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EU: divided we stand to watch the fall of liberal Europe

Not enough that the European Union has not managed, or does not want to manage, to come up with a unified stance on online gambling, but now the Union's Advocates seem to contradict each other as well.

After EU Advocate General Bot opined in the Winner Wetten case in January 2010 that German legislation constitutes a restriction to the freedom of movement of services, Advocate General Paolo Mengozzi now begs to differ.

Advocate General Mengozzi recently delivered his learned opinion on seven cases referred by German courts, stating that member states were not obliged to allow operators on their territory on the grounds that they were licensed in another EU member state. In addition, the Advocate General considers the ban on organising and publicising games of chance on the internet, as laid down by German law, as being compatible with the free provision of services, as long as it is proportionate and coherent with the general interest objective that is being relied upon.

To add insult to injury, Mr Mengozzi also stated that "offshore and extraterritorial licences granted by Malta and Gibraltar distorted the mutual trust between member states when it came to gaming laws". This was a direct criticism of the liberal market approach taken by Malta, accusing it of using loopholes in EU legislation to give an advantage to Maltese companies. But... isn't

giving an advantage what democracy, capitalism and liberalisation of the markets are all about? Or are competition regulations also out of the window now?

The UK, which until now has also taken a liberal market approach within the European spirit of the freedom to provide services across member states, has recently changed its tone and is now even considering introducing a new licence for overseas online gambling operators, in line with French and Italian developments. This UK move may indeed isolate Malta even further and would turn Maltese liberal market aspirations into a mere fight against windmills.

In fact, some may argue that Maltese developments will also depend on the UK's next move and on the conditions placed on overseas gambling operators in the UK. What the inconclusive opinion of General Advocate Mengozzi does show, however, is the continued emphasis on high regulatory standards throughout Europe. These high regulatory standards may indeed be a solid basis and acceptable compromise to retain the Maltese liberal market approach.

If the Maltese Government and the online gambling industry is indeed serious about protecting the freedom to provide services across member states, maybe the next step should be to push for harmonised regulatory standards throughout Europe.

Italy: Bentornato a casa, Bingo miu



Online bingo in Italy is legal again! Online bingo in Italy was launched in 2009, but was suspended last month when the Lazio regional court ruled that the regulations on online bingo are not compliant with Italian law. The Administrative Court however has ordered the temporary suspension of Lazio's ruling until a verdict has been reached later this month.

This means that online gambling operators can continue offering bingo for the time being. The online bingo decree has been heavily criticised by small operators because they were running the risk of losing all their players to major established operators during the suspension period. Major operators on the other hand have already committed to major investments in the Italian bingo sector and cannot afford to lose them.

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IN BRIEF

UK: Sports Betting Intelligence Unit

The UK Government announced its acceptance of all of the recommendations in the Sports Betting Integrity Panel Report, including the establishment of a new "Sports Betting Intelligence Unit" (SBIU) which was welcomed by the Association of British Bookmakers (ABB) and the Remote Gambling Association (RGA). The SBIU will have effective investigation processes in place and will be housed within the UK Gambling Commission. A new SBIU director will be appointed shortly.

New US Online Gambling Bill

A proposal for a Bill which would allow regulation of an online gambling industry in the USA (beyond the intrastate regulation currently allowed under the UIGEA) has been put forward by Barney Frank. The Bill is tacked on to a taxation bill, in the same way that the UIGEA was tacked on to the Safe Port Act. However the Senate does have a consistent anti-gambling record and it is unlikely that the Bill will pass as it stands.

Bingo Halls: Increased prize gaming limits

The maximum participation fees for games has been increased from 50p to £10 and the maximum prize has been increased from £50 to £100 where no under 18s are on the premises and from £35 to £70 where under 18s are present. The move means that the Gambling Commission will be issuing new operating licences to all non-remote bingo operators.

France: Big brother is watching you - and your bank

The French online gambling Bill has been passed by the French Senate by 181 votes to 140 last month and is now on its way to the French National Assembly for a second reading before it will be passed to the European Union for final approval.



If the approved Bill is left in its current state, online gambling operators will not only face heavy taxation, but also unworkable mechanisms for player authentication, all in the name of player protection.

Article number 12 of the French Bill not only requires operators to identify the age, identity and place of residence of its players, but also the country of residence of the depositing bank, together with verification to link each player with a bank account. This condition may sound harmless in itself,

however the actual authentication and verification process of both, players and banks, will require a huge amount of virtual and physical documentation before players are even allowed to register.

It is therefore likely that players will be required to send copies of their passports and/ or IDs together with utility bills to prove place of residence together with sufficient information on bank accounts to allow operators to meet the authentication process set out in the French online gambling Bill.

This cumbersome and somewhat unimaginative process means higher expenses for online gambling operators who are now required to employ additional staff to deal purely with administrative paper shuffling work and data protection requirements for the storage and processing of player data. It also implies that the French Government does not trust tried and tested verification methods, currently employed throughout the industry.

Whether this system is actually workable and commercially viable in real life appears to be of little interest to French legislators and it remains highly questionable whether this bureaucratic French approach is indeed necessary for player verification purposes, bearing in mind that online banking, with all its anti-money laundering and anti-terrorist measures, suddenly appears less cumbersome than opening an account with a French online gambling operator.

Florida: Proposal for online poker

Following the example set by New Jersey earlier this year, Representative Joseph Abruzzo has submitted a proposal for legislation which would enable Florida to licence online poker. Other forms of online gambling are not proposed at this time. The UIGEA allows individual states to regulate online gaming on an intrastate basis, and the draft legislation would therefore permit operators to accept only those players within state borders at the time of play.

As in New Jersey's recent proposals, licence applicants would need to already be licensed for land-based gambling. The regulatory system proposed in the draft legislation includes an internet poker hub operator which will be selected by competitive procurement process. Games would be operated by the hub operator, but offered through licensed cardroom affiliates' websites. On top of an application fee of \$500,000, the hub operator would be required to pay 10% of gross receipts to fund regulation and oversight of the operation by way of an annual licence fee and, additionally, a state tax of 20% of gross receipts. These charges are high but are unlikely to deter potential operators: with over 18 million residents, Florida represents a huge potential market.

Player protection measures would include daily deposit limits, self-exclusion tools and a minimum player age of 21. These measures may increase the likelihood of this bill being accepted by the legislators.

Three years fixed term consumer contracts may be illegal

The Office of Fair Trading (OFT) is taking a gym management company to court over its practice of signing up members to fixed term contracts for a minimum period of three years without a cancellation or break clause. Members attempting to leave their gyms are handed bills for the remainder of the three year term and their details passed on to debt collectors if they do not pay, the OFT said.

According to an OFT statement, the gym management company “should allow consumers to cancel their membership on reasonable terms. Making consumers always pay the full amount for the minimum period is, in the OFT’s view, unfair under the Unfair Terms in Consumer Contracts Regulations 1999”. The OFT also believes that this practice is in breach of the Consumer Credit Act and as such, the contracts should clearly set out the total amount the consumer is liable to pay, failing this, the contracts should not be enforceable.

Although the gym company’s aggressive tactics are not commendable, the outcome of this case may have far reaching consequences for any future fixed term contracts with consumers.

If the OFT’s interpretation of the law is indeed accepted, operators of online gaming communities may need to reconsider the “fairness” of their membership terms, bearing in mind that many online gambling operators increasingly offer an “online community membership” for their players. It is questionable however whether the length of time of a fixed term contract can in itself be perceived as unfair, as this would imply that consumers and players are unable to commit to long term legally binding agreements. It is therefore important that the clarity and legal consequences of any contractual obligations are emphasised.

Information Technology: Credit Crunch – the

Just when you think you know it all... In a recent High Court decision regarding the sale of an aircraft, the court considered whether the “*unanticipated, unforeseeable and cataclysmic downward spiral of the world’s financial markets*” constituted a force majeure event which would entitle the parties to withdraw from a deal. The court also considered whether forfeiture of the buyer’s deposit was unenforceable under these circumstances.

To cut a long and expensive story short: the High Court did not consider the Credit Crunch to be a force majeure; however the issues raised remain an important indicator as to how the courts will construe such clauses in the first place. The issue of liquidated damages is particularly important for IT and outsourcing contracts which incorporate service credit regimes. Some key elements should therefore be borne in mind to avoid potential penalties in the future:

- Quantifying the loss based on detailed calculations
- Including examples of anticipated loss calculations in the agreement;
- Confirming that liquidated damages have been accepted
- Clearly stating that liquidated damages deductible from future sums

With regard to force majeure, one should bear in mind that “force majeure” is not a legal term in English law and much will rely on the drafting of this clause. It is therefore advisable not to rely on standard force majeure clauses, but to tailor each clause according to the circumstances in question because what might be a legitimate “force majeure” in one context might be an unknown factor in a different scenario (for example: secure servers in a reputable jurisdiction may not be at risk, while less secure servers in less reputable jurisdictions may require additional contractual clauses to cater for various Force majeure circumstances).



EU – New Consumer Rights Directive to lower UK standards

The European Commission is proposing a new consumer protection law to increase European harmonisation, however, this may come at the expense of the UK consumer. The European Commission has stated that it may not be possible to protect existing UK consumer rights, and that the remedies for defective goods guaranteed to UK consumers might not form part of an EU-wide law. It is therefore no surprise that the proposed Directive was controversial in the UK and is still opposed by UK consumer rights body Consumer Focus.

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UK Gambling Advertising Update

Changes to CAP and BCAP codes

From September this year, revised CAP and BCAP codes will come into force. While there are no changes to the content of the specific gambling advertising rules, there will be a new section dedicated to the advertising of lotteries, including the National Lottery.

Similar provisions will apply to lotteries as currently apply to gambling. One key difference is that for lottery adverts, children and young persons may appear in the advert, although only those over 25 may be featured taking part in gambling.

The National Lottery is not currently subject to any specific provisions, although the general provisions of the codes do apply to it. The change reflects the Advertising Standards Authority's view that all advertisements for lotteries should be subject to the same rules.

A single BCAP code will also come into force, in place of the four separate codes for different media types.

ASA rules against Tombola despite Clearcast approval

A television advert for Tombola's bingo website has been banned by the ASA, despite prior approval being received from Clearcast.

The advert was set on a beach and showed a white man in a suit and a black man in a floral shirt repeating in song everything the white man said. Complainants felt the advert was likely to cause offence due to the negative racial stereotypes. This had not occurred to Clearcast when they reviewed the advert, but the ASA took the view that it was likely to cause serious offence.

The advert was held to breach the codes relating to offence and harmful or negative stereotypes.

This ruling highlights that gambling operators must consider their adverts in the light of the whole of the CAP or BCAP code as well as the gambling specific rules. Clearance from Clearcast is no guarantee that the advert is acceptable.

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