



New Developments in the European Union

By Dervla Broderick

While the European online gambling market continues to expand, it remains one of the few economic sectors which lacks coherent cross-border regulation. Even with the new EU Commission's extensive plans to break down barriers to online trade between Member States, online gambling is still viewed as too contentious politically for harmonised regulation to be accepted by the twenty-eight EU Member States. Consequently, operators offering their services in the EU face high compliance costs and uncertainty over the legality of their operations in certain territories. For consumers accustomed to having unfettered access to goods and services on the Internet, the lack of coherence is confusing. This article looks at how the online gambling sector currently fits within the broader EU agenda and examines developments in regulation in a number of key EU Member States.

Overview of the regulatory framework

Before turning to look at developments across the EU, it is worth looking at the current legal framework for regulating online gambling. At present, each EU Member State is free to regulate gambling

in the manner it considers appropriate subject to the condition that the applicable legislation complies with European law, specifically the Treaty on the Functioning of the European Union ("TFEU"). The TFEU encapsulates the overall principle that, within the EU, each Member State can

freely trade with others; therefore, unjustified restrictions on the supply and movement of goods, services, people and capital are not permitted.

However, Member States retain a margin of discretion to introduce rules which limit operators' rights to provide services to citizens within their national territory if objectively justified (e.g. there is a legitimate aim to protect consumers or prevent fraud). Such public interest exemptions cannot be arbitrary and must adhere to the principles of non-discrimination, suitability and proportionality. So, for example, Member States cannot restrict citizens' access to gambling services if, at the same time, they encourage participation in state-owned lotteries or other gambling services.

Over recent years the European Commission has investigated potential breaches of EU law affecting the gambling sector in a number of Member States. As a result of

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these investigations there has been some progress toward liberalisation of the gambling sector. Nevertheless, some Member States have applied and continue to apply discretionary powers to maintain state monopolies and to restrict the ability of operators licensed within other Member States from offering or advertising gambling services to their national citizens or residents.

A new EU Commission

The new EU Commission commenced its five year term on 1 November 2014 and in setting the agenda for his tenure as European Commission President, Jean-Claude Juncker put the digital economy centre stage. He is promoting a fully-connected digital single market as the means of generating up to €250 billion of additional growth in Europe, and thereby creating “*hundreds of thousands of new jobs and a vibrant knowledge-based society.*” The Commission subsequently published its Digital Single Market strategy document in May 2015, outlining a wide range of measures designed to remove barriers to cross-border service provision and create a “*connected continent.*”

However, even with the spotlight currently on the promotion of cross-border e-commerce, the online gambling sector seems unlikely to reap any rewards. The regulatory landscape is still highly fragmented with each member state free to legislate for online gambling in the manner it considers appropriate (subject to ensuring compliance with European law). While the Digital Single Market strategy includes provisions to modernise copyright laws to facilitate cross-border portability of content and to overhaul

telecoms rules on spectrum regulation and broadband investment, there has been no indication of any impetus to review the position of online gambling.

The former EU Commissioner responsible for gambling services, Michel Barnier, was a particularly active proponent of greater harmonisation in the sector. His role included the task of monitoring the compliance of Member States’ gambling legislation and in a bold move towards the end of his term he succeeded in bringing infringement proceedings against several Member States whose laws were considered to contravene EU law. However, Mr. Barnier was replaced by Commissioner Elżbieta Bieńkowska who has yet to give any indication of how she intends to deal with these cases or the gambling sector more generally. Given the current focus of the EU agenda, it may actually be an ideal opportunity to make meaningful progress towards free movement of gambling services within the EU. However, there is also a danger that this goal has fallen down the priority list as a result of it being “too politically difficult.”

Information sharing

Although a very long way from regulatory harmonisation, some steps have been taken to encourage cooperation between national regulators of online gambling. Another legacy of Mr. Barnier’s term, the results of a study into the role of regulators for online gambling were published in October 2014. The report encourages Member States to engage in the sharing of information and best practice to promote greater consistency across EU Member States. In particular the study recommended the introduction of “certificates of good standing” which could be issued to enable an operator licensed in one territory to by-pass certain of the regulatory requirements in place in another Member State, thereby streamlining the licensing process somewhat.

Other recommendations included sharing information regarding technical standards and their implementation as well as regarding players and problem operators. These recommendations are not binding in any way and require buy-in from national regulatory authorities for them to achieve their aims.

Continued on next page



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>> NEW DEVELOPMENTS IN JURISDICTIONS: EU



Continued from previous page

Significant Member State developments

While indications of the new Commissioner's agenda for online gambling are eagerly awaited, regulatory changes at Member State-level continue to cause uncertainty for operators. By way of example, we discuss recent developments in Germany, Sweden and the UK.

Germany

The regulatory landscape for online gambling in Germany remains unclear. Under the current regime operating in all German states, there are twenty online sports betting licences available. The three-stage process for issuing these licences was formally completed in September 2014. However, no actual licences have been issued to successful applicants yet, as the Administrative Court of Wiesbaden in April 2015 ruled that the tender process was unfair and ordered that a rejected application be reconsidered. Recently, a player was prosecuted for gambling with an online operator located outside of Germany, but it is not yet known whether this marks the start of a trend in this direction.

In addition, the state of Schleswig-Holstein had until recently its own Gambling Act allowing online sports betting and gambling. It issued twenty-one online gambling licences under this Act and these remain valid until their stipulated expiry

date in June 2019. However, Schleswig-Holstein has subsequently repealed its Gambling Act and no further licences will be made available.

Sweden

In 2013 when the Commission initiated infringement proceedings against a number of EU Member States, it also escalated its ongoing proceedings against Sweden requesting that Sweden's laws on online sports betting and online poker be amended to fully comply with EU law. Then on 16 October 2014 the Commission announced its decision to refer Sweden to the Court of Justice of the European Union. The referral followed an unsatisfactory reaction by Sweden to the Commission's November 2013 compliance request. This is the first such referral of a Member State on account of gambling-related regulation.

The Commission's case against Sweden is two-pronged with the first concerning inconsistencies in the online sports betting monopoly held by state-owned Svenska Spel. The Commission considers that the way in which Svenska Spel's monopoly right is run is inconsistent with the aim of achieving the public policy objectives of preventing problem gambling and criminal activities and lacks necessary state control.

The Commission's second line of attack is based on restrictions on the provision and promotion of online poker

games. The Commission's view is that Svenska Spel's monopoly in this area is not subject to adequate control by the Swedish authorities and that Sweden's policy is inconsistent because the unauthorised poker game sites are in fact tolerated.

Great Britain

A new licensing regime was introduced under the Gambling (Licensing and Advertising) Act 2014 under which all operators (wherever located) offering services to consumers in Great Britain must hold a licence from the British Gambling Commission.

In addition, the Finance Act 2014 changed the taxation of gambling online so that operators outside the UK would be liable to pay tax on all bets placed with them by UK consumers, regardless of the tax they pay in their own jurisdiction. This legislation is subject to ongoing judicial review proceedings brought by the Gibraltar Betting and Gaming Association (the "GBGA"), represented by Olswang LLP. The GBGA claimed that the new tax regime was discriminatory and therefore unlawful under EU law. In a judgment handed down on 14 July 2015, the British High Court found that there should be a reference to the Court of Justice of the European Union on important issues concerning the legality of a tax imposed on overseas gambling operators. If the tax regime is found to be in breach of European law, the British government could be ordered to repay all of the tax it has received.

Conclusion

A harmonised regulatory framework for online gambling in the EU would provide much needed certainty for operators and consumers alike. However, a majority of Member States remain committed to a certain level of protection, often linked to a desire to retain revenue from state-owned gambling monopolies. Absent any political will to move towards greater cooperation in this area, it is clear that operators will continue to face conflict in a large part of the EU for the foreseeable future. ♣