

Freedom to provide services – Restrictions – National legislation reserving for certain bodies the right to take bets on sporting events – Justification – Protection of consumers and maintenance of order in society

(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC))

Summary

National legislation which reserves for certain bodies the right to take bets on sporting events and which thus prevents operators in other Member States from taking bets, directly or indirectly, constitutes an obstacle to the freedom to provide services even if it applies without distinction.

However, in so far as such legislation does not entail any discrimination on grounds of nationality, it can be justified where its objectives are to protect consumers and to maintain order in society. Although it does not totally prohibit the taking of bets on sporting events but reserves it for certain bodies under certain circumstances, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation enjoyed by the national authorities. It is for those authorities to appraise whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them. In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they are intended to ensure.

Parties

In Case C-67/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234

EC) by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Questore di Verona

and

Diego Zenatti

on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the Italian Government, by Professor U. Leanza, Head of the Department of Contentious Diplomatic Affairs, Ministry of Foreign Affairs, acting as Agent, assisted by D. Del Gaizo, Avvocato dello Stato,
- Mr Zenatti, by R. Torrisi Rigano, of the Catania Bar, and A. Pascerini, of the Bologna Bar,
- the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,
- the Spanish Government, by N. Díaz Abad, Abogado del Estado, acting as Agent,
- the Portuguese Government, by L.I. Fernandes, Director of the Legal Service of the Directorate-General for the European Communities of the Ministry of Foreign Affairs, and M.L. Duarte, Legal Adviser in the same directorate, and A.P. Barros, Legal Coordinator in the gaming department of Santa Casa da Misericórdia de Lisboa, acting as Agents,
- the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Affairs Department in the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser in the same Ministry, acting as Agents,
- the Swedish Government, by E. Brattgård, Departmental Adviser in the Ministry of Foreign Affairs, acting as Agent,

– the Norwegian Government, by J. Bugge-Mahrt, Deputy-Director General in the Ministry of Foreign Affairs, acting as Agent,

– the Commission of the European Communities, by M. Patakia and L. Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, represented by D. Del Gaizo, Mr Zenatti, represented by R. Torrisi Rigano and A. Pascerini, of the Belgian Government, represented by P. Vlaemminck, of the Ghent Bar, of the Spanish Government, represented by N. Díaz Abad, of the French Government, represented by F. Million, Chargé de Mission in the Legal Affairs Directorate in the Ministry of Foreign Affairs, acting as Agent, of the Portuguese Government, represented by M.L. Duarte, of the Finnish Government, represented by H. Rotkirch and T. Pynnä, of the Swedish Government, represented by A. Kruse, Departmental Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by M. Patakia and L. Pignataro, at the hearing on 10 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

Judgment

Grounds

1 By order of 20 January 1998, received at the Court on 13 March 1998, the Consiglio di Stato (Council of State) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services to enable it to determine the compatibility of those provisions with national legislation which, subject to exceptions, prohibits the taking of bets and reserves to certain bodies the right to organise the taking of such bets as are authorised.

2 That question was raised in proceedings between the Questore di Verona (the police prosecuting authority of Verona) and Mr Zenatti concerning the prohibition imposed on the latter from acting as an intermediary in Italy for a company established in the United Kingdom specialising in the taking of bets on sporting events.

Legal background

3 In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931, 'the Royal Decree'), '[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event'.

4 It is clear from the Italian Government's reply to the question put to it by the Court concerning the arrangements for applying the exception so provided for that bets may be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, 'CONI') or on the results of horse races organised though the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, 'UNIRE'). The use of the funds collected in the form of bets and allocated to those two bodies is regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and 1997, arrangements for and the taking of bets reserved to CONI and UNIRE may be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.

5 Article 718 of the Italian Penal Code makes it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibits the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting are covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, can any sum paid voluntarily be reclaimed.

The main proceedings

6 Since 29 March 1997, Mr Zenatti has acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd ('SSP'), a licensed bookmaker. Mr Zenatti runs an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sends to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and receives faxes from SSP for transmission to the same customers.

7 By decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease that activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allows betting to be licensed

only where it is essential for the proper conduct of competitive events.

8 Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

9 The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

10 The Consiglio di Stato considers that the decision to be given calls for an interpretation of the Treaty provisions on the freedom to provide services. In its view, the principles expounded in the judgment of the Court of Justice in Case C-275/92 Schindler [1994] ECR I-1039 to the effect that those provisions do not preclude legislation like the United Kingdom legislation on lotteries, in view of the concerns of social policy and the prevention of fraud which justify it, appear to be applicable by analogy to the Italian legislation on betting.

11 However, since the Community judicature has not given any judgment on legislation of that kind, the Consiglio di Stato, whose decisions are not open to appeal, considers that Article 177 of the Treaty requires it to seek a ruling from the Court of Justice. It therefore stayed proceedings pending a preliminary ruling from the Court on the following question:

> 'Do the Treaty provisions on the provision of services preclude rules such as the Italian betting legislation in view of the social-policy concerns and of the concern to prevent fraud that justify it?'

The question

12 The Italian Government and all the other Governments that have submitted observations, and also the Commission, contend that the Schindler judgment provides all that is needed for that question to be answered in the negative.

13 Mr Zenatti, on the other hand, contends that the taking of bets on sporting events cannot be equated with the running of lotteries, with which Schindler was concerned, in particular because bets do not amount to games of pure chance but require the person laying the bet to use his skill in predicting results. He also considers that the social-policy concerns and the concern to prevent fraud referred to by the national court are not sufficient to justify the legislation at issue in the main proceedings.

14 It must be borne in mind that, in paragraph 60 of Schindler, the Court laid emphasis on the moral, religious and cultural aspects of lotteries and other types of gambling in all the Member States. The general tendency of national legislation is to restrict, or even prohibit, the practice of gambling and to prevent it from

being a source of private profit. The Court also observed that lotteries involve a high risk of crime and fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to players, particularly when they are operated on a large scale. They also constitute an incitement to spend which may have damaging individual and social consequences. A final consideration which, although it cannot in itself be regarded as an objective justification, the Court held to be relevant is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

15 In paragraph 61 of the judgment in Schindler the Court held that the special features of lotteries justify allowing national authorities a sufficient margin of appreciation to determine what is required to protect participants and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, taking into account the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. In such circumstances, it is for the national authorities to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

16 Even though the Schindler judgment concerns the organisation of lotteries, those considerations also apply, as is clear also from the very terms of paragraph 60 of that judgment, to other comparable forms of gambling.

17 It is true that in its judgment in Case C-368/95 Familiapress v Bauer Verlag [1997] ECR I-3689, the Court declined to treat certain games in the same way as the lotteries considered in Schindler. However, that case was concerned with magazine competitions involving crosswords or other puzzles in which a number of readers who had given correct answers received a prize following a draw. As the Court held in particular, in paragraph 23 of that judgment, such draws, which are organised on a small scale and in which the stakes are small, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

18 In this case, on the other hand, bets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.

19 In those circumstances, the betting at issue in the main proceedings must be regarded as gambling of a kind comparable to the lotteries at issue in Schindler.

20 However, the present case differs from Schindler in at least two respects.

21 First, although the laws at issue in the two cases both impose a prohibition, subject to exceptions, upon the transactions involved, their scope is not the same. As the Advocate General observes in paragraph 24 of his Opinion, whilst the national legislation considered in Schindler involved a total prohibition on the type of gambling at issue, namely large lotteries, the legislation at issue in this case does not totally prohibit the taking of bets but reserves to certain bodies the right to organise betting in certain circumstances.

22 Second, as pointed out in some of the observations submitted to the Court, the Treaty provisions on the right of establishment may fall to be applied in a situation such as that at issue in the main proceedings in view of the nature of the relationship between Mr Zenatti and SSP, the company for which he acts.

23 On the latter point, however, since the question raised by the national court is limited to the provisions on the freedom to provide services, it is not appropriate to consider the possible applicability of other provisions of the Treaty.

24 As the Court held in Schindler, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.

25 In this case, the services at issue are provided by the organiser of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.

26 It is not disputed by the parties to the main proceedings, the various Governments which have submitted observations or the Commission that the Italian legislation, inasmuch as it prohibits the taking of bets by any person or body other than those which may be licensed to do so, applies without distinction to all operators who might be interested in such an activity, whether established in Italy or in another Member State.

27 However, such legislation, preventing as it does operators in other Member States from taking bets, directly or indirectly, in Italian territory, constitutes an obstacle to the freedom to provide services.

28 It is therefore necessary to consider whether that restriction on the freedom to provide services is permissible under the exceptions expressly provided for by the Treaty or is justified, in accordance with the case-law of the Court, by

overriding reasons relating to the public interest.

29 Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), which are applicable in this area by virtue of Article 66 of the EC Treaty (now Article 55 EC), allow restrictions justified by a connection, even if occasional, with the exercise of official authority or for reasons of public policy, public security or public health. Moreover, according to the case-law of the Court (see, to that effect, Case C-288/89 Collectieve Antennevoorziening Gouda and Others [1991] ECR I-4007, paragraphs 13 to 15), restrictions on the freedom to provide services deriving from national measures which apply without distinction are acceptable only if those measures are justified by overriding reasons relating to the public interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.

30 According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in Schindler. The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.

31 As the Court acknowledged in paragraph 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v Van Wesemael [1979] ECR 35, paragraph 28, Case 220/83 Commission v France [1986] ECR 3663, paragraph 20, and Case 15/78 Société Générale Alsacienne de Banque v Koestler [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

32 As noted in paragraph 21 of this judgment, the Italian betting legislation differs from the legislation at issue in Schindler, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.

33 However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of

gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

34 In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.

35 As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others [1999] ECR I-0000 in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.

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.

37 It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

38 Accordingly, the answer to the question put by the national court must be that the Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain

bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

Decision on costs

Costs

39 The costs incurred by the Italian, Belgian, German, Spanish, French, Portuguese, Finnish, Swedish and Norwegian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the question referred to it by the Consiglio de Stato by order of 20 January 1998, hereby rules:

The EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

C-6/01, Anomar

Judgment of the Court (Third Chamber) of 11 September 2003. – Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português. – Reference for a preliminary ruling: Tribunal Cível da Comarca de Lisboa – Portugal. – Freedom to provide services – Operation of games of chance or gambling – Gaming machines. – Case C-6/01.

Parties

In Case C-6/01,

REFERENCE to the Court under Article 234 EC by the Tribunal Cível da Comarca de Lisboa (Portugal) for a preliminary ruling in the proceedings pending before that court between

Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others

and

Estado português,

on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC,

THE COURT

(Third Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, C. Gulmann and F. Macken, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others, by R. Francês, advogado,
- the Portuguese Government, by L. Fernandes and J. Ramos Alexandre and by M.L. Duarte, acting as Agents,
- the Belgian Government, by F. Van de Craen, acting as Agent, assisted by P. Vlaemminck, avocat,

– the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

– the Spanish Government, by M. López-Monís Gallego, acting as Agent,

– the Finnish Government, by E. Bygglin, acting as Agent,

– the Commission of the European Communities, by A. Caeiros and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of: Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others, represented by R. Francês; the Portuguese Government, represented by M.L. Duarte; the Belgian Government, represented by P. De Wael and P. Vlaemminck, acting as Agents; the Spanish Government, represented by L. Fraguas Gadea, acting as Agent; the French Government, represented by P. Boussaroque, acting as Agent; and the Commission, represented by A. Caeiros and M. Patakia, at the hearing on 26 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2003,

gives the following

Judgment

Grounds

1 By order of 25 May 2000, which was received at the Court on 8 January 2001, the Tribunal Cível da Comarca (Civil Court of First Instance), Lisbon, referred to the Court for a preliminary ruling under Article 234 EC 13 questions on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC.

2 Those questions were raised in the context of proceedings between the Associação Nacional de Operadores de Máquinas Recreativas (hereinafter 'Anomar'), established in Lisbon, and eight Portuguese companies involved in the marketing and operation of gaming machines (hereinafter together referred to as 'the applicants in the main action') and the Portuguese State. The questions concern Portuguese legislation relating to the operation and playing of games of chance or gambling under Decreto-Lei (Decree-Law) No 422/89 of 2 December 1989 (Diário da República, I , No 2777, of 2 December 1989), as amended by Decreto-Lei No 10/95 of 19 January 1995 (Diário da República, I, Series A, No 16, of 19 January 1995, hereinafter 'Decree-Law No 422/89'), and whether it complies with Community law.

Community law

3 Article 2 EC provides that '[t]he Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities … to promote throughout the Community a harmonious, balanced and sustainable development of economic activities'.

4 Under Articles 28 EC and 29 EC, quantitative restrictions on imports and exports and all measures having equivalent effect are to be prohibited between Member States.

5 According to Article 31 EC:

> '1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
>
> The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
>
> 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
>
> 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.'

6 Article 49 EC provides:

> '… restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.
>
> The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.'

National law

7 Decree-Law No 422/89 governs, in particular, the operation and playing of games of chance or gambling and combinations of games of chance and other forms of gaming and makes the operation and playing thereof outside duly authorised areas an offence punishable by a period of imprisonment. The general principle underpinning the statutory scheme is laid down in Article 9 of Decree-Law No 422/89, which provides that '[t]he right to operate games of chance or gambling is reserved to the State'. Although the State alone is entitled to that right, it may be exercised, other than by the State or another public body, subject to authorisation in the form of an administrative licensing agreement.

8 Decree-Law No 422/89, which forms part of a consistent legislative policy concerning the granting of licences in respect of gaming areas which may be traced back to Decree-Law No 14643 of 3 December 1937, provides that the operation and playing of games of chance or gambling are to be restricted to the games rooms of casinos located in permanent or temporary gaming areas created by decree-law.

9 Portuguese law distinguishes between various kinds of game arranged in four categories, according to the criteria laid down in the relevant provisions of Decree-Law No 422/89, governed by different legal rules.

10 The first category contains games of chance or gambling. Under Article 1 of Decree-Law No 422/89, 'games of chance or gambling are those whose result is uncertain because it depends exclusively or fundamentally on chance'.

11 That category makes provision for two types of gaming involving the use of machines. One is 'play on machines paying out tokens or cash' and the other 'play on machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling, or display a result in the form of points depending exclusively or essentially on chance' (Article 4(1)(f) and (g) of Decree-Law No 422/89).

12 The right to operate games of chance or gambling is reserved to the State and may be exercised only by undertakings incorporated as public limited companies, to which the Government grants the relevant licence by way of an administrative contract (Article 9 of Decree-Law No 422/89). The operating licence is granted on the basis of a tender procedure (Article 10 of Decree-Law No 422/89) which does not discriminate on grounds of nationality.

13 The only places where the operation and playing of games of chance or gambling are authorised are in casinos located in permanent or temporary gaming areas established under decree-law and, exceptionally and subject to ministerial authorisation, ships, aircraft, bingo halls and in halls reserved for major tourist

events (Article 3(1), (6), (7) and (8) of Decree-Law No 422/89).

14 The second category covers combinations of games of chance or gambling and other forms of gaming, statutorily defined as 'transactions offered to the public in which the expectation of winning depends on either a combination of chance and the skill of the player or on chance only and where the winnings are in the form of goods having commercial value' (Article 159(1) of Decree-Law No 422/89). It includes, in particular, lotteries, tombolas, prize draws, promotional competitions, quizzes and contests (Article 159(2) Decree-Law No 422/89).

15 Operation of such combinations of games of chance or gambling and other forms of gaming is subject to authorisation of the Minster for Interior Affairs who is to lay down, for each case, the conditions he considers appropriate and establish the relevant monitoring system (Article 160(1) of Decree-Law No 422/89). In principle, such combinations of games of chance or gambling and other forms of gaming may not be operated by profit-making organisations (Article 161(1) of Decree-Law No 422/89). Nor may they concern matters inherent to games of chance or gambling (poker, fruit machines, roulette, dice, bingo, lottery draws, instant lottery, pools (totobola and totoloto)), or replace prizes with cash or tokens (Article 161(3) of Decree-Law No 422/89).

16 The third category includes games of skill offering prizes in cash, tokens or goods with commercial value (Article 162(1) of Decree-Law No 422/89).

17 It is not permitted to operate machines on which play depends exclusively or essentially on the skill of the player and which provide winnings in cash, tokens or goods having commercial of even little value other than free extended play won on points scored (Article 162(2) of Decree-Law No 422/89).

18 The fourth category, amusement machines, is subject to a special set of rules, laid down by Decree-Law No 316/95 of 28 November 1995 (Diário da República, I, Series A, No 275, 28 November 1995, hereinafter 'Decree-Law No 316/95').

19 Amusement machines are defined as machines which:

– 'while paying out prizes directly in tokens or goods with a commercial value, run games the result of which depends exclusively or essentially on the player's skill, enabling the latter to extend the time he can play the machine free of charge on the basis of the points he has obtained' (Article 16(1)(a) of the annex to Decree-Law No 316/95);

– 'possess the characteristics described in paragraph (a) above and make it possible to obtain items the commercial value of which is no more than three times the sum the player wagers' (Article 16(1)(b) of the annex to Decree-Law No 316/95).

20 The importation, manufacture, assembly and sale of amusement machines entails the categorisation of the kinds of game concerned, which is a matter for the Inspecção-Geral de Jogos (Inspectorate-General for Gaming and Betting) (Article 19 of the annex to Decree-Law No 316/95).

21 The operation of machines in that category – be they automatic, mechanical, electrical or electronic – is subject to a registration and licensing system, irrespective of whether they are imported, manufactured or assembled in the country (Article 17(1) of the annex to Decree-Law No 316/95).

22 The proprietor of the machine must apply to the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 17(2) of the annex to Decree-Law No 316/95).

23 Before the machine may be operated, an operating licence must also be issued, either annually or biannually, by the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 20(1) and (2) of the annex to Decree-Law No 316/95).

24 A licence may be refused, by reasoned decision, where such a protective measure is justified on grounds of protection of children and young persons, prevention of crime and the maintenance or restoration of public peace, order and security (Article 20(3) of the annex to Decree-Law No 316/95).

25 Amusement machines may be operated within a zone or an establishment holding a licence for the playing of legal games on amusement machines which may not be located near an educational establishment (Article 21(2) of the annex to Decree-Law No 316/95). If more than three amusement machines are to be operated together, the establishment concerned must hold a licence exclusively for the operation of games (Article 21(1) of the annex to Decree-Law No 316/95).

26 Machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling or display a result in the form of points depending exclusively or essentially on chance are not deemed to be amusement machines. That type of equipment falls within the category of games of chance or gambling (Article 4(1)(g) of Decree-Law No 422/89) and is governed by Decree-Law No 422/89 (Article 16(2) of the annex to Decree-Law No 316/95).

27 The rules governing the operation and playing of games are legally classified as public-policy rules justified in the public interest under Article 95(2) of Decree-Law No 422/89.

The main proceedings and the questions referred for a preliminary ruling

28 The applicants in the main action brought an action against the Portuguese State under Article 4(1) and (2) of the Portuguese Code of Civil Procedure seeking a declaration that certain provisions of Portuguese law in the field of gaming do not comply with Community law, and claimed that the court should:

– acknowledge the right to operate and manage games of chance or gambling outside the prescribed gaming areas, and extinguish the monopoly held by the casinos and, accordingly, repeal Articles 1, 3(1) and (2) and 4(1)(f) and (g) of Decree-Law No 422/89, in view of the primacy of the rules and principles of Community law referred to in the application initiating proceedings;

– as a result of the repeal of the abovementioned provisions, also repeal the rules deriving from them, namely the criminal provisions defined in Articles 108, 110, 111 and 115 of that decree-law, as well as all provisions, whether substantive or procedural, laid down in any statute, prohibiting and restricting such activities.

29 The applicants in the main action base their claims, first, on the incompatibility of the abovementioned provisions of Portuguese legislation with Community law and, secondly, on the primacy of Community law over ordinary domestic law in accordance with Article 8(2) of the Portuguese Constitution.

30 The Portuguese State raised a preliminary objection to the admissibility of the application claiming, in particular, that none of the applicants in the main action has standing to bring proceedings in so far as they lack a direct interest linked to their claims, and that Anomar has no standing to bring proceedings in that a finding that the application is well founded can be of no benefit to it.

31 On the merits, the Portuguese State contends that the rules and principles of Community law on which the applicants in the main action rely were inapplicable to the purely internal circumstances in point and that the operation of gaming machines cannot in any event fall within the scope of the rules on the free movement of goods.

32 The preliminary plea of lack of standing of Anomar and the absence of interest in bringing proceedings of all the applicants in the main proceedings was upheld at first instance.

33 However, the Tribunal de Relação de Lisboa overturned the decision of the lower court and found that the applicant Anomar did have standing and that all the applicants in the main action had an interest in bringing proceedings.

34 Taking the view that, in light of the arguments of the parties, the interpretation of Community law was essential to enable it to settle the dispute before it, the Tribunal Cível da Comarca de Lisboa decided to stay proceedings and refer the

following questions to the Court of Justice for a preliminary ruling:

> '1. Do games of chance or gambling constitute an "economic activity" within the meaning of Article 2 EC?
>
> 2. Do games of chance or gambling constitute an activity relating to "goods" which is covered, as such, by Article 28 EC?
>
> 3. Are activities relating to the manufacture, importation and distribution of gaming machines separate from the operation of such machines and, therefore, is the principle of the free movement of goods laid down by Articles 28 EC and 29 EC applicable to such activities?
>
> 4. Are the operation of and engagement in games of chance or gambling excluded from the scope of Article 31 EC, in view of the fact that that provision does not cover monopolies in the provision of services?
>
> 5. Does the operation of gaming machines constitute a "provision of services" and, as such, is it covered by Article 49 EC et seq.?
>
> 6. Does a body of legal rules (such as that established in Articles 3(1) and 4(1) of Decree-Law No 422 of 2 December 1989) according to which the operation of and engagement in games of chance or gambling (defined by Article 1 of that instrument as "those whose result is uncertain since it depends exclusively or fundamentally on chance") – which include (see Article 4(1)(f) and (g) of Decree-Law No 422/89) games played on machines which pay out prizes directly in tokens or money and games on machines which, while not paying out directly prizes in tokens or money, involve matters proper to games of chance or gambling or display the number of points awarded depending exclusively and fundamentally on chance – is authorised only in casinos in permanent or temporary gaming areas created by decree-law, constitute a barrier to the freedom to provide services, within the meaning of Article 49 EC?
>
> 7. Even if the restrictive rules described in question 6 constitute a barrier to freedom to provide services, within the meaning of Article 49 EC, are they compatible with Community law, given that they are applicable without distinction to Portuguese nationals and undertakings and to nationals and undertakings of other Member States and are, moreover, based on overriding reasons relating to the public interest (consumer protection, crime prevention, protection of public morality, restriction of demand for gambling and the financing of public-interest activities)?
>
> 8. Is the activity of operation of games of chance or gambling subject to the principles of freedom of access to and pursuit of any economic activity whatever and, consequently, does the possible existence of legislation in other Member States which lays down less restrictive conditions for the

operation of gaming machines sufficient of itself to render invalid the Portuguese legal regime described in Question 6?

9. Do the restrictions laid down in the Portuguese legislation on the activity of operation of games of chance or gambling comply with the principle of proportionality?

10. Do the Portuguese rules making authorisation subject to conditions which are legal (conclusion of an administrative contract with the State following a tendering procedure: Article 9 of the abovementioned Decree-Law No 422/89) and logistical (operation and engagement in games of chance or gambling restricted to gaming areas: Article 3 of the abovementioned decree-law) in nature constitute a requirement which is appropriate and necessary for the attainment of the objectives pursued?

11. Does the use by the Portuguese legislation (Articles 1, 4(1)(g) and [162] of the abovementioned Decree-Law No 422/89 and Article 16(1)(a) of Decree-Law No 316/95 of 28 November 1995) of the word "fundamentally", in conjunction with the word "exclusively", in order to define games of chance or gambling and to draw a legal distinction between "gaming machines" and "amusement machines", affect the possibility of defining the concept in issue according to the rules of legal construction?

12. Do the imprecise legal concepts to which the Portuguese legislation resorts in defining "games of chance or gambling" (Articles 1 and 162 of Decree-Law No 422/89, cited above) and "amusement machines" (Article 16 of Decree-Law No 316/95, cited above) require an interpretation, for the purpose of categorising the various types of amusement machines, which must also take account of the margin of discretion which the national authorities enjoy?

13. Even if it were considered that the Portuguese legislation at issue does not lay down objective criteria to distinguish between gaming machines and amusement machines, does the conferring on the Inspecção-Geral de Jogos of a discretionary power to categorise games infringe any principle or rule of Community law?'

Admissibility

35 The Portuguese Government submits, first, that the questions referred for a preliminary ruling are inadmissible since they concern not the interpretation of the Treaty but the interpretation or assessment of the validity of the provisions of Portuguese legislation governing the operation and playing of games of chance or gambling, which are matters for the national court alone.

36 Secondly, it considers that the main proceedings, which concern only the

conditions for the operation of games of chance or gambling in Portugal, by Portuguese undertakings, in pursuance of Portuguese legislation, have no connection with Community law and relate to a purely internal situation.

37 As regards the first objection, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case 20/87 Gauchard [1987] ECR 4879, paragraph 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR I-2157, paragraph 22).

38 However, in the main proceedings, the referring court asks the Court to interpret Treaty provisions solely for the purpose of determining whether those provisions are capable of having any bearing on the application of the relevant national rules in those proceedings. It cannot therefore be maintained that the purpose of the questions referred for a preliminary ruling in the main proceedings is anything other than the interpretation of provisions of the Treaty.

39 As for the second objection, it must be acknowledged that all the facts in the main proceedings are confined to a single Member State. However, national legislation such as Decree-Law No 422/89, which applies without distinction to Portuguese nationals and to nationals of other Member States, may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 Oosthoek's Uitgeversmaatschappij [1982] ECR 4575, paragraph 9, and Case 98/86 Mathot [1987] ECR 809, paragraphs 8 and 9, and Reisch and Others, cited above, paragraph 24).

40 That finding does not, however, mean that there is no need to reply to the questions referred to the Court for a preliminary ruling in this case. In principle, it is for the national courts alone to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court (Case C-448/98 Guimont [2000] ECR I-10663, paragraph 22). A reference for a preliminary ruling from a national court may be rejected by the Court only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (Case C-281/98 Angonese [2000] ECR I-4139, paragraph 18, and Reisch and Others, cited above, paragraph 25).

41 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the referring court. Such a reply might be useful to

it if its national law were to require that a Portuguese national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (Guimont, cited above, paragraph 23, and Reisch and Others, cited above, paragraph 26).

42 Accordingly, it is necessary to consider whether the provisions of the Treaty, interpretation of which is sought, preclude the application of national legislation such as that in issue in the main proceedings to the extent that it is applied to persons resident in other Member States.

The questions referred for a preliminary ruling

Question 1

43 By its first question, the national court is asking whether games of chance or gambling constitute an economic activity within the meaning of Article 2 EC.

44 The applicants in the main action, the governments which submitted observations and the Commission agree that games of chance or gambling are to be deemed an economic activity within the meaning of Article 2 EC, that is to say a for-profit activity which gives rise to a specific remuneration and which falls within the framework of the commercial freedoms enshrined in the Treaty.

45 The German Government submits that neither the chance nature of the winnings nor the use to which is put the profit made on games of chance or gambling prevent the latter from constituting an economic activity.

46 As the Portuguese Government in particular points out, the Court has already held that lotteries constitute an economic activity, within the meaning of the Treaty, inasmuch as they consist in the importation of goods or the provision of services for remuneration (Case C-275/92 Schindler [1994] ECR I-1039, paragraph 19). With particular regard to the activities in issue in the main proceedings, the Court has held that games consisting in the use, in return for a money payment, of slot machines must be regarded as gambling which is comparable to the lotteries forming the subject of the Schindler judgment (Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 18).

47 That assessment must be confirmed and all games of chance or gambling must be deemed to be economic activities within the meaning of Article 2 EC, since they fulfil the two criteria laid down by the Court in its case-law, namely provision of a particular service for remuneration and the intention to make a cash profit.

48 The answer to the first question must therefore be that games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

Questions 2, 3 and 5

49 By its second, third and fifth questions, the national court is asking in essence whether games of chance or gambling constitute an activity relating to goods or, on the contrary, provision of services, within the meaning of the Treaty and, if so, whether activities relating to the manufacture, importation and distribution of gaming machines are separable from the operation of such machines in order to determine whether the principle of free movement of goods as defined in Articles 28 EC and 29 EC is to be applied to those activities, which are indivisible, as a whole.

50 In contrast to the applicants in the main action, the governments which submitted observations and the Commission take the view that gaming activities do not come under the rules applicable to goods.

51 They draw a distinction between gaming machines and gaming activities, as the Court itself did at paragraph 20 of Läärä and Others, pointing out expressly that slot machines constitute goods in themselves which may fall within the scope of Article 30 of the EC Treaty (now, after amendment, Article 28 EC). As regards gaming, that is to say the operation of gaming machines, those governments and the Commission, relying on Schindler, cited above, submit that they are not activities relating to goods but must instead be regarded as services.

52 The Court indeed held, in paragraphs 24 and 25 of Schindler, cited above, that lottery activities are not activities relating to goods, falling, as such, under Article 30 of the Treaty, but are however to be regarded as services within the meaning of the Treaty.

53 As regards the difference between activities relating, on the one hand, to the manufacture, importation and distribution of gaming machines which is within the scope of the free movement of goods and, on the other, the activity of operating gaming machines, which is within the scope of the freedom to provide services, the Portuguese, Belgian and German Governments submit that those various activities are not independent of each other. Since the manufacture and distribution of gaming machines cannot be considered independently from the operation of such machines – given that the latter, being manufactured for the purpose of organising games of chance or gambling, cannot serve for any other purpose – all the governments which submitted observations request the application of the maxim accessorium sequitur principale.

54 In connection to the similar activity of lotteries, the Court has held that the importation and distribution of advertisements and application forms, and possibly tickets, which are specific steps in the organisation or operation of a lottery, cannot, under the Treaty, be considered independently of the lottery to which they relate. Such activities are not ends in themselves; rather, their sole

purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery (Schindler, cited above, paragraph 22).

55 However, without there being any need, by approximate analogy with that reasoning, to regard the importation of slot machines as ancillary to the operation thereof, it suffices to state, as the Court did in paragraphs 20 to 29 of Läärä and Others, cited above, that, even though the operation of slot machines is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods.

56 The answer to the second, third and fifth questions must therefore be that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

Question 4

57 By its fourth question, the national court is asking whether a monopoly in the operation of games of chance or gambling falls within the scope of Article 31 EC.

58 Article 31 EC requires the Member States to adjust any State monopolies of a commercial character so as to ensure that there is no discrimination between nationals of Member States.

59 It follows both from the place of this provision in the chapter relating to the prohibition of quantitative restrictions and from the use of the words 'imports' and 'exports' in the second subparagraph of Article 31(1) and of the word 'products' in Article 31(3) that it refers to trade in goods and cannot relate to a monopoly in the provision of services (see Case 155/73 Sacchi [1974] ECR 409, paragraph 10).

60 Given that games of chance or gambling constitute services, within the meaning of the Treaty, as held at paragraph 56 above, any monopoly in the operation of games of chance or gambling falls outside the scope of Article 31 EC.

61 The answer to the fourth question must therefore be that a monopoly in the operation of games of chance or gambling does not fall within the scope of Article 31 EC.

Questions 6, 7, 9 and 10

62 By its 6th, 7th, 9th and 10th questions, the national court is essentially asking whether, first, national legislation, such as the Portuguese provisions on games of chance or gambling, which restricts the operation and playing of such games to specific areas and applies without distinction to Portuguese nationals and nationals of other Member States, constitutes a barrier to the freedom to provide services and, secondly, whether such legislation may be justified by overriding public-interest reasons relating, in particular, to consumer protection and to concerns over public morality and crime prevention, which justify it.

63 So far as concerns whether national legislation such as the Portuguese provisions in issue in the main proceedings constitutes a barrier to the freedom to provide services, both the applicants in the main action, the governments which submitted observations and the Commission consider that such legislation may constitute a barrier to the freedom to provide services, even where the restrictions it entails apply without discrimination on the grounds of nationality and are thus applicable without distinction to Portuguese nationals and nationals of other Member States.

64 The applicants in the main action submit, in particular, that in Portugal the betting and gaming industry is monopolised by the casinos, which is manifestly contrary to the economic principles and freedoms enshrined in the Treaty. The Finnish Government, for its part, is of the view that the legal provisions at issue in the main proceedings prevent, at least indirectly, operators established in another Member State from offering the services in question in Portugal.

65 It is common ground that national legislation may fall within the ambit of Article 49 EC, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Schindler, cited above, paragraph 43).

66 That is the case of national legislation, such as the Portuguese provisions, which restricts the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas created by decree-law.

67 Any justification of the Portuguese legislation relies on two elements. The first is based on the fact that the legal regime which it establishes is applicable without distinction to Portuguese nationals and nationals of other Member States, and the second on the fact that that regime is justified by the overriding reasons relating to the public interest on which it is based.

68 As the national court states in its order for reference, the Portuguese legislation does not discriminate between the nationals of the various Member States. That

legislation must therefore be regarded as applying without distinction.

69 It is appropriate to inquire whether Article 49 EC precludes legislation such as that in issue in the main proceedings which, although it does not discriminate on grounds of nationality, restricts the freedom to provide services.

70 All the governments which submitted observations maintain that such legislation is compatible with Article 49 EC. According to them, it must be regarded as being justified by overriding reasons relating to the public interest such as the protection of consumers, prevention of fraud and crime, protection of public morality and the financing of public-interest activities.

71 By contrast, the applicants in the main action take the view that the restrictions referred to in Article 30 EC by way of exception are clearly derogations and cannot be applied in general, without any criteria. They also claim that the Portuguese State, although required to state precisely the sphere and the grounds prompting it to avail itself of Article 30 EC, has not given satisfactory reasons for resorting to a legal regime such as that which it has laid down. The applicants in the main action are of the view that Portugal has not put forward any reservations of a moral or public-order nature such as to justify such a legal regime.

72 According to the information provided by the national court, the provisions of Portuguese law governing games of chance or gambling are legally classified as public-policy rules justified in the public interest. That legal regime has primacy, is highly symbolic and is designed to attain objectives of public interest and legitimate social purposes such as 'fair play' and the possibility of 'obtaining some benefit for the public sector'.

73 The various considerations leading to the adoption of such legislation to govern games of chance or gambling must be taken together, as the Court pointed out in paragraph 58 of the judgment in Schindler, cited above. In the present case, those considerations concern the protection of consumers, who are the recipients of the service, and the maintenance of order in society. The Court has already held that those objectives may justify restrictions on freedom to provide services (Case 220/83 Commission v France [1986] ECR 3663, paragraph 20; Schindler, cited above, paragraph 58; and Läärä and Others, cited above, paragraph 33).

74 Furthermore, as the Commission points out, the Portuguese legislation in issue in the main proceedings is substantially similar to the Finnish legislation on slot machines, in issue in Läärä and Others, in respect of which the Court found that it was not disproportionate, in view of the objectives which justified it (Läärä and Others, cited above, paragraph 42). Moreover, the Court considered that limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, falls within the ambit of such public-interest

objectives (Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 35).

75 Accordingly, the answer to the 6th, 7th, 9th and 10th questions must be that national legislation, such as the Portuguese legislation, which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

Question 8

76 By its eighth question, the national court is asking in essence whether the mere fact that the operation and playing of games of chance or gambling are subject, in other Member States, to legislation which is less restrictive than the Portuguese legislation in issue in the main proceedings is sufficient to render the latter incompatible with the Treaty.

77 The applicants in the main action point out that legislation in other Member States is less restrictive than the Portuguese legislation and submit that there is no social or economic reason nor any reservations from a moral or public-order angle to justify the Portuguese legislation being more restrictive.

78 On the other hand, all the governments which submitted observations point out that the level of protection which a Member State intends providing in its territory in relation to games of chance or gambling falls within the discretion recognised as being enjoyed by the national authorities. It is therefore a matter for each Member State to arrange for the appropriate legislation to govern gaming, in particular in the light of the specific social and cultural features of each Member State, and in accordance with the principles deemed best to suit the society concerned. The Portuguese Government points out that the special nature of gaming calls for and justifies a legal framework in keeping with the scale of fundamental values of each Member State.

79 It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them (Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33).

80 Accordingly, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national

authorities of the Member State concerned and of the level of protection which they seek to ensure (Läärä and Others, cited above, paragraph 36, and Zenatti, cited above, paragraph 34).

81 The answer to the national court's eighth question must therefore be that the possible existence, in other Member States, of legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

Questions 11, 12 and 13

82 By its 11th, 12th and 13th questions, the national court seeks to ascertain in essence whether legislation which makes the operation and playing of games of chance or gambling subject to legal and logistical conditions such as conclusion of an administrative licensing contract with the State following a tendering procedure and restriction of gaming areas solely to casinos, which uses imprecise legal concepts in order to categorise different sorts of games and which confers on the Inspecção-Geral de Jogos a discretionary power to categorise games by theme is compatible with the Treaty, in particular Article 49 EC.

83 The Portuguese, Belgian, Spanish and Finnish Governments agree that the Treaty does not preclude the provisions of Decree-Law No 422/89 governing the operation and playing of games of chance or gambling provided such provisions meet conditions as to proportionality and necessity.

84 The applicants in the main action, for their part, submit that the restrictions on operation of games laid down in the Portuguese legislation do not comply with the principle of proportionality by virtue of the lack of precision regarding the reasons and aims pursued by that legislation, since no justification regarding public order or social protection has been advanced. They also challenge the conferring on the Inspecção-Geral de Jogos of a discretionary power to categorise types of gaming, gaming machines and games by theme. Such power, when it lacks objective and transparent rules, is arbitrary and thus contrary to the Treaty.

85 The Commission points out that measures restricting the operation and playing of games of chance or gambling must be proportionate and appropriate for ensuring achievement of the intended aim and proposes that the Court should declare those questions inadmissible. It submits that, in the absence of a definition, at Community level, of the various sorts of games and the various types of machines to play them on, it is for the national court to rule on the interpretation of the national provisions in issue in the main proceedings. Moreover, the national court alone is competent to determine whether conferring on the Inspecção-Geral de Jogos the power to characterise and categorise is likely to affect adversely the freedom to provide services.

86 As the Portuguese Government points out, the Court has held that national measures which restrict the freedom to provide services, which are applicable without distinction and are justified by overriding reasons relating to the public interest – as is the case here, as is evident from paragraphs 68 and 72 to 75 of this judgment – must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it (Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 13 to 15, and Läärä and Others, cited above, paragraph 31).

87 None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict (see, to that effect, Schindler, cited above, paragraph 61; Läärä and Others, cited above, paragraph 35, and Zenatti, cited above, paragraph 33) and which have been deemed compatible with the Treaty.

88 The answer to the 11th, 12th and 13th questions should therefore be that, in the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

Decision on costs

Costs

89 The costs incurred by the Portuguese, Belgian, German, Spanish, French and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Third Chamber),

in answer to the questions referred to it by the Tribunal Cível da Comarca de Lisboa by order of 25 May 2000, hereby rules:

1. Games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

2. The activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

3. A monopoly in the operation of games of chance or gambling does not fall within the scope of Article 31 EC.

4. National legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

5. The fact that there might exist, in other Member States, legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

6. In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

C-243/01, Gambelli

JUDGMENT OF THE COURT

6 November 2003*

(Right of establishment – Freedom to provide services – Collection of bets on sporting events in one Member State and transmission by internet to another Member State – Prohibition enforced by criminal penalties – Legislation in a Member State which reserves the right to collect bets to certain bodies)

In Case C-243/01,

REFERENCE to the Court under Article 234 EC by the Tribunale di Ascoli Piceno (Italy) for a preliminary ruling in the criminal proceedings before that court against

Piergiorgio Gambelli and Others

on the interpretation of Articles 43 EC and 49 EC,

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward (Rapporteur), R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Gambelli and Others, by D. Agnello, avvocato,
- Mr Garrisi, by R.A. Jacchia, A. Terranova and I. Picciano, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,
- the Belgian Government, by F. van de Craen, acting as Agent, assisted by P. Vlaemminck, avocat,
- the Greek Government, by M. Apessos and D. Tsagkaraki, acting as Agent,
- the Spanish Government, by L. Fraguas Gadea, acting as Agent,
- the Luxembourg Government, by N. Mackel, acting as Agent,
- the Portuguese Government, by L. Fernandes and A. Barros, acting as

* Language of the case: Italian.

Agents,

– the Finnish Government, by E. Bygglin, acting as Agent,

– the Swedish Government, by B. Hernqvist, acting as Agent,

– the Commission of the European Communities, by A. Aresu and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gambelli and others, represented by D. Agnello; of Mr Garrisi, represented by R.A. Jacchia and A. Terranova; of the Italian Government, represented by A. Cingolo, avvocato dello Stato; of the Belgian Government, represented by P. Vlaemminck; of the Greek Government, represented by M. Apessos; of the Spanish Government, represented by L. Fraguas Gadea; of the French Government, represented by P. Boussaroque, acting as Agent; of the Portuguese Government, represented by A. Barros; of the Finnish Government, represented by E. Bygglin; and of the Commission, represented by A. Aresu and M. Patakia, at the hearing on 22 October 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1. By order of 30 March 2001, received at the Court on 22 June 2001, the Tribunale di Ascoli Peceno referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 43 and 49 EC.

2. The question was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants (hereinafter Gambelli and others), who are accused of having unlawfully organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State.

Legal background

Community legislation

3. Article 43 EC provides as follows:-

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiar-

> ies by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

4. The first paragraph of Article 48 EC provides that companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall ... be treated in the same way as natural persons who are nationals of Member States.

5. Article 46(1) EC provides that the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

6. The first paragraph of Article 49 EC provides that within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

National legislation

7. Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931, hereinafter the Royal Decree), no licence is to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets is essential for the proper conduct of the competitive event.

8. Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000, hereinafter Law No 388/00), authorisation to organise betting is granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets can relate to the outcome of sporting events taking place under the supervision of the Comitato olimpico nazionale italiano (Italian National Olympic Committee, hereinafter the CONI), or its subsidiary organisations, or to the results of horse races organised through

the Unione nazionale per l'incremento delle razze equine (National Union for the Betterment of Horse Breeds, hereinafter the UNIRE).

9. Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, (hereinafter Law No 401/89), Article 37(5) of which inserted Articles 4a and 4b into Law No 410/89, provide as follows:

> Unlawful participation in the organisation of games or bets
>
> Article 4
>
> 1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.
>
> 2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
>
> 3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.
>
> ...
>
> Article 4a
>
> The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.
>
> Article 4b
>
> ... the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or

bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

The main proceedings and the question referred for a preliminary ruling

10. The order for reference states that the Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd (Stanley), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They are accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.

11. Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.

12. Stanley is an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It is authorised to carry on its activity in the United Kingdom and abroad. It organises and manages bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley pays the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It is subject to rigorous controls in relation to the legality of its activities, which are carried out by a private audit company and by the Inland Revenue and Customs and Excise.

13. Stanley offers an extensive range of fixed sports bets on national, European and world sporting events. Individuals may participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.

14. Stanley's presence as an undertaking in Italy is consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres make electronic means of communication available to users, collect and register the intentions to bet and forward

them to Stanley.

15. The defendants in the main proceedings are registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and have received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister for Post and Communications) to transmit data.

16. The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.

17. The defendants in the main proceedings brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.

18. The Tribunale di Ascoli Piceno makes reference to the case-law of the Court, in particular its judgment in Case C-67/98 *Zenatti* [1999] ECR I-7289. However, it considers that the questions raised in the case before it do not quite correspond to the facts already considered by the Court in *Zenatti*. Recent amendments to Law No 401/89 demand re-examination of the issue by the Court of Justice.

19. The Tribunale di Ascoli Piceno refers in this context to the parliamentary working papers relating to Law No 388/00 which show that the restrictions inserted by that law into Law No 401/89 were dictated chiefly by the need to protect sports Totoricevitori, a category of private sector undertakings. The court states that it cannot find in those restrictions any public policy concern able to justify a limitation of the rights guaranteed by Community or constitutional rules.

20. The court emphasises that the apparent legality of collecting and forwarding bets on foreign sporting events, on the initial wording of Article 4 of Law No 401/89, had led to the creation and development of a network of operators who have invested capital and created infrastructures in the gaming and betting sector. Those operators suddenly find the legitimacy of their position called in question following amendments to the rules in Law No 388/00 prohibiting on pain of criminal penalties the carrying on of activities by any person anywhere involving the collection, acceptance, registration and transmission of offers to bet, in particular on sporting events, without a licence or permit from the State.

21. The national court questions whether the principle of proportionality is being observed, having regard first to the severity of the prohibition, breach of which attracts criminal penalties which may make it impossible in practice for lawfully constituted undertakings or Community operators to carry on economic

activities in the betting and gaming sector in Italy, and secondly to the importance of the national public interest protected and for which the Community freedoms are sacrificed.

22. The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.

23. The court observes that the proceedings before it raise, first, questions of national law relating to the compatibility of the statutory amendments to Article 4 of Law No 401/89 with the Italian constitution, which protects private economic initiative for activities which are not subject to taxes levied by the State, and secondly questions relating to the incompatibility of the rule laid down in that article with the freedom of establishment and the freedom to provide cross-border services. The questions of national law raised have been referred by the Tribunale di Ascoli Piceno to the Corte costituzionale (the Italian Constitutional Court).

24. In those circumstances, the Tribunale di Ascoli Piceno has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?

The question

Observations submitted to the Court

25. Gambelli and others consider that by prohibiting Italian citizens from linking up with foreign companies in order to place bets and thus to receive the services offered by those companies by internet, by prohibiting Italian intermediaries from offering the bets managed by Stanley, by preventing Stanley from establishing itself

in Italy with the assistance of those intermediaries and thus offering its services in Italy from another Member State and, in sum, by creating and maintaining a monopoly in the betting and gaming sector, the legislation at issue in the main proceedings amounts to a restriction on both freedom of establishment and freedom to provide services. No justification for the restriction is to be found in the case-law of the Court of Justice stemming from Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-124/97 *Läärä and Others* [1999] ECR I-6067 and *Zenatti*, cited above, because the Court has not had occasion to consider the amendments made to that legislation by Law No 388/00 and it has not examined the issue from the point of view of freedom of establishment.

26. The defendants in the main proceedings emphasise in that regard that the Italian State is not pursuing a consistent policy whose aim is to restrict, or indeed abolish, gaming activities within the meaning of the judgments in *Läärä*, paragraph 37, and *Zenatti*, paragraph 36. The concerns cited by the national authorities relating to the protection of bettors against the risk of fraud, the preservation of public order and reducing both opportunities for gaming in order to avoid the damaging consequences of betting at both individual and social level and the incitement to spend inherent therein are groundless because Italy is increasing the range of betting and gaming available, and even inciting people to engage in such activities by facilitating collection in order to increase tax revenue. The fact that the organising of bets is regulated by financial laws shows that the true motivation of the national authorities is economic.

27. The purpose of the Italian legislation is also to protect licensees under the national monopoly by making that monopoly impenetrable for operators from other Member States, since the invitations to tender contain criteria relating to ownership structures which cannot be met by a capital company quoted on the stock exchange but only by natural persons, and since they require applicants to own premises and to have been a licence holder over a substantial period.

28. The defendants in the main proceedings argue that it is difficult to accept that a company like Stanley, which operates entirely legally and is duly regulated in the United Kingdom, should be treated by the Italian legislation in the same way as an operator who organises clandestine gaming, when all the public-interest concerns are protected by the United Kingdom legislation and the Italian intermediaries in a contractual relationship with Stanley as secondary or subsidiary establishments are registered as official suppliers of services and with the Ministry of Post and Telecommunications with which they operate, and which subjects them to regular checks and inspections.

29. That situation, which falls within the scope of freedom of establishment, contravenes the principle of mutual recognition in sectors which have not yet been harmonised. It is also contrary to the principle of proportionality, *a fortiori*

because criminal penalties ought to constitute a last resort for a Member State in cases where other measures and instruments are not able to provide adequate protection of the interests concerned. Under the Italian legislation, bettors in Italy are not only deprived of the possibility of using bookmakers established in another Member State, even through the intermediary of operators established in Italy, but are also subject to criminal penalties.

30. The Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments, as well as the Commission, cite the case-law of the Court of Justice, in particular the judgments in *Schindler*, *Läärä* and *Zenatti*.

31. The Italian Government relies on the judgment in *Zenatti* to show that Law No 401/89 is compatible with the Community legislation in the sphere of freedom to provide services, and even in that of freedom of establishment. Both the matter considered by the Court in that case, namely administrative authorisation to pursue the activity of collecting and managing bets in Italy, and the question raised in the main proceedings, namely the existence of a criminal penalty prohibiting that activity where it is carried on by operators who are not part of the State monopoly on betting, pursue the same aim, which is to prohibit such activities and to reduce gaming opportunities in practice, other than in situations which are expressly provided for by law.

32. The Belgian Government observes that a single market for gaming will only incite consumers to squander more and will have significant damaging effects for society. The level of protection introduced by Law No 401/89 and the restrictive authorisation scheme serve to ensure the attainment of objectives which are in the general interest, namely limiting and strictly controlling the supply of gaming and betting, is proportionate to those objectives and involves no discrimination on grounds of nationality.

33. The Greek Government considers that the organisation of games of chance and bets on sporting events must remain within the control of the State and be operated by means of a monopoly. If it is engaged in by private entities, that will have direct consequences such as disturbance of the social order and incitement to commit offences, as well as exploitation of bettors and consumers in general.

34. The Spanish Government submits that both the grant of special or exclusive rights under a strict authorisation or licensing regime and the prohibition on opening foreign branches to process bets in other Member States are compatible with the policy of limiting supply, provided that those measures are adopted with a view to reducing opportunities for gaming and stimulation of supply.

35. The French Government maintains that the fact that in the main proceedings the collection of bets is effected at a distance by electronic means and the sporting events to which the bets relate take place exclusively in Italy – which

was not the case in *Zenatti* – does not affect the Court's case-law under which national laws which limit the pursuit of activities relating to gaming or lotteries and cash machines are compatible with the principle of the freedom to provide services where they pursue an objective that is in the general interest, such as the prevention of fraud or the protection of bettors against themselves. Member States are therefore justified in regulating the activities of operators in the area of betting in non-discriminatory ways, since the degree and scope of the restrictions are within the discretion enjoyed by the national authorities. It is thus for the courts of the Member States to determine whether the national authorities have acted proportionately in their choice of means, having regard to the principle of freedom to provide services.

36. As regards freedom of establishment, the French Government considers that the restrictions on the activities of the independent Italian companies in a contractual relationship with Stanley do not undermine Stanley's right to establish itself freely in Italy.

37. The Luxembourg Government considers that the Italian legislation constitutes an obstacle to the pursuit of the activity of organising bets in Italy because it prohibits Stanley from carrying on its activities in Italy either directly, under the freedom to provide cross-border services, or indirectly through the intermediary of Italian agencies linked by internet. It also constitutes a restriction on the freedom of establishment. However, those obstacles are justified in so far as they pursue objectives which are in the general interest, such as the need to channel and control the desire to engage in gaming, and are appropriate and proportionate for the attainment of those objectives inasmuch as they do not discriminate on grounds of nationality, because both Italian entities and those established abroad have to obtain the same permit from the Minister for Finance to be allowed to engage in the organisation, taking and collecting of bets in Italy.

38. The Portuguese Government notes that the main proceedings have serious implications as regards the maintenance not only in Italy but in all the Member States of a system for running lotteries by public monopoly and as regards the need to preserve a significant source of revenue for the States, which replaces the compulsory levying of taxes and serves to finance social, cultural and sporting policies. In the activity of gaming, the market economy and free competition operate a redistribution of sums levied in the context of that activity which is contrary to the social order, because they are likely to move from countries where overall involvement is low to countries where it is higher and the amount of winnings more attractive. Bettors in the small Member States would therefore be financing the social, cultural and sporting budgets of the large Member States and the reduction in revenue from gaming would force governments in the smaller Member States to finance public initiatives of a social nature and other State social, sporting and cultural activities by other means, which would

mean an increase in taxes in those Member States and a reduction in taxes in the big States. Furthermore, dividing up the State betting, gaming and lotteries market between three or four large operators in the European Union would produce structural changes in distribution networks for gaming lawfully carried on by those States, destroying an enormous number of jobs and distorting unemployment levels in the various Member States.

39. The Finnish Government cites in particular the judgment in *Läärä*, in which the Court acknowledged that the need for and proportionality of provisions adopted by a Member State are to be assessed solely in the light of the objectives pursued by the national authorities in that State and the level of protection they seek to provide, so that it is for the national court to determine whether, in the light of the specific detailed rules for its application, national legislation enables the aims relied on to justify it to be attained and whether the restrictions are proportionate to those aims, having regard to the fact that the legislation must be applied to all operators alike, whether they are from Italy or another Member State.

40. The Swedish Government observes that the fact that restrictions on the free movement of services are introduced for tax purposes is not sufficient to support the conclusion that those restrictions are contrary to Community law, provided that they are proportionate and do not involve discrimination as between operators, a matter for the national court to determine. The amendments to the Italian legislation made by Law No 388/00 enable an entity which has been refused authorisation to collect bets in Italy to circumvent the legislation by carrying on its activity from another Member State and prohibit foreign entities which organise bets in their own country from pursuing their activities in Italy. As the Court held at paragraph 36 of the judgment in *Läärä* and at paragraph 34 of the judgment in *Zenatti*, the mere fact that a Member State has opted for a protection scheme which is not the same as that adopted in another Member State cannot influence the assessment of the need for and proportionality of the provisions adopted in that area.

41. The Commission of the European Communities takes the view that the legislative amendments effected by Law No 388/00 merely make explicit what was already contained in Law No 401/89 and do not introduce a genuinely new category of offences. The public-order grounds for limiting the damaging effects of betting activities relating to football matches which are relied on to justify the fact that the national legislation reserves the right to collect those bets to certain organisations are the same regardless of the Member State in which those activities take place. The fact that the sporting events to which the bets related in the case of *Zenatti* took place abroad whereas in the main proceedings here the football matches take place in Italy is irrelevant. The Commission adds that Directive No 2000/31/EC of the European Parliament and of the Council of 8

June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1) does not apply to bets, so that the outcome should be no different to that in *Zenatti*.

42. The Commission considers that the issue is not to be examined from the point of view of freedom of establishment because the agencies run by the defendants in the main proceedings are independent and act as collection centres for bets and as intermediaries in relations between their Italian customers and Stanley, and are not in any way subordinate to the latter. However, even if the right of establishment were to apply, the restrictions in the Italian legislation are justified on the same grounds of social policy as those accepted by the Court in *Schindler*, *Läärä* and *Zenatti* with regard to the restriction on the freedom to provide services.

43. At the hearing the Commission informed the Court that it had initiated the procedure against the Italian Republic for failure to fulfil obligations in regard to the liberalisation of the horse-race betting sector managed by the UNIRE. As regards the lottery sector, which is liberalised, the Commission referred to the judgment in Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, in which the Court held that by restricting participation in an invitation to tender for the concession of a lottery computerisation system to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic had failed to fulfil its obligations inter alia under the EC Treaty.

The Court's reply

44. The first point to consider is whether legislation such as that at issue in the main proceedings (Law No 401/89) constitutes a restriction on the freedom of establishment.

45. It must be remembered that restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries, are prohibited by Article 43 EC.

46. Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

47. Furthermore, in reply to the questions put to it by the Court at the hearing, the Italian Government acknowledged that the Italian legislation on invitations

to tender for betting activities in Italy contains restrictions. According to that Government, the fact that no entity has been licensed for such activities apart from the monopoly-holder is explained by the fact that the way in which the Italian legislation is conceived means that the licence can only be awarded to certain persons.

48. In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.

49. It is therefore possible that the conditions imposed by the legislation for submitting invitations to tender for the award of these licences also constitute an obstacle to the freedom of establishment.

50. The second point to consider is whether the Italian legislation in that respect constitutes a restriction on the freedom to provide services.

51. Article 49 EC prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 50 EC defines services as services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

52. The Court has already held that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a service (*Schindler*, paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised in another Member State, even if they concern sporting events taking place in the first Member State, relates to a service within the meaning of Article 50 EC.

53. The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 22).

54. Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley

established in a Member State, in this case the United Kingdom, offers via the internet – and so without moving – to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

55. In addition, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraphs 33 and 34).

56. In reply to the questions put by the Court at the hearing, the Italian Government confirmed that an individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offence under Article 4 of Law No 401/89.

57. Such a prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor is established constitutes a restriction on the freedom to provide services.

58. The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.

59. It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.

60. In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

61. With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on

the freedom of establishment or the freedom to provide services (see, to that effect, Case C-264/96*ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).

62. As stated in paragraph 36 of the judgment in *Zenatti*, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.

63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in *Schindler*, *Läärä* and *Zenatti* that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

64. In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

65. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

66. It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs.

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.

68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to

obtaining funds, while also protecting CONI licensees.

69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

70. Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike.

71. It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.

72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.

73. The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.

74. As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other

Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.

75. It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

76. In the light of all those considerations the reply to the question referred must be that national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

Costs

77. The costs incurred by the Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunale di Ascoli Piceno by an order of 30 March 2001, hereby rules:

National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.

Skouris Jann
Timmermans

Cunha Rodgrigues Edward
Schintgen

Macken Colneric
von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass
V. Skouris

Registrar
President

C-42/02, Lindman

JUDGMENT OF THE COURT (Fifth Chamber)

13 November 2003*

(Freedom to provide services – Lottery tickets – Amount won in a game of chance held in another Member State – Income tax – Tax on games of chance – Special regime in the Åland Islands)

In Case C-42/02,

REFERENCE to the Court under Article 234 EC by the Ålands förvaltningsdomstolen (Finland) for a preliminary ruling in the proceedings brought before that court by

Diana Elisabeth Lindman,

on the interpretation of Article 49 EC,

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting as President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: C. Stix-Hackl,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Ms Lindman, in person,
- the Finnish Government, by E. Bygglin, acting as Agent,
- the Belgian Government, by A. Snoecx, acting as Agent, and by P. Vlaemminck, avocat,
- the Danish Government, by J. Molde, acting as Agent,
- the Norwegian Government, by G. Hansson Bull and H. Klem, acting as Agents,
- the Commission of the European Communities, by R. Lyal and K. Simonsson, acting as Agents,
- the EFTA Surveillance Authority, by E. Wright and V. Kronenberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finnish Government, represented by E. Bygglin, the Belgian Government, represented by P. De Wael, acting as Agent, the Commission, represented by K. Simonsson, and the EFTA Surveillance Authority, represented by E. Wright, at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1. By order of 5 February 2002, received at the Court on 15 February 2002, the Ålands förvaltningsdomstolen (Administrative Court, Åland) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC.

2. That question was raised in the course of a dispute between Ms Lindman and the skatterättelsenämnden (Taxation Verification Committee) concerning its rejection of her appeal against her assessment to tax on an amount of money which she had won in a lottery held in Sweden.

Legal background

A – Community legislation

3. Under the first paragraph of Article 49 EC:

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

B – National legislation

4. Under Article 1 of the lotteriskattelagen (552/1992) (Law on tax on games of chance), tax on games of chance is payable to the State in respect of games conducted in Finland. Under Article 2 of that law lotteries are games of chance. Article 3 provides that it is the lottery's organiser who is chargeable to the tax.

5. By virtue of Article 85 of the inkomstskattelagen (1535/1992) (Income Tax Law), winnings from games of chance covered by Article 2 of the lotteriskattelagen shall not constitute income chargeable to tax .... It is clear from the file that the exemption applies only to games of chance covered by Article 2 of the lotteriskattelagen, which include only those organised in Finland.

C – The special regime in the Åland Islands

6. By virtue of the Självstyrelselagen för Åland (1144/1991) (Åland Self-Government Law), the regulation of lotteries and other gambling falls within the legislative competence of the region of Åland. The holding of lotteries is subject to licence from the regional government the detailed rules of which are prescribed by the landskapslagen om lotterier (Regional law on games of chance, *Ålands författningssamling* 10/1966). The organisation of games of chance is governed by that law. Licences to organise lotteries and gambling covered by Article 3 of the landskapslagen om lotterier may be granted by a public law association established by regional legislation. The receipts from the association's activities must be entered in the budget of the Åland region and used to promote and support projects of public utility or in the public interest, as well as those which can be regarded as benefiting the association's activities and objectives.

The dispute in the main proceedings and the question referred

7. Ms Lindman, a Finnish national, resides in the commune of Saltvik, in the Åland Islands (Finland). On 7 January 1998, she won SEK 1 000 000 as a result of a lottery draw by the company AB Svenska Spel, which took place in Stockholm (Sweden). She had bought her winning ticket during a stay in Sweden.

8. That lottery win was regarded as earned income chargeable to income tax for the year 1998 and was assessed to national tax payable to the Finnish State, to local tax payable to the municipality of Saltvik, to church tax for the benefit of the parish and to an additional sickness insurance premium levied under the sjukförsäkringslagen (Sickness insurance law).

9. Ms Lindman appealed to the skatterättelsenämnden of Åland, to obtain rectification of the assessment against her. That appeal was rejected on 22 May 2000 on the ground that Article 85 of the inkomstskattelagen does not preclude the taxation in Finland of winnings from foreign lotteries.

10. Ms Lindman then appealed to the Ålands förvaltningsdomstolen seeking reversal of the rejection by the skatterättelsenämnden, arguing that the assessment on the winnings in Sweden should be quashed, or, in the alternative, that the winnings should be taxed not as earned income, but as income from capital, which entails a lower tax rate.

11. The Ålands förvaltningsdomstolen considers that the taxation, either as earned income or as income from capital, of winnings from games organised abroad may possibly be regarded as a special rule based on the place where the services were provided.

12. Since it considered that an interpretation of Community law was needed before a decision could be given in the dispute before it, the Ålands förvaltningsdomstolen

decided to stay proceedings and to refer to the Court for a preliminary ruling the following question:

> Does Article 49 EC preclude a Member State from applying rules under which winnings from lotteries held in other Member States are regarded as taxable income of the winner chargeable to income tax, whereas winnings from lotteries held in the Member State in question are exempt from tax?

Substance

Observations submitted to the Court

13. Ms Lindman asserts that the Finnish legislation is discriminatory, since, if she had resided in Sweden or if the amount at issue in the main proceedings had been won in a Finnish lottery, she would not have been charged income tax.

14. The Finnish, Belgian, Danish and Norwegian Governments submit that the Finnish legislation is compatible with Article 49 EC. In that regard, they rely on the Court's case-law (Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, and Case C-67/98 *Zenatti* [1999] ECR I-7289) to argue that the taxation of games of chance is only a specific aspect of the general regime governing games of chance, a field in which the Member States have a wide discretion. According to those governments, any restrictions are justified by overriding reasons in the public interest relating to combating the pernicious consequences of games of chance, since if winnings from foreign lotteries were exempt, the public would be encouraged to participate in them.

15. More particularly, the Finnish Government contends that the reason for the taxation of winnings from games of chance organised outside Finland is the impossibility of taxing, in that Member State, foreign undertakings who offer gambling activities from abroad. Were it otherwise, taxpayers in Finland and the organisers of games of chance would share a tax advantage, regardless of whether the receipts were intended to fulfil objectives in the public interest in the State of origin or whether that State's legislation sought to take account of the objectives of consumer protection and prevention of social damage.

16. The Commission and the EFTA Surveillance Authority submit that the taxation in a Member State of winnings from lotteries solely where they are organised in other Member States is contrary to Article 49 EC and cannot be justified on grounds of public interest.

17. The Commission relies on the judgment in Case C-283/95 *Fischer* [1998] ECR I-3369 to argue that, in accordance with the principle of fiscal neutrality, a Member State may not treat a winner of a game of chance lawfully organised

in another Member State less favourably than a winner who participated in a game organised in the first State.

The Court's reply

18. As a preliminary point, it must be noted that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 28).

19. With regard to the provisions of the EC Treaty relating to freedom to provide services, they apply, as the Court has already held concerning the organisation of lotteries, to an activity which consists in enabling users to participate, for a payment, in gambling (see *Schindler*, cited above, paragraph 19). Therefore, such an activity falls within the scope of Article 49 EC, provided that at least one of the providers is established in a Member State other than that in which the service is offered. It is therefore necessary to examine the case from the viewpoint of freedom to provide services.

20. According to settled case-law, Article 49 EC prohibits not only any discrimination, on grounds of nationality, against a provider of services established in another Member State, but also any restriction on or obstacle to freedom to provide services, even if they apply to national providers of services and to those established in other Member States alike (see Case C-131/01 *Commission* v *Italy* [2003] ECR I-1659, paragraph 26).

21. It is clear, in the main proceedings, that foreign lotteries are treated differently for tax purposes from, and are in a disadvantageous position compared to, Finnish lotteries. Under the lotteriskattelagen, only winnings from games of chance which are not licensed in Finland are regarded as taxable income, whereas winnings from games of chance organised in that Member State are not taxable income. The Finnish Government has also admitted that the existence of such legislation means that Finnish taxpayers prefer to participate in a lottery organised in Finland rather than a lottery taking place in another Member State.

22. Contrary to that Government's submission, the fact that gaming providers established in Finland are subject to tax as organisers of gambling does not rid the Finnish legislation of its manifestly discriminatory character, since that tax is not analogous to the income tax charged on winnings from taxpayers' participation in lotteries held in other Member States.

23. The Finnish Government, whilst admitting that the national legislation is

discriminatory, contends that it is justified by overriding reasons in the public interest such as the prevention of wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty.

24. The Norwegian Government cites also as justification the need to combat the damaging consequences of gambling addiction, which is a matter of public health. Thus, there are rehabilitation centres and other infrastructures for treating gamblers; gambling creates social problems, such as depriving of resources the families of gambling addicts, divorce, and suicide.

25. In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981).

26. In the main proceedings, the file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.

27. The reply, therefore, to the question referred must be that Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

Costs

28. The costs incurred by the Finnish, Belgian, Danish and Norwegian Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Ålands förvaltningsdomstolen by order of 5 February 2002, hereby rules:

Article 49 EC prohibits a Member State's legislation under which winnings from

games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

Timmermans Edward
Jann

Delivered in open court in Luxembourg on 13 November 2003.

R. Grass
V. Skouris

Registrar
President

About the Authors

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Cyrille Fijnaut is professor of international and comparative criminal law at the Law School of Tilburg University. In the past he was professor of criminology and criminal law at the Erasmus University Rotterdam and the K.U. Leuven. His main research interests are related to organised crime and terrorism, international police and judicial cooperation, comparative criminal procedure and police law, the history of European criminology and of policing in Europe, police and police cooperation in the Benelux. In these fields he wrote and edited some 75 books and published hundreds of articles in learned and professional journals and collected works. In the last 15 years he has worked as an expert for a number of governmental and parliamentary committees of inquiry in Belgium and the Netherlands with regard to organised and professional crime problems and in relation to security issues. Since 2005 he has a special chair, sponsored by the Dutch State Lottery, on the regulatory aspects of gambling in Europe.

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Pierre Larouche is Professor of Competition Law at Tilburg University and Co-Director of the Tilburg Law and Economics Center (TILEC). He is also a professor at the College of Europe (Bruges). He is a member of the Quebec Bar (1991). He graduated from the Faculty of Law of McGill University (Montreal) in 1990. He clerked at the Supreme Court of Canada in 1991-1992. In 1993, he obtained a masters degree from the Rheinische Friedrich-Wilhelms Universität Bonn. Thereafter he practised law for three years within the European Community law unit of Stibbe Simont Monahan Duhot in Brussels. From 1996 to 2002, he was at the Universiteit Maastricht, working with Professor Walter van Gerven in the Ius Commune Casebooks Project, which led to the publication of the *Casebook on Tort* (2000). At the same time, he obtained his doctorate in 2000 (published as *Competition Law and Regulation in European Telecommunications*). His teaching and

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Tjeerd Veenstra is a director of the Dutch Lottery company De Lotto, and since 1999 an elected member of the executive committee of European Lotteries. In that capacity he is member of the Strategy and Co-ordination Committee and chairs the Legal Working group. Those responsibilities lead to a continuous involvement in the Brussels affairs of European Lotteries.

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Alan Littler graduated from the University of Dundee (UK) in 2002 in Law (LL.B Hons) and the University of Leiden (the Netherlands) in 2003 in European Community Law (LL.M *cum laude*) after which he completed an internship with Directorate General Internal Market and Services of the European Commission. After returning briefly to the University of Leiden he is now a researcher at the Tilburg Law and Economics Center (University of Tilburg) looking at the regulation of gambling in the European Union.

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Dr. David Miers is Professor of Law at Cardiff Law School, U.K. He has a long-standing research interest in the regulation of commercial gambling. He is regularly consulted by parliamentary, government and regulatory bodies, and is a member of the Research Panel of the Responsibility in Gambling Trust. In 2003/04 he was Special Adviser to the Joint Committee on the Draft Gambling Bill 2004. He has given papers at many international conferences and has written extensively on both the current and earlier legal responses to commercial gambling market. His book, *Regulating Commercial Gambling* (2004, OUP) has been described as 'magisterial' in its command of the subject.

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Sofie Geeroms currently works as a legal officer with Eurojust, in The Hague (the Netherlands). A legal comparator by education, she has published widely in several fields. Her involvement in gambling issues began while working as a legal advisor at the Swiss Institute of Comparative Law (Lausanne, Switzerland). She has also been a member of the Brussels Bar Association. The author has degrees of *doctor in de rechten* (K.U. Leuven, Belgium), Master of Laws (Harvard University, USA), *D.E.A en droit pénal et sciences pénales* (Université Panthéon-Assas Paris II, France) and *licentiaat in de rechten* (K.U. Leuven, Belgium).

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