

ARE LEGISLATORS GETTING THEIR LAW RIGHT?

HUMAN HEALTH OR INTERNAL

By Spyros A Pappas, Member of the Athens and Brussels Bars

A string of recent case law on the negative effects caused by gambling, alcohol and tobacco on consumers is unlikely to go unnoticed. Indeed, a first glance shows that these decisions derive from the need to ensure the smooth functioning of the Internal Market and, ultimately, competitiveness in these market segments.

However, while the completion of the Internal Market remains a fundamental aim of the European Community, its pursuance is subject to the attainment of parallel policy objectives, which are acknowledged by the Treaty establishing the European Community (EC Treaty), such as the protection of consumers and public health. In this respect, a more detailed reading of the same cases seems to uncover a number of worrying issues which appear to surpass purely internal market or solely public health objectives. A systemic approach throughout the objectives which are been pursued at a given time is imperative. As a result, the conclusion may vary from one case to another depending on the specific context in which the restrictive measures are taken. What's more, the outcome of a newer case may also differ from a previous one depending on the findings of an ever evolving scientific evidence and experience as far as the effectiveness, suitability and appropriateness of the protecting measures is concerned.

CONSISTENT?

When it comes to gambling, according to the Court of Justice of the European Communities (CJEC), restrictions which seek to protect objectives of general interest, such as the protection of consumers, must be 'consistent and systematic' in how they seek to limit activities. In other words, it does not make sense for Member States to restrict citizens' access to gambling services whilst simultaneously and contradictorily

encouraging them to gamble and bet via national operators or monopolies. A number of elements seem to interact: On the one hand, the regulation of gambling is essential to uphold consumer protection. On the other hand, the regulation of gambling must comply with the Community principles of freedom of establishment and to provide services.

MORE LIGHT

The relatively recent landmark *Placànica* judgment (C-338/04), dated 6 March 2007, pushes EU Member States to amend their national laws limiting access to the provision of sports-betting services. It therefore seems to go in the same direction as the 2003 *Gambelli* case (C-243/01), which made it harder for Member states to limit gambling. In the latter case, *Gambelli*, a Stanley International Betting Limited agent, was charged by Italian authorities on the grounds that his activities, by which he accepted bets from Italian citizens, violated Italian law.

The Court of Justice based its reasoning on the fact that (1) restricting activities of betting companies amounted to obstacles to the freedom of establishment and (2) bans enforced by criminal penalties breached the principle of freedom to provide services.

In the *Placànica* case, the Court of Justice shed more light on the issue in order to help Member States regulate their betting activities. In this case, three Italian operators (*Placànica*, *Palazzese* and *Sorrichio*)

of the British sports betting company *Stanley Leisure plc* were charged in Italian courts for carrying out organised bet-collection activities without the required police authorisation.

IMPOSSIBLE

However, it was demonstrated that it was, in fact, impossible for the convicted companies to obtain the authorisation in question. The Italian courts referred the case to the European Court to ask whether Italian betting and gambling legislation was compatible with Community principles of freedom of establishment and to provide services. The Court held that, according to article 43 and 49 of the EC Treaty, it was a breach of Community law to impose a criminal penalty on companies for failure to fulfill an administrative formality when the Member State makes it impossible to observe that same formality.

In addition, "national legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a license or a police authorisation issued by the Member state concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services, provided for in Articles 43 EC and 49 EC respectively".

RESTRICTIONS

As such, it is necessary to consider whether these restrictions are to be considered as exceptional measures according to articles 45 and 46 TEC. Their justification, according to the case-law of the Court, could be found in reasons of overriding general interest such as the objec-

tives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order. The national authorities have therefore a margin of discretion to estimate the moral and financial harm occurred and act to ensure consumer protection and the preservation of public order. However, the measures should always be proportional to the goals set (proportionality principle). Therefore, the Court concluded that the restrictive measures should be examined in order to determine, in each case in particular, whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. This way, the suitability of a measure to achieve the objective is considered as a critical criterion of the compatibility of such consumer protection restrictions with the Internal Market rules.

CASE LAW

Building on this case law, the EFTA Court, in case E-3/06 published on 30 May 2007, clarified that "[t]he aim of fighting gambling addiction can serve as justification only if the restrictive measures reflect a concern to bring about a genuine diminution in gambling opportunities... In order for there to be a genuine diminution, the gaming policy as a whole must at least provide for a lower level of gambling addiction in society than would be the case without restrictions on free movement in relation to gaming services".

From this case law, it derives that gambling is a free market, which forms an integral part of the Internal Market. It is not a preserved public fortress. What matters is not the