

A pocket guide to EU law

With numerous court cases, enforcement proceedings, contradictory rulings by the European Court of Justice (ECJ) and the ongoing lack of online gambling regulation at an EU level, we thought it might be helpful to prepare a pocket guide to the extent to which EU member states can restrict the freedom to provide gambling services. In a nutshell:

- Gambling can have harmful consequences and Member States therefore have a margin of discretion to limit gambling activities.¹
- In the absence of EU harmonisation, each Member State is free to set its own gambling policy objectives, provided that any restrictive measures do not go beyond what is necessary to achieve those objectives and must be applied without discrimination.²
- National legislation must be genuinely directed at limiting the harmful effects that are given as reasons to justify restrictions on cross-border services.³
- A monopoly system may be compatible with EU law where justified (with the objective of combating fraud and crime) and proportionate.⁴ However, monopolies are unlawful if the restriction is based on purely financial grounds. Restrictions can only be justified on public policy grounds and where the protection of the public is their main purpose.⁵
- Restrictions on the number of operators must reflect a “genuine diminution of gambling opportunities”; it must be consistent and systematic.⁶
- 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.⁷
- Any restriction must be one which is equally applicable to persons established within the State, and which must be applied without discrimination.⁸
- The restriction imposed must be proportionate to observe the legitimate rules in question.⁹ The proportionality test entails examining whether the rule is “suitable or “appropriate” in achieving its legitimate aim.¹⁰
- The obligation on persons to have their base in a particular Member State constitutes a restriction on the freedom to provide services and discriminates against companies which have their base in another Member State and is also found to be disproportionate. There are less restrictive measures available to monitor activities and accounts of EEA based operators.¹¹
- 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 therefore prohibited by EU law.
- 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 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.¹²
- As regards a single-operator licensing scheme, Member States have sufficient discretion to determine the level of protection sought in relation to games of chance. However, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities’ discretion so that it is not used arbitrarily.¹³

Please let us know if you find this ECJ Pocket Guide helpful so that we can continue updating this guide for you in the future.

For references, please see back page.

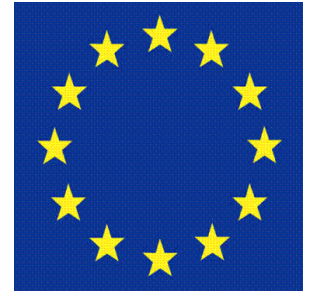
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European Update



Germany

On 8 September 2010, the European Court of Justice (ECJ) ruled that Germany's Interstate Gambling Treaty is in breach of the fundamental principles of EU law. In its ruling, the ECJ held that the German Government had undermined its consumer protection argument by letting state-run gambling companies engage in intensive advertising campaigns to lure customers, thereby undercutting the German state's argument that its monopoly is limiting addiction.

However, the ECJ also stated that monopolies are sometimes justified (and thereby approved Portugal's monopoly) and confirmed member states' rights to establish public monopolies on the basis that such a "monopoly is likely to overcome the risks connected with the gaming industry more effectively than a system under which private operators are authorised to organise bets subject to compliance with the relevant legislation".

According to the first statements issued by representatives of the state monopoly, instead of liberalising the online gambling market, Germany is considering whether to desist from advertising altogether to comply with the current ruling.



Austria

On 9 September 2010 the ECJ delivered its findings in the "Engelmann case" and found that Austrian gambling law is in breach of EU law for the following reasons.

The obligation on persons holding concessions to operate gaming establishments to have their base in Austria constitutes a restriction on freedom of establishment and freedom to provide services. This obligation discriminates against companies which have their seat in another member state and was also found to be disproportionate. There are less restrictive measures available to Member States to monitor the activities and accounts of EEA based operators.

With regard to the grant of the 12 concessions (casino licences), the ECJ considered that the absence of a competitive procedure when concessions were granted to Casinos Austria AG did not comply with freedom of

establishment and freedom of services. The obligation of transparency requires the concession granting authority to ensure a degree of publicity sufficient to enable competition and impartiality. The absence of any transparency and the award of all 12 licences to an Austrian company is contrary to the principle of equal treatment and to the prohibition of discrimination on grounds of nationality and is therefore prohibited by EU law.

The recent ECJ decision did not deal with the aggressive marketing activities of the gambling monopoly, which has the third largest advertising budget in Austria. This is contrary to previous ECJ rulings, according to which a member state may not "incite and encourage" its consumers to participate in games of chance if it has monopolised these.

France

ARJEL, the French regulatory authority for online gambling, has approved a number of existing operators for new games and activities. ARJEL has approved horse racing betting firms to operate new gaming software, while it also gave permission to operate under additional domain names. ARJEL also approved a letter sent to licensed operators reminding them of their legal obligations regarding white labelling and affiliate sites.



Belgium

The new Belgian Gambling Act is expected to enter into force on 1 January 2011, however, it has already been subject to criticism and is now the subject of a complaint to the European Commission.

The main areas of criticism are (1) a requirement for online gambling operators to apply for a land based gambling licence first and (2) requirement to relocate main gambling equipment and servers to Belgium. In other words: online gambling operators will de facto become land based casino operators, whether they like it or not.

In view of recent ECJ rulings (see our articles on Germany and Austria on page 2) it is unlikely that the new Belgian Gambling Act will be approved by the Gambling Commission.

Denmark

Denmark's new Gambling Act, which will come into force in 2011, is already under close scrutiny by interested parties. On the plus side, poker operators will be free to tap into international liquidity when the regulated Danish online gambling market opens in 2011; however licences are unlikely to be approved before March or April 2011 at the earliest.

It is planned that lottery, keno, bingo and scratchcards will remain with current monopoly Danske Spil. In addition, betting on horse races will also remain with the existing monopoly "to protect profit that home tracks are getting from horse race bets at present". This is an interesting and very narrow argument and it remains to be seen whether this complies with existing recent ECJ rulings and is compatible with EU law.

Operators will be able to apply for two licences, one permitting holders to offer sports betting (fixed, pool and spread) online and offline, the other to offer online casino games (including poker, blackjack, roulette, slots, backgammon, whist and bridge) with a flat tax rate of 20% on gross win across all products. The application fee will be €36,000 per licence.

Denmark's land based gambling industry has challenged the new law on the basis that online operators will have a lower tax burden. However it is not felt that this challenge is likely to prevent the new law coming into force.

Greece

In June 2011, Greece announced that it would open its online sports betting market by May 2011 and follow the regulatory models offered by France and Italy. The Greek Ministry of Finance subsequently published legislative proposals to offer a maximum of four licences to provide online betting services via a dedicated Greek website. Licensed operators would also need to establish their servers within Greece. At the end of August, public consultations concerning the regulation of gambling got underway. If passed by the Greek parliament, the legislation will require the European Commission's approval before being implemented.

Gambling Commission consults on change to casino game rules

The Gambling Commission is proposing to discontinue its *Rules of Casino Games in Great Britain* document, which sets out details of those banker's games which are permitted to be offered in UK casinos. Instead, the Commission would publish a list of games which are prohibited and any other game would be allowed.

Since the Gambling Act 2005 came into force, licensees have been able (with approval from the Commission) to trial games which did not appear in the *Rules of Casino Games* document. In fact, more than twenty trials of new games and side bets took place in 2009. The document is therefore of little use to either players or operators, as it does not provide a complete list of the rules of games which may be on offer in a casino at any time.

Pending the outcome of the consultation, the Commission has produced a webpage which provides details of the trials currently taking place and those that have closed. At the moment, once a trial has closed operators must ask the Commission to incorporate the game into the *Rules of Casino Games* document if they wish to continue offering it.

If the proposed changes come into effect, operators will be able to offer any game or side bet without a trial, provided it does not appear on the list of prohibited games. As is the case at the moment, operators would still need to display the rules for any games they offer on the casino premises.

The Commission is currently seeking comments on this proposal, and the consultation period ends on 24 November 2010.

British Horseracing Authority campaigns for a 'fair return'

The British Horseracing Authority is calling for the Government and Horserace Betting Levy Board to close loopholes and secure a fair return from the betting industry. Funding for the sport from the levy has fallen from £115m in 2008 to £75m in 2010, partly due to the fact that some bookmakers have moved their online betting businesses offshore and do not, therefore, need to pay the Levy.

A Charter entitled *Racing United: Campaign for a Fair Levy* has been launched jointly by the British Horseracing Authority, the Racecourse Association and the Horsemen's Group. The Charter calls for the following changes to the current system:

- No longer permitting the offshore betting industry to avoid its Levy obligations
- Ensuring betting exchanges and their bookmaker (business) users pay a fair commercial return to British Racing
- Scrapping threshold rules that currently exempt more than 60% of betting shops from paying the full rate of Levy
- Including payments for customers in Britain placing bets on overseas racing



Government to put Tote up for sale later this year

The Government has announced that it will launch an open market process for the sale of the Tote in late Autumn. Any private bidders or other parties will be invited to submit proposals for the business, and the Government will liaise closely with the Tote Board and racing interests during the process. A further update is expected in early 2011.

ASA upholds complaint about Bet365 ad

A banner ad for the bet365 website which stated 'bet365 JOIN NOW ... £200 FREE BETS FOR NEW CUSTOMERS ... NO1 FOR SPORTS' was found to breach clauses of the CAP code relating to truthfulness and the sales promotions rules.

In order to receive the £200 free bet, customers had to deposit £200 of their own money. The terms and conditions required customers to bet their initial deposit and free bet amount on three separate occasions within 90 days before they could withdraw any winnings. However, the banner ad did not even state that terms and conditions applied. Although the ASA agreed that experienced gamblers would understand the terms and

conditions that tend to apply to 'free bet' offers, the ad targeted new customers and the ASA felt that these customers were likely to be misled.

The adjudication highlights that banner ads such as this must state that terms and conditions apply, and that significant conditions likely to affect a customer's decision to sign up must be displayed in the ad itself, or no further than one click away from it. The significant conditions must appear on the landing page. They need not be the only information on the page, but cannot be buried in terms and conditions a further click away.

Two National Lottery ads receive complaints

Recent advertisements for the National Lottery's Thunderball and Euromillions games have been considered by the Advertising Standards Authority following complaints from members of the public.

Viewers felt that the Thunderball ad was misleading because it did not make clear, while advertising that the top prize had increased, that the number of balls in the draw had increased from 35 to 39 thereby reducing the chances of winning. However the ASA ruled that text stating that 'game rules and revised procedures apply' was sufficient to let customers know that the format of the game had changed so the ad was unlikely to mislead.

The criticism of the Euromillions ad was on the

basis that showing players playing paintball with one player being hit in the groin at close range was irresponsible. The ASA considered the ad under the rule against causing harm and offence, but did not find it to be in breach as, in the context of the whole ad, this humorous scene was unlikely to encourage behaviour which was prejudicial to health and safety.

Since 1 September National Lottery ads now fall under the scope of the new specific lottery advertising rules (which mirror the gambling advertising rules), however these two ads pre-dated this change and were considered under general rules in the BCAP code.

Betfair is going public

Betfair recently announced its intention to offer 10% of its common stock to the market. Interestingly enough, this move does not appear to raise any money for Betfair because the 10% of the company that is coming onto market is stock from existing shareholders.

This cautious approach is also visible when considering that Betfair appears to limit the sale of its limited stock to institutions and not to private individuals. There is also a high share valuation, relative to EBITDA.

So why float in the first place? It may very well be that the current 10% is a first step in testing the waters. The flotation will also assist Betfair in the development of international operations and help incentivise key management and provide ongoing liquidity for existing shareholders.

Intellectual Property Rights

YouTube not liable for copyright infringement of customer uploaded materials

Spanish Courts recently ruled that YouTube is not liable for copyright infringement of materials uploaded by its customers. The Spanish TV station Telecinco sued YouTube because of the presence of material in which it held copyright. The Court held that YouTube is not responsible for the copyright infringement of the videos it hosts, though it must respond quickly to claims from copyright holders about particular videos. "YouTube is not a supplier of content and therefore has no obligation to control the illegality" of hosted material. Its only obligation is to "cooperate with the holders of the rights in order to immediately withdraw the content once the infraction is identified."

The decision is in line with European law which recognizes that content owners (not service providers like YouTube) are in the best position to know whether a specific work is authorised to be on an Internet hosting service. Websites of service providers like YouTube have a responsibility to take down unauthorised material only when they are notified by the owner.

EU Parliament calls for pan-EU copyright law

The European Parliament has recently adopted a report recommending the creation of a new copyright law, which facilitates direct enforcement of copyright breaches throughout the European Union. The European Parliament "is of the opinion that the possibility of proceeding against infringers of intellectual property rights should be created in the European legal framework". The report further calls on the European Commission to conduct an assessment to strengthen the legal framework for the internet. The European Parliament also agreed with the report's findings that existing legal regimes were not up to the job of punishing or discouraging infringements.

European countries, including France and the UK, are considering or have recently passed laws that deal directly with the problem of copyright infringement and the internet. The Commission is negotiating on the EU's behalf with a selection of countries on a new international treaty on copyright laws, the Anti-Counterfeit Trade Agreement (ACTA).

Interestingly, the report also recommends "multi-territory licences" which in itself appears to increase fragmentation of the EU market instead of integration and harmonisation. The European Commission has already highlighted that different national copyright regimes may constitute a barrier trade.

Data Protection

Germany – new privacy codes expected

The German Government asked internet companies, including Google, to draw up a voluntary privacy code before the end of this year. Internet publishers and service providers should ensure that they operate "data protection-friendly basic settings" and give information "in a user-friendly way" about the gathering and intended use of data, the minister said, according to a report by Associated Press. Privacy concerns have previously forced Google to change its "Street View" to automatically blur faces and number plates.

This surprisingly open and constructive approach of involving the industry in drawing voluntary codes was swiftly followed by the Government's confirmation that non-compliance with the voluntary codes will lead the German Government to introduce restrictive privacy laws – so much for the German understanding of "voluntary".

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³ Questore di Verona v Diego Zenatti ECJ 1999 C-67/98

⁴ Case C-258/08 Ladbrokes Betting and Gaming Ltd, Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator and Case C-203/08 Sporting Exchange (Betfair) v Minister van Justitie.

⁵ Gambelli Ruling ECJ 2003 C- 243/01

⁶ Placanica, Palazzese, and Sorricchio (Cases C-338/04, C-359/04 and C-360/04) ECR (2007)

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⁹ Tourist guide cases including Case C-180/89 Commission v Italy [1991] ECR I-709; Case C-154/89 Commission v France [1991] ECR I-659; Case C-198/89 Commission v Greece [1991] ECR I -727

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¹³ ECJ Judgment in Case C-203/08 The Sporting Exchange Ltd, trading as Betfair v Minister van Justitie

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