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**Gambling Licenses in the EU**

**Martin A. Schwertmann**

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## **Abstract**

Due to the moral, religious and cultural aspects of gambling and the absence of sector-specific gambling regulations at the European level, EU Member States have some discretion to set their level of (consumer) protection in accordance with their pursued objectives of general interest. The lack of harmonization of the gambling sector at the European level leads to legal fragmentation and exposes consumers and operators likewise to 28 different national legal systems. This paper presents the status quo of gambling licenses in Europe by examining the European Union's primary and secondary law as well as the relevant ECJ case law. The paper proposes a possible target legal state.

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## LIST OF ABBREVIATIONS

AG	Advocate General
Art.	Article
BGBI	Federal Law Gazette ('Bundesgesetzblatt')
Cf.	Confer
CJEU	Court of Justice of the European Union ('the Court')
ECSC	European Coal and Steel Community
EP	European Parliament
EU	European Union
EUR	Euro
GALS-H	Gaming Act of the Land Schleswig-Holstein
GSATG	German State Amendment Treaty on Gambling
GSpG	Austrian Gambling Code ('Glücksspielgesetz')
Id.	Idem
No.	Number
O.J.	Official Journal
Para.	Paragraph
Sec.	Section
StGB	Penal Code ('Strafgesetzbuch')
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WOGLR	World Online Gambling Law Report
ZfWG	European Journal of Gambling Law ('Zeitschrift für Wett- und Glücksspielrecht')

## 1. INTRODUCTION

### 1.1 Problem statement

In 1994 the CJEU first declared the offer of gambling services to be an economic activity within the meaning of the Treaties.<sup>1</sup> As a result, the internal market provisions<sup>2</sup> apply and member states that want to restrict the offer of gambling services have to justify any restriction. Although the TFEU mentions certain justifications for these restrictions<sup>3</sup>, in *Cassis de Dijon*<sup>4</sup> the CJEU developed the concept of ‘mandatory requirements’ in order for member states to maintain non-discriminatory<sup>5</sup> national restrictions — e.g. prior administrative authorization schemes — based on objectives of general interests, such as consumer protection or fraud prevention.

Due to the *moral, religious or cultural* aspects of gambling<sup>6</sup> and the absence of gambling regulation at the European level, the CJEU grants national authorities “a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society.”<sup>7</sup>

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<sup>1</sup> See Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039, para. 19. A common definition of gambling services (or games of chance) does not exist at the European level. Member states are free to regulate and therefore define ‘gambling services’ within their national legal framework. When the CJEU refers to ‘gambling’ national gambling laws have to be considered. While in *Schindler* the service in question was the holding of lotteries the CJEU also ruled on national gambling laws concerning e.g. slot machines, sporting bets and various casino games.

<sup>2</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]. The internal market seeks to guarantee the fundamental freedoms — the free movement of goods (TFEU art. 28), persons (TFEU art. 45), services (TFEU art. 56), and capital (TFEU art. 63) — within the member states of the EU.

<sup>3</sup> See, e.g., TFEU art. 36 (“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security ....”)

<sup>4</sup> See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, para. 8.

<sup>5</sup> The application in a non-discriminatory manner is only one out of four requirements that the *Gebhard formula* requests from “national measures liable to hinder or make less attractive the exercise of fundamental freedoms.” See Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori*, 1995 E.C.R. I-4165, para. 37.

<sup>6</sup> Cf. *Schindler*, para. 60.

<sup>7</sup> *Id.* para. 61.

Member states are therefore free to set their level of (consumer) protection in accordance with their pursued objectives of general interest as long as they observe EU law. This broad margin of discretion — along with the emergence of the Internet as a distribution channel of services and procedural shortcomings of preliminary rulings<sup>8</sup> — causes legal uncertainty and quantitative and qualitative fragmentation.<sup>9</sup> The introductory remarks by AG Mengozzi in *Stoß*<sup>10</sup> provide an accurate summary of the status quo of gambling in the EU:

An industry worth thousands of millions of euros involving a harmful and culturally sensitive activity. A service which, thanks to new means of communication, finds it easy to cross frontiers. A sector for which the law is not harmonised and the case-law is based on individual cases. All those elements are present in the gaming sector: that is why it should be no surprise that the sector is highly litigious and will probably continue to give rise to disputes in the future. The questions considered here are clear proof of this, like many other questions which have already been referred to the Court.<sup>11</sup>

## 1.2 Research objective

For these reasons, the establishment of licensing regimes in individual member states and the accompanying issuance of national gambling licenses in a cross-border environment raises various important and significant issues.

The CJEU has recognized that in a cross-border environment, in order to be in compliance with EU law, all licensing regimes have to observe not only the fundamental freedoms laid

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<sup>8</sup> See TFEU art. 267; section 2.3.

<sup>9</sup> See WOLFGANG ZANKL, *ONLINE-GLÜCKSSPIEL IN EUROPA* 20 (2011).

<sup>10</sup> Joined Cases C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069.

<sup>11</sup> Joined Cases C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069, Opinion of AG Mengozzi, paras. 1-2.



down in the TFEU but also the principles of transparency<sup>12</sup>, equal treatment<sup>13</sup>, and legal certainty.<sup>14</sup>

The paper at hand examines the CJEU case-law that led up to this conclusion, presents the status quo, and offers a possible target legal state of gambling in the EU, including common minimum standards that have already been proposed, enhanced mutual recognition of national gambling licenses, and the overall improvement of legal certainty for consumers and gambling providers alike.

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<sup>12</sup> Cf. Joined Cases C-72 & 77/10, *Costa*, 2012 E.C.L.I. EU 80, para. 54.

<sup>13</sup> *Id.*

<sup>14</sup> Cf. Joined Cases C-660/11 & C-8/12, *Biasci v. Ministero dell'Interno*, 2013 E.C.L.I. EU 550, para. 33.

## **2. CURRENT LEGAL STATE OF GAMBLING IN THE EU**

### **2.1 Legal fragmentation of the EU gambling sector**

In the Treaty of Paris<sup>15</sup> the then member states<sup>16</sup> voluntarily decided to cede sovereignty in exchange for economic convergence by establishing the ECSC – an organization based on supranational principles. The mission – the prime objective – of the ECSC was economic harmonization at a transnational level:

The mission of the European Coal and Steel Community is to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution, in harmony with the general economy of the member States, of a common market as defined in Article 4.<sup>17</sup>

Following from the European integration and the establishment of the internal market<sup>18</sup>, there was the assignment of an increased amount of regulatory rights to the EU, a supranational construct, in order to drive economic integration. Notwithstanding the above, the CJEU grants member states a significant degree of latitude regarding sectors with high regulatory and socio-political relevance. In addition to this margin of discretion, the integration tends to proceed only hesitantly when it comes to competencies that form a source of income for the respective member state. Since gambling combines all those attributes it comes as no surprise that there is no harmonization in the specific area of the organization of games of chance at European level.

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<sup>15</sup> Treaty constituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

<sup>16</sup> Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

<sup>17</sup> ECSC Treaty art. 2.

<sup>18</sup> See Consolidated Version of the Treaty on European Union, art. 3(3), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

The result is a quantitative and qualitative fragmentation of the European gambling sector.<sup>19</sup> It is quantitative because consumers, as well as gambling providers, face 28 different legal situations and frameworks, each one regulating gambling in a different way. It is qualitative with regard to the fundamental disparities between the different regulatory approaches. But the broad distinctions between an outright ban on the offer of games of chance, the establishment of a gambling monopoly or the implementation of a licensing regime are not the only distinctions to be made. There are several regulatory hybrid forms in place that restrict (or liberalize) the offer of particular forms of gambling or limit the channels of distribution offered.

## 2.2 Secondary Union law

The EU lacks secondary law that harmonizes the national gambling markets. The absence of legal harmonization and the resulting fragmentation has led to considerable regulatory differences among the member states. The disparities in the level of (consumer) protection and the differences between the chosen regulatory approaches has even reached a point where gambling had to be partially or fully excluded from the scope of application of various directives in order to uphold national peculiarities. The following table provides a brief overview of their relevant directives and their scope of application regarding gambling services.

Directive		Scope of application
97/7/EC <sup>20</sup>	Distance Selling Directive	Gambling through means of distance communication <sup>21</sup> (e.g. online gambling) can fall within the scope of the Directive. Article 6(3) only restricts the consumer's right of

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<sup>19</sup> See ZANKL, *supra* note 9, at 18.

<sup>20</sup> Directive 97/7, of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19 (EC).

<sup>21</sup> *Id.* art. 2(4).

		withdrawal, unless the parties have agreed otherwise.
98/34/EC <sup>22</sup>	Information Society Directive	Member states have the obligation to notify to the Commission and each other of all national regulations concerning gambling services “provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” <sup>23</sup>
2000/31/EC <sup>24</sup>	E-Commerce Directive	Article 1(5)(d) excludes “gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions” from its scope of application.
2005/29/EC <sup>25</sup>	Unfair Commercial Practice Directive	Recital 9 of the Preamble clarifies that this directive is “without prejudice ... on conditions of establishment and authorization regimes, including those rules which, in conformity with Community law, relate to gambling activities.” The directive is therefore only of relevance for the commercial practices (e.g. marketing) of gambling providers. Additionally, annex I recital 16 explicitly states that products that could facilitate winning in games of chance constitute a misleading commercial practice.

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<sup>22</sup> Directive 98/48, of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying Down a Procedure for the Provisions of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 217) 18 (EC).

<sup>23</sup> *Id.* art. 1(2).

<sup>24</sup> Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 (EC).

<sup>25</sup> Directive 2005/29, of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L 149) 22 (EC).

2005/60/EC <sup>26</sup>	Anti-Money Laundering Directive	Article 2(1)(3)(f) limits the scope of application to casinos and therefore excludes all other forms, or distribution channels of gambling. A proposal <sup>27</sup> for the 4 <sup>th</sup> Anti-Money Laundering Directive aims to broaden the scope to cover all providers of gambling services. <sup>28</sup>
2006/112/EC <sup>29</sup>	VAT Directive	Under article 135(1)(i) “Member States shall exempt the following transactions: ... betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State.” It therefore remains at the discretion of the individual member state to completely exclude, or include gambling transactions or to establish a gambling-form-dependent tax regime.
2006/123/EC <sup>30</sup>	Service Directive	Pursuant to article 2(2)(h) the directive shall not apply to “gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions.”
2010/13/EU <sup>31</sup>	Audiovisual Media Services Directive	Recital 22 of the Preamble excludes all audiovisual content that “is merely incidental to the service and not its principal purpose. ... For

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<sup>26</sup> Directive 2005/60, of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, 2005 O.J. (L 309) 15 (EC).

<sup>27</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, COM (2013) 45 final (Feb. 2, 2013).

<sup>28</sup> *Id.* art. 2(1)(3)(f).

<sup>29</sup> Council Directive 2006/112, of 28 November 2006 on the Common System of Value Added Tax, 2006 O.J. (L 347) 1 (EC).

<sup>30</sup> Directive 2006/123, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 36 (EC) [hereinafter *Service Directive*].

<sup>31</sup> Directive 2010/13, of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services, 2010 O.J. (L 95) 1 (EU).

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, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.”

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2011/83/EU<sup>32</sup> Consumer Rights Directive

Pursuant to article 3(3)(c) gambling contracts are excluded from the directive in order for member states to adopt “other, including more stringent, consumer protection measures in relation to such activities.”<sup>33</sup>

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2014/23/EU<sup>34</sup> Concession Directive

In 2007, the CJEU held that gambling licenses<sup>35</sup> constitute public service concessions.<sup>36</sup> Regardless of such ruling, the directive excludes gambling services from its scope of application.<sup>37</sup> Nevertheless, if member states decide to regulate their national gambling markets by means of authorization, relevant EU law — in particular the TFEU and the fundamental freedoms — has to be observed.<sup>38</sup> A firm grasp of primary Union law and the CJEU case-law on its aforementioned fundamental freedoms is therefore mandatory.

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<sup>32</sup> Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64 (EU).

<sup>33</sup> *Id.* recital 31 of the preamble.

<sup>34</sup> Directive 2014/23, of the European Parliament and of the Council of 26 February 2014 on the Award of Concession Contracts, 2014 O.J. (L 94) 1 (EU) [hereinafter *Concession Directive*].

<sup>35</sup> *In concreto*, licenses for horse-race betting operations in Italy.

<sup>36</sup> See Case C-260/04, *Comm’n v. Italy*, 2007 E.C.R. I-7083, para. 20.

<sup>37</sup> *Concession Directive*, *supra* note 34, art. 10(9).

<sup>38</sup> *Id.* recital 35 of the preamble.

## 2.3 Primary Union law

Sector-specific secondary law that harmonizes the national gambling markets in the EU does not exist. The exclusion of gambling from various directives enables the member states to make discretionary regulatory decisions in areas, which otherwise would have been governed by provisions of secondary law, further adding to legal uncertainty and fragmentation.

While member states have the freedom to determine what regulatory framework is required to reach the set level of (consumer) protection, all national restrictions have to be in compliance with EU law nonetheless. The supremacy<sup>39</sup> and direct applicability<sup>40</sup> of EU law enables legal entities and individuals to successfully rely, before national courts, on the fundamental freedoms laid down in the TFEU. The qualification of gambling as an economic activity and as a *service* within the meaning of TFEU article 56 is therefore of utmost importance.

The Commission — in its role as the ‘guardian of the treaties’<sup>41</sup> — ensures the due and proper application of the Treaties and makes sure that member states exercise care when restricting fundamental freedoms, so that the effective functioning of the internal market is guaranteed. In order to fulfill this task, the Commission monitors legal changes on a national level and — when under the impression that a member state has failed to fulfill an obligation under the Treaties or a member state is adopting legislation considered to contravene fundamental freedoms — can issue infringement proceedings against individual member states.

Alongside with the Commission, the CJEU plays an important role as a guarantor of the fundamental freedoms. The Court not only ultimately resolves infringement proceedings<sup>42</sup> to

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<sup>39</sup> Cf. Case 26/62, *N.V. van Gend & Loos v. Administratie der Belastingen*, 1963 E.C.R. 1.

<sup>40</sup> Cf. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, 2010 E.C.R. I-8015, para. 53 (with further references).

<sup>41</sup> See TEU art. 17(1) („It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.”)

<sup>42</sup> TFEU art. 260(1).

ensure the correct application of the Treaties, but also offers its interpretation of EU law upon request of a national court.

In *Schindler*, the CJEU first qualified gambling as a service and opened up the opportunity to challenge national gambling laws — despite the lack of legal harmonization at EU level — before the Court on grounds of non-compliance with primary Union law. A national court<sup>43</sup> can<sup>44</sup> thus refer a question to the CJEU for a preliminary ruling pursuant to TFEU article 267 in which the Court has to decide on the interpretation of the Treaties. In gambling cases these mostly concern the interpretation of TFEU article 49 and 56 and whether they preclude specific (gambling) legislation of a member state.

But due to the wording of TFEU article 267 and its limitation on the Court's jurisdiction over the “interpretation of the Treaties”<sup>45</sup> and “the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”<sup>46</sup>, it is within the exclusive scope of the national courts to ultimately decide the case in question. It is for the referring national court to determine whether the principles laid down by the CJEU apply to the particular national gambling laws. Although all national courts are bound by the Court's interpretation<sup>47</sup>, a court can nevertheless initiate a new preliminary ruling procedure if previous judgments do not provide a sufficiently clear answer.<sup>48</sup> This fact, combined with the Court's lack of jurisdiction when it comes to the assessment of national gambling regulations, leads to an increasing number of gambling related cases before the CJEU. Despite those procedural shortcomings, the

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<sup>43</sup> What constitutes a national court or tribunal as defined by TFEU art. 267(1) is not to be determined by national law but is rather governed by EU law alone. *See, e.g.*, Case C-54/96, *Dorsch v. Bundesbaugesellschaft Berlin*, 1997 E.C.R. I-4961, para. 23.

<sup>44</sup> Pursuant to TFEU art. 267, courts “against whose decisions there is no judicial remedy” are obligated to bring the matter before the CJEU.

<sup>45</sup> *Id.* art. 267(a).

<sup>46</sup> *Id.* art. 267(b).

<sup>47</sup> Regarding the applicability of *res judicata* in preliminary rulings *see* CJEU, *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 2012 O.J. (C 338) 1.

<sup>48</sup> *See e.g.*, Case C-206/94, *Brennet AG v. Paletta*, 1996 E.C.R. I-2357, para. 11.



preliminary rulings of the CJEU remain an important driver for the compliance of national gambling laws with the principles of freedom of establishment and services. Because of the Court's interpretation of the various internal market provisions and its ongoing advancement of the equal treatment and transparency principles, knowledge of the relevant CJEU case-law is obligatory to formulate a possible target legal state of gambling in the EU.<sup>49</sup>

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<sup>49</sup> See section 4.

### 3. RELEVANT CJEU CASE-LAW

The decision-making pattern laid down in *Schindler* basically remains applicable today. Gambling, or more accurately, the offer of games of chance, constitutes an economic activity but due to its peculiar nature,<sup>50</sup> non-discriminatory<sup>51</sup> restrictions such as monopolies or authorization regimes may be justified by reasons of public interest such as consumer protection and fraud prevention.<sup>52</sup> Therefore, and as a result of the lack of legal harmonization, the CJEU cannot compare different protection levels because the legal framework at hand always has to be measured by the objectives of the general interest pursued. The Court may nevertheless carry out a proportionality review in which it examines whether the measures taken by the member states are suitable and necessary, and, as the Court noted in *Gambelli*<sup>53</sup>, carried out in a consistent and systematic manner:

First of all, whilst in *Schindler*, *Läärrä* and *Zenatti* the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.<sup>54</sup>

Since then, the proportionality review has become the pivotal point since it forces the CJEU to consider new factual circumstances and their effect on the suitability to reach a set level of protection.

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<sup>50</sup> Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039, para. 59.

<sup>51</sup> See Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori*, 1995 E.C.R. I-4165.

<sup>52</sup> Cf. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, para. 8.

<sup>53</sup> Case C-243/01, *Gambelli*, 2003 E.C.R. I-13031.

<sup>54</sup> *Id.* para. 67.

### 3.1 Liga Portuguesa

*Liga Portuguesa*<sup>55</sup> was the first judgment by the CJEU regarding the offer of games of chance via the Internet. It was eagerly awaited due to the new channel of distribution and its effect on the suitability of a *de facto* monopoly on games of chance.<sup>56</sup>

Since the CJEU regarded the Treaty provisions on the freedom of establishment as not applicable<sup>57</sup>, the national measure was assessed only on the basis of the freedom to provide services. From the ascertaining of a restriction<sup>58</sup> and the listing of possible grounds of justification<sup>59</sup> to the proportionality review<sup>60</sup> and the requirement of consistency<sup>61</sup>, the judgment at hand provides an instructive summary of the Court's previous rulings.

But the main issue was the mutual recognition of gambling licenses. In *Liga Portuguesa*, Bwin had its registered office in Gibraltar<sup>62</sup> and lawfully offered games of chance<sup>63</sup> on its website – a service similar to the one where Santa Casa was granted an exclusive right in Portugal. Consequently Santa Casa imposed a fine of EUR 74,500 on Bwin for “promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.”<sup>64</sup> In order to get Santa Casa's decision annulled Bwin (and Liga Portuguesa) brought actions before a national court.<sup>65</sup> The

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<sup>55</sup> Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia*, 2009 E.C.R. I-7633.

<sup>56</sup> *Cf. id.* paras. 3-9 (Santa Casa was the only legal entity entrusted with the operation of games of chance.)

<sup>57</sup> *See id.* para. 47.

<sup>58</sup> *See id.* para. 52.

<sup>59</sup> *See id.* para. 56.

<sup>60</sup> *See id.* para. 59.

<sup>61</sup> *See id.* para. 61.

<sup>62</sup> Gibraltar is European territory and the provisions of the Treaties are, in principle, applicable. *See Case C-42/07 Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia*, 2009 E.C.R. I-7633, Opinion of GA Bot, para. 184.

<sup>63</sup> *See Case C-42/07, Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia*, 2009 E.C.R. I-7633, para. 20.

<sup>64</sup> *Id.* para. 26.

<sup>65</sup> *Id.* para. 27.

Portuguese court, in its questions referred to the CJEU for preliminary ruling<sup>66</sup>, wanted to know whether this grant of exclusive right to Santa Casa constitutes “an impediment to the free provision of services [and is] in breach of the principles of freedom to provide services.”<sup>67</sup>

In *Liga Portuguesa*, the Portuguese government argued that the grant of an exclusive right to a single operator, such as Santa Casa, can “confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.”<sup>68</sup> Especially since the lack of control and supervision of offshore gambling operators poses a threat to the Portuguese government and its pursued objectives of the general interest:

As to whether the system in dispute in the main proceedings is necessary, the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.<sup>69</sup>

The CJEU follows this reasoning in essence and finds that due to the lack of legal harmonization of the national gambling markets, the fact that Bwin lawfully offers gambling services in one of them does not, in itself, guarantee a sufficient degree of consumer protection. This conclusion may not come as a big surprise, given the legal fragmentation and the implications that an unrestrained obligation of mutual recognition would have for regulatory approaches that rely on the quantitative restriction of gambling providers. But while the Portuguese government asserted in its submissions to the Court its lack of control and supervision over foreign

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<sup>66</sup> See *infra* Annex II/A.

<sup>67</sup> *Liga Portuguesa*, para. 28.

<sup>68</sup> *Id.* para. 67.

<sup>69</sup> *Id.* para. 68.

operators, the CJEU deviated from that reasoning when it emphasized the regulatory difficulties encountered by the home state — the state of establishment — rather than the host state:

A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, *in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment* in assessing the professional qualities and integrity of operators.<sup>70</sup>

This reasoning is atypical and surprising<sup>71</sup>, given the fact that the CJEU thus indirectly favors a restrictive regulatory regime by denying member states with a more liberal regulatory approach the competence of assessing and monitoring the licensed operators. Nevertheless, this technicality, although relevant, was only one of many deciding factors that led to the following conclusion by the Court:

Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.<sup>72</sup>

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<sup>70</sup> *Id.* para. 69 (emphasis added).

<sup>71</sup> In fact, the reasoning was so surprising that the question arose whether it was a mistake by the CJEU. *See, e.g.,* Simon Planzer, *Liga Portuguesa – the CJEU and its Mysterious Ways of Reasoning*, 11 EUROPEAN L. REP. 368, 372 (2009).

<sup>72</sup> *Liga Portuguesa*, para. 74.

### 3.2 Sporting Exchange

In *Sporting Exchange*<sup>73</sup> the CJEU was, again, confronted with the issue of mutual recognition<sup>74</sup>, but its ruling was consistent with that of *Liga Portuguesa*<sup>75</sup>. But in addition to the problems of mutual recognition, another important aspect of gambling licenses in the EU was called into question. The Court had to examine whether the principles of equal treatment and transparency are applicable to the procedure for granting a gambling license to a single operator.<sup>76</sup> This constitutes a different issue — the procedure and requirements in form and substance for the grant of gambling licenses by member states — and has to be differentiated from the possible existence of a duty of mutual recognition.

The lack of secondary EU law<sup>77</sup> and the exclusion of gambling from the scope of the Concession Directive<sup>78</sup> forced the CJEU to resort to the obligation of national authorities to comply with the Treaties and “the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency.”<sup>79</sup> In this case, the CJEU clarified that

a) the principles of equal treatment and transparency do not constitute “an obligation to launch an invitation to tender”<sup>80</sup>, but

b) the principle of transparency requires the national licensing authority to ensure “a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed”<sup>81</sup>,

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<sup>73</sup> Case C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, 2010 E.C.R. I-4695.

<sup>74</sup> Cf. *infra* Annex II/B(1).

<sup>75</sup> Cf. the almost identical wording in *Liga Portuguesa*, para. 69 and *Sporting Exchange*, para. 37.

<sup>76</sup> Cf. *infra* Annex II/B(2).

<sup>77</sup> See section 2.2.

<sup>78</sup> The Concession Directive did not exist at the time of the judgment. Cf. *Sporting Exchange*, para. 39.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* para. 41.

<sup>81</sup> *Id.*

c) the grant of just a single license “does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC<sup>82</sup>, in particular the principle of equal treatment and the obligation of transparency”<sup>83</sup>, and

d) the obligation of transparency represents a mandatory prior condition to be observed by a member state that exercises its right to grant “an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator.”<sup>84</sup>

Member states have a sufficient degree of latitude when it comes to deciding how to regulate gambling, their desired level of protection and their regulatory approach on how to achieve it. But if national authorities establish a prior administrative authorization scheme “it must be based on objective, non-discriminatory criteria known in advance”<sup>85</sup> and offer the possibility of judicial remedy to any person affected by this measure<sup>86</sup> and circumscribe the competent authorities’ discretion.<sup>87</sup>

But the CJEU ruled that the foregoing requirements do not apply to the full extent when the licensee in question is “a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities”<sup>88</sup>, therefore delegating the question whether this “direct State supervision” or “strict control by the public authorities” is truly existent, to the referring national court.<sup>89</sup>

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<sup>82</sup> TFEU art. 56.

<sup>83</sup> *Sporting Exchange*, para. 46.

<sup>84</sup> *Id.* para. 47.

<sup>85</sup> *Id.* para. 50.

<sup>86</sup> *See id.* para. 50.

<sup>87</sup> *Id.* para. 51.

<sup>88</sup> *Id.* para. 59.

<sup>89</sup> *But see* ZANKL, at 83 (citing *Sporting Exchange*, para. 58). Zankl sees this approach as a mixing of the two different layers that were distinguished by GA Bot in his opinion - the award procedure and the following exercise of the granted rights.

### 3.3 Stoß

In this case, while the first question referred to the Court deals with the consistency of Germany's gambling monopoly in substance, the second question again concerns the mutual recognition of gambling licenses.<sup>90</sup>

Due to the similarity of the referred questions in *Sporting Exchange*<sup>91</sup> and *Stoß*<sup>92</sup>, and the short time interval between the cases, the CJEU reconfirmed its previous decision regarding mutual recognition by holding that if a member state decides to regulate gambling and the legal framework established by the member state is in compliance with EU law there cannot be an obligation for mutual recognition:

In this respect, it should first be noted, as the Advocate General has stated in point 94 of his Opinion, that, where a public monopoly in the area of games of chance has been established in a Member State and it appears that that measure satisfies the various conditions permitting it to be justified having regard to the legitimate public interest objectives allowed by the case-law, any obligation to recognise authorisations issued to private operators established in other Member States is, *ex hypothesis* [sic], to be excluded, simply by virtue of the existence of such a monopoly.<sup>93</sup>

One could assume, *argumentum e contrario*, that national authorities would be obligated to recognize gambling licenses from other member states if they find their national regulatory framework in breach of EU law. But the CJEU does not go as far as forcing member states that fail to establish a consistent legal framework for the offer of gambling services — therefore breaching EU law by impeding the functioning of the internal market and posing a threat to

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<sup>90</sup> See *infra* Annex II/C.

<sup>91</sup> See *infra* Annex II/B(1).

<sup>92</sup> See *infra* Annex II/C(2).

<sup>93</sup> C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069, para. 109.



consumer protection — to recognize foreign gambling licenses. Instead, the Court only rules that the obligation of mutual recognition can only be of relevance when the national legal framework is non-compliant with EU law<sup>94</sup> but the breach of EU law, in itself, does not result in an obligation of mutual recognition.<sup>95</sup> As a result, and due to the discretion of the member states to determine their level of protection<sup>96</sup> and the lack of harmonization at EU level, “a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law.”<sup>97</sup>

### 3.4 Carmen Media

The Carmen Media Group has its registered office in Gibraltar and operates as a gambling provider via the Internet. But the obtained license limited its area of operations to offshore bookmaking<sup>98</sup>, thus raising the question<sup>99</sup> whether

the freedom to provide services requires that a service provider [be] permitted, in accordance with the provisions of the Member State in which it is established, to provide that service there as well (in the present case, restriction of the Gibraltar gambling licence to “offshore bookmaking”)<sup>100</sup>.

The argument brought forth by the Austrian and Belgian Government — that Carmen Media was established in Gibraltar because it was encouraged by a tax incentive, but mainly in order to escape the stricter legal framework of Germany<sup>101</sup> — was dismissed by the CJEU as being “outside the scope of this reference for a preliminary ruling.”<sup>102</sup>

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<sup>94</sup> See *id.* para. 114.

<sup>95</sup> Cf. *id.* para. 110.

<sup>96</sup> See *id.* para. 111.

<sup>97</sup> See *id.* para. 112.

<sup>98</sup> Case C-46/08, *Carmen Media Group Ltd v. Schleswig-Holstein*, 2010 E.C.R. I-8149, para. 23.

<sup>99</sup> Cf. *infra* Annex II/D(1).

<sup>100</sup> *Carmen Media*, para. 38(1).

<sup>101</sup> See *id.* para. 47.

<sup>102</sup> *Id.* para. 48.

Therefore, the CJEU ruled — in accordance with its previous legal practice<sup>103</sup> — that this limitation to offshore bookmaking cannot, by itself, take this economic activity outside the scope of the freedom to provide services<sup>104</sup> since the scope of application includes the recipients of the services provided as well. As a result, the CJEU held that TFEU article 56 is applicable to the services in question.

In another question<sup>105</sup> referred to the CJEU, the administrative court of Schleswig-Holstein asked whether a national legislation which grants the national licensing authority the freedom to decline the issue of a gambling license to an applicant, even though said applicant complied with all statutory requirements, is in breach with the fundamental freedom to provide services. When answering the aforementioned question, the CJEU, in a first step, once more recognized the margin of discretion the member states have in regulating the offer of gambling services, but also pointed out that the requirement of proportionality has to be fulfilled. Therefore, in consideration of previous case-law and especially *Sporting Exchange*, the CJEU noted in a second step, and in more general terms, that

where a system of prior administrative authorisation is established in a Member State as regards the supply of certain types of gambling, such a system, which derogates from the freedom to provide services guaranteed by Article 49 EC, is capable of satisfying the requirements of that latter provision only if it is based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used

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<sup>103</sup> See, e.g., Case C-243/01, *Gambelli*, 2003 E.C.R. I-13031, para. 55 (“[T]he freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions.”)

<sup>104</sup> See *Carmen Media*, para. 42.

<sup>105</sup> See *infra* Annex II/D(3).

arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.<sup>106</sup>

Ultimately, it is for the national courts to decide whether the national legislation in question satisfies these requirements set forth by the CJEU.

### 3.5 Engelmann

While most gambling license related cases deal with the issue of mutual recognition, in *Engelmann*<sup>107</sup> the CJEU examined, in great detail, the statutory conditions that are set by a member state for awarding a gambling license.

#### 3.5.1 The obligation of transparency

As already indicated by the CJEU in *Sporting Exchange*, the obligation of transparency constitutes a prerequisite for a member state to award gambling licenses<sup>108</sup> “irrespective of the method of selecting operators.”<sup>109</sup> But contrary to the previous rulings, the CJEU itself — compared to the national courts in past judgments — assessed the national legislation in question and, as a result, found the Austrian award procedure in breach of EU law, due to “the total absence of transparency”<sup>110</sup>. But the CJEU reviewed other statutory conditions as well.

#### 3.5.2 The requirement of legal form

According to the first question referred to the Court<sup>111</sup>, Austrian law forced licensees to adopt the legal form of a public limited company (‘Aktiengesellschaft’). The CJEU held that the requirement of a particular legal form can be justified due to “their internal organization, the keeping of their accounts [and] the scrutiny to which they may be subject and relations with

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<sup>106</sup> *Carmen Media*, para. 90.

<sup>107</sup> Case C-64/08, *Engelmann*, 2010 E.C.R. I-8219.

<sup>108</sup> See C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, 2010 E.C.R. I-4695, para. 47.

<sup>109</sup> *Engelmann*, para. 53.

<sup>110</sup> *Id.* para. 56.

<sup>111</sup> See *infra* Annex II/E(1).

third parties”<sup>112</sup> since those characteristics may support objectives, such as consumer protection and fraud prevention. But the CJEU, in absence of additional information, left it to the national courts to assess, whether the requirement to adopt the legal form of a public limited company is, *in concreto*, proportionate.<sup>113</sup>

### 3.5.3 The requirement of establishment

The requirement to have a seat within Austrian territory is evidently discriminating against foreign gambling providers and incompatible with the freedom of establishment.<sup>114</sup> Consequently, and contrary to the requirement of a particular legal form, this restriction cannot be justified by overriding reasons in the public interest<sup>115</sup> and is therefore only covered by an express derogating provision of the TFEU.<sup>116</sup> But the CJEU additionally noted that all restrictions must be proportionate and “may be regarded as appropriate for ensuring attainment of the objective relied upon only if it genuinely reflects a concern to attain it in a consistent and systematic manner.”<sup>117</sup>

The restriction at hand — the requirement of establishment, constituting a categorical exclusion of foreign gambling providers — does not fulfill this requirement of proportionality. Therefore, the CJEU did not find it necessary to scrutinize in great detail, whether the objectives

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<sup>112</sup> *Engelmann*, para. 30.

<sup>113</sup> *See id.* para. 31.

<sup>114</sup> *See* Case C-452/04, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, 2006 E.C.R. I-9521, para. 46 (“If the requirement of authorisation constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom. For such a requirement to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued.”)

<sup>115</sup> *Cf.* Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori*, 1995 E.C.R. I-4165.

<sup>116</sup> *See, e.g.*, TFEU art. 52(1) (“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”); *Engelmann*, para. 34.

<sup>117</sup> *Engelmann*, para. 35.

brought forward by the Austrian Government<sup>118</sup> can fall within the definition of public policy.<sup>119</sup> Not leaving it to the national courts to decide, the CJEU itself ruled that such a restriction was disproportionate.<sup>120</sup>

#### 3.5.4 The number and duration of the licenses

In the third question referred to the CJEU, the Court closely examined the GSpG, its limited number of licenses, and their long (up to 15 years) duration. While both the limited number and the duration of the licenses are liable to constitute an obstacle to the fundamental freedoms of establishment and services<sup>121</sup> the CJEU, in principle, acknowledges the arguments of the Austrian Government<sup>122</sup> but leaves it for the national court to ultimately decide.

### 3.6 Dickinger

Approximately one year after *Engelmann*, the Austrian gambling licensing regime found itself under CJEU scrutiny yet again. But due to the three amendments to the GSpG<sup>123</sup> since *Engelmann*, the Court had to consider an altered legal situation in *Dickinger*<sup>124</sup>. Additionally, while in *Engelmann* the licenses at dispute were (land-based) casino licenses<sup>125</sup>, in *Dickinger* the CJEU had to rule on the lottery license<sup>126</sup> – the only license that permits the offer of gambling services via electronic media (e.g. the Internet).

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<sup>118</sup> See *id.* para. 36 (According to the Austrian Government the requirement of establishment aims to enable efficient control of operators and to prevent the exploitation of gambling activities for criminal or fraudulent purposes.)

<sup>119</sup> See *id.* para. 37.

<sup>120</sup> See *id.* para. 40.

<sup>121</sup> See *id.* paras. 44 and 46.

<sup>122</sup> See *id.* paras. 45 and 48 (The national court has to verify whether the limited number of gambling licenses are capable of limiting gambling opportunities and whether the award of a gambling license for a period of up to 15 years is needed for the licensee to amortize his invested capital.)

<sup>123</sup> BGBl I 2010/54, BGBl I 2010/73 & BGBl I 2010/111.

<sup>124</sup> Case C-347/09, *Dickinger*, 2011 E.C.R. I-8185.

<sup>125</sup> GLÜCKSSPIELGESETZ [GSPG] [GAMBLING CODE] BUNDESGESETZBLATT [BGBl] No. 620/1989, as amended, § 21.

<sup>126</sup> *Id.* § 14.

### 3.6.1 The requirement of legal form

The GSpG requires that the sole lottery license holder be organized in the legal form of a capital company ('Kapitalgesellschaft')<sup>127</sup> with a paid-up nominal or share capital of EUR 109 million.<sup>128</sup> In accordance with *Engelmann*<sup>129</sup>, the CJEU noted that a particular legal form may be "justified by the objective of preventing money laundering and fraud."<sup>130</sup> And while the Court previously did not comment on the required EUR 109 million of share capital, in *Dickinger* it held such an amount as justifiable to "ensure a certain financial capacity on the part of the operator and to guarantee that he is in a position to meet the obligations he may contract towards winning gamblers."<sup>131</sup>

As in *Engelmann*, the CJEU delegated the proportionality review in that regard to the national courts and lets them decide whether such a restriction goes beyond what is necessary to achieve said objectives.<sup>132</sup>

### 3.6.2 The requirement of establishment

The requirement for the licensee to have its registered office within Austrian territory is, as previously shown in *Engelmann*<sup>133</sup>, a discriminatory restriction and can therefore only be justified by an express derogating provision of the TFEU. In *Engelmann* the CJEU rendered the decision itself — ruling such a requirement as disproportionate and therefore in breach of EU law — without examining the theoretical applicability of the concept of public policy<sup>134</sup>, and

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<sup>127</sup> The term 'capital company' constitutes a more general than the legal form of a public limited company required in *Engelmann*.

<sup>128</sup> GLÜCKSSPIELGESETZ [GSPG] [GAMBLING CODE] BUNDESGESETZBLATT [BGBl] No. 620/1989, as amended, § 14 ¶ 2(1).

<sup>129</sup> See Case C-64/08, *Engelmann*, 2010 E.C.R. I-8219, para. 30.

<sup>130</sup> Case C-347/09, *Dickinger*, 2011 E.C.R. I-8185, para. 76.

<sup>131</sup> *Id.* para. 77.

<sup>132</sup> See *id.*

<sup>133</sup> See *Engelmann*, para. 34.

<sup>134</sup> See *id.* para. 37.

proposed various measures constituting less restrictive means.<sup>135</sup> In *Dickinger*, the CJEU deviated from that approach and left it to the national courts to decide

whether the objectives relied on by the Austrian Government are capable of falling within that concept [the concept of public policy; note from the author] and, if so, secondly, whether the obligation concerning the registered office at issue in the main proceedings satisfies the criteria of necessity and proportionality laid down in the Court's case-law. In particular, the referring court will have to ascertain whether there are other less restrictive means of ensuring a level of supervision of the activities of operators established in Member States other than the Republic of Austria equivalent to that which can be carried out in respect of operators whose registered office is in Austria.<sup>136</sup>

### 3.6.3 The prohibition of branches

The GSpG prohibits the lottery licensee from setting up branches outside Austria.<sup>137</sup> But since the Austrian Government failed to plead a valid justification for such a restriction before the Court, the CJEU ruled such a provision as non-compliant with EU law.<sup>138</sup>

### 3.6.4 Mutual recognition

The website bet-at-home.com was operated under a valid 'Class one Remote Gaming License' for online games of chance and a valid 'Class Two Remote Gaming License' for online sporting bets, granted by the Maltese Lotteries and Gaming Authority.<sup>139</sup> The Maltese Government stated that its regulatory system aims specifically at "controlling and monitoring online games of chance [and] was designed with the objective of addressing the risks inherent

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<sup>135</sup> See *id.* para. 38.

<sup>136</sup> *Dickinger*, paras. 83-84.

<sup>137</sup> GLÜCKSSPIELGESETZ [GSPG] [GAMBLING CODE] BUNDESGESETZBLATT [BGBl] No. 620/1989, as amended, § 15 ¶ 1.

<sup>138</sup> See *Dickinger*, para. 88.

<sup>139</sup> See *id.* para. 23.

in those modern modes of operation.”<sup>140</sup> But the aforementioned requirements<sup>141</sup> set forth by the GSpG make Bwin subject to restrictions — ultimately excluding them from the Austrian market — even though the public interest “is already safeguarded by the rules to which the provider is subject in the Member State where he is established.”<sup>142</sup> The qualities and integrity of the Maltese subsidiaries are therefore — according to Mr Dickinger, Mr Ömer and the Maltese Government *sufficiently*<sup>143</sup> — guaranteed by the supervision and control of the Maltese Lotteries and Gaming Authority.

The CJEU disagrees and, once again, clarifies that “no duty of mutual recognition of authorisations issued by the various Member States can exist in the current state of European Union law.”<sup>144</sup> In light of the lack of harmonization at EU level and the wide margin of discretion in regard to the pursued objectives of general interest, the supervision of another member state’s authority cannot serve as a sufficient assurance for the achievement of the particular objectives pursued. This is because the differences between the regulatory approaches and protection levels of the individual member states are too substantial.

### 3.7 Costa

Up until the year 2002 an operator whose shares were quoted on the regulated markets could not obtain a gambling license under Italian law and was therefore excluded from the 1999 award procedure<sup>145</sup> – an award procedure that was later found to be in breach of EU law<sup>146</sup>. In order to remedy this infringement, and to ensure compliance with EU law, amendments were made to the relevant legislation increasing the amount of gambling outlets and imposing a minimum

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<sup>140</sup> *Id.* para. 91.

<sup>141</sup> *See* sections 3.6.1-3.6.3.

<sup>142</sup> *Dickinger*, para. 94.

<sup>143</sup> *Id.* paras. 94-95.

<sup>144</sup> *Id.* para 96.

<sup>145</sup> *See* Case C-72 & 77/10, *Costa*, 2012 E.C.L.I. EU 80, para 4.

<sup>146</sup> *See* Joined Cases C-338, 359 & 360/04, *Placanica*, 2007 E.C.R. I-1891.



distance between the ‘new’ outlets and outlets operating under a license which was awarded in the 1999 award procedure.<sup>147</sup>

This protection of licensees that obtained their license on the basis of an unlawful award procedure raised the question of the proportionality of the Italian gambling laws.<sup>148</sup> In *Placanica*, the CJEU, in order to remedy the infringement, proposed “the revocation and redistribution of the old licenses or the award by public tender of an adequate number of new licenses.”<sup>149</sup> In 2006, Italy issued 16,000 new gambling licenses and thus opted for an expansion of the offer of gambling services. While this approach seems legitimate and corresponds, at first glance, with the requirements set forth by the Court in *Placanica*, the continued protection of old licensees raised doubts as to whether those provisions are compliant with EU law, causing the Italian Supreme Court to refer this question to the CJEU for a preliminary ruling.

The Court found the fact that the longer-established licensees were able to conduct business seven years sooner was already putting the previously unlawfully excluded, now ‘new’, licensees at an unfair competitive disadvantage.<sup>150</sup> Therefore,

[t]o grant the existing operators even greater competitive advantages over the new licence holders has the consequence of entrenching and exacerbating the effects of the unlawful exclusion of the latter from the 1999 tendering procedure, and accordingly constitutes a new breach of Articles 43 EC and 49 EC and of the principle of equal treatment. Such a measure also makes it excessively difficult to exercise the rights conferred by EU law on operators unlawfully excluded from the

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<sup>147</sup> See *Costa*, para. 7 (The opening of 7000 new gambling and 10,000 new horse racing outlets were intended.)

<sup>148</sup> Cf. *infra* Annex II/F.

<sup>149</sup> *Placanica*, para. 63.

<sup>150</sup> Regarding the possible implications for the Austrian gambling market and member states with an expansive gambling policy in general see Arthur Stadler & Nicholas Aquilina, *EuGH: Plädoyer für Ende der Scheinheiligkeiten im Glücksspiel*, 8 ECOLX 747,749-750 (2012).

1999 tendering procedure and, as a consequence, is inconsistent with the principle of effectiveness.<sup>151</sup>

### 3.8 HIT

In *HIT*<sup>152</sup>, the question referred to the CJEU concerns advertising restrictions for foreign gambling providers. The Austrian Federal Minister for Finance rejected the applications by HIT and HIT LARIX to obtain a permit to carry out advertising in Austria for their lawfully operated gambling establishments in Slovenia, due to the fact that HIT and HIT LARIX failed to prove that Slovenian gambling laws can ensure “a level of protection for gamblers comparable to the level provided for in Austria.”<sup>153</sup> While the question at issue is not entirely comparable with the issue of mutual recognition of gambling licenses that permit an operator to offer gambling services — and not only the advertising thereof — in a particular member state, *HIT* provides additional insight into the comparison of different levels of protection.

Pursuant to GSpG, article 56(2)(2) the right to advertise and promote a gambling establishments located outside of Austria is subject to a permit, which shall only be granted if “the legal provisions for the protection of gamblers adopted by that Member State *at least correspond* to the Austrian provisions.” (emphasis added)<sup>154</sup> This national provision dictates a comparison of the level of consumer protection and therefore forces the CJEU — who typically refrains from comparing different protection levels because the national legal framework at hand has to always be measured by the objectives of general interest pursued — to ascertain whether such legislation and legal comparative approach is proportionate. The Court held that such an authorization scheme is justifiable by overriding reasons in the public interest<sup>155</sup> and

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<sup>151</sup> *Costa*, para 53.

<sup>152</sup> Case C-176/11, *HIT Hoteli v. Bundesminister für Finanzen*, 2012 E.C.L.I. EU 454.

<sup>153</sup> *Id.* para. 8.

<sup>154</sup> *Id.* para. 6.

<sup>155</sup> *See id.* para. 27.

found it to be proportionate as long as national provisions do not require the legal gambling framework of another member state to be *identical* — in contrast to being *in essence equivalent*<sup>156</sup> — or as long as such an authorization scheme does not impose rules not directly related to the protection against the risks of gaming.<sup>157</sup>

### 3.9 Garkalns

The Latvian law in question prohibits the organization of games of chance in certain designated areas (e.g. government buildings, churches and educational establishments).<sup>158</sup> In order to obtain a permit for the organization of betting or gaming in premises outside the scope of the aforementioned exhaustive enumeration the relevant municipal authority decides, in each specific case, whether such an activity would not cause “substantial impairment of the interests of the State and of the residents of the administrative area concerned.”<sup>159</sup>

Such a broad discretionary power of a licensing authority inevitably raises the question if such an elastic clause can withstand a proportionality test, considering the CJEU jurisprudence leading up to this case. Due to the prevalent legal conditions in EU law<sup>160</sup> the national authorities enjoy a sufficient margin of discretion in deciding what is required to reach the level of protection set by the member states in accordance with their objectives pursued. Nevertheless, EU law has to be observed – by member states and national authorities alike. In order to ensure compliance with EU law, a prior authorization regime such as the Latvian provision at issue, not only has to be suitable and necessary to attain the objectives brought forward by the member states<sup>161</sup>, but also meet the obligations of equal treatment and transparency. In consequence, the CJEU held, yet again, that

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<sup>156</sup> *Id.* para. 31.

<sup>157</sup> *See id.* para. 32.

<sup>158</sup> Case C-470/11, *Garkalns SIA v. Rigas Dome*, 2012 E.C.L.I EU 505, para. 5.

<sup>159</sup> *Id.* para. 6.

<sup>160</sup> Notably non-harmonization and legal fragmentation. *See* section 2.1.

<sup>161</sup> *See Garkalns*, paras. 39-41.

an authorisation scheme for betting and gaming must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise by the authorities of their discretion so that it is not used arbitrarily.<sup>162</sup>

But to verify that the award procedure was in accordance with the principles of equal treatment and transparency, the reasoning behind the licensing authority's decision must be publicly accessible in order for the national court to assess the proportionality of the national legislation.<sup>163</sup> Only if the authority's reasoning is available to the national court can it verify whether the decision to refuse authorization in particular cases genuinely pursues the declared objectives by the Latvian Government.<sup>164</sup> In conclusion, the CJEU held that the national provision in question — although granting broad discretion to national authorities — can be justified if

that legislation is genuinely intended to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner or to ensure the maintenance of public order and in so far as the competent authorities exercise their powers of discretion in a transparent manner, so that the impartiality of the authorisation procedures can be monitored.<sup>165</sup>

It is for the national court to decide whether these conditions are satisfied.<sup>166</sup>

### 3.10 Biasci

One year after *Costa* the Italian gambling laws were again under scrutiny by the CJEU. The applicants in the main proceedings were operators of data transfer centers, acting as brokers between the individual bettor and an Austrian gambling provider.<sup>167</sup> Neither the operators of

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<sup>162</sup> *Id.* para. 42.

<sup>163</sup> *See id.* para. 43.

<sup>164</sup> *See id.* para. 47.

<sup>165</sup> *Id.* para. 48.

<sup>166</sup> *See id.* para. 48.

<sup>167</sup> *See Case C-660/11 & C-8/12, Biasci v. Minitero dell'Interno*, 2013 E.C.L.I. EU 550, paras. 12-14.

the data transfer centers in Italy nor the gambling provider established in Austria were licensed under Italian gambling law<sup>168</sup>, and therefore were not eligible for the mandatory police authorizations.<sup>169</sup>

In the answer to the first question<sup>170</sup> referred to the Court, the CJEU held that the issue of a police authorization can be made subject to the prerequisite of another license.<sup>171</sup> But in a case where a member state opts for such a chain of conditions, irregularities in the prior award procedure vitiate the subsequent award procedure:

Consequently, the lack of a police authorisation cannot be held against persons who were unable to obtain authorisations because the grant of an authorisation presupposed the award of a licence – a licence which, contrary to European Union law, those persons were unable to obtain.<sup>172</sup>

The second question referred to the Court “is, in essence, identical to the questions on which the Court has ruled previously in *Costa and Cifone*.”<sup>173</sup> But the CJEU does not grow weary of emphasizing that — following from the Provisions of the Treaties, the principle of equal treatment, the obligation of transparency and the principle of legal certainty — the conditions of an award procedure “must be drawn up in a clear, precise and unequivocal manner.”<sup>174</sup> Whether these principles are met is for the referring court to verify.

The third question referred to the Court — whether a member state can make a foreign gambling provider subject to the holding of its own gambling license, even though the foreign gambling provider is licensed in another member state<sup>175</sup> — is, in essence, a repetition of former

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<sup>168</sup> See *id.* para. 4.

<sup>169</sup> See *id.* paras. 8-9.

<sup>170</sup> See *infra* Annex II/G(1).

<sup>171</sup> See *Biasci*, para. 29.

<sup>172</sup> *Id.* para. 28

<sup>173</sup> *Id.* para. 31

<sup>174</sup> *Id.* para. 38 2nd indent.

<sup>175</sup> See *infra* Annex II/G(3).

questions to the Court as well. Here too, the Court can resort to former judgments<sup>176</sup> and again held that, in the absence of harmonization, no duty of mutual recognition of licenses issued by the various member states can exist. As a consequence,

the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer betting and gaming does not prevent another Member State, while complying with the requirements of EU law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.<sup>177</sup>

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<sup>176</sup> See, e.g., Case C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069, para. 112; Case C-347/09, *Dickinger*, 2011 E.C.R. I-8185, paras. 96 & 99.

<sup>177</sup> *Biasci*, para. 43.

## 4. TARGET LEGAL STATE OF GAMBLING IN THE EU

### 4.1 Principle of legal certainty

The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings.<sup>178</sup>

Due to the margin of discretion granted by the CJEU, the member states are, in principle, free to set the objectives of their policies on games of chance.<sup>179</sup> When member states exercise this right, the decisions on how to regulate gambling are mainly driven by political considerations. But the chosen regulatory framework to ensure the level of protection has to observe EU law and fulfill the requirements set by the principle of legal certainty. This principle of legal certainty, as an underlying principle of EU law<sup>180</sup>, becomes even more important as popularity of online gambling grows<sup>181</sup>, and the breach<sup>182</sup> of national law is only a mouse click away.<sup>183</sup> It is therefore of utmost importance that the national regulatory frameworks provide “clear,

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<sup>178</sup> Case C-72 & 77/10, *Costa*, 2012 E.C.L.I. EU 80, para. 74.

<sup>179</sup> *Cf. Dickinger*, para. 46.

<sup>180</sup> *See generally* JUHA RAITIO, *THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW* (2003).

<sup>181</sup> Some authors proclaim legal certainty as being *the* international basis of the rule of law. *See, e.g.*, James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 HOUS. J. OF INT’L L. 27, 30 (2008).

<sup>182</sup> Regarding consumers, the unlawful action could be something simple such as the purchase of a lottery ticket on a website not licensed under national gambling law but the consequences may be very grave, ranging from administrative to criminal sanctions. *See, e.g.*, GLÜCKSSPIELGESETZ [GSPG] [GAMBLING CODE] BUNDESGESETZBLATT [BGBl.] No. 620/1989, as amended, § 52 (Austria); STRAFGESETZBUCH [STGB] [PENAL CODE] BUNDESGESETZBLATT [BGBl.] No. 60/1974, as amended, § 168 (Austria); STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT I [BGBl. I] at 3322, as amended, § 284 (Ger.). Regarding gambling providers, the advertising or even the design of the homepage in a particular language can lead to administrative penalties and even criminal sanctions against the corporation’s management. *See, e.g.*, Press Release, Ministry of Security and Justice, *The Gaming Authority Closes the Net Around Internet Providers of Games of Chance* (June 8, 2012), available at <http://www.government.nl/ministries/venj/documents-and-publications/press-releases/2012/06/08/the-gaming-authority-closes-the-net-around-internet-providers-of-games-of-chance.html>.

<sup>183</sup> In light of the de facto ease with which consumers can violate national gambling laws, the prevailing legal uncertainty *de lege lata* appears even more alarming. *Cf. ZANKL, supra* note 9, at 152.

precise and predictable”<sup>184</sup> provisions to ensure a *safe environment*<sup>185</sup> for consumers and gambling providers alike.

But as the increasing amount of infringement proceedings and preliminary ruling procedures illustrate, such a safe environment currently does not exist at EU level and, to a certain extent, cannot exist without sector-specific harmonization. The existing legal uncertainty on a national level can be observed, for example, in Austria<sup>186</sup>, Germany<sup>187</sup>, Italy<sup>188</sup> and the seven member states which were sent an official request for information on national legislation restricting the supply of gambling services by the Commission.<sup>189</sup> Nevertheless, there are some mechanisms available to the Commission and the CJEU to enforce compliance with EU law, thus simultaneously ensuring legal certainty to some degree:

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<sup>184</sup> Case C-72 & 77/10, *Costa*, 2012 E.C.L.I. EU 80, para. 74.

<sup>185</sup> See ZANKL, *supra* note 9, at 36; cf. EUROPEAN COMMITTEE FOR STANDARDIZATION, RESPONSIBLE REMOTE GAMBLING MEASURES para. 9 (2011), available at <ftp://ftp.cen.eu/CEN/AboutUs/Publications/GamblingMeasures.pdf> (“The objective is to ensure that gambling products are provided in a secure, safe and reliable operating environment.”).

<sup>186</sup> The Austrian gambling laws were under CJEU scrutiny so many times, some authors (playfully) propose the establishment of a branch office of the Court in Vienna. See Georg Wilhelm, *Glücksspiel ums Glücksspiel geht weiter – EuGH C-186/11 und C-209/11*, 2 ECOLEX 97 (2013); Arthur Stadler & Nicholas Aquilina, *Unionsrechtskonforme Regulierung: ein Glücksspiel?* 4 ECOLEX 389 (2013). And there is no end in sight. On Apr. 30, 2014 the CJEU found, once again, the Austrian regulatory framework for gambling contrary to EU law. See Case C-390/12, *Pfleger*, 2014 E.C.L.I. EU 281.

<sup>187</sup> Germany is in a unique situation. Due to the regulatory disparity between the Gaming Act of the Land Schleswig-Holstein (hereinafter *GALS-H*) and the German State Amendment Treaty on Gambling (hereinafter *GSATG*), governing the other 15 States, Germany chose two different regulatory approaches — an authorization regime and a complete ban on online gambling — on national level. While this circumstance alone could raise the question of compliance with EU law, the inconsistency at issue goes far beyond that. An example would be the different place of conclusion: Pursuant to *GALS-H* § 3(9), the place of conclusion for online gambling is the seat of residence of the consumer. But pursuant to *GSATG* § 3(4) the place of conclusion is where the consumer is provided the opportunity to participate in a game of chance. The result is the prohibition of an activity that is allowed, *expressis verbis*, by another national law, leading to a restriction of services within a member state. See Christian Koenig & Matti Meyer, *Discussion of the Regulatory Disparity between Schleswig-Holstein and the Remaining Fifteen German Federal States in Terms of the Coherency of the Gambling Legislation According to European Union Law*, 3 ZFWG 153 (2013). The legal certainty in Germany is therefore not only compromised by unclear, imprecise or unpredictable provisions but by actual conflicting regulations.

<sup>188</sup> As noted by the CJEU in Case C-660/11 & C-8/12, *Biasci v. Minitero dell’Interno*, 2013 E.C.L.I. EU 550, para. 33, legal uncertainty still prevails to the extent that operators do not apply for licenses due to the possible non-compliance with the licensing requirements.

<sup>189</sup> Belgium, Cyprus, the Czech Republic, Lithuania, Poland, Romania and Sweden. See Press Release, European Commission, Commission Requests Member States to Comply with EU Law when Regulating Gambling Services, IP/13/1101 (Nov. 20, 2013), available at [http://europa.eu/rapid/press-release\\_IP-13-1101\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1101_en.htm).



a) The preliminary ruling procedure

Due to the qualification of gambling as a *service* within the meaning of the TFEU<sup>190</sup>, questions regarding national gambling laws that seem to contravene EU law<sup>191</sup> can be referred to the Court. The aim of this procedure is to ensure a more consistent application of EU law across all member states – with the CJEU playing its part in ensuring legal certainty. But the increasing number of preliminary ruling procedures and the various procedural shortcomings<sup>192</sup> leave no doubt that this procedure alone cannot ensure the desired safe environment. However, in recent judgments the CJEU tightened the regulatory requirements for national gambling laws considerably, leaving them with two options for compliance:

In conclusion, the Greek legislator must now decide between two courses of action: liberalization and as a consequence thereof the introduction of a non-discriminatory tender of licences for the gambling market – or reforming the monopoly and thereby making it consistent with EU law, especially by implementing a strict control system.<sup>193</sup>

b) Infringement proceedings

At the end of 2013 the Commission called on various member states to ensure compliance of their national regulatory frameworks for gambling services with the fundamental freedoms of the TFEU.<sup>194</sup> The Commission wants to verify whether national gambling legislations are compatible with the Treaties and therefore decided to send letters of formal notice to Belgium,

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<sup>190</sup> See Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039, para. 19.

<sup>191</sup> In gambling related cases the applicable provisions are most prominently TFEU, art. 49 & 56. Only in recent judgments the CJEU considered the applicability of the Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 389, ruling that “the fundamental rights guaranteed by the Charter must ... be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable.” See Case C-390/12, *Pfleger*, 2014 E.C.L.I EU 281, para. 34.

<sup>192</sup> See section 2.3.

<sup>193</sup> Nicholas Aquilina & Sarah Pichler, *Path to Compliance: Options for an EU-compliant Greek Market*, 12 WOGLR 10, 11 (2013).

<sup>194</sup> See Press Release, European Commission, *supra* note 183.

Cyprus, the Czech Republic, Lithuania, Poland, Romania and Sweden. Given the Court's recent tendency to examine the proportionality and consistency of national gambling legislations more closely, the connection with the pending risk of infringement proceedings may help to enforce compliance with EU law more effectively.

c) 'A comprehensive European framework'

Due to the increase in gambling related preliminary rulings and the prevailing legal uncertainty, the Commission launched a consultation in 2011 on possible internal market issues resulting from the rapid development of information technology and the growing supply and demand of online gambling services.<sup>195</sup> After gathering information, responses and contributions from individuals, gambling providers and national authorities, the Commission adopted the Communication titled 'Towards a comprehensive European framework for online gambling'<sup>196</sup>. The Communication noted that:

EU Member States converge on the objective of protecting citizens although they differ in terms of the regulatory and technical approaches undertaken to achieve this objective. ... In view of the type of challenges posed by the development of online gambling and their implications for each Member State it is not possible for Member States to effectively address these challenges alone and to provide individually a properly regulated and sufficiently safe offer of online gambling services.<sup>197</sup>

The Commission is very well aware of the fact that it cannot influence national gambling laws directly but, at the same time, understands that legal certainty and clarity need to be enhanced.<sup>198</sup> The proposed actions are therefore accompanying and complementary measures, aimed at

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<sup>195</sup> European Commission, *Green Paper on On-line Gambling in the Internal Market*, COM (2011) 128 final (Mar. 24, 2011).

<sup>196</sup> European Commission, *Towards a Comprehensive European Framework for Online Gambling*, COM (2012) 596 final (Oct. 23, 2012).

<sup>197</sup> *Id.* section 2.

<sup>198</sup> *Id.*

strengthening the framework surrounding national gambling laws at European level, thus helping to establish a European framework in which the member states can actually reach their desired level of protection. Having regard to the Commission's Communication, the European Parliament adopted a resolution on online gambling in the internal market one year later, proposing similar initiatives, e.g. enhanced administrative cooperation, the establishment of black and white lists, common rules for responsible gambling advertising, an effective common system of identification control to protect minors, and closer cooperation in preventing money laundering.<sup>199</sup>

What conclusion is there to be drawn from this resolution? First and foremost that there will be no sector-specific harmonization at EU level.<sup>200</sup> But, in regard to legal certainty, the proposed initiatives are a step in the right direction.

## **4.2 Duplication of controls**

In order to facilitate access to service activities and the exercise thereof in the internal market, it is necessary to establish an objective, common to all Member States, of administrative simplification and to lay down provisions concerning, inter alia, the right to information, procedures by electronic means and the establishment of a framework for authorisation schemes. Other measures adopted at national level to meet that objective could involve reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose.<sup>201</sup>

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<sup>199</sup> European Parliament, *Online Gambling in the Internal Market*, 2012/2322 (INI) (Sep. 10, 2013) [hereinafter EP Resolution].

<sup>200</sup> Cf. *id.* recital A, E, F of the preamble & paras. 28-29.

<sup>201</sup> Service Directive, *supra* note 30, recital 46 of the preamble.

The Service Directive aims to ensure economic and social progress<sup>202</sup> but barriers to this desired progress are ubiquitous.

The barriers affect a wide variety of service activities across all stages of the provider's activity and have a number of common features, including the fact that *they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States.*<sup>203</sup>

Still, the exclusion of gambling from the scope of application<sup>204</sup> comes as no surprise. Why? It stands to reason that the consequential applicability of mutual recognition would run counter to the broad margin of discretion granted to the member states which allows them to quantitatively restrict the offer of games of chance. Due to the different protection levels, a legal compulsion to recognize controls exercised by other member states would have the undesired effect that member states are restricted in their freedom to determine the objectives they wish to pursue.<sup>205</sup>

But studies<sup>206</sup> undertaken on behalf of the Commission have shown that, while the level of protection indeed differs, the objectives pursued by the member states are quite comparable.<sup>207</sup> Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom all quote consumer protection and crime prevention as objectives.<sup>208</sup> Despite the exclusion from the Service Directive, legal certainty could be enhanced through administrative cooperation. All member states could profit

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<sup>202</sup> *Id.* recital 1 of the preamble.

<sup>203</sup> *Id.* recital 3 of the preamble (emphasis added).

<sup>204</sup> See section 2.2.

<sup>205</sup> See Case C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069, para. 112.

<sup>206</sup> See, e.g., SWISS INSTITUTE OF COMPARATIVE LAW, STUDY OF GAMBLING SERVICES IN THE INTERNAL MARKET OF THE EUROPEAN UNION (2006), available at [http://ec.europa.eu/internal\\_market/gambling/docs/study1\\_en.pdf](http://ec.europa.eu/internal_market/gambling/docs/study1_en.pdf) [hereinafter *Study of Gambling Services*].

<sup>207</sup> See EP Resolution, *supra* note 193, recital I of the preamble.

<sup>208</sup> See Study of Gambling Services, *supra* note 200, at 29.

from a share of information and best practices, working together towards a common goal: a safe environment.

The European Parliament builds on this idea and requires “better-coordinated action among Member States and at EU level.”<sup>209</sup> By launching various initiatives — e.g. common minimum certification requirements for gambling software<sup>210</sup>, common security standards for electronic identification<sup>211</sup>, common advertising standards<sup>212</sup>, and, in general, a more cooperative approach<sup>213</sup> — the European Parliament expects the legal framework of gambling to strengthen at EU level, thus enabling member states to reach their common objectives, such as consumer protection or crime prevention, more easily. Measures, such as the inclusion of all forms of gambling in the proposal for the 4<sup>th</sup> Anti-Money Laundering Directive to ensure better enforcement against money laundering in the gambling sector, or common minimum certification requirements for gambling software, could help to reduce administrative burden for member states while offsetting some of the competitive disadvantages of regulated gambling providers.<sup>214</sup> Moreover, such common requirements and administrative cooperation could help to ensure the desired high level of consumer protection<sup>215</sup> and enhance legal certainty for gambling providers.

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<sup>209</sup> EP Resolution, *supra* note 193, recital J of the preamble.

<sup>210</sup> *See id.* para. 15.

<sup>211</sup> *See id.* para. 19.

<sup>212</sup> *See id.* para. 20.

<sup>213</sup> *See id.* paras. 34-42.

<sup>214</sup> *Cf.* ZANKL, *supra* note 9, at 151.

<sup>215</sup> EP Resolution, *supra* note 193, para. 6 (“[R]egardless of the manner in which Member States decide to organise and regulate the offer of online gambling services at national level, a high level of protection of human health and consumers must be ensured.”)

## 5. CONCLUSION

### 5.1 Mutual recognition

For various reasons<sup>216</sup> more and more member states establish licensing regimes for the offering of gambling services. The vast majority<sup>217</sup> requires every gambling operator, who wishes to offer games of chance in their territories, to obtain a license within the jurisdiction despite possible equivalence.<sup>218</sup> But the growing popularity of cross-border online gambling then raised the question whether such restriction can still be suitable in terms of the raising standards for proportionality.

In the first judgment regarding online gambling, the CJEU held that there was no obligation to recognize licenses from other member states.

In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot

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<sup>216</sup> Some member states, like Greece after the judgment in the Joined Cases C-186 & 209/11 *Stanleybet International Ltd v. Ypourgos Oikonomias kai Oikonomikon*, 2013 E.C.L.I. EU 33, opt for the establishment of an authorization regime instead of reforming the monopoly currently in place. Meanwhile, other member states, e.g. Ireland or Portugal, plan to amend their gambling laws due to the tax revenues potentially available from regulated (online) gambling. Member states that have recently established licensing regimes are e.g. Denmark, Estonia, France, Italy or Spain.

<sup>217</sup> *But see* LOTTERIES AND OTHER GAMES ACT [LGA] art. 3(1) (Malta) (“Any game ... which is not authorized to be operated under any law in Malta ..., or which is not authorized to be operated under any law enacted by a member state of the European Union or a member state of the European Economic Area ... is prohibited from being played by any person in Malta.”); Explanatory Notes, Gambling Act, 2005, sec. 36(139) (U.K.) (“This means that, where gambling takes place remotely, the person providing the facilities for gambling will not fall within the scope of the offence if he does not have relevant equipment within Great Britain. This is so even if people within Great Britain can receive the gambling he is providing (e.g. over the internet).”)

<sup>218</sup> The lack of *any* equivalence assessment by the CJEU still astonishes many. Cf. CHRISTINE JANSSENS, *THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW* 36 (2013).

be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime.<sup>219</sup>

Consequently, the answer to the question referred is that Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.<sup>220</sup>

In *Sporting Exchange* the Court reiterates its case-law, holding that national legislation that prohibits foreign gambling providers — including operators established in another member state — from offering games of chance via the Internet in its territory does not breach the fundamental freedom to offer services.<sup>221</sup> It was not until *Stoß* that the CJEU introduced a new differentiation.

#### 5.1.1 Compliance with EU law

If a public monopoly has been established and that measure satisfies

the various conditions permitting it to be justified having regard to the legitimate public interest objectives allowed by the case-law, any obligation to recognise authorisations issued to private operators established in other Member States is, *ex hypothesis*, to be excluded, simply by virtue of the existence of such a monopoly.<sup>222</sup>

Therefore, if the regulatory framework in question is compliant with EU law, no duty of mutual recognition of gambling licenses issued by the various member states can exist.

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<sup>219</sup> Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia*, 2009 E.C.R. I-7633, para. 69.

<sup>220</sup> *Id.* para. 71

<sup>221</sup> See Case C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, 2010 E.C.R. I-4695, para. 37.

<sup>222</sup> Case C-316, 358-360, 409 & 410/07, *Stoß v. Wetteraukreis*, 2010 E.C.R. I-8069, para. 109.

### 5.1.2 Non-compliance with EU law

But even if a member state fails to establish a consistent legal framework for the offer of gambling services, there is no *direct* obligation to recognize foreign gambling licenses. Instead, if a monopoly is found to be non-compliant with EU law, the question — whether an obligation of mutual recognition exists — is merely “capable of having any relevance for the purposes of resolving the disputes in the main proceedings.”<sup>223</sup> But in recent preliminary rulings<sup>224</sup> and due to the latest infringement proceedings<sup>225</sup>, the CJEU and Commission exert additional pressure on all member states to establish a consistent legal framework for gambling. While the non-compliance with EU law does not result in a direct obligation to recognize foreign gambling licenses, it forces member states to choose between two options:

#### a) Option no. 1 – Reform the monopoly

The fact that a single entity is granted an exclusive right to offer games of chance in the territory of an individual member states is, in itself, justifiable. But the potential justification is under the premise that the monopoly reduces opportunities for gambling and limits activities in that domain in a consistent and systematic manner.<sup>226</sup> The expansion of the gambling sector has to be under strict control by the public authorities and limited to what is necessary in order to channel consumers towards licensed and controlled gambling providers.<sup>227</sup>

#### b) Option no. 2 – Open up the market

The second option for member states would be to open up their gambling market and “as a consequence thereof the introduction of a non-discriminatory tender of licenses.”<sup>228</sup>

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<sup>223</sup> *Id.* para. 110.

<sup>224</sup> *See, e.g.*, Case C-186 & 209/11 *Stanleybet International Ltd v. Ypourgos Oikonomias kai Oikonomikon*, 2013 E.C.L.I. EU 33; Case C-390/12, *Pfleger*, 2014 E.C.L.I EU 281.

<sup>225</sup> *See* Press Release, European Commission, *supra* note 183.

<sup>226</sup> *See* Case C-243/01, *Gambelli*, 2003 E.C.R. I-13031, para. 67.

<sup>227</sup> *See Stanleybet*, para. 36.

<sup>228</sup> Nicholas Aqulina & Sarah Pichler, *Path to Compliance: Options for an EU-compliant Greek Market*, 12 WOGLR 10,11 (2013).



## 5.2 Licensing procedures

It is consistent CJEU case-law that a prior administrative authorization scheme derogates from the fundamental freedoms laid down in the TFEU. In order to be justified, it must be based on

objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily [and] any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them.<sup>229</sup>

If a member state opts for a regulatory framework in which national authorities may grant gambling licenses, these authorities have the duty to comply with “the fundamental rules of the Treaties ..., the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency.”<sup>230</sup> Additionally, to verify that the award procedure was in accordance with the principles of equal treatment<sup>231</sup> and transparency<sup>232</sup>, it is necessary to make the reasoning behind the licensing authority's decision publicly accessible.<sup>233</sup>

These requirements were relaxed in *Sporting Exchange*. If a member state decides to grant an exclusive right to a single legal entity, such a measure would be regarded as being justified if a strict control system is implemented.<sup>234</sup>

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<sup>229</sup> Case C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, 2010 E.C.R. I-4695, para. 50.

<sup>230</sup> Case C-72 & 77/10, *Costa*, 2012 E.C.L.I. EU 80, para. 54.

<sup>231</sup> *Cf. id.* para. 57 (“The principle of equal treatment requires ... that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions.”)

<sup>232</sup> *Cf. id.* para. 55 (The principle of transparency “requires the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition and the impartiality of the award procedures to be reviewed.”)

<sup>233</sup> See Case C-470/11, *Garkalns SIA v. Rigas Dome*, 2012 E.C.L.I. EU 505, para. 43.

<sup>234</sup> See *Sporting Exchange*, para. 59.

In addition to the award procedure, the CJEU had to address questions regarding the requirements for potential applicants as well. While the requirement of a particular legal form<sup>235</sup>, the small number<sup>236</sup> or the long duration of licenses<sup>237</sup>, and a certain amount of paid-up share capital<sup>238</sup> can be justified by overriding reasons in the public interest, and may even prove to be of use<sup>239</sup>, the requirement of establishment and the prohibition of branches — if not entirely disproportionate and therefore in breach of EU law<sup>240</sup> — can be justified only on the grounds set out explicitly in the TFEU.<sup>241</sup>

### 5.3 Comparison of the status-quo with the target legal state

The case-law of the CJEU, the Commission's Communication<sup>242</sup> and the resolution of the European Parliament<sup>243</sup> clearly illustrate that there will be no sector-specific harmonization of the national gambling markets at EU level. The choice of the regulatory framework — the quintessence of national gambling laws — is left to the national legislator who is free to act within his margin of discretion and within the boundaries of EU law. But in order to genuinely reach the set level of protection — the level desired by the member states as well as the European institutions<sup>244</sup> — the Commission and the European Parliament take common objectives, such as consumer protection and crime prevention, as their starting point for various initiatives<sup>245</sup> and expect them to strengthen the legal framework of gambling at EU level.

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<sup>235</sup> See section 3.5.2 & 3.6.1.

<sup>236</sup> See section 3.5.4.

<sup>237</sup> *Id.*

<sup>238</sup> See section 3.6.1.

<sup>239</sup> See Case C-347/09, Dickinger, 2011 E.C.R. I-8185, para. 77.

<sup>240</sup> See Case C-64/08, Engelmann, 2010 E.C.R. I-8219, para. 56.

<sup>241</sup> See, e.g., TFEU, art. 52(1).

<sup>242</sup> European Commission, *Towards a Comprehensive European Framework for Online Gambling*, COM (2012) 596 final (Oct. 23, 2012).

<sup>243</sup> See EP Resolution, *supra* note 193.

<sup>244</sup> *Id.* paras. 1 & 17.

<sup>245</sup> See section 4.1(c) & 4.2.

From the consumer's perspective, such measures are to be welcomed without a doubt, but they fall short given the still prevalent legal uncertainty. To reach the proposed target legal state<sup>246</sup> — a safe environment for consumers and gambling providers alike — the national legislators are called upon to establish a consistent legal framework on national level that observes the principles of transparency, equal treatment and legal certainty. It is up to the member states to comply with the requirements set forth by the CJEU, thereby bringing the European gambling sector one step closer to the desired safe environment.

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<sup>246</sup> See section 4.

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## II. ANNEX

### A. Liga Portuguesa

[Do] the exclusive rights granted to Santa Casa, when relied on against [Bwin], that is to say, against a provider of services established in another Member State in which it lawfully provides similar services, which has no physical establishment in Portugal, [constitute] an impediment to the free provision of services, in breach of the principles of freedom to provide services, freedom of establishment and the free movement of payments enshrined in Articles 49, 43 and 56 of the EC Treaty [?]

[Is it] contrary to Community law, in particular to the abovementioned principles, for rules of domestic law such as those at issue in the main proceedings first to grant exclusive rights in favour of a single body for the operation of lotteries and off-course betting and then to extend those exclusive rights to “the entire national territory, including ... the internet”[?]

### B. Sporting Exchange

(1) Should Article 49 EC be interpreted as meaning that, where a closed licensing system is applied in a Member State to the provision of services relating to games of chance, the application of that article precludes the competent authority of that Member State from prohibiting a service provider to whom a licence has already been granted in another Member State to provide those services via the internet from also offering those services via the internet in the first Member State?

(2) Is the interpretation which the Court of Justice has given to Article 49 EC, and in particular to the principle of equality and the obligation of transparency arising therefrom, in a number of individual cases concerning concessions applicable to the procedure for the granting of a licence to offer services relating to games of chance under a statutorily established single-licence system?

(3) (a) Under a statutorily established single-licence system, can the extension of the licence of the existing licence-holder, without potential applicants being given an opportunity to compete for that licence, be a suitable and proportionate means of meeting the overriding reasons in the public interest which the Court of Justice has recognised as justifying restriction of the freedom to provide services in respect of games of chance? If so, under what conditions?

(b) Does it make a difference to the answer to Question 3(a) whether Question 2 is answered in the affirmative or the negative?

### C. Stoß

(1) Are Articles 43 [EC] and 49 EC to be interpreted as precluding a national monopoly on certain gaming, such as sports betting, where there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, in particular because the operators which have been granted a licence within that Member State encourage participation in other gaming – such as State-run lotteries and casino games – and, moreover, other games with the same or a higher suspected potential danger of addiction – such as betting on certain sporting events ([for example,] horse racing) and automated games – may be provided by private service providers?

(2) Are Articles 43 [EC] and 49 EC to be interpreted as meaning that authorisations to operate sports betting, granted by State bodies specifically designated for that purpose by the Member States, which are not restricted to the particular national territory, entitle the holder of the authorisation and



third parties appointed by it to make and implement offers to conclude contracts also in other Member States without any additional national authorisations being required?

#### **D. Carmen Media**

(1) Is Article 49 EC to be interpreted as meaning that reliance on the freedom to provide services requires that a service provider be permitted, in accordance with the provisions of the Member State in which it is established, to provide that service there as well (in the present case, restriction of the Gibraltar gambling licence to “offshore bookmaking”)?

(2) Is Article 49 EC to be interpreted as precluding a national monopoly on the operation of sports betting and lotteries (with more than a low potential risk of addiction), justified primarily on the grounds of combating the risk of gambling addiction, whereas other games of chance, with important potential risk of addiction, may be provided in that Member State by private service providers, and the different legal rules for sports betting and lotteries, on the one hand, and other games of chance, on the other, are based on the differing legislative powers of the *Bund* and the *Länder*?

Should the second question be answered in the affirmative:

(3) Is Article 49 EC to be interpreted as precluding national rules which make entitlement to the grant of a licence to operate and arrange games of chance subject to the discretion of the competent licensing authority, even where the conditions for the grant of a licence as laid down in the legislation have been fulfilled?

(4) Is Article 49 EC to be interpreted as precluding national rules prohibiting the operation and brokering of public games of chance on the internet, in particular where, at the same time, although only for a transitional period of one year, their online operation and brokering [are] permitted, subject to legislation protecting minors and players, for the purposes of compensation in line with the principle of proportionality and to enable two commercial gambling brokers who have previously operated exclusively online to switch over to those distribution channels permitted by the [GlüStV]?

#### **E. Engelmann**

(1) Is Article 43 EC ... to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?

(2) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming – such as public sports betting and lotteries – and advertise such gaming (on television and in newspapers and magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made (“TOI TOI TOI – Believe in luck!”)?

(3) Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?

## **F. Costa**

The Court of Justice is requested to interpret Articles 43 EC and 49 EC with reference to freedom of establishment and freedom to provide services in the sector of betting on sports events in order to establish whether or not those Treaty provisions permit national rules establishing a State monopoly and a system of licences and authorisations which, within the context of a given number of licences:

- (a) tend generally to protect holders of licences issued at an earlier period on the basis of a procedure that unlawfully excluded some operators;
- (b) in fact ensure the maintenance of market positions acquired on the basis of a procedure that unlawfully excluded certain operators (by ... prohibiting new licensees from locating their kiosks within a specified distance of those already in existence), and
- (c) provide cases in which the licence may be withdrawn with forfeiture of very large guarantee deposits, including the case in which the licensee directly or indirectly carries on cross-border betting or gaming activities analogous to those under the licence.

## **G. Biasci**

1. Are Articles 43 EC and 49 EC to be interpreted as in principle precluding legislation of a Member State, such as Article 88 of the [Royal Decree], under which “a permit to organise betting may be granted exclusively to persons holding a licence or authorisation issued by a Ministry or another body to which the law reserves the right to organise and manage betting, and also to persons to whom that responsibility has been entrusted by the licence-holder or by the holder of an authorisation, by virtue of such licence or authorisation”, and Article 2(2b) of Decree-Law No 40 of 25 March 2010, converted by Law No 73/2010, under which “Article 88 of the [Royal Decree], is to be interpreted as meaning that the permit provided for therein, where it is granted for commercial businesses involving gaming and the collection of bets for cash prizes, shall be deemed to be effective only after the operators of those businesses have been granted the appropriate licence to carry on such gaming and collect such bets by the [Independent Authority for the Administration of State Monopolies of the] Ministry of Economic and Financial Affairs [AAMS]”?

2. Are Articles 43 EC and 49 EC to be interpreted as in principle also precluding national legislation, such as Article 38(2) of [the Bersani Decree], under which Article 1(287) of Law No 311 of 30 December 2004 [2005 Finance Law] is to be replaced by the following:

“287. By measures of the Ministry of Economic and Financial Affairs – [AAMS] – the new rules for distributing gambling on events other than horse racing shall be laid down in accordance with the following criteria:

- (a) inclusion, among betting on events other than horse racing, of totalisator and fixed betting on events other than horse racing, on sports-based pools, ‘totip’ betting and horse race betting within the meaning of paragraph 498, and any other gaming based on events other than horse racing;
- (b) possibility of collecting bets on events other than horse racing by operators collecting bets within a Member State of the European Union, by operators in Member States of the European Free Trade Association, and also by operators of other States, only if they satisfy the requirements of trustworthiness defined by the [AAMS];
- (c) collection of bets through outlets whose principal activity is the marketing of gaming products and collection of bets through outlets whose secondary activity is the marketing of gaming products;

the provision of certain types of betting can be reserved exclusively to outlets whose principal activity is the marketing of gaming products;

(d) provision for the establishment of at least 7 000 new outlets, at least 30% of which have as their principal activity the marketing of gaming products;

(e) determination of the maximum number of outlets per municipality in proportion to the number of inhabitants and having regard to the outlets already authorised;

(f) siting of outlets whose principal activity is the marketing of gaming products in municipalities with over 200 000 inhabitants at a distance of not less than 800 metres from outlets already authorised and in municipalities with less than 200 000 inhabitants at a distance of not less than 1 600 metres from outlets already authorised;

(g) siting of outlets whose secondary activity is the marketing of gaming products in municipalities with over 200 000 inhabitants at a distance of not less than 400 metres from outlets already authorised and in municipalities with less than 200 000 inhabitants at a distance of not less than 800 metres from outlets already authorised, without prejudice to outlets at which sports-based pools are collected on 30 June 2006;

(h) allocation of outlets by means of one or more tendering procedures open to all operators, whose bid may not be less than EUR 25 000 in respect of each outlet whose principal activity is the marketing of gaming products and EUR 7 500 in respect of each outlet whose secondary activity is the marketing of gaming products;

(i) acquisition of the possibility of collecting distance bets, including games of skill offering prizes in cash, subject to the payment of not less than EUR 200 000;

(l) laying down of procedures for safeguarding licensees for the collection of bets at fixed odds on events other than horse racing governed by the regulations contained in Decree No 111 of 1 March 2006 of the Minister for Economic and Financial Affairs.”

The question concerning the compatibility of Article 38(2) [of the Bersani Decree] with the abovementioned principles of Community law relates solely to the parts of that provision in which: (a) there is a general tendency to protect licences issued before the legal framework was amended; (b) obligations are introduced to open new outlets at a certain distance from those already authorised which could ultimately ensure de facto the maintenance of pre-existing commercial positions. The question further relates to the general interpretation placed on Article 38(2) [of the Bersani Decree] by the [AAMS] by inserting in licensing agreements (Article 23(3)) a clause relating to withdrawal of the licence where analogous cross-border activities are engaged in directly or indirectly;

3. If the answer is in the affirmative, that is to say that the national legislation cited in the preceding paragraphs is not manifestly contrary to Community law, is Article 49 EC also to be interpreted as meaning that, where the freedom to provide services is restricted for reasons in the public interest, consideration must be given in advance to whether sufficient account is not already taken of this public interest by the legal provisions, checks and investigations to which the service provider is subject in the State in which he is established?

4. If the answer is in the affirmative, as set out in the preceding paragraph, must the referring court take account, in the context of its examination of the proportionality of a similar restriction, of the fact that the relevant provisions of the State in which the service provider is established provide for a degree of control which is equal to or actually exceeds that of the State in which the services are provided?