HAS THE ECJ’S JURISPRUDENCE IN THE FIELD OF GAMBLING BECOME MORE RESTRICTIVE WHEN APPLYING THE PROPORTIONALITY PRINCIPLE?

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1 Introduction

On a number of occasions beginning with the case of Schindler,¹ the European Court of Justice (hereinafter: ECJ) has been the battlefield for national measures regarding gambling to mix with the fundamental freedoms establishing the internal market of the European Community. Even after the ECJ has rendered six judgments it is not entirely clear how this discussion will settle, and indeed in view of the ongoing debate regarding the liberalisation of services in the internal market,² it may be a good while yet before national operators gain a suitable degree of legal certainty at the European level.

The case-law of the ECJ regarding gambling has arisen out of national authorities regulating gambling activities at the national level, and such regulation has had a restrictive effect on the provision of gambling services by operators established in another Member State. The extent to which national authorities can restrict supplies will be discussed in this contribution and this will be referred to as their ‘margin of discretion’.³

³ I have chosen to use the term ‘margin of discretion’ although a variety of other terms can be found. An example of this can be found in Straetmans, G., ‘Case C-6/01, Anomar v. Estado português, Case C-243/01, Piergiorgio Gambelli; and C-42/02 Diana Elisabeth Lindman’, Common Market Law Review, 41 (2004), 1409-1428 at p. 1417 where the following phrases are used to refer to the same phenomenon: ‘... the latitude granted to the
Following preliminary references from national courts, the ECJ has been called upon to determine the extent to which national authorities may restrict the provision of gambling services originating in another Member State. Debate exists as to whether this margin has been diminished by the case-law of the ECJ. Part of the ECJ’s assessment of the restrictions in question involves considering whether the restriction is proportionate in its effect to the aim it is intended to achieve.

This contribution questions whether the evolution of the ECJ’s consideration of proportionality has left Member States with a reduced margin of discretion in maintaining and enacting restrictions on the cross-border supply of gambling services. In considering this issue I will try to identify whether the ECJ has become more familiar with the issues of this sector, or whether the reasoning of the ECJ simply reflects the circumstances of each case.

In order to fully understand the approach of the ECJ I will firstly aim to provide a definition of gambling since this is an activity which can take many forms and be subject to differing policy objectives and forms of regulation. Secondly, having elucidated a definition of gambling, I will then consider the context in which the debate occurs to highlight the factors which have brought this issue to the attention of the ECJ. Thirdly, since the ECJ has chosen to deal with questions surrounding the provision of gambling as an issue falling under the freedom to provide services, a brief overview of the case-law surrounding this freedom will be given.

In dealing with national restrictions on the cross-border supply of gambling the principle of proportionality has proven to be of particular importance in relation to the margin of discretion enjoyed by the Member States. Therefore, the approach of the ECJ to the principle of proportionality in its general freedom to provide services case-law will be highlighted. Fourthly there will be a discussion of the principal cases in this field, which are considered to be Schindler, Läärä, Zenatti, Anomar, Gambelli and Lindman. This discussion will aim to draw

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4 Supra note 1.
5 Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), [1999] ECR I-6067.
7 Case C-6/01, Associaçã Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português, [2003] ECR I-8621.