

ECJ JURISPRUDENCE AND RECENT DEVELOPMENTS IN EU SPORT BETTING

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ABSTRACT

Summer 2008. A year after the ‘Placanica’ decision by the European Court of Justice and roughly 16 years since ‘Schindler’ came to light before the same court. What have we learnt? Has there truly been a dramatic shift in the way European institutions, courts, legislators, and citizens approach the exciting, yet ‘immoral’ subject of gambling? Can sport betting enterprises freely roam the services market of the European Union? Can member states still run lotteries and betting monopolies in exclusion of competitors, embracing the revenue accrued, chastising the ‘corrupt’ competition, and justify the means under EU Law? Is the gambling market yet another ‘failed’ aspect of European integration, destined to be endlessly epitomised by procedural entanglement, lack of political will, conflicts between member states, and inability or reluctance of European collective bodies to assume initiatives and resolve these conflicts, promoting the European Treaty’s purposes? Or could it just be that gambling, twisted as it may be, is in the forefront of a common market realisation? These and other

questions are entertained by the modest contribution at hand, one that aspires to unveil certain important concepts from past legal and policy developments in this exhilarating and controversial field. The best element about this academic journey is this: no risk involved whatsoever... Or could this quest be as risky as being dealt an undesirable hand on the blackjack table? The reader will know at the end. Hopefully the final gain will be as enjoyable as the journey.

KEY WORDS

Sport law; internet gambling; sport betting monopolies; EU Law and Policy; ECJ Case Law;
EU member states restrictions' scope and justification

INTRODUCTION

Remember this: The house doesn't beat the player. It just gives him the opportunity to beat himself. The only difference between a winner and a loser is character.

Nicholas (Nick the Greek) Dandalos

The typical gambler might not really understand the probabilistic nuances of the wheel or the dice, but such things seem a bit more tractable than, say, trying to raise a child in this lunatic society of ours.

Arthur S. Reber, The New Gambler's Bible

As appealing as it may be to engage in a lengthy diatribe on the nature of gambling and its position in the modern world of sport, the author needs to refrain from such noble ventures. Instead, the focus of this paper will be the legal framework of sport betting in the European Union (EU), the application of EU Law in what has now become the sport betting industry, the evolution of European Court of Justice (ECJ) Jurisprudence on the matter, and the ramifications for future policy developments in this controversial sector of EU business.

Putting things in perspective, the Study of Gambling Services in the Internal Market of the European Union (http://ec.europa.eu/internal_market/services/gambling_en.htm), composed by the Swiss Institute for Comparative Law at the request of the European Commission (EC), reveals interesting findings. For example, whereas in the US the total revenue from gambling (Gross Gaming Revenue or GGR, as used in the study) was calculated at approximately €60.7 billion for 2003, the respective GGR for the EU was €1.5 billion. Interestingly, considering the regulatory differences between the US and the EU, US betting services, including on-track and off-track betting on horses and sports, amounted to only 5% of US GGR, while in the EU, the comparable statistic was 17% of the EU total (Swiss Institute of Comparative Law, 2006, p. 37). This study extended for more than 1,500 pages, and concluded an all-encompassing research effort spanning the course of two years preceding its publication in the Summer of 2006. The timing could not have been more opportune, as the ECJ decision in *Gambelli* (C-243/01) was already available and under discussion, whilst the deliberations over *Placanica* (C-338/04) were under way, after the Advocate General's bold and drastic recommendations, which will be elaborated below.

This article will commence with fundamental legal principles involved in the governance of the EU sport betting industry, such as the principle of subsidiarity and pertinent articles from the ‘Treaty establishing the European Community’ (as amended by the Treaty of Amsterdam, C 325/35, 12/24/2002, hereinafter: EC Treaty). The examination will continue with ECJ case law on the matter, leading to the important decisions in *Gambelli*, *Lindman*, and *Placanica*, which set a different course of affairs and precedent that needs to be investigated for future national courts’ application. In addition, the article will examine the contribution of the European Ombudsman in regard to complaints from adversely affected sport betting operators against the EC’s handling of such cases, combined with recent policy developments, the controversy about the Services’ Directive, and the EC inquiries into restrictive practices of EU member states (MS). Finally, an analysis of the present situation in EU sport betting after the *Placanica* decision will be attempted, via scenarios from primary (national MS practices and policies) and secondary (Swiss Institute of Comparative Law, 2006) research.

FUNDAMENTAL LEGAL PRINCIPLES AND THE RULE OF EU LAW

Before any substantive analysis of EC Treaty provisions, one should make an important procedural point of the principle of subsidiarity (currently EC Treaty Art. 5). In essence, the EC acting as the important executive arm of the EU will act and intervene toward a resolution where the objectives pursued can be better attained at the Community level. On the other hand, there will be no action and intervention when such objectives can be satisfactorily attained by the MS, acting individually. On the matter of gambling,

one notes the important decision reached during the UK presidency of 1992 and the Edinburgh European Council meetings; gambling was considered unsuitable for Community legislation and was thus entrusted upon national regulations (<http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/92/8&format=HTML&aged=1&language=EN&guiLanguage=en>, Annex 2, Section 3, paragraph 1).

Considering traditional practices of sport betting being available to European citizens, but only through very controlled means by MS governments, EC Treaty provisions that are applicable in this examination are:

- Article 3, Paragraph 1 (c, g): ‘...an internal market characterised by the abolition... of obstacles to the free movement of goods, persons, services and capital; a system ensuring that competition in the internal market is not distorted...’
- Article 43: ‘...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 subsidiaries 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...’
- Article 49: ‘...restrictions on freedom to provide services... shall be prohibited...’

Wisely, however, the EC Treaty further forecasts:

- Article 54: ‘As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on

grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49’.

For reference, the reader may wish to also keep in mind the EC Treaty provisions on competition (Articles 81-89), especially the ones on restriction or distortion of competition (Article 81) and abuse of a dominant position (Article 82). Once again, as tempting as it may be to engage in an elaborate analysis of how EC Treaty Competition provisions may apply to MS sport betting monopolisation practices by the MS governments themselves, such an endeavour sadly goes beyond the scope of this manuscript. However, for more discussion on such matters and a comparative analysis between US Antitrust Law and EU Competition Law refer to prior samples of this research stream (Kaburakis, 2006; Kaburakis & Lawrence, 2007).

This manuscript also focuses on the procedural aspect of the issues dealt before the ECJ. From the ensuing analysis, certain steps are identified and could be posed as tests for plaintiffs and defendants in this sector wishing to meet their burden of proof:

- A first step is to confirm the jurisdiction of the ECJ. This could be problematic considering national courts have the first and most likely the last say in similar cases; when in doubt, the ECJ refers matters to the national courts (338/04, par. 27, 73).
- Another precondition is to test whether precedent (from ECJ case law) is applicable to the industry at hand (e.g. are lotteries and sport betting regulations substantially similar for the purposes of ECJ examination?) (275/92, par. 60; 67/98, par. 19).

- An immediate next step is to identify the section and principle of EU Law involved (e.g. freedom of establishment, freedom to provide services, principle of proportionality, etc) (243/01, par. 25).
- After focusing on the legal elements of the case, the court will attempt to first deliberate on whether the challenged regulation, restrictive policy, etc is indeed a violation of the EC Treaty provisions. In a case (such as *Gambelli*) where more than one sections of the EC Treaty are examined, the court would progressively test the regulations against each one (243/01, par. 45; 42/02, par. 20; 338/04, par. 42).
- Once the policy is found in violation of the EC Treaty, the most elaborate and puzzling part of the analysis in these cases commences. In order for the restrictions to be deemed justifiable, they need to be:
 - applied without distinction, in a non-discriminatory manner (67/98, par. 34; 243/01, par. 65, 70; 42/02, par. 21; 338/04, Opinion, par. 38-42 per Colomer)
 - reasonable due to overriding reasons and imperative requirements the state advocates (e.g. public policy, security, health, consumer protection, social order, prevention of fraud and crime, etc; note that state fortification via taxation or redistribution of the revenue accrued to other state interests alone would not suffice) (124/97, at 13; 67/98, par. 24, 26, 30, 33, 34, Opinion per A.G. Fennelly; 243/01, par. 41-43, 60; 42/02, par. 15, 23)

- suitable for achieving the objective which they pursue (e.g. limiting betting activities in a consistent and systematic manner) (243/01, par. 67 et seq.; 338/04, Opinion, par. 105-114 per Colomer)
- resulting in a genuine diminution of gambling opportunities (therein the inherent conflict between state-run lotteries and betting monopolies and contradictory restrictive practices against independent competitors) (67/98, par. 24, per Fennelly; 243/01, par. 47-49, 68-72; 338/04, par. 57-58)
- supported by statistical or other evidence, demonstrating the gravity of risks connected to participation in (foreign competition-sponsored) gambling, or establishing the causal relationship between the participation and the risks involved (42/02, par. 26)
- within what is necessary and not going beyond that point, in order to attain the objective pursued (thus needing comparative analysis to determine whether less restrictive means would be available as equally effective alternatives, i.e. reconsidering criminal prosecution, checking the status of registration and the financial history of a prospective betting operator licensed in another jurisdiction) (67/98, par. 28, per Fennelly, par. 37; 243/01, par. 65; 338/04, par. 126 per Colomer; par. 57-58).

EUROPEAN COURT OF JUSTICE APPLICATION OF EU LAW

PRE-GAMBELLI

The ECJ dealt with the matter of gambling and sport on a few occasions. Especially at the turn of the century the infiltration of many sport betting operators in the EU gambling market, and the developments in technology with the availability of internet-based sport betting ventures, gave rise to more cases appearing before the ECJ. These cases were handled by the ECJ after exhausting MS legal proceedings, or after the national court requested ECJ intervention.

In *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (275/92, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61992J0275) the case involved the importation of lottery advertisements and tickets in order to enable residents of one MS (UK) to participate in a lottery operated in another (Netherlands). First and foremost, the definition of services under the EC Treaty was held to cover such services promoting and assisting transnational lottery participation. Importantly, the court in *Schindler* already (in March 1994) acknowledges that restrictions by one MS precluding operators from another MS to advertise and promote their services initially violate the fundamental EU principle of freedom to provide services. However, one is taught by the court's pontification that such restrictive national regulations may be justified, when they do not discriminate on the grounds of nationality, and aim at promoting consumer protection and social order:

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 (*Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* (1994) 24 March, 275/92 at 61).

In essence, a series of cases commences with *Schindler*, erring on the side of national regulations and justifications for restrictive practices and even state monopolies in the field of sport betting. Still, ECJ Jurisprudence does note that it will not suffice to merely demonstrate that restrictive policies are justifiable, but they need to be proportionate and promoting MS purposes via the least restrictive means possible. Thus, the field remained fruitful for the recent cases that set the tone for future handling of such matters. There were a few more important decisions that contributed to the evolution of ECJ Law on gambling and sport betting.

In *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* (368/95, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0368) the ECJ heard a case from Austria where Familiapress, an Austrian newspaper publisher, appealed seeking to cease the distribution of a German magazine ('Laura') in Austria, alleging a violation of competition regulations, as the magazine featured opportunities to participate in competitions for prizes. Austrian Law on unfair competition does not allow such practices, whereas such regulation was not the case in Germany. The ECJ sided with the Austrian side restricting such distribution, accepting the argument that the restrictive policy promotes press diversity (368/95 at 5). The court did, however, instruct that such prohibition will only be tolerated:

...provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means.

This assumes, inter alia, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand.

Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned (*Vereinigte Familiapress*

Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag (1997) 26 June, 368/95 at 6).

Under the same light, with a much closer factual scenario to sport betting services though, the ECJ deliberated on national legislation reserving the operation of slot machines to a public body in *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylä) and Suomen valtio (Finnish State)* (124/97, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0124). In *Läärä* the ECJ did acknowledge that a national restriction that reserves the right for operating gaming machines to a state body, thus precluding another MS from offering similar products and services, constitutes an impediment to the provisions of the EC Treaty, ‘even if it applies without distinction’ (124/97, Paragraph 1). However, the court engaged in a thorough examination of all the considerations involved therein, and ultimately decided that such restrictions could be justified by reasons of consumer protection and public order. Moreover, such restrictive policies should be pursuing the stated objectives via means that do not go beyond what is necessary to achieve these objectives. For example, in its conclusion the ECJ considers that a MS could collect the sums received by the state-run monopoly by taxation of the operators that would be granted a non-exclusive license to operate competing products and provide services. Nonetheless, ‘given the risk of crime and fraud, [it] is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities’ (124/97, at 41). So in *Läärä* the ECJ was again convinced by the public interest objectives that may

justify such restrictive practices. Similarly to *Schindler*, one notes that the ECJ does in fact consider the danger of moral corruption such gaming devices, gambling avenues, and lotteries could have on MS citizens. The court uses such wording as ‘high risk of crime or fraud... an incitement to spend which may have damaging individual and social consequences...’ (124/97, at 13). It follows that national authorities should be granted the latitude to determine what is required to protect their citizens, the aforementioned considerations notwithstanding. Consequently, one would anticipate a similar ECJ analysis in a per se sport betting services case; indeed, it did not take long after *Läärä* for such a case to come before the court.

The case of *Questore di Verona v Diego Zenatti* (67/98, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-67/98%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>) involved a preliminary reference by the State of Italy, requiring the ECJ to answer whether the judgment delivered in *Schindler* would indeed cover national restrictions regulating sport betting. The factual background of *Zenatti* is fascinating and revisited by the ECJ in the ensuing *Gambelli* and *Placanica* cases, which set the tone for modern legal handling of EU sport betting policies. Essentially *Zenatti* was a bookkeeper (he argued that he was merely facilitating the payments of Italian nationals’ bets that took place in Britain and was simply providing pertinent information), acting as an agent in Italy for UK-based sport betting enterprises. He was passing on bets placed by Italian clients, including bank transfer documents. In the defendant’s description, the practice was a ‘data transmission

site' (*Questore di Verona v Diego Zenatti* (1999) 67/98, par. 2, Opinion per A.G. Fennelly). The method of licensing sport betting operators was reserved by the National Olympic Committee and the National Equine Organization (CONI and UNIRE respectively). Other than the subjective difficulty in obtaining such a license from Italian authorities, the Italian Penal Code criminalised such sport betting activities, as foreign sport betting operators would not be allowed to run their business without a license.

It is important to note that, unlike ensuing cases, the Advocate General in this case recommended that the ECJ allow such restrictive policy, as a restriction of the freedom to provide bookmaking services 'is not incompatible' with the provisions of the EC Treaty, provided that such policy is 'part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting' (*Questore di Verona v Diego Zenatti* (1999) 67/98, par. 34, Opinion per A.G. Fennelly). In his opinion, the Advocate General acknowledges that such services have not been harmonised at the Community level (67/98, par. 20, per Fennelly). These services constitute cross-border services that fall within the scope of Article 49 of the EC Treaty. What is interesting, and different from the *Schindler* case, is the fact that there was not absolute prohibition, but rather 'an exception to the general prohibition' (67/98, par. 24, per Fennelly). Nevertheless, the Advocate General acknowledged that the national monopoly in sport betting licenses (by CONI and UNIRE) would be considered a violation of the freedom to provide services, as it preempted other MS sport betting operators from entering the Italian market (67/98, par. 24, per Fennelly). Yet once again the opinion of the Advocate General, and eventually the ECJ, sides with the restrictive practice, allowed for 'overriding reasons relating to public interest' (67/98, par. 26, per

Fennelly). After commenting that these restrictions should not go beyond what is necessary to pursue the stated objectives, the latter are found to be similar to the ones at *Schindler*:

The prevention of crime and the protection of consumers against fraud; avoidance of the stimulation of demand for gambling and of the consequent moral and financial harm to participants and to society in general; and the interest in ensuring that gambling activity is not organised for personal or commercial profit but solely for charitable, sporting or other good causes (67/98, par. 24, per Fennelly).

What is further interesting is the continuous reluctance of the Advocates General and the ECJ to boldly declare that there are indeed other less restrictive legal, policy, and economic mechanisms to achieve the stated objectives. These matters are entrusted to the national legislature, and a comparison between competing regimes could be sufficiently undertaken by the national courts (67/98, par. 28, per Fennelly).

Dormant in the Advocate General's opinion lies the conflict between offering the opportunity on one hand to CONI and UNIRE to run similar business practices, and on the other to declare that competing sport betting ventures are disallowed (or indeed not granted a license via the Italian licensing system) due to reasons of consumer protection and crime prevention. The Italian State was held to receive adequate assurances that the established mechanisms by the state monopolies would achieve the stated objectives, minimising corruption and crime risks (67/98, par. 30, per Fennelly). Convincing for the court and the Advocate General is the moral and socio-cultural character of the activities

that the state restriction aims to preserve. Perhaps the explosion in availability of internet-based sport betting avenues might alter the Advocate General's conclusion in *Zenatti*: the fact that they 'can freely place bets with overseas bookmakers by telephone, fax or internet does not affect my analysis, because the likely effects of such activity on social order seem very small compared to those of unrestricted provision of organised betting services through representatives operating in Italian territory' (67/98, par. 33, per Fennelly). Basically the argument there is that liberalisation of national sport betting markets would have detrimental effects on the moral and social character of the state, which is not the case with the general availability of these avenues over the internet. Suffice to say a complete analysis of this particular subject is an excellent topic for a doctoral dissertation, which again is not the case herein. In a nutshell, in *Zenatti* the ECJ accepted the Advocate General's arguments above and essentially referred the matter to the national court to decide what should be concluded as a restrictive policy 'within reason', not going beyond what is necessary to achieve the stated objectives (*Questore di Verona v Diego Zenatti*, Judgment of 21/10/1999, 67/98, par. 37 (Note: Judgment unavailable in English as of 25/6/2008; translation available upon request)).

Similar was the outcome of *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português* (6/01, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6/01%20%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>). The *Anomar* case involved aspiring operators of amusement, gaming, and gambling machines

against the Portuguese policy allowing such games to take place ‘solely in casinos in permanent or temporary gaming areas created by decree-law’ (6/01, Judgment of 11/09/2003, par. 4). Once again, the prevention of fraud and social policy considerations tipped the scale in favour of the national restriction. Furthermore, the means and extent of such restrictive policy are again entrusted to the national government, tested by the national courts:

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 (*Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português* (2003) 11 September, 6/01, Judgment Par. 6).

GAMBELLI ET SEQ.

Reference for a preliminary ruling from the Tribunale di Ascoli Piceno:

Piergiorgio Gambelli and Others (243/01, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-243/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>) involved a similar factual background to *Zenatti*, above. Gambelli and 137 other defendants were actually criminally prosecuted for ‘organising clandestine bets and being the proprietors

of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State' (243/01, par. 2). The defendants, according to the investigating Judge at the Tribunale Di Fermo, had formed an elaborate system of betting agencies linked to the Liverpool, UK-based Stanley International Betting company (Stanley). As seen earlier in *Zenatti*, such services are reserved for state-affiliated and licensed organizations (CONI and UNIRE).

A somewhat interesting twist in the *Gambelli* case was that the defendants further argued that next to the freedom to provide services, the restrictive regulations at hand also violated the freedom of establishment (243/01, par. 25), by creating a local sport betting monopoly. This was an area – an analysis of the issue under article 43 of the EC Treaty – the ECJ had not examined in the aforementioned cases. The defendants also argued, as one would expect from the precedent cases, that Italian policy was inconsistent, as on one hand it was creating barriers to entry in the sport betting market via the restricting regulations (indeed, under the cover of social order, consumer protection, and the moral objectives cited in the previous cases), and on the other it was actually inciting its citizens to participate in its own gambling activities. It even facilitated the payment of debts and regulated the industry by financial laws, making the objectives appear more economic than socio-cultural (243/01, par. 26).

On the matter of equal treatment of cross-border sport betting companies, the argument was that an established and lawful company under UK Law (Stanley), was essentially treated by Italian Law as an underground enterprise (243/01, par. 28), whose agents in Italy needed to be criminally prosecuted. As an extension, the latter treatment by Italian Law not only violated the freedom to provide services and the freedom of

establishment, but also the fundamental EU principle of proportionality; criminal prosecution should be the last resort (243/01, par. 29).

What is also remarkable is the consistency and solidarity between the amicus curiae submitted by the Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments, joined by a pertinent position by the EC, supporting that *Zenatti* should rule this case as well; restrictions justified, that is, by means of public policy within reason that the MS and the national courts can control. Nonetheless, at the hearings of *Gambelli* the EC advised that it was investigating the Italian Republic, and requested it conformed to the provisions of the EC Treaty on sport betting and lotteries (243/01, par. 41-43).

In a much anticipated decision, the ECJ replied first that the restrictions imposed on Stanley and its agents in Italy were obstacles to the freedom of establishment, thus violating Article 43 of the EC Treaty (243/01, par. 45-46). The court actually admonished the Italian Government's position that Italian legislation regulating sport betting only allowed licenses to the state-sponsored monopoly-holders; the fact it is virtually impossible for a private company to obtain a license under such a restrictive regime constitutes prima facie evidence of a freedom of establishment violation under EC Treaty Art. 43 (243/01, par. 47-49).

The ECJ thereafter handled the matter of the freedom to provide services. First the court reiterated that the definition of services under EC Treaty Art. 50 covers such activities as lotteries, sport betting, and gaming, including the cross-border provision of such services via telephone, and, in the case of Stanley, the internet (243/01, par. 52-54). The court then clearly declared the interpretation of the Italian Law supported by the

Italian Government a restriction of the freedom to provide services under EC Treaty Art. 43 (243/01, par. 57-59).

Immediately following that acknowledgment, the court attempted to deal with the most intriguing matter, of the restrictive policy's rationale, and whether it could be considered under the spirit of the exceptional measures expressly provided in articles 45 and 46 of the EC Treaty (the ones mentioned above as public policy, security, or health), or in accordance with the ECJ's own case law for reasons of overriding interest (243/01, par. 60). The court dexterously delivers a blow to such arguments as the ones supported by the Greek and Portuguese governments, in regard to diminution of tax revenues, which are most certainly not considered reasons of overriding interest (243/01, par. 61). This is precisely the point that many would expect the ECJ to put forth a valiant effort (as purported by the Advocate General in the *Placanica* opinion shortly following) and clarify whether it believed such restrictions would be actually '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' (243/01, par. 65). The suspense was preserved with the court referring that crucial part of the issue's final decision to the national court (243/01, par. 66). Nevertheless, the court did provide the national court with invaluable guidance by pontificating in the ensuing sections of *Gambelli*.

First of all, the court reflected on the precedent cases of *Schindler*, *Läärä* and *Zenatti*, advising that such restrictions need to be applied in a consistent and systematic manner (243/01, par. 67). Then, at last, the court notes the point made by the Tribunale di Ascoli 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' (243/01, par. 68). In essence, perhaps the most important reference point from *Gambelli* is that a State cannot concurrently incite its citizens to gambling ventures that serve state interests, whilst restricting the same services from other prospective operators, under the facade of socio-cultural and moral considerations:

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 (243/01, par. 69).

In succession, the ECJ advises that while the national court decides on the discriminatory character of the restrictive practice, it needs to decide whether the license procedure is more easily accessible by and attainable to citizens than foreign operators (243/01, par. 70-71). The latter would not satisfy EC Treaty provisions. Finally, the ECJ suggests that the national court needs to decide whether the criminal prosecution of anyone who connects to the internet at home and places bets via a bookmaker established by another MS is disproportionate, in light of ECJ case law, in conjunction with the fact the participation in similar betting is concomitantly encouraged by national licensed bodies (243/01, par. 72). Further, the national court is called to decide whether such criminal prosecution goes beyond what is necessary to combat fraud and the stated objectives. Under the same light, when deliberating on the principle of proportionality

and the freedom of establishment, the scope of these restrictions might go beyond what is necessary to check fraud, while the adversely affected companies are lawfully licensed by other MS and their accounts and activities could easily be verified (243/01, par. 73). This perhaps is the one element of the *Gambelli* decision that might serve as a ‘Trojan Horse’, when a MS could develop regulation that would ease the licensure of sport betting providers, in order to promote state interests via taxation and other avenues, and many prospective ventures would swarm that jurisdiction, in order to infiltrate the EU market through this open door (the principle of the ‘Country of Origin’, also discussed in the Services’ Directive section). It remains to be seen if this was the ‘Achilles heel’ of the *Gambelli* decision, further quoted in later judgments. The final position of the court issuing the preliminary ruling at the request of the Tribunale di Ascoli left unanswered questions, referring matters to the national courts:

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 (243/01 (2003) November 6).

It did not take long for the ECJ to revisit the issues discussed in *Gambelli*. As a matter of fact, the decision of the court on the request for another preliminary ruling by the Finnish court of Ålands Förvaltningsdomstol in *Diana Elisabeth Lindman v. Skatterättelsenämnde* (42/02, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-42/02%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>) was delivered just a week after the *Gambelli* decision, and the proximity of the decisions is evident. In *Lindman*, the ECJ did not sit as a Grand Chamber; rather the 5th Chamber delivered the decision (http://curia.europa.eu/en/instit/presentationfr/index_cje.htm).

Ms. Lindman was a Finnish national, who had the good fortune of winning SEK 1,000,000 during a stay in Sweden. Although Finnish Law mentioned that earnings from lotteries organised in Finland would not be submitted to income tax regulations (42/02, par. 5), she was assessed income tax for the winnings from the Swedish lottery. A Finnish court interpreted the Finnish Law to encapsulate income tax-free winnings from Finnish lotteries, however excluding foreign ones from the income tax exemption. The Finnish Court held further proceedings, requesting the contribution of the ECJ on the interpretation of EC Treaty Art. 49 and whether the latter would preclude a MS from enforcing such a rule distinguishing between different member states' lotteries. The Finnish Government's arguments in favour of foreign lottery taxation are of special interest:

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 (42/02, par. 15).

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 (42/02, par. 23).

In a brief reply, the ECJ first commented that according to *Schindler*, lotteries do fall within the scope of EC Treaty Art. 49. Then the court proceeds to note that article 49 precludes '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' (42/02, par. 20). The court further notes the acknowledgment of the Finnish Government for disparate treatment between local and foreign lotteries, as well as the contention that Finnish taxpayers prefer to participate in Finnish lotteries than foreign ones (42/02, par. 21). This remarkable contention has

further extensions for sport betting practices as well, since there have been arguments that MS citizens prefer to gamble/bet via local providers, hoping their earnings would be delivered safer and faster. It is a matter of fact whether new developments in the – now expanding – sector would change these contentions and practices. Ultimately, the ECJ mentions that any alleged justification of such discriminatory and restrictive policy, constituting a prima facie violation of EC Treaty provisions, needs ‘an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State’ (42/02, par. 25). Unfortunately for the Finnish side:

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 (42/02, par. 26).

Thus, the ECJ dismissed the Finnish claims by concluding:

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 (42/02 (2003) November 13).

The ECJ was given a third opportunity to assume a definite stance on such matters of restrictive practices and national policies on sport betting in violation of the provisions of the EC Treaty, in *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio* (338/04, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-338/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>). Once again, Stanley and its agents in Italy were involved; the latter were three defendants who were prosecuted by the Italian State for running the ‘data transmission’ sites one found in *Zenatti and Gambelli*. A somewhat noteworthy inclusion was that Stanley was not allowed to apply for licensure in Italy as it was a company quoted on the stock exchange (338/04, Opinion, par. 48 per Colomer). Actually, Placanica himself had not applied for a license, whereas the other two defendants had, receiving no reply by the police authorities in charge (338/04, Opinion, par. 50 per Colomer).

The questions referred to the ECJ were dealing with the characterisation of the Italian sport betting licensure and authorisation system, as well as the criminal penalties involved for failure to comply with the legislation under examination. Specifically:

The District Court [of Teramo] needs to know, in particular, whether [the first paragraph of Article 43 EC and the first paragraph of Article 49 EC] may be interpreted as allowing the Member States to derogate temporarily (for 6 to 12 years) from the freedom of establishment and the freedom to provide services within the European Union, and to legislate as follows, without undermining those Community principles:

- allocating to certain persons licences for the pursuit of certain activities involving provision of services, valid for 6 or 12 years, on the basis of a body of rules which excluded from the tender procedure certain kinds of (non-Italian) competitors;
- amending that system, after subsequently noting that it was not compatible with the principles enshrined in Articles 43 [EC] and 49 [EC], so as to allow in future the participation of those persons who had been excluded;
- not revoking the licences granted on the basis of the earlier system which, as stated, infringed the principles of freedom of establishment and of free movement of services or setting up a new tender procedure pursuant to the new rules which now comply with the abovementioned principles;
- continuing, on the other hand, to bring criminal proceedings against anyone carrying on business via a link with operators who, [despite] being entitled to pursue such an activity in the Member State of origin, were nevertheless unable to seek an operating licence precisely because of the restrictions contained in the earlier licensing rules, later repealed (338/04, par. 31).

Procedurally, the *Placanica* was fascinating as the two national courts referring their matters to the ECJ (the three defendants' cases were jointly reviewed by the ECJ's Grand Chamber) were dealing with a prior Corte suprema di cassazione (Supreme Court of Cassation) decision that followed the ECJ decision in *Gambelli*. The procedural problem of the ECJ's jurisdiction and the conflicts (338/04, par. 27) within the Italian Justice system in regard to the interpretation of Community Law are well reviewed in paragraphs 76-90 of the Advocate General's opinion. In a nutshell, the ECJ was held as

not waiving its own jurisdiction; the Italian courts' application of *Gambelli* would have to go through ECJ review, as the court was characterised as 'principal interpreter of European law, the apex essential to a true Community of law' (338/04, Opinion, par. 89 per Colomer). Further, in a timeless lesson of procedural disentanglement, the Advocate General officiously declares:

I am also perfectly aware that, owing to the imprecision of the organisation of judicial power in the Union, confusion is sometimes caused by the Court of Justice itself, since it is not easy to achieve the appropriate level of accuracy in every situation, bearing in mind that, in law, what matters is to get the boundaries right (338/04, Opinion, par. 90 per Colomer).

In that problematic case that essentially tested *Gambelli's* application (111/04 (2004) 26 April, '*Gesualdi*') the Supreme Court of Cassation held that the national restrictions at hand were not violating the EC Treaty provisions of the freedom to provide services and the freedom of establishment. It is important to investigate the Italian high court's rationale:

Subsequently, taking as its starting-point the fact that for years the Italian legislature has pursued a policy of expansion in the sector, in order to increase State revenues, the Corte suprema di cassazione found that that approach was adopted for reasons of public order and safety which justify the restrictions on the Community

freedoms, since the gaming laws do not seek to limit supply and demand but to channel them into controllable systems in order to prevent crime.

In that connection, the Italian court argued that the British bookmaker was already subject to supervision by a Member State, since the authorisation issued in that country had territorial implications and the adoption of a regime for betting licences had not been discussed at Community level.

The Corte suprema di Cassazione also pointed out that the Italian system has a dual basis: licences and authorisations. The reasons of general interest which justify restricting the grant of licences are evident, at least in part. However, those relating to authorisations reflect subjective conditions geared to ex ante controls and continuous supervision in order to combat involvement in crime, such as fraud, money-laundering and racketeering.

As regards the assessment of the appropriateness and proportionality of the restrictions, the Italian court drew a distinction in *Gesualdi* between licences and criminal penalties, holding that it was not for the courts to decide whether the latter were appropriate or proportionate.

It also denied that the national rules were discriminatory, since those which ensure the transparency of the share ownership of the licensees apply both to Italians and to foreigners. Furthermore, since 1 January 2004 all companies have been able to participate in tendering procedures, because all the obstacles in that connection have been withdrawn (338/04, Opinion, par. 38-42 per Colomer).

The Advocate General R. J. Colomer's opinion on the *Placanica* case in May 2006 stimulates scholarly interest and aims at clarifying the field of legal handling of sport betting in the EU. In his opening sentence he leaves no doubts: “Rien ne va plus”. The Court of Justice can no longer avoid carrying out an in-depth examination of the consequences of the fundamental freedoms of the EC Treaty for the betting and gaming sector' (338/04 (2006) May 16, Opinion, par. 1 per Colomer). Further, observing that the national courts in Italy and the national authorities did not appear to follow the ECJ's recommendations from *Gambelli* in their totality, the Advocate General purports that the *Placanica* case and the questions posed by the Italian courts to the ECJ 'give the Court of Justice the opportunity to define its doctrine, knowing that the Corte suprema di cassazione (Supreme Court of Cassation) has held that the system is compatible with Community law and aware of the circumstances surrounding the grant of licences to organise betting in Italy' (338/04, Opinion, par. 4 per Colomer). On the same note, reflecting on *Gambelli*, and perhaps the lengths to which the ECJ did not deem prudent to go, the Advocate General mentions:

The Court of Justice should have been more specific and adjudicated on the implications of the Community freedoms for the provisions of national law, as suggested by the Advocate General, who had warned that the national courts found it difficult to carry out the task entrusted to them.

I have no doubt that the judgment in *Gambelli and Others* gauged the degree of thoroughness which the Court of Justice could employ without exceeding its powers, but, with the precedent of the judgment in *Zenatti*, which did not avoid a further reference, it

erred on the side of caution, since it had sufficient details at its disposal to make a more in-depth analysis, which would have made the present references for a preliminary ruling unnecessary.

It is now necessary to take that missing step and put the finishing touches to the reply so as to dispel the uncertainty which has arisen, even if the task is more complicated, because we must examine whether there is any justification for the aforementioned restrictions on the Community freedoms, assessing whether they are discriminatory, appropriate and proportional (338/04, Opinion, par. 105-107 per Colomer).

One could probably not find a better way to alert the ECJ of the possible ramifications of undertaking such an important task, essentially clarifying matters for MS national courts. Once more, the Advocate General suggests that there may be no overriding reason established for the restrictive regulations at hand, as consumer protection and public order could not be served by contradictory actions of offering national betting monopolies on one hand, while disallowing the provision of such services by others; in addition, the argument in favour of fraud and money-laundering prevention does not appear supported by evidence to that end. Not only is the licensure process more taxing for foreign prospects, but there are no secure checks that would ensure crime prevention. Instead, such measures need to be non-discriminatory, appropriate and proportionate (338/04, Opinion, par. 108-114 per Colomer). The Italian State did not demonstrate an effort to check the prospective operator's status, and did not

try to measure effectiveness of the measures under investigation against others (338/04, Opinion, par. 126 per Colomer).

The scope of the measures notwithstanding, Advocate General Colomer does not refrain from sharing the view...

...expressed by Advocate General Alber in point 118 of his Opinion in *Gambelli and Others*, when he points out that gambling is regulated in all Member States, and that the grounds given for such regulation are largely the same. Therefore, if an operator from another Member State meets the requirements applicable in that State, the national authorities of the Member State in which the service is provided should accept that as a sufficient guarantee of the integrity of the operator (338/04, Opinion, par. 130 per Colomer).

Reiterating a point from above, this could be the fallacy in the ECJ's handling of *Gambelli* and *Placanica*. One may argue that while trying to preserve the character of the Union and promote equal treatment and the EC Treaty's provisions, the pitfall of such a state-oriented approach might lead to the undesired effects discussed earlier.

Arguably the climax of the Advocate General's position comes following the analysis of licenses, authorisations, and most importantly, penalties (as the subject involved criminal prosecution and imprisonment). Retorting to the Italian high court's handling of the *Gambelli* decision and interpretation of the national regulations, he recommends:

The Corte suprema di cassazione has not completed the task entrusted to it, on the pretext that it was prohibited from doing so. It is surprising that, although it identified the three fundamental parts of the Italian betting legislation, when it took its decision it took account only of authorisations, leaving penalties out of its examination entirely and considering licences only in part.

At this juncture, the Court of Justice should give a ruling, since it has all the information necessary to do so, and unreservedly declare that a penalty which consists in loss of liberty for up to three years is disproportionate to the circumstances described throughout this Opinion, in particular those relating to the legitimate good protected by criminal penalties and those relating to the State measures to encourage betting (338/04, Opinion, par. 141 per Colomer).

In his conclusion, the Advocate General engages in a delightful discussion of the normative approach of the gambling and sport betting sectors in the EU. He actually notes that a harmonisation of the matter would be a great advantage over ECJ's deliberations (338/04, Opinion, par. 144 per Colomer). Although he is careful not to advocate an absolute liberalisation of the gambling market (footnote 116 in 338/04, Opinion, par. 147 per Colomer), he does encourage the EC to include the gambling sector in the Services Directive under development (338/04, Opinion, par. 145-148 per Colomer). On this important issue the reader should bear in mind there has been significant controversy and in 2006 the EC leaned in favour of excluding gambling from the Services Directive (<http://www.euractiv.com/en/sports/eu-sports-ministers-want-games-chance-services-directive/article-139467>, and

<http://www.euractiv.com/en/innovation/cheers-jeers-services-vote/article-152692>).

Finally, as an excellent suggestion for future research, the Advocate General mentions the intriguing character of cross-border gambling, especially when it involves a MS and a state outside the EU (338/04, Opinion, par. 149 per Colomer). Considering the documented friction within the World Trade Organisation (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm) and new developments in the US both before and after the recent Congressional elections (<http://www.govtrack.us/congress/billtext.xpd?bill=h109-4411>, [http://www.house.gov/apps/list/press/financialsvcs_dem/21frank_004_xml_\(2\).pdf](http://www.house.gov/apps/list/press/financialsvcs_dem/21frank_004_xml_(2).pdf)), there is fertile ground for further comparative analysis of these matters. This is the object of a separate comparative piece in the same research stream.

The ECJ in its *Placanica* decision is extremely careful. In its declaration of the questions referred for preliminary ruling from the Italian courts as admissible, the court notes:

...The interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.

...The Court is being asked to rule on the compatibility with Community law of a provision of national law. Nevertheless, although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (338/04, par. 36-37).

In regard to the licensure system, the ECJ essentially reflects on the Advocate General's points. After confirming its position in *Gambelli*, and after focusing on the fraud prevention objective supported by the Italian Government, it once more yields to the national court, in regard to the licensure and tender system:

A licensing system may, in those circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. However, as regards the limitation of the total number of such licences, the Court does not have sufficient facts before it to be able to assess that limitation, as such, in the light of the requirements flowing from Community law.

It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective invoked by the Italian Government, namely, that of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those

restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality (338/04, par. 57-58).

The court then dealt with the framework and scope of the police authorisation and the criminal penalties reserved for violators. It reaches a consistent conclusion with *Gambelli*, it declares the pertinent regulations incompatible with the provisions of the EC Treaty, however it arguably does not go the length the Advocate General would have wished:

National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services, provided for in Articles 43 EC and 49 EC respectively.

It is for the national courts to determine whether, in so far as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a criminal penalty on persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons (338/04, par. 73).

Finally, the most recent ECJ decision on these matters, *Commission of the European Communities v Italian Republic* (260/04, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-260/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>), offers useful insight whilst revisiting and reiterating points from *Gambelli* and *Placanica*. The issue at hand was the renewal without a public tendering process by Italy of 329 existing licenses to operate horse-racing betting offices. Crucially for Italy, there was an increase, in 1999, in the total number of betting centres, totalling 1,000. The 671 new betting centres were indeed awarded a license after competing bids. The 329 existing centres were exempted from the bidding process and ‘grandfathered in’ the new regime, which according to the EC constituted an infringement of transparency and publicity emanating from the EC Treaty provisions on freedom of establishment and freedom to provide services (Arts. 43 and 49 EC Treaty).

Following infringement procedures, the EC pursued the three steps involved in such matters: according to EC Treaty Art. 226, on 24/7/2001, the EC sent Italy the formal letter of inquiry concerning betting regulatory issues, including the renewal of the 329 licenses without a bidding process. At that point Italy's response did not satisfy the EC, holding that a ministerial decree in essence provided an exception for an unspecified timeframe for these existing betting centres. Thus, the EC, on 18/10/2002, invited the Italian government to comply within two months with the provisions of the EC Treaty, practically advertising the licensing process for the 329 centres in open competition fashion. In response, on 10/12/2002, the Italian authorities invoked the need to certify the financial status of the holders of the concessions still in force, pending organisation of the tendering procedures (260/04, Opinion, par. 11-14 per Sharpston). More than two and a half years later, on 17/6/2004 (a point that becomes important considering the Special Report by the European Ombudsman in Germany's case, analyzed in the ensuing section, combined with the fact Italy did not deny that its Law in question did take effect after the expiration of the time limit set by the EC (260/04, par. 15)), the EC proceeded with bringing action against Italy before the ECJ, since it received no information as to the completion of the financial certification process and the opening of the new tendering procedures.

A.G. Eleanor Sharpston's Opinion (260/04, Opinion, 29/3/2007) is useful on various points. First, the EC held that betting services are public service concessions that need to comply with the general principles of the EC Treaty Arts. 43 and 49. According to the undisputed facts, the Opinion of A.G. Sharpston finds a *prima facie* infringement case (260/04, Opinion, par. 20 per Sharpston). Very importantly, the Advocate General

holds that ‘considerations of a purely economic or administrative nature cannot justify restricting the freedoms laid down by the Treaty’ (260/04, Opinion, par. 31 per Sharpston). Further, in response to Spain’s supporting contentions for Italy (Spain and Denmark intervened in the case in favor of Italy, via substantive/socio-cultural, and moral factors in the case of Spain, and procedural/ECJ case-law interpretive factors in the case of Denmark), A.G. Sharpston remarks:

Social and financial considerations of the kinds cited by Spain in its third and fourth considerations, or practical difficulties involved in changing from one regime to another, do not constitute such requirements [imperative in the general interest]. And the expressed intention of the Italian authorities is not relevant to an assessment of the factual situation... (260/04, Opinion, par. 37 per Sharpston).

In her concluding remarks, A.G. Sharpston assumes a somewhat conservative yet clear approach. Therein she posits:

...I express no opinion as to other circumstances in which renewal of horse-race betting concessions without a tendering procedure might be justified by public-interest requirements. Nor do I consider it necessary to specify the precise kind or degree of publicity required where a tendering procedure is conducted. Suffice it to recall that, in the present case, 671 concessions were awarded after a tendering procedure which, in the Commission’s view, complied with Community law, while 329 were at the same time renewed without the slightest degree of transparency or publicity which could have

afforded interested parties access to the award procedure (260/04, Opinion, par. 43 per Sharpston).

Finding for the EC on 13/9/2007, the ECJ declared that Italy failed to fulfil its obligations under Art. 43 and 49 EC Treaty, in particular infringing upon the general principles of transparency and publicity, by not ensuring a sufficient degree of advertising, and by renewing the existing 329 horse-racing betting licenses without inviting competing bids. The case specifics were indicative of broader EU problems in the sport financing and betting licensing sectors.

It is useful to note Italy's points of defense: the extension of the existing licenses was going to ensure continuity, financial stability, and a 'proper return on past investments for licence holders as well as the need to discourage recourse to clandestine activities...' (260/04, par. 15). Italy felt that such justifications constitute overriding public interest requirements. The Fourth Chamber, issuing ECJ's judgment, disagreed. The Court did recognize that its case law provided for reasons of overriding general interest, 'such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order' (quoting *Placanica*, par. 46, which further cites the aforementioned ECJ cases).

In its examination of the restrictive policies' proportionality and investigating whether the licenses' renewal was suitable for the objectives pursued, not going beyond what would be necessary to achieve those purposes, while abiding by the general principle of non-discrimination, the Court remarks that the Italian Government did not rely on any derogation such as the ones provided by Arts. 45 and 46 EC Treaty. 'By

contrast the Italian Government justifies its renewal of the licences without a tendering procedure by the need, in particular, to discourage the development of clandestine activities for collecting and allocating bets' (260/04, par. 31). Unfortunately for the Italian side, there was no justification of the necessity not to invite bids as compared to the existing regime for the 329 betting licenses, and the EC's infringement allegations, in essence, were not addressed. Further, the Court chastises the Italian Government as it did not explain how the renewal of licenses without inviting competing bids could prevent the development of clandestine activities (260/04, par. 32). The broad spectrum of the above ECJ Jurisprudence shows that it is instrumental to fully employ any quantitative and qualitative tools, and any supporting evidence, documentation, testimony would be imperative for a defendant in such infringement cases. In effect, the ECJ reverberates the points set in *Gambelli* and *Placanica*, and calls national authorities to prove how these embedded restrictions in regulation serve reasons of overriding public interest according to EC Treaty Arts. 45 and 46 or as posed in established ECJ case law, as well as demonstrate that such restrictions abide by the principle of proportionality. The Fourth Chamber concludes:

Accordingly, it must be stated that the renewal of UNIRE's old licences without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, suffice it to point out that those cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty...

It follows that none of the overriding reasons in the general interest pleaded by the Italian Government to justify the renewal of the 329 old licences without any competing bids being invited can be accepted (260/04, pars. 34-36).

Shortly following the ECJ decision, the European Gaming and Betting Association (EGBA) issued a release applauding the Court's judgment. According to the EGBA's Secretary General, Sigrid Ligné:

The Court's decision sends a clear signal to Member States currently offering, or planning to offer, licences to European gaming and betting operators. The Court clearly states that the licensing must be undertaken within a set of clear and strict parameters, which are in line with the EC treaty. The Court's decision also underlines that these licences cannot be awarded without a transparent, competitive and fair tendering procedure.

The EGBA considers today's ECJ ruling marks an important step towards a regulated European gaming and betting market and encourages Italy and other EU Member States to review their legislation.

Around the same time the Italian infringement case was handled before the ECJ, the Supreme Court of France also dealt a blow to related restrictive practices perpetuating in a MS. In its ruling of 10/7/2007 regarding the case of PMU, the state horse-race betting agency, versus the Malta-based private online provider, Zeturf, the French Cour de Cassation expressed serious doubts about the conformity of the French sports betting monopoly with Community Law. It implicitly argued that the French regulations are not in compliance with Art. 49 of the EC Treaty on the freedom to provide services by holding that the French Court of Appeal was unable to prove that the access restrictions currently in place were proportional and appropriate. France's Supreme Court hence confirmed the opinion of the EC, which presented France with a reasoned opinion on 27/6/2007, refuting France's arguments for retaining the gaming monopoly. According to Sigrid Ligné:

This decision sets a precedent and strengthens the position of our association. We are calling for the establishment of fair conditions to ensure a regulated opening of the European gaming market. The aim is to protect consumers' interests by establishing uniform industry standards of the highest level across Europe, as well as develop a competitive tax model for the benefit of all stakeholder groups (EGBA release 135).

THE EUROPEAN OMBUDSMAN'S SPECIAL REPORT

A refreshing take on the issues discussed was the contribution of the European Ombudsman (<http://www.ombudsman.europa.eu>). In a nutshell, the Ombudsman

investigates complaints about maladministration in EU institutions. After record high numbers of complaints in 2004 and 2005, the level has essentially ‘stabilised at the previously unprecedented rate of 320 per month’ (Diamandouros, 2006b, p. 9). The most active role and important intervention the Ombudsman can take in order to promote EU citizens’ interests encountering multi-faceted problems by EU institutions and move the process of a conflict resolution is a ‘special report’. As of Summer 2008, there have only been 15 special reports issued by the office of the Ombudsman since 1995 (<http://www.ombudsman.europa.eu/special/en/default.htm>). Special report No. 13 was appropriately pertaining to a citizen’s complaint about sport betting services. To fully capture the EC’s stance on the matter, one should bear in mind the expectation of the *Gambelli* decision and the controversy following shortly thereafter. The EC hesitated to take significant action right after the ECJ decision, and was evidently, as is documented by the Ombudsman’s report below, procrastinating, gauging the consensus around EU jurisdictions, institutions, and the interest around the upcoming Services Directive discussions.

In January 2005, a provider of sports betting services in Germany complained (289/2005/(WP)GG) to the Ombudsman about the inactivity of the EC regarding his infringement complaint against Germany, filed in February of 2004 (Diamandouros, 2006a, p. 2). The German authorities had ordered the complainant to stop offering sports betting services, thus forcing him to close his business. In the complainant’s view this constituted a violation of the freedom to provide services under the EC Treaty. He had therefore asked the EC to take steps against Germany. The EC admitted that it had not yet taken a decision regarding this infringement complaint. According to the EC, the issue

was politically highly sensitive and the College of Commissioners had not been able to take such a decision (Diamandouros, 2006a, pp. 2-3).

During the fact-finding process, the Ombudsman's report established that the EC had received letters requesting a reply and significant action (investigating Germany's policy on sport betting and the restrictions posed thereupon) in 2004 and 2005. These requests were either unanswered or addressed in untimely fashion (six months after reception). What intensified the EC's apparent unwillingness to attend to the citizen's complaint against Germany was the (delayed) reply to the second request of 2005, stating: '...due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission *can probably not be expected in the near future*' (Diamandouros, 2006a, p. 3, italics added).

The Ombudsman's special report indicates that:

The Ombudsman considers that the present case raises an *important issue of principle*, namely the question as to whether the Commission is entitled indefinitely to delay its handling of complaints alleging an infringement of Community law by a member state on the grounds that it is *unable to reach a political consensus on how to proceed* (Diamandouros, 2006a, p. 1, italics added).

The Ombudsman report states that the Commission has a duty to deal properly with all infringement complaints, even if they are 'highly politically sensitive or controversial' (Diamandouros, 2006a, p. 1). He thus recommends the EC to 'deal with the complainant's infringement complaint diligently and without undue delay' (Diamandouros, 2006a, p. 9).

The next procedural step was for the European Parliament (EP) to adopt this recommendation as a resolution, forcing the EC to act. In the Ombudsman's final report for the year 2006, the matter fell under section 3.7: 'Cases closed after a special report' (Diamandouros, 2006b, p. 5). The EC subsequently informed the Ombudsman that it had, in the meantime, decided to open infringement proceedings by sending a letter of formal notice to Germany (Diamandouros, 2006b, p. 111).

POLICY DEVELOPMENTS, EC INQUIRIES, AND THE SERVICES

DIRECTIVE CONTROVERSY

By Summer 2008, the EC had proceeded with investigations as well as infringement procedures against Denmark, Finland, France, Germany, Greece, Hungary, Italy, the Netherlands and Sweden (<http://www.euractiv.com/en/sports/commission-investigates-national-restrictions-sports-betting/article-154029>; http://ec.europa.eu/internal_market/services/infringements/index_en.htm). These countries' restrictions were initially going to be tested for EC Treaty Art. 49 compatibility. It appears that the ECJ's rulings in *Gambelli* and thereafter provide valuable guidance to that end.

“In sending these letters of formal notice, we are not seeking to liberalise the market in any way”, said Internal Market and Services Commissioner Charlie McCreevy' (Commission investigates..., par. 2). “In the context of rising national protectionism in various member states, the European remote gambling industry welcomes the Commission's strong determination to enforce Internal Market rules in this sector”, states

a joint press release of the European Betting Association and of the Remote Gambling Association. Both associations believe that this investigation “sends a clear message to consumers, the industry and member states on the need to clarify the legal situation in this sector” (Commission investigates..., par. 3).

What is important to note in such a brief policy summation is the development of the Services Directive (Directive 2006/123/EC of the EP and Council, 12 December 2006, on services in the internal market, http://ec.europa.eu/internal_market/services/services-dir/index_en.htm, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_376/l_37620061227en00360068.pdf). After heated discussions and much controversy (<http://www.euractiv.com/en/sports/eu-sports-ministers-want-games-chance-services-directive/article-139467>, <http://www.euractiv.com/en/innovation/cheers-jeers-services-vote/article-152692>), the EP and the Council of the EU (Council) reached a final document at the twilight of 2006. This policy initiative aims at alleviating many of the problems in applying EU Law and easing the process of integration. Freedom of establishment and freedom to provide services were the two main targets for the Directive. After careful deliberation, alongside other services (Directive 2006/123/EC, Art. 2), gambling and sport betting are indeed excluded under section (h); the justification is found in section 25 of the Directive’s introduction: ‘Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection’.

Further, after the EC's official positions in the White Paper on Sport, where gambling and lottery services were briefly mentioned as the means by which sport is financed in many states, the EP, on 8/5/2008, adopted a report by its Committee on Culture and Education (European Parliament, 2008; Kaburakis, 2008). In this report, state-run gambling monopolies are supported 'based on imperative requirements in the general interest... including control over a "fundamentally undesirable activity", prevention of compulsive gambling and maintenance of public order, pursuing such objectives in compliance with European Law and ECJ Jurisprudence... State-run or state-licensed gambling or lottery services will be harmed by competition and will restrict their support mainly to amateur sport...' (European Parliament, 2008). As of late Summer 2008, the report is before the Council for debate and vote.

Researching and trying to determine what these developments by the EC, EP, and Council may mean would be an outstanding opportunity for further analysis and a separate piece. At this early stage it may be premature to foresee whether i.e. any harmonisation attempts by the EC would lead to a broad interpretation of ECJ case law, thus arguably leading to liberalisation of the sport betting sector, or whether the 'country of origin' principle reiterated in the Services Directive could be applied to sport betting with the overarching consequences of jurisdictions' competition, forum shopping, and sport betting entrepreneurs pursuing the most viable solution for the elusive EU market share. The ensuing portion attempts to serve as a 'sneak preview' of what could be the object of forecasting analysis based on developments henceforth. To that end, the reader may treat it as both a conclusion and introduction for what is to follow.

SUM, SCENARIOS, AND CONCLUSION

The above ECJ decisions, though truly insightful and instrumental in determining the legal ‘boundaries’ (per A.G. Colomer in the *Placanica* Opinion), do not ensure that there will be uniform handling of sport betting in the EU. Perhaps the EC efforts of harmonisation, occasionally by means of inquiries, intervention, and commencement of infringement procedures against a MS, may lead national authorities and courts to respect the ECJ’s guidelines and prerequisites for sport betting restrictive practices. For the time being, however, truth is that there is tremendous variability and uncertainty in regard to national courts’ decisions on sport betting licensure, authorisation, penalties, etc. The way a national court would decide, i.e. on the scope of the restrictive policy, the rationale of the measure under ECJ guidelines, the fit of the restrictions in light of the objectives pursued, appears to be a matter of local interpretation, philosophy, legal and socio-economic background, as well as knowledge and understanding of the specific and rapidly changing particularities of the gambling industry. For example, when and how is a MS stimulating gambling in its territory?

A splendid sample of such legal conflicts and interpretation problems between ECJ Jurisprudence and national courts was found in the Dutch decision of *De Lotto vs. Ladbrokes* (Injunction before the Dutch Supreme Court, 18/2/2005, NJ 2005 404; Merits in favor of De Lotto in Court of Appeal of Arnhem, 17/10/2006). In brief, Ladbrokes attempted to infiltrate the Dutch gambling market via the internet, offering the opportunity to Dutch citizens to gamble and bet via a Dutch-specific website (Ladbrokes.nl) and a telephone centre in the Netherlands. The fate of many EU

institutions and norms was confirmed in the case of the Dutch Gaming Act as well, in a somewhat perverse way. It appears the closer EU administrative entities and the ECJ approach integration of the Union, the more hurdles and reluctance this integration approach is facing in national fronts. As the *Gambelli* case was decided, the Dutch Gaming Act – at least in its interpretations and policy updates – assumed a more restrictive stance toward gambling and sport betting (Veer, Franssen and Budik, 2006, p. 3). Once again, one was confronted with state monopolies for lotteries and betting (De Lotto), essentially without an opportunity to obtain the necessary license (Veer, Franssen and Budik, 2006, p. 3). After conflicting opinions in the lower courts (among which a lower court in Arnhem argued that the Dutch Gaming Act was inconsistent with the self-defined goal of limiting fraud and preventing gambling addiction, and contradictory to ECJ's *Gambelli* decision), both the Minister of Justice and the Dutch Supreme Court concluded that the Dutch Gaming Act was valid, consistent with EU Law on freedom to provide services, and should be interpreted as excluding Ladbrokes from operating in the Dutch gaming market, practically reserved for De Lotto (<http://www.igamingnews.com/index.cfm?page=artlisting&tid=5687>). On the merits the matter had no other way than to be concluded in favour of De Lotto, after an October 2006 Court of Appeal of Arnhem decision (<http://www.debrauw.com/NR/rdonlyres/7BACD556-CD72-4A36-A586-F21421CC8B69/0/NewsletterIPICT200611.pdf>). This, despite the defendant's arguments that De Lotto spent €25 million annually for advertising and marketing (putting it into perspective, this ranked 7th among all industries), that De Lotto self proclaimed that sales' growth was an annual priority, that Dutch citizens were clearly aware of the national TV

ads of De Lotto with Euros raining down on the screen, without any mention about curbing gambling compulsion and controlling betting (Veer, Franssen and Budik, 2006, pp. 9-10). It might come as intuitively obvious to the casual observer that such practices do not follow the stated objectives the Dutch Government wishes to pursue by means of the Gaming Act. Interestingly, a closely similar case featuring Ladbrokes in Germany concluded with an Administrative Court of Appeals finding that a section of the German Criminal Code penalising foreign bookmakers offering bets to German consumers was ‘a blatant breach’ of EC Treaty Art. 49. In the interim, local providers were aggressively marketing their services for the 2006 World Cup. The Supreme Administrative Court of Finland sided with this logic as well, overturning a decision to preempt Ladbrokes from operating in Finland, whereas the respective case in Sweden led to the opposite conclusion, siding with the Swedish Government, as was the case in the De Lotto case of Holland above (<http://www.bettingmarket.com/eurolaw222428.htm>, <http://www.casino.eu/eu-law.php>). Once more, it becomes clear that there is a tremendous lack of uniformity in MS national courts’ decisions on the matter.

Thus, the pressure is growing on an EU gambling model (Veenstra, 2005). The present reality is characterised by political uncertainty (as the gambling sector tends to be emulating other industries according to EU policy makers, and state lotteries and gambling monopolies tend to resemble normal financial competitors); legal uncertainty (according to what was mentioned above on national, EC, and ECJ levels); competition (betting organisers collectively pursuing their interests and lobbying before EU bodies) and; national legislative efforts (such as the Gambling Act of 2005 in the UK and the Remote Gaming Regulations of 2004 in Malta, in conjunction with new MS regulatory

evolution). In such a reality, policy guidelines may need to incorporate protection for vulnerable populations such as the poor and the young (Veenstra, 2005). Furthermore, the political arguments are formidable, referring to the revenue generation from lotteries (which do amount for approximately 45% of EU GGR according to the Swiss Institute of Comparative Law 2006 study) and betting monopolies, which then are invested by means of state appropriations in sports, welfare, culture, healthcare, research, environment etc. The economic impact of a liberalisation of the gambling sector involves direct and indirect employment, retail infrastructure, as well as cost-saving for government spending (Veenstra, 2005). Contemporary discussion among gambling, political, legal and policy circles argues that the EU may lead the 21st Century services revolution and even set the tone for global cooperation on these matters. Moreover, the EU may control illegal operators by regulating gambling and the aforementioned harmonisation with public order and relevant objectives in mind. Worth mentioning, albeit contrary to harmonisation attempts, is the opinion that a public order objective for the EU will remain illusive, as each MS has its own discernment of what would constitute public order within its jurisdiction. This opinion also supports the notion that the remote gambling industry will continue to target markets with legal interpretation problems, so it is not harmonisation that is really needed, but rather legal clarification. Regardless of the means, the objectives remain similar according to this alternative school of thought, aiming at protecting vulnerable populations, controlling gambling addictions and pathological phenomena associated with gambling, standardising advertising so as not to promote uncontrollable urges to gamble and participate in sport betting, even offer alternative gaming models after impact assessments (Vlaemminck, 2005). In such a

developing contemporary reality the ‘Internet is not a lawless world without national borders’ (Veenstra, 2005). Liability of internet service providers and financial intermediaries for non bona fide operators can be attained by policy initiatives meeting ECJ’s requirements; additionally, bona fide operators may be requested to use geo-location software, avoiding uncertainty and streamlining the monitoring process.

The ECJ with its recent ruling in *Placanica* admittedly opened up the door for various operators to apply for sport betting licenses. Matters could always be tested by the national courts (here assuming that these cases would follow ECJ precedent and guidelines posed); national courts’ mercurial decision-making notwithstanding, the path of liberalisation has arguably opened, or at least the restrictive reality of traditional monopoly schemes has been emphatically revisited. A few weeks after the *Placanica* decision was published, sport betting operators begun making their way to national authorities’ offices with applications for authorisations and licenses, Ladbrokes, Stanley and William Hill leading the pack (<http://www.bettingmarket.com/eurolaw222428.htm>, http://www.enet.gr/online/online_text/c=115,id=48821236).

Consequently, some forecasting is in order, bearing in mind that world-renowned economists and strategists such as Argyris and Mintzberg have commented that one cannot safely forecast, but can only wisely plan to generally handle the unexpected (Mintzberg, 1994). Hence, it would only be fair in an Orwellian way to delve into an extreme scenario; such a hypothetical framework is also analysed by the ‘second alternative scenario’ of the Swiss Institute of Comparative Law study (Swiss Institute of Comparative Law, 2006, p. 46). The purpose of such hypotheses would be to cover any potential developments and embrace any conservative calculations simultaneously. Such

a scenario would involve a considerable liberalisation of the sector, opening the market, and interpreting ECJ decisions under a favorable light for competitors in the industry, thus unfavourably toward restrictions to freedoms of establishment and services' provision. On strict economic terms, bearing in mind models used in the aforementioned study, GGR from sport betting might escalate to more than double its 2006 levels by the year 2010 (Swiss Institute of Comparative Law, 2006, p. 46). At the same time, baseline prices for participation in sport betting ventures would considerably fall, due to available alternatives and growing competition. In regard to unintended consequences, the secondary data analysis conducted reveals that research produces inconclusive evidence in regard to 'social costs associated with increases in problem and pathological gambling, increases in crime associated with gambling, changes in bankruptcies, suicides, etc... Nonetheless... there very well may be... a subsequent political backlash because of the perception (if not the reality) of the consequences of such expansion' (Swiss Institute of Comparative Law, 2006, p. 1511). This research stream will side with the conclusion in the final pages of the Swiss Institute of Comparative Law study and emphasise the need for more research conducted on the matters discussed. Comparative research unavoidably takes into consideration the social, cultural, legal, economic, and political differences at the areas of focus. Quoting the study, if there is going to be any meaningful scientific contribution toward drafting future EU policy (considering the EC's call for such in the recent example of the White Paper on Sport, and legal scholars and research colleagues' immediate answer):

There is going to have to be a greater commitment by Member States, service providers and other stakeholders in addressing these information and research shortcomings. The fact that gambling services in the EU are already characterised by revenues in excess of €50 billion as well as substantial contributions to tax revenues and good causes suggests that this should be a fairly high priority (Swiss Institute of Comparative Law, 2006, p. 1512).

NOTES

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