



RECENT EU GAMBLING REGULATORY DEVELOPMENTS: A CASE OF MANY COURT CASES WITH INSTITUTIONS COURTING INCONCLUSIVENESS?

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Introduction

- * United Kingdom; shifting towards point of consumption regulation
- * Member States; competence to regulate is not boundless
- * Other European institutions; a different discourse?

United Kingdom & the Gambling Act 2005

- * Operators based in the EU/EEA (or white-listed jurisdictions) can supply services and advertise to UK consumers
- * Premised on idea of mutual recognition of regulatory regimes at the EU level
- * Reliance placed upon other regulators to uphold “licensing objectives”

United Kingdom & the Gambling Act 2005

- * DCMS - “A Consultation on the Regulatory Future of Remote Gambling in Great Britain”(2010)
- * Gambling Commission unable to exert jurisdiction over those regulated elsewhere, claimed that this undermines protection of consumers
- * Shifting towards point of consumption

United Kingdom & the Gambling Act 2005

- * Requirement to be licensed by the Gambling Commission only arises where at least one piece of remote gambling equipment used in provision of the facilities (for remote gambling) is situated in GB
- * Will extend to situations “where no such equipment is situated in Great Britain but the facilities are capable of being used there” (*Gambling (Licensing and Advertising) Bill 2012*)

EU Case-law & National Regulatory Competence

- * *Liga Portuguesa* recalls at 57-9:
 - * “...legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States...”
 - * “In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected.”
 - * Provisions should only be assessed by reference to “the objectives pursued... and the degree of protection which they seek to ensure”, thus the fact that other Member States have different systems is irrelevant.
 - * Member States are “free to set the objectives of their policy.... and, where appropriate, to define in detail the level of protection sought.”

- regulatory objectives

- * Should a measure restrict the free movement of services or the freedom of establishment then there must be an objective justification in the public interest, many have been recognised by the Court:
 - * Generally *Placanica* (46):
 - * Consumer protection
 - * Prevention of fraud and incitement to squander on gaming
 - * Sometimes more specific:
 - * Excluding private profit making interests from the gambling sector - *Sjoberg & Gerdin* (45)
 - * Protection of the interests of local residents and protection of potential consumers against the risks linked to betting and gaming - *Garkalns* (40)

- no mutual recognition

- * No mutual recognition of licences awarded elsewhere in the EU

“A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.” *Liga Portuguesa* (69)

- exclusive licence systems are permissible

- * Monopoly or no monopoly?
 - * Entitled to decide that granting exclusive rights to single entity under strict control will allow risks to be better tackled and objective of preventing incitement to squander money on gambling & combat addiction with “sufficient effectiveness” yet monopoly must be under strict control - *Zeturf (41 & 42)*
 - * Yet can only be justified “to ensure a particularly high level of consumer protection” accompanied with “legislative framework suitable... [ensuring monopolist will be able to pursue] the objective thus determined by a means of supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities.” - *Markus Stoss (83)*

- consistent and systematic

- * Restrictive measures should be consistent and systematic - *Gambelli*
- * May have a policy of controlled expansion to channel demand into regulated circuit - *Placanica (55)*
- * Which it will not be - policy of excessively inciting participation especially with a view to obtaining funds for social activities if this is no longer an “incidental beneficial consequence” of the restrictive measure - *Ladbroke's (28)*
- * Must be consistent across the entire national regulatory landscape - ‘horizontal consistency’ - *Carmen Media (71)*

- licences must be awarded transparently

- * Market entry; duty of transparency
 - * Applies to gambling licences - *Commission v. Italy*
 - * Applies to the award of an exclusive gambling licence (plus renewal) - *Sporting Exchange* - unless - the licence is granted or renewed to “a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities” (59)
 - * Licensing regime cannot disadvantage new entrants compared to existing operators - *Costa & Cifone*

- if measure is an unjustifiable restriction

- * If measure is incompatible
 - * Restrictive measure which is incompatible with free movement principles cannot apply during a transitional period until new regulation is introduced - *Winner Wetten* (69)
 - * Does not entail that market must be liberalised monopoly can also be subject to effective and strict control. If not feasible then an authorisation scheme (transparent) must be introduced - *Stanleybet* (46)

References

- * Carmen Media C-46/08
- * Commission v. Italy C-260/04
- * Costa & Cifone C-76/10
- * Gambelli C-243/01
- * Garkalns C-470/11
- * Ladbroke's C-258/08
- * Liga Portuguesa C-42/07
- * Markus Stoss C-316/07
- * Placanica C-338/04
- * Sjöberg & Gerdin C-447/08
- * Sporting Exchange C-203/08
- * Stanleybet C-186/11
- * Winner Wetten C-409/06
- * Zeturf C-212/08
- * Accessible via EUR-Lex
http://eur-lex.europa.eu/RECH_naturel.do

European Commission

- * Green Paper on online gambling in the Internal Market, 24 March 2011
COM(2011) 128 final
- * Canvass views > better understanding about specific issues “arising from the development of both legal and “unauthorised” offers” directed at consumers
- * Existence and extent of societal and public order risks
- * Regulatory and technical means Member States (could) use to secure regulatory objectives
- * Determine whether greater cooperation might help Member States achieve regulatory objectives more effectively

European Commission

- * Communication “Towards a comprehensive European framework for online gambling”, 23 October 2012, COM(2012) 596 final
- * Member States free to set policy but compliance with EU law is a “prerequisite of a successful EU policy on online gambling.”
- * Considers effectiveness of Member States acting wholly on an individual basis
- * Overcoming regulatory fragmentation
 - * Administrative cooperation - reduce “unnecessary administrative burdens”
 - * Need for trust and mutual interest between regulators
 - * Recommendation on common protection of consumers
 - * Recommendation on responsible gambling advertising
 - * Encourage cooperation between stakeholders to overcome match-fixing concerns

European Parliament

- * Report on the integrity of online gambling (2008/2215(INI)), 17 February 2009 “Schaldemose report”
- * Report on online gambling in the Internal Market (2011/2084(INI)), 14 October 2011 “Creutzmann Report”
 - * Recognises that fragmentation causes difficulties for operators and regulators alike
 - * “Active subsidiarity”
 - * Suggests some areas for cooperation

Concluding Thoughts...

- * Case-law primarily concentrates on market entry for operators and how monopolies (or those operating behind measures restricting cross-border movement) should be regulated for restrictive measures to be justifiable
- * European Commission and Parliament appear more focussed on improved cooperation between regulatory regimes and overcoming problems associated with (remote) gambling without touching upon issues of regulation as found in the case-law
- * Inconclusiveness? Case-law issues will rumble on whilst other but related issues are discussed in 'Brussels'