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## 2009 to be Another Year of Changes in European Regulatory Environment

Between 1994 and 2007 the European Court of Justice ruled in 14 cases on gambling services. In 2008 the same European Court has received the largest number ever of new referrals coming from France, Germany, Austria, The Netherlands, Greece and recently Sweden. These legal disputes surrounding gambling in the different EU Member States demonstrate the pressing need for regulatory solutions.

In his opinion in the Placanica case, the Advocate General mentioned on the last page of his opinion that the Member States already missed several opportunities to regulate gambling services at EU level. Although the comment was surprising and unfair, considering the inadequacy of the solutions proposed by the Commission, it shows that the Court is not willing to become the final arbitrator in what is becoming an increasingly difficult political problem.

Notwithstanding this, one has to admit that the European Court has acted in this area with great respect for the sensitivities and problems at stake. The Court, as always, took up its own responsibility as far as the Court could go and substantially contributed to create conditions allowing the Member States to understand what is possible within the actual context of the Treaty. From Schindler to Placanica, the Court has designed the legal framework for gambling services under the Treaty and the limits thereof.

Summarized, *the European Court does accept that gambling services are economic activities of a particular nature whereby it is perfectly acceptable for States to maintain and introduce (new) restrictions for reasons of public order or to prevent the social risks of addiction.* States are permitted to channel the public's desire to gamble towards restricted and controlled operators offering those games which the concerned State considers morally, politically and legally acceptable. Such offer of games may expand into new areas and new formats if necessary for the implementation of an effective and efficient policy and it may use several marketing methods. These are the answers that the European Court has given up to now.

But still the disputes continue and many questions remain unanswered. The European Union Treaty as such does not provide for full answers to the complexity of the gambling issues and the Court understands this. The recent Portuguese internet gambling case opposing the Gibraltar licensed BWIN to the Santa Casa de Misericordia de Lisboa illustrated just how far reaching the difficulties are. *None of the Member States present, and there were many intervening, nor the European Commission, wants the gambling market to be driven by market forces.*

The opinion given by the Advocate General BOT to the European Court in this Portuguese case is relevant to understand the exact border line between what States can and cannot do.

He argues that there is no obligation to apply market rules and competition law to gambling services as there is no additional ben-

efit for the consumer from such a competitive environment. However, he makes it perfectly clear that the attitude of the States is crucial in this regard. *If the States operate lotteries as normal economic activities with the purpose of maximizing profits, then competition law must apply.* The line is clear, at least from a legal point of view, but not always easy to draw in practise.

Even so, the situation is still not resolved with this opinion...the Court still needs to rule and even that does not resolve the regulatory problems. Hearings are scheduled in 2009 for a large number of court cases. It is not known yet whether the Court will issue rulings during 2009, but these cases will most definitely influence the political debate.

During this past year, the European Member States understood that they were obliged to look altogether into these questions and soon the world will understand that a broader reflection will be required if one wants to come to terms with online gambling problems. Indeed, in January 2009 we expect that the European Commission will rule in the Internet gambling services complaint introduced by the British Remote Gambling association against the USA under the EU Trade Barrier Regulation. Depending upon the outcome of the investigation, the EU Commission could initiate a new WTO case against the USA or close the case. The European Court of Justice could also be involved in this dispute if one of the concerned and/or interested parties decides to appeal the Commission's decision.

Where are the other EU institutions on these issues of gaming regulation? The Member States have clearly decided to take the lead on this in the course of 2008.

Indeed, following a meeting of the Government Agents to the European Court on July, 10, 2007, the Member States decided to start a dialogue on this matter. It took up until the French Presidency in the second half of 2008 before the idea was implemented through the "Services and Establishment Working Group" of the Council. Surprisingly, already during the first meeting in July the Commissioner on Internal Market declined to even participate in this dialogue with the Member States instituted by the French Presidency. This attitude has not changed over the past months. Let's hope that this changes and that the Commission Services, who have over the years acquired a substantial knowledge of the problems and understand the sensitivities, can participate and contribute to this dialogue. This is indeed the only way to come to terms in this difficult area. Although strongly focused on the problems of the online gambling market, this discussion will cover all aspects of gambling.

On 1 December 2008, the Council of Ministers decided that they want to continue the work of this Working Group under the Czech Presidency and to search for the regulatory answers. Most of them insist upon the need to approach the questions with due regard for

the subsidiarity principle. This is important because the subsidiary principle emphasizes that the problems that need to be looked into at EU or international level should be only those that cannot be adequately resolved at the national/state/regional level.

The French Presidency called upon the Commission to participate more actively in the debate and make further studies. The Commissioner of Internal Market refused this request. He does not believe that there is a sufficiently level playing field for a proper regulatory environment and prefers therefore to continue to apply the Treaty to gambling services.

He has initiated infringement cases against an increasing number of Member States, indicating that there is no simple legal problem, but rather a very serious political problem. The infringement cases will not bring solutions, but rather increase the problems. Strangely enough, the Commissioner for Internal Market does not want to take up the political challenge, although the awareness of the problem is growing inside the Commission that, as the President of the Commission is stating, "a friendly solution" must be searched together with the Member States.

Also the European Parliament wants to contribute to a better solution. Indeed, the Parliament also initially rejected the proposed solutions of the Commission, but is aware that the Treaty as such does not provide the solution. During the debate on the White Paper on Sport, it became clear that the European Parliament acknowledges the important role and contribution of Lotteries to the European sport model based upon amateur and grass root sports.

In the meantime the IMCO Committee of the European Parliament is addressing the question of gambling in its own initiative report. The fundamental discussion is scheduled for early 2009. Although initially the European Parliament considered looking into the questions of the online gambling market only, the expectations are that the Parliament will take into consideration all consumer related aspects as well as the public order elements of crime prevention. The draft report prepared by MEP Schaldemose provides a correct picture of the situation. Amendments can be tabled until mid December. Let's see where it goes.

Today it is clear that a single State cannot provide all answers to regulate properly the gambling sector. The principle of subsidiarity as outlined in the Protocol of the Amsterdam Treaty does therefore require the European Union to look for the essential cross border aspects of the problem. This is what has to be done. The coming months will show us where Europe wants to go and how it can help the world. ♦

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