

CHANGES IN THE EU LANDSCAPE: FROM LITIGATION AND REGULATORY DEBATES TOWARDS A MORE ACTIVE M&A POLICY

In 2003, the European Court of Justice handed down two decisions (Gambelli and Lindman) dealing with the compatibility of exclusive rights in the gambling sector with EC principles of free movement. Both decisions created shockwaves through the European gambling environment, with some commentators even predicting the end of European gambling monopolies.

Two years and several eagerly awaited Supreme Court decisions later, we must come to the conclusion that nothing has really changed. The Supreme Courts of at least five EU States (Belgium, Finland, Italy, the Netherlands and Sweden) have interpreted recent European Court of Justice case law and concluded that an exclusive right system does not infringe EC rules on free movement of services and freedom of establishment.

In 2006, the European Court of Justice may confirm or change its jurisprudence. In Placanica, Sorricchio and Palazzese, the compatibility of Italian law with the EC Treaty is once more at stake, following the Zenatti and Gambelli decisions. The new decisions are due in 2006 and could have a profound impact on the legality of the exclusive right system in the gambling sector. In addition to the court actions, there is also some deregulatory pressure from the European Commission to open up national gambling markets.

In 2004, the European Commission adopted a proposal for a Directive on Services in the Internal Market. The objective of the proposed Services Directive is to break down barriers to cross-border trade in services between EU Member States by making it easier for providers to establish themselves and offer services in other Member States and to provide services at a distance based on the rules in the country in which they are established (the country of origin principle). The Services Directive is currently being considered in the European Parliament with voting scheduled for January 2006.

There seems to be a consensus amongst the Members of the European Parliament to exclude gambling services from the scope of the Directive, although the Remote Gambling Association and

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the European Betting Association are pushing to keep gambling inside the Directive. The European Casino Association, which represents the interests of over 800 Casinos across Europe, takes the position that the Casino sector should be addressed separately and therefore be totally excluded from the scope of application of the proposed Services Directive. The carve-out of gambling from the Services Directive is supported by the majority of European gambling operators, including the European State Lotteries and Toto Association and Euromat.

In preparation of the plenary vote in January 2006, the European Parliament's Committee on the Internal Market and Consumer Protection approved on 22 November 2005, with an overwhelming majority, to exclude gambling from the Directive.

Another hot issue is the Study commissioned by the European Commission on Gambling Services in the Internal Market. Late in 2004, the European Commission appointed the Swiss Institute of Comparative Law to run this Study. The purpose of the Study is to provide an evaluation on how the differing national rules of the EU Member States on gambling services (both offline and online) have an influence on the smooth functioning of the internal market for gambling services and associated services (e.g. media, sports, charity and tourism) and thus could hamper the economic and employment growth of these services. Based on the Study, the European Commission will consider whether it is necessary to launch a regulatory pan-European initiative on gambling.

The Study has already stirred some controversy in the European Parliament. In October 2004, Commissioner McCreevy reacted to concerns raised by several Members of European Parliament regarding the independence of the Swiss Institute of Comparative Law and its UK subcontractor, the Centre for the Study of Gambling, which had received funding from a UK bookmaker.

McCreevy saw no conflict of interest and was satisfied of the integrity and independence of both contractor and subcontractor. The upcoming revision of the Television without Frontiers Directive and the Directive on Electronic Commerce could also have an impact on the Casino sector. These legal instruments take a country of origin approach but are currently not applicable to gambling services. In coming months, the European Commission will release a report on the application of the E-Commerce Directive. This report will address possible needs for adaptation of the Directive and could suggest inclusion of gambling services in the scope of the Directive. If gambling services were included in the Directive, this would provide a legal basis for the cross-border provision of remote Casino services. As regards Television without Frontiers, the European Commission will soon publish its proposals for a revised Directive. It is currently unclear whether the revised Directive will open the door for the provision of gambling services transmitted via interactive television.

Another key development is the recent consolidation wave in the (remote) gambling sector which has given rise to a considerable amount of merger and acquisition activity. Examples in this respect are the takeover of Mrbookmaker.com by Unibet, Sportingbet's acquisition of Paradise Poker and the deal struck between Gala and Coral Eurobet. While M&A activity is currently dominated by the remote gambling sector, it is just a matter of time before bricks and mortar Casinos will become involved in the takeover tango. Early indications suggest that several European Casino operators may prove to be attractive for US Casino operators that missed out on the UK gaming deregulation. Harrah's Entertainment is known to be eyeing the Slovenian market to create a joint venture with Hit Casinos.

The surge in M&A activity will expose the Casino sector to increased attention by local competition authorities and the European Commission. The key test prescribed by EU competition law rules is whether a proposed merger will result or may be expected to result in a substantial lessening of effective competition on the relevant market. When identifying possible competition concerns, the authorities will delineate the relevant market in terms of both product scope and geographical scope. National and European competition authorities have not had to deal frequently with Casino mergers. One exception is the merger between the French operators Accor Casinos and Barrière-Desseigne notified to the European Commission in April 2004.

As regards the relevant product scope, the European Commission's analysis in the merger case of Accor & Barrière confirmed that the



operation of Casinos is different to other types of games of chance. The relevant product market is therefore limited to the operation of Casinos. The Commission relied on a decision of the French Competition Authority which considered that games of chance offered in Casinos are not replaceable with games organised by the French National Lottery, or with turf betting. In terms of the relevant geographic market for the operation of Casinos, the European Commission decided in the above mentioned case that the Casino market has a local dimension and is situated inside the French territory. The relevant geographical market is limited to a sales territory of a one-hour car drive around each Casino. However, in a state-aid case concerning the UK Government's proposed sale of the UK Tote, the European Commission considered a broader geographical scope. In its preliminary analysis, the Commission takes the view that the betting market is a European market, since the competitors of the UK Tote are established in several Member States and betting operators accept bets on foreign races and other sporting events. Furthermore, the UK Tote offers its services via the Internet, which is easily accessible from other Member States.