

The Fallout of the WTO Internet Gambling Case: The Trade Barriers Complaint of the UK Remote Gambling Association Against the USA

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On 20 December 2007, the UK remote Gambling association (RGA) introduced a complaint at DG Trade of the EU Commission under Council Regulation 3286/94 (the so-called Trade Barriers Regulation - in short TBR):

“The complaint asserts that the US Department of Justice (DOJ) is in violation of international trade law by threatening and pressing criminal prosecutions, forfeitures and other enforcement actions against foreign online gaming operators while allowing domestic US online gaming operators, primarily horse betting and state lotteries, to flourish. Such actions violate WTO rules, enshrined in an international treaty signed by 150 nations, including the US, which prohibit its signatories from engaging in protectionism.”

Under the TBR one or more EU enterprises, or an association, acting on their behalf, which or continues to suffer adverse trade effects as a result of a trade barrier imposed by a non-EU country may lodge a complaint.

The RGA represents a small group of British remote gambling operators who did breach US laws and are prosecuted in the US courts. Remote gambling services are representing not more than

5% of the EU gambling market. The involved companies claim that the legal situation in the US prior to the withdrawal of the US commitments under GATS (WTO) was unclear (sic!). They ask the European Commission to intervene with the sole purpose to stop the prosecution in the USA against them. If not, they ask the European Commission to take a new WTO case against the USA.

According to the European press in a letter sent recently by EU Commissioner Mandelson (UK), responsible for Trade, to US Trade Representative Susan Schwab, it seems that Mandelson has requested for a suspension in the US authorities' campaign to prosecute the concerned British remote gambling operators pending the outcome of the EU inquiry. Such intervention by the competent Commissioner, pending the investigation, could be considered by some people as questionable.

As a TBR action can only be initiated insofar as the complaining party does prove that there is an adverse trade effect for the EU industry going beyond their own commercial interest, it is very unlikely that the TBR complaint can be accepted.

Parties primarily concerned by the outcome of the procedure can intervene in the TBR investigation. Upon the initiative of European Lotteries, the WLA and NASPL decided to intervene along side European Lotteries to defend the values promoted equally by the European states and the USA, and to intervene in support of the US Government.

Recently the Commission did hear European Lotteries, and one day later the WLA and NASPL, as they made a written request for a hearing showing that they are a party primarily concerned by the result of the procedure.

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The Commission services (DG Trade) intend to explore the issues further in the course of the summer. It seems that the European Commission still has doubts whether the gambling policy of several US States is compatible with the public order principle invoked by the US in the course of the WTO dispute. By questioning this, the European Commission denies the legal value of the WTO dispute settlement rulings.

When it has concluded its examination the Commission shall report to the Advisory Committee. The report should normally be presented within five months of the announcement of initiation of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months. The report is now expected in October 2008.

What are the risks that a further WTO fight is opened regarding remote gambling?

The Commission can only act if this is in the interest of the EU (the "Community interest" principle) to do so. Where commercial policy measures are envisaged, the EU can only take such measures in accordance with the International rules and proce-

dures (including the WTO dispute settlement rules).

According to several intervening parties it is difficult to consider that any further action, connected to the withdrawal of the US commitments under GATS, could be in the interest of the EU following the compensation agreement between the United States and the European Union. Besides, as the vast majority of the EU Member States pursue the same public order policy as the USA, it is hard to imagine how acting against the USA could be in the "Community interest".

Finally the whole complaint is based upon the allegation that the USA is discriminating against the involved British remote gambling operators by prosecuting only EU operators for violating US laws on gambling , and not prosecuting US citizens. The reality seems very different as, according to US sources, no discrimination is taking place in this regard.

It seems hard to believe that the complaint could lead to a further WTO dispute, but the decision is not yet taken.

Look for follow-up to this article in PGRI's September issue ♦

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