Ethics or Euros? Policy towards Cross-Border Gambling in the European Union

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Abstract

This paper considers the highly controversial issue of whether there should be a single European market for gambling. Contrasts are drawn between the policies of the UK government which stresses competition and those of some European Union governments, which favour local monopolies, officially to protect their citizens, but also apparently to protect a lucrative revenue source. The paper draws on perspectives from public policy, business and management and law to analyse the current situation regarding online gambling in the EU and speculates on the future.

Keywords: Gambling, online gambling, e-commerce, regulation, European Union
Introduction

This paper addresses the topical phenomenon of online gambling, which has allowed gambling operators to enter highly regulated markets and has thus posed "new challenges for government regulation and national sovereignty" (McMillen, 2000, p.391). The most well known example involving this industry has been that of the United States, which is estimated to have generated $6 Billion in online gambling revenues in 2005, but where the authorities view online gambling as illegal. This lucrative market was thus served by offshore firms a number of whom would controversially join the London Stock Exchange. The US, however, moved to assert its authority by arresting two online gambling executives who were travelling through American airports in 2006. Legislation was then passed by the US Congress in September 2006 prohibiting US financial institutions from transferring funds to online gambling firms (Nelson Rose, 2006), which dealt a crushing blow to the UK listed firms which served the US market (Laffey, 2007). This paper is, however, concerned with online gambling within the European Union, which has also seen controversial national regulation. Whilst online gambling firms emphasise that they are offering choice to EU citizens, governments argue the need to protect their citizens (and their tax revenues). The most extreme cases of such action bore strong parallels with the US, when in 2006 and 2007 the Chief Executives of gambling firms based in Austria and Malta respectively were arrested and charged with breaching French gambling law. However, whilst the US situation involved offshore firms, in Europe firms based within the European single market were being challenged about the legality of their operations, a situation which appears to contradict the notion of a single European market.

Objectives

This paper considers whether there is a single European market for the online gambler. The EU has historically taken the approach that issues of public interest are a matter for the individual states concerned. This paper will consider the following questions. Can restrictions upon entry into the European market can be justified in a single market? Should governments have the right to protect their peoples from vices such as gambling? Or are the governments actually excluding firms because they make money from state monopolies on gambling? It will finally consider whether the European Union should take steps to establish a common legal stance on gambling. This paper focuses on UK gambling firms who operate online, as the UK takes a relatively liberal approach to gambling regulation, and considers their legal position in Europe, as they try to enter this market. UK gambling firms are defined here as organisations with their headquarters based in the UK, to avoid confusion with the many offshore online gambling firms who are listed on the London Stock Exchange.

It should be noted that gambling services can be offered anyway through websites, but the traditional UK firms prefer to remain on the right side of the law and gain licensing rights in jurisdictions where the legal situation is in doubt. However, the newer players in the market are often more cavalier as they attempt to build their revenues, with Sportingbet – a 1998 start-up – being one of the firms targeted in the US crackdown.
What is Gambling?

Gambling involves people risking money on the outcome of an unknown event for financial gain. The industry of gambling can be categorised into activities which involve *random outcomes*, such as lotteries and slot machines, and activities which can involve *judgement*, such as some card games and betting on events (Budd Report, 2001). The word “can” is used here as a sports bettor may be as random in their choice of bet as someone picking “lucky numbers” for a lottery.

The global gambling market was estimated to have generated net revenues (stakes minus amount winnings paid out) of $258 Billion (US Dollars) in 2004, and was expected to grow to $282 Billion in 2009. The US represents the largest market accounting for 47% of net revenues, with Europe coming second at 28% (PartyGaming, 2005).

Traditional approaches to gambling regulation

The inevitable problems that are associated with gambling, most chiefly addiction and the potential for criminal involvement, lead most governments to prohibit it or allow gambling under a strictly controlled regulatory regime. Clarke and Dempsey argue that gambling regulations “should aim to strike a balance between, on the one hand, the social ills that may arise as a consequence of the activity…… and, on the other, allowing adults to exercise their free will, and encouraging economic activity which provides a net inflow of income into a jurisdiction” (1998, p.10).

In many European states the need to regulate the gambling industry has seen the emergence of state controlled gambling organizations or monopolies. Legalisation, of course, also provides a revenue stream to the government but raises questions of competition and choice for the consumer. The UK is considered to have emphasized commercial considerations in its approach to gambling and is home to many well established gambling organizations and numerous Internet start-ups (Laffey, 2005).

The Phenomenon of Online Gambling

This paper is primarily concerned with online gambling, but it is noted, however, that this is not the only way in which gambling can take place remotely. Gambling can occur over the telephone, or by means such as interactive television.

National arrangements to regulate gambling have been disrupted by the “virtualisation of gambling” (Clarke and Dempsey, 1998, p.4). Suddenly highly regulated markets have been opened up to competition. Online gambling was estimated to be worth $13 Billion (US Dollars) in 2005, 5% of total gambling revenues, and was estimated to grow to nearly $23 Billion in 2009, 8% of the industry total (PartyGaming, 2005). Whilst the US accounted for about half of this revenue, over a quarter came from Europe, a share which was expected to increase.

Online gambling enabled the emergence of numerous start-ups who would focus on international markets operating from locations such as the Caribbean and Gibraltar who offer online gambling licenses and low, or even zero, rates of corporation tax in order to gain an economic boost. The industry would also see the addition of Internet arms by established players such as the UK bookmaking firms Ladbrokes, William Hill and Coral.
Online gambling faces an important problem however; the fact that the Internet has moved faster than the law. Associated to this problem is the issue of conflict of laws, given that “every nation can unilaterally regulate every Internet transaction” (Goldsmith, 2000, p.135). In an online transaction, whose laws apply?

The United Kingdom and The Law On Gambling

The key focus of UK government policy on gambling has been on national competitiveness in order to gain the economic benefits and associated tax revenues. This was illustrated by the legislative reaction to the growth of offshore betting in the late 1990s. Bets placed with operators based overseas (mainly through the telephone and also via the Internet) could avoid the payment of betting duty, which was a tax levied on the customer (stakes or winnings) and added 9% to the cost of a bet. In response to this the large UK bookmakers set up overseas operations to remain competitive. The government wary of the loss of revenue from betting, £500 million in 2000, then negotiated the return of the UK bookmakers in return for legislation which replaced betting duty with a tax on gross profits a move which greatly stimulated demand (Paton et al, 2002).

The government proved itself willing to take a liberal approach to the online industry. Online betting was allowed in the UK as it was seen as simply an extension of telephone betting which had long been legal. Online casinos, however, could not be licensed until the Gambling Act (2005) was implemented in 2007. Prior to this the operation of casinos in the UK’s jurisdiction came under the 1968 Gambling Act which required the customer to be present in the room where the gambling takes place. But even before the statutory changes came into force, a quick search on Google enabled gamblers to enter the online casinos operated by William Hill or Ladbrokes. Given that this was apparently unlawful, how could these firms do this? The simple answer was that they operated offshore.

In the UK it is accepted that online gambling takes place where the website is. This effectively means that as long as the website is in a place where online gambling is legal, there are no legal barriers to online gambling. This position is in contrast to the position taken by many other states (notably the US and a number of European states), who have effectively made the decision that online gambling takes place where the customer is, a position which outlaws the use of foreign gambling websites within their jurisdiction.

The Gambling Act (2005) is the most recent UK legislation. This Act was given royal assent on April 7, 2005, and was implemented fully this year. It is notable that during this Act’s passage through Parliament the large bookmakers made considerable efforts to petition Parliament in order to ensure that the legislation was favourable to them. The final Act represented efforts by the drafters to balance the needs of the UK’s gambling industry in a competitive global market, against the problems caused by gambling.

This Act was, amongst other things, designed to deal with the growing phenomenon of ‘remote gambling’, as an article on BBC News Online makes clear: “[t]he scale of growth in online betting was one of the driving forces behind the Gambling Act…” (BBC News Online, 2006) The report which this Act was based upon, the Budd Report (2001), dealt with the issue of online gambling:

“Online gambling should be seen as just another way of delivering a service. We have set out… the principles that should govern the regulation of gambling and these apply as much to on-line gambling as to any other type of gambling. In addition, there are
particular characteristics of on-line gambling that may make regulation even more desirable.” (Budd Report, 2001, p.167)

The Gambling Act dealt with the issue of online gambling under a wider heading, namely, “remote gambling” (see below). This decision will allow the provisions of the Act to apply to new technology, as and when it develops:

“(1) In this Act “remote gambling” means gambling in which persons participate by the use of remote communication.
(2) In this Act "remote communication" means communication using-
(a) The Internet,
(b) Telephone,
(c) Television,
(d) Radio, or,
(e) Any other kind of electronic or other technology for facilitating communication.
(3) The Secretary of State may by regulations provide that a specified system or method of communication is or is not to be treated as a form of remote communication for the purposes of this Act (and subsection (2) is subject to any regulations under this subsection).”

Under the Gambling Act online gambling can now be licensed within the UK (section 67, Gambling Act). Whether this will persuade offshore operators to come to the UK is another matter, and will depend upon the various taxation regimes available. What is clear about the Act though, is that it follows the UK government’s traditionally liberal approach to gambling.

The UK gambling industry is lucrative. A KPMG Report suggests that “gambling accounts for more than half of the UK’s total out-of-home leisure expenditure – more than five times what we spend on health and fitness and more than 10 times what we spend visiting the cinema” (KPMG, 2003, p.6). The deregulation of the Gambling Act can only lead to further growth. And there can be no doubt that despite lip service that the Gambling Act pays with respect to helping problem gamblers, any help offered will not outweigh the problems caused by the increasing ease of access (the problem gambler will still have no difficulty placing their bets in the middle of the night).

However profitable the market in the UK is, however, big firms will always look for new markets. And online products, such as gambling, are easy to roll out to other markets. So where better for the UK gambling firms to tout their services than in the single European market place.

The European Union and The Law On Gambling

If the British government has taken an increasingly liberal approach to gambling is the same true in the EU? The ever increasing online gambling industry means that the issue is extremely relevant. There is no doubt that the European market is large. However, the legal position of online gambling within the EU is not clear. A firm of attorneys giving advice to those firms trying to break into the European market talks of its inherent “regulatory uncertainty” (Latham & Watkins, 2006), a position which has caused considerable problems for the UK online gambling firms as they try to enter the European market. So, what does EU law actually say on the issue of online gambling within the single market?
The essential background to EU Law

The European Union has a well developed legal system, with three strands; primary legislation (the treaties), secondary legislation (regulations, directives and recommendations), and case law (the decisions of the European Court of Justice).

Unsurprisingly, there is no mention of gambling in the treaties. There are, however, three provisions in the Treaty establishing the European Community (2002) that will have relevance in this area.

- Article 46: Discriminatory restrictions permissible on grounds of public policy, public security or public health
- Article 49: Freedom to provide services
- Article 50: The meaning of ‘services’

Gambling is not currently dealt with by secondary legislation (although, as we shall see later, the gambling industry was disappointed that gambling was excluded from the Services directive in February of this year). Thus, in order to examine the way in which these provisions apply to the online gaming industry, this paper will need to consider the rich body of case law which has developed in this area.

The highest legal body within the EU is the European Court of Justice (the ECJ). It is this body which has created the legal regime governing online gambling within the EU. Before considering the case law in question, it is necessary to explain briefly how the ECJ operates. The ECJ is the supreme court of the EU, ruling on matters of interpretation of European law. It is made up of 25 Judges and 8 Advocates General, appointed by the governments of the Member States.

The Judges of the Court have an obvious role – they rule on the legal issues before them. The position of the Advocates General is different. The Advocate General exists to advise the Court. An Advocate is not involved in the case, neither are they judges. They will simply give their legal opinion based upon the facts of a case before the Court rules on it. The Opinions of the Advocates General are not binding upon the Court, but in practice they are often followed.

The ECJ has a clear jurisdiction, which it can exercise in a number of proceedings, laid down by the Treaty establishing the European Community, including references for preliminary rulings, actions for failure to fulfill obligations, actions for annulment, actions for failure to act, appeals, and reviews. (Curia, 2006)

The ECJ’s Case Law on cross border gambling

The body of case law concerning gambling over national boundaries within the EU dates back to 1994 – before the widespread use of the Internet. Nonetheless, principles established in these cases are relevant to today’s online activities.

The first case to deal with the issue of cross border gambling was Schindler (1994), which followed a request for a preliminary ruling from the ECJ by the UK’s High Court. In this case letters were posted from the Netherlands to UK nationals, which were confiscated at Dover by HM Customs, under UK legislation controlling lotteries. This was claimed to be a breach of the free movement of goods, under European law. The ruling of the ECJ on this case proved to be the foundation stone for a long line of jurisprudence on this subject. So what did the ECJ say?

“1. The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member
State relates to a “service” within the meaning of Article 60 of the Treaty and accordingly falls within the scope of Article 59 of the Treaty;

2. National legislation which, like the United Kingdom legislation on lotteries, prohibits, subject to specified exceptions, the holding of lotteries in a Member State is an obstacle to the freedom to provide services;

3. The Treaty provisions relating to freedom to provide services do not preclude legislation such as the United Kingdom lotteries legislation, in view of the concerns of social policy and of the prevention of fraud which justify it. This case involved the advertisement of a German lottery to UK nationals.” (Schindler, 1994, operative part)

Thus, after the Schindler ruling, it was clear that lotteries would be treated as services, rather than goods, for the purposes of EU law, and would thus be subject to the Treaty provisions on the free provision of services, subject to limitations on the grounds of social policy. This meant that the UK government could restrict, or even prohibit, lotteries from other member states, for, as the ECJ pointed out, “it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling….” (1994, paragraph 60) The government would not, however, be entitled to do this in a discriminatory manner (1994, paragraph 61).

Schindler was followed by two cases in 1999, Läärä and Zenatti, which extended the Schindler principles to other forms of gambling; in the former case to slot machines and in the latter to sports betting. In the second case, it is interesting to note that the ECJ emphasised that financial benefits accruing on a government as a result of such a limitation could not be sufficient justification for such a limitation upon freedom of services:

“[S]uch a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.” (Zenatti, 1999, paragraph 36)

When would the financial benefit be purely coincidental, and when would it be the real objective? The Court held that this must be a matter for the municipal court to decide (Zenatti, 1999, paragraph 37).

The ECJ continued to give national governments wide powers in restricting cross border gambling, in the Anomar case (2003) allowing a state monopoly on games of chance within Portugal.

“In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy” (Anomar, 2003, paragraph 6, operative part).

The most important case to date is the Gambelli case (2003). This case involved criminal proceedings in Italy. It is of particular interest to this paper, given that Gambelli (along with a number of others) had been acting as agents for Stanley International Betting Limited (a part of Stanley Leisure, a UK bookmakers firm, now taken over by William Hill). Gambelli was prosecuted under an Italian law which prohibited unlicensed bodies accepting bets from Italian citizens. In this case the ECJ ruled that:

“National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets
on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services…. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives” (Gambelli, 2003, operative part).

This case is thus following the ECJ’s existing line of jurisprudence, stating that such restrictions are in breach of the right to provide services freely, but acknowledging that states are entitled to restrict this right for reasons of social policy. As to whether such restrictions were justified, the Court held that this was a matter for the national court to decide.

It is, however, interesting to note that the Advocate General in this case, Siegbert Alber, had taken a more liberal stance.

“The provisions… concerning the freedom to provide services are to be interpreted as precluding national legislation like the Italian legislation [in question]….., where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State” (2003, paragraph 134).

Ultimately though, the ECJ did not follow the opinion of the Advocate General (as it is at liberty to do) and continued with its earlier approach. This case has come to be considered a landmark case in this area. The Court certainly emphasizes the fact that a state has to justify a restriction on the freedom to provide services – a justification that must go beyond a financial benefit which a government can accrue from such a limitation. The restriction must have ‘real’ benefits if it is to be justified, and it must not be ‘disproportionate’, a situation to be decided by the national court. But whilst there is a de jure ban on the maintenance of restrictions unless they can be justified for reasons of social policy and are not disproportionate, there can be no doubt that, de facto, states are restricting gambling for other reasons. Ultimately this ruling leaves the Member states with a wide margin of appreciation in respect of the limitation of gambling within their borders. In the end then, as O’Connor suggests, “Gambelli was not the landmark case that many have made it out to be” (2006).

Gambelli is not the end of the story, however. The issue of cross border gambling is once again before the ECJ, in the Placanica case. Will the Court continue to allow states their wide amount of discretion in this area?

What does the Gambelli ruling mean in practice? Given that municipal courts retained the power to say if restrictions were designed only for social policy reasons, Ladbrokes, for example, shut down its German language internet sites, following a ruling in a German Court in November 2003 (Casinomeister, 2003). In a more extreme ruling, once again in Germany, a German Court held that “all internet cafes would need to hold a valid gaming licence on their computers…. [as] a computer could potentially be used as a gaming device” (European Economics, 2004, p.27). A study of European case law will thus warn a UK gambling firm that wishes to penetrate the European market that, a common market notwithstanding, states themselves will decide when it is legitimate to control gambling within their borders. Effectively, therefore, as Latham & Watkins, Attorneys, point out, “[i]n the absence of harmonizing measures introduced at the EU level, restrictive national laws will continue in force” (2006).

Today, therefore, there is no European single market for gambling. States have retained rights to limit gambling for reasons of social policy. Is this position sustainable?
Discussion

A Single Market for Gambling?

Should the EU bring in clear cross-border laws on gambling? If nothing else, it will reduce the ECJ’s case load – which can only be a good thing, given that the ECJ is overstretched. Perhaps more importantly though, is the issue of justice in a single market. Should states effectively be able to opt out of the single market in this respect? Certainly states can only place restrictions on gambling where there is a strong social justification, but as this paper has pointed out, the de facto justification all too often seems to be revenue raising. So is there a need for a common EU policy on gambling?

Recently the European Commission considered a Directive on Services in the Internal Market (European Commission, 2006). This directive was “aimed at breaking down barriers to trade in services across the EU” (Euractive, 2004). It would, therefore, have been a natural forum in which to discuss the gambling issue (and perhaps lay to rest the issue). Latham & Watkins, Attorneys, pointed out that, if online gambling were included in this directive, “an operator would only be subject to the regulations in its country of origin regardless of where its services were available” (2006).

However, at its first reading before the European Parliament in February 2006, gambling and lottery issues were specifically excluded from its scope (Euractive, 2006). This decision was not without its critics, including some MEPs, “who think that it will increase the number of court cases and complaints addresses to the Commission.” (Euractive, 2006) Indeed, the European Commission is currently investigating “internal market violations in the sports betting sector in 7 Member States.”, the states in question being Denmark, Finland, Germany, Hungary, Italy, Sweden and the Netherlands (European Betting Association, 2006c). It should be noted that this investigation follows on from the Gambelli case, and the ECJ’s emphatic statement that there must be justification for any such restrictions. The Commission is investigating the actions of the seven states with regards to their restrictive gambling controls, as a result of concerns that such controls are aimed at revenue raising rather than social protection.

The European Betting Association is one body who believes in a common market for gambling, “promot[ing] a liberalised cross border sports betting market” (2006a). It raised considerable concerns about the European Parliament’s exclusion of gambling from the services directive, claiming that it is maintaining the protectionist status quo (2006b). But it makes an interesting point, holding that a common legal position on gambling within the EU will actually be more socially responsible:

“The greatest risk is that, while searching for alternatives, the consumers will not be able to make distinctions between EU operators who can demonstrate a strong track-record of social responsibility and those offering similar services from off-shore jurisdictions which are subject to little or no social responsibility requirements” (European Betting Association 2006b).

Whilst the European Betting Association cannot be said to be a disinterested observer, there is certainly some logic in its argument. Rational, well designed controls could well prevent people going online to gamble in jurisdictions without the safeguards that a civilized body such as the EU would put in place.

It can, of course, be suggested that should the EU create a common legal regime in this area, removing a state’s right to claim the need for restrictions for social policy reasons, the EU would
actually be legitimising gambling. But, whilst there can be no doubt that gambling can be the source of considerable harm, one can certainly argue that a common legal regime in this area is desirable. This position would mean that, within the EU, all online gambling firms would operate on a level playing field. Given that it appears that many states seek to control gambling, and maintain a monopoly, not for reasons of social policy, but rather because it is an easy source of revenue, such a movement would be a step towards justice in this area.

What does the Future Hold?

This paper has now looked at what the law is, and we have seen that a chance to rationalise the law in this area has been passed over. There are, however, developments in this area, which could turn the law round, to the advantage of the British online gambling firms.

In a 2006 commentary by an Advocate General, it was held that “the 2004 Gambelli ruling did not provide a complete examination of the impact of the EC Treaty fundamental freedoms on the gambling sector” (Placanica, 2006). There is, of course no guarantee that the ECJ will deviate from its previous line of jurisprudence in this area (as happened in as in the Gambelli case. Then, too, the European Commission is examining the legal position of restrictions existing in a number of states. The decision in October 2006 by Charlie McGreevy, the Commissioner for the Internal Market and Services, to launch legal action “against France, Italy and Austria…for running gambling monopolies”, which he expected would be extended to “15 or 16 member states” (Harrison, 2006) appeared to be a statement of intent towards achieving a single EU market for gambling. This pressure did seem to have an impact, with the Italian government liberalising its gambling market and stating it would allow “games of skill” (Reuters, 2007), the Swedish ruling party voting to end the Svenska Spel monopoly and move to a regulated environment (ATE, 2007) and the French government stating its was prepared to discuss regulation of Internet gambling (Walsh, 2007). In contrast to this, however, the detention of the Unibet CEO in Holland under a French warrant demonstrated the deep divisions which still existed. The French government insisted they were not in breach of the single market, whilst the European Commission stated they were (Walsh, 2007).

Entry into Europe?

The current position for the British gaming firms trying to enter the European market is therefore really one of ‘wait and see’. On the one hand, it seems unlikely that online gambling, already by its nature supranational, will remain outside the scope of European law (this is the de facto position, not the de jure position). On the other hand, a number of European governments are doing their best to make sure that the status quo is maintained. Certainly, the British firms should be ready to enter the market, if there are clear statements from the central European bodies that the law supports them. It can only be a matter of time before this is the case. But in the meantime, they would do well to make sure that they operate within the various laws of the member states.

Conclusion

The issue of whether there should be a single market for the purposes of gambling is fraught. On the one hand, gambling firms wish to be allowed to enter the European market on an equal basis
with existing organizations (often state monopolies). On the other hand, a number of EU governments wish to maintain the status quo, officially to protect their citizens (but, all too often, to protect a lucrative revenue source). Whatever conclusions are drawn about online gambling, however, it is a subject that will not go away. Today’s gamblers have grown up with the Internet, and will inevitably go online to gamble.
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