

# Gambling in the European Union & the WTO

## The Need for an Enhanced Trans-Atlantic Cooperation Among Lotteries.

The European Court of Justice (the ECJ) and the Court of the European Free Trade Association (the EFTA Court) have recently been given the opportunity to rule on a number of questions related to the provision of gambling services in the European Union. Some self-declared “experts” were expecting a radical move in the case law of the ECJ and had already announced the demise of the state monopolies in the European Union even before the ECJ had been given the opportunity to pronounce itself on the case brought to its attention. The “March judgments” rendered by the ECJ and the EFTA Court clearly indicate that these Courts have been more prudent in their approach and that there is an evolution in the case law, but it is obvious that the judgments did not instigate a revolution. This contribution will explain why the judgments will lead to a consolidation of the restricted markets, rather than a liberalisation.



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### The Judgements: Strengthening State Monopolies

The judgment rendered by the ECJ in the notorious Placanica case concerns the Italian legislation on the organization of sports betting activities. Placanica, Palazzese and Sorricchio are three Italian nationals who fulfilled the role of intermediary for Italian customers wishing to place a sports bet with the UK based company Stanleybet. They were faced with criminal charges

because the acceptance of sports bets was carried out without having the required government authorization. Stanleybet had applied for such a license in 1999 but could not obtain one as it is a stock-exchange listed company. Such companies are prevented, under the Italian legislation, from obtaining a license. The Italian criminal courts reviewing this case decided to submit a request for a preliminary ruling to the ECJ.

The ECJ recalls the most important aspects of its Gambelli ruling, i.e. that restrictions imposed upon intermediaries as at stake principally constitute a prohibited restriction under the provisions of the EC Treaty. However, the ECJ recapitulates the basics of its standing case law established in the Schindler judgment and further elaborated in Läära, Zenatti and Gambelli, that is that “a certain number of reasons of overriding general interest have been recognised by the case law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order.” The ECJ also reaffirms that national authorities have a large margin of discretion to determine what is required in order to ensure consumer protection and the preser-

vation of public order. In addition, the ECJ repeats that such restrictions must satisfy the conditions laid down by the existing case law.

Very pertinent is the analysis made by the ECJ of the Italian situation and the licensing requirement imposed by Italian law. The ECJ considers, in line with Gambelli, that Italy cannot invoke the first reason, i.e. the reduction of gambling opportunities to justify its restrictive policy. Nevertheless, the ECJ admits that Italy can legally invoke the second type of objective, that is preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems. The ECJ recognises, as advocated in the European Court by the undersigned attorneys acting together with the Belgian government agent and French representatives, that



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for such purpose Italy is entitled to have a policy of “controlled expansion”. The ECJ also agrees, and this for the first time, with the argument developed by the Belgian and French governments

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– although the European Commission did vigorously oppose it – that 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 necessitate, according to the ECJ, “the offer of an extensive range of games, advertising at a certain scale and the use of new distribution techniques.” According to Mrs Annick HUBERT, the Belgian government agent of the Department of Foreign Affairs at the ECJ, this is the innovative element in the judgment of the ECJ and a giant leap forward into the direction of a consolidation of the restricted markets. The argument based upon a selective reading of Gambelli and used by several remote gambling operators that monopolistic environments cannot be maintained when the concerned operator does expand, advertise, etc... is hereby totally abandoned.

The ECJ therefore considers that a [national] licensing system may constitute “an efficient mechanism” enabling operators active in betting and gaming sector to be controlled. The ECJ does, however, refer the question of the total number of licenses back to the national court which needs to verify whether the limitation of licenses contributes to the objectives pursued.

The ECJ continues by addressing the questions of the tendering procedure used by Italy to allocate the sport betting licenses in the past. The issue remains important for Stanley Betting from the perspective of the penal sanctions, but is no longer relevant since Italy did in the meantime replace its licenses allocation system whereby many non Italian operators did get licenses. Again the ECJ starts by recalling the Gambelli judgment insisting upon the fact that access to licenses must be available for all EU based companies on a non-discriminatory basis. The ECJ adds that “the blanket exclusion of companies quoted on the stock markets, goes beyond what is necessary to achieve the objective pursued by Italy.” There are indeed better alternatives to control such companies. As regards the consequences flowing from the unlawful nature of the exclusion of a certain number of operators from the tender procedures, the national legal order must lay down detailed procedural rules to ensure the protection of the rights of those operators derived by direct effect of Community law.

The ECJ further admits that operators active in the betting and gaming sector are subject to an ex-ante control as well as to ongoing supervision as this clearly contributes to the objective of preventing the involvement of those operators in criminal and fraudulent activities. This appears, according to the ECJ, entirely commensurate with that objective.

The ECJ also rules that a Member State cannot impose criminal penalties for a failure to complete an administrative formality where such completion has been refused or rendered impossible by the government in question. This does not imply, however, that Member States can no longer apply penal sanctions to illegal operators. Only under the specific circumstances that a company is excluded without a valid reason under EU law from participation in a licensing tender process or any other available license allocation process, it is not acceptable to apply penal sanctions to such company for not having obtained such license.

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#### **But the Race is Far from Over**

Some of the recent cases that have been brought to the attention of the ECJ and the further initiatives taken by the European Commission in some of the infringement cases clearly indicate that the race is far from over.

The first case is related to Germany and deals with the question whether in case an infringement has been found to exist by a national court, a Member State can be given the time necessary to bring its legislation and policy in conformity with EU law, without essentially having to give up the restrictive regime. The second case concerns Belgium and is about the EU compatibility of restrictions and sanctions that prevent the organization of group participations in lotteries on a commercial basis. The last case concerns Portugal and is about the EU compatibility of sanctions following an agreement between the Portuguese football league and private operator BWin for bets on football matches which violates the monopoly of the Portuguese state operator.

*These cases are very important for the future of European state operators and will pave the way for further developments in the gambling sector within the European Union.*

The European Commission has also taken further actions to put an end to the alleged obstacles to the free movement of sports betting services in Denmark, Finland and Hungary. The European Commission has formally requested these Member States to modify their legislation further to their responses to the letters of formal notice sent in April last year. The Commission con-

siders that the restrictions in question are not compatible with EU law and that the measures taken by these Member States to restrict the free movement of sports betting services are not necessary, not proportionate and discriminatory. Furthermore, the Commission argues that existing national operators cannot be regarded as non-profit operations, given that they are subject to strict annual revenue targets and often rely on commercial retail outlets to market their various gambling services. It is clear that the signal given by the ECJ in Placanica will have an impact on these cases.

*The Commission's decision to inquire into the compatibility with EU law of the measures in question is based on complaints made by a number of service providers and on information gathered by the Commission. The complaints concern restrictions on the provision of sports betting services, including the requirement for a state concession or licence (even where a provider is lawfully licensed in another Member State). In some cases, restrictions also extend to the promotion or advertising of the services and to the participation of nationals in the Member State in question in the games.*

#### The WTO: Another Battlefield?

It is very likely that Geneva, and more in particular the WTO, will be the battlefield where the future of internet gambling will be fought for the years to come. In March 2007, a WTO "implementation panel" issued its report in the conflict opposing Antigua versus the United States. Pursuant to the report, Antigua seems to have won its latest effort to force the US to open its market to offshore gambling. The report concludes the US "has not taken the necessary steps" to resolve the long-running dispute between the US and Antigua.

The WTO allows countries to keep services, including gambling, off their list of free trade obligations to other WTO members as long the country bans those services at home.

Antigua contends the US is not consistent in its application of laws banning internet gambling since it permits interstate online horse racing gambling. The WTO agreed with Antigua in a report issued in 2005. In that report, the WTO acknowledged the US would have to amend the discrepancy in its legislation.

Last year, Congress adopted the so-called "Unlawful Internet Gambling Enforcement Act." The law prohibits US banks, financial institutions and other third-party money exchange operations from processing payments to offshore gambling sites located outside of the US jurisdiction. The law, however, specifically exempts state-sanctioned online gambling on horse racing and lotteries. Antigua, claimed that the apparent inconsistency serves as a basis for US citizens to legally gamble through online, offshore gambling casinos based in Antigua.

#### Conclusion: State Monopolies Will Continue to be in the Line of Fire

The developments at EU level and to a lesser extent at international level clearly indicate that state monopolies will be in the line of fire for another few years and that the consolidation of these restricted markets, as accepted by the ECJ in Placanica, will be the object of a fierce debate in the near future.

A stronger Trans-Atlantic cooperation between Lotteries will be required to find common solutions to stop the further growth of illegal remote gambling. ♦

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