

# THE DEFINITION OF ILLEGAL GAMBLING, THE GREEN PAPER AND THE TROJAN HORSE

by Marcos Charif

Article first published in World Online Gambling Law Report  
August 2010

The European Union, with its 27 member states, has finally agreed a common definition of "illegal gambling". According to the Spanish EU Presidency Report (the "**Report**") of 11 May 2010, "illegal gambling may be defined as: *“gambling in which operators do not comply with the national law of the country where the services are offered, provided those national laws are in compliance with EU treaty principles”*. The Report also addresses permissible methods of restricting access to illegal gambling, including ISP blocking and website distortion.

Interestingly, gambling operators, member states, sports bodies and the EU Parliament all expressed their satisfaction for the "well balanced" Report. In addition, Internal Market Commissioner Michel Barnier has announced a public consultation on this issue, with a Green Paper due to be launched in Autumn 2010. This harmony amongst all parties is encouraging at first sight. However, all parties have different, sometimes incompatible, interests to protect and the Green Paper will be decisive in setting the direction of any future EU wide legislation or policy on online gambling. As a first indicator of things to come, it should be borne in mind that the Commission's move to launch the Green Paper followed pressure from EU member states and the EU Parliament, not from gambling operators...

There is also a difference between gambling operators who are in favour of regulating gambling at EU level, and countries with liberal gambling laws: the UK and Malta. In fact, most gambling operators calling for EU harmonisation are based in these liberal jurisdictions, which until now, oppose EU legislation on online gambling. However this time only Malta decided not to support the Report, while the UK's tacit approval of the Report and its recent announcement to introduce new licensing requirements for EU gambling operators appear to bring it in line with other member states' more narrow approach to fundamental EU principles, including the freedom to provide services across member states. .

In addition, the sports industry has ensured that it will be included in the Green Paper on gambling to formalise its requests at EU level and to obtain a larger share of gambling profits, including the introduction of sports organisers' intellectual property rights. This point has not received much coverage in online gambling circles, but it has been emphasised throughout sports bodies across Europe and their representative lobbying groups in Brussels, all of whom welcome the definition of illegal gambling and the Green Paper.

With a Report and a Green Paper on online gambling being fully supported and called for by the EU Parliament, member states and sports bodies, one must but wonder why gambling operators have received these announcements so favourably, while the liberal jurisdictions in which they operate have taken a far more cautious approach. The intentions of both sides are clear: one wants to protect its gambling monopolies, impose restrictions, national licences, taxation and introduce new sports rights, while the other wants the EU "blessing" to enter gambling markets throughout the EU. Can the Green Paper cater for all these needs?

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To assess the direction of the Green Paper and to understand how, if at all, gambling can be regulated at EU level, one must not only consider the Report and the implications of the definition of illegal gambling, but also the ongoing developments throughout the EU and the underlying principles of the EU Treaties, which will determine any room to manoeuvre by gambling operators.

## The Principles of the EU Treaties

The European Union treaties incorporate the overall principle that, within the EU, each member state can freely trade with the others and that unjustified restrictions on supply and movement of goods services and capital are therefore not permitted. Crucially, EU law is superior to domestic law and Article 49 of the EC Treaty states that no member state may impose restrictions on the freedom to provide services from one member state to another. However, EU law also recognises that national sensitivities may differ between member states in areas such as gambling and if a member state is of the view that restrictions should be imposed to safeguard the public interest, then justified proportionate and consistent derogations are permitted. What has since evolved, in the context of online gambling, is a debate as to the legitimate parameters of such protectionism, based on set EU principles and confirmed by case law:

- **Proportionality:** any restriction on the freedom to provide services must be proportionate to the aim it is intended to achieve;
- **Equality and non-discrimination:** any restriction cannot be discriminatory toward foreign operators vis-a-vis national operators,
- **Subsidiarity:** the principle of subsidiarity, i.e. the right of member states to retain “exclusive jurisdiction” over areas of consumer protection and crime, must be considered. This principle will often determine whether a national gambling monopoly or liberalising gambling markets are in fact “protecting the citizen”.
- **“Objective Justification”:** any restriction must be justified on these grounds: (1) legitimate public interest which is not incompatible with EU aims, (2) equally applicable without discrimination, (3) suitable in achieving its legitimate aim in the public interest.

How these fundamental principles and the permitted limitations on the freedom to provide services apply to online gambling, can be illustrated by the decisions of the European Court of Justice (“ECJ”).

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## ECJ

Most EU member states have opted to control their gambling markets and protect their monopolies by restricting and controlling internal and external competition. Those different degrees of control derive from the interpretation of Article 52 (formerly Article 46(1)) of the EC Treaty), which permits derogations from Article 49 (freedom to provide services) by allowing restrictions that are justified on grounds of public policy, public security or public health. According to the ECJ:

- national legislation must be genuinely directed at limiting the harmful effects that are given as reasons to justify restrictions on cross-border services<sup>1</sup>,
- restricting gambling activities to state-licensed undertakings is unlawful if the restriction is based on purely financial grounds. Restrictions can only be justified on public policy grounds and where the protection of the public is their main purpose<sup>2</sup>,
- restrictions on the number of operators must reflect a “genuine diminution of gambling opportunities”, however the limitation must be consistent and systematic. Channelling gambling into a controlled environment to combat crime and fraud can be justified for restrictive measures<sup>3</sup>,
- gambling-related legislation is an area that has “significant moral, religious and cultural differences between member states”. In the absence of EU harmonisation, each member state may determine what is required to ensure that the interests in question are protected. Member states are therefore free to set their own gambling policy objectives, provided that any restrictive measures do not go beyond what is necessary to achieve those objectives and must be applied without discrimination<sup>4</sup>.
- the principle of mutual recognition does not apply in the gambling sector: operators licensed within one member state are not automatically permitted to provide the same services in other member states. A monopoly system may be compatible with EU law where justified (with the objective of combating fraud and crime) and proportionate<sup>5</sup>.

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<sup>1</sup> *Questore di Verona v Diego Zenatti* ECJ 1999 C-67/98

<sup>2</sup> *Gambelli Ruling* ECJ 2003 C- 243/01

<sup>3</sup> *Placanica, Palazzese, and Sorricchio* (Cases C-338/04, C-359/04 and C-360/04) ECR (2007)

<sup>4</sup> *Liga Portuguesa de Futebol Profissional and Bwin International Limited* (formerly Bwin International Limited) v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ECJ Case C-42/07

<sup>5</sup> Case C-258/08 *Ladbrokes Betting and Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* and Case C-203/08 *Sporting Exchange (Betfiar) v Minister van Justitie*.

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Notably, these cases do not call for a general liberalisation of the European gambling market as a whole, but instead provide some grounds to lead member states to open their gambling markets, while at the same time allowing them to retain a degree of control over those markets based on “public interest”. These rulings also highlight how the ECJ followed established principles of proportionality and Objective Justification as well as observed the underlying principle of subsidiarity.

## The European Commission

Following *Gambelli*, the European Commission became more active in the gambling sector. The issue of compliance was initially dealt with academically. The Swiss Institute of Comparative Law was commissioned to provide a study of the laws in Europe in order for the Commission to assess the position and the extent of restrictive practices in the sector. The report considered the plethora of forms of gambling, advertising, taxation and approaches to licensing in the member states, flagging the numerous inconsistencies that arise in the EU.

The European Commission’s most aggressive attempts to enforce the free movement principles of EU law have come via its use of infringement proceedings (brought under Article 226 of the EC Treaty). While the infringement procedure process in the gambling sector is currently on hold, it has had some effect, with a number of jurisdictions mooting new legislation or making concrete proposals for a licensing system for online gambling.

However, if the European Commission wanted to ensure that freedoms were afforded for gambling services, it could ultimately push for a EU law (Directive) addressing the issue and create enforced harmonisation. Interestingly, and as noted above, the recent launch of the Green Paper resulted from pressures and initiatives of the European Parliament and from those member states that want to limit and control access of online gambling operators, rather than from the gambling industry. In fact, Mr Barnier stated that “a thorough examination of the reasons why member states restrict access to online gambling was necessary, in particular with regard to societal aspects of addiction”.

## Controlled opening of gambling markets

Since 2006, the European Commission has accused several member states of infringing Article 49 and has taken action against state monopolies. As a (positive) result, gambling reform discussions are taking place in more than 17 member states. France and Italy have set the trend for these controlled openings, and more recently the UK is following suit. What is noteworthy about the French and Italian approach is the fact that the European Commission seems to have accepted a double / triple / multiple-licensing model whereby a member state may issue separate local licences and impose local taxes. It is quite possible

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that the French / Italian approach will be adopted by other EU states wishing to open their markets to online gambling operators.

## The Schaldemose Report is back

The European Parliament adopted the Schaldemose Report on the “Integrity of Online Gambling” on 10 March 2009. The Schaldemose Report stated that: *“Online gambling, which is easier to access than traditional forms of gambling, increases the risk of fraud, crime, gambling addiction, dangers to children and threats to the integrity of sports events”*.

The Schaldemose Report also asks the Commission and the Council to study methods of solving *‘the social and public order problems arising from cross border online gambling, such as gambling addiction and misuse of personal data or credit cards’*. Furthermore, MEPs stressed that online gambling operators must comply with the gambling legislation of the member states in which they provide their services and in which the consumer resides. The resolution also urged governments to protect sports competitions from *“unauthorised commercial use”* and *“ensure fair financial returns for the benefits of sports”*.

The Schaldemose Report is an own-initiative report, undertaken by members of the European Parliament under their own agenda, which means that it does not have any legislative status. It is nevertheless relevant in assessing the general attitude of the European Parliament and its views on the definition of illegal gambling and the Green Paper, bearing in mind that the Parliament called for the Green Paper in the first place.

## Sports Bodies

According to (another) report published by the EU Office of the European Olympic Committee and based on a conference organised by the European Commission on the future of funding for grassroots sports, *“the announcement of Commissioner Barnier to launch a Green paper on gambling which would include the financing of sport, would be a great response to the call made by the Olympic and Sports Movement”*. This report also states that *“revenues from gambling are extremely important for the financing of grassroots sport ... and that EU institutions are asked to support the arguments brought by sports organisations regarding their legitimate right to control the legal framework surrounding sports events”*. Consequently, bearing in mind the powerful sports lobby and the general lack of available finances for sports subsidies in most member states, all signs are pointing at the introduction of a new sports right for sports organisers with the gambling industry having to meet the bill.

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## Conclusion – The Trojan horse

It should be remembered that the Spanish Report is not about legalising online gambling, but is about “*serious concerns about illegal gambling and its negative impact on European citizens*”<sup>6</sup>. In that sense, it does no more than add to the body of the general debate and, particularly, it does not define what amounts to **legal** gambling. In other words, member states can continue to set their own parameters when judging the legality of online gambling activities in their respective jurisdictions. Further, the definition of “illegal gambling” appears to include licensed operators, which means that online gambling operators licensed in one jurisdiction cannot rely on their national licences when accessing markets of other member states. Such activity would fall under the current definition of “illegal gambling”

Countries are therefore encouraged and entitled to restrict the access of online gambling operators, “*provided those national laws are in compliance with EU treaty principles, always taking into account the principle of subsidiarity and proportionality*” and applied without discrimination. Given the Court of Justice rulings on subsidiarity and proportionality, this basically entitles member states to continue to protect their monopolies and to ban online gambling operators from entering their markets.

In addition, the national licensing regimes in France and Italy have received a further boost and confirmation of the lack of mutual recognition by the Report’s emphasis that illegal gambling is gambling that is “*operated without a licence or without complying with the laws of the relevant country, may be considered unlawful*”.

To top it all, the Report also considers various measures taken against “illegal operators”, regardless if the same operators are already licensed in other member states, as fully acceptable and “proportionate”. These measures include: (1) imposing penalties, (2) blocking financial transactions, (3) blocking web pages, (4) possible criminal proceedings, (5) sanctions against illegal advertising and (6) prohibitions imposed on citizens to access “illegal sites”.

ISP blocking, financial transactions blocking, advertising restrictions and taxation are all methods that some member states are considering today in order to continue restricting and controlling online gambling, while allowing EEA based operators to enter their controlled national markets. It was thought that future ECJ rulings would assess to what degree such restrictions are (1) proportionate, (2) non-discriminatory and (3) in the public interest. However, with the Spanish Report, these measures appear to be fully compliant with the fundamental principles of the EU.

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<sup>6</sup> Council of the European Union. *Presidency Progress Report 9495/10*. Brussels 11 May 2010

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The Report and the definition of illegal gambling is therefore not only a further step to regulate online gambling on EU level, but is also (ironically) a further step to legalise further restrictions on online gambling across the EU. In fact, based on this definition, it may now be “illegal” for gambling operators to enter any markets without a national licence, even though the national legislation is in clear breach of EU law, as doing so would be deemed “illegal gambling”.

The Report findings are no surprise and summarise the outcome of lengthy court proceedings, member states’ insistence on controlling gambling through national licences and awarding sports bodies a larger share of the gambling revenues. The much anticipated Green Paper may therefore only add an additional nail to the freedom to provide gambling services across member states. Coincidentally (or not), many newly licensed online gambling operators in France are in favour of the definition of illegal gambling and in favour of the state imposing the harshest possible sanctions against these operators, because it gives them a competitive advantage over unlicensed online gambling operators. With this in mind, it is very likely that online gambling operators will continue supporting the division of the European gambling market themselves, leaving little hope for EU wide legislation to open the barriers, but indeed focusing more on creating new barriers to keep competition at bay.

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**August 2010**