THINNING THE FOG, BUT OPENING FOR BUSINESS?

BY JULIAN HARRIS

The murkiness of Europe's gaming regulatory landscape is dissipating at a snail's pace; and yet, as online gaming legislation moves imperceptibly forward, there are more than glimmers of hope. In essence, the previously divergent roads being followed by the European Court of Justice, the Commission and individual member states seem to be converging, and the road ahead is clear: a system of national licensing for the EU.

In common with specialist gaming lawyers throughout Europe, I have addressed numerous conferences on the subject of online gaming regulation in Europe where we are asked to speculate upon the future; in particular, whether national monopolies will be maintained, and if not, whether there will be a system of national licensing, or a Europe-wide licensing regime, and when any change will take place. Attempting to see through the fog that has enveloped the subject has been well nigh impossible; looking down the road laid by a number of European Court of Justice (ECJ) cases is one thing, but trying to predict where Europe is heading when overarching political considerations might divert or terminate the road is quite another.

To some extent however, recent developments have – to continue the metaphor – thinned the fog, whilst not entirely clearing it.

On 3rd June 2010 the ECJ delivered its judgments concerning the compatibility of the Netherlands' legislation on gaming policy with European Union law in the referred cases of Ladbrokes referred by the Netherlands Supreme Court, and Betfair referred by the Netherlands Council of State.

On 25th May 2010 the Spanish presidency of the European Union published a progress report on gambling prepared by the Working Group. Ministers had been able at least to reach an agreement on a common definition of illegal gambling. The key information from the 41-page Spanish report being a definition of "illegal gambling" as: "gambling in which operators do not comply with the national law of the country where services are offered, provided those national laws are in accordance with EU Treaty provisions."

On 5th May 2010, the European Commission terminated a series of cases brought against Italy, as a result of changes made

>> THIS IS A SIGNIFICANT STEP. THE ECJ HAS STRICTLY LIMITED THE OPPORTUNITIES FOR MEMBER STATES TO MAINTAIN NATIONAL MONOPOLIES, AND HAVE SET OUT IN A SERIES OF CASES OVER MANY YEARS, THE PARAMETERS WITHIN WHICH MEMBER STATES CAN RESTRICT THEIR MARKETS. NOW THE COMMISSION TOO HAS SANCTIONED WHAT IS IN EFFECT A COMPROMISE ROUTE BETWEEN NATIONAL MONOPOLIES ON THE ONE HAND, AND THE MALTA/UK MODEL OF COMPLETE CROSS-BORDER FREEDOM, ON THE OTHER. THIS NEW MODEL IS NOW ESTABLISHED, OR SOON TO BE, IN ITALY, FRANCE AND DENMARK, WITH OTHERS TO FOLLOW. >>

to Italy's laws on online gambling. The Commission had previously found that Italy's restrictions on the foreign operators were disproportionate, but the Italian government's legislation allowing operators to apply for licences have found favour with the Commission.

On 2nd June 2010, Ioannis Spanoudakis, Chief Executive of the Greek gambling monopoly OPAP, said that he anticipates that Internet sports betting will be licensed in Greece within a year. He commented: "Legislation as applied in France and Italy and in other European areas is most likely to be the kind of guiding regulations that the Greek government will be basing its framework on."

In the UK, on 18th June 2010, the Government's consultation on the future of online gaming came to an end. Although the consultation on proposals do require all operators wishing either to transact with customers in the UK or advertise in the UK was commenced by the previous Labour government, it was thought likely that they have the support of the new Conservative-Liberal Democrat coalition Government, and detailed legislative proposals are now awaited.

It remains to be seen whether the European Commission's Green Paper will advocate an EU wide gambling licensing system: this would be a radical step indeed, and almost certainly impossible to achieve politically. The progress report's definition of "illegal gambling" supports that view. Leaving that issue to one side, at least for the moment, it is more instructive to look at recent developments to see whether there is some convergence in the different roads that European online gambling regulations have followed, to see whether, at last, there is some prospect of convergence.

SCHINDLER TO BETFAIR/LADBROKES AND BEYOND

Not only has there been a sense of divergence between the provision of member states politically on the one hand, and the law as expressed by the ECJ on the other, but the various ECJ decisions themselves have not seemed to state a clear position on the law. In the sixteen years since the Schindler case was decided in 1994, there have been a series of cases in which the ECJ have considered member states' obligations in relation to Article 49 of the European Treaty.

Article 49 requires the abolition of all restrictions on the freedom to provide services, even where those restrictions apply without distinction to national providers and to those in other member states. Article 46(1) of the Treaty allows restrictions which are justified on grounds of public policy, public security or public health. ECJ case law has also established a number of overriding reasons in the public interest which may also justify such restrictions, including, in particular, the objectives of consumer protection and the prevention of fraud and incitement to squander money on gambling, as well as the general need to preserve public order. Moral, religious or cultural factors may serve to justify a margin of discretion for national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order.

Member states are free to set the objectives to their policy on betting and gambling according to their own scale and values, and, where appropriate, to define the level of protection sought. However, any restrictive measure that they impose must satisfy the conditions laid down in ECJ case law, in particular as regards their proportionality. Furthermore, case law of the ECJ has established that it is for the national courts to determine whether member states' legislation actually serves the objectives which seek to justify it and whether the restrictions do not appear disproportionate in the light of those objectives.

It is against that background that the latest ECJ decisions were delivered on 3rd June in the Betfair and Ladbrokes cases. Both rulings were labelled as a defeat for online providers for games wishing to market their services within the EU under the terms of Article 49. In reality, they did little more than follow the previous decisions, confirming the principles already laid down by the court. The decisions provided three issues:

1. Can national legislation such as that in the Netherlands be regarded as limiting betting activities consistently where a monopoly is entitled to make their offering attractive by introducing new games and by advertising?

The ECJ upheld established case law, concluding that the Netherlands legislation can be regarded as limiting gaming activities in these circumstances. The ECJ recognised that the Netherlands' policy aim of protecting the consumer against gambling addiction is in principle difficult to reconcile with an expansive gaming policy, characterised by new games of chance and extensive advertising campaigns. It will be for the Netherlands Supreme Court to consider whether the substantial expansion of betting and gaming is in fact aimed at raising funds, in which case, in the view of the ECJ, such a policy would not be limiting betting and gaming "in a consistent and systematic manner and is not, therefore, suitable for achieving the objective of curbing consumer addiction to such activities."

2. Is it for the national courts to determine whether the measures implemented before achieving the legislative objective is compatible with the principle of proportionality?

The question is based on the assumption that the Netherlands legislation is compatible with Article 49. The court

>> IN THE UK, ON 18TH JUNE 2010, THE GOVERNMENT'S CONSULTATION ON THE FUTURE OF ONLINE GAMING CAME TO AN END. ALTHOUGH THE CONSULTATION ON PROPOSALS DO REQUIRE ALL OPERATORS WISHING EITHER TO TRANSACT WITH CUSTOMERS IN THE UK OR ADVERTISE IN THE UK WAS COMMENCED BY THE PREVIOUS LABOUR GOVERNMENT, IT WAS THOUGHT LIKELY THAT THEY HAVE THE SUPPORT OF THE NEW CONSERVATIVE-LIBERAL DEMOCRAT COALITION GOVERNMENT, AND DETAILED LEGISLATIVE PROPOSALS ARE NOW AWAITED. >>

determined that the court was not required to determine whether payment and ISP blocking measures are suitable for achieving the objective of the legislation and are compatible with the principle of proportionality.

3. Must Article 49 be interpreted to preclude legislation of a member state granting exclusive rights to one operator and prohibiting any other operator from another member state from offering betting or gaming?

Once again, the ECJ rejects the principle of mutual recognition. Following the Santa Casa case, the court reminds us that internet gaming is not the subject of harmonisation within the European Union and that a member state is entitled to take the view that the mere fact that an operator is licensed in one member state is not necessarily a sufficient assurance consumers would be protected against the risks of fraud and crime in another. However, and importantly, the court also decided that it is irrelevant whether an operator does not pursue an active sales policy in the member state concerned, thus removing any distinction between an active and passive marketing policy.

In the Betfair case, the court examined the legitimacy of the manner in which gaming licences are awarded in the Netherlands, and established that there is no competitive tendering process. The ECJ determined that there must be a treatment and transparency for the granting of a single licence, unless the state concerned grants the licence to an operator whose management is the subject of direct state supervision, or to a private operator whose activities are subject to strict control by the public authorities, where the absence of competitive tendering process would be proportionate. Once again, it is for the national court to ascertain whether in the Netherlands the holders' licences are subject to strict control by the public authorities. The procedure must be justified under Article 45/46, or on the basis of overriding reasons to the public interest.

Inevitably, these cases will now return to the Dutch courts. There will be some disappointment that these cases did not "break the mould", but equally, they have not extended the power of member states in relation to national monopolies. It is disappointing the ECJ rulings do not address the fact that consumer choice between regulated products is ignored. Nevertheless, it remains the fact that not only do restrictive systems require to be justified, limiting the commercial proposition for a monopoly, in most cases there will need to be a proper tendering process. Member states are, like dominoes, realising that consumer protection can be achieved through regulation, and that giving the consumers choice, through a range of products offered by different operators, increases revenue: and revenue is the key.

'GOODBYE TO ALL THAT'?

Only two European member states, Malta and Great Britain, have sought to adhere strictly to Article 49. Both countries probably anticipated that this would establish a course which others would follow, but that does not appear to be the case. Instead, first Italy and then France opened their formerly closed markets to a 'controlled liberalisation' process based on national licences and strict conditions. The French law was passed in May, and the most important implementation decrees are in place, which the first licences issued.

To all, it might appear that there is an even balance, but few would have put money on the next goal going to the GB/Malta team. Instead, the UK, much to Malta's disappointment, if not anger, is proposing to join the France/Italy team. On 7th January 2010, the former Labour Government announced proposals for new licence requirements for overseas online gambling operators. These would require all those wishing to advertise their services in the UK or to transact with British customers, to be licensed by the UK Gambling Commission. More details of the Government's proposals were published in a consultation document in March 2010 . The consultation concluded on 18th June.

Meanwhile, a new Conservative-Liberal Democrat coalition Government is in place; and it remains to be seen what final proposals the new government decides upon though their thinking is not thought to be substantially different from that of their Labour predecessors. This represents a complete volte-face by the British Government and a clear indication of their assumption about the future of online gambling regulation in the EU.

The indications are that others will follow suit. If Mr Spanoudakis of Greek operator OPAP is right, then an online licensing regime for sports betting at least is on the horizon. And according to Santiago of Asensi Abogados the Spanish Government is considering online gaming regulation within a few months, with the indications being that it will be inspired by the French law. In Denmark, liberalisation is well under way, with new licences likely to be issued at the beginning of 2011.

It is expected that others will follow suit, though timing is uncertain. What is certain now is that the route forged by Malta and the UK has, in effect, come to a dead end. It is plainly not attractive to most other European states, and apparently now not even to the UK. The ECJ have not interpreted Article 49 in the way that Malta certainly would have liked, and it therefore remains only the European Commission that could force member states to divert back onto the Malta road.

Although Poland considers that the ECJ's decision in Bwin/Liga v Santa Casa gives it sufficient grounds to continue

its ban on online gambling, it has recently submitted its amended draft regulations to the EU Commission which contain the first signs of an opening up of the online gambling market.

The amended draft regulations exclude online sports betting operators from the ban provided that they obtain a (national) licence in Poland which appears to be in line with the French/Italian model. The conditions imposed on licence operators include the setting up of a Polish company. Interestingly enough, when France and Italy submitted their respective gambling regulations containing similar requirements, the Commission raised strong objections based – surprisingly – on the freedom to provide services across members' states.

STATE OF THE UNION

Under the previous Trade Commissioner, Charles McCreevey, the Commission took infringement proceedings against numerous member states, including Italy, France, Finland, Sweden, Denmark, Greece and the Netherlands, on the basis that those states had closed online gambling markets, and were infringing the free movement of services required by Article 49.

Whilst the Commission have had issues with the Italian legislation, now resolved, and with the French and Danish, the closure of its cases against Italy is significant. It is an indication that the Commission regards a national licensing regime as consistent with a member state's obligations under Article 49. Although the Commission will not cease infringement proceedings until it has satisfied itself that any measures restricting the market are necessary – proportionate and non-discriminatory – a system of national licensing, giving operators from other member states the opportunity to apply for licences, will not be regarded as unduly restrictive.

This is a significant step. The ECJ has strictly limited the opportunities for member states to maintain national monopolies, and have set out in a series of cases over many years, the parameters within which member states can restrict their markets. Now the Commission too has sanctioned what is in effect a compromise route between national monopolies on the one hand, and the Malta/UK model of complete cross-border freedom, on the other. This new model is now established, or soon to be, in Italy, France and Denmark, with others to follow.

GREEN PAPER OR GREEN LIGHT?

The current Internal Market Commissioner, Michel Parnier, announced on 11th February 2010 that the EU Commission would look at the regulation of gambling in Europe, and said that the Commission "does not exclude" alternative solutions to individual infringement procedures between member states. He explained that he wants to "launch a constructive dialogue [on gambling] with Parliament and member states and concerned stakeholders", and explained that an EU Green Paper would be the first step forward. Commissioner Parnier's approach may be more restrictive than that of his predecessor, Commissioner McCreevey, but is perhaps more realistic, given the political realities.

The termination of proceedings against Italy, following Italy's opening of its market, subject to national licensing and regulation, is perhaps indicative of the Commission's approach. Space does not allow for present purposes an analysis of the effects and consequences for operators of having to obtain licences in numerous member states, but if that is where the future lies, operators will want the Green Paper at least to propose, in the absence of a European-wide licence, the establishment of common European regulatory standards, applications, control procedures and protocols addressing operational measures. This at least would help to limit the spiralling costs of a system of multiple licences and multiple regulatory systems.

In essence, therefore, the previously divergent roads being followed by the ECJ, the Commission and individual member states seem to be converging, and the road ahead is clear: a system of national licensing for the EU. That may not go unchallenged by operators, but it is, without doubt, the road currently being travelled. If that is the future, then the Commission must grasp the nettle of the burden it imposes upon operators, and ultimately consumers. CGI

REFERENCES

1. Case C-258/08
2. Case C-203/08
3. Case C-275/92 Schindler [1994] ECR I-1039
4. Now changed to Article 56 of the Treaty on the Functioning of the EU.
5. Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-0000
6. Case C-243/01 Gambelli and Others [2003] ECR I-13031 and joint cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007] ECR I-1891
7. See Placanica case and Liga Portuguesa case
8. Consultation on the regulatory future on remote gambling in Great Britain: DCMS, 22 March 2010
9. Spanishgamingnews.com: June 2010

JULIAN HARRIS

Recognised as a leading expert in national and international gambling and licensing law, Julian Harris is highly regarded by both operators and regulators throughout the world. He and John Hagan are the founder partners of Harris Hagan, the first and only UK law firm specialising exclusively in legal services to the gambling and leisure industries. He, John and other members of the firm have been at the forefront of those advising UK and international operators alike on the opportunities presented by the UK Government's major reform of gambling law. With over 25 years experience of gambling law Julian has advised some of the world's largest gaming and entertainment industry corporations, he and his team have also advised governments, trade associations and private equity houses in both online and land based gaming. Julian came to specialise in this area representing the Gaming Board for Great Britain (the then UK regulator) for five years early in his career. Julian is an experienced advocate, a respected and sought after conference speaker and the author of numerous articles and papers for gaming and legal publications and the national press. He is recommended in all guides to the legal profession, and has been described by Chambers Guide as "the best gaming lawyer in London". Julian is a Trustee and Treasurer to the International Association of Gaming Advisors. Contact Julian: harris@harrishagan.com