

Will Gambelli II bring clarification? Decision pending before the European Court of Justice in the Placanica case

An Italian court, the Tribunale di Larino, has, in its decision of the 8th of July 2004, submitted the questions already raised by the Gambelli Decision, whether and under which conditions a restriction to the freedom of services guarantee can be justified, to the European Court of Justice (ECJ). There was a need for clarification after the Supreme Court of Cassazione (Corte Suprema di Cassazione) went against the Gambelli Decision (which the court referred to) in April 2004 in its "Bruno Corsi" decision (Case no.: 23271/04).

As in the Gambelli case, this is a criminal proceedings case against a sports betting provider, in this case, it is against Mr. Massimiliano Placanica, who transmitted bets to a bookmaker authorised in another EU Member State. The Italian authorities considered this (EU) cross border provision to satisfy the elements of an offence under Law No. 401/89 (similar to Art. 284 of the German Criminal Code – StGB). The Italian court seeks clarification on the compatibility of this criminal offence with the freedom of establishment and freedom of services guarantees.

In view of the greatly differing decisions of the national courts following the Gambelli Decision (e.g. in Germany, Italy, Belgium, Austria and Sweden), the ECJ will, in our opinion, concretise its "Gambelli Criteria". The ECJ is unlikely to have been impressed by the fact that several national courts (among them some very ignorant German ones,

such as the Bavarian Supreme Court (Bayerische Oberste Landesgericht)) have held the jurisprudence of the ECJ to be completely irrelevant.

The Placanica Decision will not, however, bring any clarification to the competition law problems because the ECJ is bound to the question submitted (although it frequently reconstructs these). The question as to the compatibility of a gambling monopoly and a compartmentalisation of the national gambling market with the competition rules in the EC Treaty will, in any case, be dealt with in the breach of Treaty proceedings and, as the case may be, in the upcoming decision of the EFTA Court on the Norwegian gaming machines. The EU Commission recently commissioned a study of the gambling market. In the medium term, there will probably be a European Law regularisation of the (EU) cross border provision of games of chance (somewhat along the lines of the freedom of services directive)