

EUROPEAN UNION



European Commission— Is There Regulatory Change Ahead?

By Tony Coles

In October of last year the European Commission issued its paper on the regulation of online gambling under the title “Towards a Comprehensive European Framework for Online Gambling”. This paper was eagerly awaited by many in the online gambling industry and followed the Commission’s Green Paper consultation document which was published in March 2011. Since the release of the Commission’s paper there has been much industry comment on the initiative, along with an opportunity to reflect on what might happen in the future and what, if anything, this Commission initiative will really mean for the industry.

Background

It may be useful, especially for readers unfamiliar with the structures of the European Union, to set the scene. The scene involves the twenty-seven Member States of the European Union, each of which is a sovereign nation in its own right. It also involves the relationships between those twenty-seven Member States as governed by the Treaties establishing the European Union and the directives and other utterances emanating from the European Commission, let alone the jurisprudence of the Court of Justice of the European Union (see CJEU). Thus, it is not surprising that the scene is a complicated one. As the Commission itself writes in its paper, each of the Member States is, in principle, free to set its own regulatory policies for online gambling, but these policies must always “comply with EU law and Internal Market principles and rules”. This

freedom arises as a consequence of the Treaties establishing the European Union, and in particular Article 56 of the Treaty on the Functioning of the European Union (which relates to the free movement of services across the European Union) and Article 49 (which covers the freedom for businesses to establish themselves throughout the EU).

The development of online gambling has imposed significant pressures on the relationship between Member States’ own desires for control over gambling regulation, and their desires for control over gambling taxation, and their Treaty obligations as members of the EU. This has resulted in significant jurisprudence from the CJEU where, in a variety of cases initiated in a number of individual Member States, the compatibility of a Member State’s national rules with the Treaty obligations of that State has been challenged. In a series of judgments, the

CJEU has provided general guidance on the interpretation of the fundamental principles of the EU Internal Market, so that the national courts in the relevant Member States can then assess what the Commission describes in its paper as “the circumstances under which restrictive national gambling laws are justified on grounds related to the general interest”.

Given these EU pressures, and given the fast pace of the development of online gambling, and the fact that sites can easily operate from the EU, with consumers/players reaching across national boundaries to identify sites which attract them both in terms of the products on offer and the potential economic benefits, it is not surprising that the European Commission is involved.

Thus, as stated above, the Commission adopted a Green Paper in the Spring of 2011 which was followed by a period of public consultation so as to enable it to seek to understand both the existing situation in the industry, the way in which Member States seek to regulate online gambling, and how the individual public policy objectives of each Member State can be reconciled with its obligations to the EU so as not to undermine the Internal Market. The Commission has also sought to identify whether differing national regulatory models could co-exist, or whether action is needed at the EU level. Because, interestingly, although the online gambling industry is one of the fastest growing service activities in the EU

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it, unlike other service activities, has not hitherto been the subject of specific pan-EU regulation. That there may be a number of reasons to explain this did not deter the Commission from grappling with the problem and proposing what it sees as the way forward.

The European Commission's Action Plan

In its October 2012 paper, the Commission identified the need for an improved regulatory framework governing online gambling services within the EU as well as the need for greater co-operation between Member States and between EU institutions. The Commission accepted that issues raised in online gambling cross Member States' borders and need to be addressed by harmonised regulation, but not necessarily by regulation at the EU level.

Thus the Commission's paper, issued with an accompanying Commission Staff Working Document, identified "the key challenges posed by the co-existence of national regulatory frameworks within the Internal Market" and answered those challenges by identifying five priority areas where it says that action is required.

Broadly put those six initiatives are:

- **Ensuring compliance of Member States' regulatory frameworks with EU law.**

The Commission is to seek, or perhaps more correctly will continue to seek, to ensure that the regulation in each Member State complies with EU law. To achieve this objective the Commission plans to take enforcement action against those Member States which in its opinion do not currently comply, and it will do this by continuing, or initiating, infringement proceedings. Such infrequent

proceedings are, of course, taken by the Commission itself where it believes that an individual Member State is not complying with EU law. The process can be time consuming since it involves the Commission requesting an individual Member State to provide information regarding its regulatory law and an explanation of justification where there is apparent inconsistency with EU law. Often this process can lead to a reconciliation between the Commission's views and those of the Member State, with changes to its regulations being instituted by the Member State without further formality. But, in those cases where exchanges between the Commission and the Member State result in an impasse, the Commission may take proceedings against the Member State in the Court of Justice of the European Union and seek a ruling. Failure by a Member State to comply with a CJEU ruling is expensive both in terms of the financial penalties imposed on a Member State by the Court and also in terms of that Member State's "loss of face" with its EU partners as a "good European".

In regard to online gambling regulation the Commission currently has a number of infringements proceedings outstanding against Member States, including Sweden, Germany, the Netherlands, Finland, Hungary and Greece. It proposes to further accelerate its investigations into the complaints it receives and to take enforcement action before the CJEU where necessary.

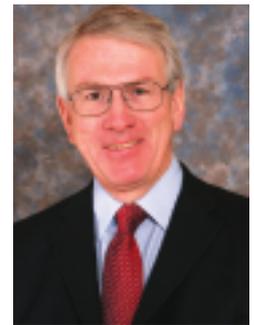
In its paper the Commission says that it will undertake an on-going review of Member States' licensing systems to gauge their transparency so as to ensure the absence of any discrimination against operators from outside that State.

- **Establishing an expert group on gambling.**

The Commission is creating an expert group on gambling with representatives from all Member States. The plan is for those experts to share their experiences, to identify what are the best practices and to provide advice and expertise on future initiatives which may emanate from the Commission.

- **Enhancing supervision, administrative co-operation and enforcement.**

The Commission regards as a priority the enhancement of co-operation between EU Member



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States and, especially, between the gambling regulatory authorities in each of the States. The Commission considers it essential that its policies be successfully implemented at both Member State and EU level by the development of closer working relations between those regulatory authorities.

The Commission also proposes to investigate the benefits and limitations of responsive enforcement measures, including website and financial transaction blocking, and procedures which may require online intermediaries to remove what are identified as “illegal gambling offers” or to block access to those offers.

The Commission has said that it considers that the possible use of the Internal Market Information System may be beneficial in this objective.

• **Protecting consumers, citizens, minors and vulnerable groups.**

The Commission states that it is eager to ensure greater protection for consumers who access online gambling sites, particularly minors (an expression used by the Commission to refer to those under eighteen years of age, even though in certain Member States young adults above that age may also be covered by the regulatory regime applicable to children) and other vulnerable people. The Commission intends to prepare recommendations for the establishment of a common set of consumer protection principles which would apply across the sector. It also considers that responsible gambling advertisements must make consumers aware of age restrictions, the fact that gambling can be harmful when not pursued responsibly, and that risks to players can be financial, social and health related. To this end, during 2013 the Commission will prepare recommendations for minimum requirements for gambling advertising across the EU.



The European Commission sets standards in the regulation of online gaming

The Commission also intends to review recommendations from specialist research groups and says that it will consider initiatives for further research into pathological gambling.

• **Preventing fraud and money laundering.**

Although its assertion may be challenged by many in the industry, the Commission says that it associates online gambling with online fraud, credit card fraud, identity theft and money laundering. It regards these problems as being transnational and requiring significant co-operation between Member States. It is therefore considering the possible

extension of the current Anti-Money Laundering Directive, which at present applies only to casino gaming, so that in future it would cover all forms of gambling.

Given that in a number of Member States certain issues are addressed by a regulatory requirement that online gambling equipment and software be certified, the Commission is to seek to ensure consistent standards across the EU and to aim to reduce the administrative burden which currently arises from the need for operators to obtain certification in each Member State, often to different standards.

• **Safeguarding the integrity of sports and preventing match fixing.**

In recognising that match fixing is a threat to the integrity of sporting events, the Commission acknowledges this threat can arise both with and without the involvement of sports betting operators. It is well-known that many leading online sports betting operators currently have well established reporting arrangements in place with the authorities in many sports. These arrangements have led to the identification of wrong-doing, and the conviction of the wrong-doers concerned whether sportsmen, administrators or those accessing a betting site. To expand on this, the Commission intends in 2014 to publish its recommendations for EU-wide anti-match fixing measures and will also assist the Council of Europe, the International Olympic Committee and other sports bodies to encourage and promote international co-operation so as to aim to prevent match fixing.

The Way Forward

In its paper, the Commission says that it intends the actions it has identified and which are summarised above to be implemented “promptly”. Thus, within two years it will produce a report detailing whether or not those actions have proved sufficient to address the challenges which the Commission regards as facing online gambling. If not, the Commission is likely to propose that additional measures are taken. Meanwhile there are on-going opportunities for those involved in the online gambling industry, and for those from outside the industry who are interested in the way in which it develops, to engage with the Commission. Although its paper sets out its current plans, it would be fair to say that the Commission has not turned its face against any particular solution to on-going issues in the industry.

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Conclusion

Many have said that the publication of the Commission’s paper will not have any immediate impact, and it seems to be clear that this initiative will not result in any, or at least any immediate, pan-European gambling regulation. If that ever materializes, it will be some while hence and will only arise as a result of much greater work at the EU level. However, the continuation of the infringement proceedings against individual Member States is likely to ensure that, within a period of a few years, those States which are seriously out of step with EU law will be found to have adopted new regulatory regimes. With more than a dozen Member States having laws that are almost certainly out of step with their EU Treaty obligations, it is certain that the Commission has much work to do in pursuing its infringement proceedings. And the involvement of the Court of Justice of the European Union is not at all unlikely before this process ends.

Upon the publication of the paper, Michel Barnier, the EU Commissioner for the Internal Market, promised that the Commission would “fulfil its role as guardian of the EU Treaty”. But where a Member State indicates plans to change its laws, and then begins to implement those

plans, the Commission is likely to allow time for the change. For example, there are currently infringement proceedings underway against the Netherlands, but with the new Dutch Government’s plans to implement changes to the regulations for online gambling, it is likely that the Commission will allow opportunities for these changes to be introduced in a way it regards as satisfactory and only then will it review the changed regime.

Of course, one significant, but not unexpected, omission from the Commission’s paper is tax harmonisation. The level of individual gambling taxes in each Member State is, generally speaking, not an issue to be determined at EU level, but nonetheless it continues to represent a significant issue for online gambling operators. In the writer’s view any move to tax harmonisation is a long way off, if it were ever to appear.

On publication, the paper was greeted by many as representing a significant step forward towards ending the discriminatory regimes in a number of Member States, but by others as a big disappointment. With the great range of operations within the online gambling industry, and with the pressures to maintain existing benefits at one end of that range and the entrepreneurial pressures for change and modernisation at the other, that divergence of opinion can only be expected. Furthermore one must not overlook the significant tax benefits which gambling provides for the revenues of many, if not all, Member States, as well as the political nature of the EU institutions.

It may therefore be not at all unlikely that, five years hence, we will be looking back at this paper to remind ourselves of what was proposed to happen but which is still awaited. ♣