Les Jeux Sont Faits? Mutual Recognition and the Specificities of Online Gambling

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Les Jeux Sont Faits? Mutual Recognition and the Specificities of Online Gambling

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Abstract

Online and land-based gambling activities merely constitute alternative marketing channels of the same unique market of gaming services. However, the particularities of online gambling are to be taken into account when assessing the scope of the restrictions imposed by national gaming laws and their suitability to pursue the legitimate objectives of consumer protection and public order maintenance. This is in essence the core of the recent preliminary rulings in Zeturf and Dickinger, on the legality of national legislation regulating the provision of horseracing betting services and the operation of internet casino games respectively. The rulings actually complement and interpret the earlier judicial pronouncements in Kulpa and Carmen Media, reconciling them with the more sectoral approach originally adopted in Schindler. At the same time, they confirm in the most categorical terms that online gaming services are automatically excluded from the application of the mutual recognition principle irrespective of the measure of monitoring and control to which they are already subject in the Member State where their operator is established.

Introduction

Recent data suggest that online gaming constitutes the most rapidly growing sector of the overall gambling market, currently covering an estimated 10 per cent of its total size. In recent times, gross revenues have risen by approximately 20 per cent per annum. However, the national legislation of many Member States makes no particular reference to the regulation of online gambling activities. This is also the case in some of the countries in which gambling laws were recently liberalised to take into account the realities of the cross-border provision of gaming services. In its recent Green Paper on online gambling in the internal market, the European Commission proposes to consider as online gaming all activities that involve wagering a stake with monetary value in games of chance by electronic means and at the individual request of a recipient of services. This covers in essence any gaming service that is made accessible to players by

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1 Legal Adviser and Teaching Associate respectively. All views expressed are personal. The author is grateful to Professor Niamh Nic Shuibhne for her comments on an earlier draft of this paper.

2 Green Paper on online gambling in the internal market COM(2011) 128, p.8. It is expected that in 2013 the online gambling market will have doubled in size as compared with 2008.

3 See the relevant part of the contributions made to the public consultation on the regulation of online gambling services in the internal market launched by the European Commission, https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp [Accessed February 25, 2012]. In some national laws, reference is made to “distant” and “remote” gambling games.

4 This proposed description of online gambling services is principally based on the definition contained in the E-Commerce Directive in order to exclude gaming activities from the application of its provisions. See, to this end, art.1(5) of Directive 2000/31 on certain legal aspects of information society services in particular electronic commerce in the internal market [2000] OJ L178/1.
means of remote communication, including the internet and other interactive platforms such as mobile phone applications and internet protocol television.

A strongly contested issue is whether online gambling is actually riskier compared with the traditional gaming market with respect to creating a pathological gaming pattern and attracting criminal activities. The data currently available on this matter are very limited and inconclusive, often supporting totally contradictory statements. However, the recent case law of the Court of Justice is clearly based on the assumption that the particularities concerned with the provision of gambling services using the internet may constitute a source of more substantial risks in the areas of consumer protection and public order maintenance. The Court originally mentioned in this respect the lack of direct contact between consumers and online gambling operators, which allegedly makes the internet a more attractive business environment for fraudsters. Later, it also relied on the particular ease of and permanent access to online gaming services. It pointed out, to this end, that the anonymity and absence of social control characterising the internet are likely to promote the development of gambling addiction and the related squandering of money, increasing the negative social and moral consequences attached to games of chance. The legitimate reasons thus underlying the recognition of a certain margin of discretion for the Member States in the gambling area, to ascertain in accordance with their own scale of values what is necessary in order to ensure consumer protection and the preservation of public order in their national territories, are particularly valid as concerns the provision of online gaming services.

It is against this background that the recent preliminary rulings in Zeturf and Dickinger need to be assessed. The Court was called upon in those cases to clarify whether the measure of monitoring and control that an online gambling operator is already subject to in the Member State of its establishment is relevant in assessing the proportionality of the national monopoly imposed on the provision of these services in another Member State. It was also asked whether the national legislature may legitimately make the licensing of online casino games subject to the obligation of their provider to keep its registered office in the national territory, in circumstances where this requirement is considered automatically illegal as concerns the same land-based activities. Most importantly, the Court was given an excellent opportunity to explain whether online gaming constitutes a separate market when it comes to ascertaining the scope of the restrictions imposed by national gambling laws and the legality of their provisions.

The preliminary rulings stress once again the particularities of online gambling. At the same time, their rationale also seems applicable to the cross-sector examination that needs to be carried out across the whole of national gambling policy, in order to assess whether a certain regulatory restriction is appropriate to pursue its alleged public interest objectives in a consistent and systematic manner. The rulings thus serve to clarify the respective case law, while reconciling it with some earlier judicial pronouncements on the matter that had a more sectoral orientation. They confirm that gambling escapes completely the application of the mutual recognition principle. They implicitly authorise the imposition of stricter regulatory restrictions on online gaming activities as compared to conventional gambling services. Most importantly, they suggest that the legality assessment of national gambling laws must in principle be based on a

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4 See particularly to this end the opposing conclusions on the matter of the European Lotteries and the European Gaming and Betting Association in their contributions to the public consultation on the regulation of online gambling services, https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp [Accessed February 25, 2012].
6 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein (C-46/08) [2011] 1 C.M.L.R. 19 at [103].
7 Criminal proceedings against Piergiorgio Gambelli (C-243/01) [2003] E.C.R. I-13031; [2006] 1 C.M.L.R. 35 at [63].
8 Zeturf Ltd v Premier Ministre (C-212/08) [2011] 3 C.M.L.R. 30; Criminal proceedings against Jochen Dickinger and Franz Ömer (C-347/09) September 15, 2011.
cross-channel and a cross-sector evaluation of overall gaming policy, taking into account where necessary the increased risks of online betting. All of these issues will now be examined in turn.

**Dickinger and the total exclusion of the mutual recognition principle**

The dispute in *Dickinger* arose when criminal proceedings were instituted against two Austrian nationals, in their capacity as directors of an Austrian company providing via its Maltese subsidiaries online casino services to the public in violation of the respective national monopoly laid down by Austrian law. The Maltese companies possessed a valid Maltese remote gambling licence to organise online games of chance and online sporting bets. One of the questions asked by the national court was thus whether in examining the proportionality of the law penalising the cross-border provision of gaming services without an Austrian licence, it was also obliged to take into account that the regulatory interests of crime prevention and consumer protection invoked by the national legislature in order to impose the contested monopoly were already sufficiently scrutinised in the state of establishment through a strict authorisation and supervision procedure.

This was certainly not the only occasion on which a national court explicitly raised the application of the mutual recognition principle in the area of online gambling. This issue originally arose in the seminal *Liga Portuguesa* case, concerning the legality of a public monopoly imposed by Portuguese law on the organisation of online games in the national territory. It was stressed then that there currently exists a complete absence of legislative approximation in the sector involving the provision of internet gaming services. Even when an operator lawfully provides its services in another Member State, subject to statutory controls and conditions on the part of its competent authorities, this cannot therefore be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of scam and crime. This is because there are many difficulties liable to be encountered in this context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of online gambling operators. Later, the Court also clarified that when a public monopoly exists in relation to gambling, which is considered to be compatible with EU law in the light of the legitimate general interest objectives allowed by the case law, any duty to recognise the authorisations issued to operators established in other Member States is automatically excluded simply by virtue of the existence of this monopoly. It is thus only when a national licensing system contravenes the provisions of EU law that the existence of a mutual recognition obligation could potentially arise.

However, is there any rationale in allowing the duplication of the controls already available in the Member State of establishment when these already guarantee an appropriate level of consumer protection and crime prevention? This argument was originally invoked in *Ladbrokes*. The case concerned a system of exclusive gambling licences which totally precluded the provision of online gaming services in the national territory, including those marketed by authorised operators established in other Member States. The applicants in the main proceedings claimed that they were subject to very strict controls in the Member State of their establishment aiming at the prevention of crime and gambling addiction. They concluded, therefore, that when the national legislature imposes restrictions relating to the organisation of remote games of chance, it must take into account the extent to which the public interest objectives it pursues are already protected in the Member State where a gambling operator is licensed to provide its services. The

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10 *Liga Portuguesa* (C-42/07) [2009] E.C.R. I-7633 at [68]–[73]. See also the ruling in *Sporting Exchange Ltd (t/a Betfair) v Minister van Justitie* (C-203/08) [2010] 3 C.M.L.R. 41 at [32]–[34].

11 *Markus Stob v Wetteraukreis* (C-316/07 and C-409/07 to C-410/07) [2011] 1 C.M.L.R. 20 at [108]–[116].
ruling was nevertheless consistent with the Liga Portuguesa line of case law, simply pointing out the risks connected with the absence of legislative approximation in the whole internet gaming industry.\textsuperscript{12}

Seen in this perspective, Dickinger constituted an ideal opportunity to explain whether the principle of mutual recognition can ever impact on national legal arrangements in the area of online gambling. The question asked by the national court in this respect was based on the premise that the crime prevention and consumer protection interests invoked by the Austrian legislature to restrict the provision of gambling services in the national territory were well taken into account in the Maltese legislation by virtue of monitoring controls that were even more rigorous than those applicable in Austria. It was accordingly stressed that the Maltese provisions were aimed specifically at addressing the risks of online gambling and that all Maltese gaming operators were subject to strict access controls involving a continuous and meticulous examination of their professional qualities and their integrity.\textsuperscript{13} The question was thus whether the Austrian legislation at issue violated the provisions of EU law by imposing on the Maltese gambling operators licensing restrictions aiming at the protection of public interest objectives, which were already amply guaranteed by the applicable rules in the Member State of their establishment.\textsuperscript{14}

Once again, the Court was not particularly impressed with this argument. Recalling its Liga Portuguesa case law, it confirmed that in the present state of EU law, there can be no obligation of mutual recognition in the gambling sector as concerns the authorisations issued by the various Member States.\textsuperscript{15} It then went on to explain why the effectiveness of the controls imposed on an operator in the Member State of its establishment cannot affect the proportionality assessment of the national rules applicable in the country where the gambling services are actually provided. After reiterating that this examination must take place solely in the light of the objectives pursued by the competent national authorities and the level of protection that these seek to ensure, it asserted that the technical means available to the various Member States to control online games of chance are not necessarily the same. Even when a particular level of consumer protection against crime may be attained in one Member State, this is not to say that the same standard will be applied in another country which does not possess similar technical means and/or which may purport to make other policy choices. Moreover, a Member State may legitimately wish to monitor closely an economic activity carried out in its territory. This may prove impossible if it is obliged to rely on checks carried out by the authorities of another Member State using regulatory systems outside its control. The mutual recognition case law is not thus currently applicable in the area of gambling services, which is not approximated at EU level and in which the Member States retain wide discretion as concerns the objectives that they wish to attain and the measure of protection that they actually seek.\textsuperscript{16}

The ruling thus confirms in the most explicit terms that the area of cross-border gambling is not to be approximated by means of negative integration, as the case law apparently leaves it to the EU legislature to take the initiative in this respect. However, the reasoning that the Court employs in order to exclude the application of the mutual recognition principle is not very convincing. To start with, it is precisely in the absence of legislative approximation that this principle comes into play. When uniform rules are eventually introduced at EU level, mutual recognition automatically gives way to their immediate

\textsuperscript{12}Ladbrokes Ltd v Stichting de Nationale Sporttotalisator (C-258/08) [2010] 3 C.M.L.R. 40 at [51]–[55].
\textsuperscript{13}Dickinger (C-347/09) September 15, 2011 at [89]–[95].
\textsuperscript{15}Dickinger (C-347/09) at [96].
\textsuperscript{16}Dickinger (C-347/09) at [97]–[99].
Harmonisation was never a necessary prerequisite as concerns the operation of the core internal market principles. Gambling seems to constitute a notable exception to this rule, suggesting that at least some measure of previous legislative approximation at EU level is necessary in this field.

Furthermore, one can easily imagine that there are many politically and socially sensitive economic activities with a cross-border nature that the competent national authorities may want to monitor more closely in their territory. Suffice it only to mention in this respect the provision of manpower by agencies licensed under the law of another Member State. This is certainly an activity that impacts on occupational relations in the labour market and the legitimate interests of the workers concerned. As a result, the national legislature is entitled to subject it to strict licensing requirements. However, any regulatory system of prior administrative authorisation must also take into account the extent to which the objectives pursued by the national legislation are already protected by virtue of the applicable rules and controls in another Member State. This is clearly not the case as concerns the regulation of online gambling. In this particular internal market area, the national authorities are allowed to ignore completely the monitoring systems of the other Member States irrespective of their capacity to ensure the professional qualities and the integrity of operators established in their territories. This is even more remarkable when one recalls that the mutual recognition principle has been legislatively transplanted to the particularly sensitive area of EU criminal law, in order to remove obstacles to the cross-border movement of enforcement rulings. At the same time that its scope is extended beyond the traditional internal market rules, a whole internal market area escapes its application completely, on the rationale that its alleged particularities require the adoption of positive integration measures.

Finally, the way in which the Court accepts in essence that the inadequacy of the monitoring means available in some Member States constitutes a legally valid reason for allowing the imposition of extra restrictions on authorised remote gambling operators is very interesting. This actually reverses the *Liga Portuguesa* reasoning, according to which the problem lies principally in the alleged inability of the national authorities in the Member State where the cross-border gaming operator is licensed to examine its professional qualities and integrity. Moreover, this monitoring issue could possibly be addressed in the context of closer administrative co-operation between the competent national authorities at EU level. The ruling avoids raising this point, thus axiomatically assuming that there is no alternative in these circumstances other than the complete and automatic exclusion of the mutual recognition principle.

Implicitly, therefore, the Court seems to support the position that gambling constitutes a legally and politically particular economic activity whose regulation cannot be currently based on a system of mutual trust between the Member States similar to that applicable in the rest of the internal market space. Presently, the application of EU law mainly serves to ascertain the internal consistency of national gambling policy and its capacity to protect a genuine public interest objective in a proportionate and systematic

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19 The most notable example of a mutual recognition measure adopted in this area is probably Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States (European Arrest Warrant) [2002] OJ L190/1. The mutual recognition of judgments in criminal matters is now explicitly declared in art.67(3) TFEU. For more information in this respect, see V. Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU” (2006) 43 C.M.L. Rev. 1277.

20 See especially in this respect the conclusions of A.G. Bot in *Liga Portuguesa* (C-42/07) [2009] E.C.R. I-7633 at [243]–[258]. See also the suggestions of A.G. Mengozzi in *Markus Stoss v Wetteraukreis* (C-316/07 and C-409/07 to C-410/07) and *Kulpa Automatenservice Asperg GmbH v land Baden-Württemberg* (C-358/07 to C-360/07) [2011] 1 C.M.L.R. 20 at [90]–[105].
manner. \footnote{For a very detailed analysis of the respective case law, see particularly D. Doukas, “In a Bet there is a Fool and a State Monopoly: Are the Odds Stacked against Cross-Border Gambling?” (2011) 36 E.L. Rev 243; S. van den Bogaert and A. Cuyvers, “Money for Nothing? The Case Law of the EU Court of Justice on the Regulation of Gambling” (2011) 48 C.M.L. Rev. 1175; J. Hörnle, “Online Gambling in the EU: a Tug of War without a Winner?” (2011) 30 Y.E.L. 255.} When this is not actually the case, the internal market rules come into play, authorising the provision of gaming services by operators licensed in other Member States. However, the assessment of national gambling laws takes place completely independently of the restrictions and controls to which an authorised operator is already subject in the Member State of its establishment. The legislature is thus entitled to impose additional licensing requirements, even when these allegedly pursue the attainment of objectives that are already well served by the legislative means provided in another national regulatory system.

The imposition of stricter regulatory restrictions on online gambling services

Although clearly tailored to the particularities of online gambling, the exclusion of the mutual recognition principle seems to cover all types of cross-border gaming services, including those made accessible to the public via commercial agencies in the national territory of another Member State. \footnote{Stoss (C-316/07 and C-409/07 to C-410/07) and Kulpa (C-358/07 to C-360/07) [2011] 1 C.M.L.R. 20.} However, the increased risks allegedly intrinsic to the provision of internet games may authorise the imposition of stricter legislative restrictions upon them as compared with similar land-based activities. This has already been apparent since the ruling in Carmen Media, which concerned the legality of German legislation on the organisation of sports betting. It was recalled there that the Member States enjoy considerable latitude to ascertain the appropriate level of protection towards consumers and the social order in the gaming sector. This is especially so in relation to internet gambling, which may pose more serious risks in this respect given its particular characteristics. A national rule thus precluding completely the provision of any gaming service on the internet may in principle be regarded as suitable to pursue the legitimate objectives of preventing gambling addiction and the related squandering of money. This is so even when these activities remain authorised under more traditional channels. \footnote{Carmen Media Group Ltd (C-46/08) [2011] 1 C.M.L.R. 19 at [100]–[105].} Both Dickinger and Zeturf provide more clarification in this respect, suggesting that the particularities of online gambling are to be taken into account when assessing the scope of the restrictions imposed by the national gaming law and the legality of its provisions.

Dickinger versus Engelmann: the obligation of establishment in the national territory

Another important issue raised in Dickinger concerned the legislative obligation that the applicable national law imposed on all gambling operators to keep their registered office in the Austrian territory, in order to be granted the monopoly licence to provide online casino services in Austria. Very interestingly, that same restrictive provision was also the subject of an earlier preliminary ruling in Engelmann. That case involved the institution of criminal proceedings against a German national accused of organising land-based casino games without a valid Austrian licence. \footnote{Criminal proceedings against Ernst Engelmann (C-64/08) [2011] 1 C.M.L.R. 22.} The Austrian Government claimed then that the purpose of the obligation was to allow the exercise of control over operators in the gaming sector with a view to combating crime. However, the Court concluded that it was not even necessary to examine whether that objective constituted a valid public policy reason. It considered that the categorical exclusion of all operators seated in other Member States manifestly violated the proportionality criterion. It pointed out in this respect that there were various less restrictive measures enabling the monitoring of the activities and accounts of casino operators, stressing that any company established in a Member State can be subject to supervision and
the imposition of sanctions upon it irrespective of the place where its managers reside. Given also that the activity at issue concerned the operation of casinos located in the Austrian territory, there was nothing preventing supervision being carried out on their premises in order to preclude potential criminal actions against consumers.

Could the particularities of online gambling authorise the imposition of this same obligation on the operators of casino games via the internet? According to the Advocate General in *Dickinger*, this was not only permissible but also required by EU law. The Advocate General recalled in this respect that a monopoly is an unusually restrictive measure, which must thus be accompanied by legislative means suitable to ensure in a consistent and systematic manner the attainment of an exceptionally elevated level of consumer protection. He then went on to explain why the reasoning employed in *Engelmann* was not applicable as concerns a national monopoly imposed on the provision of online gambling services. After recapping the increased consumer risks arising in this area, the Advocate General pointed out that the particularity of internet games lies also in the complete absence of any material infrastructure in the Member State where these services are made accessible to the players. The competent national authorities are thus not in a position to impose on online operators the controls that they consider to be necessary in order to ensure that these operators will comply with their legislative obligations. As a result, they are also unable to prevent unlawful business practices that may give rise to injurious social consequences. This is not remedied by the monitoring to which online operators are subject in the Member State of their establishment. Indeed, this cannot realistically guarantee their compliance with the applicable rules in every single country where they provide their services.

Although given in more equivocal terms than the Opinion of the Advocate General, and without making any explicit reference to the judgment in *Engelmann*, the ruling of the Court in *Dickinger* is nevertheless based on the premise that it may be possible to rely on public policy grounds in order to impose on online casino operators the obligation to keep their registered office in the Austrian territory. Responding to the argument of the Austrian Government that this is necessary to ensure that the competent authorities can oppose promptly any commercial practices contravening the national policy objectives in relation to gambling, the Court confines itself to a simple reminder that the concept of public policy is to be interpreted narrowly as it presumes the existence of genuine and serious peril to a core interest of the society. The only other concrete instruction given to the national court is that a system of awarding concessions must automatically be considered incompatible with internal market rules if it is proven that its true purpose is the maximisation of tax revenue by the imposition of an establishment obligation in the national territory.

The ruling concludes that it is ultimately the responsibility of the competent national court to ascertain whether the objectives relied upon by the Austrian Government are actually covered by the concept of public policy and whether in these circumstances the requirement concerning the existence of a registered office in the national territory meets the criteria of necessity and proportionality laid down by the case law.

The ruling thus implicitly accepts that the complete absence of material presence in the Member State where the gambling services are provided may considerably impact on the proportionality assessment of the regulatory restrictions imposed by national law. A legislative rule that would normally be considered as incompatible with the provisions of EU law as concerns a traditional land-based activity may be saved on public policy grounds when the competent national court concludes that it is absolutely necessary to

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25 *Engelmann* (C-64/08) at [37]–[38].
26 *Engelmann* (C-64/08) at [39].
28 *Dickinger* (C-347/09) September 15, 2011 at [82].
29 *Dickinger* (C-347/09) at [81].
30 *Dickinger* (C-347/09) at [83]–[84].
protect an important societal interest against the risks intrinsic to the use of the internet. Given also the earlier judicial pronouncements on the particularities of online gaming in terms of consumer protection and crime prevention, it is apparent that the national legislature is granted considerable leeway to impose more severe obligations upon operators providing their services by remote means of communication.

**The absence of a distinct online gambling market and the overall assessment of the entire gambling sector**

Do the particularities of online gambling mean then that it constitutes a separate and completely autonomous market? Some indications on this point were given in *Carmen Media*, where the Court stated that German legislation excluding the provision of internet gaming services concerned an entire marketing channel rather than a particular type of gambling.\(^{31}\) However, it was not until *Zeturf* that a national court asked a question immediately relevant to this issue.\(^{32}\)

The case concerned the legality of French legislation on the organisation of horseracing betting. French law establishes a monopoly in this area, by virtue of which off-course betting is managed exclusively by a single operator under close state control. Alleging that this violated the internal market rules, a licensed Maltese operator of online betting services instituted judicial proceedings in the competent national court. One of the problems arising in this respect was how to ascertain the scope of the examination that was to take place as concerns the contested national rules. Was the legality of the restrictions to be assessed solely in relation to online betting? Alternatively, was it more appropriate to take into account the whole betting sector in whatever mode bets were made accessible to consumers?

According to the Court, the essence of that question was to ascertain whether the market for online betting on horseracing could be considered as separate from the sector as a whole when assessing the scope of the restrictions imposed by the contested national law.\(^{33}\) The ruling stressed in this respect that the internet constitutes a simple marketing channel through which games of chance are offered to the public.\(^{34}\) It then looked at the objective pursued by the national legislation at issue, concluding that it was aimed at the protection of consumers. That being so, a consideration which was certainly relevant to the question asked by the national court was the degree of substitutability between the various marketing channels from the point of view of the consumer. If consumers considered placing an individual bet via the internet as a substitute for placing the same bet through traditional channels, this would support an overall assessment of the relevant betting sector. In principle, therefore, the horseracing betting market should be considered in its entirety and a restriction on the activity of collecting bets was to be examined irrespective of the medium through which these bets were made.\(^{35}\)

However, the above conclusion was immediately qualified by recalling the particularities relating to the provision of gambling services on the internet.\(^{36}\) All the substitutable marketing channels should therefore be taken into account, unless the use of the internet increased the risks linked to gambling beyond those normally arising in relation to games marketed through traditional channels.\(^{37}\) The Court turned then to the national legislation at issue. It concluded that when the legislature considered it unnecessary to draw...
any distinction between the various marketing channels, the assessment should be made from the point of view of the restrictions imposed on the entire sector concerned.\textsuperscript{38}

There are several important observations that can be made with regard to the ruling in \textit{Zeturf}. First, it clarified that there is no separate market for online gaming but only a unique gambling market with various distribution channels. Apparently, this is also the rationale underlying the recent decision of the Commission in the \textit{Danish Gaming Duties Act} case.\textsuperscript{39} Following the liberalisation of Danish legislation on gambling and betting services, a lower tax rate was imposed on authorised operators of online casinos as compared with licensed organisers of similar land-based activities. Denmark claimed that this measure was not selective and that it was not therefore covered by the state aid rules.\textsuperscript{40} Its main argument was that online and land-based casinos operate in distinct markets and they are not consequently in a comparable legal and factual situation. Denmark relied principally in this respect on the alleged variances between online and terrestrial casino operators, in terms of the games provided to the public and the consumer profiles of their players. However, the Commission rejected this argument. It considered that despite the objective differences between online and land-based casinos, it was not possible to establish a substantial and decisive distinction between the two types of undertakings. As concerned the taxation of gambling services, online gaming emerged as another marketing channel for similar types of gambling activities. As a result, the contested national measure was prima facie selective since it constituted a departure from the general tax regime.\textsuperscript{41} However, the imposition of this lower tax rate served eventually a well-defined public interest objective, as it purported to channel gambling into a controllable system by providing the operators of online casino games with the incentive to apply for a remote gambling licence and to comply with the applicable national regulations. The Commission thus concluded that the measure was compatible with internal market rules, on the rationale that its positive effects on the liberalisation of the sector outweighed any potential distortions of competition.

Another interesting point is that the ruling seems to place particular importance on the objective pursued by the legislature when it comes to ascertaining the marketing channels that one must take into account in order to assess the legality of the national restrictions imposed on gambling. It is stated in this context that when the law aims at the protection of consumers, the relevant examination must in principle take place in relation to all the available outlets that are considered as substitutable by the public. However, there are certain occasions where the principal purpose of the legislature is to combat crime by subjecting gaming operators to legislative control and by channelling their activities into the national regulatory system.\textsuperscript{42} In these circumstances, the substitutability criterion is arguably of little practical relevance. What really matters in this respect is, rather, the measure of the criminal risks involved in the various media used to provide gambling services to consumers. One could thus reasonably assume that, in such a case, the scope of the restrictions imposed on internal market rules would better be assessed with regard to all the alternative marketing channels that are in a comparable situation as concerns their propensity to the criminal activities targeted by the national legislature, taking again into account the particularities of online gambling.

Finally, \textit{Zeturf} stresses once again the importance of the increased risks allegedly linked to the provision of gaming services on the internet. When all the available marketing channels are considered as substitutable, this requires in principle an overall assessment of the national restrictions imposed on the relevant gaming services.

\textsuperscript{38} Zeturf (C-212/08) at [82].


\textsuperscript{40} Article 107 TFEU.

\textsuperscript{41} As this notion of selectivity was originally interpreted in \textit{Italian Republic v Commission of the European Communities} (173/73) [1974] E.C.R. 709; [1974] 2 C.M.L.R. 593.

\textsuperscript{42} That was arguably the principal objective of the Italian legislation on the provision of betting services involved in \textit{Gambelli} (C-243/01) [2003] E.C.R. I-13031 and \textit{Criminal proceedings against Massimiliano Placanica} (C-338/04 and C-359/04 to C-360/04) [2007] E.C.R. I-1891; [2007] 2 C.M.L.R. 25.
sector. Arguably, this means that the national courts are invited to ascertain the legality of any regulatory measure by examining whether it is applied consistently across the entire sector concerned. However, this could undermine the latitude that the case law currently confers on the national legislature to subject online gambling to a more restrictive regulatory regime as compared to similar land-based activities. This is why the ruling immediately clarifies that the increased risks associated with the internet are to be taken into account, even when consumers envisage it as simply an alternative means to access the provision of gambling services. The implication is once again clear. When the legislature considers it necessary to draw a distinction between two substitutable marketing channels within the same sector, the competent national court will need to ascertain the extent to which this is actually permissible, taking into account the particularities of online gaming. If there are no additional risks involved in the internet provision of a specific type of gambling, the legality assessment of national law will be carried out in relation to the entire sector. The same will also be the case when the legislature treats all substitutable marketing channels within a given area alike.

How will the national court ascertain, then, the existence of increased risks in the use of a certain marketing channel? Apparently, its examination will take place with regard to the objectives pursued by the contested regulatory rule. The problem is that, on many occasions, the legislative restrictions imposed on gambling serve a mixed consumer protection and crime prevention purpose. It is thus possible that a given marketing channel may potentially give rise to more considerable risks in relation to consumers, while it is at the same time less susceptible to criminal activities than the alternative gaming instruments available to the public. The opposite is also possible. However, this may not actually constitute an issue as concerns online gambling. As will be recalled, the Court considers that its particularities relate both to consumer protection and to the maintenance of public order. Whatever the nature of the objectives pursued by national law, the competent court will probably be called upon to examine whether the use of the internet in a certain gaming sector may give rise to increased risks in either of these two areas.

Seen in this perspective, Zeturf also helps us to interpret the preliminary ruling in Dickinger. The latter case apparently involved the same unique market of casino games as the earlier judgment in Engelmann, although these were provided on the internet rather than in land-based commercial premises. The Austrian legislature treated the marketing of casino games over the internet as lotteries, subjecting them to concession rules other than those applicable to traditional casinos. However, the same licensing requirement was imposed on all gambling operators, obliging them to be established in Austria. In leaving it to the national court to ascertain whether this obligation could be permitted in relation to online casino games, whereas it was obviously illegal for similar land-based activities, the ruling in essence applied the Zeturf principle. The national court was invited to examine whether there were additional risks involved in the provision of casino services on the internet that could potentially authorise the imposition of stricter licensing restrictions as compared to games marketed via more traditional channels within the same sector.

**Zeturf and the cross-sector assessment of the overall national gambling policy**

The cross-channel examination of gambling applied in Zeturf seems to be based in essence on the same rationale underlying the universal evaluation of national gaming policy adopted in Kulpa and CarmenMediaGroup (C-46/08) [2011] 1 C.M.L.R. 19 at [101]–[103].

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43 Carmen Media Group (C-46/08) [2011] 1 C.M.L.R. 19 at [100]–[105] and Dickinger (C-347/09) September 15, 2011 at [78]–[84].

44 Carmen Media Group (C-46/08) [2011] 1 C.M.L.R. 19 at [101]–[103].

45 See in this respect, Commission Decision of September 20, 2011 on the Measure C35/2010 C(2011) 6499, where it is concluded that online and land-based casinos should be perceived as being legally and factually in a comparable situation.
These cases concerned the legality of the public monopoly imposed by German law on the organisation of bets on sporting competitions. The applicants in the main proceedings argued that this violated internal market rules, since other types of gambling that generated more prominent game addiction risks were not subject to a similar regulatory restriction but were rather experiencing an increasingly extensive growth. This meant that the German legislation on sports betting was not pursuing its alleged objective of consumer protection in a consistent and systematic manner, as required by the case law.\footnote{Stoss (C-316/07 and C-409/07 to C-410/07) and Kulpa (C-358/07 to C-360/07) [2011] 1 C.M.L.R. 20; Carmen Media Group (C-46/08) [2011] 1 C.M.L.R. 19.}

The Court recalled in this respect the wide latitude left to the Member States to impose regulatory restrictions on the provision of gambling services in the context of the legitimate aims that they pursue. It then stressed that a variance in the applicable legal regimes is not in itself capable of affecting the suitability of the contested public monopoly to attain the consumer protection objectives constituting the reason for its creation.\footnote{Gambelli (C-243/01) [2003] E.C.R. I-13031 at [67]–[69].} It went on to conclude, however, that when the competent authorities are conducting and tolerating policies of expanding supply in relation to other types of games not covered by the monopoly, national courts can legitimately consider that the public interest objectives of preventing incitement to squander money on gambling and combating gaming addiction are not pursued in a consistent and systematic manner.\footnote{Stoss (C-316/07 and C-409/07 to C-410/7) and Kulpa (C-358/07 to C-360/07) [2011] 1 C.M.L.R. 20 at [91]–[96]; Carmen Media Group (C-46/08) [2011] 1 C.M.L.R. 19 at [58]–[63].}

Arguably, therefore, the Court considers it necessary to embark on a cross-sector assessment of overall national gambling policy in order to ascertain the compliance of a contested regulatory rule with internal market principles. This seems to run counter to the position adopted on the matter by no less than three Advocates General, who clearly suggested a sectoral evaluation of the relevant gambling legislation.\footnote{Stoss (C-316/07 and C-409/07 to C-410/07) and Kulpa (C-358/07 to C-360/07) at [97]–[106]; Carmen Media Group (C-46/08) at [64]–[68].} The Advocates General pointed out that there are particular characteristics in every single type of game which make it impossible to treat all sectors in the same way. They also emphasised that the potential of gambling addiction is not the only criterion in the evaluation of the risks that a certain game may entail in relation to the aims of the national gaming policy. There are several other considerations that need to be taken into account in this respect, such as the susceptibility of a sector to criminal activities and the negative consequences that an increase in the number of licensed operators could possibly generate in terms of the gambling opportunities available to consumers.\footnote{A.G. Bot in Liga Portuguesa (C-42/07) [2009] E.C.R. I-7633 at [300]–[308]; A.G. Mazák in Engelmann (C-64/08) [2011] 1 C.M.L.R. 22 at [86]–[91]; and A.G. Mengozzi in Stoss (C-316/07 and C-409/07 to C-410/07) and Kulpa (C-358/07 to C-360/07) at [66]–[76].}

Most importantly though, the rulings in Kulpa and Carmen Media also seem to oppose some earlier pronouncements on the matter in Schindler. That case concerned a national ban imposed on the organisation of lotteries, allegedly on the basis of crime prevention and social policy grounds. Responding to the argument that other types of gambling such as sporting bets and bingo games remained authorised within...
the national territory, even though they involved a substantial element of chance and could give rise to
stakes comparable to those of lotteries, the Court concluded that they could not nevertheless be assimilated
to the latter, as they were not analogous with them in terms of their object and methods of organisation.
Since those games were not therefore in a comparable situation with lotteries, the legality assessment of
the contested national ban was eventually carried out without taking into account the regulatory regime
that applied in the other, more liberalised gambling sectors of the Member State concerned.53

If it is acceptable, however, to compare the risks intrinsic to the various marketing channels within the
same sector when assessing the legality of a national regulatory measure, would it not be reasonable to
assume that a similar comparison is also permissible as concerns the cross-sector examination of gambling? Zeturf may very well illustrate the way that the earlier rulings in Kulpa and Carmen Media are to be understood and interpreted. It will be recalled that the German monopoly imposed on the provision of the
sports betting services involved in those proceedings was aimed principally at the protection of consumers.
Arguably, the national courts were instructed to proceed to a cross-sector evaluation of overall German
gambling policy based on the assessment of the consumer risks involved in the various types of games
concerned. The choice made by the legislature to impose a stricter regulatory regime on the organisation
of sports betting could only be accepted if there existed in this area more substantial risks of gaming
addiction. However, the competent courts already considered that other more addictive gambling activities
were subject to a less restrictive regulation.54 In these circumstances, they could thus conclude that the
contested national legislation was not pursuing its consumer protection objectives in a consistent and
systematic manner. One could assume that they would be obliged to take additional considerations into
account if the German monopoly at issue also purported to combat crime addiction. In this case, the
potential propensity of the sports betting sector to criminal activities would certainly be relevant.

The cross-sector evaluation of overall national gambling policy seems thus to take place in the context
of the same risk-based assessment applied in Zeturf as concerns the various marketing channels available
within the same gaming sector. Turing back, then, to the ruling in Schindler, it could be sustained that
what the Court actually meant by concluding that large-scale lotteries were not in a comparable situation
with sporting bets and bingo games was that they involved greater potential for consumer addiction and
crime given the particularities of their object and modes of organisation. Given that the national ban
imposed on the organisation of lotteries was based on a mixed consumer protection and crime prevention
objective, it was legitimate to impose upon them a more restrictive regulatory regime. One could certainly
criticise the simplistic reasoning employed in the ruling in this respect, not to mention the obscurity of its
conclusion. However, what is more important is that there now exists an alternative interpretation of its
pronouncements that allows for a reading of that judgment in line with the recent gambling case law.
Following Zeturf, the rulings in Kulpa and Carmen Media may not be as irreconcilable with Schindler as
they initially seem.

Conclusion

Combined with the earlier preliminary rulings in Kulpa and Carmen Media, the judgments in Zeturf and
Dickinger seem ultimately to suggest that the legality assessment of a restrictive national measure must
in principle be based on a cross-channel and a cross-sector evaluation of overall gambling policy. However,
the legislature is allowed to take into account the increased risks allegedly intrinsic in certain marketing
channels and in some gaming sectors in order to subject them to more restrictive regulation. It is nevertheless

54 Stoss (C-316/07 and C-409/07 to C-410/07) and Kulpa (C-358/07 to C-360/07) at [25] and [36]–[38]; Carmen Media Group (C-46/08) at [30]–[34].
only risks relevant to the regulatory objectives pursued by the law that may possibly be relied upon in this respect before the competent courts, when examining the consistency and the proportionality of the legislative restrictions imposed on gambling.

Especially concerning online gambling, it is clarified that this constitutes a simple marketing channel rather than a separate gaming market. However, its particularities may potentially authorise the imposition of more restrictive measures on operators providing their services by means of remote communication. Apparently, the national legislature is given a wide latitude in this respect. It is mainly when it is considered to be unnecessary to draw a distinction between the various substitutable marketing channels that the national courts will be called upon to carry out their legality assessment in relation to the restrictions imposed on the entire sector concerned.

When the applicable regulatory measures violate the consistency and proportionality requirements set by the case law, the internal market rules come into play, authorising the provision of gaming services in the national territory by operators licensed in other Member States. However, this legality assessment of national law places virtually no importance on the extent of monitoring and control to which cross-border gambling operators are already subject in the Member State of their establishment. Indeed, there is currently no mutual recognition of licences in the gaming area. Arguably, the Court considers that cross-border gambling is not to be approximated by means of negative integration, leaving it to the EU legislature to take the initiative in this respect. The recent Green Paper on online gambling and the relevant public consultation launched in consequence may potentially prove an important step to this end.