

The EC's recommendations on consumer protection

The European Commission (the 'EC') released recommendations regarding consumer protection in the online gambling industry in July 2014 - a measure that is very distinct from its powers to regulate competition in the European market through the commencement of infringement proceedings against Member States. In this article, two leading experts in gaming law - Dr Wulf Hambach (founding partner at German law firm Hambach & Hambach) and Dr Alan Littler (prominent gaming lawyer at Dutch firm Kalff Katz & Franssen Attorneys) - team up to discuss their views on the impact that this new measure can have, in particular at a national level, as well as some of the resistance coming out of Germany.

Monopolies and gambling. For some, they are natural partners. For others, the idea that the organisation of gambling should be restricted to monopolies, State or otherwise, is completely incomprehensible. It is news to no one that the Court of Justice of the European Union ('CJEU') has been the battleground for this debate, mainly arising out of preliminary references from national courts, where stakeholders have sought to demarcate their interpretation of what the free movement principles entail for online gambling.

The EC's Recommendation

The EC has also been drawn into this debate. Its involvement takes one of two forms. First, the EC is able to open infringement proceedings against Member States who it believes are in breach of EU law. This weapon, however, relies upon the interpretation of EU law,

which in this case is primarily determined by reference to CJEU case law. Secondly, the EC has sought to engage a broader range of stakeholders than Member States and those with legal standing in preliminary references. This commenced with the March 2011 Green Paper consultation, following which the EC identified five priority areas for action in its October 2012 Communication, Towards a comprehensive European framework on Online Gambling. One such priority area is the 'protection of consumers and citizens, minors and vulnerable groups' from which the first recommendation originates, namely the Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (the 'Recommendation').

Under the infringement procedure, the EC has taken aim at restrictions to the free movement of services, which can encompass exclusive licences for gambling services. Relying upon CJEU case law, it has found monopolistic regimes to be compatible with the internal market. Equally, however, it continues to question the compatibility of some monopoly regimes. Whether this will result in regulatory change remains to be seen. Ultimately, a Member State may manage to satisfy the EC that measures have been taken to align the regulation of the monopoly with free movement law.

Alternatively, a new regulatory regime may be introduced, opening up an otherwise closed market to a degree of competition.

But what of recommendations? Can they have an impact on the sustainability of monopolies?

The Recommendation aims to establish a 'high level of protection of consumers, players and minors'

whilst specifically noting that it does not interfere with the competence of Member States to regulate online gambling services. As a legal act recommendations lack any binding force. The provisions themselves within the Recommendation are broadly framed and at no instance is the notion of a 'high level' defined, which again underlines the fact that Member States' regulatory competence is not interfered with. Moreover, Member States are not excluded from upholding measures which seek to give effect to aspects of consumer protection that the Recommendation does not cover.

However, CJEU case law establishes that monopolies are only justifiable when they uphold a 'particularly high level of protection,'¹ accompanied by a legislative framework that enables the monopolist to pursue consumer protection objectives in a consistent and systematic manner 'by means of supply that is quantitatively measured and qualitatively planned by reference to the said objective.'² The CJEU has also been detailed in its judgments regarding advertising by monopolists and commercial communications.

So, could the EC point to an absence of a specific approach to upholding a high level of consumer protection amongst the regulatory requirements applicable to a specific monopolist, so as to say that the applicable regulatory regime does not give rise to a high level of protection? And therefore the monopoly, along with its associated restrictions to the free movement of services, does not amount to a justified restriction to the free movement of services? In short - no. The Recommendation states that it 'does not interfere with the right of Member States to regulate gambling services.'³ Nevertheless, some Member States

may fear that it will amount to a source of soft pressure.

Whilst the EC is not the only voice national regulators and authorities need to be aware of, the domestic judiciary in each Member State may turn to its recommendations. In brief, although recommendations do not confer rights on individuals, 'national courts are bound to take them into consideration in order to decide disputes submitted to them.'⁴ It is not inconceivable that a domestic judge will attempt to draw upon these recommendations in national proceedings. This may raise the spectre of a creeping Europeanisation of gambling policy.

Germany's response

In Germany, it seems that the EC may have somehow offended the Federal States. This could explain why the Recommendation, which contains useful regulations regarding the protection of players and minors, has been rejected by the Federal Council of Germany in its report of 10 October 2014 (printed matter 424/14).

In its response to the EC, the Federal Council of Germany stated that 'there is no need for a harmonisation of online gambling and that the member states can solely decide - in line with the subsidiarity principle and according to their own cultural, social and socio-political views and traditions - what is necessary to protect consumers from the specific dangers which result from games of chance.'

It is obvious that the report of the German States is a tit-for-tat response to the initiative of the EC. A likely explanation is that Germany is frustrated as the aims of the Interstate Treaty on Gambling ('ITG'), in particular with respect to consumer protection, have not been met.

Hopefully, the German States will reconsider their reaction and see the Recommendation as a gift and not something to cause offence

More than two and a half years after the adoption of the new ITG, sports betting licences have yet to be issued, whilst the blocking system for compulsive gamblers (known as 'OASIS') is not operating at the national level due to legal and technical issues. Furthermore, the attempts to implement financial blocking methods to interrupt the payment flows of illegal gambling offers have backfired. Studies have shown that its implementation is technically not feasible, would breach German data protection laws⁵, and that financial blocking is simply not as effective as its supporters would hope⁶. In the end, even financial blocking will not suffice to camouflage the enforcement deficits of an outdated monopolistic regulatory regime. In consequence, all of the efforts of the States to combat the black market have failed. Accordingly, Germany is, now more than ever, a candidate for new EU infringement proceedings due to the States' failure to channel consumer demands.

In contrast to the ITG, the Gaming Reform Act of Schleswig-Holstein ('GRA') was always open to the Recommendation. In 2012/2013, the Ministry of the Interior of Schleswig-Holstein had already granted 48 licences to gambling providers before the GRA was partially withdrawn: 25 online sports betting licences and 23 licences for online casino games and online poker. The licences are valid for a period of six years. Most of the gambling providers have already started their business under the Schleswig-Holstein licences. The GRA and the Executive Order regarding the Licensing of Gaming Operations and Sales ('GGVO') already fulfil the requirements of the EC. In particular, the GGVO contains detailed requirements regarding: the registration of

players (sect. 5); the limits and blocking mechanisms (Sect. 8); the blocking and closure of gaming accounts (sect.10); and the protection of players and minors (sect.13). Thus, the GRA gives rise to non-discriminatory regulation of online gambling that is in line with the Recommendation. Licence holders who have activated their licences and started conducting business under the Schleswig-Holstein licences can be confident that they hold licences which comply with EU law.

Hopefully, the German States will reconsider their reaction and see the Recommendation as a gift and not something to cause offence. The provisions within the Recommendation should benefit Member States in understanding what is required in achieving a high level of protection for consumers so as to justify the presence of a monopolist in their national market. If Member States ignore the Recommendation, then infringement proceedings will be the only way of forcing Member States to achieve the necessary channelling of consumer demand and robust consumer protection.

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1. Case C-212/08 Zeturf Ltd v. Premier minister.
2. Case C-316/07 Markus Stoß.
3. Recommendation 1(2).
4. Per Case C-322/88 Grimaldi v. Fonds des maladies professionnelles ('Grimaldi'), at Paragraph 18.
5. See <https://www.datenschutzzentrum.de/artikel/860-Datenschutzrechtliche-Bewertung-der-Regelungen-zum-Financial-Blocking-zur-Verhinderung-illegalen-Gluecksspiels-im-Internet.html>
6. See summary of the Norwegian Gaming and Foundation Authority: <https://lottstift.no/wp-content/uploads/2011/12/Summary-payment-blocking.pdf>