AG Opinion in Costa/Cifone: impact and implications

Advocate General Cruz Villalón issued on 27 October 2011 his Opinion in the joined Costa and Cifone cases regarding access of the British gambling operator Stanleybet to Italian licenses - Cases C-72/10 and C-77/10. Villalón said that licensing systems and procedures need to respect the requirements of the Treaty and legislation must be non-discriminatory, proportional and suitable. *World Online Gambling Law Report* asked two gambling experts for their take on this widely discussed case. Antonella Terranova, a Partner with De Berti Jacchia Franchini Forlani Studio Legale, who acted for Stanleybet, examines which provisions of the decree are problematic and whether - if followed - the AG's Opinion could lead to new infringement action against Italy by the European Commission, while Giulio Coraggio, a Senior Associate at DLA Piper, wonders whether this case poses a risk to the italian licensing regime.

Opinion 1: The potential impact of Costa/Cifone

In a case involving offline betting shops, Advocate General (AG) Cruz-Villalon of the Court of Justice of the European Union ruled that certain provisions of the 'Bersani Decree' relating to gambling are incompatible with EU law.

Advocate General Cruz-Villalon delivered his opinion[1] and at stake were two references from the Criminal Chamber of the Supreme Court of Italy on a number of key-features of the betting concessions granted by the Italian Monopoly Administration (AAMS) on the basis of the so-called 'Bersani Decree'[2].

Mr Costa (as well as Mr Cifone), manages retail point collecting bets on sports events on behalf of Stanley International Betting Limited without being possessed of the prescribed concession or licence. The Public Prosecutor of the Court of Rome filed an appeal to the Court of Cassation complaining of a violation of law which ought to warrant the quashing of a judgment of the Rome Judge of Preliminary Investigation, who had lifted a seizure against Mr Costa's retail points. The grounds for the lifting of the seizure were to be found in conflict with Italian domestic betting monopoly legislation and directly applicable EU law on the freedoms of establishment and to render services, according to the Gambelli[3] and Placanica[4] jurisprudence of the Court of Justice of the European Union (CJEU).

The Supreme Court took the view that there remained uncertainties of interpretation in respect of the breadth of the freedoms of establishment and rendering cross-border services laid down by Arts. 43 and 49 EC[5], and that it was therefore necessary to clarify if those freedoms were capable of allowing restriction by a domestic system based on the issuance of a limited number of concessions and ensuing police licences, inter alia, foreseeing:

- the existence of a general policy of protection of the holders of concessions previously issued as a result of a tender which had illegally excluded certain EU players;
- the presence of provisions that guarantee previously acquired privileged positions (such as the prohibition placed on new concession holders from locating their premises a certain distance away from the premises of the incumbents);
- cases of forfeiture of the concession and cashing of relevant bonds - inter alia - where the concession holder should directly or indirectly engage in cross-border gaming activities that could be likened to those forming the object of the concession, and/or in certain other cases of subjective disqualification of the concession holder's officers and employees.

For such reasons, the Italian Supreme Court, by order of 10 November 2009 (published in January 2010), referred the case to the CJEU[6].

During the hearing before the Court of Justice on 29 June 2011, the following points were debated:

- Whether a general principle of protection of incumbent concession holders, including those having been awarded concessions under the 1999 unlawful system, might be unlawful, especially if left to the full discretion of the authorities. The principles of parity of treatment (and non-discrimination) may, therefore, not be met, notwithstanding the provision being nominally indistinct;
- Whether favouring the incumbent concession holders (including those having been unlawfully awarded concessions in 1999) by setting minimum distances from the business premises of the new concession holders may be itself contrary to EU law. This restriction was in addition to two restrictions of a similar nature contained in the Bersani Decree (the maximum number of awardable concessions, the geographic and demographic criteria to define concession numbers and distance from the premises of the concession holders). The setting of a maximum number of providers of a service is, in principle, a *per se* obstacle to the fundamental

freedoms of establishment and rendering services.

- Whether the withdrawal of concessions and cashing of bonds in certain disqualifying situations, including: (1) the exercise by the concession holder of gaming activities of a nature or in a way outside the scope of the domestic concession, namely through cross-border supply put in place by means of a pre-existing network of agents; and (2) the existence of pending criminal proceedings against company officers and other persons related to the concession holder's organisation (where such criminal proceedings were initiated based on domestic non-EU compliant provisions, having been so found by the Court of Justice - in Placanica); may be equally contrary to EU law.

Advocate General Cruz-Villalòn suggested that the Court should hold that EU law is incompatible with national provisions such as those of the Bersani Decree and tenders of 2006 in so far as they:

- Perpetuate the effects of the unjust exclusion of Community operators from the old tenders, by foreseeing a general policy favouring incumbents to be implemented on the strength of discretionary administrative powers of extraordinary breadth.
- Lay down restrictions of activity and minimal distances between the premises of new concession holders and those of incumbents.
- Establish limits to the catalogue of permissible betting products not set according to objective, transparent and non-discriminatory criteria capable of effective judicial remedies.
- Force on cross-border Community operators, such as Stanley, the unjust choice between exercising the freedom of establishment by bidding for the new Bersani concessions (and thus being obliged to abandon their cross-border activity and investments) and exercising the freedom to provide services (and in so doing disqualifying themselves from the Bersani concessions, risking the forfeiture of any concessions awarded, and again losing their investments).

In a scenario where the Court of Justice in its ruling would indeed share the concerns of the Advocate General, it will be interesting to see how the European Commission will react, as it so far has publicly held Italy to be a bright example of amended gambling legislation and subsequently closed all relevant infringement cases

The measures adopted in Italy were, therefore, considered by the Advocat General Cruz-Villalon against the spirit and letter of EU law and case law. Although the opinion of the Advocate General is not technically binding on the Court of Justice, it is generally followed in the majority of cases. The upcoming decision of the Court of Justice will have an impact not only on the Italian gaming and betting market but also on a number of other national licensing regimes, where similar restrictions are provided by applicable law. Finally, in a scenario where the Court of Justice in its ruling would indeed share the concerns of the Advocate General, it will be interesting to see how the European Commission will react, as it so far has publicly held Italy to be a bright example of amended gambling legislation and subsequently closed all relevant infringement cases.

Antonella Terranova Partner
De Berti Jacchia Franchini Forlani Studio Legale
Milana.terranova@dejalex.com

De Berti Jacchia Franchini Forlani (Roberto A. Jacchia, Antonella Terranova and Fabio Ferraro) argued the case for Stanleybet's intermediaries before the CJEU.

1. Cases C-72/10 e C-77/10.
2. Law 248/2006.
3. Case C-243/04.
4. Cases C-338/04 et al.
5. Now Art.s 49 and 56 TFUE.
6. Pursuant to Art. 234, third para, EC Treaty (now Art. 267 TFUE).

Opinion 2: The risk for the Italian licensing regime

Case C-72/10, involving Marcello Costa, and case C-77/10, involving Ugo Cifone, represent an additional step of the dispute between the English bookmaker Stanley International Betting Ltd. ('Stanley') and the Italian Government in relation to the compliance of the Italian gaming license regime with the EU principle of freedom to provide services.

Indeed, Article 4 of the Law of 13 December 1989 No. 401 sanctions anyone with imprisonment of up to three years who arranges games, also through remote means of communications, without the necessary license which in the case of both land-based and remote games is a license issued by the *Amministrazione Autonoma dei Monopoli di Stato* (AAMS).

Stanley has become famous in the Italian gaming market to have set up a model of business based on the so called *centri di trasmissione dati* (CTD). For example, internet cafes without any license from the Italian Gambling Authority, without ensuring any compliance with Italian gambling regulations on the offering of remote games and - I assume but I am not in the position to document it - without paying any Italian gambling taxes, collecting bets from their customers which place them on Stanley's servers in the UK. And, indeed, both Mr. Costa and Mr. Cifone - against whom the disputes have arisen - were running Stanley's CTDs in Italy and challenged the seizure of their CTDs by the police.

The position supported by Stanley relates to the contrast between the Italian licensing regime and the EU principle of freedom to provide services that, according to their point of view, should allow an operator based in