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WHEN THE DEALIN'S DONE? RECENT DEVELOPMENTS IN ONLINE GAMBLING LAW AND POLICY

*Daithí Mac Síthigh**

Abstract

A report on the European Commission's 2014 Recommendation on online gambling and the Gambling (Licensing and Advertising) Act 2014 in the UK.

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* Reader, Newcastle Law School, Newcastle University, UK. Email: daithi.macsithigh@ncl.ac.uk. Title with apologies to Kenny Rogers, who turned 68 on the day this note was submitted.

1. Introduction

2014 is turning out to be another year of activity in relation to the regulation of gambling, particularly online gambling. This sector is still evolving, and it has not been a decade since the last major reform of gambling law in Great Britain.¹ The Court of Justice of the European Union continues to hear cases on the topic of gambling every year. Meanwhile, both the European Commission and UK Government have been reviewing the operation of current laws and putting forward proposals that can broadly be characterised as either new forms of regulation or the re-regulation of recently deregulated fields. This short note reviews the most recent initiatives at both levels.

2. European Commission recommendation

The context for the interest of the Commission in gambling is that gambling is clearly a field of relevance to European Union law, but is not (yet) the subject of its own Directive. Gambling is not itself cited in the Treaties, but it (and online gambling) is easily characterised as a service and, therefore, subject to the fundamental freedoms of EU law (article 56 TFEU).² Gambling is frequently mentioned in other Directives, but typically in a way that avoids the said Directive applying to the special case of gambling.³

The CJEU has, unsurprisingly, filled in the gaps through its regular consideration of challenges to national laws on gambling. This was aptly characterised as a ‘tug of war’ by Hornle in 2011;⁴ initially deferential to national legislatures, then applying closer scrutiny of the proportionality of member state regulation (i.e. favouring liberalisation), but ultimately upholding a number of restrictive measures in individual member states. Van den Bogaert and Cuyvers, in a detailed analysis of the case law, concluded that the Court “does not protect cross-border gambling activities with its

¹ *Gambling Act 2005*. By and large, recent gambling laws in the UK (in particular, the 2005 Act) extend to England, Wales and Scotland only. Gambling in Northern Ireland is governed by an adaptation of older UK laws. See *Betting, Gaming, Lotteries & Amusements (Northern Ireland) Order 1985*; Northern Ireland Executive, “McCausland announces plans to update gambling laws” (10 January 2013) available at <http://www.northernireland.gov.uk/index/media-centre/news-departments/news-dsd/news-releases-dsd-january-2013/news-dsd-100113-mccausland-announces-plans.htm> (accessed 21 Aug 14).

² *Gambelli*, [2006] 1 CMLR 35 [52]-[55] (online), following *Schindler* [1995] 1 CMLR 4 (import of lottery tickets).

³ *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, [2006] OJ L 376/36, recital 25 and article 2(2)(h); *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services* [2010] OJ L 95/1, recital 22; *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights*, [2011] OJ L 304/64, recital 31 and article 3(3)(c).

⁴ J Hörnle, “Online Gambling in the European Union: a Tug of War without a Winner?” (2011) 30 *Yearbook of European Law* 255-297.

ordinary internal market vigour” and that member states “are virtually given *carte blanche* to regulate gambling at national level”.⁵

The Court has subsequently shown itself willing to find against national measures,⁶ but continually emphasises the acceptability of national licensing systems without mutual recognition between states,⁷ tolerance for different approaches to regulation⁸ and the existence of moral (et al) differences between states.⁹ Indeed, because these cases are often focused on the narrow question of whether a law is compatible with the Treaties there are still significant differences between the overall approach to gambling between member states, as well as differences in the treatment of matters like advertising and the regulation of the player experience.

The European Commission responded to the emergence of gambling as a controversial issue in EU law through the publication of a Green Paper in 2011.¹⁰ The paper (on ‘online gambling in the internal market’) reflected on the growing body of CJEU caselaw and set out the Commission’s intentions in this sector. This was followed by a Communication in October 2012,¹¹ where the Commission promised to issue Recommendations on both the protection of consumers and minors and on responsible commercial communications (i.e. advertising and sponsorship). The Commission has also considered infringement proceedings against member states.¹²

The new Recommendation,¹³ published on 14 July 2014, deals with both ‘protection’ and ‘promotion’ issues to some extent. Its approach is interesting; it is framed as support for member states in pursuing public interest objectives (defined as the protection of consumers and health), and commends a preventive approach. Specifically, the Recommendation addresses the registration and protection of players; recommends actions in relation to sponsorship and advertising; calls for information to be made available on websites; seeks greater awareness of the risk of non-EU service providers; and also sets out aspects of how the sector should be regulated.

The Recommendation is a cautious one. The Commission points out in its supporting material that players could ‘start looking for competing gambling opportunities’ if

⁵ Stefaan Van den Bogaert and Armin Cuyvers, “‘Money for nothing’: The case law of the EU Court of Justice on the regulation of gambling” (2011) 48 *Common Market Law Review* 1175–1213, 1209.

⁶ See for example *Pflager*, Case C-390/12, [2014] OJ C343: Austrian regulation of gaming machines not justifiable, on the grounds that it does not actually pursue the legitimate objective of addressing gambling-related crime or do so consistently.

⁷ *Stoss*, [2011] 1 CMLR 20 [112-116]

⁸ *Liga Portuguesa de Futebol*, [2010] 1 CMLR 1 [58].

⁹ *Hit Hoteli / Hit Larix*, [2012] 3 CMLR 39 [25]; *Pflager*, see note 6 above, at [44-46]; *Liga Portuguesa de Futebol*, see note 8 above, at [57].

¹⁰ European Commission, “On-line gambling in the Internal Market” COM(2011) 128 (24 March 2011)

¹¹ European Commission, “Towards a comprehensive European framework for online gambling” COM(2012) 596 (23 October 2012).

¹² European Commission, “Commission requests Member States to comply with EU law when regulating gambling services” IP/13/1101 (20 November 2013).

¹³ *Recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online*, [2014] OJ L 214/38.

unsuitable services are unavailable,¹⁴ and repeats this point (or a version of it) frequently. It also acknowledges that while a Directive would be the best response to the problems in this market there was insufficient support for one being adopted.¹⁵ A table prepared by the Commission also leads the reader to the conclusion that possible topics for inclusion in the Recommendation (e.g. EU-wide self-exclusion and registration) were excluded because of unacceptability to member states.¹⁶ The European Parliament is unusually reluctant to assert an EU role in this case.¹⁷

Four particular features of the Recommendation can be highlighted: the protection of minors, provisions on registration, standards for advertising, and consumer protection in general.

2.1 Minors

The Commission recommends that minors should not be able to use an online gambling service (play or hold a player account).¹⁸ ‘Minor’ is not defined other than as the minimum age set at national level,¹⁹ depriving this recommendation of most of its meaning. The more detailed provisions, however, do set out some significant principles, including: avoiding inducing minors ‘to view gambling as a natural element of their leisure time activities’;²⁰ alcohol-style avoidance of associating gambling with youth culture or transitions to adulthood;²¹ and a recommendation that member states should ‘encourage’ (and here the double conditionality appears deliberate, in contrast with other recommendations that member states should ‘ensure’) that minors are protected from commercial communications regarding gambling (for instance, by such communications not being broadcast where minors are ‘expected to be the main audience’).²² It is indicative of the lower priority given to action on gambling that stronger versions of these provisions, in respect of alcohol and tobacco, are already included in the (binding) Directive on audiovisual media services.²³

¹⁴ European Commission, “Impact assessment accompanying Recommendation 2014/478/EU” SWD(2014) 233, executive summary, p 1.

¹⁵ *Ibid* 4.

¹⁶ *Ibid* 3.

¹⁷ See for example resolution 2012/2322(INI) on online gambling in the internal market (10 September 2013), following the report of the Committee on the Internal Market and Consumer Protection (11 June 2013).

¹⁸ *Recommendation 2014/478/EU*, art 8.

¹⁹ *Recommendation 2014/478/EU*, art 3(e).

²⁰ *Recommendation 2014/478/EU*, art 11.

²¹ *Recommendation 2014/478/EU*, art 14(d).

²² *Recommendation 2014/478/EU*, art 13.

²³ *Directive 2010/13/EU*, articles 9 and 22.

2.2 Registration

Detailed sections of the Recommendation deal with the relationship between the user and service provider. The Commission calls for services to be based on registration, with verification of identity where possible.²⁴ Players should be able to set their own limits (on money and time), and be able to exclude themselves from further participation²⁵. Service providers should both provide information and highlight sources of help regarding problem gambling.²⁶

Self-exclusion is a key part of the regulation of gambling, but its impact in the digital age is weakened by self-exclusion being specific to an operator or to a given nation. This is addressed in part through a recommendation that national registries be used,²⁷ although as noted above, an EU-wide approach was not proposed due to member state objections.

Experimental research carried out for the Commission includes the striking finding that a detailed registration form could cause less experienced users to abandon an attempt to register with a particular service.²⁸ The report on the research suggests, more than once (and clearly with an influence on the Commission's final decisions) that this could push users to websites regulated in a way that does not require this level of detail. However, this point was not tested in the research in any way and no evidence was provided in support of it.

2.3 Commercial communication

A series of points on the content of commercial communications (advertising, etc) are also set out in the Recommendation. These include carrying messages on the health risks of problem gambling,²⁹ not portraying gambling as a solution to financial or social problems,³⁰ and avoiding misleading the audience on chance and skill.³¹ On sponsorship, a potentially wide-reaching recommendation is that event sponsorship 'designated for or mainly aimed at minors' be prohibited and (more significantly?) that where sponsorship is permitted it not be used in merchandising designed for minors.

²⁴ Recommendation 2014/478/EU, arts 15-20.

²⁵ Recommendation 2014/478/EU, arts 24 and 29.

²⁶ Recommendation 2014/478/EU, arts 25-26.

²⁷ This appears to mean systems like that in Denmark: Register over frivilligt udelukkede spillere, available at <https://rofusweb.spillemyndigheden.dk> (accessed 21 Aug 14).

²⁸ European Commission, "Impact assessment accompanying Recommendation 2014/478/EU" SWD(2014) 233, part 2, pp 11-12.

²⁹ Recommendation 2014/478/EU, art 40.

³⁰ Recommendation 2014/478/EU, art 41(e) and (f).

³¹ Recommendation 2014/478/EU, art 41(a) and (b).

2.4 Consumer protection in general

It is apparent from the experimental research carried out in preparation for this Recommendation that greater use of ‘warnings’ was under consideration. The research found, however, that this had a limited statistically significant effect on participation in online gambling, either in terms of the amount spent or the time taken to act. This was particularly apparent in the case of a wide range of forms of information presented before gambling (all found to be ineffective),³² although the use of alerts during gambling (e.g. time and money spent) did appear to be more effective.³³

3. Offshore gambling and Great Britain

While the European Commission attempts to influence national regulation of gambling through its Recommendation, there are other pressures on member states. In Great Britain, the current regulatory system is dominated by the Gambling Act 2005, and its enforcement by the Gambling Commission.

The core concern of the 2005 Act was deregulation. The Act swept away a complex, often inconsistent, set of 20th century statutes on gaming, betting and lotteries (some of which had been spectacularly ineffective due to workarounds like members’ clubs), and also addressed the application of British law at a time when services were starting to become more readily available via the Internet. Applying for licences became much easier, with historic restrictions on the operation and promotion of gaming and betting services being broadly reduced or removed entirely. Operators could apply for ‘remote gambling’ licences,³⁴ (with ‘remote communication’ including the Internet as well as telephone, radio and TV) which were required if at least one piece of ‘equipment’ for the service was located in Great Britain. Prior to 2005, the provision of certain forms of online gambling in Britain (gaming in particular) appeared to be unlawful, although British users could readily use sites situated outside the country.

Under the 2005 Act some operators not regulated by the Gambling Commission can legally advertise their services to audiences in the UK (Great Britain and Northern Ireland alike). An operator regulated in any of the applicable locations – specifically the EU/European Economic Area; Gibraltar; a ‘whitelisted’ state (such as Antigua & Barbuda) approved by the UK Government as having adequate regulation of gambling; or, of course, an operator regulated by the Gambling Commission in Britain – is permitted to advertise their services.³⁵ In practice, few remote operators have been licensed by the Gambling Commission (taking the view that they did not need to do so because no equipment was located in Britain), no major overseas operators relocated to Britain, and household names operating online or offline in

³² European Commission, “Impact assessment accompanying Recommendation 2014/478/EU” SWD(2014) 233, part 2, p 8.

³³ *Ibid* 12.

³⁴ *Gambling Act 2005*, s 4 (definition), s 33 (offence of providing facilities for unlicensed gambling), s 67 (remote operating licence)

³⁵ *Gambling Act 2005*, s 331.

Britain rapidly opened online services in (or moved existing services to) other jurisdictions, particularly Gibraltar.³⁶

The advertising of gambling in the UK is clearly a growing phenomenon; in respect of television alone, it has grown from 90,000 spot advertisements in 2005 (representing 0.5% of the total TV advertising) to 1.4 million in 2011 (4.1% of the total).³⁷ Advertising of ‘online casino and poker’ services is close to a third of this total. A power to regulate gambling advertising through secondary legislation does exist in the 2005 Act (i.e. above and beyond the normal co-regulatory and self-regulatory systems for the control of advertising, and in respect of any medium),³⁸ but it has never been exercised.

The Gambling Commission estimated in 2013 that 85% of the remote market in the UK was not licensed by the Commission.³⁹ The Gambling (Licensing and Advertising) Act 2014 attempts to change this, requiring that service providers must both register with and comply with the conditions of the Gambling Commission if they wish to do business with British consumers. This is achieved by extending the requirement for registration to facilities that an operator knows, or should know, are ‘used’ (including where the operator knows, or should know, that they are ‘likely to be used’) in Great Britain, even if no equipment is situated in Great Britain.⁴⁰ This was first identified as a preferred option in a UK consultation paper in 2010 (under the previous Government)⁴¹ It is clearly the Government’s intention to bring within the scope of the Act those online services where a server is located outside Britain but is accessed by a player within Britain.

Furthermore, the system for allowing the advertising of services established in the EU, EEA, or the ‘whitelisted’ jurisdictions (determined by the UK as having sufficient regulatory protection) has been abolished.⁴² Only remote services regulated

³⁶ Department for Culture, Media & Sport (DCMS), “A Consultation on the Regulatory Future of Remote Gambling in Great Britain” (March 2010), [3.5]-[3.6] available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/72860/remotegambling_consultation.pdf (accessed 21 Aug 14). See also the statement announcing the Government’s proposal to reconsider the 2005 Act: HC Deb vol 503 col 11WS (7 January 2010).

³⁷ Ofcom, “Trends in advertising activity: gambling” (November 2013) 4, available at http://stakeholders.ofcom.org.uk/binaries/research/tv-research/Trends_in_Ad_Activity_Gambling.pdf (accessed 21 Aug 14).

³⁸ *Gambling Act 2005*, s 328.

³⁹ Philip Graf, “Keynote speech: IAGA International Gaming Summit 2013” (18 June 2013) available at <http://www.gamblingcommission.gov.uk/pdf/IAGA%20Gaming%20Summit%20-%20London%20June%202013.pdf> (accessed 23 Sep 2014).

⁴⁰ *Gambling (Licensing and Advertising) Act 2014*, s 1, amending *Gambling Act 2005*, ss 33 and 36.

⁴¹ DCMS, see note 36 above, at [4.27] (as “the need to obtain a licence to transact with British consumers and advertise in the UK”). The then proposal was for regulation of services “transacting with” British consumers and/or locating equipment in Great Britain. As noted above, the 2014 Act follows the “or” rather than “and”, but refers to “use” of facilities in Britain rather than transactions. The 2010 proposal also included a plan for an improved whitelisting system (rather than its complete abolition).

⁴² *Gambling (Licensing and Advertising) Act 2014*, ss 3-5, amending various provisions of *Gambling Act 2005*, pt 6.

by the Gambling Commission will be able to advertise in Britain (or indeed Northern Ireland). Again, this option had been floated in 2010.

These provisions are due to come into force on 1 October 2014,⁴³ with transitional arrangements set out in detail in secondary legislation.⁴⁴ Around 150 operators are expected to register with the Gambling Commission. However, the legislation is being challenged by Gibraltar-based operators who argue that the legislation is incompatible with EU law.⁴⁵ These operators, of course, are objecting not just to the regulatory changes but also to the proposed tax changes.⁴⁶

The 2014 Act was facilitated in part by decisions of the CJEU, which has accepted the compatibility of potentially comparable restrictions in other member states. For instance, in *Sjöberg*⁴⁷ a Swedish prohibition on the advertising of services not licensed in Sweden was upheld in 2010. More recently, the Court upheld (in a non-Internet case: *Hit Hoteli & Hit Larix*⁴⁸) a provision of Austrian law which only allowed the advertising of casinos located in other member states if the other state's regulatory system was equivalent to the Austrian one. In these cases the measures were found to restrict the freedom to provide services (article 56 TFEU) but the Court accepted that the restriction was justifiable from the point of view of EU law.

3. Conclusion

The lack of support for a Directive on gambling and the hands-off approach taken by the CJEU are both at the heart of the two recent initiatives discussed above. The Commission's Recommendation deals with important matters, but they are only a subset of the matters that a national regulator of online gambling deals with. The principles do, however, highlight some of the risks associated with the popularity of

⁴³ *Gambling (Licensing and Advertising) Act 2014 (Commencement No.1) Order 2014*, SI 2014/2444.

⁴⁴ *Gambling (Licensing and Advertising) Act 2014 (Transitional Provisions) Order 2014*, SI 2014/1641.

⁴⁵ Nathalie Thomas, "New gambling laws to be challenged through the courts" (*Daily Telegraph* 20 June 2014) (letter before action / intention to seek judicial review); "Gibraltar online gambling firms challenge UK tax" (*Daily Telegraph* 20 August 2014) (judicial review sought); Olswang, "Judicial review against the UK Government and the Gambling Commission" (20 August 2014) available at <http://www.olswang.com/articles/2014/08/judicial-review-against-the-uk-government-and-the-gambling-commission/> (accessed 21 Aug 14) (specifying article 56 TFEU and discrimination as the grounds of complaint under EU law, and also "irrationality" (presumably aspects of the secondary legislation and/or Gambling Commission actions). The letter before action itself is published at <http://gbga.gi/wp-content/uploads/2014/06/Letter-to-the-UK-Government-dated-18-June-2014.pdf> (accessed 21 Aug 14).

⁴⁶ The UK has tried to emphasise the separate decisions, while still pointing to the benefits of both changes coming into effect in proximity to one another. This approach was clearly established as far back as the 2010 consultation (where the DCMS document disavowed any arguments on taxation, stating that this was the jurisdiction of the Treasury), and in the separate announcement of a 'point of consumption' tax on 21 March 2012 by the Chancellor: HC Deb, vol 542, col 803 (21 March 2012). In the light of the jurisprudence of the CJEU, holding that the goal of increasing tax take cannot justify restricting the freedom to provide services (e.g. *Dickinger*, [2011] ECR I-8185), this is understandable.

⁴⁷ [2011] 1 CMLR 11. In Sweden, only non-profit organisations are licenced. The Court did however hold that applying harsher penalties to advertising foreign services than to advertising unlicensed domestic services would be unlawful.

⁴⁸ *Hit Hoteli*, see note 9 above.

online gambling and, as such, they provide us with an insight into the Commission's thinking and the research it is relying upon.

The 'space' created by the cautious approach of both Commission and Court also has interesting consequences for member states. The deregulatory 2005 Act in Great Britain clearly had one eye on the European position; the explicit protection of the right of licensed operators from other member states to advertise, and the desire to see international operators opt in to the modernised British regulatory system demonstrate this. As such, the realisation that the Court of Justice would tolerate a wide range of national (restrictive) measures, and that in terms of legislation neither general Directives nor specific binding rules would affect the gambling sector, meant that the 2010 change of position and the 2014 Act became much easier to defend. Of course, the Gibraltar challenge to the 2014 Act may provide the English courts with an opportunity to consider the CJEU jurisprudence, perhaps contemplating a preliminary reference.

Ironically, if the UK succeeds in effectively re-enclosing its market this could support the arguments (especially at Commission level) that something stronger than a Recommendation is necessary so as to protect the internal market. Only a seasoned gambler would bet on whether the 2014 changes mark the end of an era or not.