

# ARE THERE SIGNS OF LIGHT IN THE STYGIAN GLOOM?

BY JULIAN HARRIS

Some in the industry might consider that in 2009 the 'bad guys' had the upper hand: the US Department of Justice maintains its stranglehold on online gaming; the European Court of Justice (ECJ) provided a lifeline to national monopolies; the French Government signalled a proposed tax rate that would make online licences unprofitable for the foreseeable future and in the UK. Nevertheless, even in all this Stygian gloom, there are signs of light ahead, as we look at some of these developments in more detail.



Most years have something of the questionable quality of the curate's egg about them; 2009 may not have been an exception to this, though for my part – and I suspect that of the gambling industry whether online or land-based – the year represents an egg that most would probably have rejected. As always, however, there are lessons to be learned from the past, and history can often provide a signal to the future. Whilst 2010 might economically not be the ambrosian nirvana that Gordon Brown and his Darling would have us believe (and it almost certainly won't be for them!), there are at least some hopeful indicators that 2010 may bring some important changes, some of which at least will be beneficial to the industry.

If I might be forgiven for indulging in a little provocative over simplification, some in the industry might consider that in 2009 the "bad guys" had the upper hand: the US Department of Justice maintains its stranglehold on online gaming; the European Court of Justice (ECJ) provided a lifeline to national monopolies; the French Government signalled a proposed tax rate that would make online licences unprofitable for the foreseeable future and in the UK – well, the horrors simply pile up! The Government suffers from petrified inertia, like some tragic Greek hero, whilst the regulator seems to be playing the part of Goliath to the industry's David.

Nevertheless, even in all this Stygian gloom, there are signs of light ahead, as we look at some of these developments in more detail.

## WILL EUROPE SHOW US THE WAY?

For the online industry at the end of 2009, there was no Santa Claus, only Santa Casa. Whilst some operators have successfully argued in the ECJ that national legislation

infringed Article 49 (Free Movement of Goods and Services within the EU), these have been in cases where the Court found that derogation from Article 49 was not justified on public interest grounds. So, in Gambelli, the Court held that restricting gambling activities to state monopolies is unlawful, if the restriction is based on purely financial grounds: though it was acknowledged that such a restriction might be lawful where protection of the public is the main purpose. Where the National Government has legitimate – and there lies the rub – public interest grounds, the ECJ has ruled against operators.

In September 2009 the ECJ ruled against Bwin in the Santa Casa case, which concerned Bwin's provision of gambling services to Portuguese residents. In a nutshell, Bwin had been fined under Portuguese legislation, prohibiting anyone other than the State licensed Santa Casa from offering gambling products. The case was referred to the ECJ to determine whether Article 49 precludes Member States from enforcing legislation which prohibits operators established in another Member State from offering their residents betting via the Internet.

The ECJ held that Member States are free to set their own policy regarding gambling, but that any restrictions imposed must meet the test of proportionality. In the Bwin case, the Portuguese Government submitted that by giving Santa Casa the exclusive right to offer games of chance to Portuguese residents, it was seeking to protect the public from the risk of fraud or crime particularly associated with internet gambling. The circumstances of the case probably dictated the result. Of particular note was the fact that Bwin

sponsored the same football league on which it was accepting bets, raising concerns about the potential for corruption. The ECJ took the view that, in these particular circumstances, the measures taken by the Government were proportionate, and justified by the objective of preventing fraud and crime. The corollary of course is that where such perceived risks cannot be established by the Member State, disallowing operators licensed in a fellow Member State would not be a proportionate measure permitting prohibition and the maintenance of a state monopoly. Nonetheless, the result was greeted with dismay, and was taken by pessimists to be a victory for the monopolies.

Ladbrokes and Betfair are more optimistic. Bravely – and no doubt expensively, they have continued their long running battle against the Dutch Government, and the result of their ECJ case is eagerly anticipated, early in 2010.

Commentators are divided about the prospects, having sifted through the runes of the opinion of the Advocate General provided on 17th December. Whilst the opinion is not legally binding on the Judges, these sometimes foreshadow the eventual decision. Attorney General Bot concluded that Article 49 must be interpreted to mean that: "the principle of equal treatment and the transparency requirement that flows from it also applies to the gambling sector in the context of a single licence regime", thereby implicitly questioning De Lotto's right to act as the Netherlands' only licensed supplier of online gaming, sports betting and the national lottery, without any other operators being allowed to compete in any form of tender process.

The bad news is that AG Bot does not specifically



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question the right of a Member State to operate a monopoly, where it is justified to do so, e.g. to prevent fraud or gambling addiction, which takes us back to the Bwin position. But in this case there was no evidence of fraud or addiction. If all that is necessary for a Member State to satisfy the test of proportionality is to show that a monopoly protects citizens from accessing unregulated sites outside the EU, then Article 49 is, in effect, a dead duck for the gambling industry.

The good news is that AG Bot has signalled that it may not be legal for a Member State simply to create its own state monopoly, without having conducted a competitive tender process open to operators licensed in other Member States. Potentially, that could spell the end for the national monopolies, if Member States consider that such a process, and the possibility of having to appoint say Ladbrokes or Betfair as their provider, would be unpalatable.

Much centres on the Court's interpretation of the proportionality issue. If the Court makes it easy, as AG Bot's opinion predicates, then this will slow down the process begun by Italy and France. If, however, the Gambelli principles are strengthened then prospects for the industry will be improved. Long term, the issue is more of a political one than a legal one: both Italy and France opted for change in order to address ECJ and European Commission issues. But the real elephant in the room is economics. If Member States allow multiple licences specific to their jurisdiction there may be huge economic benefits for them. The products offered by the likes of Ladbrokes, Betfair and the other big names in the industry are much more attractive than the rather pedestrian offerings of the likes of De Lotto and Santa Casa. If they generate more business, state revenue from gambling will increase and there will be less incentive for players to go "off-piste" into unregulated sites elsewhere.

That way everyone wins.

#### FOG OVER ENGLAND

Rather like the Lord Chancellor at the beginning of Dicken's Bleak House, Gerry Sutcliffe, the Minister for gambling at the Department for Culture, Media and Sport (DCMS) sits in a fog of apparent indecision. To continue the illusion, one needs only to substitute DCMS for the High Court of Chancery in the book, to make the following quote from that great novel rather apposite:

"Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this [DCMS], most pestilent of hoary sinners, holds this day, in sight of heaven and earth". Following the outcry that the white listing of Antigua

prompted, DCMS determined that it would no longer entertain any applications from any jurisdiction, however strictly regulated, and disappeared into the fog. Then on 30th April, DCMS and the Gambling Commission announced that they were reviewing the current system that enables any online operator licensed either in an EU Member State or a white listed jurisdiction to market and advertise its gambling products in the UK. They would consider issues such as "securing fair contributions from overseas licensed operators towards the cost of regulation, the treatment of problem gambling and the horserace betting levy".

DCMS intended to report its findings to Parliament before the end of 2009. The report was anticipated in November, then December, and had transpired recently that it will not be presented to Parliament before "January or February", 2010. The delay, which on past form may yet be extended further, leaves UK gambling operators unsure about the future of UK online gambling, and may result in further offshore emigration, as operators question the point of being subject to regulation by the UK Gambling Commission, increasing UK taxes, payment for problem gambling and the horserace betting levy, when they can be based in a low tax, low cost jurisdiction with the same advantages. Even if Gerry Sutcliffe emerges from the fog early in 2010, any changes he proposes are likely to require primary legislation, and that means that nothing will happen until we have a new Government after the 2010 General Elections. By then, the bookmakers are predicting that Mr Sutcliffe will be firmly ensconced on the opposition benches.

#### NEWHAM (NOT MONTE CARLO) OR BUST

The open online gambling market for the UK was one of the few fundamental planks of the Gambling Act 2005 ("the 2005 Act") that survived its tortuous passage through the legislative process. That passage epitomised Otto Von Bismarck's comment on legislation, when he said "Laws are like sausages. It's better not to see them being made". For the land-based gambling industry, and perhaps especially the casino industry, the un-appetising offering eventually produced by weak Government and Parliament on the one hand, and the undue weight given to the Daily Mail and religious interests on the other, has been rendered almost inedible by the recession. When, 40 years ago, the first licences were being granted under the Gaming Act 1968, no one would have predicated that the time would come when it would again be impossible to apply for a casino licence in the UK. Yet that has been the position since April 2006. Now, at last, the process for 16 new licences envisages by the

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2005 Act has begun, with the London Borough of Newham releasing for consultation details of its proposed competition process for a large casino licence. Newham envisages that the date for applications to begin the first stage of the competition process will be May 2010, with a final decision to be reached in February 2011. The casino must have a gaming floor area of between 1,500 and 2,500 square metres, including a table gaming area of at least 1,000 square metres. Up to 150 slot machines will be on offer, along with non-gambling areas offering additional recreation facilities. Those applicants who reach the second stage of the process will have to demonstrate the benefit they can offer to the local community. Under Newham's draft proposals, "deliverability" of the proposal will be a key factor in deciding which applicant will ultimately be awarded the licence. This may mean that the licence could be awarded to the operator with the greatest financial muscle, and the greatest ability to fund the development rather than the one whose proposal "would be likely, if granted, to result in the greatest benefit to the authority's area", which is the criterion prescribed in the Act.

The sting in the tail is that Newham reserves the right to pass a "no casino resolution" if there are insufficient applications, or if it feels that the applications do not offer sufficient benefit to the area. Although there is no reason to believe that Newham is likely to take this measure, if employed, it will be a huge blow to potential operators who will, by then, have spent very considerable time and resources preparing their application.

The good news for operators is that this is a major new licence available in London, with a huge catchment area and population. The bad news is that, so far, there are no indications that the remaining 15 authorities will be starting their process anytime soon and that the recession, with its consequent financial constraints upon operators, together with the additional burdens inflicted by Government, render some of the locations unattractive, and all projects difficult to fund. In 2010 it will be operators, not just licensing authorities looking to see where the greatest benefit lies and both are likely to have to lower their expectations.

#### UNDIPLOMATIC RELATIONS

Since the establishment of the current regulator, the Gambling Commission, under the Gambling Act 2005, the industry, and particularly the casino industry, which has long been used to the firm hand of regulation, has worked tirelessly, and with considerable patience, to seek to establish

a cooperative and constructive working relationship with its new master. Inevitably, there have been difficulties along the way: apart from the fact that the Commission is very much larger than its predecessor, the Gaming Board, and therefore has many new staff without any background knowledge of the industry, many, if not most, of those who had built up such a wealth of experience with the Gaming Board, did not make the transfer to the Commission, and the required move from London to Birmingham. Furthermore, the 2005 Act is a very different animal indeed from its predecessor, though the fundamental principles of regulation have not changed, and the requirements upon the industry are in many respects similar, if differently expressed.

Whilst no one could properly suggest that the relationship between a regulator and the industry which it regulates ought to be a cosy one, nevertheless, if regulation is to be successful, and cost effective, a working relationship, an understanding of the needs of the industry and regular dialogue are essential elements.

Apart from the obvious differences in staffing levels and cost, there are important differences between the old Gaming Board and the new Gambling Commission:-

- The Commission is much more "process driven" than the Gaming Board;
- The Commission relies heavily on the concept of "self-regulation"; and
- As a consequence of these points, there is much greater separation between the industry and Commission staff than with the Gaming Board, who relied substantially on frequent, unannounced, visits to casinos.

The promise of regulation with a "light touch" has proved to be a myth. Whilst it might perhaps be an exaggeration to say that the "light touch" has become a heavy hand, the Commission is inevitably more distant from the industry than the Gaming Board was. The opportunity to discuss issues for the industry with its regulator seem to have diminished, and many of those now regulating the industry, perhaps as a result of the lack of opportunity for contact and discussions, have little experience or knowledge of the industry. The reliance on process is proving not to be a substitute for dialogue and understanding.

Unfortunately, where there is a lack of understanding, it is always easier to say no to developments and changes which a commercially straightened industry wish to make. The ability of the Commission to pray in aid of social responsibility provides the regulator with sufficient

ammunition to prevent many proposed developments which have no apparent adverse regulatory consequences.

Hitherto, the industry may have seemed supine in its relationship with its regulator. That would be an unjustified criticism of an industry which has simply made every possible effort to comply, in the hope that eventually, and certainly by now, the regulator would have developed a body of knowledge and understanding that would forge a healthy and constructive partnership.

Recently however there have been signs that the industry may be ready to stand its ground, as did David against Goliath. An issue arose in November 2009, which finally forced the industry to rebel against an extraordinary, and arbitrary, volte face by the Commission. The Commission had interpreted Section 81 of the Act in such a way that operators were not deemed to be providing illegal credit, if they used their own cash to fill an ATM machine on casino premises. Importantly, not to have this ability causes practical difficulties, and has substantial cost implications. There are no customer implications, nor have there been any regulatory issues with the way the system has worked.

Nevertheless, without any warning or consultation, the Commission overnight reversed its previous stated position, expressing the view that such activity would henceforth be regarded as illegal. Whilst not a fundamental issue, going to the basis of the Act, this may well have been the straw that will break the camel's back: not surprisingly, the industry rebelled. Whilst it may not yet be ready to subscribe to Keith Richards' view that "if you're going to kick authority in the teeth, you might as well use two feet", 2010 may see the industry taking a more robust approach in its dealings with the regulator.

#### SON OF...

As if the industry did not have enough difficulties with DCMS and the Gambling Commission, the "offspring" of those two bodies, the Responsible Gambling Strategy Board, has some way to go if it is to establish a healthy working relationship with the industry, but also with the current providers of advice and care to problem gamblers.

The Board was set up late in 2008 by, and in order to advise, the Gambling Commission and DCMS on research, education and treatment programmes to support the National Gambling Strategy and funding requirements. Although it expresses itself to be "independent", this is a somewhat meaningless and empty claim. Its website forms part of the Commission website, and its members are appointed by the Commission. If it were truly independent, surely the industry and the existing providers would have a say in its appointees though the industry is represented on the Board.

At first sight, it may appear that the industry connived in the creation of this body: the reality is rather different. In effect, the industry was given the Hobson's choice of the Board or a statutory levy. Not surprisingly, it chose the Board. The Board's terms of reference include the development of and strategic priorities for research, education and treatment, the quantum of funding required on a three year rolling basis and the most effective arrangements for commissioning services and distributing funding.

The Board is also tasked with advising on "the development of a robust, needs-based strategic framework to identify priorities for what should be funded and commissioned". Though somewhat impenetrable, this

Orwellian sentence gives the Board the power to determine how the industry's money will be spent. This entails directing the strategy. The Responsible Gambling Fund is the distributing body, which then has to ask the industry – via the GREaT Foundation – to provide the money. GREaT then checks that spending is consistent with strategy.

Over many years, both GamCare and Gordon House have voluntarily provided excellent advice and care to those with gambling problems. In that time they have built up a greater understanding and more experience of the subject than any other organisations or individuals. They are held in great respect by the industry, and have developed a good working relationship with it, which frequently seeks advice from them on prevention, care and the development of responsible gambling.

Of course, GamCare and Gordon House can bid for the money, along with others, but one has to ask whether these extra pressures and bureaucracy, with their obvious costs, are really going to result in better care and services for those who need it.

As in all these issues, time will tell..... CGI

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