

EU GAMBLING AT THE INTERSECTION OF POLICY AND LITIGATION

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ABSTRACT

Given its high level of regulation, the gambling industry must be able to react quickly to litigation and resulting change in policy (and enforcement thereof). Using a case study approach, this short paper highlights how the twin issues of policy and litigation have recently impacted the gambling industry in the European Union. Examples focus on recent developments in the EU that outline the relevant contours of the European Court of Justice's jurisprudence, with a special emphasis on the dynamic situation in Greece. These examples shape the ensuing discussion of the future of both the regulation and litigation of the EU's gambling industry.

Keywords: Gambling Policy, European Union Law, Sport Betting.

1 INTRODUCTION

Like all highly-regulated and technologically-focused industries the past fifteen years, the gambling industry has undergone significant change. Jurisdiction-specific litigation and public policy have had a profound impact on the scope of permissible gambling. The European Union (EU) is almost certainly the home to the highest level of revenue generation for the industry. However, the large number of often disparate legal systems among EU members makes the market unpredictable and fluid.¹ A number of important entities are headquartered in the EU or in geographically proximate nations such as Gibraltar and Malta. Examples include Ladbrokes, William Hill, Betfair, and Stanley Betting.

With traditional commercial borders between countries blurred (and in some cases largely non-existent) due to the market-changing impact of the

¹ Doukas and Anderson (2008), Eadington (2011), and Monov (2010).

Internet, litigation and policymaking have had a profound transnational impact.² EU nations have historically enacted restrictions to reign in expansion among gambling firms. However, with efforts toward an EU “common market,” an increasing number of countries are moving toward the application of a more generic law neutral to nation-specific agendas. Nevertheless, the transformation has not always been smooth. A voluminous amount of litigation specific to the gambling industry has made its way to the European Court of Justice (ECJ). Such litigation has challenged restrictions on important issues such as open competition and freedom to provide services. The purpose of this paper is to survey important legal decisions from the ECJ and provide an overview of gambling-related policymaking by EU member states.

2 CASE STUDIES

The litigation and policy-derived case studies herein focus on ECJ jurisprudence and regulatory actions specific to the gambling industry. Case files were gathered from the user-friendly ECJ database.³ Our impetus for using the ECJ database was two-fold. First, given its status at the top of the precedent pyramid, ECJ adjudications provide guidance to all EU Member States on gambling issues that cross borders. Second, the ECJ database allows researchers to access ECJ decisions in a transparent way and obtain supplemental information pertaining to prior adjudications. The select ECJ cases analysed below address important issues related to gambling and are current through the end of 2010. Policy-related developments, most notably the sweeping changes in Greece, are current through August 15th 2011.

3 STATUTORY AUTHORITY

In connection with codified gambling-related law in the EU, two provisions in the Articles of the Treaty establishing the European Community are most relevant.⁴ Article 43 states:

² Eadington (2004) and Vlaemminck and De Wael (2003).

³ Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/j_6/ (2011).

⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, 2007 O.J. (C 306) 1 [hereinafter “Treaty of Lisbon”]. It is useful to note that ECJ decisions heretofore referenced Article numbers as they stood before the adoption of the Treaty of Lisbon, in the Treaty Establishing the European Community, 2002 O.J. (C 325) 33 [hereinafter “EC Treaty”]. For future reference and pending cases, one should refer to the Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47, where past EC Treaty Articles 43 and 49 become 49 and 56 respectively.

[R]estrictions 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...⁵

Article 49 also states: “[R]estrictions on freedom to provide services...shall be prohibited...”⁶ As flushed out in a litany of cases that have reached the ECJ, Article 43, Article 49, and a host of statutes originating in individual EU member states have been heavily litigated in the past five years.

4 CASE LAW

4.1 *Carmen Media Group Ltd vs. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein.*⁷

In *Carmen Media*, the ECJ addressed a number of questions specific to Article 49. For example, does Article 49 prohibit a state-sponsored sports betting monopoly when other gambling activities are provided by private entities in the same jurisdiction? The ECJ answered that a national court may consider such a monopoly in violation of EU Law, concluding that the jurisdiction’s argument for the permissibility of monopoly status on the grounds that it helped curb addiction was unpersuasive given that other, more addictive, gambling activities were permitted to operate through a number of private companies. In this way, the ECJ made clear that any deference to legislatures was limited and regulatory schemes must be based on objective measures and be applied in non-discriminatory ways.

4.2 *Staatsanwaltschaft Linz vs. Ernst Engelmann.*⁸

Engelmann addressed a number of important questions under Article 43 and 49. Most notably, does Article 43 allow EU member states to enact legislation limiting certain gambling operations to companies headquartered in such states’ home territory? The ECJ rejected such a construction, positing that Article 43 can only be construed as prohibiting such a law. More generally, the court found that the concepts of transparency and fairness

⁵ EC Treaty, Article 43.

⁶ EC Treaty, Article 49.

⁷ Case 46/08.

⁸ Case 64/08.

imbedded in Articles 43 and 49 require EU members to make the process of licensing betting operations a competitive one without any unjustified advantage conferred on business centered in the home nation.

4.3 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd vs. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa.*⁹

Two issues were presented to the ECJ in *Liga Portuguesa*. First, inquiry was made as to whether one EU member's granting of monopoly status within its borders impedes various commercial freedoms under Articles 43, 49, and 56. Second, the court was charged with deciding whether EU law allowed one member state (Portugal) to establish a monopoly for its entire nation. The ECJ concluded that a single nation, under certain circumstances, could confer monopoly status on a single entity provided that such entity is non-profit-seeking and the conferral was done in a non-discriminatory way. Further, the grant must be justified from a public interest perspective and be narrowly-tailored toward its objectives. In reaching its decision, the ECJ considered arguments by Portugal regarding the nation's interest in fighting crime and preventing sports-related corruption.

4.4 *Sporting Exchange Ltd, trading as 'Betfair' vs. Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator.*¹⁰

Two important issues were addressed by the ECJ in the *Betfair* case. First, the court was charged with deciding whether Article 49 permitted a policy granting a single operator the unfettered right to offer certain types of gambling at the expense of another who offered the same type of gambling options over the internet. Provided that certain prerequisite conditions pertaining to proportionality and fairness are met, the ECJ found that Article 49 did not necessarily prohibit legislation of the exclusive kind at issue. The court looked to pragmatic monitoring issues and concerns over the link between increased competition and addiction in making its decision. Second, the ECJ inquired as to whether the renewal of a license could be completed by following a procedure void of any competitive bidding process and comply with Article 49. Although an apparent exemption was carved out for state-run operators and private entities under strict governmental control, the court determined that Article 49's tenets related to equality and transparency were equally applicable to the procedure for bidding on licensing renewal.

⁹ Case 42/07.

¹⁰ Case 203/08.

4.5 *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd vs. Stichting de Nationale Sporttotalisator*.¹¹

In the 2008 *Ladbrokes* case, the ECJ's task was to balance the need for national-level policy bent on preventing gambling addiction and fraud with laws permitting advertising and innovation among exclusive licensees. The court found that the two seeming polar opposites were not necessarily mutually exclusive and, in turn, precluded. Provided that addiction and fraud prevention efforts only limit gambling activity in a consistent and systematic manner, moderate advertising and innovation (eg, introducing new games into the marketplace) were permitted.

5 POLICY DEVELOPMENTS

Following *Carmen Media* and *Engelmann*, a number of European legislatures amended their restrictive gambling regulations. Included in this shift was Franssen's (2010) observation regarding the Netherlands that it is "of paramount importance for the remote gaming sector to step forward and explain to the government how regulation works in the other Member States..." Verbiest's (2010) opinion on the "right to bet" law in France is reflective of how contractual rights and intellectual property licensing converge in policymaking that now inserts a prerequisite in the area of sports betting. New sport betting providers in France must now obtain a license and comply with reporting requirements. Licensed operators are also subject to new tax rates that differ depending on the type of wagering offered. Asensi (2010) outlines the new direction of gambling policy in Spain. Of particular note: (i) technical systems supporting gambling must be approved; (ii) proof of solvency must be provided; (iii) licenses are individual to the type of wagering to be offered; (iv) physical residence is required in Spain, even for non-Spanish providers; and (v) computer servers must be capable of being monitored from Spain. Belgium's gaming law went into effect on January 1st 2011. The new licensing system extends to wagering on horse races, poker, and sports betting. It applies to both online and grounded operators. Lotteries are excluded from the licensing scheme, as they remain with Belgium's recognized government-owned monopoly.

In the United Kingdom, recent amendments were made to the expansive Gambling Act of 2005. The UK's Gambling Commission is aiming to license any operator who does business with British consumers, regardless of where the business is domiciled. Nevertheless, according to Verbiest (2010), "given the nature of the internet and EU rules which require businesses to conduct trade and services openly and freely across EU Member State borders, including services rendered on the internet..." this policy will likely prove to be a difficult task. In 2009, Italy promulgated a statute that taxes all online

¹¹ Case 258/08.

games of chance at a 20% flat rate (Mancini, 2010). Another notable feature of the Italian law¹² is a special provision requiring that all remote gaming services be offered to Italian residents solely through an exclusive platform capable of recording (and taxing) each wager in real time. Finally, the Italian law includes a clause banning companies with a “.com” domain name suffix from doing business with Italians and provides for criminal sanctions if gambling services are offered in the country without an appropriate license. Aho (2009) opined that Denmark and Sweden are poised for a more liberal regulatory environment in 2011.

More so than any of the other nations highlighted, the Greek government is currently transforming Greek gaming law, which has the potential to impact the gambling industry in the EU profoundly. This effort is part of the grand scope economic reform movement to meet European Commission, European Central Bank, and International Monetary Fund (the *troika*) prerequisites to receive debt relief, so as to avoid a default. In pursuit of fiscal stability, the Greek government has to cut expenditures, while also generating increased revenue. The latter may be accomplished through Ministry of Finance policies introduced in an omnibus bill adopted by the Greek Parliament on August 4th 2011.¹³

Specifically, the portion of the new law (Articles 25-54) regulating the gaming market in Greece also ensures that the partly state-owned *Organismos Prognostikon Agonon Podosfairou* (OPAP), the gaming giant and sport betting monopoly (#1 in Europe and among the top-10 gross gaming revenue generators in the world), receives considerable exclusive benefits (Kaburakis, 2011).¹⁴ This way the Greek government attempts to sustain the competitiveness of OPAP (the only state – albeit partly – asset that is currently solvent in Greece), in hopes that the state’s 34% stake, or preferably a small portion of it, will become even more attractive to potential investors (privatization and the pursuit of capital is a key direction of the reforms,

¹² Legge 24 Giugno 2009, n. 77 (It.).

¹³ For example, see news reports at <http://online.wsj.com/article/BT-CO-20110804-717519.html> and <http://www.reuters.com/article/2011/08/04/greece-law-eu-idUSLDE7730W620110804>.

¹⁴ As of August 15th 2011, the full law was unpublished at the *Fyllo Efimeridas Kiverniseos* (FEK), the official registry of the Government for new legislation. Without the FEK protocol number at this point, the omnibus bill can be found at <http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/r-anapt-pap.pdf>. The gaming law section may be retrieved at <http://www.mediafire.com/?9ui5xhx5z3nyx8n>. Last minute amendments passed on August 4th 2011 and transcripts (in Greek) of the heated discussion in Parliament are available at <http://www.hellenicparliament.gr/Praktika/Synedriaseis-Olomeleias?sessionRecord=1a0d999a-cbd1-427e-9dfc-2df495b24b96>, and related commentary under <http://www.infobeto.com/forum/f103/>.

aligned with the *troika's* mandates).¹⁵ For example, there are 35,000 licenses for video lottery terminals (VLTs), which OPAP is awarded at the outset. Some 16,500 are assigned directly to OPAP, with the remaining 18,500 to be outsourced by OPAP to sub-licensees. Additionally, 15,000 gaming machines are to be set up at OPAP stores and 1,500 in the horse-racing monopoly's branches (art. 39, par. 2).

Worthy of a separate investigation are several other sections of the new gaming law, whereby credit institutions – which players may utilize for games of chance online – need to be set up in Greece, licensees have to be residents of Greece, servers need to be located in Greece, domain names need to have the “.gr” identifier, betting exchanges are not allowed,¹⁶ (land-based) sport betting/horse-racing monopolies (OPAP/ODIE) and exclusive casino licenses are preserved, gaming establishments (which can carry only up to 25 gaming machines/VLTs) must be located at least five kilometers away from existing casinos, and a host of other provisions. Such provisions present a *prima facie* conflict with fundamental principles of EU law, including freedom of establishment, freedom to provide services, and fair competition (Kaburakis, 2011).¹⁷ One more significant portion of the Greek gaming law, which regulated online gaming for the first time, is that companies that have been generating gaming traffic from Greece can receive licenses if they willingly

¹⁵ See, eg, <http://www.yogonet.com/english/2011/07/29/greece-may-not-sale-its-full-stake-in-opap>, <http://www.reuters.com/article/2011/07/28/greece-opap-idUSLDE76R0QT20110728>. For an additional comment and the industry's position, see <http://www.opengov.gr/minfin/?c=19391> for Stanley Betting's arguments against the preservation of the current regime in Greece favoring OPAP and barring other competing operators. Following past attempts to set up branches in Greece, which were preempted by OPAP and Greek authorities, Stanley Betting and William Hill appealed to Greek courts, reached the highest administrative court in Greece, the Council of State (Symvoulío tis Epikratias – StE), which in turn referred the matter of Greek law's (and in effect OPAP monopoly's) compliance with EU law to the ECJ in Case C-186/11, lodged on April 20th 2011. Reference for a preliminary ruling from the Simvoulío tis Epikratias (Greece) in *Stanleybet International Ltd, William Hill Organisation Ltd and William Hill plc vs. Ipourgos Ikonomias kai Ikonomikon and Ipourgos Politismou*.

¹⁶ Particularly impacting Betfair's traffic from Greece. Betfair has consistently lobbied toward Commission action against Greek gaming policies, and similar complaints were expressed by collective bodies such as RGA, EGBA, and others. See, eg, <http://www.egrmagazine.com/news/1684587/greece-approves-egaming-legislation.thtml> and <http://www.egba.eu/en/press/579/Greek-draft-law-draws-criticism-from-European-Commission/>.

¹⁷ See also <http://www.euractiv.com/en/euro-finance/greece-shuns-eu-rules-rush-lottery-tax-revenue-news-506703>. Concerns on the draft bill prior to its adoption can be found at http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2011&inum=166&lang=EN&sNLang=EN.

subject themselves to the new tax system retroactively.¹⁸ According to this new tax system, there is a 30% tax on gross gaming revenue payable every three months (art. 50, par. 5). There is also a 10% tax on winnings, payable every month by the licensees (art. 50, par. 9). Procedurally, there is a six-month transition period for all operators to comply with the new licensing, tax, and regulatory framework. However, this transitory period is not triggered until the government can hire staff and adopt the operating procedures for the key regulatory commission overseeing all aspects of the law's enforcement. Conceivably, given the political importance and sense of fiscal urgency for the Greek government, this step will be taken shortly.

Greece has for years incurred millions of Euros in fines, legal fees, and a €1,536/day penalty for not regulating gaming.¹⁹ The question remains: Will the European Commission revisit past complaints and commence infringement proceedings (considering key provisions of this law, particularly referring to OPAP's status quo, clearly violate EU Law and ECJ precedent, especially the recent *Carmen Media* and *Engelmann* decisions), or consider this a "special circumstance" given the continuous efforts of the Greek government to raise revenue and meet bailout guarantees? And if so, are European institutions running the risk of these "special circumstances" becoming the norm and compromising fundamental principles of EU Law?

6 DISCUSSION

A review of key ECJ cases and EU national-level gambling policy developments reveal the vibrant, but somewhat uncertain, future of gaming among EU countries. There is little evidence that the volume of gambling-related litigation before the ECJ will dissipate in the near future. Similarly, both reactive and proactive legislation, and the lobbying that goes along with it, will almost certainly continue. Despite its best efforts, the ECJ's adjudications have yet to result in complete uniformity in the EU gambling industry. With the emergence of at least one sports betting hedge fund, the rising tide of gambling-related corruption in football, cricket, tennis, and other sports, an uptick in enforcement of certain gambling laws in the United States with transnational implications, and the continuing role technological

¹⁸ The particular process has not been clarified as of August 15th 2011. See, eg, <http://ggbnews.com/issue/vol-9-no-32-august-15-2011/article/greece-passes-online-gaming-law>.

¹⁹ See

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/794/794477/794477en.pdf. It is useful to note that Greece has consistently been a "usual suspect" for EU Law violations and a frequent defendant in cases handled by the ECJ. For example, see http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf. In fact, Greece holds the top spot for most new ECJ cases lodged against it, just under 100, for the period 2006-2010.

advances have on the industry, harmonisation efforts will continue to be challenged. Variation among national courts in interpreting the boundaries of policy should be expected.

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