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The Regulation of Online Gambling in the EU: An Extraordinary Roadmap

The last couple of months, online gambling has become the focus of the debate in the European Union. Not only on the legal but also on the political level. Like the early case law of the Court of Justice of the EU defined games of chance to be an economic service of a very particular nature, we see that the road towards the regulation of online gambling in EU is also far from common.

In 1992, during the Edinburgh Council, the Heads of State and Government decided that there was no need for an EU regulation on gambling. Based on the principle of subsidiarity, it was not deemed necessary at that time to find a common approach regarding games of chance, since the national level seemed the most appropriate to regulate these services of a very particular nature. When afterwards the online provision of games of chance in Europe increased exponentially, the application of this principle as such did not change but the facts of the European market clearly did. 18 Years later, the EU Member States are still considered to be the most appropriate level to regulate and control games of chance in the EU, but the reality of the online market clearly requires a coordinated approach between all the EU Member States in order to maintain and enforce their national restrictive gambling policy. Today, the EU Member States are no longer capable of regulating and controlling all aspects of gambling on their own, given the essential transnational nature of online games of chance.

That being said, games of chance have proven to be a sector in which any political debate is particularly sensitive. The normal institutional play between the EU institutions has been turned upside down, in order to come where we are today: namely Member States discussing common challenges of cross border gambling services in the Council and the Commission's intentions to adopt a Green paper on online gambling early 2011.

Indeed, in principle, any kind of policy initiative in the EU starts with preparatory work of the Commission, including a stakeholders consultation, which leads to the adoption of a Communication or Green paper. If, based on that consultation, it seems an EU initiative would be appropriate and desired, the Commission will address certain options in a White Paper, followed by a genuine Commission proposal on the issue. For internal market matters, such a proposal will be drafted by the Commission services responsible for the internal market (DG MARKT). Such a proposal will be discussed, and amended, by the European Parliament and the Council (consisting of the EU Member States), who are the two main decision-making bodies in the EU. Both the Council and the European Parliament need to agree with the final text. This is the way it normally goes. Regarding gambling services, the road towards the first stage of any kind of Commission initiative has been very different.

Indeed, in the gambling sector, we are confronted with a vast series of rulings of the Court of Justice of the EU since 1994. There is probably no other sector, not regulated on EU level, in which the Court was required to deliver so many judgments which had an important political connotation. After more than 15 years of EU legal proceedings, the Court of Justice of the EU is clearly fed up with playing the political arbitrator. As one of the judges

explicitly pointed out, in the absence of any secondary legislation, the Court has no other option than to apply the rules of the Treaty. This is no longer feasible in the area of games of chance. This tendency of the Court to implicitly push for a EU framework on gambling services was rather obvious in the most recent rulings in the Markus Stoss and Carmen Media cases.

After being confronted with a huge amount of legal proceedings before the Court, the representatives of the Member States before the CJEU started discussing this particular situation in an informal way. Based on this discussion the initiative was taken by a couple of Member States to set up an ad hoc Council WG to discuss the matter of gambling services in the EU. The French Presidency, the second semester of 2008, has started the political debate within the Council, followed by the Swedish, Spanish and Belgian Presidencies. During these discussions the Member State have pointed out their common concerns and problems generated by the online provision of games in the EU. The current Belgian Presidency is focusing its activities to reach council conclusions, which would be a first real common position of the Council on the issue. This would be a very important political sign from the Council to the Commission about those gambling related areas which, according to the Member States, need a coordinated approach. Getting there is not easy as it requires an unanimous decision by all 27 Member States and, as it stands today, the views of several Member States are still often very different.

At the same time, in February 2010, the new Internal Market Commissioner Barnier, announced its intentions to come up with a Green paper on online gambling services. The push of the Member States in the Council towards the Commission, and the aforementioned signal of the Court not to be able any longer to rule these cases based upon the Treaty principles, are very important for the Commission to have enough support for a consultation on this very specific matter. So, contrary to what is usually the case, the Member States of the EU have pushed the Commission to take an initiative in this area, given the tremendous problems that are caused by online gambling and the difficulties encountered by the Member State to unilaterally tackle illegal gambling.

The Green Paper of the Commission is aimed to determine, based on the broad stakeholders consultation, whether an EU initiative would be useful and appropriate. The Green paper will consist of a description of the main concerns and a list of question in that respect. This Green Paper will only lead to a further policy initiative on EU level if it is needed and wanted. It will not lead automatically to a legislative proposal by the Commission and will not necessarily lead to any harmonization in the field of games of chance. Nonetheless, the initiative of the Commission is very important for all stakeholders and governments, to finally obtain some legal certainty at a moment in a time when many Member States are feeling the pressure on national level to open up (partially) their gambling market. It seems that, after 15 years of battle on different levels, both the EU and the Member States are now ready to reflect together on a political solution to guarantee a sustainable environment for gambling services in the EU. ♦

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