1 What is European Gambling Regulation?

1.1 The Treaty and the European Court of Justice Case-law

1.1.1 The Legal Basis: The Freedom of Establishment and the Freedom to Provide Services

Under European law, gambling services should be considered as services in accordance with the meaning of Article 50 of the Treaty establishing the European Communities (hereinafter the ‘EC’). Indeed, the Treaty does not distinguish gambling services from other services. For this reason and in principle, all services must be considered in the same way:

Article 43 EC provides that, in the absence of specific legitimate justifications, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.

Article 49 EC prohibits restrictions on the freedom to provide services within the Community for nationals of Member States who are established in a Member State of the Community other than that of the person for whom the services are intended.

Article 49 EC also includes the right to receive services across borders. As it is not forbidden in most Members States to play an ‘unauthorized’ game, the cross-border reception of gaming services by consumers can become an important argument. This article of the Treaty thus guarantees that a service provider, duly licensed and monitored in one Member State, is allowed firstly to offer and promote its information society services in other Member States of the European Union. Secondly the service provider is permitted to accept stakes from residents of other Member States. Indirectly this also implies the right to receive and consume services across borders.
Article 46 EC provides that the aforementioned provisions of the Treaty and measures taken in pursuance thereof should not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. A Member State can therefore only impose restrictive measures in strict compliance with the limits set out in the Treaty, in particular Article 46 EC, and the case-law of the European Court of Justice (hereinafter the ‘ECJ’).

1.1.2 The Case-law of the European Court of Justice

According to the standing case-law of the ECJ, restrictions can only be maintained and enforced on the condition that they are:

- Not discriminatory, unless justified under Article 46 EC;
- Imposed as part of a consistent and proportional national policy;
- Justified by imperative reasons of general interest, notably to curb the harmful individual and social effects of gambling and gaming;
- Necessary and proportionate; the national restriction must guarantee the achievement of the objective pursued and must not go beyond that which is necessary.

1.1.2.1 Schindler, Läärä and Zenatti (1994-1999)

In the Schindler case the ECJ stated that lotteries were to be considered as ‘services’ within the meaning of Article 50 EC (ex 60) given the fact that they have a peculiar nature. A Member State can restrict or prohibit lotteries from other Member States provided those restrictions are not discriminatory on the ground of nationality. Restrictions which are based on overriding public interest considerations cannot be regarded as measures involving an unjustified interference with the freedom to provide services.

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2 Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, [2003] ECR I-13031, para. 65.

3 Supra, note 1, para. 59.

4 See Schindler, supra, note 1. para. 57 which reads: ‘... to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure