From Gambelli to Plancanica to a European framework for remote gaming

Keuleers, Ewout

Published in:
Computer Law and Security Report

Publication date:
2005

Document Version
Publisher's PDF, also known as Version of record

Computer Law & Security Report (2005) 21, 427–431

ELSEVIER

Computer Law
&
Security Report

EU REGULATION OF THE ONLINE GAMING MARKET

From Gambelli to Placanica to a European framework for remote gaming

Ewout Keuleers

Bar of Brussels

Abstract This article reviews the difficulties facing national courts in respect of the regulation of online gambling activity in the wake of two recent decisions of the European Court of Justice that, in mixed messages, may be moving towards liberalization of the European gaming market.

More than a year after the **Gambelli** and **Lindman** decisions of the European Court of Justice (ECJ) and the first report of the European Commission on the application of the electronic commerce Directive, the impact of these recent European (r)evolutions for the gaming industry has not always been very clear. In the Netherlands and Belgium, existing jurisprudence was confirmed in the so-called **post-Gambelli** decisions. In Germany, where most of the competences to regulate gaming activities have been attributed to the autonomous Länder, some courts have recognized that, in the absence of a consistent gaming policy, the imposed restrictions on the cross-border provision of gaming services could not be justified by the imperative reasons of public order. In Spain, the Loterías y Apuestas del Estado (LAE) is maintaining its position that it has the exclusive right to offer and promote games on the Internet. In Italy, a regional court has had to refer a gaming case to European Court of Justice (ECJ).

The conclusion of one year post-Gambelli case-law is that the Gambelli and Lindman requirements are applied in a very diverging manner. In the Dutch Betfair appeal case, it was even insinuated that Gambelli was not relevant! Before commenting on these national decisions, the Gambelli and Lindman decisions will be reviewed again.

0267-3649/$ - see front matter © 2005 Ewout Keuleers. Published by Elsevier Ltd. All rights reserved.
doi:10.1016/j.clsr.2005.06.003

A. The Gambelli and Lindman judgments of the European Court of Justice

Pursuant to article 4 of the Italian Act no 401/89, the organization of bets on sports events, supervised by the CONI[1] or UNIRI,[2] is reserved for companies having a public concession. The Italian public prosecutor initiated a criminal prosecution against **Piergiorgio Gambelli** and other intermediaries for the organization of and reception of bets for the British bookmaker Stanley International Betting.

The operation was performed as follows:

- The bettor notifies the person in charge of the Italian intermediary of the events on which he wishes to bet and how much he intends to bet;
- The intermediary sends the application for acceptance to the established and authorised UK bookmaker via the Internet, indicating the national football games in question and the bet;
- The bookmaker confirms acceptance of the bet in real time by Internet;
- The confirmation is transmitted by the Italian intermediary to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.

In the appeal procedure the Italian Court of Ascoli Piceno evoked two reasons to introduce a request for a preliminary ruling at the European Court of Justice (ECJ). In the first place, the Italian court raised some questions concerning the proportionality between the adopted measure, i.e., criminal repression, and the objective pursued. In the second place, the Court estimated that there was a contradiction between the national conservation of the monopoly and the expansive policy conducted by Italian authorities, for instance, to raise public funds.[3]

In its opinion of 13 March 2003, Advocate General Alber held that the Italian legislation in the field of sports betting constituted a discriminatory obstacle to the freedom to provide services throughout the European Union that failed the required justification on grounds of general interest.

The ECJ in its full judgment did not go that far. At first glance, the decision of the European Court of Justice 6 November 2003 has little to qualify it as a landmark decision that would break the European gaming market open. Indeed, the ECJ did not explicitly say that the Italian regulation in the field of sports bets imposed a discriminatory and unjustified restriction on the freedom to provide services.[4] In fact, one could even argue that the ECJ only confirmed its standing jurisprudence, following which Member States have the right to impose restrictions on the cross-border provision of gaming services, provided that certain strict requirements and conditions are met.[5]

A closer look, nevertheless, unambiguously reveals that the European Court did more than just sending the issue back to the Court of Ascoli Piceno, i.e., the competent national court. The ECJ restricted the scope for interpretation of the national authority to the extent that it was obliged to come to the conclusion that Italian law operated an unjustified restriction upon the freedom to provide services.[6]

Moreover, the European Court of Justice gave a clear indication that:

- In the absence of a "consistent gaming policy", Member States must stop calling upon pressing reasons of public order to justify these restrictions, while the actual objective being pursued was the protection of the national markets from (foreign) competition;
- To the extent that the ECJ had to leave the final decision to the national court, it would define clear "*guidelines*" as to how the latter should *de facto* use its discretionary power to interpret the facts of the case;
- The level of protection offered by the country of establishment and the control this exercised over the legality of the gaming operation, should be taken into consideration when the authorities of the destination country assessed the proportionality and necessity of the restrictive measures (*Country of Origin principle*).

[1] Comitato olimplico nazionale.

[2] Unione italiano per l'incremento delle razze equine.

[3] **Gambelli,** Opinion of Advocate General Alber, paragraph 19.

[4] See Also, Thibault Verbiest and Ewout Keuleers, Gambellli makes it harder for nations to Restrict Gaming, *Gaming Law Review*, Volume 8, Number 1, 2004.

[5] Case C-275/92, 24 March 1994, **Her Majesty's Customs and Excise v. G. Schindler & J. Schindler**, ECR, 1994, I-1039, opinion GULMANN, C; Case C-124/97, 21 September 1999, **Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd. v. Kihlakunnansyyttäjä, Suomen Valtio**, ECR, 1999, I-6067, opinion LA PERGOLA, A.; Case C-67/98, 21 October 1999, **Questori di Verona v. D. Zenatti**, ECR,1999, I-7289, opinion FENNELLY, N. See also, Thibault Verbiest and Ewout Keuleers, Cross-border gaming: The European regulatory perspective, *Gaming Law Review*, August 2003.

[6] Judgment, paragraphs 63–64.

In this regard, the ECJ recognized that the UK established bookmaker was already subject to rigorous controls exercised in his country of establishment by a private audit company and by the Inland Revenue and Customs and Excise.[7] It might be too optimistic to consider that the European Court had implicitly recognized that the internal market clause of article 3 of Directive 2000/31/EC on electronic commerce was applicable.[8,9] Had it done so this would mean that the Court was derogating from the exception foreseen in article 1.5 of that Directive. Nevertheless, it underscores the relevance of the character of protection offered – and control exercised in – by the home state.

One week after this decision, the European Court of Justice recognized in its **Lindman** decision that European consumers had the right to receive services across borders and that the restrictive Finnish (tax) measure was infringing article 49 of the EC Treaty.[10] Even though this case does not relate to the provision – or reception – of remote gaming services, Advocate General Stix-Hackl held that the situation at hand was comparable with situations in which a person was taking part in a foreign-based lottery by telephone, fax or Internet.[11]

In its judgment of 13 November 2003, the ECJ held that:

"The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State. In the main proceedings, the file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, a fortiori, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member State".[12]

By stating so the EC Court seems to indicate that a Member State imposing a restrictive and discriminatory measure must (i) demonstrate that the restrictive measure is compatible with the EC Treaty; (ii) demonstrate the risks and dangers in relation to the cross-border provision and consumption of gaming services; and (iii) submit to the competent authority statistical or other evidence that backs its arguments.

In conclusion, it can be argued that Member States have a right to impose restrictions, but when imposing or enforcing them, they must provide sufficient proof with evidence that (i) their gaming policy is consistent, (ii) there is a clear and present danger to public order, e.g., that the operations of a UK online bookmaker will be used to launder the proceeds of crime, and (iii) that the objective pursued, e.g., protection of consumers, cannot be achieved by imposing less restrictive measures.

B. Overview of post-Gambelli case-law

Since November 2003, authorities in various Member States have had to apply the above-mentioned requirements. In some countries, notably Finland, the Netherlands, Sweden, Belgium, Italy and Germany, the Supreme and Constitutional courts were called upon to deliver their views.

In contrast to the Swedish Administrative Supreme Court (Regeringsrättens), the German Bundesgerichtshof (BGH) held that the editor of an online newspaper could not be held liable for inserting a link to an Austrian licensed bookmaker. Furthermore, the BGH explicitly questioned whether current German gaming policy could be reconciled with the requirements of European law.

Moreover, the BGH referred to the decision of the Landgericht München I of 27 October 2003. In this so-called second 'Bet-at-home' case, the Landgericht held that the organization of sports bets and lotteries was subject to a monopoly. However, this monopoly was not adopted and maintained for reasons of public order, but mostly for tax reasons. For this reason, the court stated that it would not be justified to impose to upon

[7] Judgment, paragraphs 12 and 73.

[8] Directive 2000/31/EC 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.

[9] In the important Article 3, it is stated that (i) each Member State shall ensure that the information society services, including online gaming services, provided by a service provider established on its territory comply with the national provisions applicable in that Member State and (ii) that Member States may not restrict the freedom to provide information society services from another Member State.

[10] In this case, Mrs Lindman, Finnish citizen on vacation in Sweden, bought a ticket from the Swedish Svenska Spel lottery. By mere coincidence she won 1,000,000 SEK10. Under the terms of the Finish Lottery Act 1992 and the general law on revenue tax profits coming from lotteries organized outside Finland are considered as a normal revenue, subject to the Finish tax rate. In contrast, participants in a Finish lottery do not have to pay taxes on winnings from lotteries organized in Finland.

[11] Opinion Advocate General Stix-Hackl, paragraph 54.

[12] Lindman, paragraphs 25 and 26.

attorney at the Bar of Brussels an Austrian licensed bookmaker an obligation to obtain an additional German license.[13]

There have been strong rumours that the German Constitutional Court will soon issue a groundbreaking ruling that may be an important step to opening the German gaming market. It is expected that, by July 2005, the highest German court will rule in a case relating to the freedom to exercise a profession and bring some fundamental clarifications to the law in this area.

Even though this debate is focused on Article 12 of the German Constitution, i.e., the freedom to exercise a profession, e.g., act as an intermediary for a foreign gaming provider, the fundamental question is very similar to the one relating to the provision and promotion of gaming services across borders. One should only be allowed to restrict this freedom if German gaming policy was consistent and the so-called reasons of public order justifying the restrictions are not being used merely to protect the German gaming market from foreign competition. On this view, the aggressive commercial behaviour of State lotteries and Oddset, one of the six official suppliers of the 2006 World Cup, can be criticized. In line with the February 2004 decision of the High Administrative Court of Hessen and the December 2004 decision of the Landgericht of Baden – Baden, some other courts have already held that German gaming policy does not meet the required justifications imposed by the EC Treaty and the jurisprudence of the European Court of Justice.

For the time being, with its landmark decision still pending, the Constitutional Court has asked local authorities to act prudently and refrain from acting too restrictively against local intermediaries.

In the Netherlands, the situation is more confusing. On 18 February 2005 the Dutch Supreme court ruled in the **Ladbrokes** summary proceedings and rejected the appeal lodged against a September 2003 decision that recognized the exclusive right of the Dutch betting operator De Lotto. With this decision the debate in the summary proceedings seems to have come to an end. However, the situation in the main proceedings is different, if not quite opposite.

In its interlocutory judgment of 2 June 2004, the lower court of Arnhem requested proof of a consistent gaming policy. The court lacked the inconsistency of the Dutch gaming policy for a number of reasons. In the first place, the annual reports of De Lotto demonstrated that the objective pursued was to increase its turnover, notably by exploring new markets and attracting new customers. No reference was made to compulsive gambling and the protection of consumers. Secondly, the marketing campaigns of the Dutch licensees, in particular the direct and indirect promotion of their gaming activities on radio and TV shows, were omnipresent. The Arnhem court concluded that the marketing campaigns, in particular the "not-won-money-back" guarantee for new subscribers, were designed to stimulate the demand for games, even when such a demand was non-existent. A final decision in the main proceedings is expected in September 2005.

In Italy, the Supreme Court's April 2004 ruling in the "**Bruno Corsi**" case went directly against the European Court's Gambelli decision. Given the manifest contradiction between the ECJ case-law and the Supreme Court's April 2004 decision, the Tribunale di Larino, referred the case to the European Court of Justice. In an identical case to the Gambelli case, the Larino District Court, questioned whether the Italian gaming restrictions could be reconciled with European Internal Market principles. In its referral, the national court underlined the difference between the interpretation emerging from the decisions of the European Court of Justice, notably the Gambelli judgment, and the jurisprudence of the Italian Supreme Court.

C. The need for a community initiative

One must recognize that European institutions have, so far, not adopted gambling specific regulations. The Dutch Supreme court recently confirmed that, in absence of any Community rule in the field of gaming, one should only apply national (Dutch) law. As Dutch residents can obtain online access and participate in games organized by Ladbrokes without many difficulties, Dutch law applies. For this reason a local Dutch license is required.

By ruling in this way, the Dutch Supreme Court fails to consider the de facto cross-border character of the Internet and its European dimension. The fact that the gaming platform is licensed, hosted and operated in another Member State would seem to be irrelevant. It is clear that this conflicts with statements made by the European Commission and the landmark decision of the Finish Court of Appeals in Turku.

In accordance with the Directive on electronic commerce and the decision of the Landgericht München I of 27 October 2003, the Turku Court

[13] Cf., supra on the Country of Origin principle.

held in its decision of 31 March 2003 that the organization of gaming services is exclusively subject to the laws of the place of establishment (Country of Origin). For this reason, authorities in Finland or the Netherlands cannot impose additional requirements or conditions to, for example, a Maltese based and licensed remote gaming operator.

Furthermore, reference can be made to the opinion of Advocate General Gulmann in the **Schindler** case. Gulmann held that, by virtue of the principle of equivalence, the Member State of destination may not impose additional restrictions to the cross-border provision of services if those services are already subject to adequate rules from the home state. Recognising the necessity to limit the overall supply of gaming services and in absence of any Community rules in this field, restrictive measures necessarily had separately to be taken by each Member State. A contrario, this implied that when European rules in the field of gaming and associated services were adopted, e.g., via the proposal for a Service Directive, the arguments evoked by Member States to justify the restrictive measures, notably the protection of society at large, would lose their relevance.

With the new **Placanica** case pending before the European Court, 2005 seems to have become a very important year for the European remote gaming industry. Not only is there the European Commission's study on gambling and the second review of the electronic commerce Directive, but also the famous Service Directive will be debated in the European Parliament. Both the Directive on electronic commerce and the proposal for a Service Directive contain the Internal Market principle. According to this principle, a gaming operator need only comply with the law of its Country of Origin and cannot be ordered to submit to additional requirements for the cross-border provision and promotion of its services.

The inclusion of this principle in the proposed Service and Electronic Commerce Directives will be an important step towards a single European remote gaming market. Indeed, an established bookmaker in Malta, for instance, will only be subject to Maltese legislation whereas Dutch authorities must recognize the adequacy of the protection offered in Malta. For the same reasons, a Dutch gaming license is not required.

Nevertheless, at this moment, both the proposal for a Service Directive and the Directive on electronic commerce exclude the application of the Internal Market principle. On the occasion of the first report on the application of the Directive on electronic commerce, the European Commission announced, in November 2003, that it would reconsider the latter Directive. It stated that:

"Online gambling is a new area in which action may be required because of significant Internal Market problems and that it would examine the need for a possible new EU initiative".

Indeed Article 1.5 of the e-commerce Directive excludes gambling activities, which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions, from its scope of application. Therefore, in Article 3 the foreseen internal market clause concerning the cross-border provision of information society services cannot be invoked.

One must not forget that, eventually, it is very likely that regulatory models adopted by the United Kingdom, Malta and Slovakia will lead to serious Internal Market distortions, and thus complaints, underlying the need for a European initiative in the field of remote gaming and associated services. In the end, maybe it is too optimistic to anticipate that the European Commission will fully liberalize the European gaming market. However, it is clear that Member States must stop invoking imperative reasons of public order to justify gaming restrictions, while the actual objective being pursued is the protection of national markets from foreign competition.

Ewout Keuleers (LL.M) is an attorney at the Bar of Brussels (www.gaminglaw.be) and a senior researcher at the Centre of Computer and Law (University of Namur, Belgium). e.keuleers@gmail.com