

THE EUROPEAN UNION, STATE-SPONSORED GAMBLING, AND PRIVATE GAMBLING SERVICES: TIME FOR HARMONIZATION?

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I. INTRODUCTION

The growing popularity and profitability of online gambling has encountered a roadblock in the protectionist policies of many European Union Member States.¹ In September 2006, Manfred Bodner and Norbert Teufelberger, the chief executives of an Austrian gambling business, Bwin, were arrested by French officials in Monaco for “organising illegal bets” and “advertising online bets.”² An official in the French intelligence service told reporters that “all bets, be it for sporting events or for casino games, were illegal [in France], ‘even if the website is outside of France.’”³ This incident perfectly encapsulates what is occurring across the European Union, as countries prohibit access to foreign private or government-run online gambling operations in an attempt to retain a monopoly that generates substantial revenue for the government.⁴

This ban on gambling in general and online gambling specifically does not mean gambling of all types cannot be enjoyed in European countries. In fact, “gambling is a €75 billion business in Europe. . . .”⁵ In France for example, *Francaise des Jeux* and *Pari Mutuel Urbain*, which are both government sponsored, are the only companies exempted from the French ban on online gambling.⁶ State-owned or state-sponsored lotteries, betting companies, and online gambling providers enjoy country-specific exemptions in many countries across Europe.⁷

However, with the rise of the unbounded internet, nations are faced with the prospect of attempting to protect their state-run source of revenue from private companies attempting to procure citizens who once willingly wagered with the state-run operations.⁸ This is a tough task for these countries, as it is estimated

¹ *Gambling in Europe: Stacking the Deck*, ECONOMIST, Aug. 17, 2006 [hereinafter *Gambling in Europe*] (discussing European countries’ response and regulation of gambling websites), available at http://www.economist.com/business/displaystory.cfm?story_id=7808754.

² Harry Wallop, *Now France Targets Gaming Firms*, TELEGRAPH (UK), Sept. 15, 2006, available at <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/09/16/cngamble16.xml>.

³ *Id.*

⁴ See *Gambling in Europe*, *supra* note 1.

⁵ James Rutherford, *Cyber-Fortress Europe: Italy’s Ban on Foreign Operators Opens a New Front in Europe’s Battle for a ‘Common Market’ for Gambling*, INT’L GAMING & WAGERING BUS., Mar. 2006, available at <http://www.igwb.com/article.php?ida=651>.

⁶ Wallop, *supra* note 2.

⁷ *Gambling in Europe*, *supra* note 1.

⁸ See *id.*

that there are 2,000 online gambling sites with an estimated twenty-three million people⁹ wagering nearly \$12 billion in 2005 alone.¹⁰ A more recent study conducted by England's government in preparation for the world's first online gambling summit revealed: Britain has almost one million regular online gamblers, Europe has roughly 3.3 million regular online gamblers, and 2,300 online gambling sites exist across the world.¹¹

Many European nations with state monopolies on gambling are members of the European Union (EU),¹² an intergovernmental organization that unites twenty-seven Member States.¹³ One of the internal policies of the EU is the free trade of goods and services among Member States.¹⁴ In 1994, the European Court of Justice in *Her Majesty's Customs and Excise v. Schindler* established that gambling is a legitimate "service" under the meaning of the Treaty of Rome.¹⁵ However, as previously mentioned, many of the EU Member States have their own state-run gambling monopolies, which appear to prohibit the free flow of services, by prohibiting non-state sponsored gambling or promotion of non-state sponsored gambling within their state.¹⁶ According to Commissioner Charlie McCreevy of the European Commission,

⁹ American Gaming Ass'n, Fact Sheets, Internet Gambling, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17 (last visited Mar. 24, 2008).

¹⁰ Frank J. Fahrenkopf, President & CEO American Gaming Ass'n, Address to the Asian Gaming Expo: To Asia and Beyond: The Next Generation of Global Gaming at the Asian Gaming Expo (June 14, 2006) (transcript available at http://www.americangaming.org/Press/speeches/sp_eeches_detail.cfv?ID=398).

¹¹ Press Release, Dep't for Culture, Media & Sport, Extent of Online Gambling Revealed Ahead of International Summit (Oct. 31, 2006) [hereinafter Extent of Online Gambling], available at http://www.culture.gov.uk/Reference_library/press_notices/archive_2006/DCMS_134_06.htm.

¹² Europa, Key Facts and Figures about Europe and the Europeans, http://europa.eu/abc/key_figures/index_en.htm (last visited Mar. 24, 2008).

¹³ See *id.*

¹⁴ A DICTIONARY OF THE EUROPEAN UNION 210 (David Phinnemore & Lee McGowan eds., 1st ed. 2002) ("Freedom of movement lies at the heart of the objectives outlined in the Treaty of Rome, which required the abolition of barriers to the 'freedom of movement for persons, services, and capital.'").

¹⁵ Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039; Rutherford, *supra* note 5.

¹⁶ Philippe Vlaemminck & Pieter De Wael, *The European Union Regulatory Approach of Online Gambling and Its Impact on the Global Gaming Industry*, 7 GAMING L. REV. 177, 177 (2003) ("All EU Member States, except the United Kingdom and some offshore jurisdictions, have imposed strict limitations on cross-border gambling activities in order to control and limit the supply of gambling in their territory and to ensure that the revenue of gambling is to a certain extent used for public benefit.").

"the Commission is building cases against eight countries in addition to the seven countries which were warned in the spring [of 2006]" about the state monopolies on gambling.¹⁷

The countries under investigation by the Commission argue there is no specific EU legislation prohibiting them from outlawing non-state sponsored gambling in the country.¹⁸ They also point to cases where the European Court of Justice (ECJ) has held that national restrictions can be justified by public interest objectives.¹⁹ However, according to the jurisprudence of the ECJ, national restrictions must not go beyond what is necessary to attain these public interest aims.²⁰ How can Member States point to the harms of gambling on the public interest when they in fact have their own state run gambling monopolies? Also, how can the EU leave it to national courts to decide if their own protective national legislation is in line with EU policy?

It is time for the EU to go beyond the jurisprudence of the ECJ and attempt a harmonizing EU law by allowing country-sponsored and private company online gambling in each of its Member States. While discussing the matter of gambling and gaming services in 1992, the EU itself recognized " 'that as the Community becomes ever more closely integrated, and technological developments open up markets worldwide, it [cannot] be precluded that the Commission will have to reconsider its position [on gambling] in view of new and as yet unforeseeable trends.' " ²¹ Certainly, the rise of the unbounded internet was an unforeseeable trend that opened up markets across the globe, and it is now time for the EU to deal with this issue. The harmonization of online gaming across the EU would establish a framework for the national

¹⁷ Jorgen Andresen, *The Danish Pools and Lottery Monopoly under EU Pressure*, BORSEN (Den.), Sept. 13, 2006 [hereinafter *The Danish Pools*], available at <http://borsen.dk/nyhed/94994>. See also *Gambling in Europe*, *supra* note 1 (observing that in April of 2006 "the commission sent warning letters to seven EU countries asking them to justify state monopolies that do not seem to be acting in the public interest. The Swedish monopoly, for instance, recently launched its own online poker game: an astute commercial move, to be sure, but hardly the most obvious way to curb gambling addiction."). The potential countries under investigation were: Denmark, Germany, Italy, Holland, Sweden, Hungary, and Finland. *The Danish Pools*, *supra*.

¹⁸ *Gambling in Europe*, *supra* note 1 (indicating gambling was not initially included in the EU services directive and was therefore not considered a service capable of protection under EU legislation/treaty).

¹⁹ Case C-243/01, *Criminal Proceedings Against Gambelli*, 2003 E.C.R. I-13031.

²⁰ *Id.*

²¹ Thibault Verbiest & Ewout Keuleers, *Cross Border Gaming: The European Regulatory Perspective*, 7 GAMING L. REV. 185, 185 (2003).

governments to work within, as well as protect consumers, which many states argue is their primary goal in restricting cross-border gaming.

Part II of this Note provides the EU definition and treatment of “services,” the jurisprudence of the ECJ in regards to gambling and services, and a brief introduction to harmonization as it applies to the EU. Part III begins with the argument that Member States are breaking EU policy by not allowing gambling “services” within their country, and further argues harmonization is not only possible, but needed across the EU. Part IV concludes the Note by analyzing the implications of what harmonization will bring to the EU in future years.

II. BACKGROUND

A. Establishment of the European Union and Free Movement of Services

The Treaty Establishing the European Economic Community (EEC Treaty), also known as the Rome Treaty, was the first step towards today’s EU when it was signed on March 25, 1957.²² The goal of the treaty was to eventually create a single European market for goods.²³ Therefore, one of the basic principles of the treaty was the “free movement of services” across borders and among member states.²⁴ Article 49 of the EEC Treaty specifically provides: “[R]estrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”²⁵

Article 50 of the Treaty characterizes “services” as having a commercial or industrial character.²⁶ However, in the early 1990s, the European Community was unclear on whether gambling should be necessarily characterized as a service.²⁷ Therefore, the European Commission conducted a “1991 study entitled ‘Gambling in the single market—A study of the current legal and market situation.’”²⁸ Based on this study, “the European Council decided [in

²² Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

²³ *Id.*

²⁴ Verbiest & Keuleers, *supra* note 21.

²⁵ EEC Treaty, *supra* note 22, art. 49.

²⁶ *Id.* art. 50.

²⁷ Vlaemminck & De Wael, *supra* note 16, at 177.

²⁸ *Id.*

December of 1992] 'not to regulate gambling at the EU level, as it found that gambling is better dealt with at the national level.' ”²⁹ This concept is known as subsidiarity:

action should only be taken at Community level if this is justified: the Union should not treat an issue (except in the areas which fall within its exclusive competence) unless it is more effective at treating this problem than the national, regional or local level. The basic principles underlying subsidiarity were laid down in the Edinburgh European Council (December 1992) which enshrines subsidiarity in the EU Treaty. The Treaty of Amsterdam followed by adopting a Protocol on the application of subsidiarity.³⁰

Therefore, gambling is regulated within the EU at the national level, which has led many EU Member States to institute limitations or restrictions on cross-border gambling among EU Member States in an attempt to generate income for themselves.³¹

B. EU Common Law Decisions on “Services”

Beginning with the case of *Her Majesty's Customs and Excise v. Schindler* and more recently with *Criminal Proceedings Against Gambelli*, the European Court of Justice has modified the definition of services to include gambling and more specifically online gambling.

In *Schindler*, a German company wanted to compete with the British national lottery and was sending advertisements and application forms to British citizens.³² The ECJ “ruled that the activities at issue were those which provided for remuneration by an operator to enable persons to participate in a game of chance with the hope of winning. For that reason and by virtue of Article 50 of the EEC Treaty, they had to be considered as services.”³³

²⁹ *Id.*

³⁰ Euractiv.com, EU Treaty & Institutions, Glossary: subsidiarity, <http://www.euractiv.com/en/constitution/glossary/article-117273> (last visited Mar. 16, 2008).

³¹ Vlaemminck & De Wael, *supra* note 16, at 177. For example, some countries within the EU, like Finland and Sweden, have restrictions on gambling that allow only state-controlled companies to operate or even offer any type of gambling service within its borders. *Id.*

³² Verbiest & Keuleers, *supra* note 21, at 188.

³³ *Id.* This was an important decision as gambling, specifically state lotteries, had not been

Besides recognizing gambling, specifically state-sponsored lotteries, as a service, the ECJ broadly laid out the rationale behind the prohibition and state exceptions to gambling:

The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons, should not be permitted. Citizens should be protected against the dangers that may stem from the urge to gamble and there is a significant risk of criminality in this field.

But at the same time in all Member States there are to a greater or lesser extent exceptions from that prohibition. That is because it may be appropriate to permit some measure of gambling, partly to meet the citizens' desire to gamble and partly to prevent unlawful gambling. It is possible to lay down requirements concerning permitted forms of gambling in such a way as to limit the risk of criminality. In addition a significant factor in all the Member States is that it is possible to make authorization subject to conditions whereby the revenue from gambling is used for public-interest purposes or accrues to the State exchequer.³⁴

However, the court in *Schindler* also recognized that the United Kingdom (and by extension other Member States) could restrict or even prohibit lotteries from other EU Member States, provided restrictions were not discriminatory on the basis of nationality.³⁵ The court declared that restrictions based on public interest concerns would not be seen by the court as measures interfering with the freedom to provide services among Member States.³⁶

Expanding on *Schindler*, the ECJ, in *Questore di Verona v. Zenatti*, ruled sports betting was a service that could be restricted by Member States.³⁷ As

classified as a "service" under the initial EEC Treaty Services Directive. *Id.*

³⁴ Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039, ¶¶ 1–2.

³⁵ *Id.* ¶ 64. See also EEC Treaty, *supra* note 22, art. 49.

³⁶ *Schindler*, 1994 E.C.R. I-1039, ¶¶ 34–35 (“[T]he activity must be carried out in order to ensure that it is not abused to the detriment of the individual players and of society as a whole.”).

³⁷ Case C-67/98, *Questore di Verona v. Diego Zenatti*, 1999 E.C.R. I-7289, ¶ 30.

National authorities have, in this regard, particular latitude to determine what steps to take, in the light of specific social and cultural features, especially the widely differing moral and social attitudes to gambling in the Member States.

a whole, the *Schindler* and *Zenatti* cases stand for the proposition that "member states have a discretionary competence to impede the cross-border provision of gaming services throughout the European internal market, provided that the imposed restrictions are: i) not discriminatory; ii) justified by imperative reasons of general interest; and iii) proportional and necessary to achieve the objectives pursued."³⁸

The ECJ received its first gambling case when Piergiorgio Gambelli, was arrested in Italy for transmitting sports wagers online.³⁹ The Italian government alleged Gambelli's actions were illegal under local law.⁴⁰ Gambelli responded by asserting that the Italian law was contrary to the rationale behind the EEC Treaty in that it violated the freedom of establishment and freedom to provide services.⁴¹

The opinion of the Advocate General, Siegbert Alber, stated Italy's law was purely discriminatory against bookmakers from other countries, but the court did not follow Alber. Instead it decided to apply the rationale from *Schindler* and *Zanetti* by saying that "public interest considerations may justify limitations on free movement of services, providing the objectives to be achieved are not disproportionate to the restrictions imposed."⁴² The court determined that:

national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a license or authorization from the Member State

Thus, the fact that certain forms of gambling are permitted, subject to necessary controls, while others, which differ in their objects, rules and methods of organisation, are prohibited, may be the acceptable consequence of national choices of a socio-cultural character.

Id.

³⁸ Thibault Verbiest & Ewout Keuleers, *Gambelli Case Makes It Harder for Nations to Restrict Gaming*, 8 GAMING L. REV. 9, 10 (2004).

³⁹ Case C-243/01, Criminal Proceedings Against Gambelli, 2003 E.C.R. I-13031. Gambelli was an Italian agent for Stanleybet International, a UK based gambling company. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Niall A. O'Connor, *From Schindler to Placanica and Beyond*, BETTING MARKET, 2007, available at <http://www.bettingmarket.com/eurolaw222428.htm>.

concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively.⁴³

However, even after determining this violation of Articles 43 and 49, the ECJ held it was for the national court to determine if its national laws were disproportionate under the *Schindler* analysis and the recognized EU principle of subsidiarity.⁴⁴ On remand, the Italian national court determined the law did not violate EU measures as its restrictions had a public order interest, keeping gambling free from criminality, that did not make the law disproportionate.⁴⁵ Shortly after the decision, Italy passed laws requiring “telecommunications and Internet service providers to block content from operators not licensed in the country, effectively barring more than 600 Web sites from taking bets in Italy’s €500 million online market.”⁴⁶ This ruling made Italy the first nation of the EU to determine its national laws did not violate EU policy.⁴⁷

However, this legislation has prompted investigation by the European Commission as a result of “complaints from a number of sporting bookmakers of national protectionism in [countries’] online gambling regimes.”⁴⁸ For, as a result of a February 2006 vote by the European Parliament on a new directive

⁴³ *Gambelli*, 2003 E.C.R. I-13031, ¶ 76.

⁴⁴ *Id.* (“It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.” (emphasis added)).

⁴⁵ O’Connor, *supra* note 42.

⁴⁶ Rutherford, *supra* note 5.

⁴⁷ *Id.*

The Dutch Supreme Court made a similar finding last year in a challenge brought by Ladbrokes [which is one of the world’s leading sports betting and gaming companies. See Ladbrokes PLC, About Us, http://www.ladbrokesplc.com/About_Us/ (last visited Mar. 24, 2008).] A regional court in Germany has likewise found against BetandWin. In France, which in a fit of “economic patriotism” last year set barriers to foreign acquisitions in gambling and a host of other “sensitive” industries, the Court of Appeal in Paris has upheld a ban against an online operator out of Malta, Zeturf, which had been taking race bets in competition with the government monopoly Pari Mutuel Urbain.

Id.

⁴⁸ Anne Jolis, *EU May Add 8 Countries to Gambling Protectionism Probe*, DOWJONESBUS.NEWS, Sept. 12, 2006 (stating “the investigation targets state-owned or protected betting services that restrict other services trying to operate in that market”), available at <http://www.easybourse.com/Website/dynamic/News.php?NewsID=54892&lang=fra&NewsRubrique=2>.

on the free movement of services, gambling is now specifically excluded as a service.⁴⁹

C. Harmonization Introduction

Harmonization is one way the EU attempts to bring Member State policies, laws, and standards in line with EU policies, especially the internal market program.⁵⁰ Beginning in 1957, the European Community sought to attain a single, common market for European “goods, persons, services, and capital,” and therefore “[h]armonization was envisaged by the Treaty of Rome, which gave wide-ranging powers to the Community to enact secondary legislation” to accomplish this goal.⁵¹ This power to harmonize was given to the EU through the addition of Article 95 to the Treaty of Rome by the Single European Act 1986.⁵² Article 95 provides “for the approximation of laws within the European Communities and [is] therefore of fundamental importance to the existence of the internal market.”⁵³ Specifically, the text of the Act provides “for the approximation of the provisions laid down by law, regulation, or administrative action in Member States which have as their object the establishment and functioning of the internal market.”⁵⁴

⁴⁹ Council Directive 2006/123, 2006 O.J. (L376) 1, 4. “Gambling activities, including lottery and betting transactions, should be excluded from scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.” *Id.*

⁵⁰ A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 225 (defining harmonization and noting its similarity to approximation).

⁵¹ CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 493 (2004) (observing that regulatory competition within the market has failed, and that failure “together with the derogations provided by the [Rome] Treaty and the mandatory requirements developed by the Court [of Justice], has meant that there would always be a need for harmonization legislation enacted by the Community institutions to help the market function properly while at the same time protecting vital public interests such as consumer protection and public health”).

⁵² *Id.* at 494.

⁵³ A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 13. *See also id.* at 12 (defining approximation as “a term used to describe the process of removing undesired or unwarranted differences in national legislation within the context of the internal market”).

⁵⁴ BARNARD, *supra* note 51, at 494. *See also* A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 239–40 (noting how “[t]he Council accepted the principle of establishing a single market within a specified deadline . . . [detailing a] programme according to which the internal market would be completed by December 1992, . . . , [and how] [t]he Treaty of Amsterdam also introduced measures to improve freedom of movement within the EU”).

Harmonization involves instituting a single EU-wide rule that replaces the conflicting rules of various Member States.⁵⁵ This single rule is “intended to protect certain beneficial interests . . . (e.g. consumer protection and public health), while at the same time advancing free trade and market integration.”⁵⁶ The EU has used various types of harmonization in its attempt to accomplish this goal: exhaustive, optional, and minimum.⁵⁷ The EU has also used mutual recognition in situations where it feels no harmonization is needed.⁵⁸

Mutual recognition is the principle that describes “when a product [or service] is legally manufactured . . . in one Member State, it may be freely offered for sale in other Member States, irrespective of whether it complies with the relevant national legislation in that country.”⁵⁹ Therefore, national legislation cannot prohibit the introduction of a similar good made with equivalent standards from being introduced in the host Member State. Thus, if a Member State provides an equivalent online gambling service, then theoretically it should be allowed in the host Member state where it is being offered. However, mutual recognition is rarely used, and is often limited by the principle of functional equivalence, which “requires those making an assessment of equivalence to take account not only of the foreign standards but also of the broader context in which the goods/services are to be used.”⁶⁰ Given this practical limitation, it is unlikely the Court would apply mutual recognition to gambling services applied across Member States.

Exhaustive harmonization occurs when the national laws across all the EU Member States are replaced with one EU rule, and Member States cannot do

⁵⁵ BARNARD, *supra* note 51, at 506.

⁵⁶ *Id.*

⁵⁷ *Id.* at 507.

⁵⁸ *Id.*

⁵⁹ A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 280 (noting also that the ECJ established mutual recognition in Case 120/78, *Cassis De Dijon*, 1979 E.C.R. 649).

⁶⁰ BARNARD, *supra* note 51, at 508.

This can be seen in *Commission v. France (Woodworking)* [Case 188/84, 1986 E.C.R. 419] concerning woodworking machines manufactured in Germany according to standards which took account of the fact that those (Germans) operating them would have a high level of training. However, in France, standards were premised on the fact that (French) users of the machines had to be protected from their own mistakes and so presupposed a low . . . level of training. Given these differences between the systems, the Court allowed France to apply its own standards to the imported German goods.

Id.

anything to combat it.⁶¹ With exhaustive harmonization, the EU will issue a directive, a piece of EU legislation that is binding upon all members.⁶² Exhaustive harmonization imposes two obligations on Member States: "to permit the goods complying with the directive to be freely imported and marketed (the free movement clause); and to prohibit the sale of goods not complying with the directive . . . (the exclusivity clause)."⁶³ While harmonization usually applies to goods, it is equally applicable to the services context, for the impetus and goal behind the creation of a single, common market requires the free flow of both goods and services. However, exhaustive harmonization is difficult to implement as Member States are reluctant to surrender their power because it weakens their ability to control their national interest,⁶⁴ especially considering the lasting impact exhaustive harmonization has on them.

Optional harmonization allows producers the choice of whether to follow an issued directive.⁶⁵ In the case of optional harmonization, the producer is free to disregard the harmonized standard if he sells or provides goods within a localized area within a country and follows the national standard; however, if the producer chooses to provide goods across national boundaries, he must subscribe to the harmonized standard.⁶⁶ The advantage to optional harmonization is that it does not disturb the current market conditions in the various Member States, as they do not have to adapt to changes if sellers are simply selling in a local area.⁶⁷

Another advantage is that optional harmonization allows for technological progress. Unlike exhaustive harmonization, it does not lock Member States into a required standard, and allows Member States to develop new

⁶¹ *Id.*

⁶² A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 111.

[Normally, directives] take the form of general instructions on the goal to be achieved, while leaving the way in which it will be attained to the discretion of each Member State. The conditions of a directive are normally met by the Member States introducing national legislation in conformity with European Communities stipulations.

Id.

⁶³ BARNARD, *supra* note 51, at 508–09.

⁶⁴ *Id.* at 510. Thus, exhaustive harmonization actions take years to implement and Member States may block legislation where the measure may require a unanimous vote in the European Council. *Id.*

⁶⁵ *Id.* at 515.

⁶⁶ *Id.*

⁶⁷ *Id.*

technologies by not worrying about whether it must comply with an EU directive.⁶⁸ Despite the advantages of optional harmonization, the EU has been reluctant to use this approach, as optional harmonization creates conflicts over the trade of goods complying with local standards but not with the EU-wide directive.⁶⁹

Minimum harmonization occurs when the European Community adopts a minimum standard to which all Member States must subscribe. The individual Member States, however, are free to impose stricter standards on goods that will be either produced within the country or imported into the country.⁷⁰ The EU allows this provided the individual Member States higher standards do not discriminate based on nationality or place of establishment.⁷¹ For example, France may impose a higher standard (on domestic sugar production methods) than the minimum standard imposed by the EC as long as it applies the same standard to both French and non-French manufacturers. However, if France imposes a higher standard for sugar imported from other Member States than domestically produced sugar this would be a violation, as it would be discriminating against non-French manufacturers, which is expressly forbidden under both EU legislation and common law.⁷²

III. ANALYSIS

A. Free Movement of Services

By restricting access to online gambling services, EU Member States are pursuing policies inconsistent with the Rome Treaty and thus the EU.

Articles 49 and 50 of the Rome Treaty deal with the freedom to provide and receive services across Member States. Specifically, Article 49 provides that restrictions cannot be based on nationality or where the specific service is established.⁷³ More importantly, for the present discussion, the court has held that Articles 49 and 50 “apply where neither the provider nor the recipient of the service travels but the service itself moves (e.g., by telephone, fax, email, the internet, or cable).”⁷⁴ In *Gambelli*, the court held Articles 49 and 50

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See id.* at 517.

⁷² *See id.* at 517–18.

⁷³ EEC Treaty, *supra* note 22, art. 49.

⁷⁴ BARNARD, *supra* note 51, at 333 (citing Case C-384/93, *Alpine Investments BV v. Minister*

applicable to betting services provided over the internet.⁷⁵ Thus, online gambling specifically falls under Article 49 and 50, and therefore Member States cannot discriminate against providers of these services based solely on the providers' national origin.

1. German Example

While the ECJ has yet to rule on recent acts of some EU Member States,⁷⁶ it seems that Member States are violating Article 49. For example, in March of 2006, Germany's Federal Constitutional Court "ruled that a state monopoly on sport betting is acceptable—provided that its objective is to limit addiction."⁷⁷

However, while Germany could reasonably be seen as pursuing the public policy of curbing gambling addiction by only having state-sponsored betting establishments, Germany is also allowing private German operated businesses to operate within the country while excluding non-German businesses.⁷⁸ This is directly contrary to Article 49, as Germany is preventing the flow of non-German gambling services into Germany, which it may only do if the prohibition is not based on nationality.⁷⁹ Germany is discriminating against service providers based on nationality and place of establishment, as the other potential providers are not located within Germany. Thus, Germany is giving its own businesses a distinct, illegal advantage over its foreign competitors, which Article 49, and the court's interpretation of Article 49 in *Gambelli*, expressly forbids.⁸⁰

However, in line with *Gambelli*, the EU has allowed the highest court in Germany to decide the legality of Germany's actions, which the German court

vanfinancien, 1995 E.C.R. I-1141, where the Court ruled that "Article 49 covered services which the provider offered by telephone to potential recipients established in other Member States without moving from the Member State in which the service provider was established").

⁷⁵ Case C-243/01, *Criminal Proceedings Against Gambelli*, 2003 E.C.R. I-13031; see also BARNARD, *supra* note 51, at 347–50 (discussing anti-discrimination treatment in the EEC Treaty).

⁷⁶ *Gambelli*, 2003 E.C.R. I-13031; *The Danish Pools*, *supra* note 17 (noting how "the Commission is building cases against eight countries in addition to the seven countries which were warned in the spring [of 2006]").

⁷⁷ *Gambling in Europe*, *supra* note 1.

⁷⁸ *Id.*

⁷⁹ *Gambelli*, 2003 E.C.R. I-13031.

⁸⁰ *Id.*

has upheld as consistent both with *Gambelli* and Article 49.⁸¹ The German court ruling is purely nationalistic and inconsistent with both *Gambelli* and Article 49. Therefore, Germany's courts have affirmed Germany's violation of Article 49 of the EEC Treaty by allowing this situation to continue.

2. French Example

France has a protectionist policy similar to Germany's. In 2005, it set up barriers to foreign acquisitions in gambling within France, preferring instead to have only French owned gambling providers operating within the country.⁸² Also, a recent French Court of Appeals decision endorsed a foreign ban on gambling by upholding a ban on Zeturf, a racing bet company operating out of Malta, that was in direct competition with the government monopoly Pari Mutuel Urbain.⁸³ The state run racing betting operation may fall under the public policy exception, although whether the operation was set up to curb gambling addiction or bring more money to the government remains unclear.⁸⁴

The ban on foreign companies moving into France to set up gambling operations, which includes a ban on online operators, violates Article 49 as it favors French businesses and discriminates against non-French operators solely on the basis of national origin.⁸⁵ Like the courts in Germany, French courts have found no violation of either EU or common law by France's actions.⁸⁶ It appears French courts are using the EU policy of subsidiarity to favor French business over non-French business.

3. Italian Example

Perhaps the greatest abuse of Article 49 arose in Italy shortly after the *Gambelli* decision when the Italian government passed the Finance Act 2006, which "brought into force laws that require telecommunications and Internet service providers to block content from operators not licensed in the country."⁸⁷ This Act effectively blocked access to 684 betting websites not licensed by Italy as they were either non-Italian run operations within Italy or

⁸¹ See *Gambling in Europe*, *supra* note 1.

⁸² Rutherford, *supra* note 5.

⁸³ *Id.*

⁸⁴ *Gambelli*, 2003 E.C.R. I-13031.

⁸⁵ *Id.*

⁸⁶ Rutherford, *supra* note 5.

⁸⁷ *Id.*

were non-Italian operations established outside of Italy.⁸⁸ This Act violates Article 49 on two grounds. First, it prevents the free flow of services by those operations not established within Italy.⁸⁹ Second, it discriminates against businesses operating within Italy based on their nationality, since non-Italian businesses cannot obtain the now required Italian license.⁹⁰

4. *Conclusion on Services*

Germany, France, and Italy are only a few of the many EU Member States with nationalistic protectionist policies regarding gambling services. The EU has subscribed to the theory of subsidiarity by allowing individual Member States to deal with the issue as they see fit, however, this policy is not working and a change in policy is needed. Member states cannot successfully make an argument based on the *Gambelli* public policy exception, since the governments sponsor gambling themselves and license it to national organizations within their countries, while discriminating against foreign organizations solely based on national origin, which Article 49 expressly prohibits.⁹¹ Thus, in order to provide the free flow of services, one of the core freedoms of the EEC Treaty and an integral part of the EU's internal market, the EU can no longer rely upon the principle of subsidiarity and must harmonize policy across its Member States.

B. *The Right of Establishment*

EU Member states also violate Article 43's right of establishment by discriminating against foreign companies. Article 43 provides for two types of establishment for companies: (1) the right to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48;⁹² and, (2) the right to set up agencies, branches, or subsidiaries by nationals of *any* Member State established in the territory of *any* Member State.⁹³ For example, Italy's license requirement violates Article 43 by

⁸⁸ *Gambling in Europe*, *supra* note 1.

⁸⁹ Rutherford, *supra* note 5.

⁹⁰ *Id.*

⁹¹ Case C-243/01, *Criminal Proceeding Against Gambelli*, 2003 E.C.R. I-13031.

⁹² "Companies or firms" means companies or firms constituted under civil or commercial law. EEC Treaty, *supra* note 22, art. 48.

⁹³ *Id.* art. 43 (emphasis added).

impeding foreign operations from operating in Italy.⁹⁴ The Italian law that favors Italian owned gambling operations over foreign operations both inside and outside Italy violates Article 43.

Similarly, Article 43 provides that a Member State may not require a company to set up its primary/registered office or operation in the Member State in order to operate within the country.⁹⁵ The European Commission in *Commission v. Italy*, argued that an Italian law that required businesses to set up their primary establishment in Italy in order to conduct business violated Article 43.⁹⁶ While Italy argued this law was needed to supervise the operations of businesses within its borders, the Commission successfully countered by arguing the requirement of a primary establishment operating within Italy prevented businesses from establishing other forms of business branches and agencies, as it prohibited foreign operations from establishing branches or agencies within Italy to provide their services.⁹⁷ This type of national discrimination can be seen in nations across the European Union, which is one reason why the EU needs to step in.

Because EU Member States are violating the right to the free flow of services guaranteed in Article 49 and the right to establishment guaranteed in Article 43, and the highest courts in the individual Member States are allowing this to occur, the EU can no longer rely upon the principle of subsidiarity in order to bring Member States into accord with these provisions of EU law and policy. Therefore, the EU must harmonize policy across its Member States. The only questions that remain are what type of harmonization is appropriate and whether any type of harmonization will actually work.

⁹⁴ BARNARD, *supra* note 51, at 325 (noting that the ECJ in Case C-272/91, *Comm'n of the Eur. Cmty. v. Italy*, 1994 E.C.R. I-1409, "said that an Italian law providing that only companies in which all or a majority of shares were directly or indirectly in public or State ownership could conclude agreements for data-processing systems for public authorities 'essentially favour[ed] Italian companies' and so breached Article 43").

⁹⁵ EEC Treaty, *supra* note 22, art. 43.

⁹⁶ *Italy*, 1996 E.C.R. I-2691; *see also* BARNARD, *supra* note 51, at 312 ("In order to set up as a securities dealer in Italy, Italian law required that the dealer had to be constituted in the form of a limited company with its registered office in Italy.").

⁹⁷ *Italy*, 1996 E.C.R. I-2691, ¶ 8 (noting that Commission recognized that Article 43 left it up to the business what type of establishment—primary, main office, or secondary—branches and agencies—it wished to set up within a Member State).

C. Harmonization

1. Introduction

Article 95 of the EEC Treaty allows for harmonization across the EU in order to create a single, unified common market among the various Member States consistent with the goals of the EU.⁹⁸ Considering the previous analysis, as well as the ECJ's observation that once harmonization becomes an issue then it "necessarily presuppose[s] Community-wide action,"⁹⁹ the EU has various forms of harmonization it may use: exhaustive, optional, minimum, and mutual recognition. Whether any of these options are practical and workable will be the focus of this part of the analysis.

2. Exhaustive Harmonization

Exhaustive harmonization occurs when the national laws across all the EU Member States are replaced with one EU rule that leaves no room for Member States to combat it.¹⁰⁰ The exhaustive harmonization approach has until now only been used in the field of goods; however, it is easily adaptable to the field of services, as the goal of the EU is to create a single common market in goods and services.¹⁰¹ This harmonization imposes two obligations on all Member States: (1) "to permit the goods [or services] complying with the directive to be freely imported and marketed (the free movement clause); and (2) to prohibit the sale of goods [or services] not complying with the directive."¹⁰² Applying the concept of exhaustive harmonization to online gambling services, the EC could adopt a measure requiring a certain regulatory standard to be imposed upon all Member States, and once imposed, individual Member States could not impose a stricter standard as their action in the field would be preempted. Therefore, for the initial exhaustive harmonization measure to pass, individual Member States must cede power or control in a particular area to the EU.

⁹⁸ EEC Treaty, *supra* note 22, art. 95; A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 13.

⁹⁹ BARNARD, *supra* note 51, at 503 (citing Case C-84/94, *UK v. Council*, 1996 E.C.R. I-5755).

¹⁰⁰ *Id.* at 508.

¹⁰¹ EEC Treaty, *supra* note 22, arts. 23 & 49.

¹⁰² BARNARD, *supra* note 51, at 508-09.

For this reason, previous attempts at exhaustive harmonization have taken many years to negotiate.¹⁰³ Member States want to protect their national interest, because once the directive is in place the Member State will not be able to act against it.¹⁰⁴ Here, many EU Member States have state sponsored monopolies on online gambling (and gambling in general) the status would be adamant in protecting these services as they present a great source of revenue for the country, which they would stand to lose if an unfavorable EU-wide directive was instituted.

a. Swedish Example

Sweden is a prime example of a Member State incentivized to protect state-sponsored gambling. Sweden may suffer a great loss of revenue if the EC issues a directive calling for exhaustive harmonization. The Lotteries Act (1994) and The Casinos Act (1999) govern all gambling within Sweden and effectively give all control, along with the The Gaming Board of Sweden, to the Swedish government.¹⁰⁵ The Lotteries Act makes it a crime to promote gambling services within Sweden that are not sponsored by the Swedish government.¹⁰⁶

This law directly violates the holding of *Gambelli*, as well as Article 43, as businesses cannot establish gambling establishments or provide online gambling services within Sweden, since they would have to promote them.¹⁰⁷ It also violates Article 49, as it prevents businesses outside of Sweden from promoting their online services available from within another Member State.¹⁰⁸

However, believing its restriction on private operators are within EU law, Sweden points to its state interest in “maintaining public order and preventing crime and addiction.”¹⁰⁹ In 2002, the Swedish government allowed SvenskaSpel, the state run gambling operation, to promote its services through digital media, and in November 2005 allowed SvenskaSpel to provide online poker to Swedish residents.¹¹⁰

¹⁰³ *Id.* at 510.

¹⁰⁴ *Id.* at 509.

¹⁰⁵ Niall A. O'Connor, *Swedish Gambling Industry-Questions to be Answered*, BETTING MARKET, 2007, available at <http://www.bettingmarket.com/sverige151172.htm>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

In light of *Gambelli*, Sweden's restrictions on private gambling can only be justified if they are made in an attempt to lower or reduce gambling opportunities for Swedish residents and to prevent addiction.¹¹¹ However, this is clearly not the case as SvenskaSpel's 2003 annual report on gambling within Sweden showed gambling "increased by 3.5%, not least due to energetic marketing" by SvenskaSpel.¹¹² While SvenskaSpel did not actively begin to promote its internet gambling until 2003, shortly after this time visitors to the site "tripled to about 600,000 a month and more than 100,000 new gaming accounts were registered in a very short time."¹¹³

These actions do not fall within *Gambelli*'s exceptions as Sweden is not prohibiting foreign online gambling services in order to curb gambling within Sweden.¹¹⁴ Sweden is prohibiting online gambling through foreign, non-Swedish sponsored operations in order to extract all the revenue from the operation for itself.¹¹⁵ This also violates Article 49 as Sweden is preventing the free flow of services without a legitimate excuse.

If the EC issued a directive calling for harmonization that would allow the free flow of online gambling services across Member States, then Sweden would stand to lose a great deal of revenue.¹¹⁶ Thus, they, along with other Member States who have similar operations within their respective Member States, would adamantly oppose it.

b. Would Exhaustive Harmonization Work?

While exhaustive harmonization would be the best option to achieve a level playing field for online gambling services across EU Member States, it is impractical and unworkable. First, states would adamantly oppose it in order to protect their own national monopoly. Second, if it was to pass, which is especially unlikely if the Council requires a unanimous vote, it would prove

¹¹¹ Case C-243/01, *Criminal Proceedings Against Gambelli*, 2003 E.C.R. I-13031. See also O'Connor, *supra* note 105 (noting how Swedish courts have not applied the *Gambelli* decision to operations within Sweden).

¹¹² O'Connor, *supra* note 105.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; O'Connor, *supra* note 42 ("In June 2005, the Swedish Supreme Administrative Court decided not to overturn the Swedish government's decision to reject an application from Ladbrokes to be allowed to set up betting operations in Sweden.").

¹¹⁶ O'Connor, *supra* note 105 (citing an increase of 3.5% in revenue and a 60% increase in internet operations).

too inflexible to deal with the evolving nature of online gambling. Exhaustive harmonization by its definition allows no flexibility within Member States to adapt and mold the measure as they see fit.¹¹⁷ Therefore, while it would certainly be the best option to create a free flow of online gambling services across the EU, exhaustive harmonization is not practical and thus could not be effectively implemented.

3. *Optional Harmonization*

Optional harmonization occurs when the issued directive gives a harmonized standard which providers of goods or services can then choose to follow.¹¹⁸ The producer is free to not follow the harmonized standard if he sells or provides goods or services within a localized area of a country and instead follows the national standard.¹¹⁹ However, if the producer chooses to provide services across national boundaries then he must subscribe to the EU harmonized standard.¹²⁰ It is possible this approach would work as it would still allow a producer of a service, here online gambling, to provide it solely within a Member State and therefore not have to comply with EU standards. However, the problem is the exclusion of online services from various Member States. Optional harmonization appears to regulate online gambling service providers in Member State A that want to provide services in Member State B by forcing compliance with EU standards. This would create a free flow of services across Member States.

Determining what the EU standard will be is a remaining problem, as Member States would desire a stringent standard to protect their monopoly on online gambling. A very lax standard would allow anyone to provide online gambling services within the Member State and affect the revenue they would receive from their own gambling provider.¹²¹ Also, if the standard was too strict and deterred providing services across borders, it would be no different from the current situation. Local online gambling service providers would continue operating solely within the borders of one Member State, which is not the goal of harmonization.

¹¹⁷ See *supra* note 63 and accompanying text.

¹¹⁸ BARNARD, *supra* note 51, at 515.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally Rutherford, *supra* note 5; *Gambling in Europe*, *supra* note 1; Verbiest & Keuleers, *supra* note 21.

In order to keep the status quo within the Member States, many nations would lobby for a strict standard making compliance difficult for private online gambling providers. Member States could continue to operate their local online gambling operations solely within the borders of their country while ignoring the EU directive and competition from foreign competitors who would not be able to comply with the strict standard.

Optional harmonization would in essence face similar problems to those presented by exhaustive harmonization. Member States would be reluctant to cede authority and have their state-run revenue generator damaged by the influx of various private online gambling providers. Given this reluctance to cede authority, Member States would advocate for a stringent standard thereby reducing the likelihood of acceptance by the Council. Therefore, while it appears in theory a practical and a viable option, in reality, optional harmonization will not work and would only maintain the status quo under EU law instead of individual state law.

4. *Minimum Harmonization*

Minimum harmonization occurs when the European Community adopts a minimum standard to which all Member States must subscribe, while also allowing individual Member States to impose higher standards on goods that will be either produced within the country or imported into the country.¹²² Provided the individual Member State's higher standards do not discriminate based on nationality or place of establishment, the EU allows the implementation of higher standards.¹²³

Of all the harmonization approaches available, this option seems to be the most viable and practical to achieve a single unified market for online gambling services across the European Union. Minimum harmonization provides the baseline to which all Member States must subscribe, but is also flexible by allowing for more stringent standards within each Member State based upon the national interests that any individual Member State may have.¹²⁴

¹²² BARNARD, *supra* note 51, at 515.

¹²³ *Id.* at 517–18.

¹²⁴ *Id.* at 516.

a. Example

For example, in a Member State that does not provide gambling services as part of a national monopoly, minimum harmonization would allow that country to set a higher standard on services within the country, as that country has already made known its position and national interest by not promoting gambling within its borders.¹²⁵ However, in a country, like Sweden, that has a rampant state run gambling operation, the EC harmonization effort would likely not allow a higher standard to be imposed, as the "[t]reaty provisions . . . set the ceiling which national legislation cannot exceed."¹²⁶ The EC directive would set a ceiling that would not allow a Member State to impose a complete ban of online gambling services from other states.¹²⁷ An online gambling service would have to meet the minimum standards imposed on it by the EC Directive if it wanted to pursue business in other Member States.

For example, in *Buet v. Ministère Public*, the ECJ found that a French law prohibiting door-to-door sales of goods was acceptable within the framework of an EC directive although the EC directive did not call for a complete ban on door-to-door sales.¹²⁸ The ECJ found that Article 8 of the EEC Treaty allowed Member States to impose a stricter standard in order to protect consumers which might include prohibition of these contracts entered into away from business premises.¹²⁹

This rationale has been expanded to the area of services in the *De Agostini* cases.¹³⁰ The ECJ concluded a Member State may not interfere with a broadcaster's freedom to provide transmissions to other Member States. The ECJ recognized Directive 89/552, also known as the Television Without Frontiers Directive, which was enacted to assure the freedom of broadcasters to provide television services.¹³¹ The basic principle behind the directive is that responsibility is on the transmitting state to ensure that broadcasters comply with both the directive and the potentially stricter national standards

¹²⁵ See generally *id.*

¹²⁶ *Id.* at 516 & n.183.

¹²⁷ *Id.* at 516.

¹²⁸ Case C382/87, *Buet v. Ministère Public*, 1989 E.C.R. 1235.

¹²⁹ BARNARD, *supra* note 51, at 517.

¹³⁰ Joined Cases C-34-36/95, *De Agostini*, 1997 E.C.R. I-3843.

¹³¹ Council Directive 89/552, 1989 O.J. (L298) 23, amended by Council Directive 97/36, art. 2(1), 1997 O.J. (L202) 60 (EC) ("Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.").

imposed within the host state.¹³² The corollary to this rule is that receiving states must accept the broadcasts from transmitting states without exception, provided the broadcast complies with the EU-wide Directive.¹³³

However, compliance with the directive does not completely immunize broadcasts. Article 2(2)(a) provides that the receiving state can refuse to accept transmissions from a transmitting Member State if the program "manifestly, seriously, and gravely" impairs the physical, mental, or moral development of minors.¹³⁴

The rationale behind the harmonization of television broadcasting is equally applicable in the context of online gambling services because both are services transmitted from one Member State to another. Therefore, it appears that the EU could institute a directive, as it has already done with television broadcasting, that would set a baseline for the minimum criteria an online gambling company would need to meet in order to provide services both within Member States and between Member States. Individual Member States could then set higher standards for operations within its borders.

However, Member States could not ban online gambling "transmissions" from other Member States provided those transmissions complied with the criteria established by the EU. Like the television context, this option appears to be viable for achieving an EU-wide policy on online gambling among Member States.

b. Need for a High Baseline

The baseline criteria would have to be relatively high in order to create consistency across the EU. If Member States imposed higher criteria for businesses operating within their borders, it would create a migration of online gambling providers to countries subscribing only to the baseline criteria imposed by the EU.¹³⁵ Therefore, a Member State would initially want a

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* art. 2(2)(a).

¹³⁵ Extent of Online Gambling, *supra* note 11. British Secretary of State for Culture, Media and Sport, Tessa Jowell, stated

research shows that online gambling is on the rise and there is a need to do something about this at a global level, as well as in the UK. I want to secure international support for agreed standards of regulation. That's why I called the summit today . . . Of course we also want online gambling companies to come onshore. We will welcome them here because we believe that by

business to meet high standards before it offered services across the EU. It is unlikely that individual Member States would want to impose higher standards only to have the business leave for a Member State that subscribes to the lower EU baseline, thereby resulting in lost tax revenue. It appears minimum harmonization faces the same initial problem as the other forms of harmonization: since each Member State looks out for its own interest, how will the initial directive be passed?

5. *Mutual Recognition*

Mutual recognition is the principle that “when a product [or service] is legally manufactured in one Member State, it may be freely offered for sale in other Member States, irrespective of whether it complies with the relevant national legislation in that country.”¹³⁶ Specifically, national legislation cannot prohibit the introduction of a similar foreign good made with standard equivalent to that enforced in the host Member State.¹³⁷ Thus, if a Member State provides an equivalent online gambling service, then theoretically it should be allowed in the host Member State where it is being offered.

Mutual recognition perhaps offers an answer to the problem of how to get Member States to agree to an EU-wide harmonization of gambling services. If Member States must recognize equivalent gambling services from other Member States, then Member States would be able to provide online gambling services in other Member States.

For example, Sweden would be able to provide its state-run online gambling business in other Member States, but it would also have to allow non-Swedish sponsored online gambling businesses to provide their services within Sweden. Sweden would be able to retain its tax revenue from the operation while it expanded its operation into other Member States at the same time.

allowing those who want to gamble to do so over the counter, not under the counter is the best way to protect children and vulnerable people and keep out crime . . . But we won't take part in a regulatory race to the bottom. On the contrary, if companies do come to the UK it will be because “regulated in the Great Britain” will mean a website is subject to the most stringent controls and social responsibility requirements anywhere in the world.

Id.

¹³⁶ A DICTIONARY OF THE EUROPEAN UNION, *supra* note 14, at 280 (noting also that the ECJ established mutual recognition in Case 120/78, *Cassis De Dijon*, 1979 E.C.R. 649).

¹³⁷ *Id.*

Similarly, a private business operating in Germany would be able to provide its services within France. France would have to allow the business, but it could also expand its operations into Germany. This would create a competitive regime where only the best online gambling services would survive, which presumably would be those that are the safest and securest for their customers, a measure that would be the baseline for the EU directive. This would likely be allowed by Member States as they would want the increased tax revenue that would be generated within their country from these private or public businesses.

This view seems to be gaining hold in some EU Member States. For example, Italy, an early supporter of banning online gambling within its borders, recently loosened its tight restrictions on online gambling.¹³⁸ Italy's decision to regulate, instead of completely banning online gambling, "has already brought a boost to the Italian economy. . . ."¹³⁹ Italy's decision has also brought respectable online gambling operations, like Ladbrokes and William Hill, to the table to apply for Italian licenses, this generating increased revenue as citizens gamble on these respectable sites.¹⁴⁰ Following Italy's lead, Spain has also announced plans to institute regulated areas where it will allow gambling, specifically online gambling.¹⁴¹ Spain, like Italy, will grant licenses to private businesses valid for a set number of years, if the business meets the standards imposed by Spain. After expiration the licenses are subject to renewal.¹⁴² It is evident, when considering the lead of Italy and Spain, that allowing private businesses to provide online gambling, and to actually set up operations within Member States, combined with regulation, is a viable alternative to the current prohibition in many Member States.

IV. CONCLUSION

With the growing emergence of online gambling as a major business throughout the world, the time has come for the European Union to speak in a single voice for all its Member States on the issue.¹⁴³ Individual Member

¹³⁸ Haley Hintze, *Major Nations Now Debating Online Poker Legislation*, POKER NEWS, Dec. 16, 2006, available at <http://www.pokernews.com/news/2006/12/nations-debating-online-poker-legislation.htm>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Extent of Online Gambling, *supra* note 11 (as recognized by the UK in research it

States have stated their desires to keep online gambling a matter solely within the discretion of the respective Member State; however, this often means a prohibition on the importation of online gambling from any other Member State and a prohibition on the establishment of gambling operations not licensed by the individual Member State.

With the rise of the internet, nations are faced with the prospect of attempting to protect their state run source of revenue from private companies attempting to procure citizens who once willingly wagered with the state run operations. This is a tough task for these countries, as it is estimated that there are 2,000 online gambling sites with an estimated 23 million people wagering nearly \$12 billion in 2005 alone.¹⁴⁴ Some countries, notably England, Italy, and Spain, however, have already recognized the benefit and additional source of revenue a regulated online gambling regime can bring. These countries are in the minority, though, as most EU countries continue the prohibition of non-state sponsored gambling.

Prohibition is contrary to the EU's stated goal in the Treaty of Rome, which has been amended to provide for a single market across EU Member States in both goods and services, a category into which online gambling falls. In 1994, the ECJ, in *Her Majesty's Customs and Excise v. Schindler*, established that gambling is a legitimate "service" under the meaning of the Treaty of Rome.¹⁴⁵ Any attempt to prohibit the importation of online gambling violates the Article 49 provision for the free flow of services.

However, Member States argue there is no specific EU legislation prohibiting them from outlawing non-state licenses or sponsored gambling within their state. Also, these Member States point to cases, like *Gambelli*, where the ECJ held that national restrictions can be justified by public interest objectives. Member States argue consumer protection, as well as a curbing the problem of gambling within the country, falls into this category. However, prohibitions on online gambling do not serve any public interest goals and therefore cannot fall under any *Gambelli* exception.

It is time for the EU to go beyond cases like *Gambelli* and to attempt a harmonization across the EU by allowing country sponsored and private company online gambling in each of its Member States. Considering the

conducted for the first ever online gambling summit held at the Royal Ascot in Great Britain on October 31, 2006).

¹⁴⁴ Fahrenkopf, *supra* note 10.

¹⁴⁵ Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 E.C.R. I-1039; Rutherford, *supra* note 5.

borderless nature of online gaming, the harmonization of online gaming across the EU would establish a framework for national governments to work within, while at the same time protecting consumers, which many states argue is their primary goal in restricting cross-border gaming.

Leaving the decision up to the individual Member States has proven impractical. Member States are attempting to prohibit the free flow of online gambling, a potentially impossible task. States like England, Italy, and Spain have already recognized the advantages, to both the state in additional revenue and to consumers who only do business with reputable online organizations, in allowing regulated online gambling within their respective countries.¹⁴⁶

The best solution would be two-fold. The EU should institute a minimum harmonization standard coupled with a mutual recognition strategy. If the minimum standard is relatively high, protective Member States would be more likely to sign on and ensure the standard's passage. Also, through the mutual recognition strategy, Member States would have to allow online gambling services once the services met the minimum standard or, if in place, the higher one set by the host Member State.

Member States with online gambling operations already operating within their borders should not be able to ban the importation of this service on *Gambelli* grounds. Because it appears they are already promoting gambling within their borders, they cannot argue a ban will help curb the immoral activity of gambling within its borders. Member States that do not have online gambling operations, either privately or publicly run, within their borders at the time of the directive, may successfully argue that a ban on importation of online gambling is allowed under *Gambelli*.

The wording of the directive should be flexible enough to allow for changes. For example, if a Member State, that did not have online gambling within its borders at the time of the directive, later allows online gambling businesses to operate within its borders, it would then fall under the Minimum Standard imposed by the EU and would have to allow online gambling services from other states.

Under this framework, online gambling would be able to freely flow from one country to another over the unbounded internet, thereby bringing all Member States into line with the stated goal of creating a single, unified market for the free flow of goods and services.

Also, an EU-wide Directive would allow for regulation of the online gambling businesses operating within the EU. This would protect consumers

¹⁴⁶ Hintze, *supra* note 138.

from fraudulent transactions that might occur in an unregulated industry such as the online gambling industry. Currently, there are over 2,300 sites operating, the great majority of which are unregulated.¹⁴⁷ This would fulfill many Member States' stated goal of providing for the protection of their consumers.

This could also potentially generate more tax revenue from businesses operating within the EU because they would now be regulated and taxed. Also, the EU could potentially keep out online gambling provided by operators outside of the EU. The operations set up within the EU would potentially be competitive enough to keep the EU consumer euros within the EU.¹⁴⁸

It is only by speaking with a single, unified voice that the EU can bring its Member States together to further the common goal of attaining a single, common market across the EU. The EU's approach to the issue will be interesting as it attempts to address the always evolving issue of the internet, which will certainly confront the EU with various issues in the coming years. The EU's decision on online gambling will set the stage for many issues it will confront in the coming years. It begs the question whether the EU is as unified as it appears or whether it will be easily divided. Stay tuned, but hopefully the EU will make the decision most beneficial to the parties involved and which harmonizes online gambling.

¹⁴⁷ Extent of Online Gambling, *supra* note 11.

¹⁴⁸ *Id.*

