

... for they do not know what they do – or do they?

By Marcos Charif

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The gambling industry has barely recovered from the Black Friday hangover, but the Italian and French gambling regulators have announced that the much anticipated Memorandum of Understanding (MoU) between them may be signed any time soon. Considering the overall lack of enthusiasm for the regulation of gambling at EU level and the continued fragmentation of the EU into national gambling licensing regimes, the MoU may indeed be a first step forward – not necessarily in the right direction - but nevertheless forward!

The current regulatory, legal and political framework for online gambling operators to operate across various EU member states is far from satisfactory: CJEU rulings have resulted in further court cases and additional complications; the EU Commission has lost interest in pursuing its infringement proceedings against closed gambling markets; the European Parliament continues to favour the sports industry over and above any rationale; the Presidency Report took years to produce merely a negative definition of what “illegal gambling” should mean; and the Green Paper makes some readers see red. In a nutshell: the MoU is the best thing in the current circumstances – or is it?

Many still have high hopes for the MoU, which may indeed be justified. Gambling operators have for years called for gambling regulators to take a more active role, and now they have got what they asked for. All now depends both on what regulators intend to do, as well as on what they actually do, as a result of this newly found French-Italian love affair. Although star-crossed lovers can sometimes fall out dramatically, in fact bilateral agreements can be very useful and may help address the existing gambling vacuum at EU level.

At present, little is known about the extent and context of the MoU. According to ARJEL President Jean-Francois Vilotte, the MoU is a tool to regulate online gambling more effectively. Mr. Vilotte has also emphasised the need to fight illegal sites and confront a number of systematic risks that would undermine the integrity of the sports sector. It is further understood that both parties would set up working groups on matters such as integrity, player protection, the exchange of information of licensed gambling operators and the fight against illegal gambling. Both AAMS and ARJEL have refuted speculation that the MoU may lead to a shared liquidity over the two jurisdictions.

In other words: the MoU will assist regulators in policing licensed gambling operators – it is not intended to make life easier for gambling operators by streamlining the licensing procedure, or by allowing shared liquidity to increase profits. So(as if one wasn't enough) gambling operators can now look forward to having two Big Brothers watching them.

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And if this model spreads across 27 member states, we may soon have an entire Big Brother family exchanging information, setting up work groups and protecting innocent consumers. This may result in frequent visitors to the Diary Rooms of their advisors.

These are just some of the potential issues: Does “sharing information” mean that a gambling operator who runs into a problem with the regulator in one country may receive bad marks when applying for a licence in the other country? Will blacklists be combined, so that (for example) someone who breaches the French Gambling Regulations is also in breach of Italian ones and vice versa? Moreover, does information sharing include player data? When speaking about player data, there are also some minor major issues regarding Data Protection: will the AAMS have insight into player habits/patterns reported to ARJEL and vice versa? If personal data is not shared, how else do both regulators seek to control illegal betting activities? Either way, gambling operators may face additional challenges from customers who do not want their personal details to end up in another member state.

Gambling operators – being optimists - may nevertheless view the current stated restraints of the MoU as a first step to increased integration, which would hopefully lead to a streamlined licence application procedure or even a fast track application for existing licencees. Whilst not wishing to flog a dead horse, some still raise the issue of EU law, stating that EU competition law would be stretched to a maximum if the MoU led to an exclusion of or unfair disadvantage to other EU licensed operators. Here again, it will depend on the nature and spirit of the MoU, however, once both parties agree to issues such as streamlining their licensing application procedure or even automatically accepting licensees regulated by the other regulators, then we may indeed have an additional complication.

Interestingly enough, sharing liquidity pools does not appear to be included in the bilateral agreement. Although MoUs could allow for shared liquidity pool games to boost the viability and attractiveness of poker in smaller jurisdictions, the emphasis at present appears to be on ISP blocking and cross checking. Incorporating a shared liquidity pool means that everyone contributes to the available pot and therefore gives even players in the smallest countries a chance to decent liquidity levels. Although France is considered to be a big player, its disappointing gambling revenue and unattractiveness to gambling operators may lead to a change of heart in the future.

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It is understood however, that there is a provision in Italian law that would allow both countries to pool liquidity of monthly horse racing events sold in France by PMU and Italian licensees that offer horse racing. There is a big hint here – so watch this space! If things do work out, gambling operators may just accept additional security checks, information sharing and data protection glitches from their regulators.

That closer cooperation and harmonisation between regulators is needed is without doubt. It is also true that the MoU may bring about a better life for all concerned, especially when it combines regulatory concerns with commercial benefits. However, the sheer necessity and existence of an MoU is, in a way, the last nail in the coffin of EU law – not that this is news...

Normally, within the EU, there should not be the need for bilateral agreements between member states – the reason is that having them undermines the point of having the EU in the first place. Freedom to provide services, freedom of establishment, non-discrimination, proportionality, competition galore... and we still need an MoU? It may well be the case that gambling has always been “special” and in need of “special attention”, but to disregard all the EU Treaties and form an MoU seems an odd way forward.

Let's be clear about this: the MoU may be a blessing for now and has been long called-for by gambling operators. However, it may also be the first step in the opposite direction - in emphasising the fragmentation of the EU gambling market even further. It is no surprise that most observers to the gambling industry are frustrated with the ongoing lack of EU regulation and even the last remaining optimist must have felt betrayed after reading the Green Paper, which admits in its first paragraph to be predominantly concerned about “both illicit and unlawful online gambling offers” and which states that it is a response to the Schaldemose Report (will this report never go away?) and which endorses the definition of “illegal gambling” from the EU Presidency Report. Interestingly, the current statements of the French and Italian regulators appear to echo exactly the same - which may in itself indicate that the Green Paper may become a European MoU with regulators across Europe happily sharing information to combat illegal gambling, but without conceding their rights to regulate or even ban gambling altogether.

The failure of Europe to regulate online gambling has necessitated an MoU. Many may think, however, that it is a sad day for Europe if it results in numerous MoUs between gambling regulators across the European platform. That said, it would make more sense to have MoUs between European regulators and gambling regulators outside the European Economic Area – which is the usual purpose of bilateral agreement.

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For example, an agreement has been reached between the Alderney Gambling Control Commission (AGCC) and the Nevada Gaming Control Board (NGCB) laying down a framework for cooperation between the two regulatory bodies – which makes perfect sense!

In a way, France and Italy could enter into MoUs with any gambling regulators of their choice - regardless of EU membership - which would open the door to a new continental “white list” similar to the white listing procedure currently in existence in the UK. Bearing in mind the high regulatory standards that some of the white listed jurisdictions have to date, it would be no surprise to see a UK white listed jurisdiction being welcomed by France and Italy one day.

In summary, the MoU is the best that can be done under the current circumstances. Time will tell whether gambling operators and regulators alike will benefit from this increased cooperation. However, the price that is being paid is dear and is nothing less than European integrity – and if people are concerned about protecting integrity, perhaps a good starting point would be the integrity of our EU institutions instead. Let’s hope that the price will be worth paying.

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