

Odds: Gambling, Law and Strategy in the European Union

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Contemporary business law contributions argue that legal knowledge or ‘legal astuteness’ can lead to a sustainable competitive advantage.¹ Past theses and treatises have led more academic research to endeavour the confluence between law and strategy.² European scholars have engaged in the Proactive Law Movement, recently adopted and incorporated into policy by the European Commission.³ As such, the ‘many futures of legal strategy’ provide

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1 See C Bagley, ‘What’s Law Got to Do With It?: Integrating Law and Strategy’ (2010) 47 *American Business Law Journal* 587; C Bagley, ‘Winning Legally: The Value of Legal Astuteness’ (2008) 33 *Academy of Management Review* 378; R Bird, ‘The Many Futures of Legal Strategy’ (2010) 47 *American Business Law Journal* 575; R Bird, ‘Law, Strategy and Competitive Advantage’ (7 February 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327795; L DiMatteo, ‘Strategic Contracting: Contract Law as a Source of Competitive Advantage’ (2010) 47 *American Business Law Journal* 727; G Siedel and H Haapio, ‘Using Proactive Law for Competitive Advantage’ (2010) 47 *American Business Law Journal* 641.

2 J Holloway, ‘A Primer on the Theory, Practice, and Pedagogy Underpinning a School of Thought on Law and Business’ (2005) 38 *University of Michigan Journal of Law Reform* 587; J Holloway, ‘The Practical Entry and Utility of a Legal-Managerial Framework Without the Economic Analysis of Law’ (2002) 24 *Campbell Law Review* 131; C Bagley, *Winning Legally* (Harvard Business School Press, 2005); G Siedel, *Using the Law for Competitive Advantage* (Jossey Bass, 2002).

3 G Siedel and H Haapio, ‘Using Proactive Law for Competitive Advantage’ (2010) 47 *American Business Law Journal* 641.

both fodder for academic inquiry and an important facet of business executives' and future managers' strategic arsenal.⁴

The importance of legal research and related regulatory policy analysis as outlined in the above theoretical approaches is patent in any industry (recent samples from the aforementioned works include healthcare and insurance, finance and investment banking, mass communications and technology, food and drug administration, airlines and others). Yet pertinent research has paid almost no attention to the industry arguably most affected by law and legislative trends, gambling. Gambling is broadly defined as the chance to win a prize for a price.⁵ The gambling or gaming industry (terms encountered interchangeably among international scholars) encapsulates three components: the lottery market, the betting market, and casinos and video lottery games.⁶ In an industry with estimated revenue of approximately a quarter trillion US dollars globally in 2008,⁷ popular media and practitioners frequently comment that the illegal transactions taking place beyond the regulated borders of the industry amount to several billions more.⁸ It is thus imperative to identify the means by which legal and policy research can provide significant contributions to gambling firms' managers, regulators and the many stakeholders who populate this increasingly regulated industry.

The European Union (EU) economic zone is the highest revenue generator for the regulated gambling industry, and the most volatile owing to its multitude of legal systems.⁹ Several key corporations in global gaming, for example William Hill, Stanley Betting, Betfair and Ladbrokes, have headquarters in the EU, in the UK, Gibraltar, Malta or other jurisdictions with favourable regulatory frameworks. Considering the expansion of internet-based clientele for EU gambling operators beyond the borders of the EU, it is particularly important to

4 Bird, note 1 above.

5 A Kaburakis, US-EU Gambling and Sport Betting Comparative Analysis, 35th Annual Sports Lawyers Association Conference (Chicago, Illinois, USA, 15 May 2009).

6 D Korn and H Shaffer, 'Gambling and the Health of the Public: Adopting a Public Health Perspective' (1999) 15(4) *Journal of Gambling Studies* 289.

7 Kaburakis, note 5 above.

8 *Ibid.* See also D Hill, 'How Gambling Corruptors Fix Football Matches' (2009) 9(4) *European Sport Management Quarterly* 411.

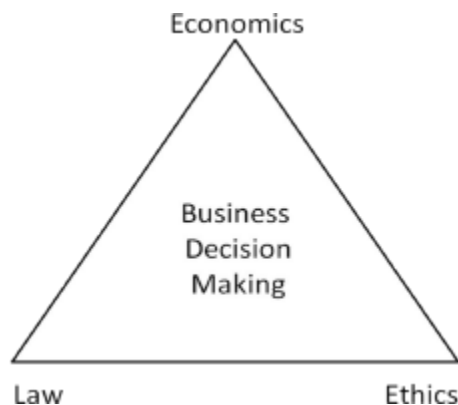
9 See, eg, D Doukas and J Anderson, 'The Dice is Loaded: Commercial Gambling and the European Court of Justice' (2008) 27 *Oxford Yearbook of European Law* 237; W Eadington, 'Gambling policy in the European Union: Monopolies, Market Access, Economic Rents, and Competitive Pressures Among Gaming Sectors in the Member States' (24 January 2011), www.unr.edu/gaming/Tillburg%20final%20draft%203-14-07.pdf; M Monov, 'The ECJ upheld its case law regarding online gambling services: towards 27 national gambling legislations?' (16 July 2010), <http://gaminglaweu.eu/news/the-ecj-upheld-its-case-law-regarding-online-gambling-services-towards-27-national-gambling-legislations>; T Veenstra, 'The battle of Europe: Pro and Contra the Liberalization of Gambling Services' (24 January 2011), www.idan.dk/upload/tjeerd_veenstra.pdf; P Vlaemminck, 'Where does Europe want to end: the gambling story' (24 January 2011), www.easg.org/files/malmo2005/presentations/Donderdag/Plenary2/philippe_vlaemminck.pdf; Kaburakis, note 5 above.

explain the present legal conditions in Europe.¹⁰ EU Member States' traditionally established restrictions mostly precluded firms from expanding operations such as online gambling, sport betting and developing regional points of contact to consumers (from major casino entertainment facilities to small licensed betting offices). Subsequent to significant progress towards the realisation of a European common market, EU states' authorities are charged with applying fundamental principles of European law such as the freedom to provide services, the freedom of establishment and fair competition to the gambling industry. Restrictions may be challenged before national courts and the European Court of Justice (ECJ) has frequently heard cases referred to it by Member States' courts. Currently, gambling services may be one of the most dynamic areas of EU policy, and legal strategists may provide meaningful value to gambling operators at times of legal and economic uncertainty.

Theory

In the several conceptual frameworks describing the law as strategy stream (key representations in Figures 1–4), fundamental legal concepts operate as key drivers of strategy towards sustainable competitive advantage. In the basic model presented in Figure 1, Siedel presents the underpinnings of business decision-making as legal, ethical and economic in nature, the cornerstone principles that affect an executive's decision and shift the course of strategy for a firm.¹¹

Figure 1: Siedel's basic model of business decision-making



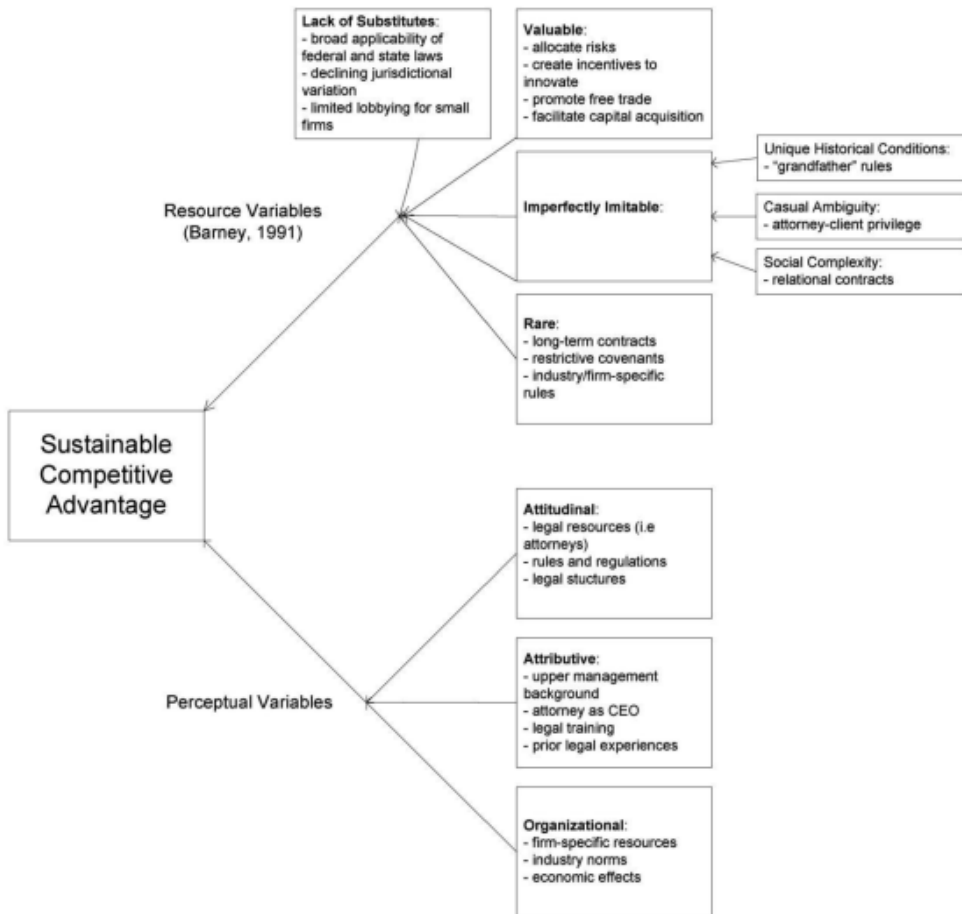
© 2002 Siedel

10 W Eadington, 'The Future of Online Gambling in the United States and Elsewhere' (2004) 23(2) *Journal of Public Policy and Marketing* 214; N Teufelberger, 'The tipping point for online gaming' (24 October 2010), www.egba.eu/pdf/EGBA-News-Issue6.pdf; P Vlaemminck and P De Wael, 'The European Union Regulatory Approach of Online Gambling and its Impact on the Global Gaming Industry' (2003) 7 *Gaming Law Review* 177.

11 Siedel, note 2 above.

In Figure 2, Bird expands on the resource-based view theory, complementing his sustainable competitive advantage model with perceptual prerequisites.¹²

Figure 2: Sustainable competitive advantage: resource and perceptual prerequisites

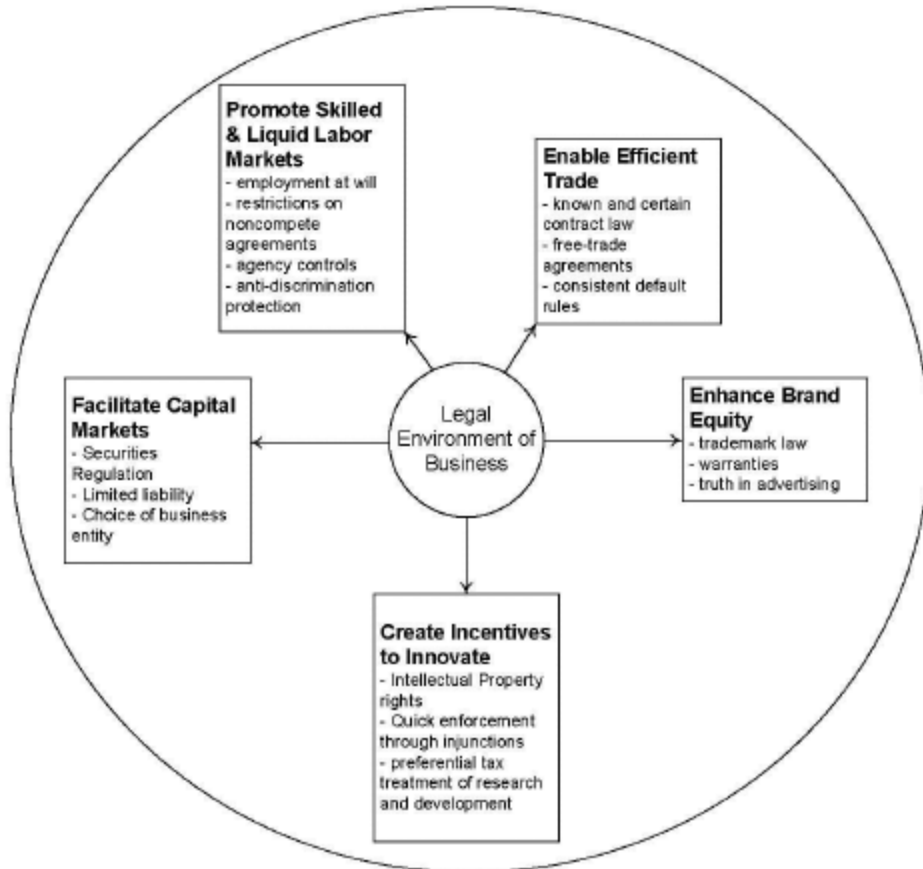


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¹² Bird, note 1 above.

In the ensuing models extended from Bagley's work, the identification of, and the opportunity to determine, what will be considered legal in each circumstance is instrumental.¹³

Figure 3: How the legal environment facilitates business strategy (adapted in part from Bagley (2005))



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¹³ Bagley, 'What's Law Got to Do With It?', note 1 above; Bagley, 'Winning Legally: The Value of Legal Astuteness', note 1 above; Bagley, 'Winning Legally', note 2 above.

Table 4: Using law to affect the competitive environment

<i>Public Policy Objectives</i>	<i>Porter's Five Forces</i>				
	<i>Direct Competition</i>	<i>Threat of Entry</i>	<i>Substitution</i>	<i>Supplier Power</i>	<i>Buyer Power</i>
Promote economic growth	Obtain development subsidies, tax breaks for domestic firm; litigate application of antitrust laws	Secure patents and other intellectual property rights; lobby for protectionist tariffs to advantage domestic firms	Secure trademarks; bundle products	Enter into long-term supply contracts	Secure cost-plus government contracts and no-bid contracts from Department of Defense; enter into exclusive dealing contracts; use contracts or IP to bundle products
Protect worker interests	Restrict availability of visas needed by rivals; lobby for tighter OSHA or FDA regulations to detriment of lesser rivals	Seek limits on overseas outsourcing	Enter into employment agreements with covenants not to compete; subject stock to vesting	Litigate definition of "employee"	Lobby for ban on products made with child or slave labor
Promote consumer welfare	Seek to outlaw competing products on safety grounds; promote expedited regulatory approval of generic drugs; disclose product ingredients and place of manufacture	Impose licensing regime; demand posting of bond by service providers	Seek to outlaw substitute products on safety grounds	Require labeling of "foreign" parts	Require purchasers to buy services from state-licensed providers
Promote public welfare	Obtain ethanol-style subsidies for firm's product; lobby for tougher environmental standards	Resist reforms designed to reduce the costs of incorporating, obtaining licenses, and issuing securities	Seek to grandfather existing products and facilities from new taxes and regulatory requirements	Lobby for reduced import duties on foreign suppliers	Lobby for domestic content requirements and higher transportation taxes; promote bans on the payment of bribes

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In Table 4, 'Using law to affect the competitive environment', Bagley describes 'how managers can use law to affect the five forces, organized by the public policies furthered by business regulation'.¹⁴ Academics and practitioners focusing on gambling frequently need to determine whether a particular form of gambling services is considered legal, under which circumstances, in which jurisdiction and how gambling operators may both utilise and influence the regulatory environment. This research adapts Bagley's framework,¹⁵ applying Porter's Five Forces model to law as a source for competitive advantage. To that end, findings from ECJ jurisprudence and EU law as expressed in Member States' policies yield insight on each aspect of the model, alerting managers and legal strategists of public policy considerations and opportunities to affect the competitive environment.

Method

This study was delimited to ECJ jurisprudence and EU regulatory policy developments affecting the gambling industry. The major data source and focus of the analysis was the ECJ database, yielding useful information on jurisprudence and challenges of restrictive gambling policies in EU Member States by several stakeholders.¹⁶ Using ECJ decisions as the main focus of such

14 Bagley, 'What's Law Got to Do With It?', note 1 above, 598.

15 *Ibid.*

16 Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/j_6 (31 July 2011).

research affords researchers significant advantages. The ECJ is the highest juridical authority in the EU; hence, barring any legislative intervention to the contrary, ECJ decisions provide guidelines for EU Member States' governments and national courts in regard to the application of EU law on each legal problem, such as compliance of gambling restrictions with EU law principles. The ECJ database allows the researcher to access ECJ decisions, prior adjudications and the Advocates General opinions (original, impartial, broad and elaborate analyses by ECJ members who provide recommendations to ECJ judges). ECJ decisions act as the necessary summaries, featuring every pertinent aspect of each case; as such, they serve managers and researchers wishing to understand the crucial concepts that led to a certain decision. These published decisions provide an efficient way to research EU law application in every industry, and contribute to reliability and content validity of analysed data, as ECJ judges are the de facto authorities determining legal theory application on each problem. Moreover, ECJ decisions provide a normative benchmark for managers and regulators, as these decisions need to be respected by national courts and incorporated into EU Member States' policy. The primary data and ECJ decisions (encompassing every case the ECJ has heard on gambling and betting restrictions through the end of 2010) were juxtaposed with current policy developments from EU Member States, from secondary sources, such as the EU policy summary sites of EurActiv¹⁷ and GamingLaw.eu.¹⁸

Findings

Case law

Fundamental principles of EU law and related analysis on each case are available in earlier contributions.¹⁹ For the purposes of this article, the most significant provisions of EU law are found in the following Articles of the Treaty establishing the European Community:²⁰

17 EurActiv, www.euractiv.com/en.

18 GamingLaw.eu, www.gaminglaw.eu.

19 See, eg, A Kaburakis, 'European Union Law, Gambling, and Sport Betting. European Court of Justice, Member States Case Law, and Policy', in Robert Siekmann (ed), *Sport Betting and the Law* (TMC Asser Press, 2011).

20 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, 13 December 2007, 2007 OJ (C 306) 1 ('Treaty of Lisbon'). For an analysis of the recent (in effect 1 January 2009) Lisbon Treaty Articles' numeric transition and alignment with the former EC Treaty utilised herein, see Kaburakis, note 19 above. For consistency, because the content of these Articles has not changed, and as ECJ case law heretofore has only applied and cited the former EC Treaty Articles' numbers, no reference will be drawn to the new numbers in the Lisbon Treaty.

1. Article 43: ‘... [R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms...’²¹
2. Article 49: ‘... [R]estrictions on freedom to provide services... shall be prohibited...’²²

A summary of ECJ case law applicable to gambling restrictions is found in Figure 5.

Table 5: ECJ jurisprudence on gambling – summary

(Outcomes column key: bold underlined: pro-restrictions; bold: anti-restrictions)

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler</i> ('Schindler')	C-275/92	1. Whether national legislation prohibiting the holding of certain lotteries in a Member State was compatible with EU law.	1. The importation of lottery advertisements and tickets is a service. 2. National legislation that prohibits lotteries is an obstacle to the freedom to provide services. 3. The Treaty provisions do not preclude legislation in view of social policy and the prevention of fraud.	Errs on the side of national regulations for restrictive practices/state monopolies. According to the Commission, it will not suffice merely to demonstrate that restrictive policies are justifiable; they may still be found incompatible with the EC Treaty if the public policy objectives could be pursued by less restrictive means.
<i>Vereingte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag</i> ('Familiapress')	C-368/95	1. Can Member State A prohibit an undertaking established in Member State B from selling in Member State A a periodical produced in Member State B, if it contains prize competitions or games that are lawfully organised in Member State B?	1. Unless the legislation of a Member State prohibits the sale on its territory of periodicals containing games or competitions for prizes... it impairs access of the product to the market of the Member State... and hinders free movement of goods. 2. Not precluding application of legislation... prohibiting the distribution... of a periodical... containing prize puzzles or competitions.	Lawful in one state... unlawful in another... OK if prohibition is proportionate to maintain press diversity and objective cannot be achieved by less restrictive means. Deferring to national court.

²¹ Treaty of Lisbon, Art 43.

²² *Ibid* Art 49.

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylän) and Suomen valtio (Finnish State) ('Läärä')</i>	124/97	1. Does national legislation that grants to a single public body exclusive rights to operate slot machines in the national territory... constitute an impediment to freedom to provide services, even if it applies without distinction?	1. If restrictions on freedom to provide services do not discriminate on grounds of nationality, they may be justified on grounds relating to the protection of consumers and the maintenance of order in society. It is for national authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially, to prohibit activities of that kind or merely to restrict them. The mere fact that a Member State has opted for a system of protection that differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end.	State 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 services.
<i>Questore di Verona v Diego Zenatti ('Zenatti')</i>	67/98	1. Whether the court's interpretation in Schindler, on the sale of lottery tickets, is equally applicable to national legislation regulating the taking of bets.	National rules that grant special or exclusive rights to certain undertakings to take bets on sporting events and consequently restrict the freedom to provide bookmaking services are not incompatible with the Treaty provisions on the provision of services if they are imposed as part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting.	Not absolute prohibition, rather 'an exception to the general prohibition'. 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.
<i>Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português ('Anomar')</i>	6/01	1. Whether the Portuguese legislation on the operation of and engagement in games of chance is compatible with Community law.	1. The operation of games of chance constitutes an economic activity within the meaning of Art 2. 2. Legislation that restricts the commercial operation of games of chance, including gaming machines, to casinos situated in certain areas stipulated by law, although constituting an obstacle to the freedom to provide services, is justified by public-interest requirements and is not disproportionate to those requirements. 3. The power of assessment a Member State enjoys in regulating games of chance is not circumscribed by the fact that other Member States may have regulated this field differently.	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...'. Within the margin of discretion that the national authorities enjoy.

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Reference for a preliminary ruling from the Tribunale di Ascoli Piceno: Piergiorgio Gambelli and Others</i> ('Gambelli')	243/01	1. Whether a Member State's national provisions concerning criminal proceedings must comply with Community law on the freedom of establishment and the freedom to provide services. Primary concern was whether the measures, considered from the point of view of the freedom of establishment, were proportionate.	1. The provisions of Arts 43, 49 et seq EC concerning the freedoms of establishment and services are to be interpreted as precluding national legislation, which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are in accordance with the legislation applicable in another state. Whether such restrictions would actually be justified by imperative requirements in the general interest, be suitable for achieving the objective that they pursue and not go beyond what is necessary in order to attain it and be non-discriminatory, is for the national court to decide...	First freedom of establishment violation (by creating a local sport betting monopoly). Established operators (Stanley UK) treated as criminals (Italy). Amicus curiae from most EU Member States pro-state. Diminution of tax revenues, not considered reason of overriding interest. Cannot exclude operators and concurrently incite betting via state monopoly (ie can't have your cake and eat it too).
<i>Diana Elisabeth Lindman v Skatterätelsenämnde</i> ('Lindman')	42/02	1. Whether Art 49 EC prohibits a Member State from treating winnings from lotteries held in another Member State as the winner's taxable income, whereas winnings from lotteries held in the Member State concerned are exempt from income tax.	1. Article 49 precludes national rules, like the Finnish rules, under which lottery winnings from lotteries held in other Member States are included in the taxable income of the winner on assessment to income tax, whereas lottery winnings from lotteries held in the Member State in question are exempt from tax.	Lotteries fall within the scope of Art 49, which precludes 'not only any discrimination, on grounds of nationality... but also any restriction on freedom to provide services, even if it applies to national providers and foreign ones alike'. (Such restrictions) need to be supported by statistical or other evidence, on the gravity of risks connected to participation in gambling, or establishing the causal relationship between it and risks.

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio ('Placanica')</i>	338/04	1. Whether (the first paragraph of Art 43 and the first paragraph of Art 49) may be interpreted as allowing Member States to derogate temporarily (for six to 12 years) from the freedom of establishment and the freedom to provide services within the EU, and to legislate as follows, without undermining those Community principles.	1. Articles 43 and 49 EC are to be interpreted as precluding national legislation that provides for prohibitions, enforced by criminal penalties, on the activities of collecting, taking, booking and forwarding offers of bets, without a licence or authorisation, whereas a permit had been issued by another Member State. 2. Licensure grants must be non-discriminatory, appropriate and proportionate. 3. Articles 43 EC and 49 EC must be interpreted as precluding national legislation that excludes companies whose shares are quoted on the regulated markets from the betting and gaming sector, as well as legislation that imposes a criminal penalty on persons pursuing the organised activity of collecting bets without a licence or a police authorisation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant them.	Stanley was not allowed to apply for licensure in Italy as it was a company quoted on the stock exchange. Placanica had not applied for a licence, whereas the other two defendants had, receiving no reply by the police authorities in charge. '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' (Per AG Colomer): Rien ne va plus (ie the court should remain silent no longer, and provide guidance to national courts).
<i>Commission of the European Communities v Italian Republic ('Italian Republic')</i>	260/04	1. In 1999, Italian authorities renewed 329 horse-race betting licences without a prior tendering procedure. The Commission seeks a declaration that Italy thereby infringed the requirements of transparency and publicity present in the Treaty provisions on freedom of establishment and freedom to provide services.	1. By not ensuring a sufficient degree of advertising, and by renewing the existing 329 horse-racing betting licences without inviting competing bids, the Italian Republic has infringed the general principle of transparency and the obligation to advertise, which follow from the provisions of the EC Treaty on the freedom of establishment in Art 43 et seq and the freedom to provide services in Art 49 et seq. 2. Betting services are public service concessions and need to comply with the principles of Treaty Arts 43 and 49.	Considerations of a purely economic or administrative nature cannot justify restricting the freedoms laid down by the Treaty.

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Bwin v Santa Casa')</i>	42/07	<p>1. Whether the monopoly against a provider of services established in another Member State constitutes an impediment to the free provision of services, freedom of establishment and the free movement of payments enshrined in Arts 49, 43 and 56.</p> <p>2. Whether it is contrary to Community law to establish a lotteries and off-course betting monopoly, and then to extend that monopoly to the entire national territory, including the internet.</p>	<p>1. Legislation by which the exclusive right to organise and operate lotteries and off-course betting on the entire territory of that state is extended to all electronic means of communication, constitutes a technical regulation.</p> <p>2. It is for the national court to ascertain whether the legislation has been notified.</p> <p>3. (a) Article 49 does not preclude legislation by which the exclusive right to lotteries and off-course betting on the entire territory of that state, conferred on a single non-profit-making body controlled by that state, is extended to all electronic means of communication, if that legislation is justified by overriding reasons relating to the public interest, if it is appropriate for ensuring the attainment of the objectives that it pursues, if it does not exceed what is necessary for attaining them, and if it is applied in a non-discriminatory way; (b) It is incumbent on the national court to ascertain that those conditions are fulfilled.</p> <p>4. In view of the risks created by games of chance and gambling on the internet, a Member State may legitimately restrict the right to organise and operate such games with the aim of protecting consumers and maintaining public order.</p> <p>5. Such legislation is appropriate if it enables the Member State to direct and control effectively the organisation and operation of those games and if the Member State does not manifestly exceed its margin of discretion.</p> <p>6. The grant of an exclusive right to a single non-profit-making entity controlled by the Member State may constitute a measure proportionate to the attainment of such objectives.</p> <p>7. Such legislation is not, as such, discriminatory.</p>	<p>The fact that one Member State considers one gambling provider a legitimate company and grants it a licence does not mean that other Member States should also accept it, contrary to their own determinations and policy considerations. 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 Art 49 violation. Fight against crime an overriding reason. Allegation that Bwin, or another sport betting and gambling provider, might be in a position to influence sporting results. Santa Casa's long history, spanning more than five centuries, and its societal, bona fide, tax-exempt functions are evidence of that body's reliability.</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Sporting Exchange Ltd, trading as 'Betfair' v Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator ('Betfair')</i>	203/08	<p>1. Whether Art 49 precludes legislation under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.</p> <p>2. Whether the case law developed by the court in relation to the interpretation of Art 49, to the principle of equal treatment and the consequent obligation of transparency, in the field of service concessions is applicable to the procedure for the grant of a licence to a single operator in the field of games of chance.</p> <p>3. Whether the renewal of a licence without competitive tendering can be a suitable and proportionate means of meeting objectives based on overriding reasons in the public interest.</p>	<p>1. Article 49 must be interpreted as not precluding legislation under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State. The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values. The restrictive measures they impose must, however, satisfy the conditions of proportionality. Therefore, the fact that only one operator is licensed 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.</p> <p>2. 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, insofar 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.</p>	<p>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. [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.</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator ('Ladbrokes')</i>	258/08	<p>1. Whether national legislation, which seeks to curb addiction to games of chance and to combat fraud, 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.</p> <p>2. Whether it is for the national courts to determine if the measure intended to ensure compliance with that legislation is suitable for achieving its objective and is compatible with the principle of proportionality.</p> <p>3. Whether Art 49 EC must be interpreted as precluding legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.</p>	<p>1. National legislation, which seeks to curb addiction to games of chance and to combat fraud, <u>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.</u> It is for the national court to determine whether unlawful gaming activities constitute a problem, 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.</p> <p>2. National courts are not required to determine whether the implementing measure intended to ensure compliance with that legislation is suitable for achieving its objective 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 restriction over and above that which arises from the legislation itself.</p> <p>3. Article 49 must be interpreted as <u>not precluding</u> legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.</p>	<p>Whereas outright aggressive marketing and bottom-line, profit-driven strategies by a state-licensed 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 practices, along with the rationale of curbing overall gambling addiction and channelling betting into 'bona fide' public benefit outlets.</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
<i>Otto Sjöberg and Anders Gerdin v Swedish State</i> ('Sjöberg and Gerdin')	C-447/08 C-448/08	<p>1. Can Swedish legislation, which makes gambling subject to a system of exclusive rights in order to combat crime and protect consumers, be considered proportionate to those objectives when it also has the objective of financing social activities, when marketing of gaming by licensed providers is not subject to any restriction? Does the fact that an internet gaming company is licensed, in the Member State where it is established, to carry on its activities in that state, preclude another Member State from prohibiting the promotion of that company's online gaming within its territory?</p> <p>2. Does the legislation at issue comply with Community law even though it imposes criminal penalties only for promoting lotteries organised in other Member States and not for advertising lotteries organised in Sweden without a licence?</p>	<p>1. Article 49 must be interpreted as not precluding a Member State's rules reserving the right to operate gambling to licensed operators carrying on their activity under the strict control of the public authorities for the purpose of protecting consumers against the risks of fraud and crime, which prohibit the advertising of internet gaming offered by companies established in other Member States.</p> <p>2. Article 49 EC precludes a Member State's rules, which make gambling subject to a system of exclusive rights, under which anyone who promotes participation in internet gaming organised by a company established in another Member State is liable to criminal penalties, whereas anyone who promotes participation in such gaming organised within the national territory without a licence does not incur such penalties.</p>	Swedish non-profit legal entities may be licensed 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. Editors and publishers of newspapers in Sweden promoted the gambling services of foreign-established companies.
<i>Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein</i> ('Carmen Media')	C-46/08	<p>1. Is Art 49 to be interpreted as requiring 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 (sic) as well?</p> <p>2. Is Art 49 to be interpreted as precluding a national sports betting and lotteries monopoly, justified on</p>	<p>1. 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.</p>	Court was very concerned with the internet as a betting tool, because it is overly convenient. Court feared that this would lead to increased gambling addiction. If a prior administrative authorisation scheme is to be justified, even though it

Case Name	Citation	Overview/Issues	Outcome	Highlights
		<p>the grounds of combating the risk of gambling addiction, whereas other games of chance may be provided in that Member State by private providers?</p> <p>3. Is Article 49 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?</p> <p>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 their online operation and brokering are permitted, subject to legislation protecting minors and players, for the purposes of 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]?’</p>	<p>2. 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 combating gambling addiction, yet a national court establishes at the same time:</p> <ul style="list-style-type: none"> – 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 pose a higher risk of addiction than the games that 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; <p>that 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.</p> <p>The fact that the games of chance subject to the said monopoly fall within the competence of the regional authorities, whereas other types of games of chance fall within the competence of the federal authorities, is irrelevant.</p> <p>3. Where a system of prior administrative authorisation is established in a Member State for the supply of certain types of gambling, such a system is lawful only if it is based on criteria that 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. Any person affected by a restrictive measure based on such derogation must have an effective judicial remedy available.</p>	<p>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 derogation must have an effective judicial remedy available to them. Grand Chamber appears greatly influenced by the referring court’s concerns and critical stance towards Germany’s own restrictive policy mechanism. State operators themselves engage in the gambling business, 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 six years.</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
			<p>4. National 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 and protecting young persons may be regarded as suitable for pursuing such legitimate objectives, even if the offer of such 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.</p>	
<p><i>Staatsanwaltschaft Linz v Ernst Engelmann ('Engelmann')</i></p>	<p>C-64/08</p>	<p>1. Is Art 43 to be interpreted as precluding a provision that posits that only public limited companies established in the territory of a particular Member State may operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State? 2. Are Arts 43 and 49 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 in the Member State concerned to limit gaming, 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 magazines) in a manner that goes</p>	<p>1. 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. 2. The obligation of transparency flowing from Arts 43 and 49 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.</p>	<p>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. Twelve licensed 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. 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 Arts 43 and 49, and the overarching precondition of transparency.</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
		<p>as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made?</p> <p>3. Are Arts 43 and 49 to be interpreted as precluding a provision under which all concessions 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?</p>		
<p>Markus Stoß (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07), Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automaten-Service Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07), Andreas Kunert (C-360/07) v Land Baden-Württemberg</p>	<p>C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07</p>	<p>(1) Are Arts 43 and 49 EC to be interpreted as precluding a national monopoly on certain gaming, such as sports betting, where there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, in particular because the operators that have been granted a licence within that Member State encourage participation in other gaming – such as state-run lotteries and casino games – and, moreover, other games with the same or a higher suspected potential danger of addiction – such as betting on certain sporting events ([for example,] horse racing) and automated games – may be provided by private service providers?</p>	<p>1. On a proper interpretation of Arts 43 EC and 49 EC:</p> <p>(a) in order to justify a public monopoly on bets on sporting competitions and lotteries, such as those at issue in the cases in the main proceedings, by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, the national authorities concerned do not necessarily have to be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter;</p> <p>(b) a Member State's choice to use such a monopoly rather than a system authorising the business of private operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework is capable of satisfying the requirement of proportionality, in so far as, as regards the objective concerning a high level of consumer protection, the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that</p>	<p>The Grand Chamber dismissed the request to reopen oral procedure, which the plaintiffs based on a study dating from 2009 ordered by the German Länder, concerning the risks of addiction connected with sporting bets and with measures suitable for combating such risks; this study appears to have been subject to some manipulation. It cannot be inferred that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies (proportionality) requirements, solely on the</p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
		<p>(2) Are Articles 43 [EC] and 49 EC to be interpreted as meaning that authorisations to operate sports betting, granted by state bodies specifically designated for that purpose by the Member States, which are not restricted to the particular national territory, entitle the holder of the authorisation and third parties appointed by it to make and implement offers to conclude contracts also in other Member States without any additional national authorisations being required?</p> <p>And</p> <p>(1) Are Arts 43 and 49 EC to be interpreted as precluding a national monopoly on certain gaming, such as sports betting and lotteries, where there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, because the operators which have been granted a licence within that Member State encourage and advertise participation in other gaming – such as state-run sports betting and lotteries – and, moreover, other games with the same or even higher potential danger of addiction – such as betting on certain sporting events (horse racing), automated games and casino games – may be provided by private service providers?</p>	<p>the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities;</p> <p>(c) the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring compliance with such a monopoly by organisers of games and bets established outside that Member State, who, via the internet and in breach of the said monopoly, conclude bets with persons within the territorial area of the said authorities, is not capable, as such, of affecting the potential conformity of such a monopoly with the said provisions of the Treaty;</p> <p>(d) in a situation where a national court finds, at the same time:</p> <ul style="list-style-type: none"> – that advertising measures emanating from the holder of such a monopoly and relating to other types of games of chance that it also offers are not limited to what is necessary in order to channel consumers towards the offer emanating from that holder by turning them away from other channels of unauthorised games, but are designed to encourage the propensity of consumers to gamble and to stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities, – that other types of games of chance may be exploited by private operators holding an authorisation, and – that, in relation to other types of games of chance not covered by the said monopoly, and which, moreover, present a higher potential risk of addiction than the games subject to that monopoly, the competent authorities are conducting or tolerating 	<p>ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue.</p> <p>The establishment of a measure as restrictive as a monopoly, justified only for a particularly high level of consumer protection, must be accompanied by a legislative framework ensuring that the monopoly will be able to pursue, in a consistent and systematic manner, the objective, by means of a supply that is quantitatively measured and qualitatively planned, and subject to strict control by the public authorities.</p> <p>A Member State cannot be denied the right to extend to the internet the application of the unilateral restrictive rules that it adopts for legitimate purposes in the public interest simply because that technological medium has a character that is in essence transnational.</p> <p><i>Having regard to margin of discretion and the absence of any Community harmonisation, a duty mutually</i></p>

Case Name	Citation	Overview/Issues	Outcome	Highlights
		<p>(2) Are Arts 43 and 49 EC to be interpreted as meaning that authorisations to operate sports betting, granted by the competent state bodies of the Member States, which are not restricted to the particular national territory, entitle the holder of the authorisation and third parties appointed by it to make and implement offers to conclude contracts in other Member States as well without any additional national authorisations being required?</p>	<p>policies of expanding supply, of such a kind as to develop and stimulate gaming activities, in particular with a view to maximising revenue from the latter, the said national court may legitimately be led to consider that such a monopoly is not suitable for guaranteeing achievement of the objective for which it was established, of preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner.</p> <p>2. On a proper interpretation of Arts 43 EC and 49 EC, in the current state of EU law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer games of chance does not prevent another Member State, while complying with the requirements of EU law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.</p>	<p><i>to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law.</i></p>

The analysis yields useful findings both on procedural and substantive elements for managers and legal advisers in the gambling industry. On procedure, this research identifies important points for plaintiffs' and defendants' burden of proof:

- A first step is to confirm the jurisdiction of the ECJ. This may be problematic considering the ECJ often defers to the national courts.²³
- Another precondition is to test whether precedent (from ECJ case law) is applicable to the industry at hand (eg are lotteries and sport betting regulations substantially similar for the purposes of ECJ examination?).²⁴
- An immediate next step is to identify the section and principle of EU law in question (eg freedom of establishment, freedom to provide services, principle of proportionality, etc).²⁵
- After focusing on the legal elements of the case, the court deliberates on whether the challenged regulation or restrictive policy may indeed be a violation of the Treaty provisions. When multiple sections of the Treaty are examined, the court progressively tests the regulations against each one.²⁶
- Once the policy is found in violation of the Treaty, the most elaborate part of the analysis commences. In order for the restrictions to be deemed justifiable, they need to be:
 - applied without distinction, in a non-discriminatory manner;²⁷
 - reasonable owing to overriding reasons and imperative requirements the state advocates (eg public policy, security, health, consumer protection, social order, prevention of fraud and crime, etc; state

23 Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio* [2007] ECR I-01891, paras 27, 73.

24 Case C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-01039, para 60; Case C-67/98, *Questore di Verona v Diego Zenatti* [1999] ECR I-07289, para 19.

25 Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, para 25.

26 *Ibid*, para 45; Case C-42/02, *Diana Elisabeth Lindman v Skatterättelsenämnde* [2003] ECR I-13519, para 20; Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio* [2007] ECR I-01891, para 42.

27 Case C-67/98, *Questore di Verona v Diego Zenatti* [1999] ECR I-07289, para 34; Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 65, 70; Case C-42/02, *Diana Elisabeth Lindman v Skatterättelsenämnde* [2003] ECR I-13519, para 21; Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio* [2007] ECR I-01891, paras 38–42; Case C-260/04, *Commission of the European Communities v Italian Republic* [2007] ECR I-07083, paras 34–36; Case C-203/08, *Sporting Exchange Ltd, trading as 'Betfair' v Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator* [2010] 3 CMLR 41, para 28; Joined Cases C-447/08 & C-448/08, *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2011] 1 CMLR 11, paras 49–50; Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2011] 1 CMLR 19, paras 86–87; Case C-64/08, *Criminal Proceedings against Ernst Engelmann* [2011] 1 CMLR 22, paras 38–40, 49–55.

- fortification via taxation or redistribution of the revenue accrued to other state interests alone does not suffice);²⁸
- suitable for achieving the objective that the restrictions pursue (eg limiting betting activities in a consistent and systematic manner);²⁹
 - resulting in a genuine diminution of gambling opportunities (therein lies the inherent conflict between state-run lotteries and betting monopolies, and contradictory restrictive practices against independent competitors);³⁰
 - 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;³¹
 - within what is necessary and not going beyond that point, in order to attain the objective pursued (thus requiring comparative analysis to determine whether less restrictive means would be available as equally effective alternatives, such as reconsidering criminal prosecution or checking the status of registration and the financial history of a prospective betting operator licensed in another jurisdiction).³²

28 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyöttäjä (Jyväskylän) and Suomen valtio (Finnish State)* [1999] ECR I-06067, para 13; Case C-67/98, *Questore di Verona v Diego Zenatti* [1999] ECR I-07289, paras 24, 26, 30, 33–34; Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 41–43, 60; Case C-42/02, *Diana Elisabeth Lindman v Skatterättelsenämnde* [2003] ECR I-13519, paras 15, 23; Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633, paras 63–65; Case C-203/08, *Sporting Exchange Ltd, trading as 'Betfair' v Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator* [2010] 3 CMLR 41, paras 27–34; Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] 3 CMLR 40, paras 38, 55; Joined Cases C-447/08 & C-448/08, *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2011] 1 CMLR 11, paras 49–50; Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2011] 1 CMLR 19, paras 98–104.

29 Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 67 *et seq*; Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* [2007] ECR I-01891, paras 105–114; Case C-260/04, *Commission of the European Communities v Italian Republic* [2007] ECR I-07083, paras 30 *et seq*.

30 Case C-67/98, *Questore di Verona v Diego Zenatti* [1999] ECR I-07289, para 24; Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 47–49, 68–72; Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* [2007] ECR I-01891, paras 57–58.

31 Case C-42/02, *Diana Elisabeth Lindman v. Skatterättelsenämnde* [2003] ECR I-13519, para 26.

32 Case C-67/98, *Questore di Verona v Diego Zenatti* [1999] ECR I-07289, paras 28, 37; Case C-243/01, *Criminal Proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, para 65; Case C-338/04, *Procuratore della Repubblica v Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* [2007] ECR I-01891, paras 57–58 and A G Colomer Opinion para 126; Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633, paras 59 *et seq*.

Some substantive findings include:

- significant inconsistency among EU Member States in respect to gambling restrictions and public policy considerations;
- prior to the latest decisions in September 2010, considerable variance in the ECJ's decisions on gambling restrictions;
- subsequent to *Carmen Media*³³ and *Engelmann*,³⁴ decided in September 2010, national courts and legislatures in Europe have more guidance from the ECJ and such guidance renders gambling restrictions in favour of state monopolies and exclusive licensees considerably more difficult to uphold under Articles 43 and 49 scrutiny; more specifically, the ECJ pre-empts legislation:
 - favouring gambling operators from particular Member States;³⁵
 - granting exclusive licences to any service provider without a competitive procedure, thus upholding principles of transparency, equal and fair treatment, as well as non-discrimination on the grounds of nationality;³⁶
 - restricting the freedom to provide services for internet gambling and sport betting operators with an authorisation in a Member State, wishing to provide services in another Member State, in which they have established business;³⁷
 - allowing a national or regional monopoly under the objectives of limiting gambling addiction and negative public influences, while concurrently permitting private operators to develop other games of chance, as well as attempting to maximise revenue by expanding supply of such alternative gaming outlets;³⁸
 - permitting arbitrary discretion for national gambling authorities issuing licences, and not affording judicial recourse to adversely affected parties;³⁹
 - 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.⁴⁰

33 Case C-46/08 [2011] 1 CMLR 19.

34 Case C-64/08 [2011] 1 CMLR 22.

35 *Ibid.*

36 *Ibid.*

37 Case C-46/08, *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] 1 CMLR 19.

38 *Ibid.*

39 *Ibid.*

40 Joined Cases C-447/08 & C-448/08, *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2011] 1 CMLR 11, paras 49–50.

- The ECJ further decided to uphold restrictive measures against internet gambling as compatible with EU law, for the purposes of preventing the squandering of money on gambling, combating addiction and protecting young and poor populations, even in cases where similar gaming alternatives are available through traditional means.

Policy summary

Following *Carmen Media*⁴¹ and *Engelmann*,⁴² several European legislatures have moved towards amendments of restrictive regulatory frameworks and more regulation of gambling. Among the most notable developments is the unprecedented prospect of gambling regulation (as opposed to liberalisation according to Franssen)⁴³ in the Netherlands. As Franssen notes, subsequent to the autumn 2010 Dutch elections, 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...' with a focus on matters of taxation, international liquidity, and a framework that according to Dutch authorities should bring in approximately €10 million shortly on licensing online gambling,⁴⁴ and up to €270 million annually.⁴⁵ Furthermore, Franssen, the European Gaming and Betting Association,⁴⁶ the Remote Gambling Association⁴⁷ and Vlaemminck and De Wael⁴⁸ among others call for harmonisation of the regulatory framework on gambling in Europe.

Verbiest explains the 'right to bet' policy in the new French Gaming Law, and underscores the important contractual relationship and licensing

41 Case C-46/08 [2011] 1 CMLR 19.

42 Case C-64/08 [2011] 1 CMLR 22.

43 J Franssen, 'New Government Spells Overnight Change For Dutch Gambling' (24 January 2011), <http://gaminglaweu.eu/videos/1871>.

44 *Ibid.*

45 D Naaktgeboren, 'Online gambling is to be liberalized. The new Dutch Cabinet, formed by Mark Rutte, believes that in time this will rake in hundreds of million Euros yearly' (8 October 2010), <http://gaminglaweu.eu/news/online-gambling-is-to-be-liberalized-the-new-dutch-cabinet-formed-by-mark-rutte-believes-that-in-time-this-will-rake-in-hundreds-of-million-euros-yearly>.

46 European Gaming and Betting Association, 'Regulated online gaming industry calls for full EU harmonisation' (13 October 2010), www.egba.eu/en/press/553.

47 Press Release from Remote Gambling Commission, 'Dutch report short off mark' (23 August 2010), www.rga.eu.com/data/files/Pressrelease/rga_press_release_commission_jansen_24.08.pdf.

48 P Vlaemminck and P De Wael, 'The European Union Regulatory Approach of Online Gambling and its Impact on the Global Gaming Industry' (2003) 7(3) *Gaming Law Review* 177.

schemes necessary in order to offer sport betting in France.⁴⁹ Sport betting providers need to negotiate and receive fair terms by the sport organisations for betting services and products, monitored by the competition authorities, avoiding unfair and anti-competitive practices. Verbiest further analyses concerns over dominant position abuses, for example traditionally established monopolies and state-run or state-affiliated providers obtaining a favourable position in negotiations and licensing rights, and the prospects of competition distortion in favour of incumbents versus new entrants.⁵⁰ Exclusionary and concealed or patently anti-competitive practices (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.⁵¹ New operators in France need to acquire a French gambling licence and report to the French gambling regulatory body. Licensed operators are subject to stakes-based tax rates of 8.5 per cent for sports betting, 15.5 per cent for horse racing betting and two per cent for online poker. Licences are granted to operators established in the European economic zone and these operators will not have to relocate to France.⁵²

Asensi summarised Spanish policy directions found in the Ley 56/07 de Medidas de Impulso de la Sociedad de la Información – Law on Measures to Develop the Information Society:⁵³

- Each type of game will require a specific class of licence.
- The operator can be a Spanish or EU 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 it 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 a licence.
- The Central Game Unit will have to be connected with the regulator 24/7 so that it is possible to register all the activities.

49 T Verbiest, ‘The Interface Between Ex Ante Online Gambling Sector-Specific Regulation And Ex Post Competition Rules: Legal Analysis Of The French Model’ (4 November 2010), <http://gaminglaweu.eu/news/xthe-interface-between-ex-ante-online-gambling-sector-specific-regulation-and-ex-post-competition-rules-legal-analysis-of-the-french-model>.

50 *Ibid.*

51 *Ibid.*

52 Harris Hagan Newsletter, ‘France and Italy One Step Further to Open Their Gambling Market’ (November 2009) at 2, <http://gaminglaweu.eu/wp-content/uploads/2010/08/300-1.pdf>.

53 S Asensi, ‘Spain: First Guidelines About the Future of Online Regulation’ (12 October 2010), <http://gaminglaweu.eu/news/spain-first-guidelines-about-the-future-of-online-regulation>.

- 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 three months from filing. Administrative silence (ie no formal response within three 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). The Spanish Government is considering several options of taxation systems:
 - corporate tax, levying gaming activities with a tax on players' wins. An initial deduction of 19 per cent on each prize – in accordance with the capital return tax – would be applied in conjunction with a finite payment on the income tax return; or
 - following the French system (eg 8.5 per cent tax on each sport bet); or
 - following the model of the Madrid and the Basque Country regions (ten per cent tax on a win).

Owing to LAE's internal restructuring and the financial strain several EU Member States are experiencing, regional authorities (eg Madrid, Basque Country) issue their own sport betting authorisations. In addition, the traditional land-based gambling sector implements defensive tactics of pre-emptive litigation and administrative complaints to uphold interests in view of expansion in the online gambling industry.⁵⁴ Thus far, however, Spanish national gambling policy adjustments are pending.

Belgium, conversely, passed a new Gaming Law in 2009, that went into effect on 1 January 2011. A licensing system is imposed for all games of chance, including but not limited to poker, sports and horse race betting, except for lotteries that 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 grants licences to both offline and online gambling operators.⁵⁵ It is important to note that such restrictive policies were introduced subsequent to the controversial⁵⁶ pro-restrictions' *Liga Portuguesa*⁵⁷ ECJ judgment in September 2009, and prior to the ensuing anti-restrictions' ECJ decisions in September 2010. Verbiest observes these restrictions may raise anti-competitive and Articles 43 and 49 freedoms' concerns, in particular the obligation to receive a land-based

⁵⁴ *Ibid.*

⁵⁵ T Verbiest, 'The New Belgian Gaming Legislation: B2B Model For Online Gambling Operators' (12 March 2010), <http://gaminglaweu.eu/news/the-new-belgian-gaming-legislation-b2b-model-for-online-gambling-operators>.

⁵⁶ L Rebeggiani, 'The Liga Portuguesa Decision of the European Court of Justice – An Economist's View' (2009) 5(3) *Rivista di Diritto ed Economia Dello Sport* 111.

⁵⁷ Case C-42/07 [2009] ECR I-07633.

licence for online providers, whereas Belgium grants a finite number of licences.⁵⁸ Verbiest posits the competition law scrutiny problem as well, in view of the anticipated business-to-business transactions between online gaming operators and land-based providers already licensed in a Member State.⁵⁹ He alerts stakeholders of the national and European competition law scrutiny of the 'ex ante online gaming regulation and ex post competition rules' reality.

The UK recently amended the Gambling Act of 2005. The UK's Gambling Commission aims to license any operator who targets British consumers online. Such a goal is difficult '... 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...'.⁶⁰

Italy, after failing to defend its restrictive policies in *Gambelli*,⁶¹ *Placanica*⁶² and *Italian Republic*,⁶³ introduced a 2009 law on fixed odds for online games of chance, including a controversial 20 per cent flat tax rate on all gross profits.⁶⁴ In Law 88/09,⁶⁵ Italian gaming policy developments are summarised as follows:

- An AAMS (Italian gaming regulator)-granted licence is required for the offer of remote gaming services to Italian residents.
- The cost of the licence is €360,000 payable on licence issue. All licences, regardless of effective date, will lapse on 30 June 2016.
- The remote gaming licence will cover fixed odds sports and horserace betting, skill gaming (including online poker and any other card tournaments eligible for skill gaming classification), online scratch-and-win, online bingo (subject to payment of an extra €50,000 fee), online casino and other games.
- The AAMS licence is open to any applicant based in a European Economic Area (EEA) jurisdiction.
- The licence may be issued directly to a foreign applicant provided he holds an EEA passport.

58 Verbiest, note 55 above.

59 *Ibid.*

60 T Verbiest, 'UK's Remote Gambling Regime To Be Reviewed In Light of Rapid Technological Advances' (4 February 2010), <http://gaminglaweu.eu/news/uks-remote-gambling-regime-to-be-reviewed-in-light-of-rapid-technological-advances>.

61 Case C-243/01 [2003] ECR I-13031.

62 Case C-338/04 [2007] ECR I-01891.

63 Case C-260/04 [2007] ECR I-07083.

64 Q Mancini, '2010 Outlook of the Italian gaming market' (13 January 2010), <http://gaminglaweu.eu/news/2010-outlook-of-the-italian-gaming-market>.

65 Legge 24 Giugno 2009, n 77 (It).

- The licence may be issued to a non-operator (such as a start-up or a company coming from a different business) subject to (i) release in favour of AAMS of a €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 to the centralised system ran by AAMS via its technological partner SOGEI, so that each 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 illegal and subject to prosecution.
- Anyone who provides online gaming services in Italy without holding an AAMS-granted licence is subject to imprisonment (six months to three years).
- Anyone who organises, offers and takes remote bets in Italy on any games regulated by AAMS in an unauthorised way, is subject to imprisonment (three months to one year) and to a fine ranging from €500 to €5,000, regardless of holding a valid AAMS licence.
- Foreign-based AAMS licensees are allowed to maintain their gaming servers abroad, provided they are located in the European economic zone, and maintain a real-time connection with the AAMS centralised system.
- The gaming software running on all games offered on the Italian platform must be certified by an AAMS-approved testing laboratory.⁶⁶

In his summary of Nordic countries’ gaming law and policy developments, Aho remarks that Denmark and Sweden are setting the pace for liberalisation and further regulatory evolution in 2011.⁶⁷ In both Denmark and Sweden, the impact of infringement proceedings and the risk of ensuing ECJ scrutiny led to the introduction of legislative bills and studies on the most appropriate options for gambling policy. The average tax rate of gross gaming revenue for sport betting prior to the liberalisation shift was 30 per cent.⁶⁸ 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

66 Mancini, note 64 above.

67 P Aho, ‘Overview of the Latest Developments in Gaming Legislation in the Nordic Countries’ (29 December 2009), <http://gaminglaweu.eu/archive/archive2009/overview-of-the-latest-developments-in-gaming-legislation-in-the-nordic-countries>.

68 M Ronde, ‘Denmark to End Gambling Monopoly’ (28 October 2009), <http://gaminglaweu.eu/archive/archive2009/denmark-to-end-gambling-monopoly>.

Commission of the country's progress towards upholding EU law and relaxing restrictive measures in favour of national monopolies and gambling schemes.

Arguably the most challenging and intriguing situation is the one taking place in Greece. The Greek Government is currently transforming Greek gaming law. This effort is part of the large-scale economic reform movement to meet European Commission, European Central Bank and International Monetary Fund (the *troika*) prerequisites to receive debt relief, so as to avoid a default. In pursuit of fiscal stability, the Greek Government has to cut expenditures, while also generating increased revenue. The latter may be accomplished through Ministry of Finance policies introduced in an omnibus bill adopted by the Greek Parliament on 4 August 2011.⁶⁹

Specifically, the portion of the new law (articles 25–54) regulating the gaming market in Greece also ensures that the partly state-owned Organismos Prognostikon Agonon Podosfairou (OPAP), the gaming giant and sport betting monopoly (#1 in Europe and among the top-ten gross gaming revenue generators in the world),⁷⁰ receives considerable exclusive benefits.⁷¹ This way the Greek Government attempts to sustain the competitiveness of OPAP (the only state – albeit partly – asset that is currently solvent in Greece), in hopes that the state's 34 per cent stake, or preferably a small portion of it, will become even more attractive to potential investors (privatisation and the pursuit of capital is a key direction of the reforms, aligned with the *troika*'s mandates).⁷² For example, there are 35,000 licences for video lottery

69 Reuters, 'Greek Parliament Passes Key Law Before EU/IMF visit' (4 August 2011), www.reuters.com/article/2011/08/04/greece-law-eu-idUSLDE7730W620110804.

70 Kaburakis, note 19 above.

71 At the time of writing the full law was unpublished at the *Fyllo Efimeridas Kiverniseos* (FEK), the official registry of the government for new legislation; without the FEK protocol number at this point, the omnibus bill is under: www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/r-anapt-pap.pdf, and the gaming law section may be retrieved under: www.mediafire.com/?9ui5xhx5z3nyx8n. Last-minute amendments passed on 4 August and transcripts (in Greek) of the heated discussion in Parliament under: www.hellenicparliament.gr/Praktika/Synedriaseis-Olomeleias?sessionRecord=1a0d999a-cbd1-427e-9dfc-2df495b24b96, and related commentary under www.infobeto.com/forum/f103.

72 See, eg, Yögonet, 'Greece may not sell its full stake in OPAP' (29 July 2011), www.yogonet.com/english/2011/07/29/greece-may-not-sale-its-full-stake-in-opap; Reuters, 'Greece may not sell OPAP stake' (28 July 2011), www.reuters.com/article/2011/07/28/greece-opap-idUSLDE76R0QT20110728. See also Ministry of Finance, 'Online Consultation Site' (31 January 2011), www.opengov.gr/minfin/?c=19391 for StanleyBet's arguments against the preservation of the current regime in Greece favouring OPAP and barring other competing operators. Following past attempts to set up branches in Greece, which were pre-empted by OPAP and Greek authorities, Stanley and William Hill appealed to Greek courts, reached the highest administrative court in Greece, the Council of State (Symvoulío tis Epikratias – StE), which in turn referred the matter of Greek law's (and in effect OPAP monopoly's) compliance with EU law to the ECJ in Case C-186/11, lodged on 20 April 2011: Reference for a preliminary ruling from the Symvoulío tis Epikratias (Greece) – *Stanleybet International Ltd, William Hill Organisation Ltd and William Hill plc v Ipourgos Ikonomias kai Ikonomikon and Ipourgos Politismou*.

terminals (VLTs), which OPAP is awarded at the outset. Of the total, 16,500 are assigned directly to OPAP, with the remaining 18,500 to be outsourced by OPAP to sub-licensees. Fifteen thousand gaming machines are to be set up at OPAP stores and 1,500 in the horse-racing monopoly's branches (article 39(2)).

Worthy of a separate investigation are several other sections of the new gaming law, whereby credit institutions – which players may utilise for games of chance online – need to be set up in Greece, licensees have to be residents of Greece, servers need to be located in Greece, domain names need to have the .gr identifier, betting exchanges are not allowed⁷³ (land-based), sport betting/horse-racing monopolies (OPAP/ODIE) and exclusive casino licences are preserved, gaming establishments (which can carry only up to 25 gaming machines/VLTs) should be located at least 5km away from existing casinos, and other provisions. Such provisions, prima facie, conflict with the fundamental principles of EU law (freedom of establishment, freedom to provide services, fair competition).⁷⁴ One more significant portion of the Greek gaming law, which regulated online gaming for the first time, is that companies, which have been generating gaming traffic from Greece, can receive licences if they willingly subject themselves to the new tax system retroactively (difficult to interpret which will be the correct determination of online operations' commencement, presumably the first time they did business with a customer from Greece). According to this new tax system, there is a 30 per cent tax on gross gaming revenue payable every three months (article 50(5)). There is also a ten per cent tax on winnings, payable every month by the licensees (article 50(9)). Procedurally, there is a six-month transition period for all operators to comply with the new licensing, tax and regulatory framework. However, this transitory period is not triggered until the government can hire staff and adopt the operating procedures for the

73 Particularly affecting Betfair's traffic from Greece. Betfair has consistently lobbied towards Commission action against Greek gaming policies, and similar complaints were expressed by collective bodies such as RGA, EGBA and others. See, eg, Remote Gambling Association, 'RGA Launches Greek State Aid Complaint' (4 October 2011), www.rga.eu.com/data/files/Press2/rga_state_aid_complaint_pr_final.pdf; European Gaming and Betting Association, 'Online Gaming And Betting: Greek Draft Law Draws Criticism From the European Commission' (7 July 2011), www.egba.eu/en/press/579/Greek-draft-law-draws-criticism-from-European-Commission.

74 Kaburakis, note 19 above. See also EurActiv, 'Greece Shuns EU Rules In Rush For Lottery Tax Revenue' (21 July 2011), www.euractiv.com/en/euro-finance/greece-shuns-eu-rules-rush-lottery-tax-revenue-news-506703, and Commission's and UK/Malta's concerns on the draft bill prior to its adoption in European Commission, 'Enterprise And Industry; Notification Number 2011/166/GR' (8 August 2011), http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2011&inum=166&lang=EN&NLang=EN.

key regulatory commission overseeing all aspects of the law's enforcement. Conceivably, given the political importance and sense of fiscal urgency for the Greek Government, this step will be taken shortly.

Greece has for years incurred millions of euros in fines, legal fees and a €31,536/day penalty for not regulating gaming.⁷⁵ The question remains: will the European Commission revisit past complaints and commence infringement proceedings (considering key provisions of this law, particularly referring to OPAP's status quo, clearly violate EU law and ECJ precedent, especially the recent *Carmen Media*, *Engelmann* and *Stoß* decisions), or consider this a 'special circumstance' given the continuous efforts of the Greek Government to raise revenue and meet bailout guarantees? And, if so, are European institutions running the risk of these 'special circumstances' becoming the norm and compromising fundamental principles of EU law?

On a pan-European level, it is important to highlight the Services Directive component.⁷⁶ 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 are the two main targets for the Directive. Alongside other services, gambling and sport betting were excluded under section (h), with this justification: '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.'⁷⁷ Nonetheless, Ellinas and Suleiman⁷⁸ found that 71 per cent of the nearly 200 high-level Commission managers interviewed were in favour of the Bolkestein Directive and the liberalisation of the services' sector in the EU. This finding is the most recent documentation of serious support behind a broader and deeper European integration in the services sector.

75 See European Parliament, 'Committee On Petitions; Notice To Members, Petition 1087/2002' (26 October 2009), www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/cm/794/794477/794477en.pdf. It is useful to note that Greece has consistently been a 'usual suspect' for EU law violations and a frequent defendant in cases handled by the ECJ: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf (statistics throughout 2010 render Greece in the top-three historically – although Greece joined the EU in 1981 and statistics date back to 1952 – of Member States for decisions rendered against it in the ECJ; impressively, Greece holds the top spot for most new ECJ cases lodged against it, just under 100, for the period 2006–2010).

76 European Commission, 'Directive on Services in the Internal Market' (31 July 2011), http://ec.europa.eu/internal_market/services/services-dir/index_en.htm.

77 Council Directive 2006/123, para 25, 2006 OJ (L 376/36) (EC).

78 A Ellinas and E Suleiman, 'Supranationalism in a Transnational Bureaucracy: The Case of the European Commission' (2011) 49(5) *Journal of Common Market Studies* 923.

Discussion

ECJ case law and EU gambling policy developments indicate that the gaming industry is entering a promising yet uncertain era in the EU. The several opportunities presented require consistent monitoring on the litigation front, and lobbying in the governmental relations and legislation arena. ECJ decisions, though insightful and instrumental in determining legal boundaries, do not ensure that there will be uniform handling of gambling in the EU. Efforts toward harmonisation,⁷⁹ occasionally by means of inquiries, intervention and commencement of infringement procedures against a Member State by the European Commission, may lead national authorities and courts to respect the ECJ's guidelines and prerequisites for acceptable restrictive practices. For the time being, there is significant variability and uncertainty in regard to national courts' decisions on licensure, authorisation, penalties, etc. The way a national court would decide on the scope of a 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 considerations of the gambling industry. For example, when and how is a Member State stimulating gambling in its territory? The lesson from *Carmen Media*⁸⁰ and the national court's stance on the German state's restrictive policy is valuable, and importantly illustrative of the impact well-researched, reasoned and balanced national courts' decisions may have not only on a national scale, but on a pan-European level, as translated by means of ECJ judgments.

The aforementioned analysis leads to certain useful conclusions in regard to using legal research as a strategy tool for managers in the gambling industry. In Table 6, one observes Bagley's model expanded from Porter's Five Forces, and its adaptation in, and application to, the European gambling industry.⁸¹

79 EurActiv, 'Commission Eyes EU Regulation of Online Gambling' (8 September 2011), www.euractiv.com/consumers/commission-eyes-eu-regulation-online-gambling-news-507351.

80 Case C-46/08 [2011] 1 CMLR 19.

81 Bagley, 'What's Law Got to Do With It?', note 1 above.

Table 6: Using law to affect the competitive environment: findings from EU legal and policy research and application to the gambling industry

Porter's Five Forces					
Public Policy Objectives	Direct Competition	Threat of Entry	Substitution	Supplier Power	Buyer Power
Economic growth	Work with sponsors and sport leagues (tax incentives via social welfare character of sport); B2B between land-based and online partners; litigate towards entry in restricted markets	Seek to obtain/maintain exclusivity or small number of licences; M&A; work with regulators to contain entrants	IP protection; horizontal and vertical integration	Market research and contracts with new providers; visit trade shows and carefully monitor gambling sites for trends	Secure licences; infiltrate new markets; lobby for amendments to restrictive regimes; B2B contracts; invest in innovation; seek exclusive contracts/ sponsorships with sport and entertainment organisations
Worker interests	Work with government agencies and licensing authorities on corruption avoidance and seek to uncover competitors' possible ties to organised crime; assist workers with relocation in new markets and EU zone incentives; lobby for tighter regulations against unlicensed actors	Lobby with government actors in each site to acquire prerequisites for local licensees and pre-empt outsourcing	Protect trade secrets/ covenants not to compete; provide line of gambling credit, lower vesting requirements; provide alternative employment options (from land-based to online, alternative products/ services...)	Corporate/ sponsors and suppliers discounts; joint lawsuits or litigate suppliers' challenges	Lobby for tighter restrictions on worker protection; educate workers on customer relations and provide waivers/ releases of liability
Consumer welfare	Ensure all products and services feature responsible gaming warnings and a problem gambling hotline; work with bona fide partners; narrow loyalty programmes and include other prerequisites (food, entertainment)	Demand tighter regulatory/ licensing and control schemes; raise licensing and entry fees	Scrutinise competitors, conduct elaborate industrial intelligence visits frequently; maintain student and young worker groups' social networks monitoring negative posts for competitors	Labels/ warnings	Create partnerships and lobby with professional organisations/ other licensees; promote fair trade and fair play in sport and sponsored events; create anti-corruption partnerships
Public welfare	Work with governments on balancing taxes and incentives; expand sport betting via licences with leagues, raising revenue for the grassroots; philanthropic initiatives and research/education funding	Resist easing restrictions on licensing and reducing fees; volunteer in peer accreditation and professional organisations service towards scrutiny of new entrants	Update existing infrastructure and equipment, invest in R&D, and seek new licences	Lobby and/ or litigate towards cost/fees control	International partnerships and lobbying efforts against corruption, problem gambling, towards good/ balanced regulation and effective enforcement

Continuous monitoring, strategic partnerships and lobbying with gambling stakeholders, regulators and governmental actors may provide a competitive advantage at times of uncertainty and volatility in international gaming. Further, key strategic alliances and investments such as sports leagues' sponsorships and betting licences through sports organisations (*Liga Portuguesa and Bwin Int'l*)⁸² may lead to sustainable competitive advantage. Importantly, profit considerations need to be balanced with consumer protections, particularly as they pertain to the mostly unregulated and highly profitable online gaming portion of the industry.⁸³

Conclusions

This study presented findings from ECJ jurisprudence and EU policy on gambling. In this process, this research contributes in the law as strategy stream, in which legal and policy research provides significant value by means of the adjudicated cases and adopted policies' data. The latter may be utilised by legal scholars, regulators, practitioners, business managers and gambling industry executives towards strategic actions to influence the competitive environment, and lead to a competitive advantage.

Future legal research needs to encapsulate more empirical research, economics⁸⁴ and analytics, for example on risks of gambling addiction (rendering certain restrictive policies permissible), which the ECJ welcomed,⁸⁵ yet did not mandate thus far in adjudications.⁸⁶ Further, the global gambling industry and such legal and policy research invite comparative contributions,⁸⁷ especially considering the value fragmented markets absent harmonisation may gain from the precedent of broadly restrictive and narrowly permissive frameworks such as the US.⁸⁸

82 Case C-42/07 [2009] ECR I-07633.

83 S Watson, P Liddell, Jr, R Moore and W Eshee, Jr, 'The Legalization of Internet Gambling: A Consumer Protection Perspective' (2004) 23(2) *Journal of Public Policy and Marketing* 209.

84 R Young, *Gambling and the EU Internal Market: Aspects of the Micro-Economics and Socio-Economics of Gambling*, Academy of European Law Conference on the Future of Gambling in the Internal Market (Trier, Germany, 8–9 February 2007), www.eer.co.uk/download/2007bobspeech.pdf.

85 Case C-42/02, *Diana Elisabeth Lindman v Skatterättelsenämnde* [2003] ECR I-13519, paras 25–26.

86 S Planzer, 'The ECJ on Gambling Addiction – Absence of an Evidence-Oriented Approach' (2010) 3 *European Journal of Risk Regulation* 289.

87 See, eg, D Doukas and J Anderson, note 9 above; W Eadington, note 9 above; Kaburakis, note 19 above; Swiss Institute of Comparative Law, *Study of Gambling Services in the Internal Market of the European Union* (2006), http://ec.europa.eu/internal_market/services/gambling_en.htm; W Thompson, C Lutrin and A Friedberg, 'Political Culture and Gambling Policy: A Cross-National Study' (2004) 8 *UNLV Gaming Research and Review Journal* 1.

88 Kaburakis, note 5 above.