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CALL A SPADE A SPADE: BARRIERS TO HARMONIZATION AND CONFLICTING MESSAGES IN EUROPEAN UNION INTERNET GAMBLING POLICY

INTRODUCTION

Internet gambling laws are rapidly changing in the European Union. On September 8, 2009, the European Court of Justice issued a ruling that placed yet another roadblock to the prospect of uniformity across the European Union in internet gambling laws.¹ In *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, the Court ruled that a Member State may prohibit outside operators from offering games of chance via the internet within their own territory.² This decision followed a decades-long distinct line of case law that fell on the conservative side of the internet gambling issue, upholding state monopolies.³ However, there is currently a moderate shift in mentality across the European Union to open up Member States' borders. For example, France recently decided to end its internet gambling monopoly.⁴ The European Court of Justice also finally declined to uphold national legislation based on social policy justifications against internet gambling in *Winner Wetten GmbH v. Mayor of Bergheim*.⁵ As of July 2010, at least twenty-five internet gambling cases were pending in the European Court of Justice.⁶ This suggests an air of uncertainty to the status of longstanding state monopolies in internet gambling who may soon be forced to face outside competition.

The European Union is home to a vast array of legislation and points of view on the issue of internet gambling.⁷ In 1992, there was hopeful discussion on the idea of harmonization at the European Union level, but

1. Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 2009 E.C.R. I-07633.

2. *Id.* ¶ 73.

3. See discussion *infra* Part I.D.

4. See discussion *infra* Part III.C.

5. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, 2010 ECJ CELEX NO. 606J0409 (Sept. 8, 2010).

6. Stephanie Bodoni, *Swedish Gambling Sanctions May Be Illegal, Court Says*, BLOOMBERG (July 8, 2010, 6:46 AM), <http://www.businessweek.com/news/2010-07-08/swedish-gambling-sanctions-may-be-illegal-court-says-update1-.html>.

7. *Stacking the Deck*, THE ECONOMIST, July 18, 2009, at 52 [hereinafter *Stacking the Deck*].

those talks were largely fruitless.⁸ As of 2009, thirteen countries out of the European Union's twenty-seven Member States support internet gambling, while seven bar the activity.⁹ The remaining seven either restrict the activity to state monopolies or heavily regulate it.¹⁰ For example, the United Kingdom currently regulates its entire gambling system through the Gambling Act of 2005.¹¹ France also recently liberalized its laws by relaxing its state monopoly and allowing private companies to offer internet gambling to its citizens.¹² The Netherlands, on the other hand, completely bans internet gambling outside its state monopoly¹³ while Poland just finished the process of doing so.¹⁴ These variations across the European Union are the impetus to many cases in the European Court of Justice today.

The world of internet gambling is now a vast one. The popularity of poker, in particular, exploded during the advent of internet gambling and televised poker games.¹⁵ Today, the World Series of Poker is one of the most watched sporting events in the United States.¹⁶ Its popularity has spread to the internet where millions of players log on to lay bets and play online poker from the comfort of their own homes. Currently, there is essentially a ban on internet gambling in the United States that originates from the 2006 Unlawful Internet Gambling Enforcement Act ("UIGEA").¹⁷ This Act specifically prohibits the transfer of funds from

8. 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).

9. *Stacking the Deck*, *supra* note 7.

10. *Id.*

11. Gambling Act, 2005, c. 19 (U.K.).

12. Max Colchester, *France Opens Gambling to Wider Competition*, WALL ST. J., June 9, 2010, at B8.

13. *A Stacked Deck*, THE ECONOMIST, July 18, 2009, at 77 [hereinafter *A Stacked Deck*].

14. April Gardner, *Poland Parliament Approves Gambling Ban*, CASINO GAMBLING WEB (Nov. 21, 2009), http://www.casinogamblingweb.com/gambling-news/gambling-law/poland_parliament_approves_gambling_ban_54828.html.

15. Chris MoneyMaker inspired internet poker-gamers after winning the World Series of Poker 2003 tournament, creating what is now known as "the MoneyMaker effect." *Shuffle Up and Deal*, THE ECONOMIST, July 10, 2010, at 65. For more information on his career, see *Team PokerStars Pro: Chris MoneyMaker*, CHRIS MONEYMAKER, <http://www.chrismoneymaker.com> (last visited Jan. 14, 2011).

16. ESPN contracted with Harrah's Interactive Entertainment to air the tournament until April 2018. *ESPN to Televisе WSOP Events Through '18 Under New Deal*, SPORTS BUSINESS DAILY (Aug. 18, 2009), <http://www.sportsbusinessdaily.com/article/132629>.

17. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367 (2008).

financial institutions to gambling websites.¹⁸ Internet users in the United States, however, still manage to log on and gamble through offshore accounts.¹⁹ Additionally, it remains a controversial issue in Congress.²⁰

The popularity of online gambling extends beyond the United States to the rest of the world, especially across the Atlantic Ocean to the European Union. In fact, the World Series of Poker Europe held its inaugural competition in London in 2007.²¹ In Europe alone, the gross profit from

18. *Id.* Banks were required to enforce the statute on June 1, 2010. Originally, the date for enforcement was December 1, 2009, but Representative Barney Frank successfully convinced the Obama administration to push back the federal crackdown date. *US Treasury, Fed Delay Internet Gambling Ban 6 Mos*, REUTERS (Nov. 27, 2009, 12:03 PM), <http://www.reuters.com/article/idUSWEQ00361620091127>.

19. This scheme is no longer a safe route because federal authorities are seizing bank accounts affiliated with internet gambling and money laundering. Van Smith, *Feds in Maryland Seize Six More Bank Accounts Tied to Laundering Gambling Proceeds*, BALTIMORE CITY PAPER BLOG (Sept. 24, 2009), <http://www.citypaper.com/digest.asp?id=19013>. In fact, Gary S. Kaplan, the founder of Betonsports Pic, an internet gambling website, was sentenced to fifty-one months in prison for violating the UIGEA. Betonsports earned \$1.25 billion in 2004. Ninety-eight percent of that revenue came from American clients online. Benjamin Israel & Andrew M. Harris, *Betonsports's Kaplan Gets 51 Months in Gambling Case*, BLOOMBERG (Nov. 2, 2009, 7:47 PM), <http://www.bloomberg.com/apps/news?pid=20601087&sid=aiL5eQ370IKg&pos=7>.

20. Representative Barney Frank (D-MA) and Senator Robert Menendez (D-NJ) have introduced separate legislation softening the rules on internet gambling. In September 2009, Senator Ron Wyden, a Democrat from Oregon, proposed an amendment to legalize and tax internet gambling to fund the then controversial healthcare reform plan from the Obama administration to the Senate Finance Committee. Revenues from the tax would be used to fund low-income families to purchase health insurance. Eric Zimmermann, *Wyden: Use Gambling Revenue to Pay for Healthcare*, THE HILL (Sept. 21, 2009, 1:49 PM), <http://thehill.com/blogs/blog-briefing-room/news/59615-wyden-use-gambling-revenue-pay-for-healthcare>. Under pressure, however, Senator Wyden withdrew the amendment no more than thirty-six hours later. Dan Cypra, *Senator Wyden Withdraws Proposal to Use Internet Gambling to Fund Health Care*, POKER NEWS DAILY (Sept. 25, 2009), <http://www.pokernewsdaily.com/senator-wyden-withdraws-proposal-to-use-internet-gambling-to-fund-health-care-5181>. At a Ways and Means Committee hearing in May 2010, Representative Frank said, "We are talking about a decision by adults to do what they want to do with their own money," as he pushed for a bill to legalize internet gambling. Another bill that was in front of the House required people to declare their earnings in their taxes and sets a 0.25% tax on wagers of all federally licensed bets. In the background as the 111th Congress considered these bills was the \$1.4 trillion budget deficit. Kim Dixon, *Lawmakers consider Internet gambling bills*, REUTERS (May 19, 2010, 1:52 PM), <http://www.reuters.com/article/idUSTRE64I60320100519?type=politicsNews>.

21. See generally *About the World Series of Poker (WSOP)*, WORLD SERIES OF POKER, <http://www.wsop.com/pdfs/2010/2010-About-WSOP.pdf> (last visited Jan. 14, 2011).

online betting amounts to five billion dollars a year.²² Forty percent of all online wagers come from Europeans, proving its popularity among Europeans.²³ However, the inconsistency in laws across the European Union prevents access by many people, affecting commerce and the freedom of services guaranteed under Article 49 of the Treaty of Rome, which is also known as the Treaty of the European Economic Community.²⁴

Part I of this Note presents the existing law in the European Union, including the relevant rights in the Treaty of Rome and the gambling case law resulting from the conspicuous lack of uniformity across the Member States. Part II discusses the current barriers to harmonization and how the policing of consumer morality is actually a guise for state-interested tax purposes. Without the ability to adapt to evolving technology, the European Court of Justice will arguably continue to perpetuate such legislation. Finally, Part III analyzes whether harmonization is a workable goal by first looking at existing gambling regulations and then surveying the options of the European Union in terms of future regulation. It concludes that while complete harmonization is unlikely, some level of mutual recognition of other Member States' laws could lead to better control of monopolies in furtherance of the European Union's goal of a single market system with freedom of trade.

I. EUROPEAN UNION LAW

The European Union consists of twenty-seven Member States.²⁵ Its structure parallels the three-branch structure of the United States.²⁶ The European Commission is its executive arm while its legislative arm consists of the European Parliament and the Council of the European Union.²⁷ The European Court of Justice is the judicial branch that adjudicates on European Union law.²⁸ But significant modification to the European Union pillar structure finally appears to be approaching.²⁹ After an

22. *A Stacked Deck*, *supra* note 13.

23. *Stacking the Deck*, *supra* note 7.

24. Treaty Establishing the European Economic Community, Mar. 25, 1957, available at http://eur-lex.europa.eu/en/treaties/dat/11957E/tif/TRAITES_1957_CEE_1_EN_0001.tif (last visited Feb. 4, 2011).

25. *Id.*

26. The European Union refers to each of the arms as "pillars." RALPH FOLSOM, EUROPEAN UNION LAW: IN A NUTSHELL 34-47 (5th ed., 2005).

27. *Id.*

28. *Id.* at 71.

29. Dan Bilefsky & Stephen Castle, *Way is Clear to Centralize Europe's Power*, N.Y. TIMES, Nov. 4, 2009, at A6.

eight-year uphill battle, the Czech Republic recently signed the Treaty of Lisbon, making it the last Member State to ratify it.³⁰ The ratification of the twenty-seven Member States brought the Treaty into force.³¹ In general, the Treaty of Lisbon seeks to increase the European Union's clout internationally while adding a presidential-post position.³² Despite this upcoming change, European law will still develop from the set of treaties that established the existence of the European Community and applicable case law from the European Court of Justice.³³ Decisions from the European Court of Justice will be analyzed more closely in terms of the European Union's unique arrangement of a single market system. In this system, European Union laws apply with equal force to each of the Member States.³⁴ The obligations of all the various countries under the treaties and how they resolve their legislative inconsistencies under the Court of Justice is a noteworthy issue that is discussed below.³⁵

A. *The Treaty of Rome and the Freedom to Services*

The Treaty of Rome established the European Economic Community in 1957.³⁶ It set out a goal to create a common market in the European community.³⁷ The Treaty of Rome primarily dictates this single market system.³⁸ Under The Maastricht Treaty, the European Union was formally created in 1992.³⁹ Ten years later, the euro currency replaced other national currencies.⁴⁰ One of the hallmarks of the European Union under

30. *Id.*

31. *Id.* The Treaty entered into force and became official law on December 1, 2009.

32. *Id.*

33. FOLSOM, *supra* note 26, at 71.

34. *Id.* at 34–47.

35. European lawmakers proclaimed the importance of internet access in 2009. While they did not declare it to be a fundamental right, they found it to be “an essential tool to exercise fundamental rights and freedoms.” Kevin J. O’Brien, *E.U. Leaders Bolster Internet Access Protections*, N.Y. TIMES (Nov. 5, 2009), <http://www.nytimes.com/2009/11/06/technology/internet/06net.html> (internal quotation marks omitted). This development could affect the issue of internet gambling in the future. *Id.*

36. Consolidated Version of the Treaty Establishing the European Communities, Nov. 10, 1997, 1997 O.J. (C 340) 1 [hereinafter EC Treaty].

37. *Id.*

38. *Id.*

39. Treaty on the European Union, July 29, 1992, 1992 O.J. (C 191).

40. See *History*, EUR. CENTRAL BANK, <http://www.ecb.int/ecb/educational/movies/history/html/index.en.html> (last visited Jan. 14, 2011) for a video history on the European Central Bank and the Euro.

the Treaty of Rome is its guarantee of the free movement of goods, capital, persons, and services in the European Union's internal market.⁴¹

Article 49 of the Treaty of Rome, also known as the Treaty of the European Economic Community, provides for the freedom of services.⁴² This freedom to provide services across European borders is a vital one to nonresidents and includes the entire tourism industry.⁴³ Article 50 of the Treaty lists activities that are considered "services."⁴⁴ It describes "services" as possessing a commercial, industrial character.⁴⁵ In essence, this freedom gives a "limited right of temporary entry into another [M]ember [S]tate."⁴⁶ Generally, discrimination based upon nationality or

41. FOLSOM, *supra* note 26, at 137.

42. EC Treaty, *supra* note 36, art. 49. Article 49 states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member [S]tates who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Id.

43. FOLSOM, *supra* note 26, at 168.

44. EC Treaty, *supra* note 36, art. 50. Article 50 states:

Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Id.

45. Matthew W. Mauldin, Note, *The European Union, State-Sponsored Gambling, and Private Gambling Services: Time for Harmonization?*, 36 GA. J. INT'L & COMP. L. 413, 417 (2008).

46. FOLSOM, *supra* note 26, at 168.

nonresidence is prohibited if there is a restriction to the freedom of service.⁴⁷ However, this freedom is subject to certain public policy, security, and health exceptions.⁴⁸

The European Court of Justice places internet gambling under the category of “services.”⁴⁹ As a result, it gives much leeway to each Member State to conveniently categorize and justify any restriction under a public policy exception. For this reason, legislation prohibiting or restricting internet gambling is generally upheld under Article 49, while state-operated gambling monopolies continue to take advantage of their market power in their own territory.

B. The Treaty of Rome and the Freedom to Establishment

Perhaps because of the failure of internet gambling websites to overcome the public policy exception to the freedom of services guarantee under the Treaty of the European Economic Community, gambling institutions turned instead to a different freedom to defend their position—the freedom to establishment. Under the Treaty of Rome, this freedom is thought to take precedence over the freedom to provide services.⁵⁰ Article 43 of the Treaty of Rome articulates this freedom,⁵¹ which gives professionals the right to create a business establishment as a self-employed person in another Member State.⁵² However, the European

47. *Id.*

48. See discussion *infra* Part II.

49. See Case C-275/92, *Her Majesty’s Customs & Excise v. Schindler*, 1994 E.C.R. I-01039, ¶ 37.

50. Case C-243/01, *Opinion of Mr. Advocate General Albert delivered on 13 March 2003 on Criminal Proceedings against Piergiorgio Gambelli and Others*, 2003 E.C.R. I-13031, ¶ 76.

51. EC Treaty, *supra* note 36, art. 43. Article 43 states:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member [S]tate in the territory of another Member [S]tate shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member [S]tate established in the territory of any Member [S]tate.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Id.

52. FOLSOM, *supra* note 26, at 162.

Union does not consider a server hosting a website to be an establishment.⁵³ Moreover, technology is regarded as neutral and sales are seen as “passive” rather than “active,” weakening the argument that a server is an establishment.⁵⁴ But the expansion of internet usage today and the increase of economic activity online call for a broader interpretation of these freedoms from the Court. It is only natural for the Court to progress with the evolution of technology.

C. Discrimination and Proportionality

In its examination of the present case law, the European Court of Justice utilizes an analysis of both discrimination and proportionality.⁵⁵ The idea of discrimination can be seen in Article 12 of the Treaty establishing the European Economic Community.⁵⁶ This principle of non-discrimination is a fundamental right in European Union law within the Community.⁵⁷ When faced with national legislation, it is first necessary for a court to decide whether the legislation in question is discriminatory in nature.⁵⁸ In general, the establishment of a monopoly is most likely discriminatory.⁵⁹ This is of particular interest to internet gambling because most of the State sport regulators at issue can be characterized as monopolies.⁶⁰ Therefore, the market effects of these legislations that enable monopolies are often a focal point.⁶¹

53. Vlaemminck & De Wael, *supra* note 8, at 181.

54. *Id.*

55. It is similar to the Due Process and Equal Protection analysis and standards of review of the United States.

56. EC Treaty, *supra* note 36, art. 12. Article 12 states:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Id.

57. Erika Szyszczak, *Antidiscrimination Law in the European Community*, 32 *FORDHAM INT'L L.J.* 624, 626 (2009).

58. Case C-243/01, Opinion of Mr. Advocate General Albert delivered on 13 March 2003 on Criminal Proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031, ¶ 92. This was the issue in the WTO of *Antigua v. United States*. See discussion *infra* Part II.A.

59. *Opinion of Mr. Advocate General on Gambelli*, 2003 E.C.R. I-13031, ¶ 93.

60. *Id.* ¶ 22.

61. *Id.*

There are two ways to view the discriminatory effects of a monopoly.⁶² For Member States that have such monopolies, they argue that there is no discriminatory effect because both national and foreign economic operators are barred in the same way.⁶³ On the other hand, automatic exclusion because of nationality is arguably blatant discrimination.⁶⁴ In addition, indirect discrimination is also prohibited under Community law.⁶⁵ If the Court deems legislation discriminatory, it would be considered an obstacle to the freedom of establishment under the Treaty, breaching Community law.⁶⁶

Whether such legislation is considered discriminatory or not, the European Court of Justice still requires a proportionality analysis.⁶⁷ This judicial touchstone originates from German public law⁶⁸ and is currently a guarantee inherent in Community law.⁶⁹ The analysis summarizes the conditions required for legislation to be justified. Legislation must “be justified by imperative requirements in the general interest; they must be suitable for securing attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”⁷⁰ The Court is typically critical when determining what is “necessary.”⁷¹ Restrictions must be proportional to legislative objectives.⁷² However, the Court recognizes the protection of consumers as a valid justification in terms of general interest.⁷³ As the following case law demonstrates, this justification overrides proportionality concerns when discussing internet gambling law across Europe.

62. *Id.* ¶ 93.

63. *Id.*

64. *Id.*

65. *Id.* ¶ 94.

66. *Id.* ¶ 97.

67. The EC Treaty appended a Protocol laying out the ways to adhere to the principles of proportionality and subsidiarity. See Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2004 O.J. (C 310) 207.

68. Nathan Horst, Note, *Creating an Ever Closer Union: The European Court of Justice and the Threat to Cultural Diversity*, 47 COLUM. J. TRANSNAT'L L. 165, 194 (2008) (pointing to Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125).

69. *Id.*

70. *Opinion of Mr. Advocate General on Gambelli*, 2003 E.C.R. I-13031, ¶ 91.

71. Horst, *supra* note 68, at 195.

72. Niall O'Connor, *European Gambling Law—From Schindler to Engelmann*, BETTING MARKET, <http://www.bettingmarket.com/eurolaw222428.htm> (last visited Jan. 14, 2011).

73. See, e.g., Case C-275/92, *Her Majesty's Customs & Excise v. Schindler*, 1994 E.C.R. I-01039, ¶ 58.

D. The Evolution of Internet Gambling Case Law in the European Court of Justice

The European Court of Justice has a relatively abundant collection of case law on internet gambling. The seminal case decided in 1992, *Her Majesty's Customs and Excise v. Schindler*, concerned a United Kingdom law prohibiting a German company from advertising its lottery services and selling tickets in the region.⁷⁴ The European Court of Justice concluded in *Schindler* that lotteries fell under the "services" provision of Article 49 in the Treaty establishing the European Community.⁷⁵ Furthermore, they concluded that the legislation in the United Kingdom blocked these services, but that they were justified due to social policy.⁷⁶

In 1999, when a gambling case arose for the second time, the Court in *Laara, Cotswold, Microsystems Ltd. & Oy Transatlantic Software Ltd. v. Kihlakunnansyyttaja & Suomen Valtio (Finnish State)* extended the ruling in *Schindler* to apply to slot machines.⁷⁷ The next relevant case was *Questore di Verona v. Zenatti*, where the defendant argued that past case law was not applicable because betting on sporting events, the activity in question there, was a game of informed prediction and not a game of chance, like the lottery or slots.⁷⁸ The Court, however, did not find this argument persuasive and argued that regardless of the "chance element" or morality question, taking bets still qualifies as economic activity and therefore falls under the "services" chapter of the Treaty.⁷⁹ Subsequent cases from the European Court of Justice took the same position, always relying on the justification of social policy to validate the barrier to the freedom of services.⁸⁰

For example, in *Criminal Proceedings against Gambelli*, Italian law forbade anybody from accepting bets from Italian citizens without an Italian license.⁸¹ Gambelli and others were agents of a U.K. betting company when criminal sanctions were taken against them.⁸² In this operation, a bettor would notify the person in the agency of his or her bets.⁸³

74. *Id.*

75. *Id.* ¶ 37.

76. *Id.* ¶¶ 62–63.

77. Case C-124/97, *Laara, Cotswold, Microsystems Ltd. & Oy Transatlantic Software Ltd. v. Kihlakunnansyyttaja & Suomen Valtio (Finnish State)*, 1999 E.C.R. I-6067, ¶ 43.

78. Case C-67/98, *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289, ¶ 13.

79. *Id.* ¶¶ 18–19.

80. *See, e.g.*, Case C-243/01, *Criminal Proceedings against Gambelli*, 2003 E.C.R. I-13031; Case C-338/04, *Procuratore della Repubblica v. Placanica*, 2006 E.C.R. I-01891.

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

82. *Id.* ¶ 10.

83. *Id.* ¶ 11.

That person in the agency would forward the acceptance of the bet via the internet to the British bookmaker.⁸⁴ After receiving a confirmation back via the internet, the bettor pays the amount owed into a special foreign account.⁸⁵ This method of collecting and forwarding bets violated an Italian law that protected the Italian monopoly on sports betting, or CONI.⁸⁶ This was the first instance that the Court dealt with a criminal sanction in gambling.⁸⁷ The Court ruled that the criminal sanctions were a restriction on the freedom of services and the freedom of establishment but ultimately left the question up to the national court to decide if the data transfer centers in question were permanent enough to be protected by the freedom of establishment.⁸⁸

Procuratore della Repubblica v. Placanica dealt with the same legislation as in *Gambelli*.⁸⁹ Again, these “data transmission centers” collected and paid out bets.⁹⁰ The Public Prosecutor of Italy brought criminal proceedings against Mr. Placanica, an operator of a data transmission center.⁹¹ The Court of Justice, however, ruled once and for all that Articles 43 and 49 preclude criminal prohibitions, closing the chapter on that particular Italian law.⁹² Many found that this ruling was favorable for private online gaming operators and that it further fueled the clash between state monopolies and private operators.⁹³

In 2009, the European Court of Justice issued a ruling in *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* that involved, more specifically, the issue of internet gambling.⁹⁴ Portugal prohibits games of chance that are not regulated by the State.⁹⁵ Through a grant of power through legislation,⁹⁶

84. *Id.*

85. *Id.*

86. *Id.*

87. Case C-243/01, Opinion of Mr. Advocate General Albert delivered on 13 March 2003 on Criminal Proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031, ¶ 61.

88. *Id.* ¶ 76.

89. Case C-338/04, *Procuratore della Repubblica v. Placanica*, 2006 E.C.R. I-01891, ¶ 2.

90. *Id.* ¶ 23.

91. *Id.* ¶ 26.

92. *Id.* ¶ 71.

93. See Thibault Verbiest & Evelyn Heffermehl, *Placanica Ruling Strengthens the Case for Private Online Gaming Operators in their Battle against National Monopolies*, INTERNET BUS. LAW SERVS. (Mar. 21, 2007), http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1708.

94. Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 2009 E.C.R. I-07633.

95. *Id.* ¶ 3.

Santa Casa, the State Gaming Department, organizes these games of chance, or 'jogos sociais.'⁹⁷ Bwin is an online gambling operation that offers games of chance on its website.⁹⁸ Its servers are located in Gibraltar, and therefore, it has no establishment in Portugal.⁹⁹ Bets are placed on the website and information is displayed in real time, enabling gamblers to interactively place bets during the sporting event.¹⁰⁰ Santa Casa eventually imposed fines on Bwin and Liga, the collection of professional football¹⁰¹ teams who placed links to Bwin on its website, for violating administrative offenses.¹⁰² The European Court of Justice went through the standard analysis under the Treaty of Rome.¹⁰³ Because Bwin carried on its activities solely on the internet, the Court found that there was no violation under the freedom of establishment.¹⁰⁴ Instead, the Court focused on the freedom of services under Article 49,¹⁰⁵ finding that the legislation restricted this fundamental freedom, but that it was justified by public policy concerns.¹⁰⁶

Late in 2010, the European Court of Justice took a surprising turn in a series of judgments by taking a stricter stance on social policy justifications. It ruled in *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* that national legislation placing restrictions on betting companies but allowing the "intensive advertising" of state monopolies "did not effectively contribute to limiting betting activities in a consistent and systematic manner."¹⁰⁷ The "intensive advertising campaigns" contradicted social policy concerns and therefore did not justify the infringement of Articles 43 and 49.¹⁰⁸ Subsequently, in *Criminal Proceedings against Ernst Engelmann*, the Court found that Article 43 "must be interpreted as precluding legislation of a Member [S]tate under which games of chance may be operated in gaming establishments only by operators

96. *Id.* ¶ 5.

97. Portuguese for "games of a social nature."

98. Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 2009 E.C.R. I-07633, ¶ 20.

99. *Id.* ¶ 21.

100. *Id.* ¶ 23.

101. "Football" around the world is actually the sport Americans know as soccer.

102. Case C-42/07, *Liga Portuguesa de Futebol Profissional v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 2009 E.C.R. I-07633, ¶ 26.

103. *Id.*

104. *Id.* ¶ 46.

105. *Id.* ¶ 48.

106. *Id.* ¶ 56.

107. Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, 2010 ECJ CELEX NO. 606J0409 (Sept. 8, 2010), ¶ 69.

108. *Id.*

whose seat is in the territory of that Member [S]tate.”¹⁰⁹ It also called for “transparency” in competitive procedures in the market in accordance with the principle against discrimination.¹¹⁰

These recent developments do not necessarily mean an upheaval is on the way. The majority of the case law concerning gambling still follows a conservative path. But the Court appears more vigilant now. Public policy matters and state tax advantages continue to impede Community-wide regulation. Furthermore, it is unlikely that the Court of Justice will change its outlook without more assistance from the legislative body of the European Union. These barriers are further analyzed in the following section.

II. BARRIERS TO HARMONIZATION

The single market of the European Union provides for the idea of a free exchange of goods and services without barriers to trade. Internet gambling laws appear to run in contrast to that single market idea. The idea is not a novel one though. There were many rumors in the 1990’s that the European Commission planned to harmonize national gambling laws.¹¹¹ The European Commission carried out a study to decide this issue.¹¹² Ultimately, they stopped any plans to standardize gambling at the European Union level when the European Council decided not to regulate at a EU Summit in Edinburgh in 1992.¹¹³ Nevertheless, the idea is still debated today.

The European Commission has several options in this ongoing discussion.¹¹⁴ Their two main options include mutual recognition or harmonization.¹¹⁵ Any step toward regulating the gambling industry, however, faces several barriers. First, the European Court of Justice generally (until recently) takes a liberal approach to the public policy exceptions and allows state restrictions even though they conflict with the freedom to services. Second, the European Union is unlikely to ever be open to the idea of harmonization if Member States are financially benefiting from large tax advantages of having state-run monopolies in this area of internet gambling. Both these barriers need to be overcome in order to work to-

109. Case C-64/08, Criminal Proceedings against Ernst Engelmann, 2010 ECJ CELEX NO. 608J0064 (Sept. 9, 2010), ¶ 40.

110. *Id.* ¶ 58.

111. Vlaemminck & De Wael, *supra* note 8, at 177.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 178.

ward any sort of regulatory scheme within the European Union. They are each discussed in turn below.

A. Social Policy/Public Morals

States are the “chief guardians of morality.”¹¹⁶ The law of nations calls upon states “to protect the health, safety, and welfare of its citizens.”¹¹⁷ Therefore, states are afforded a plethora of power as “chief guardians.” Gambling is generally considered a state issue and one that is subject to much scrutiny. Internet gambling’s biggest barrier is the social stigma that is attached to the activity. For this reason, such legislation restricting the freedom of trade, which would normally be unlawful, is tolerated. The Court in *Schindler* alluded to this social policy in upholding restrictive trade legislation.¹¹⁸ Three main concerns of governments concerning internet gambling in general include:

the prevention of crime and protection of consumers against fraud; avoidance of the stimulation of demand for gambling and of the consequent moral and financial harm to participants and to society in general; and the interest in ensuring that gambling activity is not organized for personal or commercial profit but solely for charitable, sporting or other good causes.¹¹⁹

Some studies suggest that internet gambling can be ten times more addictive than other types of betting.¹²⁰ Other research, however, argues that internet gambling is not any worse than land-based gambling.¹²¹ There is also a concern of manipulation or cheating between players with online poker.¹²² Even so, compulsive gambling is a valid impulse-control dis-

116. I. Nelson Rose, *The Future Legal Landscape for Internet Gambling*, GAMBLING & THE LAW (Nov. 3, 2000), <http://www.gamblingandthelaw.com/articles/33-antigua.html>.

117. *Id.*

118. Case C-275/92, *Her Majesty’s Customs and Excise v. Schindler*, 1994 E.C.R. I-01039, ¶ 63.

119. Case C-67/98, *Opinion of Mr. Advocate General Fennelly delivered on 20 May 1999 on Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289, ¶ 26.

120. Kate Devlin, *Internet Gambling ‘Can be 10 Times More Addictive Than Other Forms’*, THE TELEGRAPH (Sept. 17, 2009), <http://www.telegraph.co.uk/health/healthnews/6198482/Internet-gambling-can-be-10-times-more-addictive-than-other-forms.html>.

121. Tom Weston, *UK Problem Gambling Survey Finds Unusual Online Casino Results*, ONLINE CASINO ADVISORY (Sept. 16, 2009), <http://www.onlinecasinoadvisory.com/casino-news/online/uk-online-casino-survey-has-strange-results-43265.htm>.

122. Lorraine Woellert, *Online Poker Can Be Subject to Manipulation, FBI Says*, BLOOMBERG (Dec. 3, 2009), <http://www.bloomberg.com/apps/news?pid=20601087&sid=aWWU4qhI3goc&pos=9>.

order.¹²³ But more research and studies are needed in the area to determine whether internet gambling actually causes addiction or merely attracts individuals who already have a penchant to addiction.¹²⁴ Moreover, there are plenty of other activities, such as alcohol consumption, that are subject to the same addictive tendencies yet remain legally regulated. Regardless, the Advocate General for the European Court of Justice is concerned with individuals compulsively squandering away their hard-earned disposable income in the “hope of merely contingent rewards.”¹²⁵ For this reason, Member States are allowed to protect their citizens “to maintain order in society.”¹²⁶ As a result, the public morals justification is one that is constantly brought up when defending protectionist policies.¹²⁷

In fact, it is this same justification that the United States used in its defense against Antigua and Barbuda (“Antigua”) in its case before the World Trade Organization (“WTO”).¹²⁸ This was the first time the “public morals” argument was raised before the WTO.¹²⁹ Antigua claimed that legislation from the United States, including the UIGEA, violated the General Agreement on Trade Services (“GATS”), a treaty under the WTO.¹³⁰ The WTO declined to accept public moral concern as justification,¹³¹ and in January 2007, the WTO ruled that the United States did

123. See generally *Gambling Addiction and Problem Gambling*, HELPGUIDE.ORG, http://www.helpguide.org/mental/gambling_addiction.htm (last visited Jan. 14, 2011).

124. George T. Ladd & Nancy M. Petry, *Disordered Gambling Among University-Based Medical and Dental Patients: A Focus on Internet Gambling*, 16 *PSYCHOLOGY OF ADDICTIVE BEHAVIORS* 76, 78–79 (2002).

125. Case C-67/98, Opinion of Mr. Advocate General Fennelly delivered on 20 May 1999 on *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289, ¶ 30.

126. *Id.* ¶ 61.

127. Because of the current economic status in the world, there has been an increase in restrictive trade measures for European exporters. Stephen Castle, *E.U. Finds Trade Barriers Rising Since Global Crisis*, N.Y. TIMES (Nov. 5, 2009), <http://www.nytimes.com/2009/11/06/business/global/06trade.html>.

128. Other justifications include: gambling is a staple activity of organized crime and the supply of gambling into private homes and workplaces creates health risks. Executive Summary of the First Written Submission of the United States, WT/DS285 (Nov. 14, 2003).

129. It was invoked for the second time by China in their appeal before the WTO in regards to media restriction issues. John W. Miller, *China Cites ‘Morals’ in its WTO Appeal*, WALL ST. J., Sept. 23, 2009, at A9.

130. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (Mar. 20, 2007).

131. *US WTO Violations and Internet Gambling: an important issue with wider ramifications*, ERIKA MANN MEP (July 22, 2009), <http://erikamann.com/themen/Handelspolitik/diewto/Gambling%20WTO>. In July 2010, Antigua requested the help of the Caribbean Community for settlement discussions after

violate its treaty obligations by not offering full access to Antigua based online gambling companies.¹³² In June 2007, Antigua filed for trade sanctions totaling \$3.4 billion because the United States had not made changes to its legislation.¹³³ The European Union also wanted compensation for its restrictions.¹³⁴

The involvement of the European Commission provides an interesting outlook in terms of its treatment toward non-Union entities versus treatment within the European Union community. The European Commission issued a report on June 10, 2009 confirming the allegations from Antigua.¹³⁵ The report stemmed from a complaint from the Remote Gambling Association, a London-based trade association.¹³⁶ In the report, the European Commission condemns the discriminatory policy of the United States and its use of public morals as justification.¹³⁷ It is only logical for the European Union to follow the same mode of analysis in reviewing the policies of its Member States. This idea is reinforced by the fact that the European Union's legislative body is already publicly criticizing the actions of other countries that are using the same justifications used by Members States.¹³⁸ In order to keep its standing as a reputable voice in

a stalemate with the United States in the matter. The Prime Minister stated that the Antigua economy has suffered because of the delay in action. *Antigua Enlists CARICOM Support for Internet Gambling Dispute*, GOV'T OF JAMAICA (July 6, 2010), http://www.jis.gov.jm/officePM/html/20100706T150000-0500_24583_JIS_ANTIGUA_ENLISTS_CARICOM_SUPPORT_FOR_INTERNET_GAMBLING_DISPUTE.asp.

132. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (Mar. 20, 2007).

133. *Antigua Demands Trade Sanctions*, BBC CARIBBEAN (June 20, 2007), http://www.bbc.co.uk/caribbean/news/story/2007/06/070620_antwto.shtml.

134. *Id.*

135. European Comm'n, *Report to the Trade Barriers Regulation Committee: Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC) No. 3286/94, Consisting of Measures Adopted by the United States of America Affecting Trade in Remote Gambling Services*, at 9 (June 10, 2009).

136. *Id.* at 6.

137. *US WTO Violations and Internet Gambling: an important issue with wider ramifications*, ERIKA MANN MEP (July 22, 2009), <http://erikamann.com/themen/Handelspolitik/diewto/Gambling%20WTO>.

138. The dissonance in policy was also apparent in U.S. politics when President Obama visited China in 2009 and denounced China's censorship of the internet. However, the Obama administration has not changed its policy with regards to the WTO ruling on Antigua. Larry Rutherford, *Obama Tells China Not to Censor the Internet-But Supports US Internet Censorship*, CASINO GAMBLING WEB (Nov. 17, 2009), http://www.casinogamblingweb.com/gambling-news/gambling-law/obama_tells_china_not_to_censor_the_internet_but_supports_us_internet_censorship_54803.html.

the world, the European Commission and the European Court of Justice should resolve this inconsistency in policy and voice. Otherwise, it runs the risk of facing skepticism from the world abroad.

B. State Monopolies and Tax Benefits: Protecting the Public Purse

Member States argue that their restrictive legislation is in the best interests of their consumers. With the overwhelming concern over public morals, it is unlikely that these restrictions will be lifted anytime soon. However, the media is starting to realize the hypocrisy of these laws.¹³⁹ While Member States ban outside gambling operators, most have state monopolies of their own.¹⁴⁰ Monopolies are a legal barrier because they prevent the establishment of services from other Member States.¹⁴¹

The façade of public morals does not resolve the inconsistency in treatment between state and foreign operators.¹⁴² “In both America and Europe, local gambling monopolies are allowed to offer the same sorts of bets that are outlawed if placed with firms abroad.”¹⁴³ “This suggests that the prohibitionist governments’ main aim is to protect the revenue that they earn from their state-approved gambling monopolies.”¹⁴⁴ For example, gambling winnings are taxed at twenty-nine percent in the Netherlands, where internet gambling is prohibited.¹⁴⁵ Alternatively, British firms who operate legally in the United Kingdom generally pay a mere one percent tax in Gibraltar.¹⁴⁶ Currently, the Prime Minister of Poland is trying to ban all outside gambling casinos, as well as internet gambling.¹⁴⁷ While it claims the motive is for the protection of young people, the Polish government also plans to raise taxes on the remaining casinos that exist legally under Polish law.¹⁴⁸

What actually drives Member States’ policies is a hard issue to determine. The European Court of Justice recognized this difficulty in its case law.¹⁴⁹ It held in *Zenatti* that economic grounds alone are not enough to

139. See, e.g., *Stacking the Deck*, *supra* note 7.

140. *Id.*

141. Vlaemminck & De Wael, *supra* note 8, at 178.

142. See, e.g., *Stacking the Deck*, *supra* note 7.

143. *Id.*

144. *Id.*

145. *A Stacked Deck*, *supra* note 13.

146. *Id.*

147. *Poland Moves to Ban Gambling Outside Casinos*, DALJE (Oct. 27, 2009), <http://dalje.com/en-world/poland-moves-to-ban-gambling-outside-casinos/279548>.

148. *Id.*

149. Case C-275/92, *Her Majesty’s Customs & Excise v. Schindler*, 1994 E.C.R. I-01039, ¶ 60: It is “not without relevance[] . . . that lotteries may make a significant con-

justify restrictive measures.¹⁵⁰ “A Member State has the right to protect its citizens from the perceived evils of widespread gambling; [but] it does not have the right to give itself a monopoly on legal gambling principally to make money.”¹⁵¹ Unwilling to take a stand on the issue, the Court remanded the case to the national court of Italy to decide it instead.¹⁵²

III. IS HARMONIZATION ACHIEVABLE?

At least eighty-five jurisdictions around the world regulate some form of internet gambling.¹⁵³ As discussed earlier, the European Union has two options if they wish to regulate internet gambling: complete harmonization or mutual recognition. With mutual recognition, a gaming operator can provide services to all European Union Member States as long as they comply with their own country's regulations.¹⁵⁴ Harmonization, on the other hand, requires the replacement of all the different national rules with a single set of European Union rules.¹⁵⁵

In order to determine whether harmonization can work, Member States that regulate gambling should first be explored more closely. Their successes and failures can shed light on whether regulation can function to serve its purpose. If successful, these regulations could possibly be expanded to a macroeconomic level and applied to the European Union to address the question. However, the barriers previously discussed may prove to be too cumbersome to negotiate and overcome.

A. Complete Regulation in the United Kingdom

The United Kingdom completely regulates its gambling sector through its Gambling Act of 2005.¹⁵⁶ The Act covers not only the lottery and ca-

tribution to the financing of benevolent or public-interest activities such as social works, charitable works, sport or culture.”

150. Case C-67/98, *Questore di Verona v. Zenatti*, 1999 E.C.R. I-7289, ¶ 36.

151. I. Nelson Rose, *The Future Legal Landscape for Internet Gambling*, GAMBLING & THE LAW (Nov. 3, 2000), <http://www.gamblingandthelaw.com/articles/33-antigua.html>.

152. *Id.*

153. David O. Stewart, *An Analysis of Internet Gambling and its Policy Implications*, AM. GAMING ASS'N WHITE PAPER SERIES, at 4 (2006).

154. Vlaemminck & De Wael, *supra* note 8, at 178.

155. *Id.*

156. Gambling Act, 2005, c. 19 (U.K.). The objectives of the Act include:

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and

sinos, but also the realm of internet gambling.¹⁵⁷ The State witnessed significant changes from this regulation as it replaced legislation dating as far back as 1845.¹⁵⁸ The Act created the Gambling Commission, which is the regulating body on behalf of the Department for Media, Culture, and Sport.¹⁵⁹ It has the power to levy fines, withdraw licenses, bring prosecution, seize goods, and suspend or void bets.¹⁶⁰

While it was hailed as a monumental achievement in the gambling world, this drastic overhaul in gambling policy is presently revealing its faults. Part of the Act stipulates which casinos may advertise in the United Kingdom.¹⁶¹ The Gambling Commission initially required online casinos to be on a “white-list” in order to advertise in the United Kingdom.¹⁶² Complying with Community principle, all countries in the European Union were automatically placed on the white-list.¹⁶³ However, the Gambling Commission recently has halted all white-list activity while the Gambling Act undergoes review.¹⁶⁴ Because of the higher-than-average tax rates in the United Kingdom, large online gambling operators are moving offshore to places like Gibraltar and Malta where taxes are much lower.¹⁶⁵ There is a concern that these white-listed companies are receiving unfair advantages because they are able to advertise in the United Kingdom but are not subject to the same tax requirements imposed by the Gambling Commission.¹⁶⁶

While this may be a valid concern, this movement offshore is simply basic supply-and-demand economics. It is rational for a company to lo-

(c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

Id. pt. 1.

157. *Id.*

158. *UK Gambling Act is Now in Force*, THE REGISTER (Sept. 4, 2007), http://www.theregister.co.uk/2007/09/04/gambling_act_in_force/ [hereinafter *UK Gambling Act is Now in Force*].

159. For more information, see GAMBLING COMM’N, <http://www.gamblingcommission.gov.uk/> (last visited Jan. 14, 2011).

160. *UK Gambling Act is Now in Force*, *supra* note 158.

161. Devon Chappell, *UK Whitelist on Hold as Gambling Act Goes under Review*, ONLINE CASINO SUITE (Aug. 3, 2009), <http://onlinecasinosuite.com/casino-news/aug09/ukwhitelist-3356.html>.

162. *Id.*

163. See *UK White List for Online Gambling Advertising, Updated*, GAMBLING BLOG (Jan. 17, 2008), <http://www.gamblingweblog.com/2008/01/17/uk-white-list-for-online-gambling-advertising-updated/>.

164. Chappell, *supra* note 161.

165. *Id.*

166. *Id.*

cate where it can achieve the greatest tax benefit. Bigger competition issues arise, though, when countries start blocking companies who take advantage of such tax conditions. This is the kind of discriminatory attitude the European Court of Justice should take greater interest in. It is uncertain how profitable the Act has been for the United Kingdom so far but any efforts to control foreign operators might obfuscate its true revenue potential.

B. Sweden and State-Sponsored Poker

In 2006, Sweden decided to launch a state-sponsored, regulated domestic poker website.¹⁶⁷ It became the first state-owned internet poker site in the world.¹⁶⁸ Svenska Spel is the state lottery company that took part in this plan.¹⁶⁹ Upon its launch, it was a rapid success, becoming one of the fifteen most visited poker sites in the world within six weeks.¹⁷⁰ “Evidently, there was pent-up demand for a regulated Swedish poker site.”¹⁷¹ Although the website prominently displayed messages urging players to “play responsibly,” there was public criticism toward government involvement with such a morally questionable website.¹⁷² Nonetheless, the Supreme Administrative Court found this website and the accompanying regulation to be compatible with European Union law.¹⁷³

C. What Does This Mean for the European Union?

“[T]he basic focus of the European Community is the elimination of barriers to trade between [] Member [S]tates.”¹⁷⁴ Article 95 of the Treaty Establishing the European Community expresses the goal of a single, unified common market within the European Union.¹⁷⁵ The Member

167. Mary Ann Liebert, *Report from Sweden: The First State-Owned Internet Poker Site*, 11 GAMING L. REV. 108, 108 (2007).

168. *Id.*

169. *Id.*

170. *Id.* at 111.

171. *Id.*

172. *Id.*

173. *Id.* at 112 (referring to the Swedish Case: Regeringsrätten, Mål nr 5819-01 Wermdö Krog / Lotteriinspektionen (2004)).

174. LOUIS ALTMAN & MALLA POLLACK, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 28.4 (4th. ed. 2010).

175. EC Treaty, *supra* note 36, art. 95. Article 95 states:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid

States inched closer to this goal when the euro became the legal tender and currency to several Member States of the European Union on January 1, 2002.¹⁷⁶ As a result, trade among the European Community increased by seventy-three percent.¹⁷⁷ Movement toward free trade is generally desired when it comes to commerce.¹⁷⁸ Opening the internet gambling market would bring about significant revenue for the European Union. However, there are significant obstacles for harmonization to work, making it an unlikely option in the near future.

The United Kingdom model shows how regulation is possible within a single state and Sweden represents a different kind of state involvement. But the prospect of bringing uniform internet gambling laws to the European Union appears impractical at the moment. Laws vary too much and Member States are too concerned with their tax revenues to completely forego their favorable national regulations. For example, France opened up its online gambling market in online poker, sports betting, and horse racing when the French Parliament passed legislation to license private companies in April 2010.¹⁷⁹ Previously, there were only two govern-

down by law, regulation or administrative action in Member [S]tates which have as their object the establishment and functioning of the internal market.

...

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member [S]tate deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

...

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member [S]tates to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

Id.

176. ALTMAN & POLLACK, *supra* note 174, § 28.1.

177. *Id.*

178. "In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS II.2.106 (Edwin Cannan ed., 5th ed. 1904), available at <http://www.econlib.org/library/Smith/smWN.html>.

179. Brett Collson, *France Ends Internet Gambling Monopoly*, POKER NEWS DAILY (Apr. 11, 2010), <http://www.pokernewsdaily.com/france-ends-internet-gambling-monopoly-9642/>.

ment-run monopolies controlling internet gambling.¹⁸⁰ France planned to tax these private companies two percent for online poker bets and seven and a half percent for sports bets.¹⁸¹ However, an amendment that was formerly proposed to the legislation also stipulated that companies based in areas where taxes are lower, such as Gibraltar, would not be able to receive licenses.¹⁸² This protectionist policy is undoubtedly discriminatory to these offshore companies. Another strange proviso in the legislation prohibited games of luck.¹⁸³ In spite of this, sports betting and horse racing are included and considered games of skill.¹⁸⁴ It will be interesting to see the reaction from offshore companies and any legal action that might come about from this amendment. As long as the European Court of Justice allows countries to enact discriminatory legislation for the “benefit of society” there is unlikely to be any progress toward harmonization.

However, the second option of mutual recognition provides a more practical step in this area. The principle states that if internet gambling services are provided in one Member State, then all users should be able to access those services from other Member States.¹⁸⁵ Member States would be able to continue to regulate their own country’s systems and tax as they wish. This requires Member States to lift their bans on internet gambling, but compromises could be made in allowing these services to cross borders.

IV. CONCLUSION

There are certainly benefits to regulating internet gambling. A Congressional report estimated that the regulation of internet gambling in the United States could bring in nearly forty-two billion dollars in revenue over the next ten years.¹⁸⁶ One can only imagine the revenue that could be collected from the European Union.

180. Terry Goodwin, *French National Assembly Approves Online Gambling*, CASINO GAMBLING WEB (Oct. 14, 2009), http://www.casinogamblingweb.com/gambling-news/online-casino/french_national_assembly_approves_online_gambling_54635.html.

181. Collson, *supra* note 179.

182. Goodwin, *supra* note 180.

183. Tom Weston, *French Online Casino Rules to Forbid Games of Luck*, ONLINE CASINO ADVISORY (Oct. 17, 2009), <http://www.onlinecasinoadvisory.com/casino-news/online/france-says-online-casino-luck-games-barred-43358.htm>.

184. *Id.*

185. Mauldin, *supra* note 45, at 437.

186. Stephen A. Murphy, *Report Estimates Online Gambling Could Bring in \$42 Billion*, CARD PLAYER (Nov. 3, 2009), <http://www.cardplayer.com/poker-news/7878-report-estimates-online-gambling-could-bring-in-42-billion>; *see also* Catherine Dodge, *Online Gambling Tax May Be Jackpot for Congress, Lawmaker Says*, BLOOMBERG

But the barriers to harmonization are burdensome. The European Court of Justice generally allows for the violations of the freedom to service and the freedom to establishment so long as the Member State claims in good faith public policy and public morals to justify the discriminatory legislation. It is uncertain how this point of view will change in the near future in light of recent judgments. An Advocate General of the European Court of Justice reiterated the view that states are allowed to use monopolies to protect their citizens.¹⁸⁷ His opinion is not a binding one, but since the Court generally falls in line with the opinion of the Advocate General it is an early indication on how the Court of Justice will rule in a pending internet gambling case.¹⁸⁸ However, considering the European Commission's position on the "public morals" defense, it would be prudent for the Court of Justice to follow suit and reconsider its importance. This cohesion of policy is necessary for the European Union and follows the policy of the WTO. But the protection of a state's public purse is an issue that will not be defeated easily. Member States earn far too much tax revenue from operating state monopolies to relinquish those rights.

For these reasons, complete harmonization, although critical to the European Union's idea of a single market, is not likely to be endorsed by the entire Community. The next option of mutual recognition, however, is a more plausible alternative. If Member States can agree to freely recognize each other's services, then tax revenues can still be collected by each state and competition can continue. This alternative may solve the United Kingdom's problem by reevaluating its high taxes and therefore keeping domestic companies inland.

Regulation of internet gambling is possible. Both the United Kingdom and Sweden provide examples of this. The expansion of such regulation at the European Union level is a challenging idea, but one that is necessary to the idea of a single market. With increasing commerce over the internet and money constantly being transferred to offshore accounts, it is advantageous to regulate this activity. After all, internet gambling is a multi-billion dollar industry. Because of the readily accessible nature of the World Wide Web, gamblers are capable of finding different outlets to

BUSINESSWEEK (May 18, 2010, 6:56 AM), <http://www.businessweek.com/news/2010-05-18/online-gambling-tax-may-be-jackpot-for-congress-lawmaker-says.html>.

187. Tom Weston, *European Online Gambling Monopolies Get Victory over Consumers*, ONLINE CASINO ADVISORY (Dec. 18, 2009), <http://www.onlinecasinoadvisory.com/casino-news/online/adviser-says-eu-online-gambling-monopolies-acceptable-43506.htm>.

188. *European Court of Justice Advocate General Provides Opinion*, ONLINE-CASINOS.COM (Dec. 17, 2009), <http://www.online-casinos.com/news/news179608.asp>.

place their bets regardless of legality. Thus, the current state of internet gambling laws in the European Union is inconsistent and irreconcilable with the fundamental objective of a single market. The previously discussed barriers should diplomatically be overcome by mutually recognizing each Member State's competition. This type of minimal harmony is essential and provides a small step to further the single market goal of the Community, a basic tenet upon which the European Union was founded.

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* B.A., New York University (2007); J.D., Brooklyn Law School (expected 2011). I owe all my successes in life to my parents—the two hardest working and most generous people I know. Thank you to my amazing family and dear friends for your never-ending love and support. I am also grateful to the editorial staff for your patience and help with this Note. All errors are my own.