

Recent Developments in the Italian Gaming Law Framework

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SPORTS WAGERING IN ITALY AFTER THE EUROPEAN UNION COURT OF JUSTICE'S *GAMBELLI* RULING OF NOVEMBER 6, 2003

THE ITALIAN WORLD OF BETTING, AND THE RELATED LEGAL FRAMEWORK, could be soon affected by a deep change, according to a revolutionary ruling enacted by the European Court of Justice with regard to the factual monopoly situation in Italy related to betting activities. The ruling criticizes Italian Law No. 401/1989, which actually restricts the number of providers of betting services only to those legally authorized by the State, according to a specific concession. The sentence provides the so called "CTD" (private centers for gathering bets) the opportunity to "accept, gather, book and transmit proposals of betting even with EU Member States, without necessarily holding a State's authorisation."

The case examined by the EU Court of Justice is called the "*Gambelli* case,"¹ from the name of an Italian manager of a CTD, but it involved other persons, including the fourth most important UK bookmaker, "Stanley." The question was raised in criminal proceedings brought against Mr. Gambelli and 137 other defendants who are accused of having unlawfully organized clandestine bets and of being the

proprietors of centers carrying on the activity of collecting and transmitting betting data, which constitutes an offense of fraud against the Italian State, according to the laws in force.

An Italian judge contested the existence of a widespread and complex organization of Italian agencies linked by the Internet to the English bookmaker Stanley International Betting Ltd (Stanley), established in Liverpool (United Kingdom), and to which Gambelli and others belonged. They were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No. 401/89 by carrying out an intermediation activity from abroad to make possible in Italy an illicit gathering of bets, in breach of the Italian laws (being that the related CTD was unauthorized).

Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offense under Article 4 of Law No. 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by Internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by Internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which is then trans-

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¹ See European Court of Justice, Case C-243/01, *Piorgiorgio Gambelli and Others*, November 6, 2003.

ferred to the bookmaker into a foreign account specially designated for this purpose.

The Italian judge, as permitted by the European Treaties, referred to the EU Court for a preliminary ruling under Article 234 of the EC Treaty a question on the interpretation of Articles 43 and 49 EC, suspended the process and transmitted the acts to the EU Court of Justice, asking to verify the compliance of the applicable Italian laws to the EU legal framework. In particular, the question was: is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a, and Article 4b of Italian Law No. 401/89 (as most recently amended by Article 37(5) of Law No. 388/00 of December 23, 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking, and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorizations prescribed by domestic law have been complied with?

The European Court stated that “the Italian Law breaches the European rules in the field of freedom of establishment (with regard to the “CTDs” activities) as per articles 43 and 49 of the EC Treaty.”

The EU Court pointed out that Article 43 of the EC Treaty provides that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State is prohibited. Such prohibition also applies to restrictions on the setting-up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State. Further, the first paragraph of Article 49 EC provides that restrictions on freedom to provide services within the European Community is prohibited with respect to 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.

With regard to the Italian legal framework in force applicable to betting agencies, it must

pointed out that under Article 88 of the Regio Decreto No. 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No. 773 approving a single text of the laws on public security), of June 18, 1931 (GURI No. 146 of June 26, 1931, hereinafter the Royal Decree), no license is to be granted for the taking of bets, with the exception of bets on races, regatta, ball games, or similar contests where the taking of the bets is essential for the proper conduct of the competitive event.

Under Legge Finanziaria No. 388 (Finance Law No. 388) of December 23, 2000 (ordinary supplement to the GURI of December 29, 2000, hereinafter Law No. 388/00), authorization to organize betting is granted exclusively to license holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organize or carry on betting. Bets can relate to the outcome of sporting events taking place under the supervision of the Comitato olimpico nazionale italiano (Italian National Olympic Committee, hereinafter the CONI), or its subsidiary organizations, or to the results of horse races organized through the Unione nazionale per l'incremento delle razze equine (National Union for the Betterment of Horse Breeds, hereinafter the UNIRE).

Articles 4, 4a, and 4b of Law No. 401 of December 13, 1989 on gaming, clandestine betting, and ensuring the proper conduct of sporting contests (GURI No. 294 of December 18, 1989 as amended by Law No. 388/00, (hereinafter Law No. 401/89), provide as follows:

Unlawful participation in the organisation of games or bets

Article 4

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully

participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of • 516,00.

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between • 51,64 and • 516,00.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between • 51,64 and • 516,00.

Article 4a

The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

Article 4b

. . . the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

The purpose of the Italian legislation is also to protect licensees under the national monopoly by making that monopoly impenetrable for operators from other Member States, since the invitations to tender contain criteria relating to ownership

structures which cannot be met by a capital company quoted on the stock exchange but only by natural persons, and since they require applicants to own premises and to have been a licence holder over a substantial period.

As said, the European Court of Justice established that Law 401/1989 constitutes an illicit restriction of the freedom of establishment as provided by Articles 43 and 49 EC. As to the proportionality of the Italian legislation with regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licenses to organize sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.

Further, the EU Court of Justice has also acknowledged that an organization of Italian betting agencies connected with an authorized foreign bookmaker can assure the necessary guarantees both with regard to public security and prevention of crimes needs and to the aspect of reliability and economic solvency of the manager (even if not authorized by the State). To this regard, the ruling points out that the criminal sanctions provided by the Italian laws for the unauthorized (according to Law 401/1989) providing of betting services, discriminate against Italian citizens and damage the common European market, the citizens' freedoms, and competition between European companies.

In the light of all those considerations the reply to the question referred by the Italian judge must be 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 concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. 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.

The future scenarios opened in Italy by the EU Court of Justice's ruling will depend on how the Italian courts will receipt this sentence. Further, it will also depend on how the Italian legislature will modify (or even delete) Law 401/1989 containing illicit restrictions for betting services providers excluded from the authorization system. It must be said that the debate is still open, and that both the authorized (CONI, for example) and unauthorized (the CTDs) betting services providers have welcomed the EU Court of Justice's ruling as an important step for more liberalization and competition in the related gaming market.

THE NEW TECHNICAL RULES FOR ELECTRONIC GAMING DEVICES FOR LEGAL GAMES

On December 4, 2003 the Minister of Economy adopted a ministerial decree² aimed at defining the technical requirements of electronic gaming devices for legal gaming activities. The ministerial decree also provides rules related to the production of such devices and for monitoring by the competent authorities.

The decree is important because it is now possible to enter into an operational phase, after the several changes introduced with regard to the administrative and tax discipline related to gaming devices,³ as provided by Art. 110, paragraph 6 of the Consolidation Act collecting the Italian laws in the field of public security.⁴ Operational phase means that it is now easier to set up a national telematic network for the management of legal games (also to be carried out on the web), which will allow the monitoring bodies to control all the gaming devices currently in operation. In light of this target, it must be pointed out that, among other compulsory technical requirements provided for gaming devices, Article 2 of the ministerial decree sets up a unique identifier code of the gaming device⁵ which has to be displayed on the gaming device's screen or video for at least five seconds after it is turned on.

Further, each gaming device will be provided with a gaming card containing all the hardware and software components necessary for the device's operation as well as the technical procedures aimed at recording data.

For each gaming device it is provided that:

- (a) the game can be started only by inserting coins of Eurocent 50 for each game;
- (b) each device must be set up so it can accept as a maximum coins of Euro 2,00 and can give change to the player;
- (c) each device must be set up so the introduction of coins will not be allowed if the device at that moment does not have coins deposited inside to give change;
- (d) each device must be set up so the introduction of other coins during the game will not be possible.

With regard to the game rules, the ministerial decree provides that legal games must be based more on the player's ability or on entertainment purposes than on chance factors. In any case, it is strictly forbidden to reproduce, even in part, by electronic devices, poker games or games reproducing the fundamental rules of poker. Further, to be deemed legal, games:

- (a) will have a duration of between 7 and 13 seconds;
- (b) their prizes or gambling wins must not be higher than 50,00 Euros and will be given in coins;
- (c) the gambling win's mechanism will not be predetermined and will be based on a cycle of 14 thousand games in a percentage not inferior to 75% of the games played;

² Published in the Italian Official Journal of December 9, 2003 n. 285. See the text at: <http://gazzette.comune.jesi.an.it/2003/285/3.htm>.

³ See, e.g., the Law of December 27, 2002 n. 289 (so called Financial Bill for the year 2003), Art. 22, introducing rules on electronic equipment for legal games and establishing a national electronic network for legal gambling. See http://www.camera.it/chiosco_parlamento.asp?content=/parlam/leggi/home.htm.

⁴ See the text at: <http://www.bordingl.com/pdf/tulps.pdf>.

⁵ The code is released by the State Monopoly Agency after the due controls.

(d) it is strictly forbidden to turn gambling wins into points or credit in favor of the player.

Finally, the ministerial decree provides that electronic gaming devices for legal games will have to be provided with proper systems aimed at guaranteeing the inalterability of their 1) technical characteristics, 2) working modalities, and 3) modalities for computing and distributing gambling wins.

GAMING DEVICES AND APPARATUS: NEW LIMITS FOR THEIR INSTALLATION IN PUBLIC CONCERNS

The recent adoption of the Ministerial Decree of October 27, 2003 by the Minister of Economy has determined the introduction of new limits in the Italian legal framework. In particular, the decree has established the maximum number of gaming devices and apparatus whose installation is allowed in public concerns, private clubs, and other gathering places for authorized gaming activities. Further, the ministerial decree, by providing specific rules about the places where gaming activities are permitted, also prohibits the installation such gaming devices or apparatus in places such as hospitals, nursing homes, schools or other school institutes, and confirms the prohibition for indi-

viduals under legal age to carry out gaming activities or to play such games.

The concentration limit of gaming devices or apparatus changes depending on the kind of place. So, the possibilities are different if the gaming devices are installed—for example—in bars, hotels, restaurants, cafès, bathing establishments, private clubs, and associations.

Analyzing the new rules in more detail, it is provided that for each bar or similar concern one gaming device or apparatus can be installed for every 15 square meters of the area allocated to the provision of products or services; the number of gaming apparatus, in any case, may not be higher than two up to 50 square meters of the area, a number which can be increased by one unit per each additional 50 square meter area, up to a maximum of four gaming apparatus.

Restaurants are only permitted to installation one gaming device or apparatus for every 30 square meters of area. In bathing establishments the licensed state's area must be taken into consideration: the ministerial decree provides that one gaming device or apparatus every 1,000 square meters is allowed. Finally, in other gaming houses, public concerns, or authorized private clubs a specific table, certified by the Police—superintendent, must indicate—beyond the prohibited games of chance—the other games prohibited by law in the public interest.

