

ONLINE GAMBLING IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE*

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I. Introduction

1. The Role of Internet Concerning Gambling

There is a constantly increasing number of cases concerning online gambling. Contrary to the vast body of case-law, the question of how interactive gambling should be regulated within the context of the internal market is still timely. The shift of gambling to the online environment has rendered it relatively inexpensive and convenient for both suppliers and consumers to provide and receive these kind of services. The internet has facilitated cross-border gambling and thereby established a relationship that increased the importance of these services from the perspective of the common market as well.

It must be stated at the outset that any restriction concerning the supply of games of chance (involving monetary value or interest) over the internet is more of an obstacle to operators established outside the Member State, in which the recipients benefit from the services. Outside operators, as compared with operators established in the particular Member State, would thus be denied a means of marketing that is particularly effective for directly accessing that market. The internet constitutes a simple channel through which games of chance may be offered.¹

The fact however, that a significant part of the gambling has changed to the online platform can not be considered as unambiguously positive, since this tendency can have very negative effects on both the individual and the whole society and can produce or at least intensify certain special

* The author would like to thank Judit Beke-Martos for her very helpful comments on this manuscript and for her support in writing this article.

¹ Case C-212/08 Zeturf Ltd v Premier ministre [2011] ECR 5633, p. 74-75. and cited case-law.

potential dangers. Anonymity and the lack of direct contact between consumer and operator makes money laundering possible and renders surveillance more difficult.² The specific characteristics of games of chance offered through the internet may prove to be a source of different kinds of risks and therefore, may require more stringent regulations within the area of consumer protection than the traditional markets for such games, particularly regarding the young persons and those with a propensity or a likelihood of developing such a propensity for gambling.³

2. The Unusually Wide Margin of Appreciation

Since a detailed regulation of gambling at European level still does not exist, Member States retain the right to decide whether a certain form of gambling is permitted within their jurisdiction. So gambling still remains an area completely untouched by secondary legislation; the Member States have the opportunity to regulate this very sensitive sector on their own. The lack of harmonisation is the reason for the various regulatory approaches in the European Union. Unless a particular form of gambling is prohibited within their jurisdiction, Member States either use an exclusive rights model or a licensing model. Frequently, no single approach is used for the entire national gambling market: distinctions are made between different forms of gambling for regulatory purposes. Moral, religious and cultural factors, and the morally and financially harmful consequences associated with gaming and betting for the individual and society, could serve to justify the existence of a margin of appreciation on the part of the national authorities, which suffices to enable them to determine what consumer protection and the preservation of public order require.

Lacking concrete instructions manifested at the level of European secondary legislation, only the decisions of the European Court of Justice (hereinafter ECJ or the Court) can serve as a basis for the national regulator when forming its domestic regulation concerning online gambling. However, the Court primarily holds the respective national courts responsible for

² C-212/08 p. 49.

³ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* [2010] ECR 8149, p. 103. C-212/08 p. 80.

determining whether the national legislation contributes to a special objective and to ascertain whether the restrictions satisfy the conditions laid down by the case-law of the Court regarding proportionality. The ECJ gave certain concrete instructions as to which aspects should be taken into consideration by the national courts as it scrutinized an online gambling regulation regime. This article intends to summarize some of these aspects of this steadily forming case-law.

The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal of the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the concerned Member State and of the level of protection which they seek to ensure.⁴ Due to the discretion that Member States enjoy in determining the level of protection for consumers and public order which they intend to ensure in the gaming sector, it is in particular not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State correspond with a view shared by all the Member States concerning the means of protecting the legitimate interest at issue.⁵

A Member State may also differently regulate the different forms of gambling.⁶ The Member States may not only liberalize some forms of gambling and legally monopolize others, but also promote some forms and nearly forbid the rest.⁷ It is undisputed that the various types of games of chance can exhibit significant differences. The fact that some types are subject to a public monopoly whilst others are subject to a system of authorisations issued to private operators, cannot, in itself, render the differentiation void of justification. Such a divergence in legal regimes is not, in itself, capable of affecting the suitability of a public monopoly in achieving the objectives for which it was established, namely preventing

⁴ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR 7289, p. 34.

⁵ C-46/08 p. 104.

⁶ C-316/07 *Stoß & Others* [2010] ECR 8069, p. 96, 100.

⁷ C-46/08 p. 26.

citizens from being incited to squander money on gambling and combating addiction to the latter.⁸

II. How the Online Form Fits into the Case-law of the More Traditional Forms of Gambling

In its first judgement⁹ concerning online gambling, the ECJ enumerating the most important elements of the former case-law and with a very brief sentence rendered it analogously applicable to the new forms of gambling.¹⁰ Whether the considerations of the Schindler judgement are really so far-reaching and if the Court under the term '*like other types of gambling*' really meant to include online gambling in its contemporary form remains questionable. However, the characteristics of lottery as emphasized by the Court are common as well as peculiar to online gambling.¹¹

This decision also dealt with possible exceptions to the measures of the Member States and whether those constitute an obstacle to the freedom to provide services. According to paragraph 58 of the Schindler judgment, the possibly pursued objectives must be considered together.¹² As a consequence the '*determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of Schindler, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.*'

The last sentence of that paragraph is an expressive indication of a very wide margin of appreciation of the Member States. This is the main reason for the very heterogeneous regulation of (especially online) gambling. It

⁸ C-46/08 p. 62-63.

⁹ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR 7289.

¹⁰ Case C-67/98 p. 16.

¹¹ C-67/98 p. 18-19.

¹² C-67/98 p. 15.

also shows that even a total prohibition of a kind of gambling can be imposed, if the Member State can prove the pursuit of a legitimate aim and that the measure is not only suitable for securing attainment of the objectives pursued but it does not go beyond what is necessary to attain them. The Member States will very likely make use of this margin and sometimes chose very restricting options which is why the scrutiny of the proportionality became increasingly important. Interestingly, the Court delegates this task to the national courts and gives very limited guidance. It is therefore, the obligation of the national courts to verify whether having regard to the specific rules governing their application, the national legislation is genuinely directed to realise the objectives which are capable of justifying the rules and whether the restrictions which it imposes do not appear disproportionate in the light of those same objectives.¹³

III. The Justification of Restrictive Measures

1. Possible Grounds for Justification

Considering this significantly wide margin of appreciation it does not need any detailed explanation that some element of the national regulation can get into conflict with regulations of the Treaty on the Functioning of the European Union (hereinafter TFEU). Considerations of a cultural, moral or religious nature can justify restrictions on the freedom of gambling operators to provide services, in particular in so far as it might be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune.¹⁴

National rules which protecting a monopoly through establishing an administrative authorisation procedure to pursue the activity of collecting and managing bets along with the existence of a criminal penalty to be imposed on those operators, who are not part of the state monopoly and who – despite the prohibition – carry on such an activity, constitute a restriction on the freedom of establishment and on the freedom to provide services. It is necessary to consider whether such restrictions are

¹³ C-67/98 p. 37.

¹⁴ C-447/08 Sjöberg & Gerdin [2010] ECR 6291, p. 42-43.

acceptable as exceptional measures expressly provided for in Articles 52 TFEU (justification on grounds of public policy, public security or public health), or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.¹⁵ The ECJ in its case-law has recognized certain ‘*overriding reasons in the public interest*’ which may justify restrictions on otherwise unlimited freedoms. Such overriding reasons include, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order.¹⁶

A distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand, the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.¹⁷ Both the social objectives and the objectives aimed at reducing criminal activity can be recognised as a justification for a restricting measure but self-evidently they must satisfy the conditions laid down in the case-law of the Court. The diminution or reduction of tax revenue however, is not one of the grounds listed in Article 52 TFEU, and therefore, does not constitute a general interest which would qualify as an overriding reason justifying a restriction on the freedom of establishment or the freedom to provide services.¹⁸

Concerning the social objectives justifying the restricting national measures it is obvious, that the crucial element when scrutinizing this measure should be the thorough investigation of the aim pursued. Such aim should focus on causing the genuine diminution of the gambling opportunities and the true motivation of the national authorities underlying said aims, should under no circumstances be economic. The ECJ has emphasized that the ‘*restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the*

¹⁵ C-243/01 Gambelli & Others [2003] ECR I-3031, p. 59-60.

¹⁶ C-258/08 Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator [2010] ECR I-4757, p. 19.

¹⁷ C-338/04, C-359/04 and C-360/04 p. 52.; C-186/11 and C-209/11 Stanleybet International & Sportingbet [2013] p. 23.

¹⁸ C-243/01 p. 61.

*financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.*¹⁹

However, being in line with the wide margin of appreciation it is for the national court to decide whether the restrictions are justified by imperative requirements in the general interest, are suitable for achieving the objective which they pursue and do not go beyond what is necessary in order to attain it. The restrictions must in any event be applied without discrimination.²⁰ This is also an indication of the fact that the key component of the case-law concerning online gambling is the very wide margin of appreciation. In the framework of preliminary ruling procedures the national courts have the opportunity to apply for some concretisation of the abstract principles marking the limits of this margin by the Court.

A significant output of the case C-243/01 was that the accepted restrictions on gaming activities justified by imperative requirements in the general interest and on the need to preserve public order must at the same time be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. *‘In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.’*²¹

The condition of a *‘consistent and systematic manner’* presupposes that the Member State has a really well-considered policy regarding gambling which does not allow naming the aim of the measure the genuine diminution of gambling opportunities while in reality it wishes to maximize revenues from this lucrative sector through canalizing the demand towards special gambling services. This condition, in theory, should prevent a situation where measures are taken to formally fulfil the separate criteria but end up inciting to squander on gaming on the whole. A national legislation

¹⁹ C-243/01 p. 62.

²⁰ C-243/01 p. 65-66.

²¹ C-243/01 p. 67-69.

pursuing a policy of expanding activity in the betting and gaming sector with the aim of increasing tax revenue at the same time can not be seen as a real justification.²²

An expanding policy can not, in principle, be justified because it does not serve the genuine diminution of gambling opportunities and the limitation of activities in that sector. When applying an expanding policy, the second type of the objectives, namely that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems, can play a very important role. It is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of luring players away from clandestine betting and gaming – and, as such, activities which are prohibited – and directing them to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.²³

2. Difficulties of Proportionality Examination

The margin of appreciation of Member States is very wide and the examination of proportionality is delegated to the national courts with very little help setting the frames of such an examination. The national courts often not have also the factual background necessary to make such a decision. It is questionable whether the national courts are able to conduct such an examination and establish a unique practice. Whether the referring court is really able to examine to what extent the allegations are established and whether any tolerance of such practices is compatible with the pursuit of a high level of protection as the Court renders it, remains dubious.

In the context of that assessment, it is for the national court to determine, in particular, whether, first, criminal and fraudulent activities linked to gambling and, second, gambling addiction might have been a problem

²² C-338/04, C-359/04 and C-360/04 *Placanica & Others* [2007] ECR 1891 p. 53-54.

²³ C-338/04, C-359/04 and C-360/04 p. 55.

in the concerned Member State at the time and whether the expansion of authorised and regulated activities would have been capable of solving such a problem. In particular, if a Member State wishes to rely on an objective arising from a national restrictive measure which is capable of justifying an obstacle to the freedom to provide services, it is under a duty to supply the court with all the evidence relating thereto, to thereby enable the court to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality.²⁴

Since the objective of protecting consumers from addiction to gambling is in principle difficult to reconcile with a policy of expanding games of chance characterised *inter alia* by the creation of new games and by the advertising of those games, such a policy cannot be regarded as being consistent unless the scale of unlawful activity is so significant that the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful.²⁵ It remains dubious how an ordinary national court can determine when '*the scale of unlawful activity is significant*'.

3. Promotion of the Online Gambling Activity of a Single State-related Company

The most controversial element of a consistent and systematic online gambling policy is probably the question of how far the margin of appreciation can reach in a system based on only one licensee with considerable intervention of the state. This question is very important, because in most cases the Member States consider this sector a very lucrative one and consequently, look upon the enterprises as potential sources of revenue for the state budget. The Member States can therefore easily find themselves in a schizophrenic situation.

There is a certain conflict of interest for all operators, including those that are public or charitable bodies, between the need to increase their income and the objective of reducing gambling opportunities. 'A

²⁴ C-212/08 p. 70.; C-347/09 Dickinger and Ömer [2011] p. 54. and the cited case-law.

²⁵ C-347/09 p. 66-67. and the cited case-law.

*public or non-profit-making operator may, like any private operator, be tempted to maximise its income and develop the gambling market, thus undermining the objective of seeking to reduce gambling opportunities. This is particularly the case where the income generated is intended to achieve objectives acknowledged to be in the public interest, the operator being encouraged to increase the income generated by the gambling in order to fulfil those objectives more effectively. The allocation of income to those objectives may, moreover, lead to a situation in which it is difficult to forgo the amounts generated by the gambling, the natural tendency being to increase opportunities for gambling and to attract new bettors.*²⁶ Those considerations are particularly relevant in situations where the single operator holds exclusive rights over the organisation of horse races as well as over the betting on those races.²⁷ Although it is a relevant factor that games played for money may contribute significantly to the financing of such activities, such a reason in itself, cannot be regarded as an objective justification for restrictions on the freedom to provide services. Such restrictions are namely only permissible on the condition, that the financing of such social activities constitute an ancillary beneficial consequence of, and not the substantive justification for, the restrictive policy established, and that is for the national court to ascertain.²⁸

The Member States are interested in a flourishing enterprise with the highest possible revenue and in a more *'healthy society'* in all aspects of the expression at the same time. In the formulation of the Court the question actually is whether a national legislation seeking to curb addiction to games of chance and combating fraud, and in fact contributing to the achievement of those objectives, can be regarded as limiting betting activities in a consistent and systematic manner, especially 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 means of advertising.²⁹ It is almost impossible to decide in a concrete case whether the state monopoly pursues a very active, seemingly profit-maximizing business policy, and thereby leaves no room for harmful illegal gambling

²⁶ C-212/08 p. 60.

²⁷ C-212/08 p. 59-62.

²⁸ C-316/07 p. 104.

²⁹ C-258/08 p. 14.

activity or on the contrary it intends to make more people interested in online gambling to thereby acquire a large income.

However, according to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify restrictions and whether those it imposes appear disproportionate in light of those objectives. But the national courts often call for the help interpreting these objectives and especially if they were suitable for the pursuit of these aims separately, as when the national courts take the said objectives jointly and scrutinize their collective effects, they encounter difficulties. The objective of the measure is overwhelmingly the protection of consumers by the curbing of addiction to games of chance and prevention of fraud, and the national legislation does in fact serve those objectives and may not go beyond what is required in order to achieve them.³⁰

The Court has already held the policy of controlled expansion in the betting and gaming sector for possible and that it may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and other activities which are prohibited – and directing them to activities which are authorised and regulated. *‘In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.’*³¹

A dynamic commercial policy can be characterised by a number of elements, in particular making use of sustained and growing advertising for its products, including those on the internet, increasing the number of outlets for betting and for the products offered to bettors, and using a commercial strategy that seeks to draw in new audiences for the betting offered.³²

³⁰ C-258/08 p. 22-24.

³¹ C-258/08 p. 25. and the case-law cited.

³² C-212/08 p. 65-67.

However, the main difference of the cases prior to C-258/08 was that in those the Court scrutinized the different objectives separately and accepted offering an extensive range of games, advertising on a certain scale, and the use of new distribution techniques inasmuch as necessary for crime prevention purposes. *‘While it is true that the grounds of the judgment in Placanica and Others refer solely to the objective of crime prevention in the betting and gaming sector, whereas, in the present case, the Netherlands legislation is also designed to curb gambling addiction, the fact remains that those two objectives must be considered together, since they relate both to consumer protection and to the preservation of public order.’*³³ In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance or betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for gambling in order to justify restrictive measures even if the latter relate exclusively to betting activities.³⁴

The case C-316/07 sheds light upon the controversy that while considering the objectives separately we can reach a conclusion where one measure is completely suitable for the pursuit of one of the objectives but at the same time, it is contrary to the other objective. Therefore, it is necessary to investigate these measures from different points of the different objectives to reach an optimal result. However, offering an extensive range of games, advertising on a certain scale, and the use of new distribution techniques could be acceptable as suitable for combating clandestine betting, it is unacceptable for the other objective, namely for curbing gambling addiction.

Any advertising issued by the holder of a public monopoly remains measured and strictly limited to what is necessary for channelling consumers towards authorised gaming networks. *‘Such advertising cannot, however, in particular, aim to encourage consumers’ natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact*

³³ C-258/08 p. 26.

³⁴ C-316/07 p. 99.

*that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours.*³⁵

*‘In particular, a distinction should be drawn between strategies of the holder of a monopoly which are intended solely to inform potential customers of the existence of products and serve to ensure regular access to games of chance by channelling gamblers into controlled circuits, and those which invite and encourage active participation in such games. A distinction must therefore be drawn between a restrained commercial policy seeking only to capture or retain the existing market for the organisation with the monopoly, and an expansionist commercial policy whose aim is to expand the overall market for gaming activities.’*³⁶

*‘It is for the national court to determine, in the light of the facts of the dispute before it, whether, in so far as the national legislation at issue in the main proceedings allows the holders of an exclusive licence to offer new games and to advertise, it may be regarded as forming part of a policy of controlled expansion in the betting and gaming sector, aiming, in fact, to channel the propensity to gamble into activities that are lawful. If it were established that the Kingdom of the Netherlands is pursuing a policy of substantially expanding betting and gaming, by excessively inciting and encouraging consumers to participate in such activities, principally with a view to obtaining funds, and that, for that reason, the financing of social activities through a levy on the proceeds of authorised games of chance constitutes not an incidental beneficial consequence but the real justification for the restrictive policy adopted by that Member State, it would have to be concluded that such a policy does not limit betting and gaming activities in a consistent and systematic manner and is not, therefore, suitable for achieving the objective of curbing consumer addiction to such activities.’*³⁷

In the context of that assessment, it is for the national court to determine whether unlawful gaming activities may constitute a problem in the

³⁵ C-316/07 p. 103. C-212/08 p. 71.

³⁶ C-347/09 p. 68-69.

³⁷ C-258/08 p. 27-28.

concerned Member State and whether the expansion of authorised and regulated activities would be capable of solving such a problem.³⁸ The Court however, only assists the national courts in a very controversial manner, as it gave them only guidelines, which is difficult for a simple national court to investigate.

‘Since the objective of protecting consumers from gambling addiction is, in principle, difficult to reconcile with a policy of expanding games of chance characterised, inter alia, by the creation of new games and by the advertising of such games, such a policy cannot be regarded as being consistent unless the scale of unlawful activity is significant and the measures adopted are aimed at channelling consumers’ propensity to gamble into activities that are lawful. The fact that demand for games of chance in the Netherlands has already increased noticeably, particularly at a clandestine level – assuming that is established as De Lotto indicated at the hearing – must be taken into consideration. [...] However, it is for the national court to determine whether the development of the market for games of chance in the Netherlands is such as to demonstrate that the expansion of games of chance is being supervised effectively by the Netherlands authorities, both with regard to the scale of advertising undertaken by holders of exclusive licences and with regard to the latter’s creation of new games, and, in consequence, to reconcile appropriately the simultaneous achievement of the objectives pursued by the national legislation.’³⁹

‘It is for the national court to determine whether unlawful gaming activities constitute a problem in the Member State concerned which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing such addiction.’⁴⁰

An increase in the commercial activity of an operator who has been granted exclusive rights in the field of games of chance and a substantial increase in the income received from those games require particular attention

³⁸ C-258/08 p. 29.

³⁹ C-258/08 p. 30-31.

⁴⁰ C-258/08 p. 38.

in the examination of whether the legislation at issue is consistent and systematic, and hence whether it is appropriate for pursuing the objectives recognised by the Court's case-law.⁴¹

IV. The Mutual Recognition Principle

In the framework of investigating the proportionality of the measure the question of mutual recognition arose, which is undoubtedly one of the cornerstones of the complex problematic of online gambling.

Unsurprisingly, the defendants of the cases have often argued that it was difficult to accept that a company, which operates entirely legally and is duly regulated in one Member State, should be treated by the legislation in an another Member State in the same way as an operator who organises clandestine gaming, when all the public-interest concerns are protected by the legislation of the home state and the intermediaries in a contractual relationship with this enterprise as secondary or subsidiary establishments are registered as official suppliers of services and which are regularly checked and inspected.

Even if the objective of the Member State's authorities is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.⁴² The question arose whether Article 56 TFEU precluded legislation of a Member State that prohibited operators who were otherwise established in other Member States as lawful providers of similar services from offering games of chance via the internet within the territory of that first Member State.⁴³ It is undisputed that such a national measure constitutes a restriction on the freedom to provide services. It imposes simultaneously a restriction on the freedom of the residents of

⁴¹ C-347/09 p. 61. and the cited case-law.

⁴² C-243/01 p. 74-75.

⁴³ C-42/07 Liga Portuguesa de Futebol Profissional & Bwin International [2009] ECR 7633, p. 50.

the concerned Member State to enjoy, via the internet, services which are offered in other Member States.⁴⁴

Certain Member States claim that the state's control over the monopoly in different forms could be an additional safeguard which improves the security of a monopoly system. If the monopoly operates under the strict control of the state it can exercise an effective power of supervision over the monopoly and that provides the State with sufficient guarantees that the rules for ensuring fairness in the games of chance organised by the monopoly will be observed.⁴⁵

The grant of exclusive rights to operate games of chance via the internet to a single operator, which is subject to strict control by the public authorities, may, in circumstances confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators. The limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime.⁴⁶

Articles 49 and 56 TFEU must be interpreted as precluding national legislation that grants the exclusive right to run, manage, organise and operate games of chance to a single entity, where, *'firstly, that legislation does not genuinely meet the concern to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner and, secondly, where strict control by the public authorities of the expansion of the sector of games of chance, solely in so far as is necessary to combat criminality linked to those games, is not ensured. It is for the national court to ascertain whether this is the case.'*⁴⁷

Some Member States have claimed that their authorities do not have the same means of control at their disposal regarding operators having their

⁴⁴ C-42/07 p. 52-53.

⁴⁵ C-42/07 p. 65-66.

⁴⁶ Case C-203/08 Sporting Exchange & Others [2010] ECR 4695, p. 59.

⁴⁷ C-186/11 and C-209/11 p. 36.

seat outside the national territory and using the internet to offer their services as towards those under such a strict state control.⁴⁸

However, the subsequent cases have reinforced that the mutual recognition principle should not be applied in this very special sector. *‘Having regard to that margin of discretion and the absence of any Community harmonisation in the matter, a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law. It follows in particular that each Member State retains the right to require any operator wishing to offer games of chance to consumers in its territory to hold an authorisation issued by its competent authorities, without the fact that a particular operator already holds an authorisation issued in another Member State being capable of constituting an obstacle.’*⁴⁹

The principal ground for this rejection is that the internet gaming industry has not been the subject of harmonisation within the European Union until now.⁵⁰ The Court has regrettably not determined precisely what these *‘difficulties’* were and this is indicative enough to consider this special form of service different from all the other arts that the principle of mutual recognition could be applied on. As an example of such a possible difficulty, the Court referred to the lack of direct contact between consumer and operator as the games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers than the traditional markets for such games.⁵¹

In case C-258/08 the online gambling companies alleged, that where a Member State imposes restrictions relating to the organisation of such games, it must take into account the fact that the public interest justifying the restriction in question is already protected by the rules laid down by the Member State in which the provider of services is licensed to operate such games. There should be no duplication of controls and safeguards.⁵²

⁴⁸ C-42/07 p. 69.

⁴⁹ C-316/07 p. 112-113. Joined Cases C-660/11 and C-8/12. Biasci & Rainone [2013] 40-41, 43.

⁵⁰ C-203/08 p. 33.

⁵¹ C-203/08 p. 34.

⁵² C-258/08 p. 53.

But the Court, referring again to the fact that the internet gaming industry has not been the subject of harmonisation within the European Union, has reinforced its former praxis.⁵³ The Court has also confirmed, without any further explanations, that the lack of direct contact between consumer and operator in the games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers than the traditional markets for such games.⁵⁴

However, the lack of harmonization and the wide margin of appreciation entitle the Member States to use their rights to control the online gambling activity it would be disproportionate if they were not allowed to take into account the checks on operators of games of chance carried out in other Member States at all. They could be relevant at least to assessing the proportionality of the national legislature's decision to introduce a monopoly of internet casino games at all. In case C-347/09 the referring court is starting from the premise that, first, the regulatory interests relied on by the host Member State to justify the restriction of the freedom to provide services are already sufficiently taken into account in the Member State of establishment, and, second, the provisions in force in that State are even more rigorous than those applicable in the host Member State.⁵⁵ However, this is unlikely to have a considerable impact on states where a monopoly position has been granted to a public undertaking since by definition allowing the cross-border supply of gambling into such a Member State would end the monopoly status conferred upon the undertaking.⁵⁶

The case C-176/11 has special practical relevance for the mutual recognition principle. *[I]n order for a permit to carry out advertising in Austria for casinos established abroad to be granted, the levels of protection for gamblers that exist in the various legal systems concerned must first be compared. Such an authorisation scheme is in principle capable of fulfilling the condition of proportionality if it is limited to making authorisation to carry out advertising for gaming establishments*

⁵³ C-258/08 p. 54.

⁵⁴ C-258/08 p. 55.

⁵⁵ C-347/09 p. 89-90.

⁵⁶ C-316/07 p. 109-110.

established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting its residents against the risks connected with games of chance.’ A measure does not go beyond what is necessary provided that it merely requires, in order for authorisation to be granted for advertising, that the applicable legislation according to the seat of the service provider ensures protection against the risks of gaming, which is, in essence, of a level equivalent to that which it guarantees itself. ‘The position would, however, be different, and the legislation would have to be regarded as disproportionate, if it required the rules in the other Member State to be identical or if it imposed rules not directly related to protection against the risks of gaming.’⁵⁷

According to some Member States the registered office must be within the national territory in order to allow effective monitoring of online gambling, as authorities do not have the same possibilities of supervising economic operators established in other Member States.⁵⁸ According to other Member States games of chance marketed over the internet can be controlled more effectively than those distributed via traditional channels because all operations performed on electronic media can be tracked, which makes it easy to detect problematic or suspicious operations.⁵⁹ The operators concerned were in their home state the subject of strict access controls involving an examination of their professional qualities and their integrity.⁶⁰

The various Member States do not necessarily have the same technical means available for controlling online games of chance, and do not necessarily make the same choices in this respect. The fact that a particular level of consumer protection against fraud by an operator may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not imply the conclusion that the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices in this

⁵⁷ C-176/11 HIT & HIT LARIX [2012] p. 28-32. and 36.

⁵⁸ C-347/09 p. 80.

⁵⁹ C-347/09 p. 92.

⁶⁰ C-347/09 p. 93.

regard. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried out in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not grasp.⁶¹

The Member State whose territory is covered by an offer of bets emanating via the internet from an operator having its seat in other Member State may in the future also require the latter to comply with restrictions laid down by its legislation in that area, provided those restrictions comply with the requirements of European Union law, particularly that they be non-discriminatory and proportionate.⁶² A special aspect of the question of mutual recognition is the ‘offshore bookmaking’ like in the case C-46/08, which aspect would be worth to deal with in a supplementary study.

V. Special Problems in Monopole Online Gambling Regimes

1. Online Gambling Regulation Regimes

The Member States in principle may opt for a system of complete prohibition, a (state) monopoly, for a system with a limited number of possible actors (system of administrative licensing contract) or a fully liberalised model. It is evident that the great majority of cases concern the most extreme manifestation of the wide margin of appreciation of Member States, namely when they reserve the right of providing different online gambling services only for one provider. In the more liberalised forms of gambling regulation it is rather the selection of the licensees and the authorization procedure that is disputed. The Court has accepted that the Member States have special interests on more scores than one to regulate this very sensitive area on their own. It has enabled the configuration of also such restrictive regimes as a whole or partial prohibition of activities of that nature. The second option has necessarily to be supplemented by more or less strict supervisory rules. The Member States have to assess the proportionality of the measure solely in relation to the objectives pursued and the level of protection which the concerned national authorities seek

⁶¹ C-347/09 p. 98-99.

⁶² C-46/08 p. 44-46.

to ensure.⁶³

A system in which exclusive rights to organise and promote games of chance are conferred on a single operator, and whereby all other operators, including operators established in another Member State, are prohibited from offering over the internet services, constitutes a restriction on the freedom to provide services guaranteed by Article 56 TFEU. Such restrictions are allowed under certain circumstances.⁶⁴ *‘A licensing system may, in those circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. [...] It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to [...] preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.’*⁶⁵

2. The Monopolized System of Online Gambling Regulation

a) The Existence of Monopolies

‘[I]n the area of games and bets, excesses in which have damaging social consequences, national regulations seeking to prevent the stimulation of demand by limiting the human passion for gambling could be justified. [...] As regards, more particularly, the establishment of public monopolies, the Court has previously acknowledged that a national system providing for limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, was capable of falling within the pursuit of the abovementioned public interest objectives of protecting the consumer and public order. It has also held that the question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to

⁶³ C-46/08 p. 44-46.

⁶⁴ C-347/09 p. 41-42.

⁶⁵ C-338/04, C-359/04 and C-360/04 p. 56-58.

*a licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.*⁶⁶

The public authorities of a Member State may be entitled to grant exclusive rights to either a public body whose management is subject to direct State supervision or to a private operator over whose activities the public authorities are able to exercise tight control. Such control is likely to enable the state to tackle the risks connected with the gambling sector and pursue the legitimate objective of preventing incitement to squander money on gambling and combating addiction to gambling more effectively than would be the case with a system authorising a business of operators that would be permitted to carry on their business in the context of a non-exclusive legislative framework.⁶⁷ The authorities may as controllers of the body holding the monopoly have *'additional means of influencing the latter's conduct outside the statutory regulating and surveillance mechanisms is likely to secure for them a better command over the supply of games of chance and better guarantees that implementation of their policy will be effective than in the case where those activities are carried on by private operators in a situation of competition, even if the latter are subject to a system of authorisation and a regime of supervision and penalties.'*⁶⁸ Those authorities would not have the same possibilities with regard to an operator established in another Member State.⁶⁹

The grounds of justification should be taken especially strictly in the case of monopolies. The mere fact for example that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than the supervision of a single operator is irrelevant. Administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by European Union law.⁷⁰

⁶⁶ C-316/07 p. 75, 79.

⁶⁷ C-316/07 p. 80-81., 83.; C-347/09. p. 48-49. and the cited case-law; C-212/08. p. 41., 46., 70.

⁶⁸ C-316/07 p. 82. C-186/11 and C-209/11. p. 30.

⁶⁹ C-347/09 p. 80-81.

⁷⁰ C-212/08 p. 48.

The Court has also stated on several occasions that, ‘*although it is not irrelevant that a levy on the proceeds of authorised gambling may contribute significantly to the financing of such activities, such a ground could constitute only an ancillary beneficial consequence and not the substantive justification for the restrictive policy established.*’ Economic grounds are not included in the grounds listed in Articles 52 EC and 53 TFEU and therefore, do not constitute an overriding reason in the public interest capable of justifying a restriction on the freedom of establishment or the freedom to provide services. Such an objective cannot justify the establishment of a measure as restrictive as a monopoly.⁷¹

Gambling in cross-border relation started to play an important role because of the internet and has become interesting for the common market. Even the possibility of providing services via internet sheds light on the fact that the wide margin of appreciation makes it, in principle, possible for the Member States to try to close their markets, and even the internet makes their justification verifying the necessity of this strict regulation vague. The fact that, in a transnational environment such as that generated by the internet, the authorities of a Member State which has established public monopolies might be confronted with certain difficulties in ensuring compliance with those monopolies by organisers of games and bets established outside that Member State, who, via the internet and in breach of those monopolies, conclude bets with persons within the territorial area of the said authorities. However, such a circumstance cannot be sufficient to call into question the conformity of such monopolies with EU law.⁷²

b) Requirements Concerning the Monopolist

The Court has also analysed in detail the compatibility of the specific restrictions imposed on the holder of the monopoly with Article 56 TFEU. The Court had to decide, for example in case C-347/09 about the compatibility of restrictions imposed on the holder of the monopoly by the national legislation concerning its legal form, the amount of its share

⁷¹ C-212/08 p. 52.

⁷² C-316/07 p. 84-87.

capital, the location of its registered office, and the possibility of setting up branches in Member States other than that in which it is established. The imposition of certain restrictions on the holder of a monopoly of games of chance is according to the wide margin of appreciation of the Member States in principle, not only compatible with European Union law but required by that law. The restrictions must, however, comply with the requirements of European Union law regarding proportionality. They must be suitable for ensuring that the objectives pursued by setting up a monopoly system will be achieved and at the same time they must not extend beyond what is necessary for that purpose.⁷³

The requirement of a particular legal form for operators of games of chance may, by virtue of the obligations binding certain kinds of companies with respect in particular to their internal organisation, the keeping of their accounts, the scrutiny to which they may be subject and their relations with third parties, be justified by the objective of preventing money laundering and fraud. Similarly, the requirement for a share capital of a certain amount may prove to be of use in order to ensure a certain financial capacity on the part of the operator and to guarantee that he is in a position to meet the obligations he may contract towards winning gamblers. *‘It must be recalled, however, that observance of the principle of proportionality requires that the restriction imposed does not go beyond what is necessary for achieving the aim pursued. It will be for the referring court to ascertain, having regard to other possible ways of ensuring that the claims of winning gamblers will be honoured by the operator, whether the requirement at issue is proportionate.’*⁷⁴

The requirement of a police authorisation, by virtue of which operators active in the betting and gaming sector, as well as their premises, must be subject to *ex ante* controls as well as to ongoing supervision, clearly contributes to the objective of preventing the involvement of those operators in criminal or fraudulent activities and appears to be a measure that is entirely commensurate with that objective. Thus, the fact that an operator must have both a licence and a police authorisation in order

⁷³ C-347/09 p. 70., 72.

⁷⁴ C-347/09 p. 76-77.

to access the market in question is not, *per se*, disproportionate in light of the objective pursued by the national legislature, which is to combat criminality linked to betting and gaming.⁷⁵

Therefore, it is for the referring court to determine, first, whether the objectives of the concept of public policy (presuming that there is a genuine and sufficiently serious threat to a fundamental interest of society and, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed) are capable of falling within that concept and, if so, secondly, whether the obligation concerning the registered office satisfies the criteria of necessity and proportionality laid down in the Court's case-law. In particular, the referring court will have to ascertain whether there are other, less restrictive means of ensuring a level of supervision of the activities of operators established in other Member States equivalent to that which can be carried out in respect of operators whose registered office is in the Member State concerned.⁷⁶

One important aspect of the possible justification (especially of the question of proportionality) is how the concerned Member State can or should verify that the measures establishing monopolies in this field can be justified by an objective of preventing incitement to squander money on gambling and combating addiction to the same, and whether the national authorities must be able to produce a study supporting the proportionality of those measures which was prior to their adoption.⁷⁷

There are some special problems emerging in Member States which have chosen an online gambling regime with only one or limited number of operators. This regime is supplemented self-evidently with the prohibition of offering games of chance interactively via the internet.⁷⁸ Already the very existence of this '*monopole*' actor has detrimental effects from the perspective of the common market and especially on providing and receiving these services in an online form. Though this

⁷⁵ C-660/11 and C-8/12 p. 26-27.

⁷⁶ C-347/09 p. 82-84.

⁷⁷ C-316/07 p. 70-72. referring the Case C-227/06 Commission v Belgium [2008] ECR 46, p. 62-63. and case-law cited.

⁷⁸ C-258/08 p. 6-8.

solution undoubtedly has many advantages, the question of how to organise the selection of the provider of online gambling services remains a big challenge. *‘[T]he choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.’*⁷⁹ *‘However, the margin of discretion which the Member States thus enjoy in restricting gambling does not exonerate them from ensuring that the measures they impose satisfy the conditions laid down in the case-law of the Court, particularly as regards their proportionality.’* A prior administrative authorisation scheme 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.⁸⁰

Another important aspect of the online gambling systems aimed at a limited number of participants is *‘whether the case-law developed by the Court in relation to the interpretation of Article 49 EC and 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. Moreover, it asks whether the renewal of that licence without competitive tendering can be a suitable and proportionate means of meeting objectives based on overriding reasons in the public interest.’*⁸¹ The public authorities granting a licence to a single operator are bound to comply with the fundamental rules of the EC Treaty in general, including Article 56 TFEU and, in particular, the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency. That obligation of transparency applies where the service concession in question may be of interest to an undertaking located in a

⁷⁹ C-46/08 p. 58-59.

⁸⁰ C-46/08 p. 84-87, 90.

⁸¹ C-203/08 p. 38.

Member State other than that in which the concession is awarded.⁸²

The concept of licences granted on a temporary basis is in the interest of continuity, with fixed reference dates allowing decisions to be taken as to whether any adjustment of the licence conditions may be justified. But renewing these licences granted to a company without any competitive tendering procedure in principle precludes other operators from being able to express their interest in carrying on the concerned activity and, as a result, those operators are prevented from enjoying their rights under European Union law, in particular the freedom to provide services that is enshrined in Article 56 TFEU.⁸³

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.⁸⁴

It is important to distinguish the effects of competition in the market for games of chance, the detrimental nature of which may justify a restriction on the activity of economic operators, from the effects of a call for tenders for the award of the contract in question. The detrimental nature of competition in the market, *'between several operators authorised to operate the same game of chance, arises from the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction. On the other hand, such consequences are not to be feared at the stage of issuing a licence.'*⁸⁵ The competition for the market means that there is only one or a limited number of actors on the different markets in a non-competitive relationship with each other and as a result of a transparent and non-discriminatory procedure in principle every enterprise has the chance to be the only service provider. The profit is guaranteed because there is

⁸² C-203/08 p. 39-40.

⁸³ C-203/08 p. 52-55.

⁸⁴ C-203/08 p. 31.

⁸⁵ C-203/08 p. 58.

no competitor on that market and the strong regulatory participation is designed to hinder the establishment of discrepancies through the aim of earning monopole profit.

Surprisingly, the Court seems to be content to accept that even in cases of competition for the market exclusive rights to operate games of chance are granted or renewed without any competitive tendering procedure – though it says so in very precautionary terms. The Court delegates the task of ascertaining whether the holders of licences for the organisation of games of chance satisfy the conditions set out by the Court of the judgment to the national courts.⁸⁶ With this decision it became obvious that the principle of equal treatment and the consequent obligation of transparency are also applicable to procedures granting or renewing a licence to a single operator in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.

VI. Closing Remarks

Without explicitly taking a position on the question of whether the regulation of online gambling on the European secondary level was necessary and omitting the critical examination of the ECJ's judgements, this study aimed at locating and listing the requirements – in accordance with the current state of the continuously changing case-law – that the Member States must comply with when imposing regulations in this particular sector. Online gambling and its regulation is going to be a non-exhaustible source of interesting dogmatic questions in the near future.

⁸⁶ C-203/08 p. 62.

SUMMARY

Online Gambling in the Case-law of the European Court of Justice

GÁBOR KOÓS

The study is the short summary of the practices of the European Court of Justice concerning online gambling and is meant to present the core points of the relevant judgements which may provide guidance for establishing the regulatory frameworks of Member States. Accordingly, it is not intended to discuss the issues raised in depth, but rather to collect and shortly present the core points in accordance with the current standing of case law.

RESÜMEE

Online Glücksspiele in der Rechtsprechung des Gerichtshofs der Europäischen Union

GÁBOR KOÓS

Die Studie gibt eine kurze Zusammenfassung über die Praxis des Europäischen Gerichtshofs in Bezug auf Online-Glücksspiele. Sie versucht, die wichtigsten Knotenpunkte der einschlägigen Urteile zu erfassen, die bei der Feststellung der Regelungsrahmen der Mitgliedstaaten als Orientierung dienen können. Auf Grund dessen ist sie nicht darauf ausgerichtet, die aufgeworfenen Fragen im Detail zu behandeln, sondern darauf, dem aktuellen Stand des Fallrechts entsprechend die wichtigsten Punkte zusammenzutragen und kurz vorzustellen.