

INTERNET BLOCKING: COPYRIGHT INFRINGEMENTS VS. ON-LINE GAMBLING

Paulius Pakutinskas, PhD, Associate Prof.
Mykolas Romeris University, Lithuania

Abstract

By analyzing the decision of the Court of Justice made on the case of Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), intervening parties: Belgian Entertainment Association Video ASBL (BEA Video), Belgian Entertainment Association Music ASBL (BEA Music), Internet Service Provider Association ASBL (ISPA)¹, the article seeks to purify the norms and principles of the primary and secondary EU Law that could be applied not only for the control of Copyright infringements, but also blocking online gambling. Considering the fact that online gambling is spreading worldwide very fast and there is no common specific EU regulation, wider understanding of the filtering problem and assessment of legal problems generated by this problem is important not only theoretically, but also in preparing legal acts.

Keywords: Online gambling, internet filtering/blocking

Introduction

Purpose of the study: to evaluate whether provisions of the decision made by the European Court of Justice on the case of Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), intervening parties: Belgian Entertainment Association Video ASBL (BEA Video), Belgian Entertainment Association Music ASBL (BEA Music), Internet Service Provider Association ASBL (ISPA)² (hereinafter - Scarlet

¹ JUDGMENT OF THE COURT OF JUSTICE (Third Chamber), 24 November 2011 In Case C-70/10, REFERENCE for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Belgium), made by decision of 28 January 2010, received at the Court on 5 February 2010, in the proceedings Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), intervening parties: Belgian Entertainment Association Video ASBL (BEA Video), Belgian Entertainment Association Music ASBL (BEA Music), Internet Service Provider Association ASBL (ISPA).

² JUDGMENT OF THE COURT OF JUSTICE (Third Chamber), 24 November 2011 In Case C-70/10.

case), related to filtering of the content (infringing the Copyrights) can be applied to block the online gambling.

Hypothesis: a part of the common legal norms and principles can be applied to the filtering/blocking even in case of significantly different social relations and specifically copyright infringement on the internet and online gambling.

Methods

Theoretical methods: *Extrapolation, Induction and Generalization, Synthesis, Abstraction, Analysis, Analogy (comparative), Generalization.*

Empirical methods: *Case study, Document analysis.*

There are few possible definitions to describe gambling in the Internet, but let's use the term "on-line gambling" as it is proposed by EC: *"The term "on-line gambling" covers a large number of different gambling services that individual consumers can access directly via electronic means. These include on-line provision of sports betting services (including horse racing), casino games, spread betting, media games, promotional games, gambling services operated by and for the benefit of recognized charities and non-profit making organizations and lottery services."*³

This article seeks to assess whether EU legal norms and principles that are applied to an individual social relation can be applied in other relations as well. Undoubtedly, it is often easier to apply the legal norms and principles by ignoring other and different relations, but this study seeks not only apply the legal norms and principles in a simple way, but also relatively assess discussed social relations in the system of public values, and determine whether internet filtering/blocking is an appropriate measure for solving certain problems.

Copyright Infringement on the Internet and Specifics of the Online Gambling

Undoubtedly, we cannot directly compare relations of copyright infringement and gambling, because based on their nature, they are different social relations and have significantly different consequences for society and certain individuals. The copyright protected works (with certain exceptions) does not harm the society, but the same statement does not apply to gambling. In case of copyright infringement, tangible and intangible property rights of the authors are violated, and in a broader sense, it might influence economics, because widely spread copyright infringement does not promote creating intellectual products, etc. Gambling, as a phenomenon, even on the

³ The official website of the European Union. http://europa.eu/rapid/press-release_MEMO-11-186_en.htm?locale=en

internet, has its obvious potentially negative influence on certain separate individuals and society, and the internet even adds on additional negative effect.

Another important moment is to discuss about social relations determined by the fact that online gambling relations are settled by civil, administrative, or even criminal (e. g. Criminal Code of Germany⁴) law, and copyright relations are settled mostly by civil law, but in some cases administrative and criminal law can be also applied (e. g.: Criminal Code of Lithuania⁵). It is certainly important circumstances revealing how the state assesses the discussed relation and which legal norms regulates it (civil, administrative, or even criminal), but this article does not assess this circumstance separately, because it is a much broader topic in the context of proportionality of the measures.

It is important to assess the scale of online gambling and its specifics, while assessing it.

European Commission data and assumptions: *“In 2011 annual revenues of the overall EU gambling market were estimated to be around €84.9 billion, with annual growth rates of around 3%. On-line gambling is the fastest growing service activity in this sector in the EU, with annual growth rates of almost 15%. Annual revenues in 2015 are expected to be €13 billion, compared to €9.3 billion in 2011. There is a wide offer and take-up of on-line gambling services in the EU, with 6.8 million consumers currently participating in on-line gambling.”*⁶

Advocate General Mengozzi on-line gambling assessed in categorical statements: *“An industry worth thousands of millions of euros involving a harmful and culturally sensitive activity. A service which, thanks to new means of communication, finds it easy to cross frontiers. A sector for which the law is not harmonized and the case-law is based on individual cases.”*⁷ It

⁴ Criminal Code of Germany (Strafgesetzbuch, StGB), [1998] (Federal Law Gazette I, p. 945, p. 3322); translation into English: <http://www.iuscomp.org/gla/statutes/StGB.htm>. Section 287 Unauthorized Organization of a Lottery or Raffle.

⁵ Lietuvos baudžiamasis kodeksas. [2000]. Criminal Code of Republic of Lithuania. CHAPTER XXIX CRIMES AGAINST INTELLECTUAL AND INDUSTRIAL PROPERTY : Article 191. Misappropriation of Authorship; Article 192. Unlawful Reproduction of a Literary, Scientific or Artistic Work or an Object of Related Rights, Distribution, Transportation or Storage of Illegal Copies Thereof; Article 193. Destruction or Alteration of Information about Management of Author’s Rights or Related Rights; Article 194. Unlawful Removal of Technical Protection Means of Author’s Rights or Related Rights Article 195. Violation of Industrial Property Rights.

⁶ The official website of the European Union. http://ec.europa.eu/internal_market/gambling/index_en.htm

⁷ Opinion of Advocate General Mengozzi, delivered on 3 March 2010; Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07. Markus Stoß v Wetteraukreis (Reference for a preliminary ruling from the Verwaltungsgericht Giessen

allows him to make reasoned conclusions regarding the aims of this sectors to escalate legal discussions in a favor of this business: “*all those elements are present in the gaming sector: that is why it should be no surprise that the sector is highly litigious and will probably continue to give rise to disputes in the future. The questions considered here are clear proof of this, like many other questions which have already been referred to the Court.*”⁸ Such generalizations proves that due to the previously mentioned reasons, online gambling was seeking, seeks, and continue seeking in the future for exceptional solutions around the world, including legal norms of specific regulation and will seek favorable court decisions for this sector.

EC legal norms applied to online gambling

Due to the different nature of discussed relations and potential consequences, it is not purposeful to apply similar legal regulation of the online gambling and copyright infringement or unreasonably copy the fragments of such regulation; it requires to consider the fact that specifics of the online gambling regulation in the level of EC secondary law. “*The gaming sector is not at present harmonized in Community law. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market expressly excludes gaming from its ambit: ‘this Directive shall not apply to the following activities: ... (h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions’ (Article 2(2)).*”⁹, and copyright is significantly regulated by the EC law (e.g.: Directive 2004/48/EC, Directive 2001/29/EC and etc.).

“*As regards secondary European law, gambling services are not regulated by sector-specific regulation at EU level but nevertheless are*

(Germany)); Kulpa Automatenservice Asperg GmbH v Land Baden-Württemberg (Reference for a preliminary ruling from the Verwaltungsgericht Stuttgart (Germany)); SOBO Sport & Entertainment GmbH v Land Baden-Württemberg (Reference for a preliminary ruling from the Verwaltungsgericht Stuttgart (Germany)); Andreas Kunert v Land Baden-Württemberg (Reference for a preliminary ruling from the Verwaltungsgericht Stuttgart (Germany)); Avalon Service-Online-Dienste GmbH v Wetteraukreis (Reference for a preliminary ruling from the Verwaltungsgericht Giessen (Germany)); Olaf Amadeus Wilhelm Happel v Wetteraukreis (Reference for a preliminary ruling from the Verwaltungsgericht Giessen (Germany)); (Freedom to provide services – Games of chance – Consistency of national policy concerning gaming – Activity of organising sports betting subject to licence – Mutual recognition)

<http://curia.europa.eu/juris/document/document.jsf?text=online%2Bgambling&docid=79361&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=93475#ctx1>

⁸ *Ibid.*

⁹ OPINION OF ADVOCATE GENERAL MENGOLZI delivered on 3 March 2010 in Court of Justice in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07.

subject to a number of EU acts. In other cases gambling services have been explicitly excluded from the scope of EU law. In addition to benefiting from horizontal rules such as those pertaining to IPR protection, the following texts are noteworthy in this respect: the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive, the Distance Selling Directive, the Anti-Money Laundering Directive, the Data Protection Directive, the Directive on privacy and electronic communication, the e-commerce Directive and the Directive on the common system of value added tax.”¹⁰

However, EC effort to assess and potentially solve the problems in the field of online gambling is worth mentioning. Currently, there are several important EC initiatives, including Green Paper On on-line gambling in the Internal Market.¹¹

The situation with the primary EC law, which should be applied to the online gambling as well, in this case Scarlet case is a very good source for the case study, and we will use it below.

Internet Filtering

Internet filtering, as a prevention or a sanction, for online gambling operators, who do not comply with the requirements determined by the EU national legislation, is provided in the national legal acts of the EU countries. It raises a question whether it complies with the primary and secondary EC law, and whether it does not restrict the freedom of establishment and service flow, but it was discussed by the European Court of Justice repeatedly¹².

Determination of the power of the internet blocking tools provided in the laws is an important assumption of applying such measures (it will be discussed later in this article by analyzing Scarlet case), but even the countries that have the laws that do not allow such measures are trying to apply internet blocking tools (e.g.: Lithuania)¹³.

¹⁰ The official website of the European Union. http://ec.europa.eu/internal_market/consultations/docs/2011/online_gambling/sec2011_321_en.pdf

¹¹ Green Paper On on-line gambling in the Internal Market, Brussels, 24.3.2011, COM(2011) 128 final;

¹² Court of Justice Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07, C-410/07 and C-338/04, C-359/04 ir C-360/04

¹³ Administrative case No. N⁵⁷⁵-641/2012, *Gaming Control Authority under the Ministry of Finance of the Republic of Lithuania v natural person V.B.* (personal data hidden) [2012], Lithuania. Civil case No.2-6458-578/2010, Vilnius Regional Court, 2010, Lithuania. Civil case No. 2-2961-823/2011 Vilnius Regional Court, 2011, Lithuania

While discussing about the legal aspects of filtering, it is important to identify applied measures and their specifics. More detailed disclose of these measures requires a separate article, but there are various and many internet filtering/blocking measures, so we will use Green paper On on-line gambling in the Internal Market methods applied to block on-line gambling:

“Today, in order to restrict "unauthorized" and cross-border on-line gambling services the following types of methods are imposed on such intermediary service providers:

- *Domain Name System (DNS) filtering*
- *Internet Protocol (IP) blocking.*¹⁴

These measures are only internet blocking measures, i.e., they do not search for potentially illegal content or an individual, but they block information which already known.

Green paper On on-line gambling in the Internal Market provides the explanations of these methods, which will be important to the future studies:

– *“Domain Name System (DNS) filtering; A DNS filtering mechanism seeks to ensure that potential customers are prevented to gamble on unauthorized pre-listed sites or are redirected to another address (website) on the basis of a pre-defined list of internet addresses (domain names) e.g. from a .com site to one established within the relevant national jurisdiction.*

– *Internet Protocol (IP) blocking. Every device connected to the public internet is assigned a unique number known as an IP address, which includes the hostname. IP blocking prevents the connection between a server/website and one or more IP addresses”.*¹⁵

In the Scarlet case, The Court of Justice emphasizes that the filtering consists of two parts: identification of prohibited content and its elimination by denying its access to the users. Previously mentioned means of blocking are applied to block the online gambling and are designed only for blocking the information, rather than detecting a certain content. The difference between the case presented in the Scarlet case and filtration for the online gambling is that the Scarlet case required ISP to determine the prohibited content and block it as well: *“The system to be implemented is a dual system. First, it must filter any communication of data passing through Scarlet’s network, in order to detect or, if preferred, to isolate those indicating an infringement of copyright. Secondly, apart from filtering, the system must block communications which actually involve an infringement of copyright, whether ‘at the point at which they are requested’ or ‘at which they are sent’. Since the effectiveness of the filtering system is a condition of the*

¹⁴ Green paper On on-line gambling in the Internal Market SEC(2011) 321 final; p.34.
http://ec.europa.eu/internal_market/consultations/docs/2011/online_gambling/com2011_128_en.pdf

¹⁵ *Ibid.*

effectiveness of the blocking system, those two operations, although closely linked, are very different and therefore have different consequences.”¹⁶

Scarlet case

As it was already mentioned, since applied norms of the secondary EC law regulate Copyright infringements and on-line gambling are quite different, it would be purposeful to focus on the problems of the primary EC law, but also including regulation determined by the secondary EC law.

While assessing the problems of filtering/blocking online gambling, it is important to evaluate why and how such blocking tool is applied, i.e., whether it is “*interference a posteriori*, or *an interference a priori*. The Scarlet case states: “*In the main proceedings, on the other hand, an internet service provider is required to introduce a system for filtering electronic communications and blocking electronic files deemed to infringe an intellectual property right. It is not an interference a posteriori, once an infringement of copyright or related rights has been established, which is required, but an interference a priori, with the aim of avoiding such an infringement and, more specifically, in order to introduce a preventive system to avoid any future infringement of an intellectual property right, in accordance with rules which, as we shall see, are marked by numerous uncertainties.*”¹⁷

In case of on-line gambling, whether the measure is *interference a posteriori*, or an *interference a priori* depends on a specific restriction laid down in the structure of the legal norms, actual circumstances, including the actions of the regulatory authority. According to the author, the major drawback in the legal acts regulating the blocking of the online gambling is that such a powerful intervention and a measure which is partially adjustable with the primary EC Law (specifically Article 11 of the Charter of Fundamental Rights of the European Union¹⁸) is implemented not by the courts *ex post*, but by the appropriate administrative institutions that regulates gambling in a certain nation country and private persons, i.e. ISP. In fact, the actions of such regulatory institutions can be checked in the court.

¹⁶ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10 Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (SABAM) Interveniers: Belgian Entertainment Association Video ASBL (BEA Video), Belgian Entertainment Association Music ASBL (BEA Music), Internet Service Provider Association ASBL (ISPA), Clause 46.

¹⁷ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10. Clause 4.

¹⁸ Further „the Charter”“

In case of any restriction of the internet content, it is important to review the relationship of this restriction in the light of Article 11 of the Charter of Fundamental Rights of the European Union (further „the Charter“) ...”: *the guarantee of freedom of expression and the right to information*¹⁹

In the Scarlet case, Advocate General Cruz Villalon²⁰ in his opinion document states:

“(84.) Article 11 of the Charter, which guarantees not only the right to communicate information but also to receive it, is clearly designed to apply to the internet. As the European Court of Human Rights has pointed out, ‘in light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally’.

(85.) There can hardly be any doubt, as Scarlet has pointed out, that the introduction of a filtering and blocking system such as that requested, and most particularly the blocking mechanism, which may involve monitoring all electronic communications passing through its services constitutes, by its very nature, a ‘restriction’, within the meaning of Article 10 of the ECHR²¹, on the freedom of communication enshrined in Article 11(1) of the Charter, whatever the technical rules according to which the monitoring of communications is actually carried out, whatever the extent and depth of the monitoring and whatever the effectiveness and reliability or of the monitoring actually carried out, which are points to be discussed, as I have indicated above.

(86.) As Scarlet has argued, a combined filtering and blocking system will inevitably affect lawful exchanges of content, and will therefore have repercussions on the content of the rights guaranteed by Article 11 of the Charter, if only because the lawfulness or otherwise of a given communication, which depends on the scope of the copyright concerned, varies from country to country and therefore falls outside the sphere of technology. So far as it is possible to judge, no filtering and blocking system appears able to guarantee, in a manner compatible with the requirements of Articles 11 and 52(1) of the Charter, the blockage only of exchanges specifically identifiable as unlawful.“

Measures applied to block the online gambling undoubtedly restricts the access to information, i.e., an possibility to access desirable content;

¹⁹ The Charter of Fundamental Rights of the European Union
http://www.europarl.europa.eu/charter/default_en.htm

²⁰ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

²¹ The European Court of Human Rights

therefore, while assessing the appropriateness of the measure, it is important to evaluate their effectiveness, i.e., whether the use of these measures that potentially violates the primary EC law or whether it helps to achieve the goal; it would help to decide whether such measure is proportionate.

Experts and regulators of EC proves, that:

1. *ISP blocking does not work as an isolated enforcement tool and can be circumvented, but it may serve as a deterrent though only in combination with other instruments.*²²
2. *However, depending on the technology used, ISP blocking might impact on legitimate businesses.*²³

Some regulators consider financial blocking a more efficient instrument than ISP blocking, experience however is lacking. Adverse effects need to be considered (loss of forensics, blocking legitimate businesses, driving consumers to the unregulated market).²⁴

It can be argued that applied filtering measures are not reliable, i.e., do not deny the access to the entire information, and even worse, potentially, due to the errors, can restrict the information when it is not necessary to filter/block.

Advocate General states that in case of the Scarlet case, there will be violations of some protected values of the EU Law, but it is acceptable if it complies with very specific conditions: *“(87.) It is apparent from the foregoing argument that the requested measure, in that it requires the introduction of a system for filtering and blocking electronic communications such as described above, may adversely affect enjoyment of the rights and freedoms protected by the Charter, as analyzed above, and must therefore be classified, in relation to the users of Scarlet’s services and more generally users of the internet, as ‘limitation’ within the meaning of Article 52(1) of the Charter. However, limitations on the exercise of the fundamental rights of users which the introduction of such a filtering and blocking system would involve are acceptable only in so far as they comply with a certain number of conditions [...]”*²⁵

²² EUROPEAN COMMISSION Directorate General Internal Market and Services; CONCLUSIONS of WORKSHOP ON ONLINE GAMBLING; EFFICIENT NATIONAL ENFORCEMENT MEASURES AND ADMINISTRATIVE COOPERATION, 16 SEPTEMBER 2011 IN BRUSSELS. http://ec.europa.eu/internal_market/gambling/docs/workshops/workshop-v-conclusions_en.pdf

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

In this case, the circumstances of the Scarlet case and conditions of the online gambling differ, because, as it was already mentioned, online gambling is potentially harmful activity, which can negatively affect society if it is not controlled and regulated; therefore, the blocking of the online gambling may be justifiable “*the need to protect the rights and freedoms of others*” and also to the necessity for any measure of that kind to pursue “*objectives of general interest*“, but it is not totally clear how about the other important circumstance, in particular the principle of proportionality. According to the author, the proportionality should be assessed on individual basis, and the measure of filtering/blocking cannot be applied as the first preventative measure, when there are other measures (e.g.: restrictions of financial payments). In all cases, there is an easier to solve the problem regarding the compatibility of the blocking of the online gambling and the Article 52 of the Charter compared to the problems provided in the Scarlet case: “(89.) *Article 52 of the Charter thus refers to ‘the need to protect the rights and freedoms of others’ and also to the necessity for any measure of that kind to pursue ‘objectives of general interest’ and to comply with the principle of proportionality. Although the protection of intellectual property rights definitely constitutes an objective of general interest, as Directives 2001/29 and 2004/48 show, the filtering and blocking system requested nevertheless finds its main justification, in the circumstances of the main proceedings, in the need to protect the ‘rights and freedoms of others’. The ‘need to protect the rights’ of the holders of copyright or related rights is at the heart of the present case; it is the fundamental cause of the civil proceedings brought by SABAM against Scarlet*”²⁶

The issue of proportionality of the filtering/blocking measure is addressed separately in the opinion of Advocate General:

“(35.) *Scarlet and ISPA, and also the Belgium, Czech, Italian, Netherlands, Polish and Finnish Governments consider, in general, after conducting a substantial analysis of the relevant provisions but taking different approaches to the problem, that Union law precludes the adoption of a measure such as the one requested. The Commission, for its part, considers that, although the directives at issue do not, in themselves, preclude the introduction of a filtering and blocking system such as the one requested, the specific rules for implementing it, however, do not comply with the principle of proportionality. It therefore considers, in essence, that, at the end of the day, the national court of first instance has misinterpreted the requirements of the principle of proportionality, and that the national legal provisions in themselves cannot be criticized.*

²⁶ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

(36.) Indeed, it must be pointed out, in that regard, that Article 52(1) of the Charter requires that any limitation on the exercise of rights and freedoms be imposed, amongst other conditions, in compliance with principle of proportionality. Without a doubt, compliance with the principle of proportionality is necessary since the question of a limitation, within the meaning of that provision, is raised, that is to say, not only at the stage of the application in concreto of the provision by the court, which is precisely the subject-matter of the second question, but also beforehand, at the stage of its definition in abstracto, its formulation by the legislature. In my view, it is in respect of this aspect of the problem that the Commission’s line of argument is flawed.”²⁷

The other problem of the internet blocking is the unpredictability of this measure and clear anticipation in the laws. Undoubtedly, this problem is relevant for both Copyright infringements and on-line gambling, therefore it is important to consider the opinion expressed in the Scarlet case:

“(94.) The European Court of Human Rights has repeatedly held that the provisions of the ECHR making interference in the exercise of a right or the restriction on the exercise of a freedom which it guarantees subject to the condition that it is ‘provided for by law’ means not only that the measure is founded on a legal basis as such, has ‘a basis in domestic law’, but also imposes requirements relating, to use the expression which it has enshrined, to ‘the quality of the law in question’. That ‘law’ must, in effect, be ‘adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct’, to ‘foresee its consequences for him’, ‘to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.

(96). A limitation is therefore acceptable only if it is founded on a legal basis in domestic law, a legal basis which must be accessible, clear, foreseeable, conditions which all stem from the idea of the supremacy of the law. From that requirement of the supremacy of the law stems the need for the law to be accessible and foreseeable to the person concerned.

(97.) The condition that any limitation must be ‘provided for by law’ therefore means, according to the case-law of the European Court of Human Rights, that the action of the public authorities must observe the limits defined in advance by the rules of law, which ‘imposes certain requirements which must be satisfied both by the rules of law themselves and by the procedures designed to impose effective observance of those rules’.

²⁷ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

(100.) In conclusion, both the Charter and the ECHR acknowledge the possibility of a limitation on the exercise of the rights and freedoms, of an interference in the exercise of the rights or of a restriction on the exercise of the freedoms, which they guarantee on condition, inter alia, that they are 'provided for by law'. The European Court of Human Rights, principally on the basis of the supremacy of law enshrined in the preamble to the ECHR, has constructed from that expression, and essentially through the concept of 'quality of the law', an actual doctrine, according to which any limitation, interference or restriction must previously have been the subject of a legal framework, at least in the substantive sense of the term, which is sufficiently precise having regard to the objective it pursues, that is, in accordance with minimum requirements. That case-law must be taken into consideration by the Court of Justice when interpreting the scope of the corresponding provisions of the Charter.”²⁸

There is a funding for the measures of filtering/blocking issue open, especially if they comply with the requirements of the legal acts that determine the measures. The context of the Scarlet case states that the obligation of the ISP to ensure the blocking at their own expense is not compatible with the EU law:

“(105.) As we have seen above, from the point of view of Scarlet and the ISPs, the obligation to introduce, at their own expense, a filtering and blocking system such as that at issue is so characterized or even singular, on the one hand, and 'new' or even unexpected, on the other hand, that it can only be accepted on condition that it has been expressly provided for beforehand, clearly and precisely, in a 'law' within the meaning of the Charter. However, it is difficult to believe that, by adopting the requested measure on the basis of the national provision at issue, the competent national court would be within the limits expressly, previously, clearly and precisely defined by the 'law', particularly taking into account the provisions of Article 15 of Directive 2000/31. From Scarlet's point of view, the adoption by a Belgian court of a measure of that nature is difficult to foresee and, in the light of its potential economic consequences, would restrict even the arbitrary power.

(106.) From the point of view of the users of Scarlet's services and of internet users more generally, the filtering system requested is designed, irrespective of the specific manner in which it is used, to apply systematically and universally, permanently and perpetually, but its introduction is not supported by any specific guarantee as regards in particular the protection of personal data and the confidentiality of communication. Moreover, the

²⁸ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

blocking mechanism is required, also irrespective of the specific manner in which it is used, to function with no express provision being made for the persons concerned that is the internet users, to oppose the blocking of a given file or to challenge the justification for it.

(107.) It could hardly be otherwise since the national law at issue does not have the objective of authorizing the competent national courts to adopt a measure to filter all the electronic communications of the subscribers of the ISPs exercising their activity in the territory of the Member State concerned.

(108.) The necessary conclusion is therefore that the national law provision at issue cannot, in the light of Articles 7, 8 and 11 of the Charter and in particular of the requirements relating to the ‘quality of the law’ and, more generally, the requirements of the supremacy of the law, be an adequate legal base on which to adopt an injunction imposing a filtering and blocking system such as that requested in the main proceedings.”²⁹

In case of online gambling, to transfer to the ISP duty to install, improve, and pay for blocking is also unreasonable, because illegal actions are performed by the persons who are not related to the filtering ISP’s contractual relations and do not directly exist in the ISPs network (servers), and ISP do not provide a special access to these individual who are potentially breaking laws.

Scarlet case addresses the issue of the personal data protection, which is no separately analyzed in this article, because in case of online gambling, usually selected blocking measures mentioned above do not encourage to store and /or check particular persons’ information or other sensitive data, but this generalization is very conditional and directly related to the choice of the blocking measure.

Conclusion

A part of the legal norms and principles related to the internet filtering/blocking can be applied for both copyright infringement and online gambling, but it is necessary to consider the specifics of relations and potentially different filtering/blocking methods.

Legal problems of filtering/blocking of the internet content remain relevant, even in order to protect other important values (e.g. *rights and freedoms of others*’); therefore, it is very important to weigh the arguments that would allow restricting the values determined by the primary EC law, while adopting certain legal norms and making other decisions that permit such filtering/blocking.

²⁹ OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN delivered on 14 April 2011 in Court of Justice in Case C-70/10.

Legal problems of filtering/blocking of the internet show that this measure can be the last resort, when the others are ineffective, and equalization of this measure with other measures (restriction of gambling advertisements and restriction of financial payments) for online gambling control is incorrect. Unfortunately, legal norms adopted in different EU member states show that they use internet blocking as a primary preventative and unlimited in time measure³⁰.

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Civil case No. 2-2961-823/2011 Vilnius Regional Court, 2011, Lithuania

Civil case No.2-6458-578/2010, Vilnius Regional Court, 2010, Lithuania.

Court of Justice Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07, C-410/07 and C-338/04, C-359/04 ir C-360/04

Criminal Code of Germany (Strafgesetzbuch, StGB), [1998] (Federal Law Gazette I, p. 945, p. 3322), translation into English: <http://www.iuscomp.org/gla/statutes/StGB.htm>. Section 287 Unauthorized Organization of a Lottery or Raffle.

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