

“Online gambling and EU Law”

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Abstract

This paper will examine the various regulatory and jurisprudential aspects of online gambling in the internal market. Special focus will be given on the Green Paper on online gambling in the internal market which was published by the European Commission in March 2011. The case law of the European Court of Justice on online gambling will also be discussed. The European Court of Justice had the opportunity to scrutinize various legal issues relating to cross-border online gambling activities. The European Court of Justice admitted the wide discretion of Member States in the regulation of online gambling. There is no piece of secondary EU legislation which harmonizes the provision of online gambling services in the internal market and which contributes to market integration. The main argument of this article is that this lack of harmonization coupled with the wide discretion of Member States in the regulation of gambling results in the establishment of a fragmented online gambling market in the European Union. Gambling companies and consumers can not exercise freedom to provide services and freedom of establishment because restrictions on these fundamental freedoms are justified by public and social interest requirements.

1)Introduction.

The regulation of online gambling plays a very important role in the area of internal market of the European Union. Gambling in an online environment offers opportunities for cross-border economic activities. Internet has opened new ways in cross-border gambling activities. Gambling operators could easily offer gaming and betting services through internet; consumers from other Member States get easy access to these gambling services through internet.

This opening of the cross-border online gambling market has generated huge profits. The annual revenues generated by the gambling service sector, measured on the basis of Gross Gaming Revenues (GGR) (i.e. stakes less prizes but including bonuses), were estimated to be around 75,9 bn € (EU 279), showing the economic significance of the sector. On-line gambling services accounted for annual revenues in excess of € 6,16 bn, i.e. 7,5 % of the overall gambling market. This on-line market is the fastest growing segment and is expected to double in size in five years.¹ Nevertheless, this growth was not accompanied by legality and compliance. Many of these operators offered their services without complying with the national rules of their home or host Member State. These unauthorized, illegal providers constitute a vast problematic area of the internal market.

However, there are certain regulatory problems arising out of this expansion of cross-border gambling. Most of the national regulators are concerned with the following questions: “Who is going to regulate this cross-border activity?”, “Does the internal market of the European Union demand any regulatory reforms in the field of gambling?”, “Should Member States coordinate their actions and legislative choices in the area of gambling?”. In March 2011, the European Commission published its Green Paper on online gambling in the internal market. The purpose of this Green paper is to launch an extensive public consultation on all relevant public policy challenges and possible internal market issues resulting from the rapid development of both licit and unauthorised on-line gambling offers directed at citizens located in the EU.²

2)Online gambling and Member States: Regulatory problems at EU level.

With regard to gambling, Member States are interested in the regulation of this part of the internal market due to moral and social considerations (addiction etc) and to budgetary reasons (e.g. profits for state-owned companies). In its Green Paper, the European Commission categorizes national legal regimes on online gambling. It finds out that there are two categories of national legal regimes: a) the first category of legal regimes is based on licensed operators providing services within a strictly regulated

¹ EGBA and H2 Gambling Capital, 2009, http://www.egba.eu/pdf/EGBA_FS_MarketReality.pdf . COMMISSION STAFF WORKING PAPER, Accompanying document to the GREEN PAPER “On on-line gambling in the Internal Market” COM (2011) 128, 8.

² COMMISSION STAFF WORKING PAPER, Accompanying document to the GREEN PAPER “On on-line gambling in the Internal Market” COM (2011) 128, 3.

framework, and b) the second category is based on a strictly controlled monopoly (state owned or otherwise).³

These two different regulatory models on online gambling are responsible for the existence of a wide legal diversity among the different Member States. The various rulings of the European Court of Justice did not diminish this legal diversity. The European Court of Justice respected the national legal regimes on gambling. The regulatory autonomy of the Member States remained vastly untouched. The European Commission stress that, in the absence of harmonisation in the field of gambling, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the public interests are protected, in line with the subsidiarity principle. However, the European Court of Justice set a few criteria with which national provisions should comply.

The problem of legal diversity is aggravated by certain factors. First, the fact that online gambling activities could be cross-border adds another difficulty to both legal regimes. National legal orders are reluctant to accept online market operators originating from different Member States or from third countries outside the European Union. In this way, Member States quite often seek to defend their national monopolies or strict licensing systems. Secondly, the majority of online market operators across the Member States are illegal because they are operating without any license or accreditation. Out of 14,823 active gambling sites in Europe more than 85% operated without any license.⁴ Thirdly, the enforcement of national rules presents many defects. The different national rules with regard to gambling together with these factors do not contribute to the establishment and operation of a European common market for online gambling.

3) The purpose of the Green Paper on online gambling in the internal market.

As it was mentioned above, the purpose of this Green paper is to launch an extensive public consultation on all relevant public policy challenges and possible internal Market issues resulting from the rapid development of both licit and unauthorised on-line gambling offers directed at citizens located in the EU. The main objective of the Pan-European consultation is to explore the existing situation of the EU on-line gambling market.

The Commission is seeking detailed facts and views from all interested stakeholders on the existing situation of the EU on-line gambling market and the following key policy issues that the growth of this market gives rise to: a) the existence and extent of societal and public order challenges associated with on-line gambling; b) the regulatory and technical methods Member States use or could use to improve enforcement, consumer protection and the preservation of public

³ COMMISSION STAFF WORKING PAPER, Accompanying document to the GREEN PAPER “On on-line gambling in the Internal Market” COM (2011) 128, 3.

⁴ COMMISSION STAFF WORKING PAPER, Accompanying document to the GREEN PAPER “On on-line gambling in the Internal Market” COM (2011) 128, 3.

order; c) the appropriateness and effectiveness of current rules applicable to on-line gambling services at EU level in terms of ensuring the overall coherence of national systems and evaluating whether further cooperation at EU level might assist Member States to more effectively achieve the objectives of their gambling policy.⁵ Contributions to the consultation will determine the need for and form of EU follow-up action in this field, as well as the level at which such action should be taken. The objectives of the consultation are ultimately to achieve a market for on-line gambling services that is well-regulated for all.⁶

This public consultation is essential due to the regulatory and technical challenges described above and the different stances towards societal and public order issues, such as the protection of consumers from fraud and the prevention of gambling addiction.⁷

4) Online gambling and the case law of the European Court of Justice.

In many cases before it, the European Court of Justice had the opportunity to examine the legal status of online gambling and sports betting in some Member States. The regulation of online gambling plays a very important role in the area of internal market. This examination took place in the light of the internal market. The European Court of Justice examined the relevant national provisions in the light of the freedom to provide services and the freedom of establishment. In these cases, national gambling laws were challenged by private market participants who could not penetrate into the national gambling market of the Member State due to its strict licensing system or national monopoly. The European Court of Justice was called to adjudicate on the compatibility of these national laws on gambling with the EU fundamental freedoms. The most important parts of the cases with significance for European market of online gambling will be presented in the next paragraphs.

In Case C-67/98 *Zenatti*⁸, the European Court of Justice examined the transmission through internet or fax of sports betting. Mr Zenatti has acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd ('SSP'), a licensed bookmaker. Mr Zenatti used to run an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sent to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and receives faxes from SSP for transmission to the same customers.⁹ The European Court of Justice found that this national law constitutes a trade barrier and inhibits the exercise of the fundamental freedom to provide services. However, this

⁵ Public Consultation on On-line gambling in the Internal Market - Frequently asked questions MEMO/11/186, p. 2.

⁶ Public Consultation on On-line gambling in the Internal Market - Frequently asked questions MEMO/11/186, p. 2.

⁷ Public Consultation on On-line gambling in the Internal Market - Frequently asked questions MEMO/11/186, p. 2.

⁸ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289.

⁹ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289., para. 6.

trade barrier which applied indistinctly to national and non-nationals could be justified in accordance with public interest requirements. The European Court of Justice stated that national legislation which reserves for certain bodies the right to take bets on sporting events and which thus prevents operators in other Member States from taking bets, directly or indirectly, constitutes an obstacle to the freedom to provide services even if it applies without distinction. However, in so far as such legislation does not entail any discrimination on grounds of nationality, it can be justified where its objectives are to protect consumers and to maintain order in society. Although it does not totally prohibit the taking of bets on sporting events but reserves it for certain bodies under certain circumstances, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation enjoyed by the national authorities. It is for those authorities to appraise whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them. In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they are intended to ensure.¹⁰ The ECJ concludes that the Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.¹¹

Case C-243/01 *Gambelli*¹² concerned again the collection of bets on sporting events in one Member State and transmission by internet to another Member State. This commercial activity was prohibited and this prohibition enforced by criminal penalties. The national legislation at issue reserved the right to collect bets to certain bodies. The European Court of Justice was called to scrutinize the compatibility of this national legislation with the freedom of establishment and the freedom to provide services. The European Court of Justice stated that 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 on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively, which, to be justified, must be based on imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it and be applied without discrimination. In that connection, it is for the national court to

¹⁰ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289., paras 29-36.

¹¹ Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289., para 38.

¹² Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031.

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. In particular, 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 relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. Furthermore, where a criminal penalty was imposed on any person who from his home in a Member State connects by internet to a bookmaker established in another Member State the national court must consider whether this constitutes a disproportionate penalty¹³.

In Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica*, the European Court of Justice had the opportunity to examine the status of data transmission centers. The facts of this case involved Stanley International Betting Ltd. Stanley International Betting Ltd ('Stanley') is a company incorporated under English law and a member of the group Stanley Leisure plc ('Stanley Leisure'), a company incorporated under English law and quoted on the London (United Kingdom) stock exchange. Both companies have their head office in Liverpool (United Kingdom). Stanley Leisure operates in the betting and gaming sector and is the fourth biggest bookmaker and the largest casino operator in the United Kingdom.¹⁴ Stanley is one of Stanley Leisure's operational conduits outside the United Kingdom. It is duly authorised to operate as a bookmaker in the United Kingdom by virtue of a licence issued by the City of Liverpool. It is subject to controls by the British authorities in the interests of public order and safety; to internal controls over the lawfulness of its activities; to controls carried out by a private audit company; and to controls carried out by the Inland Revenue and the United Kingdom customs authorities.¹⁵ In the hope of obtaining licences for at least 100 betting outlets in Italy, Stanley investigated the possibility of taking part in the tendering procedures, but realised that it could not meet the conditions concerning the transparency of share ownership because it formed part of a group quoted on the regulated markets. Accordingly, it did not participate in the tendering procedure and holds no licence for betting operations.¹⁶

Stanley operates in Italy through more than 200 agencies, commonly called 'data transmission centres' (DTCs). The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way,

¹³ Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031, paras 65, 69, 72, 76.

¹⁴ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 20.

¹⁵ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 21.

¹⁶ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 22.

bettors are able – electronically – to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes and, where appropriate, to receive their winnings.¹⁷ The DTCs are run by independent operators who have contractual links to Stanley. Mr Placanica, Mr Palazzese and Mr Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.¹⁸ According to the case-file forwarded by the Tribunale (District Court) di Teramo (Italy), Mr Palazzese and Mr Sorricchio applied, before commencing their activities, to Atri Police Headquarters for police authorisation in accordance with Article 88 of the Royal Decree. Those applications met with no response.¹⁹

The European Court of Justice examined very carefully the administrative and criminal aspects of the national legislation. The European Court of Justice stated that 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 authorisation 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. The objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled is capable of justifying those obstacles, a licensing system being capable, in that regard, of constituting an efficient mechanism. However, it is for the national courts to determine whether, in limiting the number of operators active in the betting and gaming sector, that national legislation genuinely contributes to that objective. By the same token, it will be for the national courts to ascertain whether those restrictions are suitable for achieving the objective pursued, do not go beyond what is necessary in order to achieve those objectives, and are applied without discrimination.²⁰

Moreover, the ECJ stated that Articles 43 EC and 49 EC must be interpreted as precluding national legislation which excludes from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets. Independently of the question whether the exclusion of companies quoted on the regulated markets applies, in fact, in the same way to operators established in the Member State concerned and to those from other Member States, that blanket exclusion goes beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in

¹⁷ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 23.

¹⁸ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 24.

¹⁹ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891., para. 25.

²⁰ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891, paras 49, 52, 57-58

criminal or fraudulent activities.²¹ Articles 43 EC and 49 EC must be interpreted as precluding national legislation which imposes a criminal penalty on persons for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to them. Although in principle criminal legislation is a matter for which the Member States are responsible, Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law. Furthermore, a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned in breach of Community law.²²

Case C-42/07 *Liga Portuguesa*²³ is a very important ruling of the European Court of Justice, which was connected to online gambling. The European Court of Justice stated that Article 49 EC does not preclude legislation of a Member State which prohibits private operators 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. Admittedly, such legislation gives rise to a restriction of the freedom to provide services enshrined in Article 49 EC, by also imposing a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States. However, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue may be regarded as justified by the objective of combating fraud and crime. The grant of exclusive rights to operate games of chance via the internet to a single operator which is subject to strict control by the public authorities may 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. As to whether the system in dispute is necessary, 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 a private operator 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

²¹ Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891, see paras 62, 64.

²² Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891, see paras 68-69, 71.

²³ Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633.

operators. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games. Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.²⁴

Another case related with the offer of games of chance via the internet was Case C-203/08 *Sporting Exchange*²⁵. This case has to do with the Dutch legislation on gaming reserving a license to a single operator and with its compatibility with the freedom to provide services. After a careful analysis of the Dutch legislation and its previous case law on online gambling (especially Case C-42/07 *Liga Portuguesa*), the European Court of Justice stated that Article 49 EC must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State. Additionally, Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a licence to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not 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.²⁶

In Case C-258/08 *Ladbrokes*²⁷, the European Court of Justice discussed the compatibility with the freedom to provide services of the offer of games of chance via the internet and of the national legislation reserving a license to a single operator. The European Court of Justice stated that national legislation, such as that at issue in the main proceedings, which seeks to curb addiction to games of chance and to combat fraud, and which in fact contributes to the achievement of those objectives, can be regarded as limiting betting activities in a consistent and systematic manner even where the holder(s) of an exclusive licence are entitled to make what they are offering on the market attractive by introducing new games and by means of advertising. It is for the national court to determine whether unlawful gaming activities constitute a problem in the Member State concerned which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing

²⁴ Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633, paras 53-54, 67-73.

²⁵ Case C-203/08 *Sporting Exchange Ltd v Minister van Justitie* [2010] ECR not reported yet (nry).

²⁶ Case C-203/08 *Sporting Exchange Ltd v Minister van Justitie* [2010] ECR not reported yet.

²⁷ Case C-258/08 *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR nry.

such addiction.²⁸ For the purpose of applying legislation of a Member State on games of chance which is compatible with Article 49 EC, the national courts are not required to determine, in each case, whether the implementing measure intended to ensure compliance with that legislation is suitable for achieving the objective of that legislation and is compatible with the principle of proportionality, in so far as that measure is necessary to ensure the effectiveness of that legislation and does not include any additional restriction over and above that which arises from the legislation itself. Whether that implementing measure was adopted as a result of action by the public authorities to ensure compliance with national legislation or of an application by an individual in the context of a civil action to protect his rights under that legislation has no bearing on the outcome of the dispute before the national court.²⁹ Article 49 EC must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.³⁰

The next reference for a preliminary ruling received by the European Court of Justice dealt with advertising of gambling activities. In Joined cases C-447/08 and C-448/08 *Sjöberg and Gerdin*³¹, the European Court of Justice declared that Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States. Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.

In the next case brought before the European Court of Justice, the public and social interest objectives of the national legislation establishing a public monopoly was scrutinized (Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß*³²). The European Court of Justice stated that , on a proper

²⁸ Case C-258/08 *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR nry, para. 38.

²⁹ Case C-258/08 *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR nry, para. 50.

³⁰ Case C-258/08 *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR nry, para. 58.

³¹ Joined cases C-447/08 and C-448/08 *Criminal proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08)* [2010] ECR nry

³² Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automaten-service Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg* [2010] ECR nry.

interpretation of Articles 43 EC and 49 EC, in order to justify a public monopoly on bets on sporting competitions and lotteries, such as those at issue in the cases in the main proceedings, by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, the national authorities concerned do not necessarily have to be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter.³³ Furthermore, a Member State's choice to use such a monopoly rather than a system authorising the business of private operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework is capable of satisfying the requirement of proportionality, in so far as, as regards the objective concerning a high level of consumer protection, the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities.³⁴ Additionally, the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring compliance with such a monopoly by organisers of games and bets established outside that Member State, who, via the internet and in breach of the said monopoly, conclude bets with persons within the territorial area of the said authorities, is not capable, as such, of affecting the potential conformity of such a monopoly with the said provisions of the Treaty.³⁵ Moreover, on a proper interpretation of Articles 43 EC and 49 EC, in the current state of European Union law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer games of chance does not prevent another Member State, while complying with the requirements of European Union 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.³⁶

³³ Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis and Kulpa Automaten-Service Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR nry, paras. 81, 107

³⁴ Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis and Kulpa Automaten-Service Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR nry, paras. 83, 107

³⁵ Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis and Kulpa Automaten-Service Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR nry, para 107.

³⁶ Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* (C-316/07), *Avalon Service-Online-Dienste GmbH* (C-409/07) and *Olaf Amadeus Wilhelm Happel* (C-410/07) v *Wetteraukreis and Kulpa Automaten-Service Asperg GmbH* (C-358/07), *SOBO Sport & Entertainment GmbH* (C-359/07) and *Andreas Kunert* (C-360/07) v *Land Baden-Württemberg* [2010] ECR nry, para 116.

Another case analysing national laws which prohibited offering games of chance via the internet was Case C-46/08 *Carmen Media Group*³⁷. In this Case, the ECJ stated that on a proper interpretation of Article 49 EC, an operator wishing to offer via the internet bets on sporting competitions in a Member State other than the one in which it is established does not cease to fall within the scope of the said provision solely because that operator does not have an authorisation permitting it to offer such bets to persons within the territory of the Member State in which it is established, but holds only an authorisation to offer those services to persons located outside that territory.³⁸ On a proper interpretation of Article 49 EC, 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 arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.³⁹ On a proper interpretation of Article 49 EC, national legislation prohibiting the organisation and intermediation of games of chance on the internet for the purposes of preventing the squandering of money on gambling, combating addiction to the latter and protecting young persons may, in principle, be regarded as suitable for pursuing such legitimate objectives, even if the offer of such games remains authorised through more traditional channels. The fact that such a prohibition is accompanied by a transitional measure such as that at issue in the main proceedings is not capable of depriving the said prohibition of that suitability.⁴⁰

5) A few comments on case law

The European Court of Justice was very cautious when it was examining the national rules on gambling. In most cases, the ECJ confirmed the right of Member States to preserve their legal regimes in the area of gambling. Although some national provisions were deemed to infringe the fundamental freedoms of the European Union, Member States could justify these infringements in accordance with mandatory requirements in the public interest. The ECJ proclaimed that Member States are enjoying wide discretion in the justification of these infringements of fundamental

³⁷ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] ECR nry.

³⁸ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] ECR nry, para. 52.

³⁹ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] ECR nry, para. 90.

⁴⁰ Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] ECR nry, para. 111.

freedoms. It is obvious that this wide discretion allows Member States to implement easier their public, moral and social considerations into the gambling market. The fact that each Member State possess a wide discretion in pursuing its public and social policy in the area of gambling means that we could possibly have 27 different legal regimes in the internal market. As a matter of fact, the gambling market is regulated by different national legal regimes. This legal diversity is something very negative for the internal market of the European Union which envisages market integration in the area of gambling.

Member States' competence to decide their national policies in this part of the internal market remains untouched. The ECJ tried to construct a framework which would not allow national policies to infringe the application of fundamental freedoms. Member States will not be prohibited to adopt an exclusive rights model or a licensing model. Those regulatory policies should apply in a non-discriminatory way to nationals and non-national market participants and should respect Community rules in principle. If a national measure infringes the fundamental freedoms, it could be justified on certain grounds. Even if a national provision could not be justified, this does not mean that the whole national regulatory policy should be eliminated; it is this specific unjustified provision which should be removed or be adjusted appropriately.⁴¹ According to case law, those national policies should be systematic and consistent and should not pursue arbitrary objectives.⁴² Moreover, these policy objectives have to fit into two possible justifications: on the one hand, there are consumer protection and other social considerations and on the other hand, there is the protections against crime and fraud. National legislatures should also not forget to establish this causal link between those grounds underpinning the available justifications and the dangers (e.g. addiction, crime, fraud etc) which exist in the area of gambling and sports betting.

Member States retain their regulatory autonomy in the field of gambling and this might create problems in cross-border gambling activities. Online gambling constitutes the most common exercise of these cross-border gambling activities. This paper will criticize the ECJ's approach which does not result in market integration. It will seek to draw some conclusions on the market-making effects of the ECJ's case law on online gambling.

6) Conclusion

It is true that the market of gambling and sports betting is not an integrated part of the internal market. Member States had managed to maintain their regulatory autonomy in this area of law and can impose their own legislative choices and

⁴¹ A. Littler 'Regulatory perspectives on the future of interactive gambling in the internal market' [2008] ELRev. 211, 220.

⁴² A. Littler 'Regulatory perspectives on the future of interactive gambling in the internal market' [2008] ELRev. 211, 220.

national standards on the regulation of their national gambling and sports betting market. There is no secondary Community legislation which could harmonize some national standards or facilitate cross-border market access of market participants or impose certain safeguards on this cross-border business activities. It is easily understood that the case law of the ECJ plays a very important role in the clarification of this 'degree of latitude' that Member States maintain in this area of the internal market and in striking the right balance between this national competence and the aims of the internal market and its integration (Art. 2,3,14 EC Treaty). The case law stressed that those national regulatory choices should respect the rights of market participants to establish themselves or to provide services on EU level.