

***THE STATE MAY WANT TO KEEP ITS POKER FACE BUT  
BRUSSELS AND LUXEMBOURG WILL REQUIRE MORE THAN A  
PEEK AT ITS HAND:  
COMPETENCE AND TRANSPARENCY IN THE GAMBLING  
SECTOR***

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*Competence and Transparency in the Gambling Sector*

**Abstract**

This paper argues that Member States, when regulating their gambling markets, should engage in regulatory transparency even in situations where they are not under a duty to discharge the obligation of transparency which arises when awarding licences and public services concessions. Regulatory competence in this sector rests wholly with the Member States and they enjoy a broad margin of discretion in this regard. Yet this should not provide a veil for regulatory practices which are incompatible with EU law. Given that regulatory opacity typifies this sector regulatory transparency is necessary to ensure that the demands of the case-law which has developed over the last decade are fully respected.

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## **Introduction**

How best to regulate gambling has long vexed regulatory bodies at all levels of authority. Pitting what some perceive as human nature against a total prohibition on all gambling activities or allowing some limited degree of gambling so as to safely capture the embodiment of human nature have been two of such approaches long before the advent of the internet. With the arrival and widespread reach of the internet as a means of cheap and long distance communication gambling has been thrust into the international sphere, in both its legal and illegal emanations. How best to regulate gambling now vexes those concerned with international and transnational trade, in addition to those who grapple with national and international dimensions at the national level. It cannot go unnoticed that the very first decision to be rendered pursuant to the General Agreement on Trade in Services related to internet-based gambling services, where World Trade Organisation member Antigua and Barbuda challenged a prohibition of the United States of America against the importation of gambling services.<sup>1</sup> Within the European Union gambling cases have become an increasingly frequent topic of discussion within the case-load of the judges of the Court of Justice. Whilst the earliest case relied upon the postal system as a means of communication,<sup>2</sup> then data transmission centres acting as local agents for operators established in other Member States,<sup>3</sup> the overwhelming bulk of recent preliminary references have undoubtedly been fuelled by reliance on the internet to provide gambling services directly to consumers.<sup>4</sup> This has resulted

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<sup>1</sup> DS285 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, 7 April 2005.

<sup>2</sup> Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, [1994] ECR I-1039.

<sup>3</sup> Case C-67/98, *Questore di Verona v. Diego Zenatti*, [1999] ECR I-728 and Case C-243/01, *Criminal proceedings against Piergiorgio Gambelli and Others*, ECR [2003] I-13031.

<sup>4</sup> Case C-338/04, *Criminal proceedings against Massimiliano Placanica*, [2007] ECR I-1891; Case C-42/07, *Liga Portuguesa de Futebol Profissional, Bwin International Ltd v. Departamento de Jogos da Santa Casa de Misericórdia de Lisboa*, [2009] ECR I-7633; Case C-203/08, *Sporting Exchange Ltd v. Minister van Justitie*, judgment of 3 June 2010, n.y.r.; Case C-258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator*, judgment of 3 June 2010; Case C-46/08, *Carmen Media v. Schleswig-Holstein*, judgment of 8 September 2010, n.y.r.; and Case C-316/07, *Markus Stoß v. Ld Baden-Württemberg*, judgment of 8 September 2010, n.y.r..

in tension between those seeking to rely on the free movement principles which underpin the internal market and the regulatory competence of each Member State.

Internet fuelled clashes between different regulatory approaches to gambling have not only been ignited in the international and European contexts, but also within federated structures. During the autumn of 2010 the Supreme Court of Washington was called upon to determine whether the state wide prohibition on internet gambling in Washington was compatible with the dormant commerce clause.<sup>5</sup> Equally, different Länder in Germany have differing views on the regulation of sports-betting and lottery services, with cracks showing unanimity of the support of the Interstate Treaty on Gambling.<sup>6</sup>

This article focuses upon the one aspect of this dynamic within the context of the European Union, namely the juxtaposition between regulatory competence and regulatory transparency. Deriving from the lack of any harmonisation at the Union level in this field,<sup>7</sup> Member States are free to set their own objectives and standards applicable to the regulation of all gambling activities within their respective jurisdictions. An integral part of this includes the ‘design’ of the national gambling market, regardless of whether the same approach is used for all sectors or whether a degree of differentiation occurs between sports-betting and casinos for example. Consequently, a whole range of different regulatory models can be found across the internal market; public monopolies, exclusive rights granted pursuant to a tendering procedure, a limited number of licences or concessions, an unlimited number of licences or concessions, and in a few corners, total prohibitions stand. One result of such a preponderance of different approaches is that the internal market cannot be described as being a single market; there is very little integration between the various national markets and private operators are frequently hindered in their exercise of the freedom of establishment and moreover the free movement of services.

It is not the object of this paper to decry this state of affairs, but rather to explain how the principle of transparency has an important role to play through ensuring that some of these restrictions which underpin the fragmentation of the market are genuine. As such it will be

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<sup>5</sup> Supreme Court of Washington, *Lee H. Roussio v. State*, 239 P. 3d 1084 Wash., 2010. 23 September 2010.

<sup>6</sup> Staatsvertrag zum Lotteriewesen in Deutschland. Länder Schleswig-Holstein was reluctant to sign the reformed interstate treaty of 2008, see Becker, T., ‘Recent Developments in German Gambling Law’, in Littler, A., Hoekx, N., Fijnaut, C. & Verbeke, A.-L., *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling* (Leiden; Martinus Nijhoff, 2011), p. 200. Following the expiration of the current interstate treaty in January 2012 several länder plan on offering sports-betting licences to private operators with Schleswig-Holstein being the most fervent about the regulating for the arrival private operators. See Carter, S., *Germany: A Deeply Divided Market*, January 2011 [www.egrmagazine.com](http://www.egrmagazine.com), available at [www.gaminglaw.eu/](http://www.gaminglaw.eu/).

<sup>7</sup> Littler, A., ‘Regulatory Perspectives on the Future of Interactive Gambling in the Internal Market’, *European Law Review*, 33(2), 2008, 211-229.

explained how ‘regulatory transparency’ could and should be utilised so to ensure that monopoly providers are regulated in a manner which is consistent with the objectives which underpin their position in the market and ultimately exclude other operators from gaining access thereto.

The continued prevalence of monopolies is a reflection of the deference maintained to the regulatory preferences of Member States. Nevertheless, this does not mean that such monopolies operate outside of the internal market, on some sort of elevated pedestal far removed from developments in Union law. Such monopolies only remain in existence to the extent that the restrictive measures underpinning them are proportionate to the objectives which the overarching regulatory architecture seeks to achieve. Should a monopolist not be regulated so as to give effect to these objectives, then to what extent can that particular monopoly system be considered as suitable and necessary for attaining the given regulatory objectives? Can that very same Member State convincingly seek to rely upon these aims so as to keep operators legally established and regulated in other Member States out of their market? Given the regulatory opacity in this field it is often difficult to ascertain whether a monopolist is in fact being regulated in such a manner, i.e. that the monopoly actually conforms with the objectives of the regime giving rise to its existence. If such regulation is not ‘consistent and systematic’ with the regulatory objectives then arguably the monopoly regime is not fit for purpose, and the monopoly cannot be considered to be a proportionate means to uphold the given objectives. Thought of this way, Union law keeps the national regulator in check, ensuring that the monopolist is regulated in line with national objectives. Should the opposite be concluded then the monopoly could be argued as being incompatible with Union law. Consequently, either the regulatory regime should be reformed so as to bring the monopolist into line with national law or the regulatory regime is amended, perhaps admitting one or more cross-border suppliers.

This is all rather theoretical however in the face of transparency being absent from the regulation of most monopoly providers; it is hard to ascertain with any degree of certainty how such providers are actually being regulated. Thus, this article aims to show how transparency has a role to play in all gambling markets, not only to ensure non-discriminatory market access where licences or concessions are awarded, but to show that the exclusion of market access is also in line with Union law. In essence it suggests that it is in the interest of Member States which favour monopolies as a means of supplying gambling services that regulatory transparency is in their interest. Ultimately such regulators would be enabled to show ab initio that regulation of that monopolist is in conformity with Union law. Such an

approach is less farfetched when the decision of the Court in *Betfair* is taken into account. The licence upon which an exclusive rights holder provides gambling services need not be subject to the obligation of transparency where a public operator is subject to ‘direct State supervision’ or where the private operator is subject to ‘strict control’.<sup>8</sup> This may appear contradictory to some parties, but without evidence based reasoning, the debate surround the regulation of gambling in the internal market will suffer, as it does in other aspects, such as questions relating to addiction.

In this respect this discussion can be distinguished from that pertaining to that surrounding monopolies and the application of competition law to such entities under former Article 106 TFEU. Member States to reserve exclusive rights to themselves of public bodies under their control in light of Article 345 TFEU.<sup>9</sup> Nevertheless the exercise of such exclusive rights does not earn an undertaking shelter from the forces of the internal market given the application of Article 106(1) TFEU.<sup>10</sup> It is not the objective of this paper to enter discussion on the relevance of this provision to the gambling sector, other than to note that the grant of such exclusive rights do not receive exclusive treatment in terms of justification within free movement law. Rather, those rights which constitute indistinctly applicable measures can only be justified on the basis of mandatory requirements as per *Mediawet I*.<sup>11</sup> Therefore, the justification of such restrictive measures in terms of restrictions to Article 56 TFEU draw upon the case-law which has been developed from *Schindler* onwards.<sup>12</sup> Consequently this particular avenue is not explored any further given that such justifications will draw upon the case-law will be discussed. Significantly however this very fact illustrates how regulatory transparency remains important in situations where an exclusive right has been granted to a monopolist and national authorities wish to rely upon Article 106(1) TFEU; transparency will be required to show that such restrictive measures are in fact justifiable.

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<sup>8</sup> *Betfair*, para. 59.

<sup>9</sup> Formerly Article 295 EC

<sup>10</sup> Formerly Article 86 EC. Article 106(2) TFEU provides Member States with a derogation provided that the undertaking in question provides a service of general economic interest. Advocate General Bot in his Opinion in *Liga Portuguesa* did not consider it necessary to consider whether the Portuguese monopoly operator in question, namely the Santa Casa di Misericórdia, provided such services, concentrating his analysis instead on the freedom to provide services. Opinion of Advocate General Bot delivered on 14 October 2008, paras. 219-223.

<sup>11</sup> Case C-353/89, *Commission v. the Netherlands*, [1991] ECR I-4069, where at para. 35 the Court held: “... in order to establish whether a Member State may exclude the provision of certain services from free competition, it is a matter of determining whether restrictions on the freedom to provide services thereby created can be justified on the grounds of restrictions to the general interest.”

<sup>12</sup> Littler, A., *Member States versus the European Union: The Regulation of Gambling*, (Leiden; Martinus Nijhoff Publishing, 2010).

This paper will be divided into the following five parts. Part I will provide a brief exposé of what is understood for the purposes of this paper by ‘regulatory transparency’. Part II discusses the regulatory competence which Member States currently enjoy, in terms of how the Court has established the margin of discretion enjoyed when regulating gambling and limits to the exercise of this discretion. Part III considers the case-law which has developed under the obligation of transparency umbrella and how this has migrated to encompass the award of licences and concessions in the gambling sector. Part IV considers regulatory opacity in gambling regulation and the national level, considering transparency in relation to regulatory objectives, the granting of market access and finally obligations, supervision and enforcement.

## **I. Regulatory Transparency**

Transparency will be understood from a broad perspective for the purposes of this paper. As already indicated the obligation of transparency developed by the Court in relation to the award of contracts and public service concessions falling outwith the scope of secondary legislation is one incarnation of transparency which is relevant for the regulation of gambling. However, the remit of this paper takes it beyond this single conception of transparency so as to encompass the entire regulatory process relating to gambling services to ensure the accountability of the regulatory system. Failing to do so entails that non-arbitrary standard setting or enforcement becomes impossible.<sup>13</sup> Moreover, requiring regulatory bodies to give reasons, to motivate their decisions, constitutes a means by which the persons to “keep an eye on the authorities’ activities and thereby to ensure that a given administrative decision is not defective”.<sup>14</sup> Following Jordana and Levi-Faur two of five dimensions fundamental to accountability and transparency of regulatory systems thread through this paper, namely; the transparency of the rules to be followed and the accountability and transparency of regulating actors.<sup>15</sup> As will become evident regulatory systems differ not only in terms of the transparency of rules which suppliers must abide by but also whether the assessment process is transparent. Whilst this form of transparency is important, the principal focus of

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<sup>13</sup> Jordana, J. & Levi-Faur, D., *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, Edward Elgar, 2004), p. 127.

<sup>14</sup> Vesterdorf, B., ‘Transparency – Not Just a Vogue Word’, 22 *Fordham International Law Journal* (1998-1999), 902, at p. 910.

<sup>15</sup> *Ibid.*, p. 128. The other three dimensions being the accountability and transparency of the decision-making process involved in the setting of rules and standards, the accountability and transparency of activities of regulated actors and of feedback processes.

accountability in this instance is not whether a particular operator can hold the regulator to account but whether regulatory practices are compatible with the requirements of EU law. The focus of accountability here reflects compatibility with the free movement provisions rather than processes to hold the regulator to account.

Yet, what in essence does transparency encapsulate? In response to the stock market crash of 1929 Louis Brandeis argued in relation to the lack of disclosure by companies as to their financial health that “publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.”<sup>16</sup> How does this process of disinfection occur? By reducing uncertainty through the provision of information for the recipient thereof.<sup>17</sup> Moreover transparency has been described as:

“... a measure of the degree to which the existence, content, or meaning of a law, regulation, action, process, or condition is ascertainable or understandable by a party with reason to be interested in that law, regulation, action, process, or condition.”<sup>18</sup>

As already hinted at by reference to licensing procedures transparency involves far more than merely enlightening the public as to the content of legislation but encompasses regulatory processes, such as the award of licences and concessions for gambling services. Not only does this facilitate holding the activities of regulatory authorities to account, in this instance in terms of their compatibility or otherwise with the requirements of European gambling related case-law, but it allows those authorities to signal to those who, outside of regulatory authority and in possession of less information than that authority, may otherwise view governmental action with “little more credence than the bids of a poker player might be viewed”.<sup>19</sup> Therefore transparency helps diminish public fears and thus reduce distrust between a government and the public.

There is no reason to limit the effects of such signalling to the national arena, given that in the international context transparency has been identified as a means to “induce Members to behave in a WTO-consistent manner” given that their legislation can be better

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<sup>16</sup> Brandeis, Louis D., *Other People's Money* (2<sup>nd</sup> ed., Federick A. Stockes Company, 1932, p. 92) as quoted in Graham, M., *Information as Risk Regulation: Lessons from Experience*, May 2001, Center for Business and Government, John F. Kennedy School of Government. Available at: <http://www.innovations.harvard.edu/showdoc.html?id=74>.

<sup>17</sup> Although the provision of information may give rise to further or other uncertainties which were not present prior to the provision of the first piece of information. Mock, W., ‘On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency’, *John Marshall Journal of Computer Law & Information Law*, 17, 1999, 1069, at p. 1072. Available on SSRN at: <http://ssrn.com/abstract=1027611>.

<sup>18</sup> *Ibid.*, p. 1082.

<sup>19</sup> *Ibid.*, p. 1091.



monitored by other Members.<sup>20</sup> This can also be expected to extend to “cover discrimination stemming from discretionary or arbitrary decisions made by regulatory authorities” such as regarding licence award procedures in the transnational setting of the internal market.<sup>21</sup> Thus signalling can be expected to reduce distrust by the regulatory peers of a gambling regulator, as well as undertakings established in other jurisdictions with an interest in entering a regulated market.

Information disclosure plays a role in reducing the likelihood of arbitrary decision making on the part of regulatory authorities. Without suggesting that regulators engage in corrupt practices observations made by Weil indicate how disclosure laws can counter corrupt practices do not lack relevance in the current context. Such laws seek to redress information asymmetry which “arises when potential users have inadequate information concerning the practices of those parties which have been delegated political or organizational authority.”<sup>22</sup> Given that gambling regulators, particularly when regulatory powers are vested within ministries which may have a direct interest in revenues generated by gambling operators within their Member State, greater disclosure of information, and thus transparency surrounding regulatory practice, will improve the perception of the state in terms of truly upholding public policy objectives rather than protecting its own vested interests. Thus transparency, even where corruption does not prevail is a means to build trust in vertical relationships between regulatory institutions and individuals.<sup>23</sup> Trust can also play an important role in horizontal relationships; those between regulatory authorities as suggested by Advocate General Mengozzi in his Opinions in *Carmen Media and Markus Stoß* and as will be subsequently shown for horizontal regulatory cooperation to be viable information pertaining to the regulation of this sector must be made available to other national regulators.<sup>24</sup>

Certain uses to which transparency is put go beyond the scope of this paper, and these uses concern the use of transparency by consumers as a tool to reach policy goals and instances where transparency dilutes informational asymmetries to enable greater

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<sup>20</sup> Delimatsis, P., *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford; Oxford University Press, 2007), p. 256.

<sup>21</sup> *Ibid.*

<sup>22</sup> Weil, D., *The Benefits and Costs of Transparency. A Model of Disclosure Regulation*, 2002. Available on SSRN at: <http://ssrn.com/abstract=316145>.

<sup>23</sup> Best, E., ‘Transparency and European Governance: Clearly Not a Simple Matter’, in Deckmyn, V. (ed.), *Increasing Transparency in the European Union?* (Maastricht, European Institute of Public Administration, 2002), p. 98.

<sup>24</sup> Opinion of Advocate General Mengozzi, in cases *Carmen Media Markus Stoß* and, both delivered on 3 March 2010.

participation of civil society. Firstly, transparency is used by regulators to encourage change in a particular field through requiring that suppliers disclose information relating to the goods or services. Through such disclosure governments seek to attain certain public policy goals, relying on the responses of users of goods or services and their behaviour in light of the disclosed information to create incentives for suppliers to change their behaviour.<sup>25</sup> Given the focus of this article on regulatory transparency the role that the provision of information by suppliers of gambling services to (potential) consumers will receive no attention.<sup>26</sup> Secondly relating to civil society transparency can be considered to go beyond merely informing consumers as to what decisions have been taken to understanding transparency as a two way street whereby public service providers respond to their users.<sup>27</sup> Whilst some providers of gambling services within the EU are publically owned, whether they can be considered as providing a public service is a moot point, and one which remains open for discussion in another forum.

## II. National Regulatory Competence

Gambling related case-law emanating from Luxembourg has staunchly defended the right of national authorities to regulate national markets in light of national concerns and policy preferences with relatively minimal regard required for regulatory regimes prevailing in other Member States. Given the lack of any applicable harmonisation in secondary legislation at the Union level this is hardly a novel stance, but rather it is the degree to which Member States need not pay attention to the regulatory activities of their neighbours which possibly irks those interests seeking to rely on the free movement of services and the freedom of establishment. Whilst Member States are “free to set the objectives of their policy on betting and gaming and, where appropriate, to define the level of protection sought”<sup>28</sup> “in accordance

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<sup>25</sup> Fung, A., Weil, D. Graham, M. Fagotto, E., *The Political Economy of Transparency: What makes disclosure policies effective?* 2004, which at p. 6 notes that transparency systems “rely on responses to new information by users and disclosers to create market or political incentives for change”. Available on SSRN at: <http://ssrn.com/abstract=766287>. See also Sunstein, C., ‘Informational Regulation and Informational Standing: Akins and Beyond’, 147 *University of Pennsylvania Law Review* (1998-1999), 613.

<sup>26</sup> For more information see Eggert, K., ‘Truth in Gaming: Toward Consumer Protection in the Gambling Industry’, *Maryland Law Review* 63(2), 2004, 217 and Littler, A., ‘Protecting Consumers of Gambling Services: Some Preliminary Thoughts on the Relationship with European Consumer Protection Law’, in Kenny, M. & Devenney, J. (eds.) *European Consumer Protection: Theory and Practice* (Cambridge; Cambridge University Press, forthcoming 2011).

<sup>27</sup> Stirton, L. & Lodge, M., ‘Transparency Mechanisms: Building Publicness into Public Services’, *Journal of Law and Society* 28(4), 2001, 471-489, p. 476.

<sup>28</sup> *Placanica*, para. 48.

with [their] own scale of values”<sup>29</sup> it is the relatively light touch of the Court in its application of the proportionality principle which by and large has done little to reign in the exercise of margin of discretion. Doukas and Anderson have noted how the Court has only been willing to declare as incompatible “manifestly discriminatory or disproportionate national measures”,<sup>30</sup> and whilst the Court did strike down the regulatory systems at the heart of the provision of sports-betting in Germany and casinos in Austria,<sup>31</sup> on many occasions its gambling specific case-law has played into the hands of the obfuscation provided by the often found veil of regulatory opacity. In reviewing the gambling related case-law which has arisen to date attention will firstly be directed towards those decisions which established and defined the margin of discretion before turning to those decisions concerned with how that discretion has been exercised. These latter cases will illustrate the need for regulatory transparency.

## **IIa. Establishing the Margin of Discretion**

The first case which pitted national gambling legislation against the freedom to provide services was that of *Schindler* in which tickets for a German lottery were posted to residents of the United Kingdom at time when large-scale lottery gambling was prohibited within the latter jurisdiction. The two Schindler brothers who mailed the tickets sought to establish that the prohibition in question was incompatible with the free movement of services. The High Court felt it necessary to inquire whether social policy reasons and the prevention of fraud constituted legitimate public policy and public morality considerations so as to justify restrictions.<sup>32</sup> Four grounds were enumerated by the Court of Justice which provided national authorities “a sufficient degree of latitude” to determine national gambling policy. Three of the four grounds could form the basis of a objective justification to restrict indistinctly applicable measures restricting the freedom to supply services, these being; firstly the moral, religious and cultural aspects of gambling; secondly, the high risk of crime and fraud and thirdly that gambling constitutes an incitement to spend which can entail damaging consequences for individuals and society. The fourth ground being that gambling generated revenues make significant contributions to the financing of benevolent or public interest activities, or at least that was the case of lotteries as discussed in *Schindler*. This degree of latitude was thus based upon what was deemed necessary to protect players, including

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<sup>29</sup> *Liga Portuguesa*, para. 57.

<sup>30</sup> Doukas, D., & Anderson, J., “Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded”, 27 *Yearbook of European Law* (Oxford; Oxford University Press, 2008), 237 et seq, at p. 253.

<sup>31</sup> Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, judgment of 8 September 2010, n.y.r. and Case C-64/08, *Ernst Engelmann*, judgment of 9 September 2010, n.y.r..

<sup>32</sup> *Schindler*, para. 12.

specific social and cultural features of the Member State so as to maintain order in society. As such, it permits national authorities the discretion to determine the design of the operation of gambling services and were necessary the eventual restriction of any such services.<sup>33</sup>

Next in line is the Court's decision in *Läärä* which in essence entails that the proportionality of a restrictive measure is tested only in relation to the regulatory regime in question.<sup>34</sup> Not only may Member States opt for different objectives and standards, but also for different systems of protection. Differences in the systems embodied by national regulation, i.e. monopoly versus licensing, "cannot affect the assessment of the need for, and the proportionality of, the provisions enacted".<sup>35</sup> This was strengthened in the far more recent decision from September 2010 in *Markus Stoß* where the Court noted that in the application of the proportionality principle that "it is in particular not necessary, ... that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue".<sup>36</sup> National regulatory autonomy, and thus the margin of discretion, is secured to a degree; an operator excluded from one domestic market which relies upon a monopolist to provide sports-betting services for example cannot rely upon the fact that in another Member State the same sector is supplied by an unlimited number of licence-holders. The application of the proportionality test in *Läärä* has been described as 'soft',<sup>37</sup> and the approach of the Court in terms of national regulatory discretion was repeated in the subsequent case of *Zenatti*.<sup>38</sup> However, the Court in *Zenatti* noted that national legislation must be "genuinely directed to realising the objectives which are capable of justifying it"; in this case the restriction of sports-betting to limit the harmful effects of this activity.<sup>39</sup> Consequently there needs to be a real connection between public interest grounds advanced by a Member State and the legislation relied upon, "formal justification on the grounds of public interest is no

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<sup>33</sup> *Ibid.*, para. 61.

<sup>34</sup> Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnanyhtäyää (Jyväskylän) and Suomen valtio (Finnish State)*, [1999] ECR I-6067.

<sup>35</sup> *Läärä*, para. 36.

<sup>36</sup> *Markus Stoß*, para. 80.

<sup>37</sup> Hörnle, J., 'National regulation of online gambling as a trade restriction', in Hörnle, J. & Zammit, B., *Cross-border Online Gambling Law and Policy* (Cheltenham; Edward Elgar, 2010), p. 146.

<sup>38</sup> *Zenatti* marked the first of several to arise out of the Italian regime for licensing sports-betting operations and also the power of the internet. Albeit here a bookmaker established and licensed in the United Kingdom relied upon data transmission centres established in Italy to act as an agent for the taking of bets from Italian residents. Communication between such centres and the bookmaker occurred via fax and the internet.

<sup>39</sup> *Zenatti*, paras. 37-8.

longer sufficient.”<sup>40</sup> Subsequently *Anomar* witnessed the reaffirmation of the Member States’ ability “in the context of the power of assessment” to determine the objectives of their regulatory regime, the means which they consider the most suited to achieving such objectives and to “establish rules for the operation and playing of games, which may be more or less strict”.<sup>41</sup>

However, *Gambelli* took the Member States to task with a more questioning approach in the line of that to which *Zenatti* bore witness. Whilst this did not diminish the national margin of competence to determine the objectives and standards of the national regulatory regime it nevertheless impacts the execution of it. As such it marks the beginning of the Court’s work in establishing parameters as to how Member States can exercise their margin of discretion, which is further developed in its post-*Liga Portuguesa* decisions. The innovative element of *Gambelli* being the introduction of a “hypocrisy test”<sup>42</sup> to ensure that objectives which the Member State seeks to rely upon to exclude operators from other Member States from entering the domestic market are actually employed vis-à-vis national providers. Factually, the situation giving rise to the preliminary reference reflected that of arising in *Zenatti*, however the referring court expressed concerns about whether the Italian state was practicing what it preached; were the objectives which were being relied upon to prevent operators based elsewhere from effectively relying upon the freedom to provide services embodied in Article 56 TFEU actually being applied against operators licensed within the Italian regime? The national court was concerned by “the considerable expansion of betting and gaming which the Italian State [was] pursuing at national level for the purpose of collecting taxation revenues”.<sup>43</sup> Such a factual account clearly contrasted with the requirement for a genuine diminution of gambling opportunities as derived from the Court in *Zenatti*.<sup>44</sup> Whilst preserving the existence of a sufficient margin of discretion to enable national authorities to determine what consumer protection and the preservation of public order require in light of moral, religious, and cultural factors as well as the harmful consequences of gambling,<sup>45</sup> the Court proceeded to tighten the noose around those authorities in terms of the

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<sup>40</sup> Hoekx, N., ‘*Placanica: Combating Criminality vs. Reducing Gambling Opportunities As Grounds for Justification in the ECJ’s Jurisprudence*’, in Spapens T., Littler, A. & Fijnaut, C. *Crime, Addiction and the Regulation of Gambling* (Leiden; Martinus Nijhoff Publishers, 2008), p. 73.

<sup>41</sup> Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português*, [2003] ECR I-8621, para. 87.

<sup>42</sup> De Koning, M. and van der Beek, J.C.M., ‘De Goksaga wederom vervolgd: De Lotto/Ladbrokes’, *Nederlands Tijdschrift voor Europees Recht*, 2005, no. 7/8, p. 185.

<sup>43</sup> *Gambelli*, para. 22.

<sup>44</sup> *Ibid.*, para. 62.

<sup>45</sup> *Ibid.*, para. 63.

execution of those requirements. Restrictions, justified by imperative requirements, with the aim of consumer protection and the prevention of fraud and incitement to squander of gambling must be suitable for achieving such objectives “inasmuch as they must serve to limit betting activities in a consistent and systematic manner”.<sup>46</sup> Therefore should a Member State incite and encourage participation in a particular form of gambling then the authorities of that State foreclose themselves from invoking public order concerns relating to the need to “reduce opportunities for betting” to justify restrictive measures.<sup>47</sup> As will become apparent in the subsequent narrative whilst the objectives of gambling regulation may be apparent the lack of regulatory transparency entails that it is frequently difficult to establish whether national authorities are indeed regulating national providers in a manner which is consistent and systematic with the objectives relied upon to exclude the cross-border movement of gambling services and service suppliers.

A preliminary reference giving rise to the *Placanica* decision marked the final instalment of the Italian sports-betting trilogy which marks a further small step in the demarcation of boundaries to the execution of the national margin of discretion. In contrast to the previous cases the Court split the objectives at hand, notably distinguishing between the objectives of reducing gambling opportunities and combating criminality.<sup>48</sup> It the second which deserves our attention, whereby the Court expounded on the notion that it may be desirable to expand a gambling sector in a controlled manner so as to draw players away from clandestine suppliers. Seemingly this may be achieved through providing authorised operators the opportunity to provide a reliable “but at the same time attractive, alternative to a prohibited activity”. Consequently authorised operators can offer an extensive range of games, advertise on a certain scale, and use new distribution techniques.<sup>49</sup> Not only is it rather unfortunate that the parameters of such activities are rather vague it is all the more regrettable from a regulatory transparency perspective that the Court did not offer any hint of guidance as to what level of clandestine activity would be required to trigger such a controlled expansion. Without the *ex ante* establishment of objective criteria for determining the point at which the size of the illegal gambling market within a Member State is sufficiently large so as to justify the expansion of gambling by authorised providers there is a danger that national authorities will over state the need for such expansion. Assuming that there is at least one authorised provider for the form of illegal gambling in question, is there a threshold at below which a

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<sup>46</sup> *Ibid.*, para. 67.

<sup>47</sup> *Ibid.*, para. 69.

<sup>48</sup> *Placanica*, para. 52.

<sup>49</sup> *Ibid.*, para. 55.

Member State can no longer rely upon the existence of illegal gambling to justify the expansion of the legal sector?<sup>50</sup> If there are just two illegal operators can a state monopolist legitimately expand its offer, without enforcement measures being taken against the said illegal operators? Furthermore, without a duty on national authorities to disclose the size of the illegal market and the evidence upon which they base their calculations, any expansion of the market given the lack of transparency as to the State's perception of the illegal market will be open to suspicion.<sup>51</sup> However, the lack of an evidence based approach should not come as a surprise to those familiar with the Court's case-law, it has also been noted there has been no call from the ECJ as to the need for evidence in terms of the potential health risks posed by gambling.<sup>52</sup> This is somewhat regrettable given the earlier signal of the Court in the *Lindman* case where the Court referred to the lack of evidence in the case file establishing a causal relationship between the risks that the Finnish government in the case was concerned about arising from the participation of Finns in lotteries organised in other Member States.<sup>53</sup> Intriguingly however, the Court did have an opportunity in *Placanica* to refer to the value of evidence in the context of combating crime given that in its observations in this case the Italian Government had "referred to a number of factual elements, including, notably, an investigation into the betting and gaming sector carried out by the Sixth Permanent Committee (Finance and the Treasury) of the Italian Senate."<sup>54</sup>

The next case of *Liga Portuguesa* focuses upon the ability of national authorities not to heed what fellow regulators in other Member States are doing. *Liga Portuguesa* is the first case to arise which did not draw upon any possible exercise of the freedom of establishment,

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<sup>50</sup> For example, a considerable proportion of what is considered by the authorities in the Netherlands to constitute illegal gambling is that of online poker; however no current licensed provider is permitted to offer this form of gambling. From the perspective of channelling demand into legal avenues expanding the quantity of gambling supplied by existing providers with their current range of gambling services would be futile. See Littler, A., 'Case Note C-258/08 Ladbrokes', *Tijdschrift voor Consumentenrecht en Handelspraktijken* 2010-5, 227-230. Arguably introducing a new form of (online) gambling is likely to lead to far more political discussion than marginally increasing the quantity which current providers are authorised to provide.

<sup>51</sup> In relation to a claim made by Spain that level gambling addiction in that Member State was at such a level so as to justify measures discriminatory treatment in granting of exemptions from taxation on the winnings of gambling services provided by non-profit public bodies and entities pursuing social or charitable objectives outside Spain, the Court noted:

"Spain has adduced no evidence capable of establishing that, in Spain, such an addiction has reached the point amongst the population at which it could be considered to constitute a danger to public health."

Case C-153/08, *European Commission v. Spain*, [2009] ECR I-9735, para. 40.

<sup>52</sup> Planzer, S., 'The ECJ on Gambling Addiction – Absence of an Evidence-Orientated Approach', 3 *European Journal of Risk Regulation* 2010, p. 289-295, at p. 292.

<sup>53</sup> This case concerned a discriminatory measure of Finnish taxation law which exempted winnings from games organised in Finland from income tax, but not winnings from equivalence activities elsewhere. Lindman, a Finnish resident won a prize in a Swedish lottery and was thus taxed in a manner which would not have arisen had she won in a Finnish lottery. See Case C-42/02, *Diana Elisabeth Lindman*, [2003] ECR I-13519, para. 26.

<sup>54</sup> *Placanica*, para. 56.

with the operator in question seeking to provide its services solely via the internet, without any recourse to agents or subsidiaries located within the Member State where the service was being received. Bwin, the private operator in question, supplied a range of gambling services to residents of Portugal on the basis of a licence issued by Gibraltar which conflicted with the monopoly enjoyed by Santa Casa for the provision of lotteries, lotto games and sports betting services. Bwin was subsequently fined for providing such services in contravention of Santa Casa's monopoly and during the course of an action for annulment of this decision, a preliminary question was referred to Luxembourg. Seemingly the Portuguese model was centred on the objective of combating crime and fraud, "specifically the protection of consumers of games of chance against fraud on the part of the operators".<sup>55</sup> Portugal had argued that the monopoly model was necessary because authorities of Member States lack the means of control over operators which are established in other Member States yet providing their gambling services via the internet as they have over operators established within their own territory. According to the Court the Portuguese authorities were entitled to pay no regard to the fact that Bwin was subject to statutory conditions and controls by the competent authorities of another State due to the Court's view that authorities in the operator's Member State of establishment are unable to assess "the professional qualities and integrity of operators".<sup>56</sup> In essence Portugal was thus entitled to conclude that regulation by other Member States failed to provide sufficient assurance that Portuguese residents were protected against the risks of crime and fraud in cross-border situations.

Whilst this is not the forum to consider how the Court subtly altered the question asked by the Portuguese court nor how the application of mutual recognition has no role to play in instances where monopoly regimes are otherwise deemed suitable and necessary means to achieve regulatory ends, it sets a precedent within which national authorities need not heed what is being done elsewhere. This is in contrast to the hint towards mutual recognition in *Gambelli* in relation to the imposition of criminal penalties on the data transmission centres which acted as intermediaries for the United Kingdom based bookmakers. Guidance to the national court was given to the effect that it would have to consider whether such penalties went beyond what was necessary to combat fraud "especially where the supplier of the services is subject in his Member State of establishment to a regulating entailing controls and penalties."<sup>57</sup> Equally the blanket exclusion of companies

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<sup>55</sup> *Liga Portuguesa*, para. 62.

<sup>56</sup> *Ibid.*, para. 69.

<sup>57</sup> *Gambelli*, para. 73.



quoted on the regulated markets of other Member States from the licence procedure “may be considered to be a measure which goes beyond what is necessary to check fraud” given that other means existed to check the probity of such potential suppliers rather than solely listing on the Italian stock exchange. This became clearer in *Placanica* where such exclusion was held to go beyond what was considered necessary to uphold the objective in question.<sup>58</sup> It can be readily appreciated that for conditional recognition of regulatory equivalence to work Member States would have to regulate in a transparent manner and ensure that information is available to be exchanged between regulatory authorities.<sup>59</sup>

### **IIb. Exercising the Margin of Discretion**

Subsequent case-law, in this section, will concentrate upon the operationalization of the consistency and systematic requirement from which the need for regulatory transparency emerges and becomes more transparent. In this regard the *Ladbrokes* decision will be discussed. The Court’s embrace of the obligation of transparency in its gambling case-law, the relevant cases shall be discussed following the overview of the growth of the obligation of transparency more generally in the following section entitled ‘Obligation of Transparency’.

Returning to the concept of consistent and systematic, as it refers to the execution of regulatory policies which seek to reduce opportunities for gambling, the decision of the Court in *Ladbrokes* provides a useful illustration of how greater information in the regulation of gambling is necessary. Whilst the subtle call in *Lindman* for evidence has never been at the forefront the Court’s decisions, the need for evidence has crept into the language of the Court with a dual dimension. In *Markus Stoß* the Court noted how a Member State could not be prevented from relying upon a restrictive measure which serves to attain a justifiable objective to the freedom to provide services “solely on the ground that that Member State is not able to produce studies service as a basis for the adoption of the legislation at issue”.<sup>60</sup> This would seem to suggest that national authorities are not under an EU obligation to provide information at the point at which they introduce restrictive measures. However *Ladbrokes* shows that for as long as national courts are called upon to review the compatibility of the execution of national policies with underpinning regulatory objectives, regulatory transparency should not be dismissed as an inconvenient irrelevance by those benefiting from

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<sup>58</sup> *Placanica*, para. 62.

<sup>59</sup> See further on this point Littler, A., ‘Gambling Regulation in the European Union: Recent Developments’, in Littler, A., Hoekx, N., Fijnaut, C. & Verbeke, A.-L., *In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling* (Leiden; Martinus Nijhoff, 2011), 15-74.

<sup>60</sup> See *Markus Stoß*, paras. 71-2. It will be interesting to learn what the Court considers “not able to” to constitute.

the current opaque regulatory approach.

The judgment in *Ladbrokes* arose following a preliminary question referred by the Hoge Raad during a protected legal battle between the incumbent monopolist for the provision of sports-betting services in the Netherlands and Ladbrokes. Ladbrokes was established in the United Kingdom and regulated pursuant to the regulatory regime which preceded that introduced by the Gambling Act 2005. Under domestic legislation the incumbent held the single licence available for the provision of such services and it had attained an injunction against Ladbrokes ordering that the provision of sports-betting services to residents of the Netherlands. Advice was sought to ascertain the compatibility of the Dutch regime, particularly given the dual objectives; the protection of consumers from addiction to gambling services and the prevention of fraud. Recalling firstly *Gambelli* restrictions limiting betting opportunities must do so in a consistent and systematic manner, whilst *Placanica* paved the way for authorities to engage in an expansionist policy in order to combat crime by channelling demand into legal avenues. Considered together the case-law appears in danger of self-contradiction, yet the judgement allows the Court to provide further guidance as to the nature of consistent and systematic restrictions. In so doing it calls upon the national court to assess evidence, which may not otherwise be in the public domain.

Responding to concerns that the expansionist policy may excessively incite and encourage participation guidance is given as to what the national court should consider so as to review whether expansion of supply is proportionate with the regulatory objectives. Firstly the national court must consider whether “unlawful gaming activities constitute a problem in the Netherlands” and whether the “expansion of authorised and regulated activities would be liable to solve the problem”.<sup>61</sup> Secondly, to justify an expansion of lawful gambling in the face of the objective of preventing excessive gambling, such an expansion can only be lawful if the “scale of unlawful activity is significant” and the measures adopted channel demand into lawful avenues.<sup>62</sup> The Court then notes that evidence presented by the incumbent that demand for gambling “particularly at the clandestine level” exists must be taken into consideration.<sup>63</sup> Two initial responses can thus be made; the Court places the national court in the position of the regulator. The national court must determine whether there is a problem and moreover whether this is ‘significant’. Furthermore it must assess whether substitution through an expansion of the legal supply would counter this. Secondly the national court is to

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<sup>61</sup> *Ladbrokes*, para. 29.

<sup>62</sup> *Ibid.*, para. 30.

<sup>63</sup> *Ibid.*, para. 31.

take evidence into consideration as to the scale of the alleged problem. Via the decision of the national court it will be interesting to see whether such evidentiary requirements can be met on the basis of information which is in the public domain, or will the national court have to pierce the veil of regulatory opacity to obtain this information? In this regard information upon which the regulatory authorities should be basing their decisions on will come to light.

In actual fact the Court refers to some evidence which it considers “may establish an intention on the part of the national authorities to narrowly circumscribe the expansion of games of chance”.<sup>64</sup> Of greater significance it then states that the national court must decide whether “the expansion of games of chance is being supervised effectively by the Netherlands authorities” in such a manner to reconcile the expansionist policy with that of protecting consumers against the dangers of gambling.<sup>65</sup> Here the Court is pointing towards the need for the actions of gambling regulatory authorities to be reviewed, which gains considerable currency *Betfair*. Where regulatory opacity prevails regulators would thus have a choice it seems; regulate in a transparent manner so as to minimise the risk of such discourse occurring before courts or to have their hands forced and for information to be disclosed in legal proceedings. As this review shows, whilst Member States may be able to arrange their deck of cards as they see fit, this does not entail that EU law does not have an interest in what happens ‘behind the scenes’ and therefore regulatory competence needs to be accompanied by regulatory transparency. It is time for national poker faces to be removed.

### **III. Obligation of Transparency**

The duty or obligation of transparency has evolved through the extension of transparency beyond secondary legislation concerning public procurement. Whilst it is not the purview of this contribution to assess whether this is desirable in terms of public procurement law, nor discuss every twist in the development of the case-law, the significance of this development for the gambling sector cannot be ignored and neither shall its main contours. Nevertheless a brief review of this field will be provided to enable an appreciation of the application of transparency in an integral part of the Court’s approach to the granting of authorisation for the provision of gambling services.

Since the 1970s secondary legislation has regulated public authorities in their procurement of works, goods and services with current legislation taking the form of two

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<sup>64</sup> *Ibid.*, para. 36.

<sup>65</sup> *Ibid.*, para. 37.

consolidating directives; one of a general nature applicable to public works, public supply contracts and public services contracts with the second applicable to specific sectors.<sup>66</sup> The Court considers that secondary legislation eliminates barriers to the free movement of services and to protect the interests of operators wishing to provide goods and services to public authorities in Member States other than the one in which they are established.<sup>67</sup> Indeed Recital 2 of Directive 2004/18/EC maintains this approach, nothing the need to respect the principles found within the Treaty and free movement principles, including “the principle of proportionality and the principle of transparency.” For contracts of a sufficiently high value detailed procedures abound, with the objective of ensuring that procurement at the Union level is open to competition. However, commentators in this field note how the Court has adopted a rule of reason through which established principles of Union law have been authenticated in their application to this field.<sup>68</sup> Such reasoning clearly resonates with the approach the Court has taken in the most recent cases concerning the award of licences, which belong to a wider class of arrangements which fall beyond the scope of secondary legislation. The case-law of the Court not only encompasses contracts but also ‘service concessions’ where consideration for the performance of the service is formed by the right to exploit the service rather than the operator receiving solely remuneration from the contracting authority. As noted in *Parking Brixen* such constructions are those where “the provider takes the risk of operating the services in question...”.<sup>69</sup> Spill-over of the principles embodied by secondary legislation to concessions outside of their scope first arose in *Telaustria* where the Court nevertheless held that the contracting entities in question were “bound to comply with the fundamental rules of the Treaty, in general and the principle of non-discrimination on the grounds of nationality, in particular”.<sup>70</sup> Even in the absence of any applicable directives the contracting authority is duty bound to ensure that there is a “degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.<sup>71</sup> Failure to hold a competition for the award of a services

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<sup>66</sup> Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L134/114 and Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L134/1 respectively.

<sup>67</sup> Case C-360/96, *Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV*, [1998] ECR I-6821, para. 41.

<sup>68</sup> Bovis, C.H., ‘Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making’, *Common Market Law Review*, 43 (2006), 461-495, p. 461.

<sup>69</sup> Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen und Stadtwerke Brixen AG*, [2005] ECR I-8585, para. 40.

<sup>70</sup> Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG*, [2000] ECR I-10745, para. 60.

<sup>71</sup> *Telaustria*, para. 62.

concession thus not only breaches Articles 49 and 56 TFEU, but also the principles of equal treatment, non-discrimination and transparency.<sup>72</sup> Consequently contracting authorities under the obligation of transparency are bound to open up an award procedure so that undertakings established within the internal market can bid for the concession in question should they be interested in doing so.<sup>73</sup> Only where there is an insufficient connection with the functioning of the internal market given “special circumstances” such as the “very modest financial interest at stake” so as to entail that the contract would not be of any interest to undertakings in other Member States may an authority not follow up on its obligation of transparency.<sup>74</sup>

Whilst *Gambelli* and *Placanica* hinted at the application of procurement legislation for gambling related licences, it took an infringement procedure of the European Commission to clarify the Court’s position on this matter, in *Commission v. Italy*.<sup>75</sup> Arising from the same legal quagmire as these two preliminary references the Commission’s procedure challenged Italy’s failure to invite any bids for the renewal of 329 licences for horse-race betting operations. Relying upon the classification of these licences as public services concessions as found in *Placanica* the Court referred to the obligation of transparency as a means to ensure that the principles of equal treatment and non-discrimination on the grounds of nationality are complied with.<sup>76</sup> Through failing to invite bids for the grant of these 329 licences the Italian authorities breached Articles 49 and 56 TFEU and in particular, the general principle of transparency and the obligation to ensure a sufficient degree of advertising through foreclosing the possibility of competition and review of the impartiality of the procurement procedures.<sup>77</sup>

Unfortunately there is little discussion upon the appropriateness of treating licences for betting services as public service concessions, given that in this decision the Court refers to the absence of any attempt by the Italian authorities to refute the classification of these licences as concessions and moves swiftly onwards.<sup>78</sup> *Placanica* itself reveals that Italy had unlawfully excluded operators established in other Member States from the tender procedure

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<sup>72</sup> *Parking Brixen*, para. 50.

<sup>73</sup> Case C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de’ Botti*, [2005] ECR I-7287, para. 21. There remains some uncertainty as to the extent of the obligations arising from the obligation of transparency. These are likely to rest somewhere between the duty to advertise the availability of the contract and a duty to hold an invitation to tender as if it were falling within the scope of public procurement legislation. See Neergaard, U., ‘Public Services Concessions and Related Concepts – The Increased Pressure from Community Law on Member States’ Use of Concessions’, *Public Procurement Law Review*, 6 (2007), 387-409.

<sup>74</sup> *Ibid.*, para. 20.

<sup>75</sup> Case C-260/04, *European Commission v. Italy*, [2006] ECR I-7083.

<sup>76</sup> *Ibid.*, para. 24.

<sup>77</sup> *Ibid.*, para. 25.

<sup>78</sup> *Ibid.*, para. 20.

for the award of licences, although at no point was this explicitly discussed in terms of public service concessions as such.<sup>79</sup> Brown notes that the extension of fundamental elements of the procurement rules to arrangements which are “even f further removed from the straightforward contracts for pecuniary interest that were originally targeted by the Procurement Directives themselves”.<sup>80</sup> Nevertheless the Court clearly brings licences for the provision of gambling services into the fold of the *Telaustria* line of reasoning. Boundaries have been placed around the obligation of transparency following *Telaustria*, and as such the obligation will not apply to situations where a licence is awarded in-house.<sup>81</sup> Such circumstances arise where a contracting authority must not be excluded from being able to exercise control over the concession holder in a manner “similar to that which it exercises over its own departments”.<sup>82</sup>

Following *Betfair* the Court is likely to be called to explore the application of these boundaries in relation to the award of gambling concessions, licences and other forms of market access given the nature of its decision in this case in which the application of this case-law has taken an interesting and possibly awkward turn. Ultimately the fly in the ointment will derive from questions of definition, concerning whether the requisite conditions have been met to avoid a competitive tendering procedure for the award of an exclusive licence. Purely from a transparency point of view however this somewhat paradoxical decision could act as a catalyst for enhanced regulatory transparency in the sector. *Betfair* concerns the exclusion of the United Kingdom based operator from the Dutch sports-betting and horserace betting markets and the refusal of the competent Dutch authorities to provide it with authorisation to enter the domestic market.<sup>83</sup> Following the refusal of its request for a licence for each of these two market sectors, Betfair was prohibited from providing its services to residents of the Netherlands. Subsequently the licences held by the incumbents were renewed and Betfair challenged this, alleging that under the case of *Commission v. Italy* the Netherlands had failed to respect the principle of transparency. In this decision the Court extended the approach taken in relation to service concession contracts as discussed above to

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<sup>79</sup> *Placanica*, paras. 59-64. Reference is made to ‘tender procedures’ and that, as found in *Gambelli*, the blanket exclusion of operators established in other Member States from such procedures constitutes a restriction on the freedom of establishment.

<sup>80</sup> Brown, A., ‘The Obligation to Advertise Betting Shop Licences Under the EC Principle of Transparency: Case C-260/04 *Commission v Italy*’, *Public Procurement Law Review*, 1 (2008), 1-7, p. 3.

<sup>81</sup> Case C-107/98, *Teckal Srl v. Commune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I-8121, para. 50.

<sup>82</sup> Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1, para. 49.

<sup>83</sup> Both of these forms of gambling are supplied pursuant by a different monopolist.

the single licences at stake in the two respective and legally distinct gambling sectors. Article 56 TFEU applies in the same manner in terms of the principles of equal treatment and the obligation of transparency to ‘administrative licences’ such as those in question as it does to concessions. Moreover the Court held that “the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator”.<sup>84</sup> Here the Court took a functional approach, noting that effects of such licences “on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession agreement”.<sup>85</sup> The Court then proceeded to note how the award of such licences must be based on objective, non-discriminatory criteria known in advance, so as to prevent the arbitrary exercise of discretion on the part of the awarding authority.<sup>86</sup> Consequently the need for a ‘sufficient degree of advertising’ extends to this administrative form of licensing,<sup>87</sup> and therefore according to the Court in *Carmen Media* the pursuance of legitimate objectives “cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law”.<sup>88</sup> The *Betfair* approach thus far was emboldened by the response of the Court the award of concessions for the operation of casinos in Austria, a process which wholly negated the obligation of transparency.<sup>89</sup> The Court considered that the obligation of transparency to be a pre-condition which Member States must satisfy so as to be able to award licences, once again on an effects based approach considering the impact on undertakings established in other Member States which could be potential bidders. A total absence of transparency can be nothing other than an infringement of the Articles 49 and 56 TFEU.<sup>90</sup>

Considering the regulatory opacity in many Member States at the award of an exclusive right, this aspect of transparency marks a huge step forward in terms of gambling regulation. As such it has the potential to make significant inroads into ensuring that Member States respect the freedom to provide services in the execution of their policy and regulatory preferences determined at the national level. Such potential is all the more increased given

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<sup>84</sup> *Betfair*, para. 47.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, para. 50.

<sup>87</sup> *Ibid.*, para. 51.

<sup>88</sup> *Carmen Media*, para. 86.

<sup>89</sup> *Engelmann*.

<sup>90</sup> *Ibid.*, paras. 53 and 56.

that the same concerns arise, and the obligation of transparency equally arises, when a licence is being renewed as opposed to awarded for the first time.<sup>91</sup>

Thus far the narrative reads strongly in favour of those seeking a strong reliance on free movement principles in the face of the denial of unconditional recognition; where licences are in place operators established within the internal market should have equal access to and equal treatment within the licensing procedure. Hopes of such a utopia for private operators is dashed however by the Court's response to claims by the Dutch government that the system of exclusive licences embodied in national legislation constitutes appropriate and proportionate restrictions of free movement. The Court proceeds to note that the obligation of transparency need not apply to the award or renewal of a single licence if that licence is awarded to "a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities".<sup>92</sup>

It can readily be anticipated that discourse will arise as to what constitutes 'direct State supervision' and 'strict control by the public authorities', and probably the Court has done itself no favours if it wishes to reduce the tirade of gambling related preliminary references. Indeed, will this reference to public operators tally with the notion of in-house contracting as developed in public procurement legislation?<sup>93</sup> National courts will become the battlefields in the defining these concepts. Whilst the margin of discretion which Member States enjoy has not been diminished, their regulatory track record will now be viewed against the light of day. Paradoxically, through providing a safe haven for Member States to avoid the duty of transparency those very authorities will have to regulate in a transparent manner to prove that the duty does not apply to them.

Lacking any real degree of regulatory transparency many challengers to claims that an avoidance of the obligation of transparency is justifiable will find themselves against a veil of regulatory opacity which will be described further below. To ensure that Member States cannot hide behind the language of the Court's case-law, and thus to uphold the effective and full application of the free movement principles, the need for regulatory transparency has never been more apparent.

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<sup>91</sup> *Betfair*, paras. 54-5.

<sup>92</sup> *Ibid.*, para. 59. Furthermore from a broader perspective, it is unclear whether this approach will remain limited to the gambling sector and thus to what extent it will mark a break from established case-law surrounding the obligation of transparency in other areas of economic activity.

<sup>93</sup> See *Teckal* as referred to above.



#### **IV. Regulatory Opacity and Gambling Regulation**

Various approaches to regulating gambling are found throughout the Member States, not only in terms of objectives and standards, but also in relation to the regulatory machinery which is employed and the subsequent degree of transparency which prevails. Although it is beyond the scope and capacity of this section to detail the institutional mechanisms applicable to all forms of gambling across the twenty-seven Member States it is nonetheless important to appreciate the nature of the regulatory opacity which often prevails. Regulatory opacity as such is not unique to gambling services, but a feature of services regulation in general given regulatory intensity and complexity, combined with the lack of transparency which characterises the regulation of many service sectors.<sup>94</sup>

Four elements of regulatory transparency will form the backbone of this brief overview. Firstly, what are the regulatory objectives which apply to the sector and thus possibly will form the basis of objective justifications to justify restrictive measures? Secondly, who acts as gatekeeper to the market and how is market access provided? Thirdly, once access has been provided to an operator, what are the obligations which licence holders must uphold and how is compliance assessed? This is closely related to the fourth point concerning supervision and enforcement mechanisms which are used in relation to such suppliers. The third and fourth points will be considered together. Through this division it is hoped that the lack of transparency which can prevail will become more evident.

##### **IVa. Regulatory Objectives**

Given that the restriction of gambling services must be consistent and systematic with the objectives of the given regulatory regime the need for such objectives to be known is indisputable. Whilst it is unthinkable that gambling legislation would be enacted without any indication as to the objectives sought, Member States differ in terms of the degree of detail and whether objectives vary as between sectors. Broad objectives encompassing the entire national market will permit regulatory authorities greater discretion within their regulatory activities, and in the absence of a statement of regulatory intent and regulatory transparency, such discretion could easily slide towards arbitrariness.

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<sup>94</sup> Delimatsis, p. 66-76.

Turning to the United Kingdom the Gambling Act 2005 provides three over-arching objectives which run through the entirety of the regulatory regime.<sup>95</sup> These so-called licensing objectives are frequently referred to throughout regulatory materials and the work of the relevant national authority, the Gambling Commission. To all who have a cursory interest in the regulation of commercial gambling in the United Kingdom it is thus readily apparent that these objectives are:

- “(a) preventing gambling from being a source of crime or disorder, being associated with crime or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.”<sup>96</sup>

Whilst such objectives may appear broad in nature they are mitigated in part by the mandate of the Gambling Commission which is to “permit gambling, in so far as [it] thinks it reasonably consistent with pursuit of the licensing objectives”.<sup>97</sup> Again broad in nature, the conclusion of the combination of ‘in so far as’ with the licensing objectives is to be found within the licence conditions and codes of practice which are attached to the operating licences which suppliers of gambling services must obtain. A wide multitude of operating licences is available, and these include for example a “casino operating licence”, a “general betting operating licence” and “remote gambling licence”.<sup>98</sup> All operators must adhere to the generally applicable *Licence Conditions and Codes of Practice* in addition to that applicable to the specific category of operating licence, such as the *Conditions and Codes of Practice applicable to Non-remote Casino Licences*.<sup>99</sup> These conditions will be returned to in

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<sup>95</sup> Accurately speaking the vast majority of the provisions of the Gambling Act 2005, pursuant to s. 361 only apply to England and Wales and Scotland, and not to Northern Ireland. However, given that legislation applicable to the National Lottery applies to the entirety of the United Kingdom and not just Great Britain, and that it is the United Kingdom which is a member of the European Union, reference will only be made to the United Kingdom for the sake of simplicity.

<sup>96</sup> Gambling Act 2005, s.1. The National Lottery is operated on the basis of different objectives which are found within s. 4(1) of the National Lottery Act 1993 and require that the National Lottery is run “with all due propriety” and “that the interests of every participant in a lottery that forms part of the National Lottery are protected.”

<sup>97</sup> Gambling Act 2005, s.22.

<sup>98</sup> Holding such a licence is not sufficient to enter the gambling market; ‘personal licences’ issued pursuant to section 80 of the Gambling Act permit the Gambling Commission to regulate who may offer gambling services and ‘premises licences’ regulate the location of premise based gambling services, pursuant to Part 8 of the Act. Licence categories are found in s. 65(2) and s.67 of the Gambling Act 2005.

<sup>99</sup> Gambling Commission, *Licence Conditions and Codes of Practice*, October 2008, available at: <http://www.gamblingcommission.gov.uk/pdf/LCCP%20-%20Oct%202008.pdf> and the *Conditions and Codes of Practice applicable to Non-remote Casino Licences*, December 2008, available at: <http://www.gamblingcommission.gov.uk/pdf/Licence%20conditions%20and%20codes%20of%20practice%2009%20casino%20-%20December%202008.pdf>.

‘Obligations, Supervision and Enforcement’ as examples of providing guidance to operators as to what is expected of them, and thus in turn, the requirements against which they will be assessed in their compliance with the regulatory requirements and ultimately the regulatory objectives.

In contrast the specific enunciation of regulatory objectives given in primary domestic legislation in the United Kingdom, the principal piece of law in the Netherlands is somewhat hazy in comparison. Within the ‘general conditions’ of the Wet op de Kansspelen of 1964 (hereinafter WoK) no general objectives are given. Reports from the Minister of Justice to the Tweede Kamer, the lower chamber of parliament, have shown the objectives to be:

“the regulation and control of gambling, with particular attention for combating gambling addiction, the protection of the consumer and combating illegality and criminality.”<sup>100</sup>

Additionally, the decisions of the Court in *Betfair* and *Ladbrokes* reflect the lack of specific regulatory objectives. Whilst under the heading ‘national legal context’ of the Court’s report it is clear that the supply of gambling is based on exclusive licences for the sectors concerned, and that certain conditions are attached to these licences. However no reference is made to regulatory objectives which are subsequently found in the decision of the Court due to an absence of a provision explicitly setting out such objectives. In *Ladbrokes* the Court states that “the wording of the first question put by the referring court shows that the objectives of the WoK are clearly identified by that court, namely protection of consumers by the curbing of addiction to games of chance and the prevention of fraud”.<sup>101</sup> Indeed, the question notes that the restrictive gambling policy “in fact contributes to the achievement of objectives.... namely the curbing of gambling addiction and the prevention of fraud.”<sup>102</sup> Similarly the national court in *Betfair* came to the same conclusion as to the objectives of the national legislation.<sup>103</sup>

Reference to the decision of the Hoge Raad, when it decided to refer the preliminary question to Luxembourg in *Ladbrokes*, reveals that in finding the objectives of the WoK are not explicitly expressed in the legislation itself. Whilst finding the licensing requirement embodied in Article 1a suitable for upholding such objectives, the Court does not point to any single provision regarding the objectives of the regime. Rather, it describes aspects of the Act

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<sup>100</sup> Derde voortgangsrapportage kansspelbeleid, *Kammerstukken II*, 2004/05, 24 557 nr. 47, p. 2.

<sup>101</sup> *Ladbrokes*, para. 23.

<sup>102</sup> *Ibid.*, para. 13.

<sup>103</sup> *Betfair*, para. 30; “... the national court found that the objectives – of ensuring the protection of consumers and combating both crime and gambling addiction – underpinning the system of exclusive licences provided for by the WoK...”.

in a general nature and refers to parliamentary proceedings, such as that referred to above.<sup>104</sup>

Interestingly, the European Commission in its infringement procedure against the Netherlands regarding restrictions to the freedom to provide services in the sports-betting sector, listed the generation of revenue for the general good as one of the objectives of the Dutch regulatory regime.<sup>105</sup> Of course, such a justification cannot support a restrictive measure, but this reading by the Commission is not wholly unfounded. In vesting in the Minister of Justice and the Minister for Welfare, Public Health and Culture the right to grant an exclusive licence the WoK states that such sports related prize competitions are to be organised in the “interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.”<sup>106</sup> The Commission’s claim was rejected by the Dutch government, which considers that the generation of revenue is merely a side-effect of the provision of gambling services.<sup>107</sup> Whilst the Dutch legislation is not unique in referring to the generation of revenue as an objective, it does not offer any explicit parameters to this objective vis-à-vis others contained within the legislation.<sup>108</sup> This contrasts with the regulation of the National Lottery in the United Kingdom.<sup>109</sup>

To be clear, this is not a criticism of the objectives, but rather the lack of overt transparency surrounding their definition and the relationship between different objectives where multiple objectives are given. Arguably if the regulatory objectives were truly transparent it would not be required for a court decision to make them apparent. Indeed, substantive provisions allow conclusions to be drawn as to what the Dutch legislation seeks to achieve. Yet this is not the same as an explicit statement of objectives which govern the regulatory regime.

Lacking any overall objectives in such primary legislation permits changes to be made without recourse to the legislative process. Originally casinos were introduced to improve the attractiveness of the Netherlands to tourists whereas currently the casino monopolist is seen as

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<sup>104</sup> Hoge Raad, *Ladbroke’s/De Nationale Sporttotalisator*, LJN BC8970, 13 June 2009, para. 4.13.

<sup>105</sup> Afschrift van het door de Commissie van de Europese Gemeenschappen uitgebrachte advies over de Wet op de kansspelen, Tweede Kamer 24 557, 98, para. 34 (Reasoned Opinion of the European Commission of February 2008).

<sup>106</sup> Article 16 of the WoK.

<sup>107</sup> Kabinetsreactie op het advies van de Commissie van de Europese Gemeenschappen over de Wet op de kansspelen, Tweede Kamer, 24 557, nr. 98, p. 12-3.

<sup>108</sup> Similar references are made with regards to other exclusive licences such as that for the provision of an instant lottery under Article 14b, lotto under Article 27b

<sup>109</sup> s. 4(2) National Lottery Act 1993.

an instrument to channel demand for casino gambling into a legal controlled environment.<sup>110</sup> Equally De Lotto was originally introduced to capture revenues lost to lotto games organised in Germany and to aid De Lotto's viability given that in 1971 when lotto was introduced De Lotto was authorised to offer only sports-betting services. To what extent do these purposes fit with the objectives which are currently used to define the purpose of the WoK? The legislation may be ripe for reform,<sup>111</sup> and whilst this paper is not the appropriate forum to tackle this issue, the very fact that such objectives are absent from the primary piece of Dutch gambling legislation only serves to show the need for transparency in this sector. As these examples indicate the legislation has proved to be malleable for the government of the day, therefore how should those called upon to assess whether measures enacted pursuant to it are in fact consistent and systematic?

#### **IVb. Granting Market Access**

Market access, in terms of the award of licences or other forms of authorisation, frequently occurs either through ministerial discretion or via the authority vested in an independent regulatory authority. As witnessed above, the award of licences for betting in the Netherlands follows the former approach with there being no systematic process for potential new operators to gain access to the licensing procedure as the existing licence of an incumbent nears its expiry date.<sup>112</sup> Similarly, as became evident in *Engelmann* the organisation of casino gambling in Austria relies upon ministerial discretion in granting market access; an administrative order in 1991 granted one undertaking a number of concessions for the operation of casinos for a maximum period of 15 years. When a portion of those concessions were renewed in 1998, and another portion in 2001, no tender procedure was utilised. Likewise, the granting of authorisation for casino operators in France rests with the Ministry of the Interior upon advice of the Commission supérieure des Jeux. The modus operandi of the commission has led to considerable criticism, in part surrounding the lack of transparency of the advice it provides to the Ministry of the Interior.<sup>113</sup> There is no duty for the reasons

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<sup>110</sup> van 't Veer, A., Moerland, H., & Fijnaut C., *Gokken in drievoud. Facetten van deelname, aanbod en regulering* (Arnhem; Gouda Quint, 1993), p. 209.

<sup>111</sup> New draft legislation was introduced in 2007, *Regels inzake kansspelen (Wet op de Kansspelen 200\*)* which was rejected by the upper house, Stemming over het wetsvoorstel 'Wijziging van de Wet op de kansspelen houdende tijdelijk bepalingen met betrekking via internet (30362), *Kamerstukken I*, 25-1040, 1 April 2008. Subsequently a bill has been introduced to establish an independent gambling authority whereas there has been no further attempt at the time of writing to introduce new legislation on substantive matters.

<sup>112</sup> *Betfair*, paras. 15-8.

<sup>113</sup> Trucy, F., *L'évolution des jeux de hasard et d'argent*. Rapport d'information no. 58 (2006-2007) d u 7 novembre 2006, fait au nom de la Commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation, p. 273.

behind negative advice to be published, and thus depriving would be market operators, within and beyond France, from valuable information concerning their application and thus indirectly the assessment process.

Other Member States however rely upon a more open and transparent market access mechanisms, such as that embodied by the Gambling Act 2005 in the United Kingdom.<sup>114</sup> Apart from casinos for which there is an upper limit of on the number large and small casinos for which licences can be awarded,<sup>115</sup> the total number of operating and where appropriate premise, licences is only limited by the discretion of the Gambling Commission in giving effect to the licensing objectives.<sup>116</sup> Absent of any limited number of licences there is no danger of the market being foreclosed because the single or one of a few licences has been awarded. The Gambling Commission regulates the entry of suppliers to the market, both domestic and those established elsewhere through the operating licence, the forms for which are readily available on the Gambling Commission's website. Guidance notes stipulate what the Commission "expects from applicants for licences" whilst detailing the factors against which an application will be processed.<sup>117</sup> These include the identity and ownership of the undertaking, the integrity of the applicant, their competence and any criminal record. In contrast with other regulatory regimes the publication of the grounds upon which the Commission exercises its discretion are to be welcomed, as is the indication given in the Commission's policy statement concerning, in part, how it will exercise its discretion in licensing matters.<sup>118</sup> This policy statement provides some insight into how the Commission will consider the aforementioned factors and moreover indicates that the Commission will inform an applicant of the decision. Should an application be refused then "the licence applicant will be given the opportunity to make representations before that decision is finalised".<sup>119</sup> In the case it is necessary, appeals can be lodged before the Gambling Appeal Tribunal. Whilst it remains beyond the scope of this section to also consider the manner in

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<sup>114</sup> This section does not pertain to the tender procedure undertaken by the National Lottery Commission to award to the licence for operation of the nationwide National Lottery.

<sup>115</sup> See S.I. 1327/2008 *The Gambling (Geographical Distribution of Large and Small Casino Premises Licences) Order 2008*.

<sup>116</sup> It should be noted for the sake of completeness that premise licences are awarded by the relevant local licensing authority for particular location concerned, under guidance issued by the Gambling Commission.

<sup>117</sup> Gambling Commission, *Operating Licence Application Forms: Guidance Notes*, July 2010, available at: <http://www.gamblingcommission.gov.uk/pdf/Operating%20licence%20application%20forms%20Guidance%20notes%20-%20July%202010.pdf>

<sup>118</sup> Gambling Commission, *Licensing, compliance and enforcement policy statement*, September 2009, available at <http://www.gamblingcommission.gov.uk/pdf/Licensing%20compliance%20and%20enforcement%20policy%20statement%20-%20September%202009.pdf> .

<sup>119</sup> *Ibid.*, para. 3.40.

which local licensing authorities consider applications for premises licences this particular aspect of the Gambling Commission's work marks a considerable contrast to the opaque nature of the mechanisms referred to in relation to Austria, France and the Netherlands.

#### **IVc. Obligations, Supervision and Enforcement**

Once market access has been granted, presumably an operator will have conditions which it has to abide by. Where such conditions are designed to give effect to restrictions to the free movement principles it is imperative that compliance with those conditions is effectively enforced. In the absence of such enforcement it could be argued that the regulation of the supplier is not aligned with the regulatory objectives which are used to restrict the entry of services and suppliers in other Member States. Indeed, the Court has guided the national court in *Ladbroke's* to consider whether there is effective supervision of the operator concerned regarding the expansion of new games in terms of advertising and the creation of new games so as to "reconcile appropriately the simultaneous achievement of the objectives pursued by the national legislation".<sup>120</sup> The other objective being the protection of consumers against excessive gambling.

Working through *Ladbroke's* it becomes evident that information is needed as to the conditions which uphold these objectives and the enforcement by the relevant ministerial bodies of those conditions. The WoK vests in the Ministers the competence to set conditions relating the provision of sports-betting services, which are spelt out in detail in the licence awarded to the operator. Little detail is provided in relation to sports-betting with broad references to the 'total number of contests'.<sup>121</sup> Similarly, the same approach is taken in relation to the totalisator for horserace betting, which refers for example to the maximum number of races and the maximum bet per person.<sup>122</sup> Such details are only given greater body once the licence has been awarded, for example the current authorisation for the provision of sport-betting provides for a maximum of 400 contests per year, with no bet being greater than €22,69 and maximum limits on the amounts individual players can lose per week.<sup>123</sup> Such operating conditions are thus only known once the licence has been awarded given that they are contained within the licence. This contrasts to those which are contained within the licence conditions and codes of practice pursuant to the Gambling Act 2005.

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<sup>120</sup> *Ladbroke's*, para. 37.

<sup>121</sup> Article 21.2 WoK.

<sup>122</sup> Article 25.2 WoK.

<sup>123</sup> Beschikking van de Minister van Justitie van 14 januari 2010, nr. 5637097/10/DSP, houdende verlening van een vergunning tot het organiseren van sportprijsvragen, lotto en cijferspel.

As the following example illustrates in relation to sports-betting, the British regime places greater emphasis on the discretion of the operator. Rather than describing limits as to amounts which can be staked, the conditions attached to general betting operating licences require that an operator who offers credit to member of the public “set a maximum credit limit for each customer”.<sup>124</sup> Clearly this offers a different level of protection than setting a ceiling which above which no more losses can be sustained by a customer; but differences in national levels of protection are not of relevance in this instance. On the contrary, the transparency of conditions which operators must abide by in question, and as such this condition and many others are made available in advance of the granting of licence in contrast with the situation in the Netherlands.

Once an operator is installed, it is pertinent that there are supervisory and enforcement mechanisms in place, and once again this is an area lacking in transparency as to the functioning of such processes. Whilst the Minister of Justice in the Netherlands awards authorisation for gambling services in cooperation with another Minister depending on the sector for which authorisation is granted, advice is provided by the College van Toezicht as to whether authorisation should in fact be awarded, and subsequently whether it should be modified or repealed.<sup>125</sup> What is of real interest is the role of this body in supervising the licence holders to ensure that they abide by the conditions and contained within the law, and their statues and rules. Although the College van Toezicht has been described as a “toothless watchdog”,<sup>126</sup> and will be replaced by an independent authority, the supervisory mechanism which it embodies remains of interest.<sup>127</sup> Remaining with the sports-betting sector, the annual reports of the College van Toezicht indicate that deliberations occurred within the supervisory body examining possible breaches by the incumbent operator of the conditions to which it must adhere.<sup>128</sup> Only the decision is given, with some limited reasoning given but the actual parameters used by the members of the College van Toezicht remain invisible. Ultimately however the decision of whether any enforcement measures should be taken rest with the

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<sup>124</sup> Gambling Commission, *Conditions and Codes of Practice applicable to: Non-remote General Betting Licences, Non-remote Pool Betting Licences, Non-remote Betting Intermediary Licences*, December 2008, available at <http://www.gamblingcommission.gov.uk/pdf/Licence%20conditions%20and%20codes%20of%20practice%2009%20betting%20-%20December%202008.pdf>.

<sup>125</sup> Article 34(1) WoK

<sup>126</sup> Huls, N., ‘Dutch Gambling Law and Policy: An Untenable Parochial Approach’, in Littler, A. & Fijnaut, C., (eds.), *The Regulation of Gambling: European and National Perspectives* (Leiden; Martinus Nijhoff, 2007) , p. 72.

<sup>127</sup> See note 111.

<sup>128</sup> Under the headings ‘regulatory compliance’(naleving regelgeving) and ‘complaints’(klachten), as found in the *Jaarverglagen* of 2005, 2006, 2007, 2008 and 2009.



Ministry of Justice and yet in terms of transparency this process remains something of a black box.

In contrast the Gambling Commission the United Kingdom offers some insight into how it supervises and enforces licensees with reference once again being made to its *Licensing, compliance and enforcement policy statement*. Under the headings of ‘compliance’, ‘regulatory enforcement’ and ‘investigation and prosecution of offences under the Gambling Act 2005’ the Gambling Commission sets out the nature of its supervisory and enforcement activities and how it seeks to execute these tasks. For example, when carrying out compliance assessments and visits the Commission states that it will “explain what information is required, and why, to ensure requests are appropriate, proportionate... and enable the relevant person to comply fully with the request”.<sup>129</sup> In relation to regulatory enforcement activities the Commission is empowered to conduct licence reviews through which it considers the performance of licence holders and the operation of licence conditions.<sup>130</sup> The policy statement establishes the framework by which the Commission is to adhere including the opportunity for discussion with the licence holder under review, how the Commission will assess suitability and whether licensed activities are being carried out in a manner inconsistent with the licensing objectives and the forms of action which the Commission is empowered to take. Although this policy statement may not be exhaustive in the points which it includes and does not shed light on how the Commission will assess whether licence holders are “honest and open” as part of the integrity assessment, it nevertheless goes some way to informing stakeholders of the review process.<sup>131</sup>

## V. Conclusion

Within the context of the General Agreement on Trade in Services it has been noted that “a requirement to disclose the objective of a regulation is implicit in any provision that requires that a domestic regulation be the least trade-restrictive means necessary to achieve a regulatory purpose”.<sup>132</sup> Arguably, this will apply in the context of the application of the consistent and systematic requirement as an element of the proportionality test under Article 56 TFEU. Moreover, given the nature of this requirement, and how the Court has

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<sup>129</sup> *Licensing, compliance and enforcement policy statement*, Section 4.9.

<sup>130</sup> *Ibid.*, Section 5.3.

<sup>131</sup> *Ibid.*, Section 5.32.

<sup>132</sup> Feketekuty, G., ‘Deepening Sectoral Disciplines for Services Regulation: How to Move Forward in the GATS’, in Sauvé, P. & Stern, R.M. (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington DC; Brookings Institution Press, 2000) p. 17.

subsequently operationalized the application of this concept first developed in *Gambelli* it would appear that this implicit requirement to disclose extends far deeper into the regulatory regime. As such transparency takes on a far greater life than suggested by the obligation of transparency in terms of awarding licences and concessions. Yet concurrently the margin of discretion to set regulatory objectives and standards has remained protected, thus showing how the need for regulatory transparency has crept into the regulation of national gambling markets as a means to keep a check on the exercise of the national regulatory competence in this field.

Furthermore although a pan-European gambling market based on unconditional mutual recognition has been dismissed by the Court, if it was ever a realistic prospect, does not mean that recognition of regulatory equivalence between regulatory regimes where monopolies do not prevail has been wholly foreclosed. The establishment of regulatory equivalence would require that regulatory authorities share information with each other regarding the objectives and mechanisms which form the basis of their regulatory regimes. Ultimately the case-law of the Court allows national regulatory authorities the capacity to share such information, and moreover political signals from Brussels recognise the importance of cooperation between regulatory authorities. Having noted that a need exists for Member States to “effectively regulate” gambling services the European Council recognises the need for regulatory authorities to “work more closely together”, with possible areas of cooperation including the sharing of information on gambling operators and the protection of consumers.<sup>133</sup> This is in addition to the Council having identified the allocation of gambling licences, where applicable, as a task of such authorities which should be undertaken in accordance with transparent criteria. Such political findings echo the judicial pressure which has emerged for transparency in the regulation of gambling.

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<sup>133</sup> Council of the European Union, *Conclusions on the framework for gambling and betting in the EU member states* 3057<sup>th</sup> Competitiveness (Internal Market, Industry, Research and Space) Council meeting, Brussels, 10 December 2010.