INTERNATIONAL

Confusion in Europe

The European Commission makes progress towards greater liberalisation in online gambling while the UK proposes a step back

By David Zeffman

In the coming months the European Commission will publish its much anticipated action plan on online gambling. The basis for the action plan was a report on online gambling in the internal market which was approved by the European Parliament in November 2011 (the "**Report**") and which called for greater co-ordination in the regulation of online gambling across the European Union ("**EU**"). As in the US, where there is no harmonised federal online gambling legislation, EU Member States can and do regulate this complex area very differently, with many choosing to impose restrictions on foreign operators' activities, a practice which, in many cases, conflicts with the fundamental freedoms provided for by EU law. Although the European Commission's action plan is likely to stop well short of recommending a European legislative framework which would overcome such conflicts of law, Michel Barnier, the European Commissioner respons-ible for gambling, has on several occasions in recent months expressed his commitment to pursue Member States whose regulatory approach to gambling continues to infringe EU law.

It is against this relatively progressive backdrop at an EU-level that the UK is planning to introduce restrictions on online gambling operators in the form of new tax and regulatory burdens. These proposed changes will have the effect of the once confidently liberal UK regime partially closing its doors to competitive and consumer-friendly online gambling. The apparent reversal towards de-liberalisation in the UK leaves the government open to challenge under EU law, something which has already been recognised by many in the industry. In this article we take a closer look at developments at the EU level and consider whether proposed legislative changes in the UK can be reconciled with a call for closer cross-border cooperation between European Member States.

A new action plan for European online gambling

The Report approved by the European Parliament last November was prepared by the Committee on the Internal Market and Consumer Protection which was chaired by German MEP, Jürgen Creutzmann. The Committee's investigation ran parallel to the Commission's Green Paper consultation and collected views from across the industry. The Report's overarching argument is for greater coordination in the regulation of online gambling across the EU, and its recommendations range from a call for a European Directive on consumer protection and betting fraud to a request for common standards on licensing. While recognising that the unique nature of gambling as a service may justify regulation at individual Member State-level, the Report suggests that a lack of coordination between Member States distorts the competitive environment, permits grey and black market gambling to thrive on the internet, and fails to protect potentially vulnerable gambling consumers.

In particular, the Report urged the European Commission to pursue more vigorously Member States whose national gambling legislation is inconsistent with EU law and, importantly, this is a recommendation which appears to have been taken seriously by Michel Barnier. Speaking before the European Parliament in late June, Mr. Barnier stated that a key part of the upcoming action plan will include re-activating proceedings, some of which stretch back as far as 2008, against a number of infringing Member States. This is also very significant for those countries such as the UK which are now proposing changes to their legislative frameworks, as all changes to national gambling laws need to be noticed to the Commission before they are implemented. Accordingly, we can expect that the Commission will be even more vigilant in using this opportunity to raise any objections in advance of legislation being enacted in order to avoid infringement proceedings further down the line.

The Report was also welcomed by gambling operators for its recommendations in favour of an EU-wide approach to online gambling regulation, in stark contrast to the 2009 Schaldemose Report - also approved by the European Parliament - which warned against regulation at an EU level. While this is without doubt a significant shift in the right direction, it is understood that proposals for EU-wide legislation on online gambling will not be included in the action plan, which is disappointing (although not unexpected) news for online operators.

However, Mr. Barnier has undertaken to foster a collaborative dialogue between the national gambling regulators of EU Member States in order to overcome the apparent lack of trust that exists between these bodies and to encourage increased cooperation, something national gambling regulators are apparently taking seriously. The French regulator, ARJEL, and the UK Gambling Commission have recently signed a memorandum of understanding to formalise cooperation and information sharing. This follows on from ARJEL agreeing a similar arrangement with AAMS, the Italian regulator.

A step back for the UK

The UK, since the Gambling Act 2005 came into force on 1 September 2007, has been the most open gambling market in the EU. Under this regime, registered operators in other EEA Member States, Gibraltar or 'White List' jurisdictions - namely, Tasmania, the Isle of Man and Alderney - can offer gambling services to UK citizens and may lawfully advertise their services in the UK subject to the advertising rules. Currently, operators licensed in the UK pay a gross profits tax of fifteen per cent, while operators based offshore pay tax where they are licensed at generally much lower levels. As a result, the majority of UK-facing remote gambling operators are now established in jurisdictions such as Gibraltar, Alderney and the Isle of Man where they can lawfully target UK customers, while paying taxes which are materially lower than those in the UK.

The main beneficiaries of the UK's approach to regulation are UK punters who

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have access to an extremely competitive online gambling market-place. Indeed, the UK is the world's largest legal online gaming market (although is likely to be soon overtaken by Italy). The UK's online gambling population is generally quite sophisticated with many holding accounts with multiple operators in order to take advantage of the best available deals. Given the fierce competition between them, the operators themselves are working to increasingly low margins.

The UK Government is working on two strands of change to gambling policy. The first involves changes to the licensing regime which would require operators based in overseas jurisdictions - who are targeting UK consumers - to be licensed by the UK Gambling Commission. In July of last year, the Gambling Minister stated:

> *The current system for remote gambling doesn't work. Overseas operators get an unfair advantage over UK-based companies, and British consumers who gamble online may have little or no protection depending on where the operator they deal with happens to be based. So our new proposals are an important step to help address concerns about problem gambling and to plug a regulatory gap, ensuring a much more consistent and high level of protection for those people in the UK who gamble online.*

The second proposed change, which is seen by many as the main impetus for the proposed licensing modifications, involves the introduction of a 'point of consumption' tax, which would require online companies, wherever based, to pay duty on all of their UK customers. The planned date for the introduction of this tax is December 2014.

The proposed changes raise significant issues from an EU law perspective. Firstly, the European Courts have held that financial objectives such as increasing tax revenues are not legitimate grounds for justifying restrictive measures. However, the proposed changes to the licensing regime cannot stand alone without some form of justification, but there is no evidence to suggest that the existing licensing regime for remote gambling 'doesn't work'. A recent consultation carried out by the Department for Culture, Media and Sport failed to prove the case for any regulatory change. In restricting the list of countries in which operators can be licensed to certain approved territories, the UK gambling regime has already succeeded in ensuring that operators are subject to strict regulatory scrutiny. Without being able to demonstrate a sufficient justification for the taxation changes in this manner, UK gambling policy will, for the first time, be open to challenge under EU law.

In addition to these legal hurdles, the Government also faces the prospect that a place of consumption tax will increase black market gambling, drive some operators to divert their business to other jurisdictions and force others out of business altogether. All of which is likely to mean a worse - not better - deal for UK punters. Given that the proposed policy changes would, in effect, close one of the EU's only fully open markets in the EU, it is expected that it will face significant challenges both from the European Commission and from gambling operators whose businesses will be severely impacted in the event that the new policy is implemented. ♣