



Economic and Regulatory Fairy Tales: As Told by the Remote Online Gambling Operators

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For many years the battle regarding online gambling was driven by the idea of opening up a single pan-European market, whereby the remote gambling operators could operate from the most flexible jurisdictions where taxation was low and regulatory control “acceptable” (i.e. less regulation imposed in the so-called “remote gambling hubs”). Arguments about “mutual recognition”, namely the obligation under European law to recognize all over Europe a license issued by a single jurisdiction in order to operate in the whole of Europe, have failed. The Santa Casa case put an end to those dreams, jurisprudence which was afterwards explicitly confirmed in the Dutch Ladbrokes case, and also in the German Carmen Media and Markus Stoss cases. Finally, subsidiarity did prevail, guaranteeing the Member States their full competence and authority in this matter.

But it didn't take long for the global remote gambling industry to open another battlefield. Online gambling is difficult to combat, although the US authorities have shown that it is entirely possible to do so. In many jurisdictions, remote gambling operators continued to operate illegally, meaning that they were operating without having a licence from the authorities in the jurisdictions where the consumers actually reside. This has not only given rise to increasing litigation, but also to growing pressure on governments to find solutions for the increasing risks of addiction. In Belgium, the Brussels criminal court convicted an illegal operator, requiring it to not only pay a substantial fine, but also to pay damages to the government. The reason is that by operating illegally, the opera-

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tor was also undermining the responsible gaming policy of the State.

Several governments are now looking into national regulatory solutions. Italy and France have implemented a good structure for allocating licenses according to their own legislation, while also keeping strict border rules to stop illegal operations. Others, like Belgium, decided to implement a so-called “license-plus” model. According to this model, only land-based licensees are entitled to obtain an additional license to operate games on the Internet. The remote gambling industry was furious about this approach and complained about it at the EU Commission. Up to now, the Commission did not dare to take any action against Belgium. Following the ruling of the EU Court of Justice in the Dickinger case, it is probably very unlikely that the Commission has any serious argument to win a case against Belgium. In the meantime, the Constitutional Court of Belgium declared the new approach legal from

an EU law perspective as well as from a constitutional law perspective. The Dutch parliament, well informed about this, decided to vote in favour of an approach comparable to Belgium and against the views of the Dutch Minister, believing that a low-tax liberalisation of online gambling was the only way forward, and that it would even provide more income to the state.

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Unfortunately this “low-tax story” was accepted in Denmark. Indeed the Danish Parliament adopted a view that low and discriminatory taxation in favour of online casinos was the only way forward in order to get control over the online gambling world. The law was attacked by the land-based casino and slot-machine operators who called this a form of illegal state aid. The EU Commission investigated the matter and recently decided that the Danish approach, whereby online casinos receive a very low level of taxation contrary to land-based casinos who remain subject to a very high taxation, is a form of state aid which distorts competition. The market of online and off-line is indeed not different! However, the EU Commission did support the argument of Denmark that a form of state aid is acceptable because it is in the common interest and in order to develop economic activity. According to the EU Commission, the incentive effect on foreign operators to get a license will reduce the amount of illegal gambling ... and makes the distortion of competition less important. The decision created shock waves throughout Europe. It undermines the global political process and goes completely against the case law of the European Court. According to the EU Court, online gambling is the most dangerous form of gambling. And in a consistent regime, the most dangerous games must be the ones that are most severely regulated. This is actually the opposite of what Denmark is doing with the support of the EU Commission. Most likely, the decision will be attacked by operators, but it may well also be attacked by other Member States. Low taxation, and distortion of competition, is not the essential condition for properly regulating online gambling. The experience in France has proved the opposite. A normal and strict taxation of online gambling is what will keep it in line with public policy considerations, and maintain a healthy ‘Public Order’. Low taxation of online gambling, to the detriment of the well regulated off-line gambling world, can only lead to more problem gambling, less income to the state, and more social disorder.

Channeling online gambling into legal corridors by no means requires that the land-based operators be discriminated against, nor that the online operators be provided with very low taxation ... Just that good and responsible regulation be combined with strong law enforcement in cooperation with other governments.

Governments never did win any battles by adopting and endorsing the standards of off-shore jurisdictions! ♦

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