

European Union Law and Online Gambling

by Marcos Charif

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With infringement proceedings, rulings by the European Court of Justice (ECJ) and the on-going lack of online gambling regulation at EU level, it is important to understand the extent to which member states can today restrict the freedom to provide (gambling) services. Member states may only maintain restrictions on the freedom to provide services in specific circumstances where these are justified by overriding reasons of general interest, on grounds of public policy, public security or public health; and where they are proportionate.

The ECJ has developed a number of “general principles” when interpreting national restrictions on the freedom to provide services:

- Proportionality: restrictions must be no more than are necessary to achieve their purpose;
- Legal certainty: ambiguous restrictions will be interpreted in accordance with EU law;
- Equality/Non-Discrimination: restrictions cannot be discriminatory by favouring national operators over EU based operators
- Objective Justification: excessive restrictions are incompatible with EU law, if this can be achieved by less restrictive means
- Subsidiarity: decisions must be taken as closely as possible to the citizen, i.e. by member states and not the EU.

ECJ judgments

The ECJ has applied these general principles to online gambling cases to assess the compatibility of national restrictions with the freedom to provide services:

Gambling as a restricted commercial activity:

- Gambling can have harmful consequences and member states therefore have a margin of discretion to limit gambling activities.
- In the absence of EU harmonisation, each member state may determine what is required to ensure that their interests are protected, provided that any restrictive measures do not go beyond what is necessary and are applied without discrimination

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- the principle of mutual recognition does not apply in the gambling sector: operators licensed within one member state are not automatically permitted to provide the same services in other member states .

Monopolies

- Restrictions are unlawful if these are based on purely financial grounds. Restrictions can only be justified on public policy grounds where the protection of the public is their main purpose;
- Restrictions on the number of operators must reflect a “genuine diminution of gambling opportunities”; however the limitation must be consistent and systematic;
- A monopoly system may be compatible with EU law where justified (with the objective of combating fraud and crime) and proportionate;
- Regarding single-operator licensing schemes, member states have sufficient discretion to determine the level of protection sought in relation to games of chance .

Proportionate and Objectively Justifiable

- Restrictions must be proportionate to the purpose. The proportionality test entails examining whether the rule is “suitable or “appropriate” in achieving its aim ;
- national legislation must be genuinely directed at limiting the harmful effects that are given as reasons to justify restrictions ;
- A member state undermines its consumer protection argument by letting state run gambling companies engage in intensive advertising campaigns thereby undercutting the argument that its monopoly is limiting addiction. A member state, which pursues the objective of preventing incentives to squander on gambling and of combating gambling addiction, but fails to pursue this objective in a consistent and systematic manner, acts in violation of EU law .
- The obligation on persons to have their seat in a particular member state is disproportionate. There are less restrictive measures available to monitor activities and accounts of EEA based operators .

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Equality/ Non-Discrimination:

- The restriction must be one which is equally applicable to persons established within the State, and which must be applied without discrimination”
- The obligation on persons to have their seat in a particular member states constitutes a restriction on the freedom to provide services and discriminates against companies which have their seat in another member
- the absence of a competitive gambling licensing procedure does not comply with freedom of establishment and freedom of services. The absence of transparency is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality and is therefore prohibited by EU law.

National Licensing Regimes

As a (positive) result of ECJ rulings and the European Commission’s infringement proceedings, gambling reform discussions are taking place in more than 17 member states. France and Italy have set the trend for these controlled openings, and more recently the UK is considering following suit. What is noteworthy about the French and Italian approach is the fact that the European Commission seems to have accepted a double / triple / multiple-licensing model whereby a member state may issue separate local licences and impose local taxes. It is quite possible, even probable, that the French / Italian approach will be adopted by most other EU states wishing to open their markets to online gambling operators.

The Definition of “Illegal Gambling” and the Green Paper

The European Union has agreed a common definition of “illegal gambling”. According to the Spanish EU Presidency Report (the " Report") of 11 May 2010, “illegal gambling may be defined as: “gambling in which operators do not comply with the national law of the country where the services are offered, provided those national laws are in compliance with EU treaty principles”. The Report also addresses permissible methods of restricting access to illegal gambling, including ISP blocking and website distortion.

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The Spanish Report is not about legalising online gambling, but is about “serious concerns about illegal gambling and its negative impact on European citizens” . The definition of “illegal gambling” does not differentiate between licensed and unlicensed operators.

Shortly after the Report, Internal Market Commissioner Michel Barnier announced a public consultation on this issue, with a Green Paper due to be launched in Autumn 2010. As a first indicator of things to come, it should be borne in mind that the Commission’s move to launch the Green Paper followed pressure from EU member states and the EU Parliament (both in favour of restricting the freedom to provide gambling services).

What does this Mean for Gambling Operators?

In the absence of gambling regulations on EU level, online gambling will continue to be regulated by EU member states, which must observe the freedom to provide services. Continued uncertainty makes it difficult for online operators to plan workable risk strategies. Companies which are publicly listed must satisfy listing authorities that they are not conducting unlawful business and it assists their argument if local laws are contrary to EU law. However, this rationale is becoming more limited:

- If member state gets the “permitted restrictions” right. This can be more easily established for a restrictive monopoly, while a monopoly that pursues commercial gains has less scope to justify its restrictions;
- All ECJ gambling judgments continue to give member states room to manoeuvre;
- As with Italy and France, some jurisdictions may insist on operators obtaining domestic licences. However, in the absence of mutual recognition of licences this may not assist in assessing regulatory risks, save in the jurisdiction where the licence is held.
- The definition of “illegal gambling” implies that licensed gambling operators are deemed “illegal” from the outset.

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Having said that, member states have not, to date, elected to take the U.S. style approach towards enforcement. It is the widely held view that breaches by EU licensed gambling operators will not have an effect on their respectability and their ability to lawfully access markets – as long as they do access markets where the European Commission has already given its blessing to the existing licensing regimes.

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