Internal and External Consistency:
Lessons from the U.S. WTO Saga on Internet Gambling

By Philippe Vlaemminck & Annick Hubert

Philippe Vlaemminck

Annick Hubert

Under the Uruguay Round the US made the commitment (probably accidentally) to grant market access to foreign based Internet gambling operators under the new GATS rules. For years a vigorous debate took place in Geneva about the interpretation of the US commitments under GATS and later on the way the US was entitled to invoke the public order concept under GATS. According to the Panel ruling under art. 21.5 DSU, the US did not prove to be totally consistent in its Internet gambling policy. The IHRA proved to be a bridge too far and was too business oriented to fall within the scope of public order.

Betting on horse races seems to be a lucrative activity in different places around the world, but causes at the same time serious problems to several governments. Recently in the EFTA Court the government of Norway was criticized for maintaining a policy on horse race betting that was questionable from its public order approach towards lotteries and sport betting. Betting on horse races was considered to be "business oriented" contrary to all other games of change who could only be organized for non profit. The same problem could occur in other jurisdictions where betting on horse races is organized to support horse breeding. A noble and important cause, but considered by the EU Commission and the EFTA Court as business oriented approach.

The advantage of the WTO system, compared to other international legal order like the EU and/or the EEA, is that a Member can at the end withdraw its commitment if abiding would put at stake its whole internal policy. The message from the US Federal government could not be clearer. The US has no intention whatsoever to grant foreign based Internet gambling operators any access to the US territory. By taking this step, which could turn out to be quite expensive, as the US has to compensate any third country for withdrawing the advantage granted under GATS., the US shows the seriousness of the matter at stake. (Internet) gambling is not simply a matter of business, but a matter of organizing society and order in society.

But is the withdrawal of the GATS commitment a sufficient safeguard? From an international perspective it does guarantee the right for the US to keep its borders closed for any cross border Internet gambling supply. The UIGA provides further means to develop a comprehensive legal framework with other friendly jurisdictions to stop the illegal Internet gambling operators who abuse the Internet for money laundering and tax evasion purposes. Other legal problems both externally and internally remain unresolved. There are indeed no adequate legal rules under The Hague Conventions on private international law. Nor is it clear whether the development of a more pro active lottery policy (long term monopolistic privatization models) by some US States would be able to survive the necessity test of the dormant commerce clause considering the sole business oriented approach of such models.

It does not mean that modernisation of lotteries in the US is not possible, but a true expert approach , whereby all national and international legal principles are taken into consideration, is certainly advisable. The external consistency by withdrawing from the GATS commitment does not necessarily provide an internal guarantee if the internal consistency is not upheld.

In the recent EFTA Court ruling the question of internal consistency was expressed in par. 59 of the judgement:

"If it turns out that the national authorities have opted for a rather low level of protection, it is less probable that a monopoly is the only way of achieving the level of protection opted for. In that case, it is more likely that less restrictive means, for instance in the form of a licensing system which would allow an operator such as the Plaintiff to enter the market, could suffice. In this context, it is also relevant to assess whether channelling, to the extent the national court deems this to be relevant, could be achieved equally well under a licensing system."

This means that if a monopoly is not based upon a high level of protection, but rather on the sole maximization of profits (the logic choice under a privatized monopoly), the monopoly could no longer be sustained.

The question of legality of EU cross border Internet gambling when an operator only holds a licence in his country of origin, is currently pending before he European Court of Justice in the Portuguese BAW case. Bet & Win operates with an off shore licence from Gibraltar and tries actively to get access to the Portuguese sport betting market, by sponsoring the Portuguese football league, notwithstanding the monopoly of the Santa Casa de Misericordia de Lisboa,

The issue of sport betting seems to be the central focus of the EU Commission challenges against the EU Member States.

In April 2006 the Commission decided to start procedures under art. 226 EC against seven Member States – Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden – In public debates the European Commission argues that all controls and checks carried out by the home Member State should be taken into account by the authorities of the host Member State, especially as, according to the EU Commission, the concerned Member States do not uphold a consistent gambling policy.

In October 2006 the Commission decided to start procedures about sport betting against three Member States, Austria, France and Italy, followed by a procedure against Greece in June 2007.

Does it mean that those States do not abide to the rulings of the European Court of Justice? Not at all, the rulings of the ECJ in cases like Gambelli and Placanica are addressing specific questions referred to the ECJ by a national court. Only the referring court is legally bound to follow the ruling and to apply it to the pending national case. However, several of these rulings cannot simply be transposed to the actual situation in other States. All present infringement cases are precisely linked to the absence of clarity emerging from the European case law and the absence of clear regulatory solutions. There is still a long way to go before the final outcome. ◆

Philippe Vlaemminck is the managing partner of Vlaemminck & Partners, a Belgian law firm specializing in EU & WTO law and for more than 20 years substantially involved in defending the cause of lotteries at all levels (internet, privatizations, regulatory approaches…).

Annick Hubert was previously a State Attorney of the Belgian Department of Foreign Affairs, legal representative of the Belgian Government at the Court of Justice of the European Union and the European Free Trade Area Court. She joined the EU law practise group of Vlaemminck & Partners this summer.

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