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Online Gambling in the European Union: a Tug of War without a Winner?

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I. Setting the Scene

A multi-billion industry, involving a dangerous and, from a cultural point of view delicate activity. A service which, due to modern communications technology, easily crosses borders. A non-harmonised sector, for which we have to derive the law from individual cases. All these elements coalesce in the gambling sector: therefore it is not surprising that [governance of] this sector is highly controversial and that it will produce further disputes in the near future.[1]

This Article looks at the conflict between national regulation of gambling on the one hand and the freedom to provide services within the EU/EEA on the other hand. Online gambling[2] is gambling (such as betting, betting exchanges, casino and other games, poker tournaments, and lotteries) on the internet. National regulation of gambling in Europe has traditionally attempted to confine gambling and keep it within narrow bounds (through criminal prohibition, providing for State controlled gambling monopolies, by limiting it to certain tightly controlled physical locations, such as casinos and by prohibiting advertising). Regulators have seen a need to satisfy the unavoidable demand for some forms of gambling while at the same time restricting supply. These restrictive regimes on a national level clash with the cross-border supply of gambling by means of the internet, allowing operators to avoid national restrictions. Some States have passed specific laws applying to online gambling,[3] others apply their existing laws to Internet gambling. Operators of online gambling from Member States

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[1] Advocate General Paolo Mengozzi Opinion in Cases C-316/07, C-358/07-360/07, C-409/07-410/07 *Markus Stoss* and others Opinion of 5 March 2010, paras 1–2.

[2] For examples of online gambling see <http://www.betfair.com/> (betting exchange); <http://www.zeturf.com/en/ http://www.zeturf.com/en> (online betting); <http://www.ladbrokes.com/lbr_portal>; <https://www.bwin.com> (various forms of online gambling); <http://www.national-lottery.co.uk/player/p/home.ftl> (UK national lottery).

[3] See for example the German Framework Treaty (*Staatsvertrag zum Glückspielwesen in Deutschland-Glückspielstaatsvertrag*) entered into force on 1 January 2008 specifically prohibiting internet gambling or the licensing of remote gambling in the British Gambling Act 2005.

with liberal licensing regimes (such as Malta, Gibraltar, or the UK) may wish to provide gambling services to consumers in Member States prohibiting or restricting certain forms of online gambling (such as Germany, Finland, France, Italy, Portugal, Sweden, or Norway[4]) and may argue that such prohibition or restriction is an infringement of the freedom to provide services guaranteed under Article 56 TFEU.

This article traces the development of the ECJ's jurisprudence in this area, distinguishing between four distinct phases. The case-law of the ECJ in online gambling cases, described by the metaphor of a tug of war in this article, is highly interesting as it is a typical demonstration of how judge-made law develops step-by-step starting from more general principles, then moving to more detailed and refined rulings. As will be shown in detail below the Court initially left the Member States wide discretion, while subsequently it examined the application of the proportionality test more closely, and in its latest case-law, the Court has developed nuanced and refined criteria for allowing the Member States wide discretion in the area, but guarding against abuse. In so doing, the case-law moves like a pendulum between tolerating restrictions and pushing for liberalization.

I will argue that the Court has been right in allowing the Member States wide discretion and refusing to liberalize the gambling sector on the basis of a mutual recognition principle despite the pressure caused by the increasing number of cases referred to it and despite the confusion caused by its nuanced approach at the level of the national courts. It is argued here that the freedom to provide services should not be used to whittle away important social policy objectives and that harmonization can only be achieved by EU legislation guarding these social policy objectives.

A. Policy Objectives of National Gambling Regulation

The reason for confining gambling in this way is that online gambling presents potentially serious risks for individuals and for society at large.

The most important of these is the potential for gambling addiction and problem gambling.[5] Problem gambling is defined as 'gambling that compromises, disrupts or damages family, personal or recreational pursuits'.[6]

[4] Not an EU Member State but an EEA Contracting State.

[5] See also T Hayer and G Meyer, 'Die Prävention Problematischen Spielverhaltens' (2004) 12(5) *Journal of Public Health* (Springer) 293–303, 296.

[6] H Wardle, K Sproston, J Orford, B Erens, M Griffiths, R Constantine, and and S Pigott, *British Gambling Prevalence Survey 2007* (National Centre for Social Research) prepared for the Gambling Commission, available at <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Prevalence%20Survey%20final.pdf> p 72, taken from HR Lesieur and MD Rosenthal, 'Pathological Gambling: A Review of the Literature' (1991) 7 *Journal of Gambling Studies* 5–40

The British Gambling Prevalence Survey 2007[7] has found that the percentage of problem gamblers across all different forms of gambling is between 0.5 per cent[8] and 0.6 per cent[9] of the whole population, equating in absolute numbers to 236,000–284,000 persons in Great Britain.[10] The Survey refers to similar surveys carried out in other States, which showed the following rates of problem gambling (relating to the whole population): 0.2 per cent for Norway, 0.5–0.6 per cent for Sweden, New Zealand, and Switzerland, 3.5 per cent for the USA, 4.1 per cent for Singapore, 4.3 per cent for Macao, and 5.3 per cent for Hong-Kong.[11]

While these rates may seem small, research about internet gambling has identified a danger that internet gambling will lead to an increase in gambling addiction, because of the apparent anonymity, increased access and convenience, higher immersion, interactivity, its asocial nature and simulation, which make gambling particularly attractive and seductive, reduce inhibition, and lead to more opportunities to gamble.[12]

A second concern is to prevent minors from gambling on the internet. Clearly gambling is an activity which involves the spending of potentially large sums of money and which may lead to addiction and the consequent harms for a person's health. Minors are more impressionable and may be more vulnerable to these risks. The British Gambling Prevalence Survey 2007 has shown that persons who started to gamble below the age of 15 are much more likely to become problem gamblers.[13]

A third concern is that all players are treated fairly and openly when engaging in online gambling. This concern is about consumer protection standards and fair commercial business practices. Specific issues related to online gambling in this respect are: to ensure that the consumer obtains transparent and honest

[7] Above n 7.

[8] Ibid; using the Canadian Problem Gambling Severity Index 79; this Index concentrates more on the negative consequences of problem gambling 72; the prevalence among men was 10 times higher (1.0 per cent) than the prevalence among women (0.1 per cent) 79.

[9] Ibid, using the DSM IV diagnostic criteria, 1 per cent of men are rated problem gamblers under this test, but only 0.2 per cent of women 75–6; the DSM IV test focuses more on the psychological underpinnings of problem gambling 72; this is the same overall prevalence as found in the 1999 Survey 76; perhaps unsurprisingly (because of their more risk taking behaviour), prevalence is highest in young men (1.5 per cent in men aged 16–24 and 1.7 per cent in men aged 25–34) 76.

[10] Taking into account the confidence interval measures of both surveys the absolute figures are certain to be somewhere between 189,000 and 378,000, Ibid 84.

[11] Ibid 85.

[12] M Griffiths, 'Internet Gambling: Issues, Concerns, and Recommendations' (2003) 6(6) *Cyber Psychology and Behaviour* 557–68, 558–60; see also J Gottfried 'The Federal Framework for Internet Gambling' (2004) 10 *Richmond Journal of Law and Technology* 1–101, 28; P Pereira de Sena, 'Internet Gambling Prohibition in Hong Kong' (2008) 38 *Hong Kong Law Journal* 453–92, 459.

[13] Above n 7, p 93 (although the early gambling behaviour is not necessarily the cause for becoming a problem gambler— it could be that certain personalities more prone to problem gambling are tempted to start gambling earlier than their peers).

information about the odds at stake, minimum and maximum payouts, that there is true randomness in virtual games of chance (such as online roulette or online card games), and more generally, that consumers are not misled about the nature of the gambling activity carried out.

A fourth risk is consumer fraud, such as online casinos fraudulently taking deposits and disappearing or refusing to pay out winnings, or using the customer's details (such as credit card details) in order to perpetrate identity theft.[14]

Furthermore, online gambling operations may be used for money laundering. Money laundering is defined as an act or attempted act to conceal or disguise the identity of the proceeds of serious crime so that the money appears to have originated from a legitimate source.[15] A money launderer could use a legitimate gambling website by opening a gambling account under a fake identity and placing US$100,000 in the account. He would then gamble with a small amount or by placing bets on two opposing teams to recoup any losses, and afterwards withdraw the money from the account, which would now appear to be legitimate winnings.[16]

In conclusion, the social policy objectives[17] of gambling regulation are the prevention of gambling addiction by providing for protection of vulnerable adults, preventing gambling by minors, consumer protection and fighting crime associated with gambling, and preventing money laundering.

Given these serious policy concerns, it is not surprising that gambling has been regulated restrictively in the Member States. However, these restrictions act as an obstacle to the creation of an EU Internal Market for the different gambling services concerned.

[14] D Schwartz, *Cutting the Wire* (University of Nevada Press, Reno Nevada, 2005), 182.

[15] Definition adopted by Interpol's General Secretariat Assembly in 1995, quoted on the Interpol website at <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/default.asp>; see also Article 1(2) of Directive 2005/60/EC on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing of 26 October 2005, OJ 2005 L 309/15–36; see also the definition in s 340 of the UK Proceeds of Crime Act 2002.

[16] J Skala, 'Money Laundering and Internet Gambling-A Suspicious Affinity?' in Swiss Institute of Comparative Law' in *Cross-Border Gambling on the Internet* (Schulthess, Zürich, 2004), 307–48, 316.

[17] Section 1 of the Gambling Act 2005, The licensing objectives:

(a) Preventing gambling from being a source of disorder and crime, being associated with rime and disorder and being used to support crime,

(b) Ensuring that gambling is conducted in a fair and open way, and

(c) Protection children and other vulnerable persons from being harmed or exploited by gambling.

See also the German Supreme Court case, BVerfG 1 BvR 1054/01, Decision of 28 March 2006 paras 94–102.

B. General Introduction

The TFEU[18] provides for several fundamental freedoms which potentially conflict with national restrictions on online gambling imposed by the Member States of the EU. Of most relevance in the gambling context are the free movement of goods in Article 34, the freedom to provide cross-border services in Article 56, and the freedom of establishment in Article 49.

For instance, a Member State restricting the import of gaming machines may fall foul of the free movement of goods. An example of the restriction of the freedom to provide services is a prohibition on internet gambling. If a Member State has a State monopoly with an exclusive right to provide, for example, internet sports betting, thereby preventing bookmakers from other Member States from providing sports betting on the internet, this could be both a restriction of the right to provide services and of the freedom of establishment. Finally, a Member State imposing restrictive licensing requirements on operators of gambling websites may also restrict the freedom to provide services and the freedom of establishment.

However, the TFEU provides for exceptions which allow the Member States to restrict the free movement of goods in Article 36 if this is required on the grounds of public morality, public policy, or public security, the protection of health and life of humans, animals or plants, the protection of national treasures [. . .] or the protection of industrial or commercial property. Similar exceptions exist in relation to the freedom to provide services in Article 62 and the freedom of establishment in Article 52(1): public policy, public security, and public health.

If the national measures restricting the freedoms are indistinctly applicable without discrimination on the grounds of nationality or the place of establishment, meaning that they apply equally to domestic and foreign providers, then a wider list of policy objectives may justify the restriction.[19] In the online gambling field these include: consumer protection, fighting gambling addiction and overspending, preventing fraud and other crime, public policy, public order, and preventing gambling from being a source of private profit.[20]

A measure is only justified if it satisfies the proportionality test. According to this, first, the measure has to serve one of the legitimate policy objectives; secondly, it must be suitable to achieve the objective claimed as a ground for

[18] The Treaty Articles have been renumbered in the Treaty of Amsterdam and more recently in the Treaty of Lisbon. In order to avoid confusion, I refer to the most recent version in the Treaty of Lisbon signed at Lisbon on 13 December 2007, published in OJ 2008 C 115/1–384 of 9 May 2008.

[19] Case C-288/89 *Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007, paras 13–15 and Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221; see also P Craig and G de Burca, *EU Law,* 4th ed (Oxford University Press, 2008), 826–7 and A Kaczorowska, *European Union Law* (Routledge-Cavendish, 2009), 689–91.

[20] See the discussion further below.

justification; thirdly, the measure must be necessary to achieve this objective.[21] It has been pointed out[22] that a 'one size fits all' approach to balancing the legitimacy of national regulation and the freedom to provide services does not fit the complexity and diversity of services and hence the balance has to take into account the *particular* nature of the services. This statement rings especially true for the regulation of online gambling. As will become apparent from the discussion below, the application of the proportionality test is crucial in determining whether a national restriction on gambling is an infringement of the Treaty freedoms or whether it can be justified, and the ECJ has developed detailed and complex criteria for this assessment.

C. Diversity of Regulatory Models and Harmonization

The regulation of online gambling in the EU would not clash with the fundamental freedoms in the TFEU if regulation was harmonized at EU level. Furthermore, it would be more difficult for providers to undermine national regulation by establishing themselves in a foreign jurisdiction (at least within the EU, ignoring the global situation for the moment), since all EU Member States would then enforce the same legal standards in their territory. However, since Member States' attitudes and approaches to gambling (and between different types of gambling) vary greatly from Member State to Member State it seems unlikely that this can be achieved in the near future.[23] No harmonization by secondary legislation has been attempted to date.[24]

D. No Country of Origin Regulation?

In some sectors the EU has introduced country of origin regulation for the cross-border provision of services by secondary legislation (Directives). This means that the authorities of the Member State where the service provider is established (country of origin or home State) are exclusively competent to regulate. The country of origin would then apply its law and enforce it against the service provider, either *ex ante* through licensing or *ex post* through administrative or criminal sanctions. Country of origin regulation also means that the authorities of the Member State where the recipients are located (country of destination or host State) must desist from regulating. The advantage for service providers is that they only have to comply with the law at the place of their establishment. Country of origin regulation also means that Member States lose

[21] See discussion below and P Craig and G de Burca, above n 20, 827–8 and M Horspool and M Humphreys, *European Union Law*, 5th ed (Oxford University Press, 2008), 400.

[22] C Barnard, *The Substantive Law of the EU*, 2nd ed (Oxford University Press, 2007), 407.

[23] See also the discussion of EU policy below and A Littler 'The Regulation of Gambling at European Level' (2007) 8(3) *ERA Forum* 357–71, 359–60.

[24] A Littler, 'Regulatory Perspectives on the Future of Interactive Gambling in the Internal Market' (2008) 33(2) *European Law Review* 211–29, 225.

the ability to regulate a particular service, as a provider may establish itself in a Member State with the most liberal regime and then freely provide the services to all other Member States. However, the relevant Directives exclude gambling from country of origin regulation.

The E-commerce Directive[25] contains a country of origin rule for information society services[26] in Article 3.[27] However Article 1(5)(d) excludes from the scope of the entire Directive 'gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions'.

The meaning of 'gambling activities' was examined by the Irish High Court[28] which held that a chat room hosted by an online betting exchange was not a gambling activity. This chat room was not used for betting activities as such, but rather as a forum for discussion. Consequently, the betting exchange could qualify for the hosting immunity in Article 14 of the E-commerce Directive. Article 14 confers immunity on online service providers[29] (OSP) who merely store ('host') content provided by others, provided the OSP does not know about the illegal (gambling) activities and their nature is not apparent from the circumstances. If this ruling is correct, it will also mean that a chat room discussing sports and betting generally would benefit from the country of origin rule.

Likewise the Audio-visual Media Services Directive[30] clarifies the interpretation of audio-visual media services in Recital 18 as excluding interactive gambling.[31] However, this Directive (and the country of origin rule) does apply to *television broadcasting* of gambling and related advertising.[32]

Finally, the Services Directive,[33] liberalizing the provision of services in many ways, also excludes gambling activities from its scope in Article 2(2)(h). The previous drafts of the Services Directive contained a 'country of origin' rule in Article 16(1) but this was reduced by the European Parliament to a codified

[25] Directive 2000/31/EC OJ 2000 L 178,/1–16 of 17 July 2000.

[26] Defined as 'any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services' in Article 2 (a) of the E-commerce Directive referring to the definitions in Article 1(2) of Directives 98/34/EC and 98/84/EC.

[27] For a discussion of the country of origin rule and how it goes beyond the freedom to provide services see: J Hörnle, 'Country of Origin Regulation in Cross-border Media—One Step Beyond the Freedom to Provide Services' (2005) 54 *International Comparative Law Quarterly* 89–126.

[28] *Seamus Mulvaney v The Sporting Exchange Ltd (Betfair)* [2009] IEHC 133, Judgment of 18 March 2009.

[29] Such as a blog provider, YouTube, Facebook, Flickr etc.

[30] Directive 2007/65/EC of 11 December 2007 published in OJ 2007 L 332/27–45 of 18 December 2007.

[31] 'That definition should exclude all services whose principal purpose is not the provision of programmes [. . .] For these reasons games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines [. . .] should also be excluded from the scope of this Directive.'

[32] Recital 18.

[33] Directive 2006/123/EC OJ 2006 L 376/36–68 of 27 December 2006.

provision on the freedom to provide services.[34] Hence country of origin regulation is largely inapplicable to online gambling services, which is not surprising, given the regulatory diversity and controversy in the field.[35]

II. Description of the Jurisprudence on the Freedom to Provide Services

Since country of origin regulation principles are largely inapplicable to online gambling, operators would have to fight any restrictions by claiming an infringement of their freedom to provide services.

This section will examine the ECJ's jurisprudence on the freedom to provide services and how this applies to cross-border gambling. Essentially the jurisprudence can be grouped into four distinct phases (like a tug of war between liberalization and non-liberalization): one step back–one step forward–one step back–one step forward towards liberalization.

In the first phase, the Court applied a 'soft' proportionality test, without examining too closely the Member States' justifications of restrictions. The early cases of *Schindler, Läärä, Zenatti*, and *Anomar* fall in this phase.

A. Early Case-Law: Stepping Back

The *Schindler* decision[36] of 1994 was the first decision of the Court in this area and concerned the importation of lottery tickets and advertising for German lotteries into Great Britain in contravention of national legislation. The defendants (German lottery agents) argued that they had a right to import such tickets and advertising under the free movement of goods and the freedom to provide services. The Court classified lotteries as a service and held that the provisions on the freedom to provide services applied[37] and not the provisions on the free movement of goods.[38] Furthermore the Court found that the prohibition on advertising and selling of lottery tickets was a restriction to the freedom to provide services.[39] This classification has been maintained in the Court's subsequent jurisprudence. The Court found that this restriction was justified on the grounds of consumer protection and maintenance of public order.[40] The Court

[34] See C Barnard, above, n 23, 403–5.
[35] A Littler, 'Regulatory Perspectives on the Future of Interactive Gambling in the Internal Market' (2008) 33(2) *European Law Review* 211–29, 225; see also J Hörnle, 'Social Policy and Regulatory Models' Chapter 3 in J Hörnle and B Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar, Cheltenham, 2010).
[36] Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-01039.
[37] Then Articles 59 and 60 of the EC Treaty; para 25.
[38] Para 22.
[39] Paras 43, 45.
[40] Paras 57–59, 63.

held that gambling was a sensitive area and because of the specific cultural, moral, and historical factors in each Member State, regulation would differ. Therefore Member States must be given sufficient latitude as to how they regulate lotteries. It held that Member States might restrict lotteries or prohibit them completely at their discretion, as long as such restrictions were not discriminatory.[41] This early case set the tone for the Court's later jurisprudence: the wide margin of appreciation established in *Schindler* is a formula which has been repeated in all later cases and constitutes a common thread running through the Court's web of jurisprudence. In *Schindler* the Court establishes a soft proportionality test without questioning the appropriateness of the national measures.

In *Läärä*[42] an English company supplied fruit machines (gaming machines) to a Finnish company whose chief executive was fined and the imported machines confiscated. Under Finnish law,[43] the exclusive right (monopoly) to distribute and operate fruit machines was conferred on a Finnish public law body.[44] According to Finnish law, games of chance may only be organized for the purpose of collecting funds for charity or another non-profit-making purpose[45] and a person who organizes games of chance without a licence is liable to a fine or term of imprisonment[46] and any gambling device may be confiscated.[47] The claimants appealed against their punishment on the basis that it infringed their right to free movement of goods (concerning the importation of the fruit machines) and their freedom to provide services (concerning the distribution and operation of the machines). As in *Schindler*, the Court made its decision based on the freedom to provide services.[48]

The claimants argued that this case should be distinguished from *Schindler* on the basis that the gaming machines were not gambling as the stakes and potential winnings were much smaller than in a lottery. However, the Court rejected this argument pointing to the danger of repetitive play by players and the large amounts of money which could be earned through these machines.[49] The Court stated that the monopoly on gaming machines was a restriction to the freedom to provide services,[50] but since the monopoly equally affected domestic and foreign operators, it was not discriminatory.[51] The Court pointed out that restrictive measures were only justified by overriding reasons relating to the

[41] Para 61.
[42] Case C-124/97 *Läärä v Finnish State* [1999] ECR I-06067.
[43] See paras 3–6.
[44] Para 5.
[45] Article 1(1) Law No 491 of 1 September 1995.
[46] Article 6(1) of the same Law.
[47] Finnish Criminal Law as amended by Law No 143 of 13 May 1932.
[48] As it did not have sufficient information about the practical effect of the Finnish legislation on the importation of gaming machines, para 26.
[49] Para 17.
[50] Para 29.
[51] Para 28.

public interest[52] which were such as to guarantee the achievement of the intended aim and were necessary to achieve it.[53]

Hence the Court made clear that the proportionality test applied, but at the same time it stressed, with reference to the *Schindler* case, that Member States enjoy a margin of discretion and left it to the national Member State to assess what was required in its territory to protect consumers and maintain public order.[54] In particular the Court stated that the fact that one Member State has opted for less stringent measures than another was not an indication that the stricter measures were disproportionate. The Court held that a monopoly was suitable to achieve the policy objectives, as it had the effect of channelling and controlling gambling activities[55] and hence the Finnish measures were not disproportionate.[56]

As in *Schindler* the Court adopted a 'soft' proportionality test for gambling, leaving the Member State concerned a wide margin of assessing what level of protection it required and how this protection is implemented.

The third case in this early phase is the *Zenatti* decision.[57] This closely follows in the footsteps of *Schindler* and *Läärä*. Mr Zenatti took bets on foreign sporting events from Italian punters acting as an agent on behalf of an English company, SSP Overseas Betting Ltd, a bookmaker licensed in England. Mr Zenatti provided information on foreign sports events and sent the relevant bets by fax or via the internet to the English bookmaker.[58]

Under Italian law, betting is only allowed on Italian sports events organized under the supervision of the National Olympic Committee and the National Union for the Improvement of Horse Breeds.[59] The use of funds collected from such sports bets is regulated and must be used for the promotion of sporting activities.[60] Under various laws from 1995–1997 a restricted tendering procedure was set up which limits the number of licences for the taking of bets for such sports events.[61] Italian law makes it a criminal offence for unlicensed entities to accept bets[62] and Mr Zenatti was accordingly ordered to cease acting as betting intermediary.

[52] Here to limit the exploitation of the human passion for gambling, to avoid the risk of crime and fraud, and to authorize gambling activities only with a view to funding benevolent purposes, para 32,
[53] Para 31.
[54] Paras 33–35.
[55] Paras 35–39.
[56] Para 43.
[57] Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-07289.
[58] Para 6.
[59] GURI No 146 of 26 June of 1931 Royal Decree, paras 3–4.
[60] Para 4.
[61] Para 4—the Court in *Zenatti* did not examine these laws and their proportionality in detail (cf *Gambelli* and *Placanica*).
[62] Article 718 of the Italian Penal Code and Article 4 of GURI No 401 of 18 December 1989, para 5.

On reference for a preliminary ruling by the Italian Court, the Court held that the restrictions on betting agents (off-course betting) were a restriction of the freedom to provide services,[63] but as the restrictive measures (in the form of a very limited number of betting licences) applied to both domestic Italian and foreign providers they were not discriminatory.[64]

Again the Court held that the level and scope of protection a Member State wished to provide was within its margin of discretion. It was for the national authorities to appraise the type of protection and to lay down more or less rigorous procedures for controlling betting activities.[65] The Court restated that the mere fact that a Member State had chosen a system of protection different from that adopted by another Member State could not affect the appraisal as to the need for and proportionality of the provisions adopted.[66] The Court referred to the *Schindler* case and the moral, religious, and cultural aspects of gambling[67] and re-iterated its 'soft' proportionality test confirming the wide margin of discretion enjoyed by the Member States.

The fourth and final case in this early series was *Anomar*,[68] which concerned a reference for a preliminary ruling by a Portuguese court. The National Association of the Operators of Amusement Machines (Portuguese acronym Anomar) and eight Portuguese companies involved in the marketing and operation of gaming machines challenged the Portuguese legislation regulating the operation of gaming machines alleging that the legislation infringed the provisions of the Treaty. The Portuguese legislation[69] distinguished between different categories of gaming machines[70] and provided for different levels of regulation depending on the category concerned.[71]

The Court held that public interest objectives, such as consumer protection and the maintenance of order in society, may justify the restriction of the freedom to provide services in the instant case.[72] The Court stated that the Portuguese legislation, which authorized the operation of games of chance solely in casinos in areas specified by the law and which was applicable without distinction, constituted a barrier to the freedom to provide services but that the freedom to provide services did not preclude such legislation in view of the

[63] Para 27.
[64] Para 26.
[65] Paras 15, 33.
[66] Para 34.
[67] Paras 14–15.
[68] Case C-6/01 *Anomar v Portugal* [2003] ECR I-08621.
[69] Decree-Law No 422/89, see further paras 10–20.
[70] Depending on whether winning depends on chance, partly on chance and partly on skill, or on skill alone; depending on whether the winnings were paid out in cash or in the form of goods having a commercial value; and depending on the nature of the games offered.
[71] Allowing operation of such machines only in places regulated as casinos by an appropriately licensed public limited company; allowing operation of machines only by non-profit organizations; prohibiting the operation of certain types of machines and a registration and licensing regime.
[72] Paras 73, 75.

social policy concerns and the prevention of fraud which justified the restriction.[73] Again the Court held that a Member State had a wide discretion to decide on the level of protection it wished to provide. The Court repeated that the fact that another Member State provided a less restrictive system of protection did not mean that the more restrictive regulation was disproportionate.[74] It was a matter for the national authorities alone to define the objectives they intended to protect, to consider the means to achieve them, and to establish the rules for the operation of gambling, which may be more or less strict.[75] Again the Court did not examine too closely the application of the proportionality test.

After these cases leaving the national regulatory system unscathed, the Court held in a series of cases that aspects of national legislation may not be justified and therefore constitute an infringement of the freedom to provide services. In this second phase the Court was prepared to indicate to the national court how the proportionality test should be applied and distinguished between legitimate and non-legitimate grounds for restrictions.

B. Stepping towards Liberalization?

In five recent cases the Court has stepped towards the liberalization of cross-border gambling, as the guidance of the ECJ indicates that the national legislation may be a disproportionate restriction of the freedom to provide services. In these cases the Court did not change its constant dictum that Member States have a wide discretion in gambling cases, but rather developed more nuanced criteria for applying the proportionality test. The Court made a distinction between permissible and impermissible policy justifications and examined the appropriateness of the national measures in the light of the justifications advanced by the Member States. This stricter approach can probably be explained by the number of cases brought before the Court and the fact that national regulation constitutes a real barrier to the freedom to provide services and therefore should be scrutinized closely as to its conformity with the Treaty. As the EU is moving to an ever closer union and as the pressure to create an Internal Market in services mounts, the ECJ is interpreting restrictions on the freedom to provide services more restrictively.

Gambelli[76] was the first decision on gambling in which the Court took a more pro-active stance in questioning the proportionality of the national measures and in particular questioning the *actual* (as opposed to *presumed*) objectives of

[73] Para 75.
[74] Paras 79–81.
[75] Para 87.
[76] Case C-243/01 *Criminal Proceedings against Piergiorgio Gambelli and others* ECR [2003] I-13031.

the national legislation in order to distinguish between legislation protecting domestic operators and national tax revenues and restrictions imposed to address genuine public policy risks.

It was based on similar facts to *Zenatti* (and the later case of *Placanica*[77]). Mr Gambelli and 137 (*sic*) other betting agents were criminally prosecuted in Italy. These betting agents were part of a substantial network of betting agents, accepting bets on behalf of an English company, Stanley International, licensed in Liverpool.[78] Under Italian law, the betting agents were unable to obtain a betting authorization[79] and were hence acting illegally.[80]

The Court found that both the restrictions placed on the betting agents and the Italian punters were restrictions on the freedom to provide (and receive) services.[81] As to whether the Italian measures were justified, the Court held that preventing a diminution of tax or other public revenue was not an overriding general interest and may not be relied upon as a ground for justification.[82] The Court emphasized that the financing of social activities through a levy must constitute only an incidental beneficial consequence and was not a justification for restrictive measures.[83]

Any restrictions had to bring about a genuine diminution of gambling opportunities as part of a consistent and systematic regulation of gambling.[84] Such consistency was undermined, if it could be shown that the Member State concerned incited and encouraged consumers to participate in gambling with the lawful operator(s) (for example by the State increasing the number of licences).[85] Furthermore the Court questioned whether the exclusion of quoted companies in the tender requirements complied with the principles of non-discrimination and necessity, as there may be other ways to prevent fraud and check the identity of the persons controlling a company.[86]

Although the ECJ had given more pronounced pointers for the national (Italian) court in *Gambelli*, the balance between the wide margin of appreciation and the application of the proportionality test remained unclear.[87] Soon after *Gambelli* a further case was referred by the Italian courts on the sports betting licensing regime, which had to spell out the limitations more clearly.

[77] Discussed below.
[78] Para 10.
[79] But were licensed as data transmission centres, see para 15.
[80] See the discussion under *Zenatti* above.
[81] Para 59.
[82] Paras 61, 69.
[83] Para 62.
[84] Paras 62, 67.
[85] Para 69.
[86] Para 74.
[87] See for example *Gesualdi*, Judgment No 111/04 of 26 April 2004 (Italian Supreme Court of Cassation) holding that the Italian betting legislation is compatible with the freedom of establishment and the freedom to provide services.

Placanica[88] also concerned the criminal prosecution of some of the betting agents in the network set up by Stanley International and the case is therefore based on very similar facts to *Gambelli*. The case was referred since the Italian Supreme Court (Corte Suprema Di Cassazione) had interpreted the Italian legislation to be in conformity with EC law after *Gambelli*.[89] The Italian Supreme Court had reasoned that the measures in question were not inconsistent as their primary purpose was not to reduce gambling opportunities as such but to ensure that betting was channelled into a legitimate framework, preventing crime,[90] and therefore the (lower) criminal tribunals asked the ECJ for further guidance.

The ECJ held that licence and police authorization requirements were suitable to channel betting activities into a legitimate framework and to prevent crime.[91] Furthermore the ECJ also found that the police authorization requirement may be proportionate to achieve this purpose.[92]

However, the ECJ found that the condition in the tender requirements that licensees could not be public companies quoted on the stock exchange was disproportionate to the objective of identifying the shareholders in order to prevent crime.[93] The Court pointed out that other methods were available for ensuring transparency and that therefore this condition was not necessary.[94] Furthermore the ECJ went so far as to direct the Italian authorities to revoke the existing licences and redistribute new licences or to issue additional new licences.[95] Moreover the ECJ also held that the criminal penalties issued against the betting agents were disproportionate, as the betting agents had not been able to obtain a licence and police authorization, due to Italy's breach of EC law.[96]

Unlike the previous decisions on gambling this decision gives guidance in the form of clear directions of what the national court should decide, leaving the national court little discretion. Presumably, one of the reasons for the Court's change of approach in Phase 2 was that it felt compelled to give clearer and more detailed guidance to the Italian courts since despite its previous rulings in *Zenatti* the law had remained unclear.

Furthermore the Court avoided treading on sensitive territory by giving such constraining guidance, condemning some of the provisions of the Italian legislation, since the relevant Italian provisions had already been repealed by the time

[88] Case C-338/04 *Criminal Proceedings against Placanica and others* [2007] ECR I-01891, Judgment of 6 March 2007.
[89] *Gesualdi*, Judgment No 111/04 of 26 April 2004.
[90] Paras 15–16 of *Placanica.*
[91] Para 57.
[92] Para 65.
[93] But cf the later case of *Engelmann* where the Court found that the requirement that only public companies with minimal share capital may obtain a casino licence was held to be justified, below n 193.
[94] Paras 62 and 64.
[95] Para 63.
[96] Paras 67, 69–70.

of the ECJ judgment. The new law provides that all companies, without limitations as to their legal form can now take part in the tender procedures.[97] Even though the ECJ has moved towards liberalizing gambling in the sense that it examined the necessity test more closely in *Placanica*, it nevertheless left untouched the discretion of the Member States to decide on the structure and forms of gambling allowed in each State,[98] as is shown by the later cases discussed below.

However the Italian law has given rise to yet one more case before the ECJ, when the Commission brought infringement proceedings concerning the renewal of the sports betting licences. Again in this case the ECJ looked more closely at the proportionality test.

Commission v Italy[99] concerned Italy's renewal of 329 licences for horse race betting without opening these licences to tender procedures. The Italian Government had planned to enlarge its network of horse race bookmakers from 329 to 1,000; to carry out that plan, 671 new licences were granted after a tendering procedure, but the 329 existing licences were simply renewed without having invited competing bids or advertising.[100] The ECJ held that the freedom of establishment and the freedom to provide services required that public service concessions must be tendered with 'a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed'.[101] The ECJ reiterated its ruling that the Member States have a margin of discretion and may set the level of protection in the area of gambling.[102]

However, as in *Placanica*, the Court examined the application of the proportionality test more closely. It found that in this case the measures did not satisfy the principle of proportionality as the Italian Government had not explained how the renewal of the existing 329 licences would fight crime and clandestine betting activities, as argued by the Italian Government.[103] Furthermore, the second ground of justification adduced by the Italian Government, namely that the renewal of licences was required for the financial stability, continuity, and proper return on investment for past licensees, was not a valid reason.[104]

[97] Article 22(11) of Law No 289 of 27 December 2002 (GURI No 305 of 31 December 2002), para 10.

[98] See also S Alber, 'Freier Dienstleistungsverkehr auch für Glückspiele?'(2007) 8(3) *ERA Forum* 321–55, 322 and S Geeroms 'Cross-border Gambling on the Internet under the WTO/GATS and EC Rules Compared' in Swiss Institute of Comparative Law, *Cross-Border Gambling on the Internet* (Schulthess, Zürich, 2004) 143–80, 171.

[99] Case C-260/04 *Commission v Italy* ECR I-07083, Judgment of 13 September 2007.

[100] Para 30; decision of the Ministry for Finance of 21 December 1999 (GURI No 300 of 23 December 1999) renewing the licences for six years from 1 January 2000.

[101] Para 24.

[102] Para 28.

[103] Para 32.

[104] Para 35.

Therefore, the ECJ held that Italy had infringed both freedoms by its complete failure to invite competing bids.[105]

A further ruling finding that the proportionality test was not satisfied was handed down in respect of gaming in Greece.

Commission v Greece[106] concerned an action by the European Commission against Greek legislation[107] prohibiting the installation and operation of *all* electrical, electromechanical, and electronic games, whether played on public or private premises.[108] This prohibition included not only games of chance played on gaming machines, but in addition all other games, even where there was no chance of winning a prize. It included all gaming machines, as well as computer games.[109] The Law provided for criminal and administrative penalties.[110] The Court held that the Greek legislation was an unjustified infringement of the free movement of goods, the freedom to provide services, and the right of establishment.[111] The Court expressly distinguished this case from its previous jurisprudence by finding that the Greek legislation did not deal with games of chance and gambling as such, but with the much wider field of games and computer games.[112] The Greek Government tried to justify its measures on the basis of public policy concerns related to gambling, when in fact the measures concerned gaming generally: 'the games which are the subject of the prohibition [. . .] are not by nature games of chance, because they are not played for the prospect of winning a sum of money'.[113] Considering that the Greek measures under consideration were not limited to the regulation of gambling, it is therefore unsurprising that the Court found the measures disproportionate.

In these four cases of the second phase, (*Gambelli*, *Placanica, Commission v Italy, Commission v Greece*) the ECJ for the first time held that a national piece of legislation regulating gambling (and gaming) failed to satisfy the proportionality test. This is a step further than the Court's previous stance that Member States have a veil of discretion around their gambling legislation which must not be pierced by the proportionality test. Instead of the 'soft proportionality test' the Court is now applying a much more stringent test, examining both the grounds adduced for justification and the appropriateness and suitability of the measures much more closely. In these Phase 2 cases the Court refused to leave the application of the proportionality test to the Member States.

The Court exposed the fact that national legislation was motivated by purely fiscal or other financial reasons or that the national legislation was unsuitable to

[105] Para 25.
[106] Case C-65/05 *Commission v Greece* ECR [2006] I-10341, Judgment of 26 October 2006.
[107] Law No 3037/2002.
[108] Article 2(1) of Law 3037/2002.
[109] Definitions in Article 1 of Law 3037/2002.
[110] Articles 4 and 5.
[111] Paras 42, 52, 55.
[112] Paras 36–37.
[113] Para 36.

achieve its objective or disproportionate. However, the significance of these cases must not be exaggerated. The Court has not liberalized the gambling sector within the EU/EEA, and Member States nevertheless have a wide margin of discretion in how they regulate online gambling and what level of protection they provide against gambling addiction or fighting crime. The Court does not automatically presume that national legislation is motivated by fiscal reasons and will not interfere if the State concerned can demonstrate that the regulation serves a legitimate objective (such as the fight against gambling addiction or crime) and is suitable for this purpose. This will be shown by some more recent cases of the third phase. In Phase 3 the whole tug of war takes a few steps back from liberalization.

C. Taking a Few Steps Back Again

The six cases belonging to Phase 3 have further developed the nuanced approach of the ECJ/EFTA Court, but this time emphasizing the right of the Member States to determine the regulatory regime for gambling. In these cases the Court[114] takes a few steps back from liberalization, emphasizing that Member States are free to choose the mode of regulation (public/private monopoly, restrictive or liberal licensing regime) and level of protection and emphasizing that Member States are under no obligation to recognize the regulation already carried out at the Member State of establishment of the gambling provider.

The EFTA Surveillance Authority brought a case against Norway before the EFTA Court[115] challenging the conformity of an amendment[116] to Norway's law regulating the operation of gaming machines with the freedom to provide services and the freedom of establishment. In Norway gaming machines may only be operated for the benefit of humanitarian or socially beneficial causes.[117] Under the 'old' law, gaming machines were operated by charities and private operators on behalf of charities. Because of an increase in gambling addiction caused by gaming machines,[118] Norway introduced an amendment to reduce the number of gaming machines by one third and to create a state monopoly (*Norsk Tipping*) to operate all gaming machines and, thereby exclude all private operators from the market.[119] The Court found that this measure (albeit applicable without distinction to domestic and foreign operators) was both a

[114] The expression 'Court' includes both the ECJ and the EFTA Court, for ease of reference.
[115] Case E-1/06 *EFTA Surveillance Authority v Norway* [2007] 2 CMLR 27.
[116] Act 90 of 29 August 2003.
[117] Para 9.
[118] At para 45: 'However, it is clear that the increase in gambling addiction in Norway in later *(sic)* years has occurred simultaneously with the increase in gaming machine gambling. Furthermore, figures from the telephone helpline for problem gamblers [. . .] show that 81 per cent of callers in 2004 reported gaming machines as a problem [. . .] Moreover studies in the field of gambling [. . .] point at gaming machines as the single most potentially addictive form of gambling.'
[119] Paras 10, 12.

restriction of the freedom to provide services and a restriction of the freedom of establishment.[120] The Court held that it was for the State concerned to show that the measures in its national legislation were justified.[121] The Norwegian Government argued that these restrictions are justified by the following public interest objectives: fighting gambling addiction, reducing machine gaming to a socially defensible level, strengthening public control, reducing crime, enforcing the age limit, eliminating private profit as a market incentive (and hence market growth), and limiting the reduction in revenue for humanitarian and socially beneficial causes.[122]

The EFTA Surveillance Authority had argued that the proposed Norwegian regulation was inconsistent, as the monopoly spent a considerable amount on advertising gambling generally. However, the Court held that only the advertising in respect of gaming machines should be taken into account, as it was important to distinguish between different types of gambling because of their differing potential for gambling addiction. The Court found that the Norwegian Government was genuinely intending to reduce *machine gaming*.

Furthermore the EFTA Surveillance Authority had argued that, as in *Gambelli*, the objective of the amendment was to increase public revenue (in the Norwegian case for humanitarian and social causes rather than tax revenues).[123] The Court rejected this argument and said that the maintenance of income for charities was merely an incidental benefit of the amendment and did not defeat the legitimacy of the *other* public interest objectives cited by Norway.[124]

Finally, the EFTA Court found that a monopoly may be a suitable and necessary measure: 'in the court's view, it is reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than a commercial operator' motivated by private profit.[125]

A further case examined the Norwegian regulatory system, confirming that a monopoly may be justified by social policy concerns (other than the funding of 'good' causes). In the *Ladbrokes* case[126] Ladbrokes appealed against three administrative decisions rejecting its application to provide offline and online gambling services in Norway.

[120] Paras 26–27.
[121] Para 31.
[122] Para 30.
[123] Para 17.
[124] Paras 36–38; especially para 38: 'The fact that a system based on an exclusive right for one operator leads to a lowering of operational costs, allowing for the same revenue for humanitarian and socially beneficial organisations to be accrued by less gaming activity, cannot by itself compromise the legitimacy of the system.'
[125] Para 51.
[126] Case E-3/06 *Ladbrokes Ltd v The Government of Norway* [2007] 3 CMLR 12.

The Norwegian law provided first of all that for all forms of gambling (such as betting on sports events and competitions, the numbers game Lotto, and gaming machines) regulated under the Gaming Act[127] the State-owned monopoly, *Norsk Tipping* was the exclusive operator, the profits going to sports and cultural purposes.[128] Secondly, minor lotteries were regulated by the Lottery Act[129] (such as scratch cards, lottery draws, and bingo) which provided that permits for lotteries may only be granted to organizations which had a socially beneficial or humanitarian purpose and that the revenues had to be used for such purposes.[130] Thirdly, betting on horse races was governed by the Totalisator Act[131] providing for a licensing system, but in fact only one licence had ever been granted, so that the *Norsk Rikstoto* had an exclusive licence to operate horse race betting. The Act furthermore provided that the proceeds of horse race betting should contribute towards the promotion of equestrian sports, horse husbandry, and Norwegian horse breeding.[132]

The Court repeated its constant dictum that moral, religious, and cultural factors specific to gambling gave States a margin of discretion and allowed the State to determine the level of protection it wished to ensure.[133] The Court held that a State may set the *level* of protection. The necessity of the measure would then be examined in the light of *this level* of protection. For example if it was clear that a State had in fact set a low level of protection (judged by the number of outlets, the frequency and pervasiveness of gambling, and the marketing efforts undertaken) then a very restrictive regime (such as a monopoly) may not be justified.[134]

The Court held again that the objective of financing socially beneficial causes and the promotion of equestrian sports could not serve as justification.[135] However the other five objectives[136] (including preventing the operation of gambling from being a source of private profit) were legitimate policy objectives.[137] The Court found that relying on one policy ground which was not legitimate did not defeat the measure, if there were other grounds justifying it.[138] The Court held that an exclusive rights system may indeed be suitable for

[127] Act No 103 of 28 August 1992.
[128] Paras 24–29.
[129] Act No 11 of 24 February 1995.
[130] However charities can use private operators to conduct a lottery on their behalf, see paras 19–23.
[131] Act No 3 of 1 July 1927.
[132] Paras 32–34.
[133] Para 42.
[134] Para 59.
[135] Paras 46, 71, 75, 77.
[136] Protecting its citizens from compulsive problem gambling keeping the volume of gambling at a moderate level; channelling gambling activities into responsible outlets and ensuring consumer protection, protection of public order, and preventing crime; and preventing the operation of gambling from being a source of private profit, in para 43.
[137] Para 48.
[138] Para 47.

attaining the objectives which had been put forward as the aims of the Norwegian legislation.[139] However the Court again reiterated its dictum in *Gambelli* that the national regulatory system must be consistent and held that if a Contracting/Member State 'takes, facilitates or tolerates other measures which run counter to the objectives pursued by the legislation' then the legislation may be unsuitable.[140]

The Court found that in this context, marketing activities were relevant, but that even if a State claimed to fight gambling addiction by reducing the opportunities to gamble, a State may tolerate a controlled expansion of the gambling sector (offering an extensive range of gambling, advertising on a certain scale, and using new distribution channels such as the internet) in order to entice consumers away from illegal gambling.[141]

Furthermore the Court held that the necessity test had to be applied differently to each form of gambling, as each form of gambling (lotteries, betting, gaming) entailed a different risk of addiction or crime.[142] Finally the EFTA Court pointed out that, since Member States are allowed to choose the level of protection they wish to provide, different levels of protection may exist throughout the EU/EEA. For example a licence permitting the offering of gaming may be less strict in the home State of the operator than in the host State—hence the mere fact that the operator (such as Ladbrokes) already had a licence in its home State does not mean that it could freely provide services into another Member State.[143] However the Court also held that the host State had to take into account the requirements already fulfilled by the operator in its home State (and could not demand duplication).[144]

In the *Ladbrokes* case the Court attempted to clear up some of the contradictions arising from its earlier rulings by reconciling previous dicta. In particular there appeared to be a contradiction between the constant dictum that Member States have discretion to set the level of protection, but at the same time subjecting the State's regulatory system to the necessity test. The Court left the Member State's freedom to choose the type of regulatory system (monopoly or licensing) and level of protection intact, provided its approach is consistent.

If the jurisprudence of the ECJ in cross-border gambling cases can be described as a tug of war with one step forward–one step back in respect of the liberalization of gambling services, then, like the two previous cases decided by the EFTA Court concerning Norway, the case of *Bwin v Santa Casa da Misericordia de Lisboa* may be another example of retreat in Phase 3.[145]

[139] Para 50.
[140] Para 51.
[141] Para 53–54.
[142] Para 57.
[143] Paras 83–85.
[144] Para 86.
[145] Case C-42/07.

This case concerned the exclusive right[146] of the Santa Casa,[147] a non-profit organization with the object of financing social causes in the public interest, to organize all lotteries and off-course sports betting on Portuguese territory. The Santa Casa retains about 25 per cent of the profits and distributes the remainder to various social and sporting institutions.[148] Bwin, an Austrian online gambling operator with a registered office in Gibraltar, had concluded a sponsorship agreement with the Portuguese football Liga in breach of national Portuguese law and the directors of the Gaming Department of the Santa Casa fined the Liga and Bwin Euro 75,000 and 74,500 respectively.[149]

The Advocate General stated that 'Member States may legitimately determine the appropriation of the revenue from games of chance and gambling and may thus decide that private interests may not profit from them'.[150] He further found that a Member State should be constrained to open up their market for online gambling *only if that State* treated online gambling as a true economic activity from which maximum profits should be received.[151] He pointed out that restrictive measures in relation to internet gambling may be even more likely to be justified, as the public policy risks were greater than those associated with offline gambling[152] and age verification is more difficult.[153]

The Court agreed with the Advocate General and found that the freedom to provide services does not preclude legislation prohibiting operators established in other Member States from offering online gambling in Portugal.[154] The Court cited as legitimate grounds of justification consumer protection, fraud prevention, suppressing incentives for consumers to squander money, and the general need to preserve public order.[155] The Court pointed to the remaining significant moral, religious, and cultural differences between the Member States and held that it was for each Member State to determine in accordance with its own values what is required in terms of gambling regulation.[156] Provided the regulation is consistent and systematic, it will be assessed solely by reference to the objectives pursued by the relevant Member State.[157] The Court found that the measures may be justified because of the high risks of crime and fraud

[146] Decree-Law No 282/2003 of 8 November 2003, Article 2 grants the Santa Casa the exclusive right to operate online betting and lotteries, see para 89.
[147] The Casa Santa is a social welfare organization founded on 15 August 1489; it has always been devoted to charitable work for the most disadvantaged members of society.
[148] Para 121.
[149] Para 126.
[150] Para 251.
[151] Para 257.
[152] Paras 266–269.
[153] Para 270.
[154] Case C-42/07 *Bwin v Santa Casa da Misericordia de Lisboa*, Judgment of 8 September 2009, available from LEXIS, para 73.
[155] Para 56.
[156] Para 57.
[157] Paras 58–61.

which, especially for internet gambling, can be better controlled by a single national operator, such as the Santa Casa.[158] In particular the Court pointed to the specific risks associated with remote, internet gambling, where the operator and the sports competition, as well as the consumer are in two Member States making it more difficult to prevent fraud.[159] This case represents a clear victory in favour of the national monopoly for online gambling and a move away from liberalization.

Sjöberg and Gardin[160] concerned the criminal prosecution under Swedish law of two newspaper editors who had allowed advertisements for online sports betting by foreign bookmakers to appear in their publications. Swedish Law prohibits the promotion in Sweden both of gambling organized legally in other Member States and of unlicensed gambling in Sweden.[161] The Court pointed out that there are significant moral, religious, and cultural differences between the Member States in the gambling sector and hence Member States have a wide discretion not only in deciding the level of protection they wish to provide but also the means by which they regulate.[162] For this reason Member States may exclude private profit entities from the gambling sector.[163] In particular the Court held that Member States may restrict the provision of gambling to charitable organizations.[164] Since the foreign gambling operators were commercial entities and given the Swedish policy on limiting gambling to non-profit operators, the Court found that the advertising restrictions were necessary.[165] However, the Court held that the Swedish legislation may be discriminatory, as it prohibits advertising of foreign lotteries and betting as a criminal offence, whereas it seemed that the advertising of unlicensed, illegal lotteries and betting taking place in Sweden was not a criminal offence, but only an administrative offence carrying a much lower sanction.[166] This was ultimately a question for the national court to decide and in particular it was for the national court to decide whether the different sanctions were discriminatory on the basis of all laws and on the basis of the actual enforcement practice.[167]

The two final Phase 3 cases concerned the Dutch gambling monopoly. In *Ladbrokes International*[168] the ECJ found that an order imposed by a Dutch court on the UK bookmaker to block access to its gambling website by Dutch

[158] Paras 67, 69–71.
[159] Paras 69–71.
[160] Cases C-447/08 and 448/08 *Otto Sjöberg and Anders Gerdin*, Judgment of the Court of 8 July 2010 (not yet reported; available from Westlaw).
[161] Para 33.
[162] Para 37–38.
[163] Para 41–42.
[164] Para 43.
[165] Para 45.
[166] Para 56.
[167] Paras 55–56.
[168] Case C-258/08, Judgment of the Court of 3 June 2010.

residents is not in conflict with the freedom to provide services.[169] The ECJ also repeated its constant dictum that the mutual recognition principle does not apply to gambling services[170] and that Member States may decide to restrict gambling services to a monopoly.[171] Likewise in *Sporting Exchange Ltd*[172] the Court also held that Member States may confer on a single operator the right to organize and promote games of chance. This case concerned the Dutch monopoly for gambling which prevented Sporting Exchange Ltd (trading as Betfair) from obtaining a licence for internet betting. The Court held that a monopoly may be justified by the objectives of preventing fraud and crime.[173] As in the *Engelmann* case the Court held that the award of the exclusive licence to the single operator must be transparent.[174]

These six cases all demonstrate how the Court has accepted that Member States may choose to regulate gambling by a monopoly, excluding providers licensed elsewhere in the EEA. However in the next Phase 4 of the developments of its case law in September 2010 the Court has further refined its rulings on monopolies, thereby moving the tug of war towards liberalization again. Before Phase 4 is examined it may be helpful, by way of analogy and comparison to look at monopolies in other sectors. By way of contrast, it should be pointed out that in other sectors the ECJ has found that a monopoly is *not* consistent with the free movement of goods. The ECJ's jurisprudence on online gambling contrasts with the ECJ's rulings in other sectors, such as the sale of alcohol.

D. State Monopolies

State monopolies may clearly clash with cross-border e-commerce, as service provision and sales over the internet are apt to undermine a national monopoly. Examples can also be found in a sector which is similar to gambling, as it too involves risks of addiction and consumer protection issues: the sale of tobacco and alcohol.

First of all, it should be pointed out that the ECJ has consistently held that Article 31 TFEU[175] did not require that national monopolies with a commercial character had to be abolished, but that they had to be adjusted in such a way as to ensure that there was no discrimination in the procurement and marketing of domestic goods and those stemming from other Member States.[176]

[169] Para 44.
[170] Para 54.
[171] Para 58.
[172] Case C-203/08, Judgment of the Court of 3 June 2010.
[173] Paras 33, 36.
[174] Para 62.
[175] Formerly Article 37 of the EC Treaty.
[176] Cases C-59/75 *Manghera* [1976] ECR 91, para 9; C-78/82 *Commission v Italy* [1983] ECR 1955, para 11; C-189/95 *Franzen* [1997] ECR I-5909, para 38; C-438/02 *Hanner* [2005] ECR I-4551, para 34.

In *Franzen*[177] a case concerning the Swedish state monopoly system on alcohol production and retailing, the ECJ held that since there was no discrimination in the selection of the products for retail in the *Systembolaget*, there was no infringement of Article 31.[178] In these cases, in accordance with Article 31, the Court left untouched a national State monopoly set up to implement public policy objectives. This does not mean that the Court has given wide discretion to Member States on how they run a State monopoly. For example in *Franzen* the ECJ found that the restrictive licence conditions imposed on retailers (high fees, storage requirements etc) were unnecessary and hence an infringement of the free movement of goods.[179]

More relevant to the question of the treatment of cross-border online gambling is how the ECJ has treated the 'import' of goods and services from other Member States outside the State monopoly structure. In a 2007 decision, the ECJ had to examine the Swedish alcohol monopoly again. It held that the Swedish prohibition on alcohol imports outside the State monopoly is in breach of the principle of free movement of goods.[180] The case also concerned the legislation on alcohol (*Alkohollagen*) of 1994 which provided that spirits, wine, and strong beers may only be imported by wholesalers (subject to certain exceptions such as individual consumers travelling abroad). This meant that Swedish consumers were not allowed to buy alcohol from other EU Member States by way of e-commerce or other distance selling and had to go through the national State monopoly provider (*Systembolaget*) for ordering alcoholic beverages from abroad.

The Court held that this law was not concerned with the operation or exercise of the monopoly's exclusive right to retail sale on Swedish territory and should therefore not be adjudged under Article 31 TFEU, but instead under the provisions on the free movement of goods in Article 30.[181] The Court held that the prohibition on importation was a trade restriction[182] and then considered whether it could be justified on the grounds of protecting the health and life of humans, by combating alcohol abuse. First of all the Court held that it was unlikely that alcohol consumption would be lowered generally, as consumers could obtain imported alcohol in spite of the prohibition on individual imports through the *Systembolaget* and hence the prohibition imposed by the law on alcohol was not effective in achieving its objective.[183] This reasoning seems

[177] [1997] ECR I-5909.
[178] See also Case C-387/93 *Banchero* [1995] ECR I-4663, para 44.
[179] Paras 70–77.
[180] Case C-170/4 *Klas Rosengren and others v Riksåklagaren* [2007] ECR I-04071, Judgment of 5 June 2007.
[181] Paras 20–21 and 27.
[182] Paras 33–35, on the basis of the right of the *Systembolaget* to refuse an order and the inconvenience caused to the consumer in having to order through a shop and the 17 per cent surcharge imposed.
[183] Paras 46–47.

inconsistent with the Court's finding that the prohibition on imports is a trade restriction—surely the higher cost and inconvenience means that individuals are less likely to consume foreign alcohol and therefore the prohibition is at least partly effective, at least for law-abiding citizens[184].

Secondly the Court considered whether the prohibition was proportionate to the goal of reducing alcohol consumption by younger persons. Here the Court pointed out that individuals have to prove their age in the shops of the *Systembolaget*. However the Court held that the measure was probably[185] not necessary, as less restrictive measures, such as the foreign third party implementing age verification checks and a declaration by the consumer may be equally effective to prevent persons under 20 from ordering alcohol at a distance (including online).[186] Again this finding is surprising in view of the difficulty of establishing a person's age online (which is much greater than in a mode of selling where the consumer is physically present in a shop) and this contrasts with the Opinion of the Advocate General mentioned above.[187]

By contrast in *Banchero*[188] the ECJ held that the Italian system of State licensing of tobacco retailers and a prohibition on individual imports of tobacco on which excise duty had not been paid was in accordance with the Treaty and in particular with the free movement of goods.[189] The difference from the *Klas Rosengren* case is of course that tobacco in Italy was not sold by a State monopoly, such that the licensed individual retailers could make their own commercial decisions (which tobacco products to stock from other Member States etc) and that individual importation was allowed, provided the excise duty had been paid.[190]

The significance of *Rosengren* is that the Swedish consumer's ability to order alcoholic beverages from other EU suppliers at a distance by necessity undermines the protection of the State monopoly. Why would a Swedish consumer buy French or Spanish wine (for example) in the expensive *Systembolaget* shop if they can have the same ordered from the convenience of their home or office and delivered there at a much lower cost? Effectively this means that the particular way of controlling alcohol consumption in Sweden has been circumvented—instead of deferring to the discretion of the Member State to regulate an area as problematic as preventing alcohol abuse, the Court has imposed its

[184] An entirely different question is of course whether the prohibition of individual alcohol imports via the internet can be enforced.
[185] Ultimately it is a matter for the national referring court to decide the question of proportionality, as pointed out by the Court in para 50. However this tight ruling of the Court leaves very little room for arguments in favour of the national law's proportionality.
[186] Paras 55–56.
[187] *Bwin*, above n 154.
[188] Case C-387/93 [1995] ECR I-4663.
[189] Para 44, according to the principles established in Cases C-267 and 268/91 *Keck and Mithouard* [1991] ECR I-6097.
[190] Paras 59–62.

values of trade liberalization on Sweden. It is here that the difference lies from online gambling.

Unlike the rulings on alcohol and tobacco sales, to date the Court has largely deferred to Member States' wide margin of discretion in the gambling area and consistently held that a monopoly is a more effective way of controlling gambling in order to prevent addiction and crime (*Lärää*, *Anomar*, *EFTA v Norway, Ladbrokes v Norway*, *Bwin*, *Ladbrokes International, Sporting Exchange Ltd*) even if the monopoly restricts services from other Member States in a discriminatory way.

The reason for this different treatment of online gambling[191] may be that a majority of Member States allow individual imports of alcohol, whereas most Member States restrict online gambling. This may be the reason why the Court does not subject gambling monopolies to as close a scrutiny as alcohol regulation. However despite the sensitivity of the subject-matter the Court has tightened its scrutiny of gambling regulation in a series of cases decided in September 2010. In Phase 4 the whole tug of war is again moving closer to liberalization.

E. Taking A Few Steps Forward Again

In the most recent set of cases decided in September 2010 (*Ernst Engelmann, Markus Stoss*, and *Carmen Media*) the Court took a closer look at the licensing system in Austria and the regional monopolies in Germany. The Court found non-justifiable, discriminatory practices in the non-transparent allocation of casino licences in Austria and the residence requirements for companies.

In the case of *Ernst Engelmann*[192] the ECJ had to answer the question of whether a requirement in the Austrian legislation[193] that only public limited companies established in Austria with a minimum share capital of £22 million may apply for a casino licence is an infringement of the freedom of establishment.[194] The Court decided that it was, on the basis that a distinction based on the nationality of a company is discriminatory and in this case could not be justified by the narrow policy grounds for discriminatory restrictions and was disproportionate.[195] The Court held that regulators and other authorities have at their disposal various measures to monitor the activities and accounts of foreign gambling operators, such as requiring separate audited accounts, transparency requirements, and information about managers and main

[191] In addition to the obvious difference that alcohol sales are adjudged under the free movement of goods and online gambling under the freedom to provide services.
[192] Case C-64/08 *Staatsanwaltschaft Linz v Ernst Engelmann*, Judgment of the Court of 9 September 2010 (not yet reported; available from Westlaw).
[193] Para 21(2) *Glückspielgesetz*.
[194] This case concerned the freedom of establishment, not the freedom to provide services, since the casinos were physical, tangible operations on Austrian territory, not online casinos, see para 47.
[195] Paras 37–40; see also General Introduction above.

shareholders.[196] However, the Court held that the requirement that the operator of the casino must be a public limited company was not discriminatory and may be justified by public interest objectives (subject to the application of the proportionality test by the national court).[197] Finally the Court held that it may not be an infringement of the EU law to limit the number of licences to 12 and their duration to 15 years,[198] subject to the application of the proportionality requirement by the Austrian court[199] but that the extension of the licences of the Austrian providers without transparency and publication in a competitive procedure cannot be justified.[200]

In *Markus Stoss*[201] the Court had to decide whether the German monopoly on lotteries and sports betting (other than horse racing) is an infringement of the freedom to provide services. The cases concerned German betting agents acting for bookmakers in other Member States (United Kingdom, Gibraltar, Malta, and Austria) who wished to carry out this activity but were not given a licence to do so in Germany. First of all and contrary to the argument advanced by the applicants, the Court held that a Member State is not obliged to produce studies to serve as a basis for any restrictive measures, such as a monopoly for sports betting and lotteries.[202] The Court also repeated its dictum that the choice of regulation, ie public monopoly vs regulation of private operators, must be left to the Member State, hence the establishment of a monopoly is not contrary to EU law, as it confines gambling opportunities to controlled channels.[203] In particular, the Court pointed out that Member States had better control over the provision of gambling activities through the vehicle of a public monopoly:

> The said authorities may indeed legitimately consider that the fact that, in their capacity as controller of the body holding the monopoly, they will 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 . . .[204]

The mere fact that gamblers in Germany are able to place bets with foreign operators thus circumventing the protection established by the monopoly did not mean that the monopoly was ineffective or amounted to inconsistent

[196] Ibid.
[197] Paras 29, 31; cf *Placanica* above.
[198] Para 22 *Glückspielgesetz.*
[199] Paras 45, 48.
[200] Paras 50–58.
[201] Cases C-316/07, C-358/07–360/07, C-409/07–410/07 *Markus Stoss*, Judgment of 8 September 2010 (not yet reported; available from Westlaw).
[202] Para 72.
[203] Para 79.
[204] Para 82.

regulation. The Court found that this circumstance did not call into question the conformity of the German monopoly with EU law.[205]

The Court also repeated its dictum that, since the area of gambling is not harmonized, Member States are under no obligation to recognize an authorization which a gambling provider may have obtained in another Member State—hence the mere fact that a betting provider is authorized in Member State A does not entitle that provider to provide services in Member State B.[206]

However the Court pointed out that the financing of public objectives may not be used as a legitimizing ground for a public monopoly. It may be an incidental benefit, if there are other grounds justifying the monopoly, but not the main reason for its existence. The Court acknowledged that even a public monopoly will have to engage in advertising in order to inform gamblers of its services, but this advertising must not go beyond what is necessary for this purpose, and in particular must not stimulate demand, as otherwise the Member State's assertions that it has not established the monopoly for financial reasons and that it wishes to reduce gambling opportunities are not credible. Furthermore the Court held that if a Member State tolerates extended advertising for *other, more addictive* forms of gambling (such as casino games) and if it relaxes some of the restrictions for *other, more addictive* forms of gambling (as Germany was alleged to have done in respect of machine gaming) this may indicate that its overall gambling policy is inconsistent, and that hence the betting monopoly is not necessary. While this is a test for the national court to undertake, interestingly the Court pointed to the referring courts' doubts in this respect and indicated that the German monopoly on sports betting and lotteries may therefore not be justified under EU law.[207] This is a major departure by the Court from its previous jurisprudence, where the Court has held that each form of gambling has to be looked at separately.[208] By contrast it seems that the Court now assesses the consistency of a Member State's overall policy across all gambling sectors, so that an expansive policy in respect of casinos may defeat restrictions on betting. This approach has been confirmed in the third and final case of Phase 4, *Carmen Media*, also concerning the German regulatory system.

In *Carmen Media Group Ltd*[209] the question referred to the ECJ was whether the German authorities had to allow a betting operator with an offshore licence from Gibraltar to provide remote online betting services to German consumers.

[205] Paras 84–87.
[206] Paras 112–113.
[207] Paras 100–106.
[208] *Ladbrokes* discussed above n 143 and text.
[209] Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein*, Judgment of the Court of 8 September 2010 (not yet reported; available from Westlaw).

The offshore only licence meant that the provider was not entitled to offer betting to residents of Gibraltar, where the operator was established.

Advocate General Mengozzi contended that the principle of mutual recognition cannot apply to an offshore licence.[210] The operator's offshore licence precluded the provision of gambling services to residents of the state of establishment (Gibraltar). For this reason the Advocate General said that the German authorities cannot trust the authorities at the place of establishment (Gibraltar) to exercise sufficient control to avert any of the social policy risks.[211] He said that the principle of freedom to provide services does not apply if the services cannot be legally provided in the Member State of establishment.[212] The Court did not follow this recommendation and held that an operator with an offshore only licence may rely on the freedom to provide services when offering betting services only in Member States other than the one in which it is established.[213] In particular, the Court found that the

> fact that the authorisation issued to an operator established in a Member State covers only bets offered, via the internet, to persons located outside the territory of that Member State cannot, by itself, have the consequence of taking such an offer of bets outside the scope of the freedom to provide services . . .[214]

The Court avoided the question of whether the service provider in question had deliberately evaded German law by establishing itself in Gibraltar, since this question had not been referred to it for preliminary reference.[215]

Moreover, the Court repeated its dictum in *Markus Stoss* that it is necessary to consider a Member State's overall policy in all sectors of gambling when assessing the necessity of a public monopoly excluding private operators from the online betting and lotteries market. In particular the Court held in *Carmen Media* that a public monopoly for lotteries and certain sports bets is not justified on the grounds of combating gambling addiction and consumer overspending if other, more addictive gambling activities (such as casino games or gaming machines) are licensed to private operators and these private operators are allowed to expand and to stimulate demand with a view to maximizing revenue.[216]

Interestingly the Court held that a complete ban on online gambling could be justified, even if the equivalent forms of offline gambling were allowed to be offered (whether by the public monopoly or the licensed private operators). The Court found that a prohibition on internet gambling may in principle be suitable for combating the risk of gambling addiction, preventing consumer

[210] Case C-46/08, Opinion of Advocate General Mengozzi of 4 March 2010, para 41.
[211] Paras 45–46.
[212] Para 37.
[213] Judgment, para 52.
[214] Para 42, referring to Case C-56/96 *VT4* [1997] ECR I-3143, para 22.
[215] Para 48.
[216] Para 66–71.

overspending and protecting minors.[217] The Court pointed to the greater risks inherent in online gambling.[218]

In conclusion, both in *Markus Stoss* and in *Carmen Media* the Court held that when examining the proportionality of a restrictive measure and the level of protection adopted by a State, it is necessary to assess the *overall* consistency of a Member State's policy across all gambling sectors (casinos, other games of chance, sports betting, bingo, lotteries etc). This makes it difficult for Member States such as Germany, France, Italy, or even the UK (providing for a monopoly in respect of the national lottery) to argue that their regulatory regime is consistent and may lead to further liberalization.

III. Analysis of the Jurisprudence

A. Development of the Case-Law

Four distinct phases can be observed in the jurisprudence of the ECJ/EFTA on gambling. The first phase is characterized by a 'soft' approach to proportionality: the Court simply states that Member States have a wide margin of discretion without examining the application of the proportionality test and taking a 'hands-off' approach.[219]

In the second phase the Court questioned the legitimacy of some of the grounds of justification adduced by the Member States (*Gambelli, Placanica*) and the appropriateness/suitability of the measures for achieving the social policy objectives (*Commission v Italy*, *Commission v Greece*).[220] It has been argued that the ECJ was carefully moving towards liberalization in this second phase.[221] The reason for this closer examination may be the sheer number of cases referred to the Court and a need to curtail abuse by Member States who use their margin of appreciation to impose trade restrictions not justified by social policy objectives in order to guard the national income from gambling activities.[222]

By contrast in the third phase of its jurisprudence, the ECJ has rebounded again to emphasize once more Member States' wide margin of discretion. Arguably this is due to a realization by the Court that remote gambling, which poses serious policy risks, cannot be liberalized through the back door of the Court's power to issue preliminary rulings on specific questions, but

[217] Paras 105, 111.
[218] Paras 102–103.
[219] Section 2.1.
[220] Section 2.2.
[221] See, eg, E Keuleers, 'From Gambelli to Placanica to a European Framework for Remote Gaming' (2005) 21(5) *Computer Law & Security Report* 427–31, 427.
[222] D Doukas and J Anderson, 'Commercial Gambling Without Frontiers' (2008) 27 *Yearbook of European Law* 237–76, 247.

requires agreement by the Member States on how to regulate remote gambling. But instead of reverting to its previous hands-off, soft approach, the ECJ has moved to examining the question of proportionality even more closely, by developing detailed and nuanced criteria for applying the proportionality test.

Finally, in the fourth phase, the Court has widened its focus by looking at the overall consistency of a Member State's regulatory regime across all sectors of gambling, thereby showing up inconsistencies between the regulation of different forms of gambling. Where such inconsistencies exist a Member State may decide to either liberalize the sector, or on the contrary, tighten up regulation of types of gambling more leniently regulated.

Having analysed the Court's long list of jurisprudence, it may be helpful to interpret the case-law by taking an overall view on how the Court's jurisprudence can be reconciled. The next section will paint this landscape.

B. Interpretation

The ECJ has consistently held that gambling was an economic activity to which the freedom to provide services and the freedom of establishment applied, not an illegal activity as such.[223] Therefore, the regulation of gambling (in the form of licensing and authorization requirements, exclusive rights granted to a private or State monopoly, or a total prohibition) was a restriction of the freedoms.[224]

One question here is whether a gambling operation established in one Member State A (such as Gibraltar or Malta) and holding an offshore licence, allowing it to provide gambling services only to jurisdictions other than Member State A can rely on the freedom to provide services in Member State B. It could be argued that this gambling operation deliberately circumvents the regulation (and taxation) in Member State B. However the Court held in *Carmen Media*[225] that an operator with an offshore only licence may rely on the freedom to provide services when offering betting services only in Member States other than the one in which it is established.[226] The Court in that case stated that the issue about evasion of law in Member State B and the freedom to provide services are two separate issues.[227] In other words, even with an offshore licence there is a presumption that the freedom to provide services applies, unless the State wishing to impose restrictions can show circumvention of its national laws.

[223] *Schindler*, above n 37, paras 19 and 31–35; Anomar, above n 69, para 47; see also S Geeroms, pp 149–153.
[224] *Schindler*, above n 37, paras 43, 45; *Läärä*, above n 43, para 29; *Zenatti*, above n 58, para 27; *Gambelli*, above n 77, paras 57–59; *EFTA Surveillance Authority v Norway*, above n 116, paras 26–27.
[225] Above n 210.
[226] Judgment, para 52.
[227] Paras 48–49.

Restrictions can be justified by overriding public interest requirements such as consumer protection,[228] preventing overspending,[229] preventing gambling addiction,[230] preventing fraud and other crime,[231] preserving public order,[232] and barring gambling from being a source of private profit.[233] This last ground of justification also means that a State monopoly[234] (or a complete prohibition as in *Schindler*[235]) can be justified if a Member State wishes to suppress gambling activities for moral, cultural, and religious reasons, provided it does so consistently.[236] The Court emphasizes different interests justifying the restrictions depending on the grounds raised by the Member State concerned.[237] While it is impossible to establish a hierarchy of the importance of the different interests, the Court has made a black and white distinction of grounds which justify restrictions on the freedom to provide gambling services and grounds which do not. For example, the Court has held that financial objectives such as providing for the financing of charitable and cultural purposes or increasing tax revenues were not legitimate grounds for justifying restrictive measures.[238]

But the Court has repeatedly stated that the financial objectives behind national legislation did not defeat the legitimacy of a measure, *if* that measure was justified by *other* public interest requirements, so that the financial benefits were only incidental.[239]

The Court has constantly held that Member States have sufficient 'latitude'[240] or 'discretion'[241] in regulating gambling according to the moral, religious, or cultural factors prevailing in that country. This means that Member States can set the level of protection they wish to grant in respect of the justifying public

[228] *Schindler*, above n 37, para 58; *Zenatti*, above n 58, para 31; *Gambelli*, above n 77, para 67; *EFTA Surveillance Authority v Norway*, above n 116, para 34; *Ladbrokes*, above n 127, para 44, *Sjöberg*, above n 161, para 36.
[229] *Gambelli*, above n 77, para 67, *Sjöberg*, above n 161, para 36.
[230] *Gambelli*, above n 77, para 67; *EFTA Surveillance Authority v Norway*, above n 116, para 37; *Ladbrokes*, above n 127, para 44.
[231] *Schindler*, above n 37, para 57; *Gambelli*, above n 77, para 67; *Ladbrokes*, above n 127, para 44; *Sjöberg*, above n 161, para 36.
[232] *Zenatti*, above n 58, para 31; *EFTA Surveillance Authority v Norway*, above n 116, para 34; *Ladbrokes*, above n 127, para 44, *Sjöberg*, above n 161, para 36.
[233] *Zenatti*, above n 58, para 31; *Ladbrokes*, above n 127, para 48.
[234] As in *EFTA v Norway*, above n 116 and *Ladbroke v Norway*, above n 127, *Läärä*, above n 43, and *Bwin*, above n 148.
[235] See above n 37 and text.
[236] See also S Alber, 'Freier Dienstleistungsverkehr auch für Glückspiele?' (2007) 8(3) *ERA Forum* 321–55, 351.
[237] *Läärä*, above n 43, para 17, *Zenatti*, above n 53, paras 14–15, Anomar, above n 70, paras 73, 75.
[238] *Gambelli*, above n 77, para 61; *EFTA Surveillance Authority v Norway*, above n 116, para 36; *Ladbrokes*, above n 127, para 46.
[239] *Zenatti*, above n 58, para 36; *Gambelli*, above n 77, para 62; *EFTA Surveillance Authority v Norway*, above n 116, para 38; *Ladbrokes*, above n 127, para 124.
[240] *Schindler*, above n 37, para 61.
[241] *Läärä*, above n 43, para 35; *Zenatti*, above n 58, para 33; *Anomar*, above n 69, paras 79–80; *Gambelli*, above n 77, para 63; *Commission v Italy*, above n 100, para 28, Case C-258/08 *Ladbrokes*, Judgment of the Court of 3 June 2010, para 19.

interest objectives. This also implies that the regulation of gambling may vary from Member State to Member State.[242] Member States may decide to completely prohibit a form of gambling, or a particular channel of delivery such as the internet. In *Carmen Media* the Court held that a total ban on internet gambling may be suitable to combat gambling addiction, fraud, consumer overspending, and to protect minors.[243]

However, this discretion notwithstanding, a national measure is only justified if it is suitable to attain the objective it is intended to achieve and if it is necessary in the sense that there is no less restrictive alternative measure achieving the same objective (proportionality test)[244] and the Court has held that the burden of proof in this respect rested on the Member State.[245]

As to suitability, the Court has only doubted the suitability of a measure where it was unclear to the Court how the measure was to achieve the intended objective. For example, in *Commission v Italy*, the Court held that Italy had not convincingly shown how the renewal of the existing licences could lead to a reduction in crime.[246] However, in most cases the Court has not given much guidance on the suitability of the measure (such as a licensing system channelling betting into a legal framework in *Zenatti*,[247] *Gambelli*,[248] and *Placanica*[249] or a monopoly leading to greater control in the *Läärä*,[250] *EFTA v Norway*,[251] *Markus Stoss*,[252] *Sporting Exchange Ltd*[253] cases).

As to necessity, prima facie, there seems to be a contradiction in the Court's jurisprudence by on the one hand allowing every Member State the discretion to formulate its regulation of gambling and on the other hand insisting on the application of the necessity test.[254] The Court has solved this apparent contradiction by saying that Member States' regulation must be systematic and consistent.[255]

The necessity of a measure is not adjudged by the system of regulation prevailing in another Member State. In other words, if a provider is licensed in one

[242] *Anomar*, above n 69, para 87; *EFTA Surveillance Authority v Norway*, above n 116, paras 83–85; *Sjöberg*, above n 161, para 38; S Alber, p 351.
[243] Above n 210, paras 105, 111.
[244] *Läärä*, above n 43, para 31, *Bwin*, above n 146, paras 59–60; *Markus Stoss*, above n 202, paras 77–78.
[245] *EFTA Surveillance Authority v Norway*, above n 116, para 31; *Ladbrokes*, above n 127, para 42.
[246] Above n 100, para 32.
[247] Above n 58.
[248] *Gambelli*, above n 77, para 66.
[249] *Placanica*, above n 89, para 57.
[250] Para 41: 'given the risk of crime and fraud, it is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities'.
[251] *EFTA Surveillance Authority v Norway*, above n 116, para 51.
[252] *Markus Stoss*, above n 202, para 79.
[253] *Sporting Exchange Ltd*, above n 173, paras 33–36.
[254] *Ladbrokes*, above n 127, para 55.
[255] *Gambelli*, above n 77, para 67; *Sjöberg*, above n 161, para 40; *Markus Stoss*, above n 202, para 97; *Sporting Exchange Ltd*, above n 173, para 33.

Member State, there is no presumption that its services are already well-regulated and hence sufficiently 'safe' to be provided in another Member State.[256] A Member State's system of regulation will only be measured against the level of protection that particular State has decided to provide.[257]

But it is here that the Court will check whether the regulation is systematic and consistent.[258] For example, if a Member State claims to suppress betting as far as possible and that this can only be satisfied by a single State monopoly provider or a restrictive licensing system, it may then not radically expand betting by allowing the State monopoly to engage in intensive advertising, rapidly expanding operations, or in providing a tightly knit, expansive network of betting outlets.[259] However the Court accepts that even within a restrictive regime there may be some necessity for advertising, controlled expansion, innovation, and the use of new distribution mechanisms such as the internet to prevent gamblers being enticed to gamble with more attractive, but illegal (and possibly unsafe) operations.[260]

The Court has also stated that the proportionality test must distinguish between different forms of gambling, as the policy risks are different (machine gambling being more addictive and hence more risky than weekly lotteries, for example). Hence it would be irrelevant for judging a measure on, for example offline casinos, if a Member State had expanded the sector of online betting.[261]

However, the Court has added a further gloss on the need for distinction between different forms of gambling, namely in its judgment in *Martin Stoss*.[262] In Paragraph 100 the Court found the argument that restrictions on other forms of gambling (gaming machines) have been relaxed and that the German authorities have tolerated increased advertising of other forms of gambling relevant to showing the inconsistency of policy.[263] By contrast in Pararaphs 93–96 the Court held that a distinction must be made between different forms of gambling: the mere fact that betting on horse racing, casinos, and gambling machines is operated by licensed private entities does not call into question the public monopoly on lotteries and betting on sports other than horse racing.[264]

[256] *Läärä*, above n 43, para 36; *Zenatti*, above n 58, para 34; but otherwise cf *Gambelli*, above n 77, para 73; *EFTA Surveillance Authority v Norway*, above n 116, paras 83–85, Case C-258/08 *Ladbrokes*, Judgment of the Court of 3 June 2010, para 54.
[257] *Läärä*, above n 43, para 36; *Zenatti*, above n 58, para 34; *Anomar*, above n 69, paras 79–80, 87; *Ladbrokes*, above n 127, para 58; S Alber, p 351.
[258] See above n 256.
[259] *Gambelli*, above n 77, para 69; *Ladbrokes*, above n 127, para 59; S Alber, p 351.
[260] *Ladbrokes*, above n 127, paras 53–54, *Placanica*, above n 89, para 55; see also Case C-64/08 *Staatsanwaltschaft Linz v Ernst Engelmann*, Opinion of Advocate General Jan Mazak of 23 February 2010, para 82, Case C-258/08 *Ladbrokes*, Judgment of the Court of 3 June 2010, paras 25, 31.
[261] *EFTA Surveillance Authority v Norway*, above n 116, para 44; *Ladbrokes*, above n 127, para 57; Case C-64/08 *Staatsanwaltschaft Linz v Ernst Engelmann*, Opinion of Advocate General Jan Mazak of 23 February 2010, paras 88–90, *Markus Stoss*, above n 202, para 96.
[262] See above n 202.
[263] See also *Carmen Media*, above n 210, paras 66–71.
[264] See also ibid, para 61.

The Court seems to say that Member States may choose different forms of regulation for different types of gambling, but that nevertheless its policy must be consistent across all forms of gambling. For example it would be inconsistent to prohibit advertising of less addictive forms of gambling (such as lotteries) while allowing operators of more addictive forms of gambling (such as casino gaming or gaming machines) to expand through aggressive advertising campaigns. This is in sharp contrast to the recommendations[265] by Advocate General *Mengozzi* who had pointed out that each form of gambling and each law applying to gambling had to be examined separately and independently on a case-by-case basis and had recommended that the ECJ should *not* look at the Member State's regulation of the gambling sector *as a whole* in applying the proportionality test.[266]

The Court furthermore held that the proportionality test has to be carried out in respect of each public interest objective and it was sufficient if a measure was justified by at least one public interest requirement. For example, in *Placanica* the Italian Government argued that its intended objective was not primarily to reduce gambling opportunities but to fight crime and the Court agreed that therefore the measures had to be examined against this *particular* objective.[267]

In cases concerning gambling the Court has refused to intervene in applying the necessity test in most cases. However it has done so in at least five decisions (*Gambelli, Placanica, Commission v Greece, Markus Stoss*, and *Carmen Media*).[268] For example in *Gambelli*[269] and in *Placanica*[270] the Court held that the Italian legislation prohibiting public companies from obtaining a betting licence was not necessary, since transparency could be achieved by other means (it may have helped in this case, however, that Italy had already repealed the offending legislation at the time of the judgments). In *Commission v Greece* the ECJ found that a measure prohibiting all gaming (not merely games of chance) on the grounds of social policy risks related to *gambling* was not necessary.[271] In *Markus Stoss*[272] and *Carmen Media*[273] the Court cast doubt on the necessity of the lottery and sports betting monopolies in Germany, compared to the level of protection offered in respect of casinos and gaming machines.

However in most cases the Court has left the application of the necessity test to the national court so that in conclusion the Court has to date refused to

[265] Which are, of course, not binding on the Court.
[266] Advocate General Paolo Mengozzi, Opinion in Cases C-316/07, C-358/07–360/07, C-409/07–410/07 *Markus Stoss and others*, Opinion of 5 March 2010, paras 72, 88.
[267] Paras 16–17, 52, 54.
[268] All discussed in Section II above.
[269] Para 74.
[270] *Placanica*, above n 89, paras 62, 64.
[271] *Commission v Greece*, above n 107, para 36.
[272] Above n 202.
[273] Above n 210.

liberalize the online gambling sector. Provided Member States regulatory regime is consistent, it is unlikely that the Court will find a measure to be unjustified.

IV. National Courts

The nuanced guidance given by the ECJ has produced confusion and inconsistent application on the level of the national courts and legal uncertainty.[274] The ECJ's initial approach of giving the Member States wide discretion coupled with a more directive stance in later rulings where the ECJ gave directions on the suitability and necessity of the national measures in question have caused difficulties for the national courts in judging the compatibility of a national measure with the freedom to provide services. Furthermore, for historical reasons, the gambling laws in many EU jurisdictions have developed in order to allow fundraising for charitable, sports and cultural purposes, or in order to increase tax revenues as well as protecting consumers from gambling addiction and crime.[275] These historically grown laws and State monopolies sit ill with the Internal Market objectives of the EU. The result of this has been a spate of litigation through all instances in many Member States as operators are fighting to open up this lucrative market.[276] In fact this pressure means that, even after the recent avalanche of ECJ cases providing clearer guidelines, at least six national courts have referred cases to the European Court of Justice seeking guidance from the ECJ and these are pending at the time of writing.[277]

[274] J Borg Barthet, 'Online Gambling and the Further Displacement of State Regulation' (2008) 57(2) *International & Comparative Law Quarterly* 417–26, 417; see also arguing on similar lines: D Doukas and J Anderson 'Commercial Gambling Without Frontiers' (2008) 27 *Yearbook of European Law* 237–76, 257.

[275] See further Chapter 2 of J Hörnle and B Zammit *Cross-border Online Gambling Law and Policy* (Edward Elgar, Cheltenham, 2010).

[276] See for example: Oberlandesgericht Frankfurt aM, Decision of 4 June 2009, 6 U 93/07 and 6 U 261/07, finding the German prohibition of internet betting compatible with the freedom to provide services; Federal Administrative Court, Decision of 28 March 2001, Case C2/01 BVerwGE 114,92 p 102 regarding the German State monopolies as justified; see also the Dutch cases *Compagnie Financière Regionale BV v The Minister of Justice* Court of Breda, Administrative Law Section Decision of 2 December 2005; J Franssen, 'What's Next for the Netherlands?' (2006) 10(1) *Gaming Law Review* 33–6 finding that the Dutch monopoly on (physical) casinos is infringing the freedom to provide services, as it does not amount to coherent and consistent regulation, but cf the Dutch Supreme Court in *De Lotto v Ladbrokes* Decision of 18 February 2005 NJ 2005, 404 finding that the Dutch monopoly on betting is not an infringement of the freedom to provide services and confirming an injunction against Ladbrokes to cease their online betting activities in the Netherlands. It held that a betting operator such as Ladbrokes had to block IP addresses indicating that the viewer is situated in the Netherlands, see J Franssen and R Budik, 'The European Remote Gambling Market' [Autumn 2005] *Casino Lawyer* 8–9.

[277] See Case C-212/08 *Zeturf*; Joined Cases C-72/10 and C-77/10 *Costa* and *Cifone*; Case C-255/10 *Sacchi*; Case C-279/10 *Minesi*; Case C-116/09 *Formato*.

One example of the many civil and criminal court cases on the freedom to trade which have arisen before the national courts,[278] is the *Zeturf* case. This case concerned the freedom of Zeturf,[279] originally a French undertaking, to establish itself in Malta (incorporated as a Maltese company and licensed there) and provide internet betting services on French horse races to French customers from there. The purpose of Zeturf's set-up was clearly to circumvent French law.[280] Pari Mutuel Urbain (PMU),[281] an economic interest grouping under French law, uniting the different horse racing tracks under one umbrella organization and founded in 1930, had a monopoly on (offline and online) horse race betting in France (obstacle, flat, and trot races) granted by legislation.[282] PMU is under the supervision of the French Government.[283] According to article 3 of its constitution it is a not-for-profit organisation. Its purposes are to prevent betting being a source of individual profit and preventing fraud and other crime as well as the improvement of horse breeding in France and a levy is deducted for this latter purpose.[284]

PMU challenged Zeturf's internet activities directed at France as a criminal offence and an illegal act of unfair competition (ie a tort) before the French court[285] and obtained an injunction prohibiting Zeturf from providing internet betting in France.[286] Zeturf appealed against this order on the basis that the French law giving PMU the exclusive right to provide horse race betting in France was an infringement of its freedom to provide services. The *Cour d'Appel* (Paris) confirmed the order of the lower court on the basis that the restriction on the freedom to provide services was justified for public order reasons.[287] Zeturf further appealed to the *Cour de Cassation*.[288] The *Cour de Cassation*, allowing the appeal, annulled the decision and referred the case back to the lower courts.[289] It held that the court should examine on the facts whether the French law was consistently applied and in particular whether the French authorities had in fact engaged in expanding the betting sector in order to increase tax

[278] Article 56 of the Treaty is directly applicable as Community Law and directly effective in disputes before the national courts: Case 2/74 *Reyners* [1974] ECR 631; Case 33/74 *Binsbergen* [1974] ECR 1299; Case 279/80 *Webb* [1981] ECR 3305; A Kaczorowska, pp 304–6.
[279] <http://www.zeturf.com/fr> (accessed 7 February 2011).
[280] J Borg Barthet, p 419.
[281] <http://www.pmu.fr/pmu/html/fr/entreprise-pari-mutuel-urbain/statut-pari-mutuel-urbain.html> (accessed 7 February 2011).
[282] French law has since moved to a licensing system.
[283] French Law of 2 June 1891 amended by Article 186 of the Finance Law of 16 April 1930 and Decree 97.456 of 5 May 1997 (amended by the Decree of 12 November 2002).
[284] *Zeturf v PMU*, Decision of 4 January 2006, [2006] 2 CMLR 39, paras 27–28.
[285] Tribunal de Grande Instance, Paris.
[286] The Court of Appeal in Malta held that the French court order cannot be enforced under the Jurisdiction Regulation (EC) 44/2001, as it concerned a public law matter (not a civil and commercial matter).
[287] *Zeturf v PMU*, Decision of 4 January 2006, [2006] 2 CMLR 39, paras 30, 32.
[288] *Zeturf v PMU*, Decision of 10 July 2007, [2008] 1 CMLR 4.
[289] Ibid, para 19.

revenues.[290] The *Cour de Cassation* furthermore held that the lower courts should examine whether the objective to reduce gambling opportunities and to prevent crime was not already provided for by the Maltese regulation of Zeturf.[291] However this guidance from the *Cour de Cassation* did not help the *Cour d'Appel* to finally decide the case and the matter has now been referred to the ECJ by the *Conseil d'Etat* on 21 May 2008.[292]

Online gambling providers established in places like Gibraltar, Malta, and Great Britain are likely to continue their onslaught on national legislation restricting gambling in the (other) Member States by bringing cases before the national courts insisting on the freedom to provide services and by lobbying the European institutions. While at present the ECJ has not opened the door wide enough for liberalization of the gambling area, the other European institutions are also wavering between the serious social policy concerns related to gambling and pressure from operators.

V. Recent Developments and Policy

It has been reported that the Commission, in its quest to further the Internal Market objective, has abandoned the attempt to harmonize the national laws on online gambling[293] and is instead pursuing a policy of bringing infringement proceedings[294] against the Member States to address the inconsistency of the national regulatory systems.[295] By contrast, the European Parliament has pointed to the dangers inherent in online gambling in a Resolution of 10 March 2008.[296] The Resolution points out that the revenues from regulated gambling have been the 'most important source of income for sports organisations in many Member States' and online gambling may jeopardize this revenue and hence sports activities in the EU.[297] The European Parliament expresses its concern not only about crime prevention, but also the prevention of under-age

[290] *Zeturf v PMU* Decision of 10 July 2007, [2008] 1 CMLR 4, para 15.
[291] Ibid, para 18.
[292] Case C-212/08 *Zeturf* OJ C 197 of 2 August 2008, 12.
[293] See also S Alber, p 327.
[294] Most of the jurisprudence of the ECJ are answers to specific questions under the preliminary reference procedure in TFEU (Art 267) which is slow to produce a cogent and clear statement of the law—hence the use of the infringement procedure under Article 258 may be a more direct way to bring about clarification of the Member States' obligations in this area.
[295] The Commission has taken preliminary steps against the Netherlands in respect of sports betting (Europa Press Release IP/08/330), Sweden in respect of poker tournaments and sports betting (IP/08/118, IP/06/436, IP/07/909), Germany in respect of internet gambling and advertising prohibitions (IP/08/119), France and Greece in respect of sports betting (IP/07/909, IP/06/1362, IP/08/330), Denmark, Finland, and Hungary in respect of sports betting (IP/07/360), and Austria and Italy in respect of casino advertising and sports betting (IP/06/1362).
[296] Resolution on the Integrity of Online Gambling of 10 March 2009, P6_TA(2009)0097; see also the Report of the Committee on the Internal Market and Consumer Protection (A6-0064/2009).
[297] At B.

gambling and addiction and in relation to betting, ensuring that sports competitions themselves remain fair and without undue influence.[298] The Resolution also points to the likelihood that online gambling is more addictive because of easy access and lack of social constraints and recommends more research into the addictiveness of online gambling.[299] The Resolution indicates that the European Parliament is opposed to the liberalization of gambling and specifically asks the Commission to take into account the jurisprudence of the ECJ allowing Member States discretion in this area.[300] It calls on the Member States to cooperate in solving the social and public order problems arising from cross-border online gambling, including the negative impact on sport by illegal betting behaviour and match or race fixing.[301] The Resolution states that the European Parliament considers self-regulation by itself insufficient to address the regulatory concerns.[302] In the meantime, the EU Council has started a Working Group on gambling services tasked to carry out research and discussions in order to explore the subject, without any idea as to the outcome. The French Presidency had flagged up the diversity of national approaches to online gambling at the end of 2008 and suggested ongoing discussions.[303] In conclusion, there is much debate about the issues involved in online gambling at a European level, but much of the policy debate currently focuses on taking stock of the existing regulatory regimes within the EU and how to cooperate (without harmonization) in tackling these regulatory issues.[304]

VI. Conclusion and Outlook

The case-law of the ECJ in online gambling cases, described by the metaphor of a tug of war in this article, is highly interesting as it is a typical demonstration of how judge-made law develops step-by-step starting from more general

[298] At I and K.
[299] At J and paras 11–23.
[300] At para 1: 'Highlights that, in accordance with [. . .] the case law of the European Court of Justice, Member States have an interest and right to regulate and control their gambling markets in accordance with their traditions and cultures [. . .], as well as to protect the culturally-built funding structures which finance sports activities and other social causes in the Member States' and para 2: 'Stresses that gambling services are to be considered as an economic activity of a very special nature due to the social and public order and health care aspects linked to it, where competition will not lead to a better allocation of resources [. . .]; emphasises that a pure Internal Market approach is not appropriate in this highly sensitive area, and requests the Commission to pay particular attention to the views of the European Court of Justice . . .'
[301] Paras 4–10.
[302] Paras 24–26.
[303] See, eg, <http://www.gamblingcompliance.com/node/20075>; see also the French Presidency Report dated 27 November 2008: <http://register.consilium.europa.eu/pdf/en/08/st16/st16022.en08.pdf> (accessed 7 February 2011).
[304] See also Council Presidency Progress Report of 27 November 2008 <http://register.consilium.europa.eu/pdf/en/08/st16/st16022.en08.pdf> (accessed 7 February 2011).

principles, then moving to more detailed and refined rulings. Starting from general principles such as the freedom to provide services and a prohibition on restrictions to this freedom and balancing this prohibition with legitimate justification of restrictions, the Court has, step by step, developed refined and nuanced criteria for assessing Member States' regulation of gambling, moving between liberalization und upholding Member States' restrictions.

For example, the Court had to solve the inherent conflict between allowing the Member States discretion in this area while nevertheless applying the proportionality test. The Court has achieved this by holding that Member States are allowed to set the level of protection they wish to provide, but once that level has been set, Member States must provide for consistency within the regulatory model they have chosen to adopt. While initially only demanding consistency within the regulation of one form of gambling, the Court now looks at overall consistency.

Therefore, the stricter the regulatory regime in a Member State, the easier it would be for the Member State concerned to argue that any restrictions are justified. Thus, if a Member State prohibited gambling any restrictions it imposed on incoming services would be justified.[305] However, in practice most Member States allow many forms of gambling, but regulate them through having an exclusive monopoly or more or less restrictive licensing regimes.

The reason for different regulatory regimes for the various forms of gambling is that the traditional motive for the regulation of gambling is that it has been regarded as a socially harmful and immoral activity, the promotion of which is against the public interest.[306] Thus, the purpose of regulation was to confine gambling to narrow bounds and to limit the supply of gambling services. At the same time, regulators have seen a need to satisfy the unavoidable demand for some forms of gambling. Traditionally one compromise solution has been to allow certain restricted forms of gambling but to ensure that the income derived is used for beneficial, charitable, or cultural purposes or accrues to the State as tax revenue.

Therefore the Court's ruling that financial considerations (such as the financing of cultural, sporting, or charitable causes) are not a legitimate ground for restrictions will cause problems for many Member States. This traditional compromise means that many Member States will have to reform their laws, which are frequently modelled mainly on the very objective of providing funding for such 'good' causes. Furthermore, the technological advances which enable remote online gambling also mean that Member States have to reconsider their existing laws on gambling. This need for legal reform may mean that (some) Member States put greater emphasis on the policy objectives recognized

[305] See also Case C-46/08 *Carmen Media Group*, Opinion of Advocate General Mengozzi of 4 March 2010, para 69.

[306] See further Chapter 2 of J Hörnle and B Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar, Cheltenham, 2010).

by the ECJ for regulation (such as preventing gambling addiction, crime, money laundering, under-age gambling)[307] or it may mean that (some) Member States will liberalize the sector.[308]

Developments in the EU have been influenced by the increasing drive of online gambling providers established in liberal jurisdictions to break into the lucrative markets of those jurisdictions where gambling has traditionally been prohibited or limited to a monopoly provider. However as has been seen from the analysis of the ECJ's jurisprudence, the Court has to date refused to liberalize the internet gambling sector by case-law and has not insisted on the principle of mutual recognition. It has consistently held that Member States have discretion to decide the level of protection and the regulatory means by which such protection is implemented.

Otherwise, the freedom to provide services as a fundamental principle to achieve the goal of an Internal Market for services within the EU may have the undesirable consequence that important social policy considerations are merely regarded as obstacles standing in the way of the freedom to trade. Considering the serious policy risks raised by online gambling (such as gambling addiction, harm to minors, and links with criminal activities), this would be a worrying development. Social policy objectives on a national level would slowly but constantly be whittled away. It may be all well and good to argue that the regulatory restrictions imposed by the Member States are a restriction of the freedom to provide services. This argument does not explain how to protect against the policy risks. If Member States cannot provide for protective mechanisms, the European institutions would have to. But since they have limited powers in respect of social policy, such a pan-European approach is not practicable. Furthermore the Court's case-law represents a piecemeal approach to regulation, which has created confusion and legal uncertainty.[309] *Doukas* and *Anderson* argue that Member States' reticence in abolishing national gambling monopolies is motivated by an illegitimate motive to tap gambling revenue.[310] This argument in my view misses the wider policy question of whether there should be a limit to the Internal Market and the apparent prerogative of economic values over moral values. Gambling *is* a sensitive area and Member States should have discretion on how to implement social policy objectives, absent any pan-European harmonization.

Doukas and *Anderson* furthermore suggest that a country of origin rule and the establishment of minimum standards or mutual recognition may serve to solve the problems arising from the divergent case-law.[311] This argument makes

[307] An example is Germany.
[308] An example is UK, with the introduction of remote licences in the Gambling Act 2003.
[309] See also D Doukas and J Anderson 'Commercial Gambling Without Frontiers' (2008) 27 *Yearbook of European Law* 237–76, 264.
[310] Ibid, 266.
[311] Ibid, 267–71.

the assumption that the gambling sector must be liberalized and that Member States should not be allowed to restrict or prohibit certain forms of gambling. This author disagrees with this proposition for the same reason advanced above: Member States regulation is too divergent and mutual recognition would mean that the majority of Member States who currently have restrictive provisions on many aspects of gambling would be forced by a small minority of Member States to liberalize the gambling sector. The serious risks associated with remote gambling must be addressed before liberalization of the sector can be contemplated.

However, the European institutions are not (yet) ready to replace national social policy with an effective pan-European social policy in the online gambling field, as the cultural, moral, and religious attitudes and approaches to online gambling are too divergent to find a common denominator for harmonization.[312] Therefore, given the serious policy concerns associated with gambling, the ECJ has rightly resisted the pressure by gambling operators to liberalize this sector through the back door and has consistently held that Member States have a margin of discretion to set the national agenda in this field, provided Member States implement their policy in a systematic and consistent manner.

Interestingly, many countries attracting and allowing online gambling providers to operate from their territory prohibit the provision of online gambling services to their *own* populations and thus provide for a preferential export regime, allowing service providers to circumvent or avoid regulation by the destination country.[313] In the context of the freedom to provide services, it is clear[314] that the destination Member State is entitled to apply its national laws to a foreign service provider, if the service provider targets its services to the destination Member State with the sole purpose of deliberately avoiding the regulation of that Member State by establishment in another Member State. This evasion principle is an important safety valve to prevent the undermining of national regulation in sectors where there is no harmonization.[315] However even if there is no deliberate evasion of national law, a Member State may still justify a restriction on the basis that it provides a higher level of protection and a different regulatory regime than the Member State of origin.

It has to be accepted that the gambling sector and the social policy objectives have not been harmonized within the EU. In the author's view any harmonization requires protective mechanisms and these have to be implemented by legislation, as self-regulation alone is not sufficient.

[312] Similar concerns are expressed by J Borg Barthet, p 417.

[313] See further the discussion in A Littler, 'Regulatory Perspectives on the Future of Interactive Gambling in the Internal Market' (2008) 33(2) *European Law Review* 211–29.

[314] Case 33-74 *Van Binsbergen* [1974] ECR 1299; Case C-148/91 *Veronica* [1993] ECR I 487; C-23/93 *TV10* [1994] ECR I 4795.

[315] See further J Hörnle, 'Country of Origin Regulation in Cross-border Media—One Step Beyond the Freedom to Provide Services' (2005) 54 *International Comparative Law Quarterly* 89-126 and also Advocate General Mengozzi in *Markus Stoss*, above n 202, paras 104-105.

As a general principle, it is my opinion that markets should only be liberalized if national social policy can be replaced by an effective, coordinated European social policy. However for the EU to develop such a policy there would have to be not only agreement on legal standards and the type of regulation, but also a developed infrastructure (including reliable regulatory bodies for licensing and enforcement cooperation) which all Member States can trust, as has been pointed out by Advocate General Mengozzi in the *Markus Stoss* case. He had pointed out that the practices of some Member States (such as Malta and Gibraltar) of giving off-shore licences to providers targeting their services exclusively to another Member State were likely to undermine the very trust and confidence between Member States required for future approximation of laws and future administrative cooperation and coordination in the regulation of online gambling.[316] He thus gave a very clear word of warning that harmonization cannot be achieved through the back door of the jurisprudence of the ECJ and that harmonization requires much more work on political cooperation and coordination in regulating gambling, protecting consumers, and implementing the necessary social policy objectives.

Furthermore, a different model for the financing of social, cultural, and sporting activities would have to be found.

And even if there was a harmonized approach throughout the EU (through a licensing system for example) it is then likely that online operators would target citizens in the EU from non-EU Member States with an even more liberal (licensing and tax) regime.

In the short to medium term, it is likely that the Member States will only agree to cooperate to some extent in non-contentious aspects of the regulation of online gambling such as developing effective means of age verification, research into the addictiveness of online gambling and the prevention of gambling addiction, and prosecuting fraudulent online gambling operations. It remains to be seen whether this cooperation will eventually lead to a closer approximation of national policies. The tug of war is set to continue for quite some time.

[316] Para 104, see also Case C-46/08 *Carmen Media Group*, Opinion of Advocate General Mengozzi of 4 March 2010, paras 45–46.