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ONLINE GAMBLING REGULATION PROBLEMS IN LITHUANIA AND THE EUROPEAN UNION

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Abstract. *In many European countries, the market for gambling has grown quite significantly in the last decade. This has mainly been online gambling and the resulting opportunity to play internationally. In Lithuania, online gambling is prohibited; however, it is rapidly gaining popularity and is available for Lithuanian players. Thus, it is clear that gambling services in Lithuania are not regulated enough. In the first part of the article, a brief overview of the legislation regulating gambling activities in Lithuania is given. The second part of the article deals with an analysis of the access of Lithuanian players to online gambling; attention is drawn to the problem of taxation—international online gambling companies do not pay taxes to the Lithuanian budget. The second part also includes a discussion of online gambling regulatory alternatives, their positive and negative aspects. In the third part of the article, the author analyses how online gambling activity is regulated in other European Union (EU) countries. The author notes that the gaming market regulatory framework differs among the EU Member States. Attention is drawn to the fact that gambling throughout the EU is regulated at the national level and not by the European Community legislation. The fourth part of the article summarizes the case-law of the European Court of Justice on online gambling restrictions in individual countries. The European Court of Justice has examined a number of cases in which the legality of gambling restrictions*

was questioned. Upon entering the EU, the Member States agree to provide free movement of persons, goods, services and capital within the EU Member States, but, as the European Court of Justice has ruled, the Member States may restrict cross-border gambling activity provisions in their country. Thus, in this section, the author analyses the grounds on which such restrictions must be justified.

Keywords: online gambling, regulation of gambling, gambling restrictions, restrictions on the free movement of services, justification of gambling restrictions.

Introduction

Gambling activity in Lithuania has been legalized relatively recently; however, a large number of gaming machine halls, casinos and betting stations are already in operation. Recently, the popularity of gambling in cyberspace has increased. Although the Lithuanian law prohibits gambling operators to offer online gambling to Lithuanian residents, gambling services are available. There are no obstacles for Lithuanian players to use online gambling services offered by gambling operators registered in foreign countries. It should be noted that gambling services are considered as a very specific type of economic activity due to social and public order and health care issues. For this reason, proper regulation of online gambling is highly relevant in order to ensure consumer protection, fraud and crime prevention. This problem emphasizes the *topicality* of the present research.

The article deals with the topic that is relatively *new*. Online gambling regulation issues have been analysed by Mantas Arasimavičius¹. The author gave a quite detailed analysis of the spread of online gambling trends, discussed the theoretical issues regarding online gaming regulation. The article also dealt with many issues of online gambling in the U.S. Meanwhile, the present article addresses the issue of how to regulate online gambling activities in Lithuania according to the European Union (EU) legislation and the case-law of the European Court of Justice (ECJ). As the gambling activities period in Lithuania is short enough, there is no case-law on online gambling regulation issues in Lithuania yet.

Therefore, the *subject* of this research is online gambling services in Lithuania.

The *aim* of the research is to reveal different approaches to the regulation of online gambling. To achieve this objective, the following *tasks* were set: 1) to examine the gaps in online gambling regulation in Lithuania; 2) to disclose the availability of online gambling for Lithuanian players; 3) to disclose the EU Member States' approach to online gambling regulation; 4) to analyse EU legislation and the case-law of the ECJ on online gambling regulation.

1 Arasimavičius, M. Internetinių azartinių lošimų teisinio reguliavimo problemos [Internet gambling regulation. Arising legal issues]. *Socialinių mokslų studijos*. 2009, 2(2): 310–311.

The author of this article used a variety of methods. Analytical and comparative methods were used to review online gambling regulation problems in Lithuania, to compare online gambling services legislation in different EU Member States, to analyse the case-law of the ECJ on the legality of online gambling restrictions.

1. Gambling Regulation in Lithuania

Gambling services in Lithuania were legalized in 2001 when the Gaming Law (the GL) entered into effect. In comparison with other countries, gambling activity in Lithuania has existed for a sufficiently short period of time.

Currently, gambling of the following types may be organized in Lithuania: machine gaming, bingo, table games (roulette, cards or dice games), lotteries, totalisator and betting. The GL provides location requirements for the appropriate games organization. Under Article 12(1) of the GL, gaming should be operated in gaming machine halls, bingo halls and gaming establishments (casinos).² However, the GL does not specify the place of the betting and totalisator stations.

Article 8 of the GL provides that gaming should be operated by companies which have obtained a licence to carry out this activity and permits to open gaming machine halls, bingo halls and gaming establishments (casinos) or when the State Gaming Control Commission (the Control Commission) approves totalisator or betting regulations.³ This means that each company, in order to open a gaming machine hall or gaming establishment (casino), must obtain a permit, and in order to start betting activity or totalisator, they also must have an approval of the Control Commission. It can be concluded that if a company's chosen place or premises to organize gambling do not meet the requirements of the GL, the Control Commission will not approve the regulation necessary for gaming activities. Thus, this is a way to control betting and totalisator stations.

Under Article 10 of the GL, it is prohibited to operate gaming not provided for in this law or to operate it in violation of the procedure established in this law.⁴ This provision prohibits not only the organization of different types of gambling, but also for example, the organization of the games of chance in places or premises not described in the GL.

Lithuania now has seventeen companies with a licence to organize the games of chance. Lithuania operates a total of 271 gaming establishments (casinos), gaming machine halls and betting halls.⁵

None of the companies registered in Lithuania organize gambling online. Online gambling is not in directly mentioned in the GL; however, in consideration of the abo-

2 Gaming Law of the Republic of Lithuania. *Official Gazette*. 2001, No. 43-1495.

3 *Ibid.*

4 *Ibid.*

5 Valstybinė lošimų priežiūros komisija. *Licencijų ir leidimų sąrašas* [State Gaming Control Commission. The list of licences and permissions]. [interactive]. [accessed 23-03-10]. <<http://www.vlpk.lt/lt/losimu-organizatoriai/licencijos-leidimai/ataskaitos/>>.

mentioned provisions regulating gambling activities and the opinion of the Control Commission, it is possible to conclude that online gambling is prohibited in Lithuania. It does not necessarily mean that online gambling should be considered as a distinct type of gambling in the GL, because all types of gaming described in the GL such as gaming machines, bingo, betting, etc. can be organized on the Internet. As already mentioned above, not only the gambling type but also its organizational arrangements cannot be in conflict with the law. The places where gaming activity can be operated are also regulated by the GL. However, it does not mention the cyber space. Moreover, the GL does not include any provisions with regard to the places for the establishment of betting and totalisator stations. Still, as stipulated in the GL, these activities can be operated in accordance with the approved regulations. It should also be noted that Article 10(2) of the GL defines the locations where the operations of gaming are prohibited, although the prohibition of online gambling organization is not mentioned.

During recent decades, the gambling market has grown considerably in many other European countries. The ever-expanding accessibility to the Internet has led to the recent growth of the gambling market and, in particular, cross-border gambling.⁶ The resulting opportunity to play on the international level facilitates the development of a global gambling market beyond state control.⁷

Therefore, the opportunity for Lithuanian players to choose online gambling will be discussed further.

2. Online Gambling Accessibility in Lithuania

Although the GL prohibits online gambling activity, it does not impose any restrictions for Lithuanian players. It allows Lithuanian players to choose gambling services provided by online gambling operators registered in foreign countries. Thus, online gaming organized by various gambling operators, for example, with the licence granted by the Malta Lotteries and Gaming Authority or registered in Gibraltar, the Isle of Man and others, is available for Lithuanian players.⁸ The websites of these gambling organizers are offered in many languages, including Lithuanian. Furthermore, some gambling operators registered in foreign countries even advertise in the Lithuanian language and support Lithuanian sports teams.

Malta is the first EU Member State to provide jurisdictional services to interactive gambling operators and this has enabled Malta to the exclusivity of being the only EU location with certain online gaming licences.⁹ For example, one British company has

6 Cisneros Örnberg, J. *Nordic Gambling Markets and the Possibilities for State-Level Control* [interactive]. 2006 [accessed 01-04-10]. <<http://www.camh.net/egambling/issue18/ornberg.html>>.

7 *Ibid.*

8 See websites <<http://www.unibet.com/>>; <<http://www.triobet.com/>>; <<http://www.pokerstars.com/>>; <<http://www.bwin.com/>>, etc.

9 Swiss Institute of Comparative Law. Study of gambling services in the internal market of the European Union. *Final Report* [interactive]. 2006 [accessed 01-04-10]. <http://ec.europa.eu/internal_market/services/docs/gambling/study5_en.pdf>.

obtained a Maltese gaming licence, initially only for the supply of online poker services, since it cannot yet be offered under licence in the UK. This effectively gives gaming operators registered in other countries the possibility to relocate their operations to Malta, seeking for a more attractive tax policy.¹⁰ That step can be interpreted as a means of pressure on individual countries with respect to their tax policy.¹¹

Thus, the Lithuanian laws prohibit the organization of gambling in cyber space, but they do not prevent players from using such services. It also facilitates foreign registered gambling operators to supply their services.

The fact that online gambling is not regulated by the Lithuanian laws was also confirmed by the Control Commission. According to the existing law, online gambling organization is prohibited; however, there is no prohibition to gamble online. Operators offer online gambling to Lithuanian players due to high demand for such services, but there are no effective legal instruments to control foreign online gambling operators even in cases when their actions, by nature, are directly addressed to the Lithuanian market (accessibility of online gambling websites, language, transactions through Lithuanian banks).¹²

The problem is that online gambling companies offering their services to Lithuanian players do not pay any taxes to the Lithuanian Government. For example, in 2009, LTL 32,1 million went into the state budget through lottery and gaming tax paid by national lottery and gambling operators.¹³ It is likely that this amount would be much higher, if Lithuanian gamblers had the opportunity to choose Lithuanian online gambling operators instead of foreign ones.

As stated by the European Parliament:

Online gambling has existed since 1996, where the first game was made available in Finland. Since then the market for online gambling has grown considerably. In 2003, it was estimated that the commercial online gambling market in EU 25 generated Gross Gaming Revenues (operator winnings less payments of prizes) of € 51.5 billion in 2003. At present, online gambling via Internet, mobile phones or interactive TV accounts for roughly 5 % of the total gambling market in the EU, worth € 2 to 3 billion in annual Gross Gaming Revenues in 2004. The European online gambling market is expected to grow at a minimum rate of 8.4 per cent per annum (in Austria and Hungary) to a maximum of 17.6 per cent (in Italy).¹⁴

10 Swiss Institute of Comparative Law. Study of gambling services in the internal market of the European Union. *Final Report* [interactive]. 2006 [accessed 01-04-10]. <http://ec.europa.eu/internal_market/services/docs/gambling/study5_en.pdf>.

11 *Ibid.*

12 Arasimavičius, M., *supra* note 1, p. 310–311.

13 Valstybinės lošimų priežiūros komisija. *2009 metų veiklos ataskaita* [2009 Activity Report of the State Gaming Control Commission]. [interactive]. 2009 [accessed 01-04-10]. <<http://www.vlpk.lt/Dokumentai/LT/Veiklos%20ataskaitos/2009%20metu%20veiklos%20ataskaita.pdf>>.

14 European Parliament. Report A6-0064/2009 of 17 February 2009 on the integrity of online gambling (2008/2215(INI)) [interactive]. 2009 [accessed 01-04-10]. <<http://www.europarl.europa.eu/sides/getDoc.do?language=LT&reference=A6-0064/2009>>.

Thus, it is clear that online gambling is rapidly gaining popularity. This may be related to the fact that online gambling overcomes many of the inconveniences which apply to offline gambling products, such as expense and time. Online gambling also helps avoid negative social attitude which players may encounter during a visit to gambling or betting halls.

To sum up these statements, *two alternatives* can be identified:

- online gambling legalization in Lithuania;
- the prohibition of the provision of online gambling services through foreign gaming operators' Internet websites to Lithuanian residents.

What regards the first alternative, it should be noted that, when such an issue relating to Internet and other forms of remote gambling arises, governments often consider whether to permit this activity and, if so, to what extent as well as how it should be regulated.¹⁵ However, in light of the reality of remote gaming already in existence, the appropriate questions that governments should be considering are how this activity can be properly regulated and what will be the consequences.¹⁶

Gambling services are considered as a very specific kind of economic activity due to social and public order and health care issues. For this reason, both positive and negative aspects related to the legalization of this activity can be identified.

One of the negative aspects is the threat of more individuals engaging in gambling activities and the increased risk of gambling dependence.

Most consumers are able to gamble without risking a psychological addiction, however a small but significant number of individuals risk becoming problem gamblers. World Health Organization defines problem gambling as any excessive gambling that leads to financial, social and/or psychological disorders. The risk of an addiction to gambling is generally aggravated by the permanent availability of the opportunity to play, the frequency of wins, the enticing or attractive nature of games, the possibility of staking large sums, the availability of credit in order to play, the location of games at places where people can play on an impulse, and the fact that there is no information campaign regarding the risks of gaming.¹⁷

It must also be acknowledged that, as online gambling is available at any time, the player has a constant opportunity to gamble, and for this reason online gambling is becoming increasingly attractive.

Another negative aspect is that online gambling covers several risk factors of problem gambling. For example, online operators are able to offer a wide variety of games (betting, roulette, poker, slot machines, etc.) and constantly introduce new games using new marketing and targeting methods, involving the latest data research technologies to explore customer (spending) behaviour, keeping the consumer 'glued' to the screen.¹⁸ A worrying aspect is the increasing cross-over between multimedia services, for example, television, phone and SMS services and Internet sites in offering remote or online

15 Swiss Institute of Comparative Law, *supra* note 9.

16 *Ibid.*

17 European Parliament, *supra* note 14.

18 *Ibid.*

games, making it easy and socially acceptable to participate in those games, especially for younger people.¹⁹

It is obvious that remote gaming is already a reality, and there are all possibilities and conditions for players to gamble online. As mentioned earlier, cross-border gaming operators have created not only the websites translated into the Lithuanian language, but also a cash payment system that is easy to use and understand. For this reason, it is likely that the legalization of online gambling in Lithuania should not significantly increase the number of potential players. Most likely, the already existing gamblers, instead of choosing games of chance from a cross-border gaming operator, will choose the Lithuanian one.

One of the main positive aspects is that the legalization of online gambling would ensure the collection of revenue from the Lithuanian players to the local operators rather than foreign ones. This would ensure a larger lotteries and gaming tax collection to the state budget.

The European Parliament in the report on the integrity of online gambling states that profits from gambling should be used for the benefit of society, including rolling funding for education, health, professional and amateur sport and culture.²⁰ Such a view can be described as favourable to the legalization of gambling activities. There is no doubt that the revenue from gambling should be seen not as a justification of the policy, but only as an additional positive effect.

With regard to the legalization of online gambling, it is necessary to mention another important aspect. Lithuanian players, after winning a certain amount of money, must pay income tax calculated from the difference in the amounts won and paid. For example, a player who purchases a betting card or collects a winning (less than LTL 3,500) is not registered, so it is fairly simple to avoid the taxes. Meanwhile, if the player is buying betting cards online, it would be difficult to evade taxes. Thus, one can argue that online gambling legalization as a means of tax enforcement is a positive thing.

The GL (Article 20(1)) stipulates the duty of the gaming operator to register persons who either exchange cash for tokens or place a stake or collect a winning in excess of LTL 3,500 or an equivalent amount in foreign currency in accordance with the procedure established by the Government.²¹ For example, the player may split its stakes buying a few instead of one betting card and avoid registration. Meanwhile, if players used online gambling services from Lithuanian gaming operators, all transactions and money transfers would be registered.

Thus, one can argue that online gambling is more transparent in terms of tax collection. Online gambling legalization would help the state ensure a decrease in tax evasion and implement anti-money laundering measures.

19 European Parliament, *supra* note 14.

20 European Parliament. Resolution P6_TA(2009)0097 of 10 March 2009 on the integrity of online gambling (2008/2215(INI)) [interactive]. 2009 [accessed 01-04-10]. <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EN>>.

21 Gaming Law of the Republic of Lithuania, *supra* note 2.

Online gambling legalization is available on *national* and *international* levels. Legalization on the national level means that gaming operators holding Lithuanian licences are authorized to organize online games, while legalization on the international level means that both Lithuanian gaming operators and cross-border gambling operators are allowed to offer online gambling to Lithuanian players. Here attention should be drawn to the question whether the legalization of online gambling on the national level is consistent with EU legislation and is not in violation of Article 49 of the European Community Treaty,²² which stipulates that any restrictions on free circulation of services within the Member States are prohibited.

Another alternative mentioned above is the prohibition of online gambling services provided to Lithuanian residents in foreign gaming operators' Internet websites. This means that legal and technical measures should be taken to ensure that online gambling services provided to Lithuanian residents in cross-border gaming operators' Internet websites are prohibited and unavailable. This alternative is one of the several objectives of the Control Commission regarding online gaming legislation.

In the report on the integrity of online gambling published by the European Parliament, it was noted that:

Member States are therefore forced to adapt and develop regulation in order to keep pace with consumer preferences and suppliers' services. The specific nature of online gambling causes certain difficulties for policy-makers in the Member States. First of all, online gambling entails a cross-border element, which makes it possible for online gambling operators to provide their services to consumers in other Member States than the one they are based in. Consumers may therefore not know in which country their service provider is based. Secondly, online gambling creates an increased risk of online gambling providers not being able to verify the identity of the consumer since the person using a credit card may not be its rightful owner. Thirdly, online gambling sites can be set up quickly and dishonest operators can therefore appear and disappear within a short period of time. Fourthly, it is difficult for online gambling operators to supervise their customers as opposed to conventional gambling where it is possible to see whether the customer is under age, is drunk or in other ways intoxicated or behaving suspiciously. Also since access to online gambling services is easy and can be done in isolation, social checks and constraints that can be exercised by the presence of others are lacking.²³

Although it is insufficient justification by itself for legalization, it is almost impossible to ensure effective prohibition of online gambling because it is difficult to block individual players' online access and prosecute operators that legally provide online gambling services from other countries.²⁴

22 Treaty Establishing the European Economic Community (Consolidated version 1992). *Official Journal C* 224 of 31 August 1992.

23 European Parliament, *supra* note 14.

24 Williams, J. R.; Wood, T. R. *Internet Gambling: A Comprehensive Review and Synthesis of the Literature* [interactive]. 2007 [accessed 01-04-10]. <<http://www.uleth.ca/dspace/bitstream/10133/432/1/2007-InternetReview-OPGRC.pdf>>.

There are several other online activities that are very difficult to control (e.g. child pornography, sites promoting illegal behaviour, sites containing hateful content, etc.) as well as it is also possible to identify a number of laws to which the general public does not strictly adhere (e.g. illicit substance use, drinking and driving, declaring all taxable income, etc.).²⁵ The existence of legal efforts to limit these activities is a better alternative than non-existence, and certainly preferable to no action and no legal prohibition.²⁶ Finally, it must be remembered that the purpose of legislation is not to conform to human behaviour, but to help shape it.²⁷

The Chairman of the Control Commission admits that ‘there is a desire to block everything that comes from foreign markets and outside the jurisdiction of Lithuania, but to implement these objectives a lot of financial resources are required’.²⁸

Most countries that prohibit online gambling services from cross-border gambling operators use such measures as blocking IP addresses as well as banning money transfers from banks. However, there is no clear benefit and results of such measures: ‘[w]hile it is theoretically possible to keep an entire nation from accessing online gaming through static IP control or internet service provider limitations, there would be nothing to stop consumers from going around these preventative measures as the collective public learning curve overcomes attempts by government to suppress the activity’.²⁹

Online gambling prohibition is often grounded by two opinions distinguished on the basis of an assumption as to who has the obligation to ensure the prohibition. For example, the British Government’s position is that if a country does not want its residents to gamble online games provided by foreign operators, it itself rather than the country where the gaming operator is located must take legal and technical measures.³⁰ The regulated remote gambling activity takes place where the operator is located. The British Government reserves the right to impose geographical restrictions to stop operators accepting bets from countries where all gambling, or perhaps just online gambling, is forbidden. It distinguishes this situation from the one where another country is seeking to prevent access by its citizens to British or other foreign operators, but not locally.³¹ This contrasts with the view taken in the U.S., which is that gaming operators must comply with the laws of the country where players are located.³² Thus, although the Lithuanian legislation prohibits online gambling, cross-border gambling operators are allowed to accept bets from Lithuanian players.

25 Williams, J. R.; Wood, T. R. *Internet Gambling: A Comprehensive Review and Synthesis of the Literature* [interactive]. 2007 [accessed 01-04-10]. <<http://www.uleth.ca/dspace/bitstream/10133/432/1/2007-InternetReview-OPGRC.pdf>>.

26 *Ibid.*

27 *Ibid.*

28 Staniulytė, T. Nors ir nelegalūs, internetiniai lošimai įgauna pagreitį [Online gambling grows in popularity despite being illegal]. *Verslo žinios* [interactive]. Vilnius, 2009 [accessed 01-04-10]. <<http://vz.lt/Print.aspx?ArticleID=5e007407-2c52-4872-b231-c164a0b9776a>>.

29 Swiss Institute of Comparative Law, *supra* note 9.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

This leads to a conclusion that if the states' position is online gambling prohibition, it should impose legal and technical measures, despite a relatively complicated implementation of such restrictions.

The second alternative also leads to the question whether state law can prohibit gambling operators located in any other country to offer gambling services and whether it could not be regarded as a restriction of the freedom to provide services. The legitimacy of restrictions in the gambling area has been examined by the ECJ in a number of cases. Therefore, the following section of the article deals with the examination of how other EU Member States deal with this issue and a summary of the case-law of the ECJ as regards gambling.

3. Online Gambling Regulation in EU Member States

The European online gambling markets are regulated differently. There are different online gambling market regulation models.

The Edinburgh European Council of 1992 decided not to regulate gambling on the EU level and, in accordance with the principle of subsidiarity, found that it was better to regulate gambling on the national level.³³ As stated by the European Parliament, 'the regulatory frameworks for the (conventional and online) gambling market in the EU are very much heterogeneous.'³⁴ In twenty EU Member States online gambling is allowed, whereas seven Member States have prohibited online gambling, thirteen Member States have a liberalized market, while six have state-owned monopolies and one Member State has licenced a private monopoly³⁵.

EU Member States can be categorized into four high-level policy stances according to their legislation on online gambling:

Table 1. Summary of EU Member States' approaches to online gambling³⁶

Actively allow*	Passively allow	Actively prohibit	Passively prohibit
Austria	Bulgaria	Germany	Lithuania
Belgium	Cyprus	Greece	Netherlands
Denmark	Estonia	Romania	Slovenia
Finland	Hungary	Czech Republic	
France	Ireland		

33 Cisneros Örnberg, J., *supra* note 6.

34 European Parliament, *supra* note 14.

35 *Ibid.*

36 Young, R.; Todd, J. *Online Gambling. Focusing on Integrity and a Code of Conduct for Gambling* [interactive]. Brussels, 2008 [accessed 01-04-10]. <<http://www.europarl.europa.eu/activities/committees/studies/download.do?file=23191>>.

Italy	Luxembourg		
Latvia	Poland		
Malta	Portugal		
Slovakia	Spain		
Sweden			
UK			
11	9	4	3

* 'Member States that actively allow or actively prohibit online gambling are defined as those which have passed legislation and/or imposed regulation which deals explicitly with online gambling. Member States that passively allow or passively prohibit are defined as those which have chosen to take no new action in relation to online gambling but to remain silent on it or to apply pre-existing legislation' (Young and Todd, 2008).

Table 1 shows that Lithuania is among the few EU Member States which passively prohibit online gambling. It should be noted that the vast majority of EU Member States tolerate online gambling and have chosen to regulate online gambling activities rather than prohibit.

Most states in Europe control online gambling through licencing. Legislation is often present, obliging to obtain specific licences and sanction special rules for online-gambling practices. In the UK, for instance, legislation not only tolerates the activity altogether but also supports foreign operators coming into the UK and running their activities from there.³⁷ The advantage of such an attitude towards online gambling is that the state is able to regulate the activity effectively, thus enabling public authorities to tackle issues of fraud and money laundering.³⁸

The governments of EU Member States which prohibit online gambling 'have generally placed the burden of prevention on the financial system, by requiring banks and other payment processors to block financial transactions between would-be players and online gambling operators'³⁹. Financial institutions have criticized this approach, arguing that they are not adequately prepared to differentiate between legal and illegal transactions without a clear black list; they also argue that such measures violate Article 56 of the EU Treaty on the free movement of capital.⁴⁰

The EU Member States which allow online gambling have implemented different online gambling market models. *The principal categories are:*

1. State monopoly (Denmark, France, Hungary, Luxembourg, Spain, Sweden);
2. Licenced private monopoly (Austria);
3. Liberalized market with regulation (all other EU Member States).⁴¹

37 Online casinos & EU legislation [accessed 01-04-10]. <http://www.gamblingplanet.org/legality_main.php>.

38 *Ibid.*

39 Young, R.; Todd, J., *supra* note 36.

40 *Ibid.*

41 Young, R.; Todd, J., *supra* note 36.

For example, the Nordic countries seek to preserve a state-controlled market with one or a few state-controlled gambling operators, while the UK has a fairly open gambling market with many operators and shows an interest in expanding this market in the future.⁴² All Member States establish different types of restrictions on online gambling and most of these restrictions support the objectives of the efforts to protect consumers against fraud and crime as well as addiction and juvenile participation in games while ensuring consumer protection.⁴³

At the same time, the monopolistic structure of state-controlled gambling is being questioned on both the national and the international levels due to the EU legislation regulation and harmonization.⁴⁴

According to the European Parliament,

The Member States who have banned online gambling altogether or allow it only under monopoly conditions argue that these limitations are justified on grounds of social and public order. However, there have been great disputes regarding the so-called national gambling monopolies. Numerous complaints have been filed with the European Commission by gambling companies, private persons and media organizations claiming that certain Member States are unlawfully protecting their gambling markets and the revenues arising from their monopolies. As a result the Commission has started infringement procedures against ten Member States, in order to verify whether national measures limiting the cross-border supply of online gambling are compatible with Community law.⁴⁵

The single market is defined as a place without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed. In order to decide whether the European Community law can be applied, it is necessary to determine which one of the freedoms is online gambling in conflict with. In some cases, gambling may be related to the free movement of goods, but mainly it is the freedom to provide services that applies.⁴⁶

The European Commission does not regulate gambling, which remains a national competency. However, gambling services are within the scope of the EC Treaty under the freedom to provide services (Article 49) and the third Anti-Money Laundering Directive (2005/60/EC), but there is no secondary legislation in the field.⁴⁷

The European Parliament highlights that the Member States have a right to regulate and control their gambling markets in accordance with their traditions and cultures in order to protect consumers against addiction, fraud, money-laundering and match-fixing

42 Cisneros Örnberg, J., *supra* note 6.

43 *Ibid.*

44 *Ibid.*

45 European Parliament, *supra* note 14.

46 Cisneros Örnberg, J., *supra* note 6.

47 MacLeod-Miller, L.; Winkelmuller, M. The role of the EU in the regulation of gambling. In *The Future of Gaming and Amusement in Europe: A Collection of Essays* [interactive]. Brussels: EUROMAT, 2006 [accessed 01-04-10]. <http://www.euromat.org/uploads/fmanager/the_future_of_gaming.pdf>.

in sports.⁴⁸ The European Parliament also stresses that all gambling markets must be well-monitored and regulated, and online gambling operators must comply with the legislation of the Member State in which they provide their services and the consumer resides.⁴⁹

Summarising the abovementioned individual EU Member States' approaches to online gambling regulation, it can be concluded that most countries allow online gambling activities. In order for it to be transparent and to ensure the protection of EU citizens, online gambling activity must be properly regulated. It should draw attention to the fact that Lithuania is one of only three EU Member States which passively prohibit online gambling activities.

In summary, it seems likely that rapid growth and expansion of gambling activities via remote channels, regardless of national legislation with increasing dangers to citizens of individual countries and the loss of tax revenues, should result in the establishment and enforcement of international agreements. The ultimate result may eventually be the establishment of common international standards and regulatory requirements that would reduce the differences between individual jurisdictions.⁵⁰ This may be an important way of encouraging EU citizens to gamble within EU regulated companies because of the legal protection provided.⁵¹

4. Case-Law of the European Court of Justice

As mentioned above, gambling within the EU is not regulated by the European Community legislation; instead it is subject to the legislation on the national level. All Member States have imposed strict limitations on gambling activities in order to control and restrict the supply of gambling in their territory and to ensure that the revenue from gambling at least to some extent is used for public benefit.⁵²

The ECJ has examined a number of cases in which the legitimacy of restrictions in the area of gambling was questioned. For this reason, a summary of the case-law of the ECJ regarding gambling is presented in this section.

Upon entering the EU, states agree to provide free movement of persons, goods, services and capital within the EU Member States, but, as the ECJ has ruled, the Member States may restrict cross-border gambling activity provisions in their countries.⁵³

The ECJ has examined to what extent national authorities can impose restrictions on other countries with regard to gambling activity and whether these restrictions are compatible with the EC Treaty. The ECJ examines the cases of gambling services in accordance with the Article 43 of the EC Treaty which consolidates the freedom of

48 European Parliament, *supra* note 20.

49 *Ibid.*

50 Swiss Institute of Comparative Law, *supra* note 9.

51 *Ibid.*

52 Cisneros Örnberg, J., *supra* note 6.

53 MacLeod-Miller, L.; Winkelmuller, M., *supra* note 48.

establishment and Article 49 which prohibits restrictions on the freedom to provide services.

The first gambling-related case examined in the ECJ was *Her Majesty's Customs and Excise v. Gerhart Schindler and Joerg Schindler* (the Schindler case).⁵⁴ The case dealt with the question whether lotteries fall within the scope of the free movement of services and whether these services could be restricted when it comes to games and lotteries. The ECJ found that the restriction on the cross-border provision of lottery services should fall within the scope of the rules of the EC Treaty. The ECJ considered the particular nature of lotteries, including moral, religious, and cultural aspects. The ECJ acknowledged that the general tendency of the Member States was to restrict or even forbid gambling and to prevent it from being a source of private profit. It was also noted that lotteries in many cases involved the risk of crime or fraud and gave incentives to spend money, what may have damaging individual and social consequences. Although it is not considered to be an objective justification as such, lotteries are an important contributor to the financing of good causes and public interest activities.⁵⁵ As the ECJ concluded, when a Member State prohibits advertisement in its territory for big lotteries organized in another Member State, it does not constitute an illegitimate restriction of the principle of free movement of services.⁵⁶ The ECJ also emphasized that the legislation in the UK was in accordance with the European Community law, taking into account social aspects and aims to prevent fraud.

Then followed the case *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyöttäjä (Jyväskylä) and Suomen Valtio (Finnish State)* (the Läärä case).⁵⁷ Under the Finnish law, only one licence for operating games on slot machines may be issued. The ECJ in this case ruled that the Finnish legislation was compatible with the European Community law under the condition that the regulation had the purpose of limiting citizens' disposition for gambling and ensuring proper control of gambling development. The ECJ argued that the mere fact that a Member State has opted for a different system of protection could not affect the assessment of the need for, and proportionality of, the provisions enacted to that end.⁵⁸ These provisions must be considered only in relation to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they want to provide.⁵⁹

In the case *Questore di Verona v. Diego Zenatti* (the Zenatti case)⁶⁰, the ECJ concluded that the restrictions of the free movement of services might be justified on the

54 Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1993] I-01039.

55 Cisneros Örnberg, J., *supra* note 6.

56 *Ibid.*

57 Case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyöttäjä (Jyväskylä) and Suomen Valtio (Finnish State)* [1999] I-06067.

58 Cisneros Örnberg, J. *supra* note 6.

59 *Ibid.*

60 Case C-67/98, *Questore di Verona v. Diego Zenatti* [1999] I-07289.

grounds of public policy and on purpose to avoid harmful effects resulting from gambling.

In the case *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português* (the Anomar case),⁶¹ the ECJ confirmed the legitimacy of the Portuguese gaming monopoly organization. The ECJ ruled that the Portuguese legislation establishing a monopoly for the gambling activities constituted a barrier to the freedom to provide services, but it might be justified for the reasons of public policy and fraud prevention. The ECJ also stressed that the fact that there might exist, in other Member States, less restrictive legislation laying down conditions for gambling than those provided for by the Portuguese legislation did not affect its compliance with the European Community law.

Summarising the four abovementioned cases, it can be stated that the restrictions were not considered discriminatory, despite the fact that the restrictions did undoubtedly constitute an obstacle to the right to supply services according to Article 49 of the EC Treaty. A closer study of the national legislations showed that all the countries had the aim of preventing crime, obstructing addictive gambling, ensuring public order and consumer protection, and the surplus from the activity went to charity or to promote culture.⁶²

The ECJ judgment in the case *Tribunale di Ascoli Piceno (Italy) v. Piergiorgio Gambelli and Others* (the Gambelli case) revealed the additional requirements in accordance with the justification of restrictions on the free movement of services and the freedom of establishment. According to the ECJ, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions. Furthermore, as the ECJ ruled, the restrictions must in any event reflect a concern to actually reduce addictive gambling, and the financing of social activities through a levy on the proceeds of authorized games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.⁶³

In the Gambelli case, similarly to the abovementioned Schindler, Läärä and Zenatti cases, the ECJ stated that:

Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order is required. In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the

61 Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português* [2003] I-08621.

62 Cisneros Örnberg, J., *supra* note 6.

63 Case C-243/01, *Tribunale di Ascoli Piceno (Italy) v. Piergiorgio Gambelli and Others* [2003] I-13031.

ECJ. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination. First of all, whilst in *Schindler, Läärä and Zenatti* the ECJ accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a *consistent and systematic* [emphasis added] manner.⁶⁴

In 2009 in the case *Liga Portuguesa de Futebol Profissional, Bwin International Ltd, formerly Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* (the Bwin case), the ECJ stated that:

It is accepted that the legislation of a Member State which prohibits providers, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC. Such legislation also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.⁶⁵

In the Bwin case, the ECJ also noted that restrictions could be justified on the grounds of public policy, public security or public health. Also some new principal reasons in the public interest were recognized: the objectives of consumer protection, the prevention of fraud, the prevention of encouraging spending money on gambling and the general need to maintain public order. Furthermore, national legislation can guarantee the attainment of these objectives, but only if they are being achieved in a consistent and systematic matter.

One of the recent cases of the ECJ is the case *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* (the Winner Wetten case).⁶⁶ The court once again stated that the restrictions could be justified on public policy grounds or by an overriding reason in the general interest such as protecting consumers against being induced to squander money on gaming. In addition, the restriction must also be proportionate to the aim, which means that the aim must be pursued in a consistent and systematic manner, while the determination of the question whether the legislation in question pursues such aims in a consistent and systematic manner must be based on an analysis of the practical effects of that legislation by a national court.

To sum up the case-law of the ECJ, it must be noted that the regulation of gambling is one of the areas where the Member States have their own moral, religious and cultural

64 Case C-243/01, *Tribunale di Ascoli Piceno (Italy) v. Piergiorgio Gambelli and Others* [2003] I-13031.

65 Case C-42/07, *Liga Portuguesa de Futebol Profissional, Bwin International Ltd, formerly Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] I-07633.

66 Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* [2010] OJ C 288, 23.10.2010, p. 6–6.

differences. It must be recognized that because of the amounts won and paid gambling activity is related to addiction, crime and fraud and may have harmful consequences for individuals. In the absence of harmonized European Community rules, it is for each Member State to determine, in accordance with its own scale of values, what is necessary to protect the interests concerned. Therefore, the Member States may set a desired level of protection as well as gambling policy rules. The restrictions may be justified if they are necessary to protect consumers and maintain public order. However, the restrictions must be compatible with the case-law of the ECJ and be proportionate to the aim. The aim to restrict gambling activities must be pursued in a consistent and systematic manner. It must be also applied in non-discriminatory manner and to the extent necessary to achieve the objectives.

One of the main problems regarding the harmonization of the regulations on gambling activities is the lack of political will among the Member States to establish a gambling market without borders and with free competition.⁶⁷ One of the main reasons for this is the existence of gambling monopolies and the significant tax revenues.⁶⁸

However, the European Parliament encourages the Member States to cooperate closely in order to solve the social and public order problems arising from cross-border online gambling, also in order to fight against the illegal online gambling services offered, to protect consumers and prevent fraud.⁶⁹ There should be a common position on the ways in which this can be achieved.

Conclusions

1. None of the gambling operators registered in Lithuania organizes gambling online. The Gaming Law prohibits operating gaming not provided for in this law or operating it in violation of the procedure established in this law. The Gaming Law does include any provisions regarding online gambling; therefore, it can lead to a conclusion that online gambling is prohibited in Lithuania, although it would be more accurate to say that online gambling services are not regulated enough in Lithuania.

2. Lithuanian players are allowed to choose gambling services provided by online gambling operators registered in foreign countries, as there are no restrictions for players imposed by Lithuanian legislation. Online gambling services organized by cross-border online gaming operators are available for Lithuanian players. An important fact is that their websites are translated into many languages, including Lithuanian, and some of them even advertise in the Lithuanian language and support Lithuanian sports teams.

3. One of the problems is that online gambling companies offering their services for Lithuanian players do not pay any taxes to the Lithuanian budget. The market for gambling has grown quite significantly in the last decade in other European countries. It

67 Cisneros Örnberg, J., *supra* note 6.

68 *Ibid.*

69 European Parliament, *supra* note 20.

is clear that online gambling is rapidly gaining popularity. It follows that proper regulation of online gambling services in Lithuania is absolutely necessary.

4. Two *alternatives* for online gambling regulation in Lithuania were identified:

- online gambling legalization in Lithuania;
- the prohibition of the provision of online gambling services through foreign gaming operators' Internet websites to Lithuanian residents.

5. What regards the first alternative, it should be noted that gambling services are considered as a very specific kind of economic activity due to social and public order and health care issues. For this reason, both positive and negative aspects related to the legalization of this activity can be identified. As one of the negative aspects the threat that more players will engage in gambling activities and the risk of making it easy and socially acceptable for young people can be identified. The main positive aspects are the collection of larger lotteries and gaming tax to the state budget, decrease in tax evasion and the implementation of anti-money laundering measures. Despite all positive and negative aspects of the legalization of online gambling, the fact is that remote gaming is already a reality, and there are all possibilities and conditions for players to gamble online.

6. The second alternative indicates that it is almost impossible to ensure effective prohibition of online gambling. While this is true, it is insufficient justification by itself for legalization. This leads to a conclusion that if the states' position is online gambling prohibition, it should impose legal and technical measures, despite relatively complicated implementation of such restrictions.

7. The analysis of other European countries' approach to online gambling shows that Lithuania is among the few EU Member States which passively prohibit online gambling. It should be noted that the vast majority of EU Member States tolerate online gambling. These Member States have chosen to regulate rather than prohibit online gambling activities. The EU Member States which allow online gambling have implemented different online gambling market models: state monopoly, licenced private monopoly and liberalized market with regulation.

8. According to the EU law, the Member States have the right to regulate and control their gambling markets in accordance with their traditions and cultures in order to protect consumers against addiction, fraud, money-laundering and match-fixing in sports. In order to ensure consumer protection, the ultimate result may eventually be the establishment of common international standards and regulatory requirements that would reduce the differences between individual jurisdictions. This may be an important way of encouraging EU citizens to gamble within EU regulated companies because of the legal protection provided.

9. The analysis of the ECJ case-law shows that the ECJ has examined a number of cases in which the legitimacy of restrictions in the area of gambling was questioned. As the ECJ has stated, the legislation of a Member State which prohibits providers, established in other Member States, from offering services in the territory of that first Member State via the Internet constitutes a restriction on the freedom to provide services. The court also noted that restrictions could be justified on public policy grounds or by an

overriding reason in the general interest such as protecting consumers against being induced to squander money on gaming. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the ECJ. Furthermore, as recognized by the ECJ, restrictions must be proportionate to the aim, which means that the aim must be pursued in a consistent and systematic manner. The provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure

10. The European Parliament encourages the Member States to cooperate closely in order to solve the social and public order problems arising from cross-border online gambling, also in order to fight against the illegal online gambling services offered, to protect consumers and prevent fraud. It also stresses the need for a common position on the ways in which this can be achieved.

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AZARTINIŲ LOŠIMŲ REGLAMENTAVIMO INTERNETE PROBLEMA LIETUVOJE IR EUROPOS SAJUNGOJE

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Santrauka. Azartinių lošimų veikla Lietuvoje legalizuota palyginti neseniai, tačiau jau veikia nemažai lošimų automatų salonų, lošimų namų, lažybų punktų. Pastaruoju metu vis sparčiau populiarėja azartiniai lošimai virtualioje erdvėje. Nors Lietuvos teisės aktai lošimų operatoriams draudžia siūlyti internetinius azartinius lošimus Lietuvos gyventojams, tačiau jie yra prieinami. Nėra jokių kliūčių Lietuvos lošėjams lošti užsienio valstybėse registruotų azartinių lošimų organizatorių internetinėse svetainėse. Reikia paminėti tai, kad azartinių lošimų paslaugos yra laikomos ypatingo pobūdžio ekonomine veikla dėl su

ja susijusių socialinių, viešosios tvarkos ir sveikatos apsaugos aspektų. Dėl šios priežasties tinkamai reglamentuoti internetinius azartinius lošimus yra labai aktualu, siekiant kad būtų užtikrinta vartotojų apsauga, sukčiavimo ir nusikalstamumo prevencija. Straipsnyje nagrinėjama, kaip internetinių azartinių lošimų veikla reglamentuojama kitose Europos Sąjungos valstybėse, nes azartinių lošimų rinkos reguliavimo sistemos Europos Sąjungos valstybėse narėse yra labai skirtingos. Atkreipiamas dėmesys ir į tai, kad azartiniai lošimai visoje Europos Sąjungoje yra reguliuojami ne Europos Bendrijos teisės aktais, o nacionaliniu lygiu. Pabrėžtina, kad, vadovaujantis Europos Bendrijos teise, valstybės narės turi teisę kontroliuoti ir reguliuoti savo azartinių lošimų rinkas, atsižvelgdamos į savo tradicijas bei kultūrą, siekdamas apsaugoti vartotojus nuo lošimo priklausomybės bei sukčiavimo. Tačiau siekiant tinkamai užtikrinti gyventojų apsaugą, turėtų išigalioti tarptautiniai susitarimai, mažinantys skirtumus tarp atskirų jurisdikcijų. Taip atsirastų galimybė paskatinti Europos Sąjungos piliečius naudotis lošimų organizatorių, kurių veiklą reglamentuoja Europos Sąjungos teisės aktai, paslaugomis bei taip būtų užtikrinta reikiama teisinė apsauga. Straipsnyje taip pat apibendrinama Europos Teisingumo Teismo praktika dėl internetinių azartinių lošimų apribojimų atskirose valstybėse. Europos Teisingumo Teismas išnagrinėjo ne vieną bylą, kurioje buvo tikrinamas azartinių lošimų apribojimų teisėtumas. Teismas konstatavo, kad draudimas teikti internetinių azartinių lošimų paslaugas iš kitos valstybės prieštarauja laisvės teikti paslaugas principui. Teismas taip pat patvirtino, kad laisvės teikti azartinių lošimų paslaugas internete apribojimai gali būti pateisinami, jei jie būtini siekiant apsaugoti vartotojus, palaikyti viešąją tvarką, neleisti, jog azartiniai lošimai būtų asmeninio pasipelnymo šaltinis. Tačiau nustatant apribojimus yra būtina atsižvelgti į Europos Teisingumo Teismo formuojamą praktiką ir joje nustatytus proporcingumo reikalavimus. Apribojimų tikslas turi būti nuosekliai bei sistemingai riboti azartinių lošimų veiklą. O apribojimai turėtų būti taikomi nieko nediskriminuojant ir tiek, kiek reikalinga tikslui pasiekti.

Reikšminiai žodžiai: internetiniai azartiniai lošimai, azartinių lošimų reglamentavimas, azartinių lošimų veiklos apribojimai, laisvės teikti paslaugas apribojimai, azartinių lošimų veiklos apribojimų pateisinimas.

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