From Gambelli to Placanica: The need for a European framework for remote gaming

Article by Ewout Keuleers (LL.M)

Not even a year after the landmark European Gambelli decision, a new remote gaming case is pending before the European Court of Justice (ECJ). While the final decision in the Gambelli case is still pending before the national court, national authorities in various Member States had to judge on the de facto consistency of the national gaming policy and its compatibility with European law. 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 Betfair appeal case, it was even insinuated that Gambelli was not relevant!

In 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 the current German gaming policy could be reconciled with the requirements of European law.

In the Netherlands the situation is more confusing. While in summary proceedings, the initial decisions — upholding the gaming restrictions — were confirmed, the situation in the main proceedings is different. In its interlocutory judgement of 2 June 2004, the lower court of Arnhem requested a 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 the De Lotto demonstrate that the objective pursued is to increase its turnover, notably by exploring new markets and attracting new customers. No reference is made towards 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, are 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 inexistent. The marketing strategy of Holland casino even presented a visit to the casino as a normal day out with the family! A final decision in the main proceedings is expected for April 2005.

In Italy, the Supreme Court’s April 2004 ruling in “Bruno Corsi”-case went directly against the European Courts’ Gambelli decision. Seen the manifest contradiction between the ECJ case-law and the Supreme Court’s decision, the Tribunale di Larino, referred the case to the European Court of Justice. In an identical case as the Gambelli case, the Larino District Court, questioned whether the Italian gaming restrictions can be reconciled with the European Internal Market principles. In its referral, the national court underlines 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.

With the new Placanica case pending before the European Court, 2005 seems to become a very important year for the European remote gaming industry. Not only is there the European Commission’s study on gambling, 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 should only comply with the law of its Country of Origin and cannot be submitted to additional requirements for the cross-border provision and promotion of its services. The inclusion of this principle in the Service and Electronic Commerce Directives will be an important step towards a single European remote gaming market. Indeed, a UK established bookmaker, for instance, will only be subject to UK legislation and, e.g., Dutch authorities must recognize the adequate character of the protection offered in the UK. For the same reasons, a Dutch gaming license is not required.

Eventually, one may not forget that it is very likely that regulatory models adopted by the United Kingdom, Malta and Slovakia will lead to serious Internal Market distortions, underlying the need of a European initiative in the field of remote gaming and associated services. At the occasion of the first report on the application of the Directive on electronic commerce, the European Commission acknowledged 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.”

In the end, maybe it is too optimistic to state that the European Commission will fully liberalise 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 pursued is the protection of the national markets from foreign competition.

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