

BMIT's response to Consultation launched by the European Commission by means of the Green Paper on Online Gambling in the Internal market {SEC (2011) 321}

Intro on BMIT

BMIT is Malta's leading provider of hosting and co-location services for Internet and data services, providing reliable and secure facilities to a wide range of customers requiring data centre and communication-related services. The company has established itself as a leading online co-location service provider in Europe and is the partner of choice for data centre customers in Malta and beyond.

BMIT is able to offer a one stop shop arrangement for companies in various sectors. Customers who choose BMIT as their partner of choice benefit from geo-neutral co-location and associated services, complimented by the direct access to the most advanced Next Generation Networks (NGN) in Europe, which is possible thanks to BMIT's collaboration with various international service providers.

BMIT Response to Consultation

BMIT welcomes the Consultation launched by the Commission on Online Gambling in the internal market. The online gambling providers established in Malta and other European countries remain a significant majority of BMIT's market for its Information Society Services (ISS). For this reason BMIT believes that the current legislative changes taking place in various member states and any future Europe-wide initiative will directly affect its operations. Notwithstanding, BMIT and similar ISS providers supply a content neutral service not unlike that provided to other highly regulated service sectors, such as the financial services sector.

Moreover, BMIT believes that the continuous technological developments in the ICT sector (such as cloud computing) are indeed a vehicle for the growth of e-commerce in the EU, including online gambling, and should therefore not be stultified by unwarranted, ill-informed regulation or regulation that is not based on evidence.

Liability of ISS intermediaries

Under Section 2.4 'Enforcement and related matters', the green paper refers to the methods employed by almost all Member States in order to restrict "unauthorised" and cross border online gambling services including DNS filtering and ISP blocking.

At the outset it must be recalled that ISS remain governed by the e-Commerce Directive (2000/31/EC) and incorporated into Maltese Law by the Electronic Commerce Act. As such, BMIT

falls under the governance spectrum of the Malta Communication authority, as the competent authority vested at law to regulate ISS in Malta.

BMIT believes that the methodology being followed by a number of member states to reform and, or update their online gaming legislation is leading to an unprecedented fragmentation of the e-commerce internal market which goes diametrically opposite to the Digital agenda for Europe¹ and its overall aim to *'deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications.(p.3)'*

BMIT is of the opinion that the same member states that are partitioning their national incoming online gambling supply market from the rest of the internal market with measures such as ISP blocking and DNS filtering obligations are disproportionate and mostly ineffective, which if not complied with carry significant administrative and even criminal penalties. Within this context, BMIT urges policy makers to focus their regulatory enforcement on the relevant gaming services in particular and not rely on the intermediaries to enforce what seems to be inadequate or unsuitable regulatory control of the gaming sector.

BMIT maintains that ISP providers like itself should not be delegated with the legal and economic burden of the fight against unauthorised gambling, whether in compliance with EU law or otherwise. This approach, which seems to have been accepted in wholesale by numerous legislators and endorsed by the Commission itself, goes against the spirit and the letter of the E-Commerce Directive which establishes the exemption from liability for intermediaries where they play only a passive role as a "mere conduit" of information from third parties (in this case gaming providers and their consumers of services) and limits ISS providers' liability for other 'intermediary' activities such as the storage of information. It is fully recognised that in instances where a member state considers its law being infringed it has the possibility to ask the ISS provider to terminate or disable access to information carried by the ISS provider. However, it must be recalled when such measures are required to be taken/imposed and the ISS providers concerned are established and operating in other member states, the directive clearly requires the destination member state that intends to impose restrictions, to notify, in advance the Commission and the member state where the ISS provider is established of the intention to impose such measures – a procedure that is commonly disrespected in instances to date where member states sought to restrict the services of providers established in Malta. BMIT urges the Commission to ensure that the provisions of the Directive are fully adhered to and that measures that may be necessary to be imposed from time to time, are indeed based on legitimate justification and are proportionate. It must also be borne in mind that such measures are usually costly to implement and that the ISS provider should not be made liable to carry such costs.

Technological developments and ISS intermediaries

The use of cloud computing in online gambling to date has mainly focused on private clouds in order to improve latency by connecting back-office systems and various web-sites usually of same gaming provider thus improving real time gambling experiences (usually betting).

¹ Commission document COM(2010) 245 final – A Digital Agenda for Europe

However as the speed of broadband increases the use of private clouds is set to increase on both the providers' side and the users' side. While this may take some time to become main-stream to call for any special reference or attention, BMIT would like to submit, at this stage, that as the cloud and services provider would in such an event be making a partial upstream move into the applications and their platforms themselves, it is envisaged that some of the regulatory requirements currently imposed on the gaming provider would have to be met in coordination with the cloud provider.

However, due to the fact that the ISS (Cloud and other services) provider would remain a service provider to the gaming provider (a B2B service), such a service should continue to be treated as an 'intermediary' service.

Conclusion

In conclusion BMIT re-iterates that member states and the European Union in concerted action should focus and base gaming regulation on content and providers of gaming services (supply side) like it has been done in other services sectors and not seek to create 'borders' to an otherwise borderless medium by imposing disproportionate and ineffective measures on the 'intermediaries' such as providers of transmission or storage of data. BMIT believes that this consultation process and dialogue to ensue between all stake-holders should help in creating a better understanding of the regulation of online gaming and the opportunities that this sector provides, not least to the regulators.