Let's play Monopoly

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Online gambling in Europe has come a long way: from initial outright rejection, to the first signs of liberalisation and legitimisation, but with EU law principles on the freedom to provide services still challenging the legality of national monopolies across EU member states.

This battle has resulted in some gambling monopolies crumbling under the pressure of EU law (such as the ones in France and Italy), while others (such as in Germany) are currently witnessing a Götterdämmerung-style twilight, of which even Wagner (that's Richard Wagner, not X-factor Wagner) would have been proud. There are also some die-hard bastions that are still playing monopoly, unwilling or unable to surrender to economic realities and the changes caused by the Internet.

After a plethora of rulings by the European Court of Justice (ECJ), as well as infringement proceedings by the European Commission and the ongoing reluctance to regulate online gambling at EU level, a new legal framework of national licensing regimes spearheaded by Italy and France is, however, replacing monopolies across EU member states – and with the blessing of Europe's institutions. But the remaining monoplies appear unmoveable and even Germany is struggling to acclimatise to a liberalisation of its online gambling market.

This stagnation is not helped by legal and political developments to date, with the ECJ ruling that monopolies are indeed compatible with EU law and awarding member states sufficient discretion to determine the level of protection sought in relation to online gambling. In short: although member states must observe EU principles of freedom of establishment and the freedom to provide services, they are nevertheless at liberty to regulate online gambling on a national level, even banning it alltogether – as long as this ban is consistent and non-discriminatory (but quite how this can be done will require jumping though several hoops). This balancing act will be closely monitored and the monopoly needs to get the "permitted resitrictions" right. Ironically, this can be more easily achieved by restrictive monopolies, while a monopoly that pursues commercial gains has less scope to justify its existence.

It therefore comes as no surprise that gambling monopolies still dominate the European landscape. Claiming moral supremacy and the protection of consumers from the perceived evils of gambling may be sufficient to justify their existence for the time being. However "money talks" and so their future is more likely to depend on their profitability than on legal and moral considerations. How monopolies are coping with the ongoing "threat" of liberalisation can best be illustrated by the usual suspects, who manage to make it into the top ten charts of skilled monopoly players year after year: Norway, Sweden and Portugal.

Norway

Norway is not a member of the European Union. However it is a member of the EEA (European Economic Area) and EFTA (European Free Trade Association) and so the single market principles of freedom to provide services between member states apply.

Norwegian gambling legislation only allows gambling for non-commercial purposes and prohibits money transfers between gambling providers and Norwegian residents. Advertising and marketing of gambling products is strictly prohibited and may lead to fines, criminal prosecution and imprisonment. All forms of authorised gambling are conducted by the State monopolies Norsk Tipping and Norsk Risktoto, which spend all profits on charitable or sports purposes. In 2007, the EFTA Court was asked to assess the compatibility of Norwegian monopoly rules with the EEA free movement to provide services , after the Norwegian State appointed the state owned monopoly Norsk Tipping to operate gaming machines. (Un)surprisingly, the EFTA Court held that public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than commercial operators and that it was plausible to assume that the State can more easily control and direct a wholly State-owned operator than private operators.

In addition, Norway introduced “UIEGA style” provisions on 1 June 2010, prohibiting banks and other financial service providers from arranging payments of stakes from gambling companies. Norwegian gambling regulations also prohibit all forms of “assistance” to gambling. This wide definition will include hosting and technical facilities as well as gambling software. B2B services provided from inside or outside Norway to a Norwegian based gambling operator are illegal. However, B2B services provided from outside Norway to a genuine international B2C operator who has business interests in a variety of jurisdictions (and not directly targeting Norway) would not necessarily be deemed illegal, even if Norwegian customers have access through an international (not a Norwegian) website.

Although Norwegian legislation does not prevent its citizens from placing wagers on foreign operators’ sites, foreign operators may still face prosecution, because the law provides for criminal prosecution of activities outside Norway as well. However, prosecuting for activities outside Norway is the subject of an on-going legal debate, including the extent to which Norwegian decisions can be binding on foreign based operators in the first place. It is therefore interesting to note that, although the current laws strictly prohibit all forms of online gambling and even allow prosecuting foreign operators, several foreign operators have continued for years (and still do so) to offer their gambling products to Norwegian residents without (yet) having been subject to any criminal prosecutions.

Recently, however, Norway has agreed that an online betting operator can be prosecuted in Norway for failing to safeguard a Norwegian resident with mental disabilities form losing Euro 3 million, claiming that the operator failed to intervene despite the claimant’s high levels of betting.

Sweden

The Swedish Government restricts gambling licences to (1) non-profit organisations, (2) the horse racing industry, and (3) the Swedish State monopoly Svenska Spel (which also holds a licence to arrange sports betting).

In 2008 the Swedish Government released a report on gambling with a view to amending the existing legislation. The Report proposed a partially new lottery system, which would make it possible for new operators to secure permits from the Government. The Report also proposed types of gambling that could be opened up to new operators. However, the Report was heavily criticised by gambling operators for being limited with regards to the types of games and not including, for instance, online poker.

Unlike Norwegian law, however, Swedish legislation only applies to and restricts Swedish based gambling operators. Consequently, the prohibition on organising gambling in Sweden does not include a prohibition on foreign gambling operators from accepting bets and/or wagers from Swedish residents. Furthermore, the Act does not prohibit Swedish consumers from participating in online gambling organised abroad. However, Swedish legislation prohibits and penalises the promotion, advertising and marketing in Sweden of gambling organised outside of Sweden. In other words, while Sweden does not prohibit foreign based B2C or B2B operators from accepting wagers from Swedish residents, Swedish law explicitly prohibits the marketing and promotion of these services in Sweden. This has led to various court proceedings against Swedish newspapers and advertisers, including TV sports commentators.

It is worth noting, however, that the Swedish state has continuously prosecuted Swedish based advertisers direct and not B2C or B2B operators. How Sweden would react to a marketing campaign organised outside of Sweden but targeting Swedish residents is yet to be seen - place your bets now (but don't advertise that you have done so in Sweden!)

Portugal

Portuguese gambling laws regulate land based gambling. However all gambling activities not expressly permitted by law are deemed illegal. The only exception to this total ban was created for the State monopoly Santa Casa da Misericórdia de Lisboa. Portuguese laws include a range of penalties, including administrative fines, seizure of gambling equipment and closure of illegal gambling establishments.

The question of compatibility with EU law arose when Santa Casa was challenged by online gambling operator Bwin's sponsorship of a local football club . The ECJ ruled in favour of the State-run monopoly, stating that the prohibition imposed on operators such as Bwin may be regarded as justified by the objective of combating fraud and crime and may therefore be compatible with the principle of the freedom to provide services. Santa Casa has recently issued further administrative proceedings against Bwin in relation to its sponsorship of the Portuguese football league cup, to be known as the "Bwin Cup".

B2C operators, regardless of location, are deemed to be conducting an illegal activity if they accept wagers from Portuguese residents. However there have been no enforcement proceedings taken against foreign B2C operators for offering online gambling (as opposed to sponsorship deals). There are also no clear measures, such as ISP blocking, preventing unlicensed/ foreign online gambling.

All marketing of online gambling is strictly prohibited. However, there are no significant prosecutions reported to date. Even when the courts found that Bwin was violating Portuguese regulations by sponsoring the Portuguese football team, no actions have been taken and main TV stations continue to broadcast gambling sponsored advertisements.

Weep no more

Given the three examples summarised above, and before taking any righteous route of monopoly-bashing in the name of EU law and principles, it may be instructive to step back and consider how monopolies compare with the new era of national licensing regimes.

Gambling reform discussions are taking place in more than 15 member states. France and Italy have set the tone and Spain, Belgium and Denmark are following suit. In addition, the UK is going through the pains of contemplating the introduction of a remote gambling licence for overseas operators and Ireland has recently announced that it will raise 1% tax on all bets placed by online gambling operators. The European Commission has endorsed this multiple licensing model whereby each member state can issue its own gambling licences and set its own rules and taxes with the result that operators will have to apply for a gambling licence in each jurisdiction in order to offer their services legally.

Gone are the days when gambling operators could rely on EU law and enter monopoly markets with the full knowledge that these monopolies were "illegal" and therefore restrictions cannot apply. Also gone are the days where no local taxes had to be paid and no local restrictions and (some might say) ludicrous technical, administrative and regulatory standards were imposed. The new licensing regimes, deemed legal by European institutions, will cost operators dearly and will result in financial losses and a reduced appetite to enter these markets in the first place. Publicly listed gambling operators must satisfy their listing authorities that they are not conducting unlawful business and it assists their argument if local laws are contrary to EU law. This line of argument can no longer be applied to new national licensing regimes which received EU blessing and where local high taxes must be paid. It is therefore no surprise that many operators derive a significant percentage of their turnover from current monopolies where the EU law defence still works – and where no taxes are paid. Germany with all its Teutonic prohibitions was a very profitable playground for gambling operators until now, however, with the end of its monopoly in sight, it is left to be seen if playing on German turf is still profitable in the long term.

For member states to continue on playing monopoly however, they must comply with EU law – which may render their monopolies unprofitable. In this context, the ultimate end of monopolies means less profit and more restrictions on online gambling operators, leaving only a few large players to enjoy the game.

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