



(Online) Gambling in Europe – What’s at stake

Introduction

The EU gambling debate is more vibrant than ever with, amongst others, the recent judgments of the Court of Justice of the EU, the developments in the Council Working Group under the different Presidencies of the EU and the Commission’s Green Paper consultation. The challenges and opportunities of the Internet as a new distribution channel have reshaped the focus point of the debate on both the political and legal level and have put the gambling sector under an enormous pressure in many EU Member States. The ECA has been closely observing these changes and the debate around them.

Today, EU Member States and EU Institutions are looking for a sustainable solution for the challenges and problems generated by online gambling services. Instead of choosing for the legal way of proceeding with infringement cases, the Commission looks for policy answers to the challenges posed by the new market trends and the cross border issues generated by online gambling. EU policy makers are confronted with complex and different sets of market-specificities, cultural behaviours and different political approaches to consumer protection, sports integrity, money-laundering and public order.

All these developments leave us to conclude that the Internet as a new way of distributing gambling services has initiated the debate in the EU about an EU conform regulatory approach.

The ECA, which by now represents about 800 casinos and over 60,000 employees in 22 countries across Europe and as such is one of the biggest and most important representations of the gambling market at EU level, feels urged to actively engage in the discussion.

The purpose of this document is to provide an overview of the actual evolution of the gambling world.

Why do we need strict national regulation for gambling?

- *Historic experience with liberalised and unregulated markets*

It is common knowledge that people like to play games of chance and skill and they want to gamble, whether through land based or remote means, whether the offer is legal or not. With the existence of such strong market demand for gambling on the one hand and the tendency in the Western hemisphere to

increasingly refrain from state intervention into the play of the free market forces on the other, one could rightly raise the question: Why do we need State regulation for gambling? Why not deregulate the market like in other industry sectors?

Historic experiences with unregulated and liberalised gambling markets and our solid expertise as long-standing industry in this sector have shown us that gambling is a particular and very sensitive service not comparable with an ordinary economic activity which, due to its special character, needs to be regulated, limited and restricted in order to prevent any negative outcomes.

Throughout Europe, there are several examples where countries decided to revert to strict regulation and control after having allowed some liberal movements, which had led to a considerable increase in criminal behaviour and social problems following a sudden rise of gambling offers. Norway is such an example where, due to the detrimental effects on the social order, the government entirely banned the operation of the 15.000 slot machines established throughout the country some years ago. In Hungary, it took the government almost seven years to rehabilitate the market for instant lottery win games after its breakdown following the enactment of liberalising rules in 1991, which had resulted in insolvencies of operators, damage to players and a massive loss of consumer confidence. The authorities came to realise that it was just impossible in practice to control the reliability and creditworthiness of licence holders and to administer the requirements stipulated in the law.

These examples show clearly that we should learn from history and avoid making the same mistakes as in the past. We should accept that gambling is not a service like others that can be offered in an unregulated, unlimited and liberal environment.

- *The need for strict regulation at national level*

Historic experience has proven that there is a need for an effective national gambling policy which meets the double challenge of channelling gambling desire:

- steer the demand for gambling away from grey or illegal offers and ensure that the demand for gambling is satisfied;
- minimise the undesirable effects of gambling.

Regulation is necessary to protect public and social order by minimising the effects of problem gambling, protecting youth and other vulnerable people, preventing crime, etc.

A country's primary objective for allowing gambling under restrictive conditions is therefore not, as many claim, motivated by the fact to generate additional taxes.

Many countries have today succeeded in establishing effective control over their legalised gambling markets, allowing for a market size in their respective countries, which is desirable and acceptable for its population and which takes into consideration the respective national specific needs and traditions.

In fact, this last point is a crucial one, which needs to be taken into consideration in the on-going liberalisation debate: the fact that culture, ethics and religion as well as economic and legal traditions vary from country to country and that therefore, gambling traditions and public opinion towards gambling are different in each Member State.

The differences are reflected by the national gambling market size, the types of games, laws, regulations, restrictions and controls, all of which are very heterogeneous across Europe. The differences in gambling traditions also become apparent when analysing the figures of annual spending on betting and the size of the market (per capita) differs significantly from country to country.

With a regulatory framework tailored to the specific needs and requirements of each country, national governments are in a position to effectively control their markets, for instance to avert oversupply, which would risk leading to an increase in gambling addiction and disturbances of the public and social order. The question whether a new gambling offer or new product should be introduced and to what extent, is subject to intense internal political discussions with a view to establish appropriate rules and controls prior to any market appearance.

Furthermore, advertising is an important element for the success of the countries' gambling policy as it allows steering the demand for gambling away from grey or illegal offers. As outlined above, local politics determine the size of the market, so it is appropriate to satisfy the demand while allowing effective control. An advertising policy, which is in line with this political reasoning, is not only a required marketing tool but also absolutely sound and legal in terms of European law and the subsidiarity principle. Therefore, the argumentation according to which the sole purpose of Member States' advertising practices is to increase turnover lacks any basis.

In light of the above, the ECA strongly believes that it is imperative for every country to be in a position to decide on and have the control over the question of an extension, a limitation or a reduction of the gambling market. State regulation is necessary, because as operators we want to offer our services in a safe, fair and legal environment. This line of thinking has been confirmed in the recent rulings of the Court of Justice of the EU which will be discussed further in this document.

- *The current EU framework for gambling*

In the early nineties during the Edinburgh Council, Member States concluded, with reference to the principle of subsidiarity, that, considering the particularities of the gambling sector, there was no need for European legislation and/or harmonisation in this sector.

National governments were and still are responsible to secure a safe regulatory environment for national gambling services to prevent crime and to defend the consumers against the risks of excessive gambling.

National restrictive policies defined along those lines have been upheld by the Court of Justice of the EU, stating that it is up to the Member States to regulate and to choose the appropriate gambling policy in their respective countries, as

long as these restrictions are proportionate to the aims pursued and applied in a non-discriminatory manner.

Given the particularities of the gambling sector, both in the E-Commerce Directive and the Services Directive and, more recently, in the Consumer Rights Directive, gambling has been excluded as normal Internal Market rules do and cannot work.

Since September 2009, a substantial number of cases have been heard and ruled upon by the Court of Justice of the EU, changing the legal debate on gambling services significantly. Not only has the Court explicitly denied the application of the principle of mutual recognition in the gambling sector in several cases, it has also acknowledged the particular dangerous nature of online games, supporting the open call for a strict regulation of online gambling. The Court has given a clear signal to the European Commission and the Member States to develop a sustainable solution for online gambling services on EU level as the basic Treaty principles on the free movement within the EU are no longer sufficient to provide legal certainty in this very specific area.

The implications of online gambling offering

Exploring further the issue of online gambling, this industry is a highly profitable business and has today overtaken other industry players to become the market leader in the e-commerce business. Indeed, today players at home can access a high number of online gambling websites. This rapid evolution of the online business compared to bricks and mortar operations can be explained by the fact that investment costs are comparably low.

However, behind many of these websites are operations based in overseas countries, many of which operate illegally as they do not have the necessary licence required by the country where the services are provided.

At the time when these private operations first started finding their way into the online world, it proved very difficult to put an immediate stop to them. They literally flooded the Internet with e-mail invitations and online advertisements, as effective measures to trace them down did not yet exist.

Being an important source of fraud and money laundering, it became clear that such illegal gambling offers had to be banned and forbidden and its operators called to account. We as ECA believe that it is absolutely mandatory to forbid and ban all illegal offers.

Online operators need to accept the well balanced and properly regulated markets of each Member State, operating under similar rules and terms and requirements as everyone else.

Both the absence of common definitions of gambling services and the establishment off-shore of remote gambling operations in order to avoid paying taxes created a very unsatisfactory situation.

Over the last couple of years, the EU institutions have increased their involvement in shaping gambling policy to meet and identify these well-known

problems. Today, all three political institutions of the EU (European Parliament, Council and Commission) are actively taking part in the political debate on (online) gambling services in the EU.

The European Parliament has given a clear political sign on the orientation of gambling services issues by communicating the March 2009 European Parliament **Resolution on “The integrity of online gambling”** (subsequently “the Schaldemose Report”)¹ which called for wide-ranging EU actions which would have a direct impact on the sector² (e.g. introduction of a monthly cap that a person can use for gambling activities, obligation for online gambling operators to make use of prepaid cards to be sold in shops, stricter regulation of advertising or marketing etc.). The report addressed several crucial issues such as the transparency of the online gambling markets, combating fraud and crime, and consumer protection. The report determined that online gambling operators must comply with the legislation of the Member State where the customer has its residence and the right of the Member States to strictly regulate and control gambling, in accordance with the subsidiarity principle and the respective tradition and culture of their country, was recognised. This clearly follows ECA’s line of thinking and confirms one of ECA’s core principles.

The Belgian Presidency of the Council continued the discussions on gambling in the Establishment and Services Working Group, which were initiated by France, and came up with **Council Conclusions** which represent a very balanced view of the position of each Member State.³ The Council Conclusions focused amongst others on the supervisory role of regulatory public authorities, the cooperation between regulatory authorities, governments of EU Member States and third countries to address the cross-border nature of the different relevant issues. In these conclusions, the need for a discussion on EU level with regard to online gambling, which is a service in principle accessible in various Member States, was emphasized as well as the fact that online gambling services by their very nature pose global challenges. Although these Council Conclusions do not create a legally binding framework, they express the common political view shared by all EU Member States and oblige the Commission to deal directly with the issues.

The lack of relevant data regarding the online gambling market (in particular key policy issues such as the organisation of online gambling services, enforcement of applicable laws, consumer protection, commercial communications, customer identification and payment services) and a facts-based picture of the existing situation in the EU online gambling market and of the different national regulatory models, have encouraged the European Commission to come up with a **Green Paper on online gambling services**, which was adopted on 24 March 2011 and to organise a stakeholders consultation on the relevant issues. This publication is the first step towards a regulatory framework for online gambling services in the EU. In particular, the Commission aims to assess whether the rules at EU level are appropriate to ensure an adequate environment for gambling across the EU and to assess the developments of online gambling

¹ C. Schaldemose, Committee on the Internal Market and Consumer Protection, *Report on the Integrity of Online Gambling*, (February 17, 2008), 2008/2215(INI).

² European Parliament resolution of 10 March 2009 on the integrity of online gambling (2008/2215(INI)).

³ Council conclusions on the framework for gambling and betting in the EU Member States of 10 December 2010.

operators and the evolution of illegal gambling. Furthermore, the Commission wants to examine whether the co-existence of the different national models can continue and/or whether more cooperation between the Member States is necessary to address the issues linked to the new market realities.

The Court of Justice of the EU has also been actively dealing with the issues related to online gambling and the question of compatibility with EU law, in particular articles 43 and 49 EC Treaty (now articles 49 and 56 TFEU).

The Court of Justice of the EU has explicitly acknowledged the more dangerous nature of online gambling in its recent rulings. On 8 September 2009, the Court provided its landmark ruling in the *Liga Portuguesa de Futebol Profissional* case.⁴ The ruling was a victory for the EU Member States as the Court clearly recognized the right for Member States to regulate and control their national online gambling markets, thereby explicitly denying the application of the principle of mutual recognition in the gambling sector. With its ruling, the Court clearly established the core principles of the discretionary power of the EU Member States in the field of online gambling. The Court confirmed the legality of the grant of exclusive rights to operate games of chance via the internet to a single operator, which is subject to strict control by the public authorities, and the appropriateness to protect consumers against fraud. The Court also recognized that internet games are more dangerous than physically offered games, and that the Member State of residence of the consumer can legitimately prohibit or restrict the access to its territory for operators established in other jurisdictions such as Malta and Gibraltar.

On 3 June 2010, the Court delivered two other important rulings, in the Dutch *Betfair*⁵ and *Ladbrokes*⁶ cases, concerning the closed sole license system in the Netherlands. Besides extending the scope of application of the theory of controlled expansion to consumer protection, the Court ruled that a Member State is allowed to restrict or prohibit a foreign operator to make his games accessible through the internet within its territory, simply by having a website which is accessible to the consumers within that territory. The Court also acknowledged the Member States' right to grant a license to, or renew the license of, a single public operator directly supervised by the State or a single private operator strictly controlled by the public authorities without any competitive tendering procedure.

The most recent judgments were rendered by the Court on 8 September 2010 in the *Markus Stoss*⁷ and *Carmen Media*⁸ cases, giving clear directions on the way forward for the regulation of games of chance in the Member States and regarding the potential policy options. The Court confirmed that a duty to mutually recognize authorizations issued by the various Member States cannot exist having regard to the current state of EU law, indicating that a clearer regulation in this field is necessary, since the mere application of the Treaty principles regarding the free movement does not suffice to face the challenges

⁴ CJEU judgment of 8 September 2009, C-42/07, *Liga Portuguesa de Futebol Profissional*, ECR 2009, page I-07633.

⁵ CJEU judgment of 3 June 2010, C-203/08, *Sporting Exchange (Betfair)*, ECR 2010, not yet published.

⁶ CJEU judgment of 3 June 2010, C-258/08, *Ladbrokes*, ECR 2010, not yet published.

⁷ CJEU judgment of 8 September 2010, joined cases C-316/07, C-359/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, *Markus Stoss and others*, ECR 2010, not yet published.

⁸ CJEU judgment of 8 September 2010, C-46/08, *Carmen Media*, ECR 2010, not yet published.

posed by the very specific nature of (online) gambling services. The Court gave also clear indications as to the inconsistency of a monopoly (unlimited and revenue-stimulating advertising, authorized private operators exploiting other types of games, tolerated expansion of non-monopoly games which present a higher potential risk of addiction to maximise revenues) but concluded that a monopolistic approach with strict boundaries is nevertheless more likely to tackle the gambling risks and prevent incitement to squander money on gambling and combat addiction more effectively, especially with regard to online games which entail a greater risk to consumer protection than traditional games. With these rulings, the Court has clearly put the responsibility on the Member States to ensure an effective enforcement system and to tackle illegal online gambling. The Court seems to be of the opinion that Member States need to have the possibility to regulate and control the offer of online games very strictly, emphasizing the need for a regulator.

Effects of liberalised markets

At this stage we would like to draw the scenario, which would materialise in case Member States would be forced to open their betting markets and accept the principle of country of origin, the effects of which would clearly be noticeable in the remote as well as the land-based sectors.

First of all, it is important to note that a market opening would have very divergent repercussions in the different Member States, due to the historic and socio-cultural variations in the different market structures and typologies.

Second, and most importantly, a liberalisation of the betting markets, which would entail the application of the principle of the country of origin, would force countries to accept the standards applied in the country from which the service provider emanates. As it cannot be ruled out that foreign countries lower their standards to extreme terms with a view to attract operators, Europe would be faced with an unacceptable race to the bottom. If an EU operator would be allowed to offer its games on the entire EU territory, this would destroy the discretionary power of the national authorities while the Court of Justice of the EU has consistently recognised the discretionary power of the Member States to decide about the number and type of operators, as well as the right to decide about the type and volume of games, independently from what other jurisdictions do. This discretionary power of the Member States has also been acknowledged by the Court of Justice of the EU with regard to online gambling.

Liberalised markets would create a situation where national governments would be deprived of their possibility to control and limit gambling offers and market sizes. Local and State authorities would see the number of betting offices operating on the basis of for instance a Maltese licence explode in their area and would not have the means to do anything about it.

An additional problem occurs due to the absence of clear definitions. With the new technologies available today and a bit of imagination one can create games that allow people to bet on almost everything. As such, one would be able to bet on the outcome of a casino game or a lottery game. Consequently, the borders between the different types of games, whether short odds or long odds, become blurred. What used to be long odds becomes a short odd and with new games

appearing every day it will be virtually impossible to make a clear distinction. However, one has to bear in mind that the addictive potential and dangers for consumers inherent in each type of game is different and that gambling regulation takes these differences into account by establishing rules for each game appropriate to alleviate the respective dangers. One can easily imagine that this whole well-balanced regulatory system becomes obsolete if one were to liberalise even only one game.

These effects can already be seen today. In some countries betting shops have installed automatic Roulette games, on the outcome of which people can place bets. The logical consequence of this development is that betting offices will soon evolve to become small casino shops, offering all sorts of gambling offers in an agreeable social atmosphere, perhaps even with entertainment, food and beverage – bypassing any regulation and control mechanisms. Do we really want to have such shops at every corner of the street, escaping any possibility for Member States to regulate and control?

The ECA is convinced that a decision to liberalise unconditionally one single gambling product would lead to a destabilisation of the entire regulatory control mechanisms set up in the different countries, ultimately resulting in a breakdown of the controlled gambling markets in Europe. Therefore, we believe that in order to meet public order and market control objectives, all types of gambling offers, whether online or not, need to fall under the same restrictions that apply to all licensed operators today.

What is the best way going forward?

For years, ECA has been supporting a well-balanced and politically acceptable solution that puts an end to the undesired evolution of gambling as we have seen it in the last years.

The European Parliament, the Council and the Court of Justice of the EU have all emphasized that, in line with the principle of subsidiarity, internet games resort under the competence of the Member State where the consumer is established.

On national level, a dual movement can be detected. Different EU Member States have replaced or are in a process of replacing a total prohibition of online gambling by a national regulatory model. While some Member States have opted for a controlled opening of their national gambling market by granting licenses to new operators on the online market (France, Denmark), and thus maintaining quite a liberal approach, others established an even stricter control (Belgium).

France opened up three different sub sectors to competition, after adopting its law concerning the opening to competition of online gambling in May 2010, i.e. horse race betting, sport betting and online poker. In order to legally offer online games of chance, operators must obtain a licence which is granted on the basis of a non-discriminatory licensing process for a renewable period of 5 years to EU operators respecting a list of requirements. ARJEL operates as an independent administrative authority responsible for the regulation of online games.

Belgium's new Gambling Act, which entered into force on the 1st of January 2011, replaces the general prohibition on online gambling by installing a so-

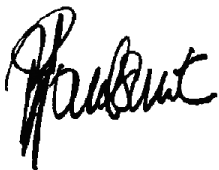
called 'license plus' system, whereby only the existing licensees who are already on the market are eligible to obtain an online license in accordance with their current "real world" license. Besides having an actual establishment in Belgium, the operator's server must be located on Belgian territory in order to allow maximum control by the Gaming Commission. The Belgian model is most in line with ECA's policy.

In the light of the very diverse national legislation on gambling across EU Member States, the ECA furthermore considers it appropriate in the long-term to create a consistent framework for gambling at the EU level creating a level playing field taking into account all of the important elements enshrined into national gambling legislation such as responsible gambling provisions, crime prevention, consumer protection, taxation etc.

In the absence of such an EU framework, the ECA and its members call on the Member States to enforce initially the national regulatory rules in the country where the consumer of such services has his residence. In other words, the application of such principle (accepted for VAT purposes for online services) to all gambling operators and to all means of distribution for gambling services (both terrestrial and remote) has to be guaranteed.

This approach would give enough time to reflect on the establishment of a solid EU framework, providing for agreeable solutions to problematic questions such as taxation, control mechanisms, effective enforcement, etc. Given the delicacy of the issue, we strongly advise against any approach taken under pressure and on the fly.

For further information, please consult the ECA's website at www.europeancasinoassociation.org.

A handwritten signature in black ink, appearing to read 'Ron Goudsmit', written in a cursive style.

Ron Goudsmit
Chairman, ECA

A handwritten signature in black ink, appearing to read 'Guido Berghmans', written in a cursive style.

Guido Berghmans
Vice Chairman, ECA

The European Casino Association (ECA) represents the interests of about 800 casinos and 60.000 employees across Europe. Founded in the early 90's as the European Casino Forum, the ECA has gradually grown over the years and today includes 22 members from the majority of the EU's Member States and from Switzerland and Serbia.