

OPPORTUNITIES IN ONLINE GAMBLING IN EUROPE

While the US remains steadfast in its opposition to online gambling, Europe offers greater scope for operators looking to attract a significant (and lawful) number of gamblers. There is, however, no uniform attitude to online gambling across Europe, which means that knowledge of local regulations is crucial for any company assessing or operating in Europe's various markets. While the UK has adopted a liberal and regulated approach to online gambling – somewhat at odds with the UK government's recent dilution of its casino liberalisation agenda – other countries across Europe are moving at different speeds, often being prompted as much by the European Commission as ideology.

A new regulatory regime in the UK

On 1 September 2007, the key provisions of the Gambling Act 2005 ("**Act**") finally came into force, bringing with them the biggest overhaul of UK gambling law for years. The Act, among other things, introduced new offences, required operators to obtain new licenses (from the Gambling Commission, a new regulator), liberalised the advertising of gambling in the UK and permitted online gaming companies to operate from the UK.

The decision to update gambling legislation was made, at least partly, because the old legislation was not capable of addressing the substantial changes in technology that had taken place since it came into force. One of the key aims of the Act was to provide a regulatory framework capable of being adopted to take account of technological changes on an ongoing basis.

In contrast to the old legislation (which distinguished primarily between the different types of gambling), the Act focuses on separating out the concepts of remote and non-remote gambling. It therefore properly contemplates how internet, mobile and interactive forms of gambling should be regulated. Furthermore, it seeks to address the tricky jurisdictional issues that arise in the context of remote gambling. However, until the provisions of the Act are actually tested in the courts, it is difficult to assess how successful it has been in doing so. Even with such provisions being included in the Act, concerns do remain about its application and enforcement.

"Remote gambling" is defined in the Act as gambling in which persons participate by the use of remote communication and "remote communication" includes communicating using the telephone and the internet. Under the Act, "gambling" means "gaming, betting and participating in a lottery". If a game does not constitute "gambling", it is not regulated by the Act. For example, prize competitions (whether skill-based or free prize draws) do not fall within its ambit.

Licenses for online gambling operators

It is an offence under the Act to "provide facilities for gambling" without a license unless one of the limited exceptions applies. A person provides facilities for gambling if he:

- invites others to gamble in accordance with arrangements made by him;
- provides, operates or administers arrangements for gambling by others; or
- participates in the operation or administration of gambling by others.

However, this offence is only relevant if an operator sites any of its remote gambling equipment in the UK. Remote gambling equipment is electronic or other equipment used by or on behalf of a person providing facilities for remote gambling to:

- store information relating to a person's participation in the gambling,
- present, to persons who are participating or may participate in the gambling, a virtual game, virtual race or other virtual event or process by reference to which the gambling is conducted,
- determine all or part of a result or of the effect of a result, or
- store information relating to a result.

Where such equipment is not located in the UK, the licensing provisions of the Act do not apply.

The Gambling Commission has recently issued advice clarifying which equipment will require a license to be obtained by an operator, particularly in the light of the growth of white label and affiliate agreements in the sector. The Gambling Commission has stated that it does not intend equipment used for integrity testing, money laundering compliance, complaints handling and responsible gambling analysis to be regarded as licensable. Equipment used to store customer information for marketing purposes, even where that information includes data used in the calculation of bonuses and incentives, is also excluded provided that such bonuses or incentives are not an "in-game" feature.

It is clear that operators who do not wish to obtain a license from the Gambling Commission will need to give careful consideration as to how their systems process the relevant information to ensure that a license is not actually required.

Whether the UK will benefit from this new licensing regime remains in question. Although there are some benefits for operators locating in the UK – including a large and skilled pool of labour, reliable communications and access to the investment funds of the City – these will often be outweighed by the costs. Specifically, while remote gaming tax is levied at 15%, the UK will find it hard to compete with offshore locations.

Advertising online gambling in the UK

There is no prohibition on individuals in the UK placing bets with overseas operators and (provided no remote gambling equipment is located in the UK) it is not necessary to hold a Gambling Commission license in order to offer gambling services to UK gamblers. However, there are limitations on overseas operators advertising their gambling services to such people.

The Act introduced a new regime for advertising gambling services in Great Britain. (Northern Ireland, although part of the UK, has retained its own restrictions on advertising gambling.) An operator which provides facilities for gambling and which either (i) holds a license from the Gambling Commission or (ii) is subject to the laws of any other EEA State, Gibraltar, Alderney, the Isle of Man or Tasmania (the last three being on the Department of Culture, Media and Sport's "white list"), may advertise its gambling services in Great Britain. Thus, whilst a gambling operator does not necessarily have to be located in the UK to provide its services to UK

gamblers, the location from where it provides its services is relevant in determining whether it may promote such services to individuals in the UK.

Advertisements in the UK must also comply with the various advertising codes, which contain specific rules relating to advertising gambling. These include rules of the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP). The industry has also adopted a voluntary code, the Gambling Industry Code for Socially Responsible Advertising. The latter includes the introduction of a 9pm watershed on gambling advertisements and programme sponsorship (excluding bingo, pool betting, National Lottery advertisements and the sponsorship and advertising of betting companies around sporting events), the inclusion of gambling aware messages in advertising and a ban on sponsorship on children's replica sports shirts for all contracts after 1 September 2007.

So far, the regulators seem to have been satisfied that operators are adopting a sensible approach to the liberalisation of the advertising rules. The Advertising Standards Authority ("**ASA**") published a report in February 2008 assessing whether advertisements for gambling in September and October 2007 complied with its codes. It found that 99% of advertisements complied with those codes. Furthermore, it also ruled in favour of Ladbrokes, the first operator to broadcast a television advertisement under the new legislation, after receiving a number of complaints about those advertisements.

Slow moves to liberalisation across Europe

While the UK liberalised gambling legislation of its own volition, progress across the rest of Europe has been driven more by the European Commission ("**EC**") and the European Court of Justice ("**ECJ**"). This remains slow.

For a number of years the EC has been considering the extent to which gambling legislation in some member states of the European Union breaches European law. The key issue has generally been whether national laws, which promote national monopolies and prevent private sector operators (including those from other member states) from offering gambling services in that member state, comply with the principles of free movement of services and the freedom to provide services (Articles 49 and 43 of the European Community Treaty (as amended) respectively).

In recent years, the EC has commenced infringement proceedings against seven member states (Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden) claiming that the national gambling legislation in those states was restricting the supply of sports betting services. In March 2007, the EC requested that Denmark, Finland and Hungary amend legislation relating to sports betting services and in June 2007 the EC requested that France and Sweden do the same. In February 2008, the EC requested that the Netherlands and Greece amend their respective legislation on sports betting services.

If national legislation is not amended in line with an opinion issued by the EC then the EC can bring proceedings in the ECJ against a member state. This could lead to a ruling and potentially a fine from the ECJ against that state.

We have set out below an overview of the current position in some of the key member states.

Mixed news in Germany

At the end of 2007, Bet and Win International (BWin) claimed a victory for online sports betting operators. An Administrative Court of Appeal in the state of Hessen overturned a ruling by a lower court that had prohibited the online gambling operator, which is based in Austria, from providing its services to German customers. The court found that a ban on internet gambling would be impossible to enforce and as such ought to be considered "null and void".

Notwithstanding the Hessen court decision and the EC's numerous warnings, on 1 January 2008 16 German states passed the Interstate Gambling Treaty banning all forms of internet betting in Germany (including the total prohibition of games of chance on the internet, advertising restrictions on TV, on the internet or on jerseys or billboards and the prohibition on financial institutions processing and executing payments relating to unauthorised games of chance). The treaty is controversial because it will have the effect of protecting the national lottery and betting monopolies and online sports betting operators BWin and Fluxx AG are thought likely to challenge the treaty and Paddy Power has withdrawn from the German market. The adoption of this legislation is also likely to have the knock-on effect of ending sponsorship deals between BWin and German sports teams including VfB Stuttgart.

In February 2008, the EC sent Germany an official request for information on the treaty as it restricts the supply of gambling services. The request is the first stage in the infringement procedure and Germany has two months to respond. At this time, the legal situation in Germany therefore remains uncertain.

French have more time to bring betting laws in line with EU rules

Following talks with French ministers last year, the EU Commissioner for the Internal Market agreed that France could have additional time to find a solution to keeping its national betting laws in line with EU rules. These negotiations follow the EC's opinion that France's gambling laws breach the EU laws on the free movement of services. If France fails to modify existing legislation as requested it is likely to face proceedings in the ECJ.

The French budget minister responsible for brokering this extension with the EC has insisted that there will be a controlled opening of the French sports betting services market which is currently dominated by two state-owned monopolies Français des Jeux ("**FDJ**") and Pari-Mutuel Urbain ("**PMU**"). However, sports betting operators are reported to be unhappy with the proposals which would open the betting market only to a limited extent e.g. the fixed odds betting market would continue to be served solely by FDJ.

Meanwhile the PMU has suffered a defeat in its attempts to prevent a Maltese sports betting service operator (Zeturf) and its co-location service provider BellMed from offering services in France. PMU began proceedings in the French courts in 2005 and was initially successful in seeking orders to stop Zeturf offering its services in France and forcing BellMed to disable Zeturf's website.

As expected PMU sought to enforce the French judgments against Zeturf and BellMed in Malta applying EC Regulation 44/2001 (the "**Brussels Regulation**"). The Maltese court upheld PMU's application for the enforcement of the French judgment at the initial application stage. However, Zeturf and BellMed successfully appealed this enforcement decision in January and September

2007, respectively. The Maltese court considered that PMU was exercising powers of an "administrative nature" and, as the Brussels Regulation applies only to the enforcement of civil or commercial matters not those of an administrative nature, the decision could not be enforced in Malta.

Zeturf has continued legal action in the French courts by appealing the French judgments to the French Supreme Court. The French court held in July 2007 that any restriction on operators' freedom to provide services needed to be adequately justified (e.g. in order to prevent criminal or fraudulent activity or reduce gambling addiction). The Supreme Court held that it did not believe that a public policy objective would be realised by protecting PMU's monopoly position even if this potentially increased government revenue. Further to this, the Supreme Court quashed the decision under appeal and has remitted it back for the Court of Appeal to consider the legal status of PMU as a state monopoly.

Sweden's response to European Commission still unclear

In Sweden (as in many other jurisdictions) the liberalisation of gambling laws has been highly political. In late October 2007, the ruling Moderate Party voted in favour of privatising state-owned gaming operator Svenska Spel and introducing a licensing system for the gaming market. The CEO of Svenska Spel, Jesper Kärrbrink, then stated that he considered a new Swedish gaming system allowing competition in the market was required on condition that unlicensed cross-border operations could be prevented from operating in Sweden.

In January 2008, the EC sent Sweden an official request for information on national legislation restricting the supply and promotion of certain gambling services, in particular online poker games and tournaments. The request is the first stage in the infringement procedures and Sweden has two months to respond.

Opportunities increase in Italy

Following the Gambelli and Placanica rulings and the change of government in 2006, the Italian betting and gaming market was the subject of some liberalisation. In 2006, new gaming licenses were awarded to international operators based in the EU and EFTA states to provide online betting services to Italian gamblers as well as licenses for traditional betting shops outlets based in Italy. In January 2008, Italian regulatory authorities sent their new law on internet gaming to the EU for approval before it comes into force.

It is also anticipated that the Italian government will provide clarification of the legal definition of "skill gaming". In particular, it is hoped that this re-clarification will mean that, once licensed, online operators will be able to offer poker and other popular card games to Italian consumers. However, games such as roulette will not be licensed in Italy as these are not classified as games of skill and can only be organised in a very limited number of land-based casinos.

Norwegian amendment to gambling law proposed

At the end of November 2007, the Norwegian government proposed that existing gambling laws should be amended to prohibit Norwegian banks and financial institutions from processing payments for online gambling services. The justification for this proposed amendment is in order to clarify the current legislation which prohibits companies from "mediating" with online gambling

service operators. If adopted, this ban is likely to take effect from the middle of 2008. This proposal follows the recent EFTA court ruling that Norwegian national gambling monopoly, Norske Tipping, was justified on the basis of legitimate public policy.

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