GUIDING PRINCIPLES CONCERNING THE COMPATIBILITY OF THE REGULATIONS FROM THE MEMBER STATES REGARDING THE ONLINE GAMBLING WITH THE PROVISIONS OF THE TREATY FOR THE FUNCTIONING OF THE EUROPEAN UNION

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Abstract: *The article presents the guiding principles concerning the compatibility of the regulations from the Member States regarding the online gambling with the provisions of the Treaty for the functioning of the European Union, taking into account the fact the online gambling market is the segment with the highest growth in the global market of online gambling with very large profit and the member states must protect its consumers and guarantee the full transparency and non discriminatory concurrence.*

Keywords: *Gambling, treaty, consumer, protection.*

1. Introduction

The online gambling internet sites have appeared in the mid 1990's opening a market whose considerable evolution[1] is accompanied by a growing concern of the Member States with respect to its regulation.

The diverse issues related to the internal market which derive from the rapid evolution of the offer of online gambling, both legal and unauthorized, addressed to the citizens of the EU[2], have determined the European Commission to enact on March 24th 2011 a document called "the Green Paper concerning online gambling in the internal market", with the purpose of launching an extended public debate with respect to all the relevant challenges related to this subject, especially the ones generated by the coexistence of different regulation models, given the high number of preliminary decisions of the EU Court of Justice in this field which proves the existence of a very fragmented internal market – in many member states there is a total contradiction, or an interdiction under the reserve of authorization, while in other states there is a fully opened and liberalized market. As mentioned in the Green Paper, the status of the regulation in the online gambling market is characterized by the fact that, in the year 2006, following a unanimous request from the Council and the European Parliament in the first lecture, the Commission has excluded the online gambling from the domain of its

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[1] The online gambling market is the segment with the highest growth rate of the gambling global market, which recorded in 2008 an annual income of more than 6,16 billion euro – for more details see http://ec.europa.eu/internal_market/services/gambling_en.htm

[2] Octavian Manolache, *Tratat de drept comunitar, Ediția a V-a,* Ed. C. H. Beck, Bucureşti, 2006.

modified proposal for a Services Directive. As a consequence of the lack of the political will to take under consideration the enactment of a secondary legislation in this field, the attention was focused towards the application of the primary legislation. Referred with respect to the interpretation of this legislation, the EU Court of Justice has elaborated a series of guiding principles, and a significant number of States against which the Commission has opened infringement procedures, have initiated reforms of the gambling national regulations, with more than 50 projects being notified to the Commission.

Responding to the same concern which, in fact, has determined the enactment of the Charter, the Commission for the internal market and consumer protection of the European Parliament[3] has adopted a Draft of the report concerning the online gambling in the internal market, comprising a proposal of a Resolution of the European Parliament in this field. According to the explanatory memorandum which accompanies the project, an organized and open gambling market needs an independent and strong internal regulation authority, with the necessary powers to be able to sanction any breach and to act against illegal operators. Concerning the cross border nature of the internet, the member states are not capable of regulating all the aspects of online gambling and therefore an extended cooperation between the regulating authorities is essential.

Considering these concerns and modifications of the legislation of the member states as a result of the actions of the Commission in this field, in order to ensure the compatibility of the national regulations with those of the EU, especially by report to the provisions of art. 56 of the Treaty for the functioning of the EU (hereinafter the TFEU[4]) which forbids the restrictions for the free performance of services towards beneficiaries from other member states, it is important to outline the means in which the EU Court of Justice has interpreted these provisions in its case law. This is also by report to the fact that in Romania it was recently enacted a Government Decision no. 823/2011 concerning the modification of the Government Decision no. 870/2009 for approving the Application methodology of the Government Ordinance no. 77/2009 concerning the gambling organization and exploitation[5], by which the functioning conditions of online gambling were set, as well as the conditions for approving, monitoring and taxation of the operators which activate in the gambling market in Romania, decision which just like the former decisions enacted in the matter has seen numerous oppositions and critical remarks in the juridical Romanian environment, with respect to the compatibility with the EU legislation.

2. Guiding principles mentioned in the case law of the EU Court of Justice

The EU Court of Justice had the opportunity in several cases to lean over the problem of the compatibility of the national gambling legislation, including online, with the freedom of performing[6] a cross border service, as well as to

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[3] Gyula Fabian, *Drept instituțional comunitar, ediția a III-a*, Ed. Sfera Juridică, 2008.
[4] The former art. 49.
[5] Published in the Official Bulletin, Part I, no. 616/31.08.2011.
[6] Camelia Stoica, *Dreptul Uniunii Europene, Libertățile Fundamentale,* Ed. Universitară, 2009.

mention the conditions to which the national monopolies in the gambling and sporting bets must correspond in order to be considered as justified.

For example, in the adjoined cases C-338/2004, C-359/2004 and C-360/2004 (criminal procedures against Masimiliano Placanica and others) concerning the requests to issue a preliminary decision of the Tribunals of Larino and Tribunale di Teramo, the EU Court of Justice had the opportunity to solve the compatibility between certain provisions of the Italian internal law – Law no. 401 of December 13th 1989 concerning the intervention in the gambling and clandestine bets and the protection of the good outcome of sporting competitions with the principles of art. 43 CE[7] and following, as well as art. 49 CE[8] concerning the freedom to perform cross border services[9].

According to the mentioned Italian law, the organization of gambling or collecting bets requires in advance the granting of a **concession** and an **authorization** from the police. Any crime against these rules is subject to **criminal sanctions** with up to 3 years imprisonment. In 1999, the Italian authorities have granted, following an offer request, 1000 concessions of sporting bets and 671 new concessions for riding competitions (329 existing concessions were automatically renewed). These concessions were valid for 6 years with the possibility of a renewal for the same period. The offer requests specifically excluded the operators which were organized as companies whose shares were listed on the regulated markets (whose individual shareholders could be identified at any given moment). Among these was the English company Stanley International Betting Ltd., holder of a license issued by the municipality of Liverpool, part of the Stanley Leisure plc. Group, a company listed on the London stock exchange and that was at that moment the fourth largest bookmaker and first administrator of gambling agencies in the UK. Stanley operates in Italy through "data transmitting centers" (DTC) administered by independent operators contractually linked to Stanley, that offer betting participants telematic bets that allow access to the Stanley server in the UK. Messiers Placanica, Palazzese and Sorricchio are all three administrators of DTCs linked to Stanley. In 2004 they were prosecuted in front of Tribunale di Larino and Tribunale di Teramo for conducting the organizing and collecting bets activities without the prior authorization of the police[10].

Examining the case, by report to the existing case law in the matter – Decision of March 24th 1994, Schindler, C-275/92, Rec., p. I-1039, points 57-60, Decision of September 21st 1999, Laara and others, C-124/97, Rec., p. I-6067, points 32 and 33, Decision Zenatti, points 30 and 31 as well as Decision Gambelli and others, point 67 the Court stated the following:

- A national Regulation that forbids the performance of collecting, accepting, registering and transmitting bet proposal activities, especially sporting

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[7] Hereinafter the present art. 49 of TFEU

[8] Hereinafter the present art. 56 of TFEU

[9] http://curia.europa.eu

[10] See the press release no. 20/07 of March 6th 2007 the Decision of the Court in the adjoined cases C-338/2004, C-359/2004 and C-360/2004 (criminal procedures against Masimiliano Placanica and others

bets, lacking a concession or an authorization from the police of the member state in question represents a restriction of the freedom of establishment as well of the freedom to perform services, provided in art. 43 and 49 CE.

- It is of the competence of the requesting Courts to verify if, in case the number of operators acting in the gambling sector is limited, the national regulation truly corresponds to the objective of preventing the exploitation of the activities in this sector in a criminal or fraudulent purpose.
- Articles 43 CE and 49 CE must be interpreted as opposing a national regulation, such as the one in the main claims, which exclude and furthermore continues to exclude from the gambling sector operators organized as capital companies whose shares are listed on the stock exchange.
- Articles 43 CE and 49 CE must be interpreted as opposing a national regulation, such as the one in the main claims, which impose a criminal sanction to persons such as the defendants in the main claims for conducting an organized activity of gambling collection, without a concession or an authorization from the police required by the national law, when these persons could not obtain the mentioned concessions or authorizations due to the refusal of the member state, which disregards the communitary right of granting them.

With respect to the question whether the case law of the Court related to the interpretation pf article 49 CE as well of the principle for the equality in treatment and the transparency obligation which derives from it, in the service concession domain, the procedure for granting an authorization to a sole operator in the gambling field is applicable, respectively if the renewal of this authorization, without an offer request, can represent an adequate and proportional reason for creating an objective grounded on imperative general interest reasons, the Court decided that, given the current status of the EU law, the services concession contracts are not regulated by neither of the directives by which the EU lawmaker regulated the public procurement field. However, the public authorities that conclude such contracts are forced to respect the fundamental norms of the TFEU in general, especially art. 49 CE and, in particular, the principles of equality in treatment and non discrimination by report to the citizenship or nationality, as well as the transparency obligation which derives (Decision of December 7th 2000, Telaustria and Telefonadress, C-324/98, Rec., p. I-10745, points 60-62, Decision of September 10th 2009, Eurawasser, C-206/08, Rep., I-8377, point 44 as well as Decision of April 13th 2010, Wall, C-91/08, point 33). The transparency obligation is applicable to the situation in which the concession of services may interest a company from another member state than the one in which the concession is awarded (see the Decision of July 21st 2005, Coname, C-231/03, Rec., p. I-7287, point 17 and Decision Wall, point 34). Without necessarily involving the obligation to present an offer request, this transparency obligation forces the conceding authority to guarantee, in favor of any potential participant, a sufficient level of publicity to ensure the competitive environment in the field of public services concession as well as the control of the impartiality of the procedure (Decision of November 13th 2008, Coditel Brabant, C-324/07, Rep., p. I-8457, point 25 and Decision Wall, previously mentioned, point 36). In any case, the restrictions to the fundamental freedom mentioned in art. 49 CE, which derive

from the awarding and renewal procedures of an authorization for a sole operator, similar to the ones from the main claim, can be considered as justified if the member state was to decide to award or renew the authorization to a public operator whose administration is subject to a direct supervision from the state or to a private operator over whose activities the public authorities are able to exercise a strict control (see Decision of September 21st 1999, Laara and others, C-124/97, Rec., p. I-6067, points 40 and 42 as well as Liga Portuguesa de Futbol Profissional and Bwin International, points 66 and 67).

3. The legal framework in Romania

The domain under consideration is regulated in Romania, in principle, by the Expeditious Government Ordinance no. 77/2009 concerning the organization and exploitation of gambling, approved by the Law no. 246/2010. For its application the Government Decision no. 870/2009 concerning the organization and exploitation of gambling was enacted, which was substantially modified by the Government Decision no. 823/2011, by introducing a special section – Section 7 – Gambling as defined in art. 10 first paragraph, letters g)-i) from the expeditious ordinance, as well as lotto games and mutual bets organized by means of internet systems of communication, fixed or mobile systems of communication.

The normative acts mentioned above show the concern of the Romanian state for the regulation of this field, the mentioned activities being subject to a licensing and authorization regime regulated in detail, regime which raises, however, a series of problems from the perspective of the guiding principles enunciated by the EU Court of Justice in the examined case law.

At least two of the general conditions imposed to the economic operator requesting the organization license and functioning authorization for online gambling, online bets and bingo games organized by means of internet systems of communication, fixed or mobile systems of communication attract a special attention from the perspective of the compatibility with the provisions of art. 49 and art. 56 TFEU – especially the ones provided in art. 73^{16} first paragraph letters a) and b) from the GD no. 870/2009: the condition that this operator is set up as a Romanian legal person under the conditions of the law, respectively to hold directly or through a shareholder/associate an organizing license and exploit authorization for gambling characteristic for the activity of casinos with at least 20 authorized tables or for gambling slot-machine type for minimum 500 stations or for betting type gambling in fixed quota with a minimum 100 agencies or for bingo type activities organized by means of television networks.

From the perspective of the principles set up by the EU Court of Justice in the examined case law, the rule concerning the sanctioning of the performance of activities in this sector without an authorization or a license issued by the state represents in itself a restriction to the establishment freedom as well as the freedom to perform services. Also, the conditions requested for the authorization represent restriction, so that from the perspective of the same case law, it is necessary to examine if the mentioned restrictions can be accepted under the title of derogatory measures expressly mentioned by art. 49 and art. 56 TFEU or if they can be justified by general interest imperative reasons (the consumer's protection

objectives from fraud and inciting the citizens to an excessive cost related to the game as well as preventing the disruption of the social order, diverse particularities of moral, religious or cultural order, as well as the moral and financial damages to the individual and society which are associated with gambling and betting).

We consider that the two conditions set by the Romanian legislation for the authorization – the set up as a Romanian legal person and holding an organizing license and an exploitation license for offline gambling can not be construed to any of the reasons mentioned above.

Therefore, if the high level of taxes set up by the law, respectively the considerable number of contraventions and crimes regulated by the aforementioned Romanian legal acts could be supported by stating a controlled political opening of the online gambling, respectively to prevent and fight their exploitation in criminal or fraudulent purposes and channeling them through controllable circuits (although in this respect it ill be necessary to analyze the proportionality of the measures), the elimination from the gambling market of the persons that do not fulfill the two conditions mentioned above have no reasonable explanation top justify the abridgement of the freedoms mentioned in art. 49 and art. 56 of the TFEU.

4. Conclusions

As mentioned in the Report of the Commission for the internal market and the consumers protection, mentioned under section above, once a member state has opted for the opening of the online gambling market, it has to guarantee the full transparency and ensure a non discriminatory competition, which implies, from the TFEU perspective the introduction of a licensing mechanism which would allow all European gambling operators, by fulfilling the conditions set out by the state, to request for the licensing (and not only the residents of the state).

As a consequence, in order to perform the compatibility of the internal legislation with the guiding principles that govern the application of the relevant principles of the Treaty, we consider that a modification is necessary, or else there would be the possibility to initiate an infringement procedure for Romania. The politics of the state of a strong control of the online gambling market, which is justified considering the specificity of the field, must be reconciled with the rules set forth by the principles that govern the application of the mandatory norms of the EU.

Furthermore, as we have already mentioned, the majority of the member states have already changed the gambling legislation (especially with respect to the online gambling) according to the present reality of the gambling market and with the EU legislation and recent case law of the EU Court of Justice in the matter, and at the EU level the forming of a joint regulation framework is envisaged, as well as an institutionalized cooperation in the field.

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