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Is Europe Moving Towards a Controlled Opening of Gambling Markets?

In recent months we did see several governments in the EU responding to the threats of the Commission to bring them to Court by proposing ways to get a stronger control over the online gambling market. The Netherlands and Germany reinforced the prohibition of online gambling, but have difficulties in getting their laws enforced. It is astonishing to see that in markets like Germany, Turkey and Greece, a large group of remote gambling operators try to take as big a stake as possible in spite of the fact that their activities are totally illegal.

Italy was the first to respond to the legal challenges by setting up a transparent and open concession model requiring operators to connect their servers to the AAMS, the Italian regulator. However, still a number of operators continue to challenge the right of the Italian government to impose licences, although Italy's system is perfectly in line with the case law of the European Court of Justice and the EFTA Court. Indeed, the Courts did recognise the right of each State to impose its own licensing system as long as such system is non-discriminatory and transparent, and proportionate to the aims pursued. Italy's system is in line with these conditions and provides for a fair and controlled access to its market.

France, Denmark, Finland and Belgium responded more recently to the provocations by proposing legislations in line with the case law of the European Court of Justice to tackle the illegal online gambling operations, although the answers proposed are in some ways different.

France is indeed proposing a partial opening of its market, limited to certain defined online games (certain types of sport betting and poker). Each operator will need to obtain a licence in France and pay taxes over the stakes. Those stakes are limited. They will also be obliged to contribute to sport and agree with the organizers on the use of sport events for betting purposes. The land based world will not change, both La Française des Jeux (lotteries) and the PMU (horse racing) will maintain their monopoly. The control over the online gambling market will be in the hands of a new regulator (ARJEL) who will also define the operational conditions. The French bill is well conceived and balanced and in full compliance with EU law. France was largely inspired by the Italian model and is today a further inspiration for Spain and Denmark. The French Minister of budget called the French approach "a controlled opening of the market."

Will this become the EU model? Clearly the UK model, based

upon a single licence issued by the UK or any other remote gambling jurisdiction (Malta or Gibraltar) valid throughout the whole EU will not prevail. Such model does indeed not recognise the right of each state to decide upon its own gambling policy.

But there are also other models promoted in the EU. Finland, the first country in the world having offered games through the Internet, does take legal steps to reinforce its monopolies. According to the case law, this is perfectly legal as well. The difference between Finland and France is to be found in the number and types of operator. While in France any EU based company will in the future be able to apply for a licence to operate the games of chance admitted by the French government remotely on the French territory, Finland prefers that such games are only operated through a single company, and preferably a state owned company. As such there is nothing wrong with that choice as both the European Court and the EFTA court did in two cases (Läära and the Norwegian slot machine) recognise that a monopoly in gambling is legal from the EU perspective.

Belgium chooses a third way. Licences for casinos, gaming halls and sport betting operators will be extended to the online market. As such the Belgian legislator follows the line decided by the WTO dispute settlement bodies that online gambling is a like service and Internet just another distribution mode.

All these solutions prove that today EU Member states take the issue of remote gambling seriously and look for ways to get the illegal offerings under control; while understanding that prohibition is not an effective solution to combat crime and to avoid addiction. However, all these solutions prove to be limited in practise. Without a coordinated approach to tackle illegal online gambling, enforcing judgements in all the other states and consolidating the states' choices, all solutions will partially fail. The EU principle of subsidiarity requires the EU institutions to become involved when essential transnational problems occur which cannot be adequately resolved at national level. Up to now this has not been done in a satisfactory manner. As a result there is still a growing number of litigations, some of them going up to the European Court of Justice. At the moment there are 12 cases pending.

Many of these issues have already been decided in past cases. One has to acknowledge that the European Court has acted in this area with great respect for the sensitivities and problems at stake. The Court, as always, took up its own responsibility and did substantially

contribute to the objective of creating the conditions that enable the Member States to understand what is possible within the actual context of the Treaty. From Schindler to Placanica, the Court has designed the legal framework for gambling services under the Treaty and the limits thereof.

The EU Treaty as such does not provide for full answers to the complexity of the gambling issues and the Court understands this. The Portuguese internet gambling case did show how far-reaching the difficulties are. None of the Member States present, and there were many intervening, nor the EU Commission wants the gambling market to be driven by market forces. Already in Schindler, the Advocate General explained in a very high level and well argued opinion that applying market rules to gambling services will not lead to a better allocation of resources as aimed at by the Treaty. There is no need, the Advocate General states, to apply internal market rules and competition law as such in an area where there is no benefit for the consumer from a liberal, competitive environment. However, he makes it perfectly clear that the attitude of the states is crucial in this regard. If the states do not operate their lotteries as normal economic enterprises and are not trying to maximise profits, this is fine and they should not be forced to apply market driven principles. The AG considers that operating a lottery as the Santa Casa de Misericordia de Lisboa is doing under strict governmental control and ownership is perfectly alright.

But the situation is albeit not resolved with this opinion. The Court still needs to rule and even that does not resolve the regulatory problems.

Where are the other EU institutions on this?

The Member States have clearly decided to take the lead. Indeed, following a meeting of the Government Agents to the European Court on July, 10, 2007, the Member States decided to start a dialogue on this matter. It took up until the French Presidency in the second half of 2008 before the idea was implemented through the "Services and Establishment Working Group" of the Council.

Surprisingly, already during the first meeting in July the Commissioner on Internal Market denied even to participate in this dialogue with the Member States instituted by the French Presidency. This attitude has not changed over the past months. Let's hope that this changes and that the Commission Services, who have over the years acquired a substantial knowledge of the problems and understand the sensitivities, can participate and contribute to this dialogue. This is indeed the only way to come to terms in this difficult area.

On 1 December, 2008, the Council of Ministers decided that they want to continue the work of this Working Group under the Czech Presidency and to search for the regulatory answers. Most of them insist upon the need to approach the questions with due regard for the subsidiarity principle, thereby emphasizing that only those problems need to be looked into at EU or international level that cannot be adequately resolved at the national/state/regional level.

The French Presidency did call upon the Commission to participate more actively in the debate and make further studies. The Commissioner of Internal Market refused this request. Unfortunately, the Czech Presidency, overwhelmed by the financial and economic

crisis, did not take up this matter seriously. Only a conference and an informal meeting at the end of June 2009 will give attention to the gambling problems. The upcoming Swedish Presidency will pay substantially more attention to the complexity of the gambling services issues. During the second half of 2009 we expect that at least 3 meetings between the Member States will be held to talk about the problems and to define the scope of an EU approach.

Also the European Parliament did contribute to a better solution. The Parliament did, like the Council, reject the proposed solutions of the Commission to base gambling services upon a single country of origin licence as promoted by the UK, Malta and Gibraltar, but was aware that the Treaty as such did not provide the solution. During the debate on the White Paper on Sport it became clear that the European Parliament acknowledges the important role and contribution of Lotteries to the European sport model based upon amateur and grass root sports.

In the meantime the IMCO Committee of the European Parliament has addressed the question of gambling in its own initiative report. Although initially the European Parliament was considering to look into the questions of the online gambling market only, the Parliament took into consideration all consumer related aspects as well as the public order elements of crime prevention. The report prepared by MEP Schaldemose provided a correct picture of the situation. It was adopted by an overwhelming 85% majority of the Parliament. The Parliament recognizes the fundamental right of each state to regulate gambling and warned that remote gambling is much more dangerous. The Parliament did also insist upon more academic research to understand the risks of remote gambling.

Both initiatives can be quite welcomed and show how both institutions take up their political responsibility to find proper political and regulatory answers, if necessary under secondary EU law, something that the European Court could as such not do.

Today it is clear that a single Member State cannot provide all answers to regulate properly the gambling sector. The principle of subsidiarity as outlined in the Protocol of the Amsterdam Treaty does therefore require the European Union to look for the essential cross border aspects of the problem. Some member states may choose to open up their markets more than others. But all member states endeavour to have their laws enforced and their regulations respected. That requires making serious work of getting control over the remote gambling markets and operators. ♦

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