Chapter 4
European Union Law, Gambling, and Sport Betting: European Court of Justice Jurisprudence, Member States Case Law, and Policy

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It is the mark of an inexperienced man not to believe in luck.
—Joseph Conrad

Fortune knocks at every man's door once in a lifetime, but in a good many cases the man is in a neighbouring saloon and does not hear her.
—Mark Twain

A number of moralists condemn lotteries and refuse to see anything noble in the passion of the ordinary gambler. They judge gambling as some atheists judge religion, by its excesses.
—Charles Lamb, Essays of Elia (1832)

A dollar won is twice as sweet as a dollar earned.
—Paul Newman, The Color of Money

It can be argued that man's instinct to gamble is the only reason he is still not a monkey up in the trees.
—Mario Puzo, Inside Las Vegas

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4.1 Introduction

"Rien ne va Plus" these words by Advocate General R. J. Colomer at the outset of his *Placanica* opinion left no doubts: it was time the highest court in Europe did its job, and provided clarifications for what had become a remarkably obfuscated environment for the gambling and sport betting industry. His prophetic words resonated with all involved stakeholders in ensuing years.

Carmen Media and *Engelmann* are the latest in a series of many cases handled by the European Court of Justice (ECJ) on matters dealing with gambling, sport betting practises, and member states' traditionally established monopolies. EU Law application on these cases has been problematic and fairly inconsistent among national courts and the ECJ itself. In an era where online gaming, in particular, is rapidly growing into a larger share of the gambling industry, and considering the ease of access and multitude of products, services, and transactions involved, the ECJ, European Commission (EC), and national governments are toiling over the most prudent, balanced, and practical approach and policy directions for the future of the industry in Europe. In this process, the burgeoning industry has been able to lobby and cooperate with political, regulatory, and key legal actors in order to promote interests of the rapidly expanding number of gaming providers. As per European Gaming and Betting Association's (EGBA's) rich vault of resources,[1] there has been an extensive educational effort about the industry's new players, private operators competing with traditionally established (usually) state-actors or state-supported and/or affiliated exclusive rights holders and monopolies maintained by European state governments. This has been a 'myth-busting' exercise,[2]

[1] http://www.egba.eu/en

[2] http://www.egba.eu/en/about/mythbusting

as well as a profound and elaborate research effort on the part of the industry's private gaming sector, considering how deeply ingrained certain conceptions of gambling and betting have been for centuries, i.e. that gambling is morally reprehensible, that gambling is intimately tied to corruption, fraud, money laundering, criminal elements of society, and organised crime networks reaping most of the revenue from it, as opposed to regulated gaming and betting on sport for the benefit of the state, generating revenue which will automatically flow back into the grass roots and the game, on which the betting activity is based. It is reported that both state-run gambling monopolies and private operators are experiencing approximately a 70% growth between 2008 and 2012, and given the global recession, the fact this number is considered slow progress for industry standards is astounding.[3]

In an eerie coincidence, these most recent ECJ decisions were reached on the 1-year anniversary of the *Liga Portuguesa* judgment by the ECJ's Grand Chamber, September 8th 2009, a day that delivered a significant blow to the private gaming sector, until *Carmen Media*, decided on September 8th, 2010. *Carmen Media* and *Engelmann* followed a group of other ECJ judgments in June and July 2010, in great part confirming dicta in *Liga Portuguesa* on challenges that dealt with monopolies and restrictive policies in the Netherlands and Sweden (*Betfair* and *Ladbrokes*; *Otto Sjöberg and Anders Gerdin v. Swedish State* respectively). This timing was 3 years removed from the *Placanica* decision by the ECJ, which was then believed to be strong confirmation that there is a clear turn towards liberalisation of the gambling sector in Europe, and against preservation of state monopolies; indeed, as will be elaborated below, *Placanica* followed the expected progress of legal theory and EU Law application, emanating from several cases that led to *Placanica* at the time. The most recent cases of the busy 2010 docket came 18 years following *Schindler*, the first case the ECJ had the opportunity to hear and decide on related issues.

What have we learnt in the process of these two decades of litigation and policy challenges? 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 now 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 as revisited by the Treaty of Lisbon? 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 this chapter, one that aspires to unveil certain

[3] http://www.egba.eu/en/facts/marketreality

important concepts from past legal and policy developments in this exhilarating and controversial field. Additionally, this investigation prepares the reader for the ensuing chapters in this valuable contribution and volume of collected works by summarising the important jurisprudence that led to the reality of a regulated and competitive 2011 market.

To answer the questions posed above, this chapter will focus on the legal framework of gambling and sport betting in the European Union, the application of EU Law in what has become a very competitive and lucrative sport betting industry, the evolution of 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,[4] composed by the Swiss Institute for Comparative Law (with the significant strategic approach of outsourcing to the Salford Business School Centre for the Study of Gambling[5]: at the request of the 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 €51.5 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.[6] This study extended for more than 1,500 pages, and concluded an all-encompassing research effort spanning the course of 2 years preceding its publication in the Summer of 2006. The timing could not have been more opportune, as the ECJ decision in *Gambelli*[7] was already available and under discussion, while 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 chapter commences with fundamental legal principles involved in the governance of the EU gambling and sport betting industry, such as the principle of subsidiarity and pertinent articles from the Treaty of Lisbon (amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01) and the Treaty on the functioning of the EU, 9.5.2008, C-115/47 et seq. (hereinafter: EC Treaty). The examination will continue with ECJ case law on the matter, leading to the important decisions in *Gambelli*, *Lindman*, *Placanica, Italian Republic, Liga Portuguesa, Betfair, Ladbrokes, Carmen Media, and Engelmann,* which encompassed a legal maelstrom that needs to be investigated for future national courts' application. In addition, the chapter briefly examines 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

[4] http://ec.europa.eu/internal_market/services/gambling_en.htm

[5] http://www.gamblingstudies.salford.ac.uk/consultancies.php

[6] Swiss Institute of Comparative Law 2006, p. 37.

[7] C-243/01.

with recent policy developments and member states' case law, the controversy about the Services' Directive, and the EC inquiries into restrictive practises of EU member states (MS). Finally, an analysis of the present situation in EU gambling and sport betting after the recent ECJ decisions will be attempted, via scenarios from primary (national MS practises, policies, and case law) and secondary[8] research.

4.2 Fundamental Legal Principles and the Rule of EU Law

Before any substantive analysis of EC Treaty provisions, it is useful to note the important procedural point of the principle of subsidiarity (currently Treaty of Lisbon Article 3b, formerly EC Treaty Article 5). In essence, the EC, as the executive arm of the EU, will act and intervene towards 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.[9]

Considering traditional practises of gambling and sport betting being available to European citizens, but only through very controlled means by MS governments, Lisbon Treaty and EC Treaty provisions that are applicable in this examination are (*note that in this section the new Treaties' articles are utilised for future reference; however, for consistency purposes, in the ensuing ECJ jurisprudence analysis, the former Article numbers are used, as per official ECJ decisions' records*):

- Lisbon Treaty Article 3b, para 3: '…in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level…'
- EC Treaty Article 49 (formerly 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…'

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[8] Swiss Institute of Comparative Law 2006; EGBA 2010; GamingLaw.eu 2010.

[9] http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/92/8&format=HTML&aged=1&language=EN&guiLanguage=en, Annex 2, Sect. 3, para 1.

- Article 56 (formerly 49): '…restrictions on freedom to provide services… shall be prohibited…'

Wisely, however, the EC Treaty further forecasts:

- Article 61 (formerly 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 56.'

For reference, the reader may wish to also keep in mind the EC Treaty provisions on competition (Articles 101–109, formerly 81–89), especially the ones on restriction or distortion of competition (Article 101, formerly 81) and abuse of a dominant position (Article 102, formerly 82). Engaging in an elaborate analysis of how EC Treaty Competition provisions may apply to MS gambling and sport betting monopolisation practises 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.[10]

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.[11]
- 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?)[12]
- 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).[13]
- 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.[14]

[10] Kaburakis 2009a; Kaburakis 2008a, b; Kaburakis and Lawrence 2007.

[11] 338/04, paras 27, 73.

[12] 275/92, para 60; 67/98, para 19.

[13] 243/01, para 25.

[14] 243/01, para 45; 42/02, para 20; 338/04, para 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[15]
  - 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; note that state fortification via taxation or redistribution of the revenue accrued to other state interests alone would not suffice)[16]
  - suitable for achieving the objective which they pursue (e.g. limiting betting activities in a consistent and systematic manner)[17]
  - resulting in a genuine diminution of gambling opportunities (therein the inherent conflict between state-run lotteries and betting monopolies and contradictory restrictive practises against independent competitors)[18]
  - 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[19]
  - 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 licenced in another jurisdiction).[20]

4.3 European Court of Justice Application of EU Law

4.3.1 Pre-Gambelli

The ECJ dealt with the matters of gambling and sport betting on a few occasions. Especially at the turn of the century the infiltration of many sport betting operators

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[15] 67/98, para 34; 243/01, paras 65, 70; 42/02, para 21; 338/04, Opinion, paras 38–42 per Colomer; 260/04, paras 34–36; 203/08, para 28; 447/08, paras 49–50; 46/08, paras 86–87; 64/08, paras 38–40, 49–55.

[16] 124/97, at 13; 67/98, paras 24, 26, 30, 33, 34, Opinion per A.G. Fennelly; 243/01, paras 41–43, 60; 42/02, paras 15, 23; 42/07, paras 63–65; 203/08, paras 27–34; 258/08, paras 38, 55; 447/08, paras 44–46; 46/08, paras 98–104.

[17] 243/01, paras 67 et seq.; 338/04, Opinion, paras 105–114 per Colomer; 260/04, paras 30 et seq.

[18] 67/98, para 24, per Fennelly; 243/01, paras 47–49, 68–72; 338/04, paras 57–58.

[19] 42/02, para 26.

[20] 67/98, para 28, per Fennelly, para 37; 243/01, para 65; 338/04, para 126 per Colomer; paras 57–58; 42/07, paras 59 et seq.

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*[21] 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 (the 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, the court pontificates 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.[22]

In essence, a series of cases commences with *Schindler*, erring on the side of national regulations and justifications for restrictive practises 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 fertile for ensuing cases setting 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.

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[21] 275/92, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61992J0275.

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

In *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*[23] 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 practises, 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.[24] The court did, however, instruct that such prohibition will only be tolerated: …provided that the prohibition is proportionate to maintain press diversity and that the 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.[25]

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. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*.[26] 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.'[27] 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 licence to operate competing products and provide services.

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[23] 368/95, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0368.

[24] 368/95 at 5.

[25] *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* (1997) 26 June, 368/95 at 6.

[26] 124/97, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0124.

[27] 124/97, para 1.

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.'[28] So in *Läärä* the ECJ was again convinced by the public-interest objectives that may justify such restrictive practises. 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*[29] 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 subsequent *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 practise was a 'data transmission site.'[30] 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 licence 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 licence.

It is important to note that, unlike ensuing cases, the Advocate General in this case recommended that the ECJ allows 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.'[31] In his opinion, the Advocate General acknowledges that such services have not been harmonised at the Community level.[32] These services

[28] 124/97, at 41.

[29] 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.

[30] *Questore di Verona v. Diego Zenatti* (1999) 67/98, para 2, Opinion per A.G. Fennelly.

[31] *Questore di Verona v. Diego Zenatti* (1999) 67/98, para 34, Opinion per A.G. Fennelly.

[32] 67/98, para 20, per Fennelly.

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.'[33] Nevertheless, the Advocate General acknowledged that the national monopoly in sport betting licences (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.[34] Yet once again the opinion of the Advocate General, and eventually the ECJ, sides with the restrictive practise, allowed for 'overriding reasons relating to public interest.'[35] 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.[36]

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.[37]

Dormant in the Advocate General's opinion lies in the conflict between offering the opportunity on one hand to CONI and UNIRE to run similar business practises, and on the other to declare that competing sport betting ventures are disallowed (or indeed not granted a licence 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.[38] 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 *Zennati*: 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.'[39] Basically the argument there is that

[33] 67/98, para 24, per Fennelly.
[34] 67/98, para 24, per Fennelly.
[35] 67/98, para 26, per Fennelly.
[36] 67/98, para 24, per Fennelly.
[37] 67/98, para 28, per Fennelly.
[38] 67/98, para 30, per Fennelly.
[39] 67/98, para 33, per Fennelly.

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.[40]

Similar was the outcome of *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português*.[41] 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.'[42] 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 licenced for that purpose, falls within the margin of discretion which the national authorities enjoy.[43]

4.3.2 Gambelli et seq

Reference for a preliminary ruling from the Tribunale di Ascoli Piceno: Piergiorgio Gambelli and Others[44] 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, para 2). The defendants, according to the

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[40] *Questore di Verona v. Diego Zenatti*, Judgment of 21/10/1999, 67/98, para 37 (Note: Judgment unavailable in English as of 10/11/2010; translation available upon request).

[41] 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.

[42] 6/01, Judgment of 11/09/2003, para 4.

[43] Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português (2003) 11 September, 6/01, Judgment para 6.

[44] 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.

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 licenced organisations (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,[45] 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.[46]

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,[47] 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.[48]

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 to be conformed with the provisions of the EC Treaty for its sport betting and lotteries' strategies.[49]

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.[50] The court actually admonished the Italian Government's position that Italian legislation regulating sport betting only allowed licences to the state-sponsored monopoly-holders;

[45] 243/01, para 25.
[46] 243/01, para 26.
[47] 243/01, para 28.
[48] 243/01, para 29.
[49] 243/01, paras 41–43.
[50] 243/01, paras 45–46.

the fact it is virtually impossible for a private company to obtain a licence under such a restrictive regime constitutes prima facie evidence of a freedom of establishment violation under EC Treaty Article 43.[51]

The ECJ thereafter handled the matter of the freedom to provide services. First the court reiterated that the definition of services under EC Treaty Article 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.[52] 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 Article 43.[53]

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.[54] 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.[55] 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.'[56] The suspense was preserved with the court referring that crucial part of the issue's final decision to the national court.[57] 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.[58] 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.'[59] In essence, perhaps the most important reference

[51] 243/01, paras 47–49.
[52] 243/01, paras 52–54.
[53] 243/01, paras 57–59.
[54] 243/01, para 60.
[55] 243/01, para 61.
[56] 243/01, para 65.
[57] 243/01, para 66.
[58] 243/01, para 67.
[59] 243/01, para 68.

point from *Gambelli* is that a State cannot concurrently incite its citizens to gambling ventures that serve state interests, while restricting the same services from other prospective operators, under the facade of socio-cultural and moral considerations.

Insofar 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.[60]

In succession, the ECJ advises that while the national court decides on the discriminatory character of the restrictive practise, it needs to decide whether the licence procedure is more easily accessible by and attainable to citizens than foreign operators.[61] 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 that the participation in similar betting is concomitantly encouraged by national licenced bodies.[62] 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 battle fraud, while the adversely affected companies are lawfully licenced by other MS and their accounts and activities could easily be verified.[63] 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 offer services provided in Articles 43 and 49 EC, respectively. It is for the national court to determine whether such legislation, taking account of

[60] 243/01, para 69.

[61] 243/01, paras 70–71.

[62] 243/01, para 72.

[63] 243/01, para 73.

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.[64]

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*[65] 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 Fifth Chamber delivered the decision.[66]

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,[67] 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 Article 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.[68]

The Finnish Government, while 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.[69]

In a brief reply, the ECJ first commented that according to *Schindler*, lotteries do fall within the scope of EC Treaty Article 49. Then the court proceeds to note

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[64] 243/01 (2003) November 6.

[65] 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.

[66] http://curia.europa.eu/en/instit/presentationfr/index_cje.htm

[67] 42/02, para 5.

[68] 42/02, para 15.

[69] 42/02, para 23.

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.'[70] 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.[71] This remarkable contention has further extensions for sport betting practises 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 practises. 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.'[72] 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.[73]

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.[74]

The ECJ was given a third opportunity to assume a definite stance on such matters of restrictive practises 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*.[75] 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

[70] 42/02, para 20.

[71] 42/02, para 21.

[72] 42/02, para 25.

[73] 42/02, para 26.

[74] 42/02 (2003) November 13.

[75] 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.

exchange.[76] Actually, Placanica himself had not applied for a licence, whereas the other two defendants had, receiving no reply by the police authorities in charge.[77]

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 6–12 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 are 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 above-mentioned 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.[78]

Procedurally, the *Placanica* case 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[79] within the Italian Justice system in regard to the interpretation of Community Law are well reviewed in paras 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

[76] 338/04, Opinion, para 48 per Colomer.

[77] 338/04, Opinion, para 50 per Colomer.

[78] 338/04, para 31.

[79] 338/04, para 27.

essential to a true Community of law.'[80] 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.[81]

In that problematic case that essentially tested *Gambelli's* application[82] 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 this 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.[83]

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

[80] 338/04, Opinion, para 89 per Colomer.

[81] 338/04, Opinion, para 90 per Colomer.

[82] 111/04 (2004) 26 April, '*Gesualdi*'.

[83] 338/04, Opinion, paras 38–42 per Colomer.

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.'[84] 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.'[85] 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.[86]

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.[87] The Italian State did

[84] 338/04 (2006) May 16, Opinion, para 1 per Colomer.

[85] 338/04, Opinion, para 4 per Colomer.

[86] 338/04, Opinion, paras 105–107 per Colomer.

[87] 338/04, Opinion, paras 108–114 per Colomer.

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.[88]

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.[89]

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 licences, 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 3 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.[90]

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.[91] Although he is careful not to advocate an absolute liberalisation of the gambling market,[92] he does encourage the EC to include the gambling sector in the Services Directive under development.[93] On this important

[88] 338/04, Opinion, para 126 per Colomer.

[89] 338/04, Opinion, para 130 per Colomer.

[90] 338/04, Opinion, para 141 per Colomer.

[91] 338/04, Opinion, para 144 per Colomer.

[92] Footnote 116 in 338/04, Opinion, para 147 per Colomer.

[93] 338/04, Opinion, paras 145–148 per Colomer.

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.[94] 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.[95] Considering the documented friction within the World Trade Organisation[96] and new developments in the US both before and after recent Congressional elections,[97] 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.[98]

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

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[94] 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

[95] 338/04, Opinion, para 149 per Colomer.

[96] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

[97] 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.govtrack.us/congress/bill.xpd?bill=h111-2267; http://www.govtrack.us/congress/bill.xpd?bill=h111-4976

[98] 338/04, paras 36–37.

genuinely contributes to the objective invoked by the Italian Government, namely, that of prevent 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.[99]

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 in Articles 43 EC and 49 EC, respectively.

It is for the national courts to determine whether, insofar 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.[100]

A recent ECJ decision on these matters, *Commission of the European Communities v. Italian Republic*,[101] offers useful insight while 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 licences 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 licence after competing bids. The 329 existing centres were exempted from the bidding process and 'grandfathered in' the new regime, which

[99] 338/04, paras 57–58.

[100] 338/04, para 73.

[101] 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.

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 (Articles 43 and 49 EC Treaty).

Following infringement procedures, the EC pursued the three steps involved in such matters: according to EC Treaty Article 226, on 24/7/2001, the EC sent Italy the formal letter of inquiry concerning betting regulatory issues, including the renewal of the 329 licences without a biding 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 time frame for these existing betting centres. Thus, the EC, on 18 October 2002, invited the Italian government to comply within 2 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 December 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.[102] More than two and a half years later, on 17 June 2004 (a point that becomes important considering the Special Report by the European Ombudsman in Germany's case, analysed in the ensuing section, combined with the fact that Italy did not deny that its Law in question did take effect after the expiration of the time limit set by the EC),[103] 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[104] 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 Articles 43 and 49. According to the undisputed facts, the Opinion of A.G. Sharpston finds a prima facie infringement case.[105] 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.'[106] Further, in response to Spain's supporting contentions for Italy (Spain and Denmark intervened in the case in favour 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 …[107]

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[102] 260/04, Opinion, paras 11–14 per Sharpston.

[103] 260/04, para 15.

[104] 260/04, Opinion, 29 March 2007.

[105] 260/04, Opinion, para 20 per Sharpston.

[106] 260/04, Opinion, para 31 per Sharpston.

[107] 260/04, Opinion, para 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.[108]

Finding for the EC on 13/9/2007, the ECJ declared that Italy failed to fulfil its obligations under Article 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 licences 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 defence: the extension of the existing licences 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…'[109] 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.'[110]

In its examination of the restrictive policies' proportionality and investigating whether the licences' 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 Articles 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.'[111] 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 licences, 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 licences without inviting competing bids could prevent the development of clandestine

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[108] 260/04, Opinion, para 43 per Sharpston.

[109] 260/04, para 15.

[110] Quoting *Placanica*, para 46, which further cites the aforementioned ECJ cases.

[111] 260/04, para 31.

activities.[112] The broad spectrum of the above ECJ Jurisprudence shows that it is instrumental to fully employ any quantitative and qualitative tools; any supporting evidence, documentation, testimony would be imperative for a defendant in such infringement cases. In effect, the ECJ reiterates 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 Articles 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.[113]

Shortly following the ECJ decision, the 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 as 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 practises perpetuating in a MS. In its ruling of 10 July 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 Article 49 of the EC Treaty on the freedom to provide services by holding that the French Court of

[112] 260/04, para 32.

[113] 260/04, paras 34–36.

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 June 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).

4.3.3 Liga Portuguesa, Betfair, Ladbrokes, Carmen Media, et al. ECJ Twists and Turns

During the latter part of the new millennium's first decade there was an influx of cases challenging gambling and sport betting monopolies in EU member states, and several questions brought forth by state courts to the ECJ. Considering the number of cases the latter hears, it has been fairly impressive to note that several gambling and sport betting-related cases have recently been decided by the ECJ, which usually issues an original interpretation of EU Law on each particular case, and defers to the state courts to decide its application and enforcement mechanisms per state law. A pivotal case was *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*.[114] Considering its *stare decisis*, the ECJ assumed an interesting position in *Liga Portuguesa*, allowing certain restrictions posed by state authorities. Thus, it introduced new interpretations and gambling-related application in respect to the establishment clause in the EC Treaty, importantly the services clause, and the principle of the Country of Origin. On these matters it is good to utilise the analysis by Doukas and Anderson 2008, framing the problem around vertical (EU vs. State law) and horizontal (State vs. other member state law) compatibility.[115]

The ECJ's Grand Chamber issued its judgment on *Liga Portuguesa* on 8 September 2009, and it truly sent a shockwave across the continent and beyond to all private sector industry stakeholders, who thus far believed they would

[114] 42/07, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=&nomusuel=Liga%20Portuguesa&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

[115] p. 256 et seq.

challenge traditionally established restrictions and member state monopolies successfully. The case revolved around the sponsorship of the Portuguese football league by Bwin, an online gambling company registered in Gibraltar, licenced, chartered, and abiding by UK Law. The league actually surrendered naming rights under Bwin's contract (the 'Bwin Liga'), and engaged in major sponsorship activation, advertising campaign, and gambling services utilisation efforts. Those actions resulted in fines levied against both the Liga and Bwin (approximately 75,000 € each) by the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Santa Casa'), the Portuguese state-authorised lottery and sport betting monopoly. As in other cases across Europe, and importantly in another Grand Chamber decision issued by the ECJ a year prior to *Liga Portuguesa*, in C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, 1 July 2008, there are several state entities that have been entrusted with both key functions: the commercial and the regulatory. And in the gambling sector, traditional state monopolies have enjoyed the commercial enterprise of lotteries, sport betting, etc, as well as the regulatory authority, including enforcement of sanctions against competitors of their exclusive licence; such was the case with Santa Casa. It run the sport betting, lottery, and related games of chance business in Portugal, and its Gaming Division was further authorised to prosecute cases, and issue fines, against competing gambling providers.

The major questions the Grand Chamber had to answer dealt with the applicability of EC Treaty Article 49, the freedom to provide services; Articles 43, freedom of establishment, and 56, free movement of capital and payments, were rendered inapplicable; the former did not apply as Bwin, established in Gibraltar, with its servers there and in Austria, never intended to establish a principal place of business and/or physical offices in Portugal, rather would continue offering gambling services over the internet; the latter, free movement of payments, was deemed secondary, embedded in Article 49, which would be the defining Article in this case. The Grand Chamber had to determine whether the Portuguese Law was in violation of EC Treaty Article 49, by granting an exclusive licence to Santa Casa over Bwin, which was lawfully established in another member state (note that Gibraltar is a British overseas territory, a separate jurisdiction from the UK, outside the customs zone and VAT area). Additionally, the Grand Chamber had to investigate the nature of the licence and its scope, granting Santa Casa the sole authority over gambling services in Portugal, including internet-based lotteries and gambling transactions.

There was a significant procedural point to the *Liga Portuguesa* case. Bwin requested that the Court re-opened the oral examination process. The ECJ can do so if it deems that it lacks sufficient information, or if it decides that it is about to adjudicate on a matter on which the parties' positions have not been heard. Neither the ECJ Statutes nor its procedural rules allow a party's position on the Advocate General's opinion. However, it is important to note Bwin and Liga submitted that the Advocate General Bot's opinion was confined to arguments brought forth by Santa Casa and the Portuguese government. Instead of factual items, Bwin and Liga argued that the A.G. used points which were the subject of dispute,

discounting their own counter arguments. Particularly the A.G. Bot's opinion[116] and its sections on problem gambling and the risks inherent in the gambling and betting sector[117] were recorded as *de facto* and not as disputable arguments. It is insightful to quote from the A.G. Bot's opinion:

> 245. In my view, Community law does not aim to subject games of chance and gambling to the laws of the market. The establishment of a market which would be as open as possible was intended by the Member States as the basis of the European Economic Community because competition, if it is fair, generally ensures technological progress and improves the qualities of a service or product while ensuring a reduction in costs. It therefore benefits consumers because they can also benefit from products and services of better quality at a better price. In that way competition is a source of progress and development.
>
> 246. However, these advantages do not arise in the area of games of chance and gambling. Calling for tenders from service providers in that field, which would necessarily lead them to offer ever more attractive games in order to make bigger profits, does not seem to me a source of progress and development. Likewise I fail to see what progress there would be in making it easier for consumers to take part in national lotteries organised in each Member State and to bet on all the horse races or sporting events in the Union.
>
> 248. Games of chance and gambling, for their part, can only function and continue if the great majority of players lose more than they win. Opening the market in that field, which would increase the share of household budgets spent on gaming, would only have the inevitable consequence, for most of them, of reducing their resources.
>
> 249. Therefore limiting the powers of the Member States in the field of games of chance and gambling does not have the aim of establishing a common market and the liberalisation of that area of activity.
>
> 290. Liga and Bwin point out that in recent years the Portuguese Republic has had a policy of expansion in the field of lotteries and off-course betting, supported by very appealing advertising. They state that the range of the State's games of a social nature for which the Santa Casa has a monopoly on operation and which was originally confined to Totobola and Totoloto was enlarged in 1993 to include 'Joker', in 1994 the 'Lotaria instantânia', in 1998 'Totogolo' and in 2004 'Euromilhões'. They observe that the last mentioned doubled its profits between 2003 and 2006.
>
> 291. The Portuguese Government asserts that, on the contrary, it has a responsible gambling policy and that the Santa Casa's profits, mainly because of EuroMillions, fell significantly in 2007.
>
> 292. I am of the opinion that the arguments of the Liga and Bwin do not show, as such, that the Portuguese Republic is failing in its obligation to attain the objectives underlying the restrictions imposed by its legislation in a coherent and systematic manner.
>
> 293. It must be observed that the aims of the legislation in issue do not preclude a policy of controlled expansion. The extension of the Santa Casa's monopoly to on-line gaming arises from the fact that it actually exists. The extension of the monopoly is in response to

[116] Delivered on October 14, 2008. http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=&nomusuel=Liga%20Portuguesa&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

[117] A.G. opinion paras 28–33.

> the wish to channel gaming into a legal framework in order to prevent its operation for fraudulent or criminal purposes and to limit the supply, as well as to keep the revenue from gaming for financing social causes or causes of general interest.
> 297. The Portuguese Government stated that it had to cope with a worrying increase in illegal gaming and increasing risks of fraud. In that connection the Santa Casa observed that it had brought about ten prosecutions in the third quarter of 1995, 400 in 2005 and 600 in 2006.
> 298. Consequently the Portuguese Government could legitimately take the view that the increase in illegal gaming made it necessary to create new games of a social nature to satisfy Portuguese consumers' desire to gamble and to channel that desire into a legal framework. The Government was also justified in considering that the creation of new games could achieve that result only if it was accompanied by advertising on a certain scale to inform the public of their existence.
> 300. … Liga and Bwin also claim that the Portuguese Government has extended gaming in casinos, increasing the number of operating licences, installing more than 800 slot machines in the new Lisbon casino and announcing its opening in a wide advertising campaign. Between 1996 and 2006 the gross revenue of casinos in Portugal rose by 150%. Furthermore, negotiations are said to be in progress for permitting casinos to offer their games on the internet.
> 301. I do not think that these arguments are such as to demonstrate that the grant to the Santa Casa of a monopoly of the operation of lotteries and off-course betting on the internet is inappropriate for attaining the objectives for which that exclusive right was conferred.
> 311. Like the Portuguese Government, I am of the opinion that, in view of the above-mentioned circumstance, a Member State may legitimately consider that fair play is secured more effectively by the grant of an exclusive right to an entity operating under the Government's control and which, like the Santa Casa, is non-profit-making.
> 314. Furthermore, I agree with the Portuguese Government's argument that consumers are better protected against the risks connected with the games offered by unscrupulous operators by the grant of an exclusive right to the Santa Casa, the sole and historic holder to operate the monopoly to operate lotto games and betting, than by a licensing system open to several operators. The Portuguese system has the advantage of simplicity because consumers residing in Portugal can easily be warned that the lotteries and off-course betting offered by any provider of on-line games, other than the Santa Casa, are prohibited and are potentially risky.

While analysing whether the Portuguese monopoly favouring Santa Casa violated Article 49 and the freedom to provide services principle, the ECJ noted the Portuguese government's concession that such policy restricting access to internet gambling services provided by a lawfully established company in another member state does give rise to an Article 49 violation. Nonetheless, the justification for the restriction is the core issue and as per Article 46 and reasons of public policy, security, and health, such restrictions may be considered justifiable in certain cases. The ECJ proceeds to reiterate *Placanica et al.* precedent theorem on protection of consumers, prevention of fraud and incitement to gamble and squander money, and the general preservation of public order. It is accepted that gambling and the precise justifications for restricting access to it are one of the most challenging areas of European Union Law where major divergence of philosophical, legal, and political approaches exists among member states. Absent harmonisation (on the latter refer to the excellent analysis and forecast in Doukas and Anderson 2008, pp. 266 et seq), the fact that one member state considers one gambling

provider a legitimate company and grants it a licence does not—according to the ECJ Grand Chamber in *Liga Portuguesa*—mean that other member states should also accept it, contrary to their own determinations and policy considerations. 'The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality.'[118]

Thus, the ECJ entered the anticipated test of whether the restrictive policy is suitable to achieve its objective, whether it goes beyond what is necessary to achieve the objective, and whether the restriction is applied in a non-discriminatory, consistent, and systematic manner. The objective per Portuguese government's and Santa Casa's assertions has been the protection against crime and fraud on the part of gambling operators. It is indeed fascinating to observe that in the last part of the new millennium's first decade such assertions still pass ECJ muster, i.e. that the starting point of the analysis is still gambling operators trying to prove they are not the shoddy, shady, immoral, and untrustworthy businesses they traditionally were held to be. It appears that if the ECJ's judgment herein is broadly accepted, gambling operators commence competing at a disadvantage, not standing many chances of beating the odds against them.

The ECJ considers the fight against crime an overriding reason which may lead to such restrictive practises meeting the relative hurdle of an Article 49, freedom of services' violation. 'Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers.'[119] Further, '…limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation.'[120]

What may have been somewhat unique in the Santa Casa instance, however, was the long history and nature of the monopoly in Portuguese affairs and its societal, bona fide, tax-exempt as non-profit corporation, functions. 'Santa Casa's long existence, spanning more than five centuries, is evidence of that body's reliability…'[121] In one sense, one could argue that centuries of a particular European state practise would justify its status as legitimate, under this rationale by the ECJ Grand Chamber. Of course, to the contrary, European history is replete with samples of long-standing injustice and unfair treatment, discrimination, and deference to the institutions that have traditionally enjoyed European elite's preference.

The Portuguese Government points out that Santa Casa operates under its strict control. The legal framework for games of chance, Santa Casa's statutes and government involvement in appointing the members of its administrative organs

[118] *Placanica and Others*, para 48; 42/07, para 59.

[119] 42/07, para 63.

[120] 42/07, para 64.

[121] 42/07, para 65.

enable the State to exercise an effective power of supervision over Santa Casa. This system, based on legislation and Santa Casa's statutes, provides the State with sufficient guarantees that the rules for ensuring fairness in the games of chance organised by Santa Casa will be observed.[122]

In such a way, the ECJ considers the establishment of restrictive policy schemes as serving public-interest considerations. Still, it goes further; it declares that a monopoly such as the one granted to Santa Casa, encompassing both the commercial and administrative functions, may be justified given a member state's particular circumstances: '… The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.'[123]

In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.[124]

It is then the element of control and governmental oversight over the said entity that guarantees its legitimacy and prospects of successfully achieving its stated goals of preventing crime and fraud… Yet it remains to be seen whether the *de facto* or *de jure* state actor/gambling provider accomplishes such goals, and by which means.

As to whether the system in dispute in the main proceedings is necessary, the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.

In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

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[122] 42/07, para 65.

[123] 42/07, para 66.

[124] 42/07, para 67.

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.[125]

More questions are posed as per above lines from the ECJ decision. Not only does the ECJ defer to member states for an arbitrary, and possibly capricious, resolution on who would be worthy of an exclusive licence, but it additionally raises concerns over legitimate operators in member states conducting their business over the internet. The latter now is argued to be a site featuring 'more substantial risks of fraud' compared to 'live' gambling markets, due to the lack of direct contact. For everyone with rudimentary experience and fundamental understanding of secure internet transactions and coding, combined with the billions of transactions taking place each week over such secure sites, the internet would not be rendered the 'lawless-like place' it is argued to be. As Rebeggiani 2009 notes, '[i]f one has to protect consumers even from stock-listed companies like Bwin, why then not prohibit internet shopping at all, particularly portals such as EBay, with all the uncertified private sellers? … [R]emote transactions are a part of everyday life.' Furthermore, 'live' gambling markets arguably may feature more stealth ambushing techniques for customers, absent some stringent quality control measures, which are nowadays frequently patent on gambling sites, with the appropriate documentation.

Also alarming is the potential allegation that Bwin, or another sport betting and gambling provider, might be in a position to influence results of sporting competitions to increase profits and/or the rate of return on the pertinent sponsorships. Conversely, one might argue that it is precisely the contractual relationship and official sponsorship of the league that guarantees the legitimacy of the provider, and moreover ensures that profits will be directly invested into the actual product for which consumers care, the game, and the athletic competition. If there were any criminal elements to compromise the relationship with the sport organisation, the sponsorship would not be consummated or would be immediately discontinued (via contractual provision, litigation, or otherwise), as the clients/fans' interest and their desire to bet and play would be considerably diminished. Stated otherwise, the gambling public would pursue alternative options if there were any doubts about one of the most crucial and fundamental aspects of a sport competition, the integrity of the league and the uncertainty of outcome. Pure sport competition differs markedly from scripted entertainment such as cinema, theatre, or music.

[125] 42/07, paras 68–71.

The final holding of the court was thus expressed:

Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

In a nutshell, *Liga Portuguesa* perplexed matters that were marching towards clarification after the post *Gambelli* and *Placanica* developments. Proportionality, Country of Origin, Establishment and Services Clauses, as well as the precise burden of proof for a member state to uphold a monopoly were thrown into a cauldron, from which at that point it was uncertain what legal, policy, and practise outcomes would emanate. Certainly, after *Liga Portuguesa* lawyers and scholars continued to see their future agendas elongate.

The baton from *Liga Portuguesa* and ECJ's Grand Chamber was picked up by the Second Chamber in two decisions issues on the same day, 3 June 2010; 203/08, *Sporting Exchange Ltd, trading as 'Betfair' v. Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator* (*Betfair*),[126] and 258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator* (*Ladbrokes*).[127] Both these cases had extensive similarities, in being primarily online providers of gambling and sport betting services, maintaining a healthy clientele base in the Netherlands. Although Dutch Law allows licensure for private operators, albeit a single-licensing system for each game/lottery (favouring non-profit private actor 'for public benefit' De Lotto), as opposed to several European countries that opt for public entities, the key component to these cases was that in Holland, games of chance via the internet are prohibited.[128] Thus, the Second Chamber of the ECJ dealt with some difficult questions, answers to which would yield valuable insight for forthcoming cases across Europe.

Betfair took matters to court as it was precluded from competing for the single licence, which was renewed without justification for De Lotto. In addition, Betfair challenges Dutch Law's compliance with EU Law and specifically EC Treaty Article 49 on freedom to provide services, as it preempted Betfair and others from receiving licences for internet-based games, whereas Betfair was already offering legitimate games via the internet, based on a licence it received in the UK. Moreover, it was the Dutch Law's single-licensing system's compatibility with ECJ case law that was tested, i.e. whether it would pass ECJ muster in view of objective, fair, transparent, and consistent criteria for granting such exclusive licences. And depending on ECJ's decision on the compatibility question, could it

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126 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0203:EN:HTML

127 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&jurcdj=jurcdj&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALLTYP&numaff=&ddatefs=28&mdatefs=5&ydatefs=2010&ddatefe=4&mdatefe=6&ydatefe=2010&nomusuel=&domaine=&mots=&resmax=100&Submit=Rechercher

128 203/08, para 11; 258/08, para 7.

be that this system might not be suitable or proportionate for accomplishing the reasons of public interest it set to uphold?

In its analysis, the ECJ proceeds to some interesting, and somewhat alarming, theory and recap of prior case law components. After acknowledging that indeed Article 49 would *prima facie* be violated, nevertheless such a single-licensing system might still be enforceable under EU Law if it is held to promote reasons of public interest. On that note:

> 27 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order.[129]
>
> 28 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality.[130]
>
> 29 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.[131]
>
> 30 Referring specifically to the judgments in *Gambelli and Others* and *Placanica and Others*, the national court found that the objectives—of ensuring the protection of consumers and combating both crime and gambling addiction—underpinning the system of exclusive licences provided for by the Wok can be regarded as overriding reasons in the public interest within the meaning of the case-law of the Court.

Hence, once more the ECJ assumes a controlled and conservative stance in respect to the scope of such restrictive systems, rendering them compatible with EU Law considering the important objectives they set to accomplish. As regards proportionality, '… the fact that only one operator is licenced simplifies not only the supervision of that operator, thus enabling monitoring of the rules associated with licences to be more effective, but also prevents strong competition from arising between licensees and resulting in an increase in gambling addiction.'[132]

These lines are tremendously enlightening and illustrative of ECJ's contemporary philosophy towards the gambling sector. As Planzer 2010 notes, '[t]he Court continues to rely on assumptions regarding the mechanisms of gambling addiction. The absence of an evidence-oriented approach prevents an adequate assessment of health risks inherent to gambling activities… [E]mpirical data

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[129] Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 47.

[130] See, to that effect, *Placanica and Others*, para 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 59.

[131] *Gambelli and Others*, para 75, and *Placanica and Others*, para 58.

[132] 203/08, para 31.

suggests that things are a bit more complex in reality. The 2005 Gambling Act liberalised the gambling market in the UK and substantially increased the exposure to gambling offers. Nevertheless, the British Gambling Prevalence Survey 2007 did not find increased levels of pathological gambling and participation in some form of gambling within the past year slightly dropped from 72% in 2000 to 68% in 2007. In the US, the life prevalence rate for pathological gambling was 0.7% in the 1970s. More than 30 years later, life prevalence of pathological gambling is at a rate of 0.6%. Despite a dramatically increased exposure to gambling offers (both in terms of numbers and variety of games), prevalence of pathological gambling is essentially at the same level as 30 years ago.'[133]

It would be useful to engage in a pan-European, all encompassing, multi-faceted study of gambling and gaming services' consumers. Contemporary analytical tools and a rich arsenal of statistical methods available to researchers and policy analysts may provide more ammunition to parties in future cases. Correlations between consumer preferences, perceptions, and addiction precursors on one hand, and licensing systems' restrictions, advertising and marketing schemes, and the tools available widely over the internet on the other, may demonstrate a different reality to one the ECJ currently subscribes; such research might even demonstrate that it is the promotion of the public gambling and sport betting monopoly that led certain populations to gambling addiction, whence they could have been led to other, more serious and illegal forms of gambling, addiction, and criminal behaviour. Alternatively, no statistically significant evidence might be found for declaring that such restrictive mechanisms lead to protection against gambling addiction. Consequently, overriding reasons for public interest would not be useful as defence for these restrictive practises.

The national court in *Betfair* concluded that there was no disparate treatment, as the prohibition against other potential licensees was applied in uniform fashion. Of course, that does not render that prohibition compliant with EU Law, rather it deems it more broadly restrictive and arguably the impediment to the common market for services the EC Treaty provisions were chartered to preempt.

The ECJ promptly rejected the principle of the Country of Origin, deferring once again to national courts to interpret national law as they deem fit, as long as the usual provisions apply (on which one still remains uncertain, given the ECJ's reluctance to issue more concrete guidance and benchmarks for national courts, and absent harmonisation attempts at the Commission, Council, and Parliament levels). What may be more intriguing is the Second Chamber reiterating the Grand Chamber's theorem in *Liga Portuguesa*'s para 70: '… [B]ecause of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.'[134] And to achieve perfect balance and consistency on decisions issued on the same day, the

[133] p. 294.

[134] 203/08, para 34.

Second Chamber used the exact wording, to the letter, in its analysis of *Ladbrokes*, arguing again that games of chance over the internet pose inherently more risks as compared to the traditional forms of 'live gambling.'[135] Instead of further commentary, one should revert to the aforementioned critique, in *Liga Portuguesa*.

Arguably the Second Chamber goes even further with its response to the questions pertaining to the EU Law compliance of the single licensure system for games in Holland. In a fairly bold series of statements, one reads:

> 59 [T]he restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.[136]
> 60 In such situations, the grant to such an operator of exclusive rights to operate games of chance, or the renewal of such rights, without any competitive tendering procedure would not appear to be disproportionate in the light of the objectives pursued by the Wok.
> 61 It is for the national court to ascertain whether the holders of licences in the Netherlands for the organisation of games of chance satisfy the conditions set out in para 59 of the present judgment.
> 62 In the light of the forego Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a licence to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.

Refraining from commentary on an 'Orwellian twist' the ECJ herein assumes, one may merely posit that it is precisely what the ECJ proposes that would be a clear deviation from the rule of transparency and consistency, directly favouring public (or private, yet public-sector-friendly and state-controlled) operators. Questions thus remain, in the best case scenario; in the worst, they would be answered in forthcoming cases under this ECJ Second Chamber light, i.e. deferring to the 'public function' test, where 'what is public (or public-like) is good…' Somewhat unanticipated, entertaining Jurisprudence nonetheless.

Ladbrokes has similar twists and sections in ECJ's judgment. It is worth reflecting on the national courts' front briefly, to illustrate such legal conflicts and interpretation problems between ECJ Jurisprudence and national courts. A great sample was the Dutch decision of *De Lotto vs. Ladbrokes*.[137] 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

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[135] 258/08, para 55.

[136] See, to that effect, Case C-124/97 *Läärä and Others* [1999] ECRI-6067, paras 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paras 66 and 67.

[137] Injunction before the Dutch Supreme Court, 18 February 2005, NJ 2005 404; Merits in favour of De Lotto in Court of Appeal of Arnhem, 17 October 2006.

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 towards gambling and sport betting.[138] Once again, one was confronted with state monopolies for lotteries and betting (De Lotto), essentially without an opportunity to obtain the necessary licence.[139] 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.[140] 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.[141] This, despite the defendant's arguments that De Lotto spent €25 million annually for advertising and marketing (putting it into perspective, this ranked seventh 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.[142] It might come as intuitively obvious to the casual observer that such practises 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 Article 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.[143] Once more, it becomes clear that there is a tremendous lack of uniformity in MS national courts' decisions on the matter.

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138 Veer et al. 2006, p. 3.

139 Veer et al. 2006, p. 3.

140 http://www.igamingnews.com/index.cfm?page=artlisting&tid=5687

141 http://www.debrauw.com/NR/rdonlyres/7BACD556-CD72-4A36-A586-F21421CC8B69/0/NewsletterIPICT200611.pdf

142 Veer et al. 2006, pp. 9–10.

143 http://www.bettingmarket.com/eurolaw222428.htm, http://www.casino.eu/eu-law.php

One may marvel at the placement of the Dutch national court's question in regard to restrictive policies attempting to curb pathological gambling[144]:

> 13.(1) Does a restrictive national gaming policy which is aimed at channelling (sic) the propensity to gamble and which in fact contributes to the achievement of the objectives pursued by the national legislation in question, namely the curbing of gambling addiction and the prevention of fraud, inasmuch as, by reason of the regulated offer of games of chance, participation in gambling activities occurs on a (much) more limited scale than would be the case if there were no national regulatory system, satisfy the condition set out in the case-law of the Court of Justice of the European Communities, particularly in the judgment in Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, that such restrictions must limit betting activities in a consistent and systematic manner, even where the licence-holder/s is/are permitted to make the games of chance which they offer attractive by introducing new games, to bring the games which they offer to the notice of a wide public by means of advertising and thereby to keep (potential) gamblers away from the unlawful offer of games of chance (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 55, *in fine*)?
>
> 23 In the present case, the wording of the first question put by the referring court shows that the objectives of the Wok are clearly identified by that court, namely protection of consumers by the curbing of addiction to games of chance and prevention of fraud, and that, in the referring court's view, the national legislation at issue in the main proceedings does in fact serve those objectives and does not go beyond what is required in order to achieve them.
>
> 24 The referring court nevertheless has doubts as to the consistent and systematic nature of the national legislation, since the legislation pursues the objectives referred to in the preceding paragraph while allowing economic operators who have exclusive rights to organise games of chance in the Netherlands, such as De Lotto, to offer new games and to use advertising to make what they are offering on the market attractive.

While deliberating *Ladbrokes*, the Second Chamber attempts to keep some semblance of balance and remarks that whereas outright aggressive marketing and bottom-line, profit-driven strategies by a state-licenced provider would not pass muster per se, it would still be possible to see advertisements and commercials, e.g. for the public-sector sport betting outlet, be considered as compliant practises, along the rationale of curbing overall gambling addiction and channelling betting into 'bona-fide' public benefit outlets. Here, Planzer's 2010 concerns in regard to ECJ's apparent lapse of attention to contemporary litigation and judicial trends, and the delay in demanding concrete data and research-based arguments, the evidence-oriented approach per Planzer 2010, echo a broader call for empirical analysis and statistical data, which would yield significant insight on the arguments of each side. The so called 'legal analytics,' which are so extensively utilised and increasingly popular in U.S. litigation, indeed entrenched in the legal history of America dating back to the 'Brandeis brief,'[145] as well as in progressively more international jurisdictions, provide the most sound research and a vault of methodological approaches from various disciplines for Law practitioners and

[144] 258/08.

[145] *Muller v. Oregon* 1907.

scholars to utilise towards more informed, justified, balanced, and fair decisions. When one reads, e.g. '…that demand for games of chance in the Netherlands has already increased noticeably, particularly at a clandestine level—*assuming that is established as De Lotto indicated at the hearing*…' (emphasis added), one cannot help but wonder why the ECJ and other top-level adjudicating bodies do not render such arguments dependant upon the corresponding research that should accompany each case file (note that in reference to 258/08, para 33, such kind of evidence-oriented approach per Planzer 2010 was absent from the case file). As Planzer 2010 notes: 'There is… no cogent reason for the ECJ to base its jurisprudence on assumptions rather than scientific evidence. Only on rare occasions has the ECJ mentioned the role of evidence in the assessment of health risks. It did so in its sixth case, *Lindman*, in an *obiter dictum* where it asked for "statistical or other evidence."[146] Only one week earlier, the Court had already realised that justifications like public health and public order may serve us pretexts for other purposes, i.e., financial interests, and had held in *Gambelli* that gambling offers needed to be limited in consistent and systematic manner…'[147] Planzer boldly concludes that ECJ's '… statements on gambling addiction are more reminiscent of moral views and conventional wisdom, in other words subjective views or assumptions, rather than scientific findings.'[148]

Furthermore, the ECJ appears to give significant value to the letters submitted by De Lotto on its advertising strategy and the request by the Dutch Ministry of Justice to keep such advertising to a minimum.[149] Nevertheless, the marketing campaign had taken place, and according to Ladbrokes' complaint in even an unfair competitive advantage fashion, due to the status of the Dutch licence and relation to public media outlets. Regardless of that disputed point, the ECJ traditionally defers to the national court for determination of what constitutes a balanced and appropriate level of such activity, considering the stated objectives towards the 'public good.' And it sounds fair to defer to national courts, knowing each jurisdiction's particular considerations, however as the record shows the vast majority of appeals and cases referred to national courts after a preliminary ruling do not side with the challengers, rather side with the state monopoly and perpetuate the single/exclusive licensing schemes, that arguably hinder the assimilation to the common market for trans-European entities and impede the unionisation progress.

Consequently, the Second Chamber's holding on the important first question, whether EC Treaty provisions and past case law on the charge to limit gambling in systematic and consistent fashion would be upheld in a case such as De Lotto's exclusive licence and allowable advertising efforts for the exclusive gambling/lottery/sport betting services granted by Dutch Law, does indeed consider both the

[146] 42/02, paras 25–26.

[147] p. 293; also see Doukas and Anderson 2008, p. 247 et seq.

[148] p. 294.

[149] 258/08, paras 34–37.

exclusive licence and such ads as compliant by EU Law application and ECJ precedent. The judgment reads:

[N]ational legislation, such as that at issue in the main proceedings, which seeks to curb addiction to games of chance and to combat fraud, and which *in fact contributes to the achievement of those objectives*, can be regarded as limiting betting activities in a consistent and systematic manner *even where the holder(s) of an exclusive licence are entitled to make what they are offering on the market attractive by introducing new games and by means of advertising. It is for the national court to determine* whether unlawful gaming activities constitute a problem in the Member State concerned which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing such addiction.[150]

The second question the ECJ had to answer was referred as follows:

> 13.(2)(a) Assuming that national legislation governing gaming policy is compatible with Article 49 EC, is it for the national courts to determine, on every occasion on which they apply that legislation in practise in an actual case, whether the measure to be imposed, such as an order that a particular website be made inaccessible to residents of the Member State concerned by means of software designed for that purpose, in order to prevent them from participating in the games of chance offered thereon, in itself and as such satisfies the condition, in the specific circumstances of the case, that it should actually serve the objectives which might justify the national legislation in question, and whether the restriction resulting from that legislation and its application on the freedom to provide services is not disproportionate in the light of those objectives?
> (b) In answering Question 2a, does it make any difference if the measure to be implemented is not ordered and imposed in the context of the application of the national legislation by the authorities, but in the context of a civil action in which an organiser of games of chance operating with the required licence requests imposition of the measure on the ground that an unlawful act has been committed in its regard under civil law, inasmuch as the opposing party contravened the national legislation in question, thereby gaining an unfair advantage over the party operating with the required licence?

Delving into more procedural matters and into technical territory in this portion of the case, the Second Chamber held that the injunction that was imposed on Ladbrokes and the civil action were merely the way of the law in the Netherlands to enforce an otherwise applicable policy (as found in the first portion and by the analysis above abiding by EC Article 49). Specifically, the applicable law was interpreted as excluding Ladbrokes from licensure as well as operations, and the company was further preempted from conducting business over the internet with Dutch citizens. Via judicial decree, Ladbrokes was required to undertake technical measures to block access to its sites from Dutch customers, including telephone access to betting services. The ECJ herein emphasises that this procedure was not to be considered a double jeopardy, an additional restriction to the affected entities, rather an inherent component to the already deemed EU Law-abiding policy favouring De Lotto, in view of curtailing gambling addiction and the

[150] 258/08, para 38, emphasis added.

aforementioned objectives, which were analysed under the first portion and were instrumental in declaring the restrictive practise allowed by the ECJ. In each case, the ECJ's guidance herein remarks that it is up to the national court to decide the rule's conformity with the overarching EU Law principle, here Article 49. As an (intriguing) extension, the national courts are thus instructed to not be concerned with analysing each restrictive/enforcement measure on a case-by-case basis, rather defer to their broad-scope analysis of the restrictive policy's compatibility with, e.g. EC Treaty Article 49. Arguably a dangerous precedent set herein, considering: (a) the fact the ECJ has not truly given specific parameters for national courts on how to precisely conclude on which of these policies may or may not be in violation of Article 49, other than the general principles and some limited analysis in the recent cases; (b) that even if the national court decides that a national law is compatible, the state or public function authority enforcing it might engage in select means of enforcement that may truly go beyond what is necessary to achieve this objective, i.e. curtail gambling and limit exposure of sensitive populations to the risks of gambling addiction; (c) the patent inability of both the ECJ and national courts to assume a balanced stance between careful application of EU Law and traditionally established (possibly even politically popular) state-run monopolies (also see Doukas and Anderson 2008, p. 256 et seq). It is worth noting the ECJ's rejection here:

> 46 In those circumstances, contrary to what is submitted by the Ladbrokes companies, there is no further need to consider whether the implementing measure is actually justified by an overriding reason in the public interest, whether it is suitable for achieving the objectives of limiting addiction to gambling and preventing fraud or whether it does not go beyond what is necessary to achieve those objectives.
> 47 Moreover, whether that implementing measure was adopted as a result of action by the public authorities to ensure compliance with national legislation or of an application by an individual in the context of a civil action to protect his rights under that legislation has no bearing on the outcome of the dispute before the national court.

It follows from the foregoing observations that the answer to the second question is that, for the purpose of applying legislation of a Member State on games of chance which is compatible with Article 49 EC, the national courts are not required to determine, in each case, whether the implementing measure intended to ensure compliance with that legislation is suitable for achieving the objective of that legislation and is compatible with the principle of proportionality, insofar as that measure is necessary to ensure the effectiveness of that legislation and does not include any additional restrictions over and above that which arises from the legislation itself. Whether that implementing measure was adopted as a result of action by the public authorities to ensure compliance with national legislation or of an application by an individual in the context of a civil action to protect his rights under that legislation has no bearing on the outcome of the dispute before the national court.

As per the third question, the ECJ Second Chamber merely reiterates, and pastes therein, its earlier decision from the same day on Betfair, that is, it declares single entity licensing for each game and preclusion of other competitors from

entering the market as justifiable for the reasons of public interest that were analysed above. Interestingly, the ECJ further points out in this third portion of its *Ladbrokes* analysis that it does not so much matter whether the claimant/potential entrant in the gaming sector publicises and markets its products and services (by spending in adverts) more or less than the licensee of the state and single entity in gaming services as well as enforcer of its exclusive licence. What matters is the fact the exclusive licence and restrictive scheme was deemed compatible with EU Law and not violating fundamental principles such as Article 49.

Planzer 2010 gives an entertaining take on the inconsistency of ECJ Jurisprudence through the waves analysed above: 'Since *Läärä*, the ECJ has adhered to the view that limited authorisation through a single operator had the advantage of confining the desire to gamble within controlled channels. The argument has been mainly used in relation to prevention of crime. In *Ladbrokes*, the Court also expressly approved that argument in relation to gambling addiction. A comparison of the exact wording in different cases demonstrates that the guidance offered by the Court is quite confusing. Referring to the Court in *Gambelli*, national authorities were not allowed to "incite and encourage consumers to participate" in gambling offers. In *Placanica*, however, it found that "a policy of controlled expansion … may be entirely consistent … [An attractive offer] may … necessitate … advertising on a certain scale." In *Ladbrokes* finally, the Court found that a Member State was not allowed to pursue a policy of "substantially expanding" gambling by "excessively inciting and encouraging consumers to participate" in these offers. Hence, according to *Placanica*, a State can expand its gambling offers and advertise them, but according to *Gambelli*, it cannot (at all) incite and encourage consumers whereas referring to *Ladbrokes*, a State can incite and encourage consumers—but not excessively… It is a certain feeling of helplessness which transpires from such wording. These criteria will remain patchwork as long as the ECJ does not pursue an evidence-oriented approach…'[151]

Approximately a month following *Betfair* and *Ladbrokes*, on 8th July 2010, the ECJ's Fourth Chamber delivered a judgment that did not receive the publicity of the previous and ensuing cases, in *Otto Sjöberg and Anders Gerdin v. Swedish State*.[152] Therein, Swedish national legislation, which precluded marketing and promotions of online gambling operators chartered and operating in other member states, was found to be compliant with EU Law. However, differences in penalties for Swedish unlicenced gambling operators as opposed to other European member states' gambling providers were not found to be abiding by EU Law provisions. As Monov 2010 notes, the ECJ followed a general path outlined in *Liga Portuguesa*,

[151] pp. 293–293.

[152] Joint cases C-447/08 and C-448/08, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-448/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

thus deferring to national legislation and national courts for many of the crucial questions raised in respect to harmonisation and assimilation to the common market. The latter 'is far from being achieved.'[153]

It is useful to observe that the Swedish law had clearly defined objectives:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.[154]

The gaming law in Sweden affords the opportunity for Swedish non-profit legal entities to be licenced and operate gaming establishments and provide services; these non-profit legal entities under Swedish law share the gambling market and cooperate with the two state-controlled or operated providers in Sweden. In addition, the Criminal Code and the Gaming Law in Sweden have sanctions and penalties specifically for the scope of each legal framework's scope, which excluded gambling operations that have been established in other EU member states. Both the Criminal Code and the Gaming Law, however, do provide for fines and imprisonment of individuals (and accomplishes), who illegally establish foreign gambling (including, obviously, online) services, in particular with the participation of Swedish residents.

The two individuals involved in this case were editors and publishers of newspapers in Sweden, who promoted the gambling services of foreign-established companies (Expekt, Unibet, Ladbrokes and Centrebet), via advertisements in their publications. Thus, the consolidated question posed by the referring court was whether EC Treaty Article 49, on the freedom to provide services, precludes national legislation which would pertain to disallowing ads for gambling operators who have been established abroad. According to the Fourth Chamber:

> 44 In the cases in the main proceedings, the gaming operators which caused the advertisements on account of which the criminal proceedings were initiated to be published are private undertakings run for profit, which could never, as the Swedish Government confirmed at the hearing, have obtained licences for the operation of gambling under Swedish legislation.
> 45 The prohibition on the promotion of the services of such operators to consumers resident in Sweden therefore reflects the objective of the exclusion of private profit-making interests from the gambling sector and may moreover be regarded as necessary in order to meet such an objective.
> 46 … Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.

[153] Monov 2010, para 5.

[154] 447/08, para 5.

Next, the Court handled the problem of the different sanctions provided for the several gambling providers and stakeholders by Swedish Law. Namely, had the newspaper editors promoted unlicenced gambling providers in Sweden, they would only face an administrative decree, as opposed to the criminal charges the Criminal Code provided for promoters of foreign unlicenced providers. Hence, the question therein was 'whether Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence.'[155]

According to fundamental principles of EU Law, as well as dicta in *Placanica* and *Liga Portuguesa*, any such sanctions and restrictive practises, need to be proportionate and applied in non-discriminatory fashion.[156] In general, herein the ECJ defers to the national courts to interpret national law and determine scope and extent of discrimination posed, if any. There was indeed an argument between parties as to the application of the particular sanctions and the Swedish Law provisions. In a nutshell, nevertheless, the ECJ remarks: '…Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.'[157] It could be argued that the Swedish Law case yields some insight on what may take place in the minds and internal discussions among ECJ members, and foreseeably this was not the last case the court dealt with in 2010. Indeed, there were even more important judgments delivered that would arguably mark a new reality in the gambling industry and gaming law applications. Exactly 2 months subsequent to the Swedish Law case, that pivotal moment in ECJ Jurisprudence came, in impressive fashion, considering recent precedent.

Should one think that *Liga Portuguesa, Betfair,* and *Ladbrokes* signified a turn in ECJ jurisprudence and would serve as yardsticks for forthcoming cases in the field of European gaming law and international (internet) gambling policies, there is indeed much more… In true ECJ fashion, the Grand Chamber and the Fourth Chamber issued two decisions on consecutive days, 8th and 9th September 2010,[158] which were bound to challenge several of the dicta in the immediately

[155] 447/08, para 48.

[156] 447/08, paras 49–50.

[157] 447/08, para 57.

[158] C-46/08, *Carmen Media Group Ltd v. Land Schleswig–Holstein, Innenminister des Landes Schleswig–Holstein,* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-46/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&

preceding five cases, deferring to national courts and rendering single entities, exclusive licensing systems, with the embedded preclusions of private operators from entering the national gambling and betting market arenas, as compliant with EC Treaty provisions.

In *Carmen Media*, the complaint revolved around the restrictive regime in Schleswig–Holstein, denying the plaintiff access to games of chance and sport betting over the internet. It should be noted that the legislative framework in Germany up to this decision was very carefully drafted (particularly considering other member states against which the Commission had issued complaints in the past), and periodically revisited in the federal and state level for compliance, aligning policy with ECJ Jurisprudence. The *Glücksspielstaatsvertrag* (hereinafter: GlüStV) had four major goals:

1. to prevent dependency on games of chance and on bets, and to create the conditions for effectively combating dependency,
2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised games of chance,
3. to ensure the protection of minors and players,
4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.

Carmen Media had received a licence for online sport betting services in Gibraltar, as did Bwin, and other providers. It requested, in vain, to be licenced, or allowed through a special provision, to offer internet betting services for German customers. Interestingly, the licence Carmen Media has from Gibraltar encompasses 'offshore bookmaking,' yet it does not allow it to offer other broader betting services. Thus, the interior minister of the Land Schleswig–Holstein expectedly remarks that there should not be an obligation by a member state to allow a potential provider to receive a licence for services in which the said provider does not already engage in another member state. Moreover, as the referring court observed, the gambling monopoly in Germany did not appear to meet the 'consistent and systematic' criterion towards controlling gambling and curbing addiction; namely, it saw sport betting being severely curtailed on one hand with cases such as *Carmen Media*, and on the other a significant expansion in casinos

(Footnote 158 continued)
typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher; and C-64/08, *Staatsanwaltschaft Linz v. Ernst Engelmann*[158], http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-64/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher, respectively.

and other gambling methods (i.e. gaming machines). Hence, the four-pronged referral from the German court on which the Grand Chamber would have to adjudicate entailed the following questions:

(1) Is Article 49 EC to be interpreted as meaning that reliance on the freedom to provide services requires that a service provider be permitted, in accordance with the provisions of the Member State in which it is established, to provide that service there as well (in the present case, restriction of the Gibraltar gambling licence to 'offshore bookmaking')?
(2) Is Article 49 EC to be interpreted as precluding a national monopoly on the operation of sports betting and lotteries (with more than a low-potential risk of addiction), justified primarily on the grounds of combating the risk of gambling addiction, whereas other games of chance, with important potential risk of addiction, may be provided in that Member State by private service providers, and the different legal rules for sports betting and lotteries, on the one hand, and other games of chance, on the other, are based on the differing legislative powers of the *Bund* and the *Länder*?

Should the second question be answered in the affirmative:

(3) Is Article 49 EC to be interpreted as precluding national rules which make entitlement to the grant of a licence to operate and arrange games of chance subject to the discretion of the competent licensing authority, even where the conditions for the grant of a licence as laid down in the legislation have been fulfilled?
(4) Is Article 49 EC to be interpreted as precluding national rules prohibiting the operation and brokering of public games of chance on the internet, in particular where, at the same time, although only for a transitional period of 1 year, their online operation and brokering [are] permitted, subject to legislation protecting minors and players, for the purposes of compensation in line with the principle of proportionality and to enable two commercial gambling brokers who have previously operated exclusively online to switch over to those distribution channels permitted by the [GlüStV]?

Some fascinating insight can be derived by the Grand Chamber's exploration herein. First, it is deemed incompatible with EC Article 49 to render a licence dependent upon whether the prospective provider precisely offers the same services in the member state where it already holds a licence. Even more intriguingly, perhaps, is the input embedded in the Belgian and Austrian *amici curiae*, whence one may argue that the freedom to provide services protection should not apply in cases such as these gambling providers', since their major objective for applying and receiving a licence in Gibraltar was the tax benefit to be derived therefrom. Nonetheless, the ECJ does not delve into the due analysis on this problem, as it is considered beyond the scope of the questions posed. The first question is thus answered:

Having regard to all the foregoing, the answer to the first question is that, on a proper interpretation of Article 49 EC, an operator wishing to offer via the internet

bets on sporting competitions in a Member State other than the one in which it is established does not cease to fall within the scope of the said provision solely because that operator does not have an authorisation permitting it to offer such bets to persons within the territory of the Member State in which it is established, but holds only an authorisation to offer those services to persons located outside that territory.

The second question is obviously the meat of the case, and arguably an extremely pivotal moment for ECJ Jurisprudence and the future of the gambling sector and an eventual liberalisation of the industry. In essence it is inquired whether EC Article 49, the freedom to provide services, should allow exclusive state regulated providers and gambling monopolies on grounds of curtailing gambling and minimising addiction risks, whereas concurrently there is patent expansion on several aspects of the industry, in which the state-run, affiliated, or licenced provider possesses the main or only (if a monopoly) market share. It is further tested whether it would make a difference if the particular governance mechanism or relationship with the state (and perceived public benefits) would allow these restrictive practises.

Perhaps a very important point here is that the Grand Chamber appears greatly influenced by the referring court's concerns and critical stance towards Germany's own restrictive policy mechanism. Such a (carefully deliberated) position by a national court might heretofore not have been encountered. Thus, the thoughtful reader of these decisions should keep in mind that the backdrop of the German court's positions may have been instrumental in the Grand Chamber's final judgment. At this point, the ECJ in retrospect fully utilises its theorem from *Zenatti, Gambelli,* and *Placanica,* in regard to state authorities not being able to claim justifications of the public interest, benefits from curtailing gambling (competition), and minimising risk of gambling addiction, when the state operators themselves engage in the business, furthermore trying to incite potential clients to gamble and invest in their services. It was deemed a disconnect to observe that gaming machines' regulations were relaxed, casinos establishments increased from 66 to 81 in 6 years, yet the services Carmen Media wished to pursue were restricted by the state sector via the sport betting monopoly, federally introduced and passed in each German state, with differing aspects and results. On the latter, the ECJ is fairly clear; regardless of internal considerations, the Federal Republic of Germany cannot infringe on Article 49, rather work in conjunction with its constituent states upholding it. Although only a few weeks separated from the ECJ decision, it appears that this answer will be imperative for ensuing national courts' deliberations:

> [O]n a proper interpretation of Article 49 EC, where a regional public monopoly on sporting bets and lotteries has been established with the objective of preventing incitement to squander money on gambling and of combating gambling addiction, and yet a national court establishes at the same time:
>
> - that other types of games of chance may be exploited by private operators holding an authorisation; and
> - that in relation to other games of chance which do not fall within the said monopoly and which, moreover, pose a higher risk of addiction than the games which are subject to

> that monopoly, the competent authorities pursue policies of expanding supply, of such a nature as to develop and stimulate gaming activities, in particular with a view to maximising revenue derived from the latter;

This national court may legitimately be led to consider that such a monopoly is not suitable for ensuring the achievement of the objective for which it was established by contributing to reducing the opportunities for gambling and to limiting activities within that area in a consistent and systematic manner.

The fact that the games of chance subject to the said monopoly fall within the competence of the regional authorities, whereas those other types of games of chance fall within the competence of the federal authorities, is irrelevant in that respect.

The third question is of procedural and substantive value, as it is an endeavour to decide whether a member state authority has the opportunity to issue licences on its own discretion, even when the normative statutory obligations and licensure parameters have been satisfied. It is herein where the principle of proportionality enters. The value of paras 86 and 87 of the Carmen Media decision cannot be overstated; indeed they were much anticipated:

> 86 According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings.[159]
> 87 Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.[160]

It is precisely here where the ECJ delivers its tremendous guidance and impacts directly the practises of EU member states in ensuing months/years. The final outcome leaves little room now for objections by member states' representatives and gambling monopolies proponents:

> [O]n a proper interpretation of Article 49 EC, where a system of prior administrative authorisation is established in a Member State as regards the supply of certain types of gambling, such a system, which derogates from the freedom to provide services guaranteed by Article 49 EC, is capable of satisfying the requirements of that latter provision only if it is based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.

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[159] See, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, para 49.

[160] See *Sporting Exchange*, para 50 and case-law cited.

The fourth question in *Carmen Media* is almost equally as important. It indirectly touches upon the legality of internet gambling in its entirety (at least where Schleswig–Holstein would like to lead the discussion and ECJ's analysis). As per ECJ case law and interpretations of Article 49 application, the Court may decide that a certain scope restriction may be 'regarded as suitable for achieving the objectives of preventing incitement to squander money on gambling, combating gambling addiction, and protecting young people.'[161] Sadly, as one is prepared for a lucid moment herein by the Grand Chamber, the internet gambling anecdote and *Liga Portuguesa* theorem is once more utilised: '… [B]ecause of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.'[162] Moreover, the Grand Chamber actually elaborates and expands in this case, and reverts to its more conservative positions in past judgments, by holding:

> 103 It should be noted that, in the same way, the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.
> 104 Moreover, it should be noted that, having regard to the discretion which Member States enjoy in determining the level of protection of consumers and the social order in the gaming sector, it is not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue.[163]

Thus, a prohibition under the non-discriminatory criteria and with deference to national courts' interpretation and enforcement is rendered suitable, given the objectives mentioned above. Nevertheless, any transitional period, licensing procedure, etc need to be applied in uniform fashion. Concluding its profound analysis in this case, the Grand Chamber leaves some room for (damage) control and restrictive practises in member states (internet) gambling policy:

> [N]ational legislation prohibiting the organisation and intermediation of games of chance on the internet for the purposes of preventing the squandering of money on gambling, combating addiction to the latter and protecting young persons may, in principle, be regarded as suitable for pursuing such legitimate objectives, even if the offer of such

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[161] 46/08, para 98.

[162] *Liga Portuguesa de Futebol Profissional and Bwin International*, para 70.

[163] See, by analogy, Case C-518/06 *Commission* v. *Italy* [2009] ECR I-3491, paras 83 and 84.

> games remains authorised through more traditional channels. The fact that such a prohibition is accompanied by a transitional measure such as that at issue in the main proceedings is not capable of depriving the said prohibition of that suitability.

As Hambach 2010 notes, the ECJ judgment in Carmen Media caused sufficient legal chaos in Germany. His collection of German headlines in the days following the decision is illuminating of the concerns and popular reactions.

The press coverage of the decision was widespread in Germany. The media suggested that the 'end of the German gambling monopoly' seems to be inevitable. Examples of headlines and statements of the German press and media were…

> The German monopoly on lotteries and sports betting and other games of chances is inapplicable with immediate effect.[164]
>
> Sport betting is now allowed in Germany.[165]
>
> The European Court of Justice stops the hypocrisy.[166] The Germany monopoly on gambling is illegitimate and—even transitionally—not applicable.[167]

As frequently noted and recently acknowledged by both sides, solutions may be provided via political will. In Germany, there were recent bi-partisan efforts to accomplish certain goals and make progress with the new reality the ECJ brings forth. As Hambach 2010 notes:

A clear reaction on the political front came immediately from the region of Schleswig–Holstein, whose proposal now becomes trend-setting. The press release sent out by the parliamentary parties of the CDU (conservatives) and the FDP (liberals) in Schleswig–Holstein on September 10 reads as follows:

> The parliamentary parties of the CDU and the FDP in Schleswig–Holstein today suggested a two-stage process for the development of a new gaming law. According to this, the new gaming law will come into force by the end of 2011 at the latest.
>
> 'The judgment by the European Court of Justice requires fast and at the same time well-coordinated measures,' said Dr Christian von Boetticher, head of the CDU parliamentary party. 'Otherwise, the courts will no longer be able to prosecute illegal gambling,' FDP leader Wolfgang Kubicki said. 'Therefore, we need a new regulation as quickly as possible.'

Von Boetticher and Kubicki named seven criteria which the new gaming law mandatorily needs to fulfil in the opinion of the coalition parties in Schleswig–Holstein:

- Compliance with European Union law
- Provision of funds for popular sports and public welfare work, at least at their present Level

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164 Tagesspiegel, September 8, 2010.

165 Sueddeutsche Zeitung, September 9, 2010.

166 Die Welt, September 9, 2010.

167 Tagesspiegel, September 9, 2010.

- Effective protection of players and minors
- Effective prevention of addiction
- Effective measures against manipulation of bets
- Prevention of bets whose contents are detrimental to the reputation of sports
- Drying up of the black market in gambling

Moreover, Ehlermann 2010 posits that there are far-reaching consequences across Europe after *Carmen Media*. He believes that the ECJ grasped the opportunity to ensure consistency and clarify some parameters for national courts, which was missed in *Liga Portuguesa*. He argues that there is a chance for EU member states to promote modern, EU Law-compliant regulation in reference to cross-border online gaming, since all member states post-*Carmen Media* need to revisit their regulatory frameworks and document their consistency. Furthermore, Ehlerman 2010 observes: '*Carmen Media* is a landmark ruling because it provides decisive clarifications of the scope of the consistency requirement in two respects: Firstly, the Court does not carry out the quantitative assessment separately for each type (or "sector") of game but rather compares different types of games with each other… Secondly, the Court does not even limit the comparison between different types of games to those types of games that are covered by the monopoly (or, for that matter, the respective legal act under scrutiny—which was the German gambling treaty in the case at hand). Rather, the Court makes the comparison between those types of games that are covered by the restriction (here the monopoly) and those games that are not covered by it.'

The other case of the pivotal September 2010 docket, *Ernst Engelmann,* teased out Austrian law restricting access to casino and gambling licences. It is enlightening to observe the Austrian Law explanatory notes that the ECJ's Fourth Chamber utilised during its legal context introduction. It is therein found that the Austrian law holds this position:

> [I]deally, a total prohibition on gaming would be the most judicious form of regulation but given that, as is well known, a passion for gambling seems inherent in the human condition, it is far wiser for that passion to be channeled in the interests of the individual and society. It is stated that two goals are thus achieved: first, gaming is prevented from entering the realm of illegality, as may be observed to happen in States which prohibit games of chance entirely; at the same time, the State is enabled to retain the possibility of supervising games of chance operated lawfully, the main objective of such supervision having to be to protect the gambler.

As to the fiscal objective, the explanatory notes identify an interest on the part of the federal State in being able to derive the maximum possible revenue from the gaming monopoly and, therefore, when adopting rules on gaming, the federal government must, while observing and protecting the goal of regulating gaming, ensure that games of chance are operated in such a way that the monopoly produces the maximum possible revenue for it.

Upon criminal penalties, the only means a gambling operation may be organised in Austria is through it fairly restrictive regime of 'concessions,' public licences, for which stringent parameters are introduced. Reserving the right for the

state to organise a 'games of chance state monopoly,'[168] the Austrian Ministry of Finance may only grant 12 such licences, and only one per municipal territory, for a period of up to 15 years. On the business law side, these providers need to be chartered as 'public limited companies having their seat in Austria and with a share capital of at least EUR 22 million; in the light of the circumstances the concessionaire must also offer the local public authorities the best prospects of maximising tax revenue, whilst observing the rules … on the protection of gamblers.'[169] Additionally, there are impressive conditions for the state's oversight over the business operations for such providers, allowing state authorities and an appointed state commissioner to periodically inspect accounts, conduct visits, and seek elaborate audits.

By Austrian law decree, the concessions had been awarded to a state-run company, Casinos Austria AG, for several gaming operations for a period of 15 years, as the Austrian government admitted without a public tender inviting competing bids. The plaintiff in this case, Mr Engelmann, a German national, was fined EUR 2,000, resulting from his offer of games of chance, absent receiving a licence from state authorities. Thus the Austrian court referred the matter to the ECJ, seeking to know whether the Austrian Law restricting the opportunities to conduct such business were lawful under EC Treaty Articles 43 and 49. The usual concerns were raised by the national court, (a) in respect to an absence of analysis prior to assuming the restrictive policy, thus justifying its appropriateness, (b) considering that there is substantial advertising and enticement to gambling on the part of the Austrian monopoly company, (c) given that the latter is the only provider and indeed a public limited company causing the court to doubt whether this policy would sufficiently prevent crime, fraud, or addiction, and (d) taking into account the fact that Austria's declaration that a key objective is to pursue tax revenue from the gaming establishments conflicts with well-established ECJ case law on limitation of gambling opportunities as a justifiable rationale for restrictive policy, and not boosting state coffers. Hence, the three legal questions the Austrian national court posed and the Fourth Chamber was charged to answer were:

(1) Is Article 43 EC … to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?
(2) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming—such as public sports betting and lotteries—and advertise such gaming (on television and in newspapers and

[168] 64/08, para 7.
[169] 64/08, para 9.

magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made ('TOI TOI TOI—Believe in luck!')?

(3) Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?

The first question tests applicability of EC Article 43 in regard to the two limitations posed by Austrian Law, namely setting up a public limited company and have their seat in Austria. The ECJ very promptly and in one sentence declares such a regime a violation of the freedom of establishment enshrined in EC Treaty Article 43, and proceeds to examine whether such a violation may be deemed justifiable, either via the expressed derogation embedded in the Treaty provisions, or via the ECJ's case law for overriding reasons in the public interest. Without going into much analysis, the Fourth Chamber considers such restrictions as disproportionate, and although usually deferring to the state court for deliberations, does provide with sufficient guidance based on its own precedent as investigated above. Thus, in Sections 38–40 of its judgment, the ECJ provides alternative measures for Austria, an interesting approach herein, and succinctly declares its policy a violation of the freedom of establishment, Article 43 of the Treaty:

> 38 Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition, as the Advocate General has stated in point 60 of his Opinion, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers.
>
> 39 Moreover, having regard to the activity at issue, namely the operation of gaming establishments located in Austrian territory, there is nothing to prevent supervision being carried out on the premises of those establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.
>
> 40 The answer to the first question is therefore that Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State.

Thereafter the Fourth Chamber decided to delve into the related third question, essentially asking whether EC Treaty Articles 43 and 49 preclude a policy such as Austria's wherein there is no competitive, open, biding procedure and a finite number of licences are granted to public companies for 15 years. These three restrictions (number of licences, limitation in duration of licence, and absence of transparency) were tested by the Fourth Chamber in its analysis. 12 licenced facilities meant that each site would correspond with approximately a population

of 750,000, thus resulting in a direct impact of curtailing gambling opportunities for the public, long accepted as a justified reason for restrictive policy. The Fourth Chamber also considered the limitation in duration a policy that could be justified, subject to verification by the state court; the ECJ acknowledges herein that the concessionaire needs a reasonable period of time to experience a return on its investment. The lack of transparency, however, did not sit well with the Fourth Chamber. Although services' contracts were excluded from Commission directives in respect to public procurement, nevertheless the ECJ pontificates that member states are bound by the general provisions of Articles 43 and 49, and the overarching precondition of transparency, frequently set as imperative by ECJ precedent.[170] In Sections 50 and 51 the ECJ further explains that although there is no true obligation to call for tenders, there needs to be a sufficient amount of publicity in respect to competition, and a fundamental transparency in the review process. It is very clearly indicated that interest from other member states should be considered in the decision-making process, and no discrimination and alienation of other states' prospective contractors should take place. The criteria need to be set forth well in advance, and the affected parties need to have recourse within the state system.[171] Hence, in para 58 the Fourth Chamber promptly rejects Austria's restrictive regulatory regime as set in the proceedings: 'In the light of all of those considerations, the answer to the third question is that the obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.'

The second question was rendered moot and the Fourth Chamber explains: 'In view of the answers given to the first and third questions and of the fact that the national court, as pointed out in para 26 of the present judgment, has established a link between the facts satisfying the definition of the offence with which Mr Engelmann has been charged and the question whether he was lawfully excluded from the possibility of obtaining a concession, it is not necessary to answer the second question.'[172]

Regarding the Austrian case, the secretary-general of the EGBA**,** Sigrid Ligné, stressed that it confirms clearly that member states does not require EU licenced online operators to be physically present on their territory. Clive Hawkswood, chief executive of the Remote Gambling Association (RGA), added that Austria is not alone in having gambling laws and arbitrary practises that seek to protect particular local operators. 'We hope that this ruling will convince other member states to introduce changes in their legislation,' he said.[173]

[170] 64/08, para 49.

[171] 64/08, para 55.

[172] 64/08, para 59.

[173] EurActiv 2010.

As an overall reception subsequent to these latest ECJ rulings, there was considerable backlash among European lotteries and the state-interests' organisations, and definite celebration among gambling industry shareholders. Professor Siegbert Alber, who represented most of the private gambling industry during the latest litigation process, and was Advocate General in *Gambelli*, remarked 'that EU Commissioner Barnier will propose a new EU regulation to liberalise the European gambling market—and end the national discussions.'[174]

4.4 The European Ombudsman's Special Report

A refreshing take on the issues discussed was the contribution of the European Ombudsman.[175] In a nutshell, the Ombudsman investigates complaints about maladministration in EU institutions. After the record of high numbers of complaints in 2004 and 2005, the level essentially 'stabilised at the previously unprecedented rate of 320 per month.'[176] The number fell to 260 in 2009.[177] 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 Fall 2010, there have only been 17 special reports issued by the office of the Ombudsman since 1995.[178] 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[179] to the Ombudsman about the inactivity of the EC regarding his infringement complaint against Germany, filed in February of 2004.[180] 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

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174 EurActiv 2010.

175 http://www.ombudsman.europa.eu

176 Diamandouros 2006b, p. 9.

177 Diamandouros 2010.

178 http://www.ombudsman.europa.eu/special/en/default.htm

179 289/2005/(WP)GG.

180 Diamandouros 2006a, p. 2.

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.[181]

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 (6 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.*'[182]

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*.[183]

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.'[184] He thus recommends the EC to 'deal with the complainant's infringement complaint diligently and without undue delay.'[185] 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.'[186] 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.[187]

4.5 Policy Developments, EC Inquiries, and the Services Directive Controversy

The last part of the first decade of the new millennium demonstrated that gambling has been one of the most volatile and dynamic sectors in EU economy and indeed one of the most fertile for both further growth and regulation. As of December

[181] Diamandouros 2006a, pp. 2–3.
[182] Diamandouros 2006a, p. 3, italics added.
[183] Diamandouros 2006a, p. 1, italics added.
[184] Diamandouros 2006a, p. 1.
[185] Diamandouros 2006a, p. 9.
[186] Diamandouros 2006b, p. 5.
[187] Diamandouros 2006b, p. 111.

2010, the most recent legal and policy developments in EU member states in brief are:

An impressive turn and developing political change in the Netherlands, where for the first time there is the prospect of regulation (v. liberalisation per Franssen 2010). As Franssen 2010 notes subsequent to the Dutch elections and only days following the formation of a new government in the Fall of 2010, 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…' and particularly focus on matters of taxation, international liquidity, and a framework that according to Dutch authorities should bring in approximately 10 million Euros shortly upon licensing online gambling,[188] and up to 270 million Euros annually.[189] Furthermore, Franssen 2010 joins other law and economics practitioners and scholars,[190] and the collective voice of the gaming sector[191] calling for harmonisation that would behove every EU stakeholder. In addition, the Dutch Ministry of Justice commissioned the Janssen Report (Fall 2009 to Summer 2010), which yields useful insight and assumes a balance, promoting regulation for online poker yet remaining short of the liberalisation the gaming industry would strongly advocate.[192]

One of the most important and arguably most progressive policy developments in the betting sector came in the form of the new French regime for regulating the gambling industry. Verbiest 2010a explains the 'Right to Bet' policy in the new French Gaming Law, and underscores the important contractual relationship and licensing schemes necessary in order to offer sport betting in France; namely, sport betting providers would need to negotiate and receive fair terms by the sport organisations for betting services and products, monitored by the competition authorities, ensuring unfair and anticompetitive practises will be avoided. Verbiest 2010a expresses concerns on the matter of dominant position abuses, the traditionally established monopolies and state-run or -affiliated providers obtaining a favourable position in negotiations and licensing rights, and overall the prospects of competition distortion in favour of incumbents versus new entrants. Exclusionary and concealed or patently anticompetitive practises (such as loyalty rebates, overly entangled and practically unenforceable or impossible to meet criteria in obtaining licensure, etc) need to be carefully monitored by competition authorities in this new regulatory framework.[193] Overall, new operators in France would need to acquire a French gambling licence and be regulated by the French gambling regulatory body. licenced operators will be subject to stakes-based tax rates of 8.5% for sports betting, 15.5% for horse racing betting, and 2% for online

[188] Franssen 2010.

[189] Naaktgeboren 2010.

[190] Europe Economics 2004; Vlaemminck and De Wael 2003.

[191] EGBA 2010.

[192] RGA 2010.

[193] Verbiest 2010a.

poker. Licences will only be granted to operators established in the EEA and these operators will not have to relocate to France.[194]

Asensi 2010 reflects on some of the respective policy (non) developments in Spain as of December 2010, and recapitulates some of the directions set forth by the Spanish state in view of upcoming regulation of the online sector. These policy directions have been funnelled through media outlets, but at time of print there is no concrete legislative delivery after the passing of the Ley 56/07 de Madidas de Impulso de la Sociedad de la Información—Law on Measures to Develop the Information Society. Importantly, the licensing provisions that have been floated through the Spanish press include:

- Each type of game will require a specific class of licence.
- The operator can be a Spanish or European Union company, but it will be necessary to have a permanent establishment in Spain.
- The operator will have to deposit a bond as a 'general solvency guarantee' and 'additional guarantees' for each class of game that if offers.
- The operator will have to present an operational plan for the activity that it wants to develop.
- Technical systems will have to be endorsed prior to the request for the licence.
- The Central Game Unit will have to be connected with the regulator 24/7 so that it is possible to register all of the activities.
- Servers need not be located in Spain, but it will have to be possible to monitor them from Spain.
- The period to resolve a licence application will be 3 months from filing. Administrative silence (i.e., no formal response within 3 months) will constitute a refusal.
- LAE (the state lottery) reserves for itself the activity related to lotteries.
- A distinction is drawn between licences (with a permanent character) and authorisations (with an occasional or sporadic character).[195]

The Spanish government has on a number of occasions communicated to Spanish newspapers several options of taxation systems, which are as follows:

- Corporate tax, levying gaming activities like those performed by any other firm, together with a tax on players' wins. An initial deduction of 19 per cent in each prize—in accordance with the capital return tax—would be applied to the player together with a definitive payment at the income tax return; or
- To follow the French system (8.5 per cent tax on each bet); or
- To follow the model of the Madrid and the Basque Country regions (10 per cent tax on the win).[196]

[194] Hagan 2009.

[195] Asensi 2010.

[196] *Idem*.

What has been a difficult process, due to LAE's internal restructuring and the usual financial struggles several European states have been experiencing in the state sector, has created on one hand the initiative by regional authorities (e.g. Madrid, Basque Country) to issue their own sport betting authorisations, and on the other the defensive tactic of preemptive litigation and administrative complaints filed by the traditional land-based sector to uphold hard-fought interests over an uncertain future posed by the expansion in the online gambling industry. It has been generally expected that clarification in the legal and policy regime over the online sector will ensue in the early part of 2011.[197]

Belgium, conversely, has proceeded with significant legislative intervention and regulatory evolution, by means of a new Gaming Law passed in December 2009, to take effect January 1st, 2011. A licensing system will be imposed for all kinds of games of chance, including but not limited to poker, sports betting (whether fixed-odd or mutual) and horse race betting, except for lotteries which remain the monopoly of the state-owned incumbent, *La Loterie Nationale*, and are thus excluded from the Gaming Law's scope of application. The Belgian Gaming Commission will be entrusted with the task of granting licences to both offline and online gambling operators.[198] It is important to note that fairly restrictive aspects of the policies embedded therein were introduced subsequent to the *Liga Portuguesa* judgment, yet prior to the ensuing ECJ decisions. As Verbiest 2010b observes they may surely raise anticompetitive and Articles 43/49 freedoms' concerns, in particular the obligation to receive a land-based licence for online providers, whereas there is a finite number of licences Belgium will grant. Verbiest 2010b intelligently posits the competition law scrutiny problem as well in view of the anticipated business-to-business transaction between online gaming operators and land-based providers already licenced in a member state. He alerts stakeholders of the national and European competition law scrutiny of the 'ex ante online gaming regulation and ex post competition rules' reality.

Amidst heavy activity in member state jurisdictions and in the gambling industry, the first highly regulated environment, and the one with the licences and territories which serve as catapults for global online gambling operators, the UK, proceeded with a few key initiatives in succession of the major legislative acts of the mid 2000s (arguably the most important Act in the world of gambling heretofore, the Gambling Act of 2005). The UK's Gambling Commission would have to licence any operator who targets British consumers online. '… [I]t remains to be seen how the UK Government intends ensuring that the above-mentioned measures can be directed towards those online operators *active* in the British market who are *targeting* British consumers, 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 …'[199]

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197 *Idem*.

198 Verbiest 2010b.

199 Verbiest 2010c.

Italy being the favourite defendant in key ECJ cases shaping the contemporary reality, the liberalisation of the gambling market took a few years to truly be implemented. Impressively, with a 2009 Law on fixed odds for online games of chance, there was the introduction of a 20% flat tax rate on all gross profits. Per Law 88/09, Italian gaming policy developments can be summarised as follows:

An AAMS (Italian gaming regulator)-granted licence is required for the offer of remote gaming services to Italian residents. Not only offshore-based, but even operators licenced elsewhere in the EU will not be allowed to carry out across-the-border services in Italy.The one-off cost of the licence will be €360,000 (VAT included) payable upon licence issuance. All licences, no matter when actually granted, will lapse on 30 June 2016. The remote gaming licence will cover fixed odds/pool sports and horse race betting, skill gaming (including online poker and any other card tournaments which are all eligible for skill gaming classification), online scratch-and-win (subject to a sub-distribution agreement with the current exclusive licence holder), online bingo (subject to payment of an extra €50,000 fee), online casino, online poker and other cash games, bets on virtual events and betting exchange (subject to these two games being regulated by AAMS). The AAMS licence is open to any applicant based on a European Economic Area jurisdiction. The licence may be issued directly to a foreign applicant provided he holds an EEA passport. The licence may be issued even to a non-operator (such as a start up or a company coming from a totally different business) subject to (i) release in favour of AAMS of an €1.5 million bank guarantee and (ii) certification by an independent auditing firm that the applicant holds all required technological infrastructure and management resources to run the licence. Remote gaming services can only be offered to Italian residents through a dedicated platform which must be linked up by the centralised system run by AAMS via its technological partner SOGEI so that each bet/wager placed by an Italian customer may be recorded, monitored, tracked, validated, and taxed in real time.

Provision of remote gaming services from a foreign-based '.com' platform to Italian residents is strictly forbidden and subject to the blacklist restrictions currently enforced by AAMS as well as to prosecution. Whoever offers online gaming services in Italy without holding an AAMS-granted licence is subject to imprisonment from 6 months up to 3 years.

Whoever organises, offers and takes remote bets in Italy on any games regulated by AAMS but in a way other than that required by the AAMS rules, is subject to arrest from 3 months up to 1 year and to a fine ranging from €500 to €5000 even if the violator does hold an AAMS licence. Foreign-based AAMS licensees are allowed to keep their gaming servers abroad provided they are located in the EEA space and a full, real time connection with the AAMS centralised system is in place. The gaming software running on all games offered on the Italian platform must be certified by an AAMS-approved testing laboratory.[200]

[200] Mancini 2010.

'[O]ther first-tier European markets do not seem to be proceeding at the same speedy and rather operator-friendly pace as Italy when it comes to opening up their respective gates to international operators eager to penetrate new territories and gain new customers across the Old Continent…'[201] It becomes evident that through Commission's infringement proceedings and ECJ decisions chastising the restrictive environment Italy imposed in the past, Italy has now become one of the frontrunners in modern gaming legislation, and indeed doing so in a way that immediately and very positively impacts the state coffers. Historically, it is important to note that the key procedural motions were put forth by the Italian government soon after the tragic L'Aquila earthquake, via the 'Abruzzo decree;'[202] the latter outlined the reconstruction plans, and encompassed gaming regulation and revenue distributions. Closely, in response to the global financial crisis, another Italian legislative intervention provided for the establishment of four additional lottery licences, upon the Lottomatica-owned Consorzio Lotterie Nazionali exclusivity's expiration in 2010. Mancini 2009 comments: '…[I]n addition to keeping its national licence regime fully in place with the official blessing of the Brussels authorities, Italy also became the champion of a pragmatic and reasonably flexible regulatory model which is currently the only realistic alternative to an Europe-wide harmonisation of the licensing rules … Other EU jurisdictions like France and Denmark… have largely drawn from it to open up their respective markets thereby combining a system of internal rules and controls still issued and enforced at local level, with less administrative red tape and lighter operational hurdles for licence applicants based and licenced in other EU jurisdictions …'

In his recap of Nordic countries' gaming law and policy developments, Aho 2010 remarks that Denmark and Sweden are setting the pace for liberalisation and further regulatory evolution in 2011. In both Denmark and Sweden, the impact of EC infringement proceedings and the risk of ensuing ECJ scrutiny led to some commotion and introduction of legislative bills and studies on the most appropriate options for gambling policy.

Ronde 2009 outlines the parameters of the Danish efforts: '…[T]he Danish Government announced in April 2009 plans to end the gambling monopoly held by the State-owned organisation, Danske Spil, and to proceed with plans to liberalise parts of the gambling market in order to offer better protection to the players, avoid economic crime related to gambling and to guarantee future revenues for social causes… [This] will create a national licensing and taxation framework for online sports betting, poker and casino games, allowing increased competition in these areas. The national lottery, LOTTO, and instant games will on the other hand continue under the exclusive provision of Danske Spil. Operators will be subject to taxation, licence fees and must abide by all Danish gambling regulations…' Danske Spil, the traditional Danish gambling monopoly, greeted the news

[201] *Idem*.

[202] Spring–Summer 2009.

positively, as it could now enter the roulette and poker markets. In addition, the sport organisations in Denmark and non-profits receiving gaming revenue also were looking forward to the new regime, since Danske Spil revenues and appropriations to sport were shrinking the 2 years preceding the new gaming framework. With an average tax rate of 30% of GGR for sport betting prior to the liberalisation shift,[203] there was a lot to celebrate in Denmark. It is useful to note that Ladbrokes had won cases in both Danish and Swedish national courts. On the other hand, Finland, although faced with ECJ castigation in the past, has not yet assumed the proactive approach that would convince the Commission of the country's progress towards upholding EU Law and relaxing restrictive measures in favour of national monopolies and gambling schemes.

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.[204] These countries' restrictions were initially going to be tested for EC Treaty Article 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.'[205] '"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.[206]

What is important to note in such a brief policy summation is the development of the Services Directive,[207] 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,[208]

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[203] Ronde 2009.

[204] 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

[205] Commission investigates…, para 2.

[206] Commission investigates…, para 3.

[207] 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[207] 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.

[208] Directive 2006/123/EC, Article 2.

gambling and sport betting were 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.[209] 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-licenced gambling or lottery services will be harmed by competition and will restrict their support mainly to amateur sport…'[210]

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.

4.6 Sum, Scenarios, and Conclusion

Although *Carmen Media* and *Engelmann* certainly provided much more guidance for national courts in forthcoming challenges of gambling and sport betting restrictions, the fact remains that ECJ's mercurial decision-making has contributed to a very inconsistent reality in EU member states' gambling and sport betting policies (*stare decisis?* Admittedly difficult in these malleable concepts). The above ECJ decisions, though truly insightful and instrumental in determining the legal 'boundaries,'[211] do not ensure that there will be uniform handling of sport

[209] EP 2008; Kaburakis 2008b.

[210] EP 2008.

[211] Per A.G. Colomer in the *Placanica* Opinion.

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 practises. 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? The lesson from *Carmen Media* and the national court's stance on the German state's restrictive policy is invaluable, and importantly illustrative of the impact well-researched, reasoned, and balanced national courts' decisions may have not only on a national scale, but now on a pan-European level, as translated by means of ECJ judgments.

Thus, the pressure is growing on an EU gambling model.[212] The present environment 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 ones mentioned above in Holland, France, Belgium, Italy, Denmark, Sweden, the Gambling Act of 2005 in the UK, the Remote Gaming Regulations of 2004 in Malta, in conjunction with new MS regulatory evolution, which presumably will follow suit very shortly in Germany and Austria subsequent to *Carmen Media* and *Engelmann*). In such a milieu, policy guidelines may need to incorporate protection for vulnerable populations such as the poor and the young.[213] 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, health care, research, environment etc (indeed a key factor, i.e. Santa Casa's historical socio-cultural tradition and civic engagement in significant part deciding the *Liga Portuguesa* case; also worth noting herein the strategic business decision by Santa Casa executives to contract with Accenture while developing a new portal and future competition solutions.[214]

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[212] Veenstra 2005.

[213] *Idem*.

[214] http://www.accenture.com/Global/Services/By_Industry/Media_and_Entertainment/Portals/Client_Successes/SantaCasa.htm

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.[215] Contemporary discussion among gambling, political, legal, and policy circles argues that the EU may lead the twenty-first 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 elusive, 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 offering alternative gaming models after impact assessments.[216] In such a developing contemporary reality the 'Internet is not a lawless world without national borders.'[217] 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 geolocation software, avoiding uncertainty and streamlining the monitoring process.

In the new European and gambling order shaping post-*Carmen Media*, Teufelberger 2010 declares the last quarter of 2010 as the tipping point for the European gaming sector and reflects on initiatives from the industry and political forces in the Commission, Parliament, and Council levels,[218] including the recently announced Green Paper draft effort, unprecedented on a pan-European level. Also, he underscores the importance of the online gaming sector for upcoming regulatory reform[219]: 'While reforms are a step in the right direction, one needs to be cautious of how these markets reform. Often they fail to take into account the cross-border nature of the online gaming sector, thus paving the way for 27 Internet online gaming markets. As a consequence, a consumer in Manchester cannot enjoy the same gaming and betting services like a consumer in Porto—but how does this fit in with the Digital Single Market?'

The ECJ with its recent ruling in *Carmen Media* undoubtedly opened up the door for various operators to apply for sport betting licences. Matters could always be tested by the national courts (here assuming that these cases would follow ECJ

[215] Veenstra 2005.

[216] Vlaemminck 2005.

[217] Veenstra 2005.

[218] Also updates under: http://www.euromat.org/.

[219] As of late 2010 documented in 2/3 of the EU: http://www.egba.eu/en/press/553.

precedent and guidelines posed); national courts' volatile decision-making notwithstanding, the path of liberalisation has arguably opened, or at least the restrictive reality of traditional monopoly schemes has been emphatically revisited. As early as a few weeks after the *Placanica* decision was published, sport betting operators began making their way to national authorities' offices with applications for authorisations and licences, Ladbrokes, Stanley and William Hill leading the pack.[220] Stanley and William Hill actually led to the country with the biggest per capita spending on betting in Europe, Greece,[221] indeed ironic considering its recent financial hardship, to be referred to the ECJ by two judges of the highest administrative court, the Greek Council of State, who held that the Greek state gambling monopoly, OPAP (one of the highest revenue generating gaming operators in the world, and No. 901 on Forbes' Global 2000 top performing firms.[222]

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.[223] 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.[224] 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 favourable light for competitors in the industry, thus unfavourably towards 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 end of 2010.[225] 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.'[226] This research stream will side with the

[220] http://www.bettingmarket.com/eurolaw222428.htm, http://www.enet.gr/online/online_text/c=115,id=48821236.

[221] http://www.kaburakis.com/wp-content/uploads/2009/09/Gambling-links-for-SLA-abridged.pdf

[222] http://www.forbes.com/lists/2010/18/global-2000-10_The-Global-2000_Counrty_5.html, is not proportionate, justified, nor EU Law-compliant[222] http://gaminglaweu.eu/archive/archive2009/legitimacy-of-the-opap-monopoly-challenged/.

[223] Mintzberg 1994.

[224] Swiss Institute of Comparative Law 2006, p. 46.

[225] *Idem*.

[226] Swiss Institute of Comparative Law 2006, p. 1511.

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 towards 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.[227]

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