THE GAMBLING ON INTERNET – A TRUE CHALLENGE FOR FUNDAMENTAL FREEDOMS

by

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The article focuses on the European case law on-line gambling and gambling in general. The case law is notable due to the clashes of fundamental freedoms of common market, namely freedom to provide services and freedom of establishment, and fundamental interests of member states, namely moral, religious or ethical values, protection of consumers, prevention from crime and more importantly the considerable income for state from taxation of gambling. The Court of Justice was traditionally reluctant to intervene in national legislation where the moral and ethical values were involved. However in the last decade, the court was forced to narrow possibilities to justify such restrictions to fundamental freedoms when the member states started to abuse this benevolent approach in order to disguise protectionist measures which aimed to prevent online-gambling companies from entering national markets. The article contains the analysis of C-275/92 Her Majesty's Customs and Excise v. Schindler, Case no C-124/97 Markku Johani, Case C-67/98 Zenatti, C-243/01 Piergiorgio Gambelli Joint cases C-338/04, C-359/04 and C-360/04 Placanica and others.

KEYWORDS

Online-gambling, freedom of establishment, freedom to provide services, justification

1. INTRODUCTION

It seems that it is fate of Gambling industry to be accompanied by controversy, caused by its reputation of industry damaging both individuals and societies. Pressure of public opinion together with grave impact on states' fiscal policies makes it difficult for any government to leave gambling sector without regulation. The right to regulate gambling industry results from sovereignty of each state and this sovereignty can be restricted only by an

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act of the state, e.g. in the form of international treaty or supranational body such as the EU.

Since there is no European harmonization of the Gambling issues, the aim of this paper is to analyze the case-law of ECJ that addressed the collision between interests of individual states and fundamental freedoms given by the EC Treaty. The 'leitmotiv' of these cases is a question whether the law of European Union puts any restrictions on the right of its member states to regulate their Gambling industries, and if yes, to what extent is the sovereignty of member states restricted. This paper will focus on leading cases to describe the current status quo of gambling industry's regulation in Europe.

2. THE NEED FOR REGULATION

Before I start with a legal analysis of the conflict between national regulation and common market principles, it can be useful to point out what are the main driving factors for gambling regulation at the level of member states. There are several factors which lead governments to put gambling activities under regulation.

The most frequently mentioned arguments for the regulation are **adverse effects of gambling addiction on individuals and subsequently on the whole society**. The negative effects on society can be illustrated by analysis of all possible "social costs" of gambling, by D. Walker. He reached the conclusion that costs of gambling are shared between individual gambler *(income lost from missed work, decreased productivity on the job, depression and physical illness related to stress, increased suicide attempts) and society (bailout costs, unrecovered loans to pathological gamblers, unpaid debts and bankruptcies, higher insurance premiums resulting from pathological gambler-caused fraud, corruption of public officials, strain on public services, industry cannibalization).*[1]

Secondly, there might exist **moral, religious or ethical values** which may be inconsistent with certain forms of gambling or against gambling itself. These values may be different in each member state. Moreover, the gambling activities are frequently accompanied by high risk of fraud e.g. manipulated results of sports events. Gambling also creates a **potential space for money laundering**, the regulation of gambling may therefore be necessary to combat other criminal activities.

The fact that the gambling industry also **contributes significantly to state income** is of a massive importance for governments. States tend to create controlled monopolies in various gambling fields (most typically lotteries) and use income from gambling for various purposes. As will be de-

[1] See Walker. D. The Economics of Casino Gambling, Springer Berlin Heidelberg, 2007 ISBN 978-3-540-35102-3

scribed below, the question of regulation motivated fully or partly by budget reasons became one of the key legal issues of case-law on gambling.

As a result of these factors, the regulation of national gambling industries tends to hinder the access of foreign gambling companies to national markets. This gives rise to plenty of objections which claim incompatibility with fundamental principles of common market, especially with freedom to provide services, freedom of establishment and eventually free movement of goods. These objections puts challenge to both national and community courts, which are to rule on compatibility or incompatibility of such regulations with the law of EU.

3. EARLY ECJ CASE LAW ON GAMBLING

The "early" case law on gambling in Europe was formed by the cases of *Schindler*, *Lārā*, and *Zanneti*. These cases appeared throughout the nineties which could be characterized as a period when the ECJ was rather reluctant to interfere with these sensitive issues. The early case law on gambling will be addressed only briefly, since it does not contain the element of internet and have been sufficiently analyzed by other authors.

3.1. SCHINDLER

Schindler case[2] wasn't only a landmark case for the regulation of gambling, it can be considered as one of the leading cases in the area of free movement of services. This case dealt with attempt of German loterry's agents to promote lottery and sell their lottery tickets in Great Britain, where at that time, lotteries were prohibited. European court of justice acknowledged that gambling is an economic activity and it also stated that sale of lottery tickets relates to free movement of services[3] rather than to free movement of goods. The prohibition of lotteries in the UK therefore constituted a restriction to free movement of services, however the court recognized that the purpose of this restriction is "preserving the maintenance of order in society"[4] and can be therefore justified as so called mandatory requirement,[5] provided that such restriction is non-discriminatory.

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[2] C-275/92 Her Majesty's Customs and Excise v. Schindler

[3] Ibid. Para. 37

[4] Ibid. Para. 58

[5] *justify national authorities having 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, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory*

3.2. LĀRĀ

Lārā case[6] involved Finnish regulation on slot machines, which did not completely prohibit them, but subjected them to a strict regulation. Under this regulation, the running of the slot machines were reserved to a public institution. The court in this case recognized that "*in so far as such legislation involves no discrimination on grounds of nationality, that impediment may be* ***justified on grounds relating to the protection of consumers*** *and the maintenance of order in society.*"[7] The court further examined the proportionality of Finnish regulation, but scholars perceive its approach in this case to be a "remarkedly hands-off approach"[8] as opposed to strict proportionality test used in *Schindler*. The court held that member states have discretion to choose a measure to achieve the pursued objective, which in this case meant that Finland could choose restriction of gambling by means of state monopoly instead of prohibition as could be seen in Schindler case.

3.3. ZENATTI

Zenatti case[9] might not belong to most important cases of the substantive law of the EU, however it had direct impact on Italian legislation and preceded Gambelli. Similarly to Gambelli case, Zenatti involved Italian regulation of gambling. Like in Lārā, Italian government restricted gambling industry by creating a state controlled institution which held the monopoly on sport-betting. The court confirmed that Italy had the right to partially prohibit gambling for justifiable purposes, such as social policy. It is important to mention, that the court analyzed provisions of Italian law only in the light of their compatibility with provisions on free movement of services, since preliminary question referred to ECJ did not cover freedom of establishment.[10]

4. THE ITALIAN SAGA – GAMBELLI AND PLACANICA

4.1. GAMBELLI

The case of Piergiorgio Gambelli and others involved criminal prosecution of Italian entrepreneurs who were contracted to UK company Stanley International Betting Ltd, which is the fourth biggest bookmaker and the largest

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[6] Case no C-124/97

[7] Ibid. Second paragraph of case summary

[8] Paraphrase Barnard, Catherine The substantive law of EU, 2007, Oxford university press p. 381

[9] Case C-67/98 Zenatti

[10] See para. 74 of OPINION OF advocate GENERAL ALBER delivered on 13 March 2003 (1) Case C-243/01

casino operator in the United Kingdom.[11] In this business model the contracted entrepreneurs served as intermediaries between Italian customers and British betting company, by processing bets and collecting money from Italian customers and subsequently communicating these bets to Stanley via Internet. Italian law prohibited, under criminal sanctions, to organize or carry on betting without a licence issued by Italian state authorities, while the maximum possible amount of betting licences' holders was limited to 1000. Mr. Gambelli and other entrepreneurs owned licences for processing data, but did not have licences for providing betting services. Entrepreneurs were thus charged by Italian authorities with "Unlawful participation in the organization of games or bets". The defendants brought an action for review before the Italian court, which referred to the European court of Justice for a preliminary ruling regarding compatibility of Italian legislation with law of European communities.

The question of Italian court focused on national law's compatibility with two fundamental freedoms of common market, namely the **freedom of establishment** and the **freedom to provide** services (Art 43 et seq treaty).[12] This subchapter will therefore analyze these legal issues rosed by the national court.

4.1.1. RESTRICTION ON THE FREEDOM OF ESTABLISHMENT

Article 49 of Treaty on the functioning of the European Union grants nationals of any member state the right to set up agencies, branches or subsidiaries in any other member states. Mr. Gambelli and representatives of Stanley claimed that Italy was denying this right by excluding certain types of companies (companies with liability limited by shares), restricting the amount of licences to relatively low number and granting them under conditions which could in practice be met only by those bookmakers which had already been participating in Italian betting system.[13] Italian government did not in fact refute allegations that its licensing system created restrictions

[11] Joint cases -338/04, C-359/04 and C-360/04 Placanica and others - para 20.

[12] The exact wording of the question referred for the decision is as follows: *'Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?'* See para. 23.

[13] See para. 25 and para. 33 of OPINION OF advocate GENERAL ALBER delivered on 13 March 2003 (1) Case C-243/01 Criminal proceedings against Piergiorgio Gambelli and Others

to freedom of establishment and relied more on justification of their schemes.

Even though neither side of the case, nor any interested party nor advocate general disputed the claim that the national legislation imposes restriction on freedom of establishment, an interesting point was raised by Commission which held the opinion that it is not appropriate to address this issue in light of freedom of establishment because of the fact that "*the agencies managed by Mr Gambelli are technically independent and are not subordinate to Stanley*"[14] and that it would be therefore more appropriate to consider this issue in light of freedom to provide services.[15] However this objection dealt with concrete situation of concerned parties. Because the task of the European court of Justice was to answer more general question on compatibility of Italian law with the articles 43 et seq. of the former EC treaty, the objection of European commission will be set aside in this chapter and analyzed in a different part of this paper.

As to the question whether Italian government created a restriction to freedom of establishment, the court unsurprisingly reached a conclusion ***that Italian legislation on betting constituted such restriction***.[16] The court noted *that any restriction on the activities of agencies such as defendants in the main proceedings constitute such obstacle*.[17] The restrictions in this individual case vested in the fact that Italian regulation made it impossible to run gambling business for capital companies.

4.1.2. RESTRICTIONS TO FREE MOVEMENT OF SERVICES

The European court of justice has been sticking to the legal opinion that gambling is considered as a service since its decision in *Schindler* and *Gambelli* case is no exemption from this established doctrine. With reference to *Schindler*, the court merely stated that *the activity of enabling nationals of one Member State to engage in betting activities organized in another Member State, even if they concern sporting events taking place in the first Member State, relates to a 'service' within the meaning of Article 50 EC.*[18] The fact that the services are rendered from distance via Internet had no real impact on the legal qualification of the situation of Stanley's activities as a service.[19]

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[14] Ibid. Para 57

[15] As was noted by ECJ in Gebhard, articles 39,43, and 49 are "mutually exclusive" - see Barnard, Catherine *The substantive law of EU, 2007*, Oxford university press *p252*

[16] See para 59. of C-243/01 Piergiorgio Gambelli

[17] See para. 44. of C-243/01 Piergiorgio Gambelli

[18] Ibid. Para 52

[19] Ibid para 53 and 54. In para 54, the court expressly referred to C-384/93 *Alpine Investments* where ECJ reached a conclusion that article 49 covers also services which provider offers by telephone to potential recipients without moving from the member state in which he is established

After the court made it clear that service is involved in the case, the second logical step was to find out whether the freedom to provide services is restricted by Italian measures. The Italian government confirmed that according to Italian law, an *individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offense.*[20] The court did not need to use any complicated reasoning to rule that provision which prohibits customers to use certain service from foreign entrepreneurs creates restriction of freedom to provide services.[21] Moreover, according to the opinion of the court, the restriction of freedom to provide services vested also in criminal penalties for companies which served as intermediaries of gambling services, such as Gambelli.

4.1.3. JUSTIFICATION FOR RESTRICTION OF FREEDOM OF ESTABLISHMENT AND FREE MOVEMENT OF SERVICES

In the Zenatti case the court stated that Italian government could justify restriction of free movement of services on the basis of protecting society from negative effects of gambling. The most significant difference between regulation of gambling in Zenatti and other aforementioned gambling cases[22] is that the true purpose of restrictions in Italian contemporary legislation was not only the protection of customers and prevention from fraud and money laundering, but also **to protect national private undertakings** as it was apparent from the working papers relating to the disputed provisions of national law.[23]

The element of blatant protectionism meant a new challenge for the court of justice, which had previously tended to give member states a significant amount of discretion when regulating their gambling industry. On the one hand, ECJ is generally hesitant to intervene in the discretion of Member states in cases involving morale, public order or human rights. On the other hand, ECJ had promoted itself, mainly by its own case-law involving direct effect of EC law, to the role of protector of entrepreneurs from state protectionism. Therefore if the court overlooked Italian protectionist measures, he would undermine the predictability of his own decisions and thereby also the legal certainty in the European law. With these two contradicting tendencies in mind, the court had to decide whether the

[20] Ibid para 56

[21] It is important to note that such restriction creates restriction of freedom of establishment as well

[22] Schindler, Lara, Zenatti

[23] See para. 19 of

restriction contained in Italian measures can be justified or exempted from the scope of EC treaty via former articles 45 or 46 of EC treaty.[24]

The court refused to apply articles 45 or 46 of the Treaty with reference to its earlier case law. The court did not go very deep with reasoning why he didn't apply these provisions; this was probably caused by the fact that, apart from Greece, none of the concerned or interested parties used these articles in its opinions. Even if one of these articles applied it would not provide court with final solution since the exemptions contained in them relate only to freedom of establishment and not freedom to provide services.

After it was clear that exemptions under articles 45 and 46 of the treaty would not apply, it was necessary to analyze, whether the restrictions could be justified as imperative requirements. As European court of justice previously ruled in Gebhard[25] certain restrictions on fundamental freedoms can be justified in case following four conditions are met:

- they must be applied in a non-discriminatory manner
- they must be justified by imperative requirements in the general interest
- they must be suitable for securing the attainment of the objective which they pursue
- they must not go beyond what is necessary in order to attain it.[26]

These four conditions were met in previous gambling cases, however it was indeed questionable whether these conditions were also met in the regulation disputed in Gambelli.

The legal analysis on whether Italy meets these requirements was brilliantly construed by Advocate general. In his opinion he hinted, that Italian regulation failed to meet conditions of Gebhard. First, he considered Italian procedure of awarding licences discriminatory in nature since it clearly favored entrepreneurs with previous experience, and required business premises on Italian territory. This made it practically impossible for foreign "newcomers" to obtain concessions to organize betting . Second, he questioned the suitability[27] and proportionality[28] of provisions which prevent access of share companies to Italian betting market. In the end, advocate gen-

[24] Currently articles 50 and 51 of the treaty

[25] C-55/94 Gebhard [1995] ECR I-4165

[26] Ibid. Para. 37

[27] See para. 98 of Opinion- "The question nevertheless arises whether the specific exclusion of companies limited by shares is capable of serving that objective"

[28] See para 99 of Opinion "The complete refusal of access seems in any event to be disproportionate."

eral questioned also the imperative requirements which were relied on by Italian government.

Advocate general held the opinion that the regulation of gambling in other member states provides sufficient protection from eventual harm and therefore Italian authorities go beyond what is necessary when they require any extra regulations of once regulated businesses.[29] What is more Italian government did not really attempt to prevent passion for gambling, it was in fact extending the opportunities for it by law. The final, and in my view also **the most important argument, in the reasoning of advocate general was that prevailing purpose of Italian regulation is protection of its own tax revenues,**[30] and therefore this regulation cannot be justified by arguments of protection of customers or social policy. Indeed the court ruled in the Zenatti[31] that the financing of social activities through a levy on the proceeds of authorized games [may constitute] only an incidental beneficial consequence and not the real justification for the restrictive policy adopted[32] Advocate general also suggested, that the court should abandon his doctrine on letting member states' courts to decide on justification of measures which restrict gambling and in this case rule on the incompatibility of Italian law directly. Had the court fully followed the opinion of advocate general, the ruling of the case would be

> *The provisions of Article 49 et seq. EC concerning the freedom to provide services are to be interpreted as precluding national legislation like the Italian legislation contained in Article 4(1) to (4), 4a and 4b of Law No 401 of 13 December 1989 (as most recently amended by Article 37(5) of Law No 388 of 23 December 2000), which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State.*

However, as will be described below, the court approached the case more carefully, and let national court to decide on justifiability of national measures under certain conditions. I would say, that such approach was rather

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[29] Ibid. Para 118.

[30] In paragraph 127 of his opinion advocate general expressly said that: "it is clear from the submissions of the Member States that what they fear most is the economic consequences of changes within the gambling sector. Little reference is made in this context to any dangerous effects that gambling might have on gamblers and their social environment."

[31] Case C-67/98 Zenatti

[32] Case C-67/98 Zenatti para 36 - as mentioned in para 125 of attorney general.

counter-productive, since as the development in Italy later showed, the refusal to decide on compatibility with EC treaty only slowed the process of abolishing incompatible national law. For the defense of the ECJ can be said, that it could not foresee that the loopholes in the case law will be exploited in Italy and that at that a strict ruling would be strongly inconsistent with rather benevolent approach in previous gambling cases.

As was mentioned above, the court has ruled that Italian legislation creates a restriction to free movement of services and to freedom of establishment, but did not make a final decision in the question whether such restriction is justified. The court noted without any explanation, nevertheless in accordance with previous case law, that *it is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims*[33] The wording of the ruling of the court is therefore as follows:

> *National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorization from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.*

It may appear that the European court of justice avoided the question and returned the case to national court with little help, however the progress in comparison to previous gambling case is evident. In its reasoning, the ECJ gave Italian court clear guidelines on what can be considered justifiable so that it would be quite difficult for Italian court to "get lost".

First of these criteria is **the existence of general interest** such as public order which may justify restrictions. Important conclusion made by the court is, that *In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns*[34]. Second condition is that the Italian **rules must be applicable without distinction** between Italian and foreign providers. Third condition

[33] C-243/01 *Criminal proceedings against Piergiorgio Gambelli*, para 76
[34] Ibid. Para 69

was that the measure **must be suitable in for achieving objectives** of protecting the general interest, which in the individual case meant that *they must serve to limit betting activities in a consistent and systematic manner*[35]. Final condition is proportionality. ECJ set forth that Italian court must examine whether the **restrictions must not go beyond what is necessary** to combat fraud.

4.2. JOINED CASES C-338/04, C-359/04 AND C-360/04 PLACANICA AND OTHERS

Placanica case originates in the controversial application of Gambelli case by Italian supreme court. Its factual background is therefore very similar to the case of *Gambelli*. Like *Gambelli*, it involves Stanley International Betting Ltd which kept leading its legal battle for the right to access Italian market. The case also involved criminal prosecution of entrepreneurs[36] who, like Mr Gambelli, run data centers which served as intermediaries between Stanley company and customers. The Italian regulation on gambling remained similar to regulation in the times of *Gambelli*. It still preserved a system of limited number of licences awarded by state institution and sanctioned those who organized betting without them. The significant change in Italian regulation since Gambelli was the fact that the licences were awarded by independent state institution instead on Italian olympic committee (CONI) and the fact that all kind of companies (including capital companies which were previously prevented) were allowed to apply for licences. However, despite allowing capital companies to apply for the licence, **Italy did not revoke the licences awarded under previous system**, and thus did not leave virtually any space for companies to participate in Italian gambling market for upcoming years.

Italian supreme administrative court, had a chance to apply the test of justifiability set forth in *Gambelli* in a very similar case of *Gesualdi*, approximately one year after the decision in *Gambelli*. The Italian court surprisingly found, that restrictions posed by Italian national law are justified due to the public order and safety[37]. The court pointed out that the system of authorizations which was established in order to combat involvement in crime, such as fraud, money-laundering and racketeering and did not create distinct treatment between national and foreign companies, *since it had the effect of excluding not only the foreign companies whose shareholders cannot be precisely*

[35] Ibid. Para 67

[36] under article 4(4a) of Law No 401/89

[37] See opinion of advocate general on case Placanica

identified, but also all the Italian companies whose shareholders cannot be precisely identified.[38]

It however appears, that lower-instance Italian courts were not completely persuaded by the reasoning of the court in *Gesualdi* case, since two of them asked for preliminary rulings in cases almost identical to *Gambelli* or *Gesualdi*. Both of them questioned the Italian legislation "approved" by Corte suprema di cassazione and one of them even expressly questioned the decision in *Gesualdi*.

First of these 'rebelling' courts was Tribunale di Larino, which was to decide on a criminal case, where Mr. Placanica was charged by committing a crime of collecting bets without required authorization. The judge was unsure about the compatibility of the status quo of Italian application practice and decision of Gesualdi with community law, so it stopped the case and asked the European court of justice to make a preliminary ruling on question:

> *'Does the Court of Justice consider Article 4(4a) of Law No 401/89 to be compatible with the principles enshrined in Article 43 [EC] et seq. and 49 [EC] concerning the freedom of establishment and the freedom to provide cross-border services, having regard to the difference between the interpretation emerging from the decisions of the Court ... (in particular the judgment in Gambelli and Others) and the decision of the Corte Suprema di Cassazione, Sezione Uniti, in Case No 23271/04? In particular, the Court is requested to rule on the applicability in Italy of the rules on penalties referred to in the indictment and relied upon against [Mr] Placanica.'*

Tribunale di Teramo who was dealing with similar case questioned that Italian regulation did not abolish licences that were awarded in a previous licensing scheme. The Tribunale di Teramo pointed out that previous licensing scheme was discriminatory towards capital companies, and even though it was not discriminatory at the time of the decision, the fact that licences awarded under previous scheme remained valid constituted temporary derogation of right to provide services for capital companies because they could apply for licences only after expiration of existing ones. The court therefore asked whether first paragraph of the former Article 43 EC and the first paragraph of Article 49 EC may be interpreted as

> *1. allowing the Member States to derogate temporarily (for 6 to 12 years) from the freedom of establishment and the freedom to provide services within the European Union, and to*

[38] See para 17 of Placanica

2. allocate to certain persons licences for the pursuit of certain activities involving provision of services, valid for 6 or 12 years, on the basis of a body of rules which excluded from the tender procedure certain kinds of (non-Italian) competitors; then amending that system, after subsequently noting that it was not compatible with the principles enshrined in Articles 43 [EC] and 49 [EC], and

3. not to revoke the licences granted on the basis of the earlier system which, infringed the principles of freedom of establishment and of free movement of services; and

4. .... to bring criminal proceedings against anyone carrying on business via a link with operators who, [despite] being entitled to pursue such an activity in the Member State of origin, were nevertheless unable to seek an operating licence precisely because of the restrictions contained in the earlier licensing rules?'[39]

Since these cases had similar factual background and since they were opening the same legal issues the court decided to deal with them jointly.

Comparing to the questions laid by Italian court in Gambelli, questions in Placanica are much more detailed and instead of asking generally, they are focused on the application of national law by national authorities and courts.[40]

4.2.1. BARRIERS TO FREE MOVEMENT OF SERVICES, FREEDOM OF ESTABLISHMENT AND THEIR JUSTIFIABILITY

The question whether regulation of gambling industry which limits the number of possible providers of services, such as those introduced by Italian government, creates obstacle for freedom to provide services or freedom of establishment had been already answered in Gambelli together with the question of justifiability of such restrictions. In Placanica the European court of justice merely repeated its conclusions from Gambelli, and then further developed these conclusions[41] with regard to the individual elements of the

[39] The quotation of preliminary question is shortened due to better comprehensibility and due to space reasons.

[40] Here has to be noted that the wording of the referred questions (especially the question from tribunale di Larino) rised doubts whether it is admissible. The court directly asked about compatibility of national law with EC legislation, an issue which should be decided by national court. However the court, in accordance with opinion of advocate general, decided that here is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law. See para. 86 of the judgement.

[41] See paras. 41-49 of the decisions

national legislation as were described by inquiring courts. These four elements were abstracted from the referred questions:

- the obligation to obtain a licence;
- a method of awarding those licences, by means of a tender procedure excluding certain types of operator;
- the obligation to obtain a police authorization; and
- criminal penalties for failure to comply with the legislation at issue.

4.2.2. AD: THE OBLIGATION TO OBTAIN A LICENCE

As was ruled in Gambelli the Italian licensing scheme posed restrictions on fundamental freedoms of common market, but it can be justified if four conditions set forth by the European court of justice are met. That means that existence of licensing scheme is not objectionable per se. The ECJ subscribed to this point of view by recognizing that licensing system may constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes[42]. The court also pointed out that not only the mere existence of licensing scheme that limits the number of licence holders has to be justified (as Corte suprema di cassazione ruled it is, due to public order and safety reasons) but also the limit itself must meet conditions given in Gambelli[43]. In conformity with previous decisions the ECJ let national courts to rule on whether the number of permitted licences (1000) could meet the criteria set forth in Gambelli. These conclusions were also reflected in first two paragraphs of the ruling:

> *1. National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorization issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services, provided for in Articles 43 EC and 49 EC respectively.*
>
> *2. It is for the national courts to determine whether, in so far as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.*

[42] See Placanica para
[43] See Placanica para

This part of the Court decision did not truly bring any fresh air into the legal problem, since it only summarized what was already said in the previous case laws and in the end came "back to the beginning" by letting national court to decide on justifiability of the national measures. Moreover, the needlessness of these conclusions can be objected, since the questions of the national court did not contain the issue of compatibility of licences per se, but rather the compatibility of criminal prosecution of entrepreneurs who do not hold these licences.

4.2.3. AD: THE METHOD OF AWARDING LICENCES

As was already ruled in Gambelli, the exclusion of capital companies from the tender procedures created restrictions on freedom of establishment. This restriction cannot be justified since the exclusion of capital companies goes beyond what is necessary to combat criminal and fraudulent activities in the betting industry. Italian government quietly consented with this stance by revoking the rule which excluded capital companies from tenders. Nevertheless, this step of Italian government created a challenging question to be resolved by ECJ. The **question to be answered was, whether a national regulation could pose a restriction even after it ceased to be valid**.

The arguments for stating that even abolished provisions create restriction to freedom of establishment seem to be clear. Even if the disputed provision is no longer valid, the results of its application are persisting and creating obstacle in entering Italian market for certain group of entities. The European court of justice supported this view by stating, that it should be noted that the question of the lawfulness of the conditions imposed in the context of the 1999 tender procedures is far from having been made redundant by the legislative amendments introduced in 2002[44]. Ultimately, the ECJ decided that:

> *1. Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes - and, moreover, continues to exclude - from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.*

ECJ hinted that in such situation, the most suitable solution is to revoke old licences and redistribute licences anew. The court also touched the fourth point when it noted that if operators cannot be sanctioned for not having a licence if they had been unlawfully prevented from receiving them. There

[44] Ibid. Para. 60

is however a rather surprising point in the reasoning of the ECJ. In Gambelli it was reluctant to rule on compatibility or incompatibility of national provisions and ruled that such decision is to be made by national court. In Placanica, it did not hesitate to rule that the same regulation was precluded by articles 43 and 49 of the Treaty.

4.2.4. AD: POLICE AUTHORIZATION AND CRIMINAL PENALTIES

The situation on police authorizations of operators was similar to situation on licences and also the courts ruling on this issue had the same outcome. Operators were willing to register for police authorizations and also were willing to become subjects of police control, however, police refused to issue authorization because it could be issued only to licence holders. The court pointed out that the lack of a police authorization cannot, in any case, be a valid ground for complaint against people who were unable to obtain them contrary to EU law.[45]

5. B-WIN CASE

The Bwin case is the most recent ECJ case on internet gambling. The most interesting thing on this case is that it involved cross border provision of services purely via internet, i.e. without any physical presence of service provider in the national market.

The case had its origins in Portugal, where the gambling industry was by law exclusively operated by a state owned company named Santa Casa. Santa Casa has the legal monopoly on providing gambling services via the Internet. The Portuguese laws prevent any other business entity from running any gambling business and sanction undertakings that promote, organize or operate gambling games.[46] B-win ignored this prohibition and concluded a sponsorship agreement with Portuguese first football division, which was subsequently named "Liga betandwin.com". Both parties to this agreement were hence fined by the aggregate fine of 150 000 EUR. Both parties appealed to the Portuguese court, which asked ECJ to rule on the preliminary question, whether it is contrary to Community law, in particular to the above-mentioned 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.[47]

[45] Ibid para 67
[46] See B-Win -Para. 10
[47] Ibid Para. 28.

After finding that Portuguese laws created an obstacle to free movement of services, the ECJ applied the Gambelli test to find out whether they can be justified. Unlike in previous gambling cases where states regulated gambling to limit the impact of gambling on the society, the Portuguese regulation followed the objective of fight against crime or consumer protection from fraud. The Portugal managed to persuade ECJ that the way Santa Casa operates is an appropriate way to fight against crime and consumer protection. Santa Casa was under the government's control and that this model of gambling regulation has been efficient in Portugal since eighteenth century. The court also acknowledged that the specificities of internet gambling, namely the fact that there is no physical contact between consumer and the provider, can create higher risk of fraud. Hence the strict Portuguese regulation was found proportionate to the pursued objective of the regulation.

Despite the fact that the member state succeeded in justifying the restriction on free movement of services, the approach of the ECJ cannot be compared as "hands off" approach in cases prior to Gambelli. The court made rather detailed examination of the national laws and applied the same test as in the case of Gambelli.

6. CONCLUSION

It can be concluded that Gambelli and Placanica had set a clear trend of narrowing the discretion of member states in gambling regulation in the case law of both ECJ court case-law. The ECJ has abandoned his rather cautious approach in limiting state sovereignty and drawn a border lines which cannot be crossed by state regulations.

After Gambelli every government of a member state had to reconsider, whether it can justify its legislation in the light of proportionality, suitability, non discrimination and the objects of legislation. Gambelli also made it clear, that financial interests of the state cannot be considered as general public interest, which can justify restriction of fundamental freedoms of common market. This conclusion seems to be the only possible solution to protect free common market, however can bring a certain amount of dishonesty in lawmaking process, because it dictates states to pretend they are not aware of financial benefits of state regulation.

Placanica narrowed the scope of states discretion even further when it accented consistency of measures with the objectives of regulation. After Placanica, member states must be even more aware of the fact, that mere existence of general public interest cannot "free their hands" to unlimited regulation, and that every element of the regulation must be considered separately under Gambelli test.

The four steps of this test are summarized in this table:

The existence of general interest (objective pursued)
Rules achieving such interest must be applicable without distinction between national and foreign service providers.
Measure must be appropriate for achieving objective (general interest)
The restrictions must not go beyond what is necessary to achieve the objective

This test was subsequently applied not only in the cases before the European court of justice (Such as Bwin case), but was adopted also by the EFTA court in "gambling cases" of Ladbrokes Ltd[48] or in the EFTA surveillance authority v. Norway,[49]

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