

Setting up a Common Legal Framework to Regulate the Gaming Sector in the European Union

ARIANE AQUILINA

Online gaming is considered to be ‘the fastest growing service activity’¹ and has an estimated annual growth rate of 15%.²

One of the issues faced by leaders and officials within the EU is whether it is more convenient for gaming to be regulated by a common legal framework or whether each Member State should be allowed to regulate gaming within its own territory. This problem has to be dealt with in the parameters of the principles of proportionality and subsidiarity that govern EU law. These principles can be found in Article 5 of the Treaty on European Union:

(3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.³

¹ --, 'Gambling' (ec.europa.eu 2014) <http://ec.europa.eu/internal_market/gambling/index_en.htm> accessed 17 February 2014

² Ibid

³ Treaty on European Union 2009 Title 1 Article 5

In keeping with the principles of proportionality and subsidiarity the EU should only interfere and enjoy competence in certain sectors where it is to the advantage of the Member States themselves that the EU regulates matters.

The gaming sector presents unique problems due to the particular nature of the sector itself. Currently the situation is that there is no common legal framework in the EU. This means that Member States all have different laws regarding gaming. This is problematic because it causes confusion especially when various Member States are involved in a particular case. Online gaming is even more complicated as it is of a 'cross-border'⁴ nature. It is prudent to mention that although there is no particular common framework as yet, there are a number of directives issued by the EU to protect the consumer in the economy which also apply to the gaming sector and therefore provide the consumer with some level of supra-national protection, such as the Directive on Consumer Rights.⁵

The uncertain state of gaming regulation within the EU offers a potentially dangerous situation. It is the author's belief that a stable legal framework is necessary to prevent and remedy situations of abuse, such as money laundering. Therefore it is important that the Member States and the EU come to an agreement as to how gaming is to be regulated. Up until now, the regulation of the EU gaming sector was left to the market itself, the Member States, and the Court of Justice of the European Union's case law that sets down principles which Member States have to follow with regard to their gaming regulations.

One of the first cases to deal with gaming was the **Schindler case**.⁶ In this case 'a British law banning national lotteries was disputed'⁷ as it did not allow other Member States to provide such a service within the United Kingdom. The Court decided that the United Kingdom was not in breach of EU regulations when it imposed this ban due to the unique nature of lotteries, however one of the most important facts to come out of this trial was the Court's statement that when a restriction was put in place with the purpose of protecting public interest, such a restriction was not in contravention with EU law. Another prominent case was the **Santa Casa case**⁸ which confirmed that gaming is considered an economic activity and that therefore Member States' regulations on gaming must observe the freedoms found in the EU Treaty. It also declared that the Commission must ensure 'that both existing and future legislation of Member States do not infringe upon basic freedoms.'⁹ In this way case-law helped to create what may be considered a de facto

⁴ --, 'Legislative environment' (egba.eu) <http://www.egba.eu/pdf/EGBA_FS_Legislation.pdf> accessed 17 February 2014

⁵ Directive 2011/83/EU Consumer Rights [2011] OJ L 304/64

⁶ Case C-275/92 *Her Majesty's Customs and Excise v Gerhart*

Schindler and Jörg Schindler [1994] ECR I-01039

⁷ Bassini M, 'ECJ case law on gambling: how technology thwarts regulatory barriers' (MediaLaws 2010) <<http://www.medialaws.eu/how-technology-thwarts-regulatory-barriers-the-ecj-case-law-on-gambling-and-internet/>> accessed 17 February 2014

⁸ Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd, formerly Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-07633

⁹ --, 'Legislative environment' (egba.eu) <http://www.egba.eu/pdf/EGBA_FS_Legislation.pdf> accessed 17 February 2014

common EU framework on gaming as it set down principles that had to be followed by Member States even if their own gaming law frameworks did not comply with such principles.

On 23 October 2012 the European Commission launched 'The Communication on Online Gambling' with the intent of working 'towards a comprehensive European framework for online gambling.'¹⁰ The Commission made it clear that it believed that gaming should be to a certain point regulated at EU level particularly when issues in gaming involve more than one Member State. The Commission went on to identify five priority areas in the gaming sector:

- i. Compliance of national regulatory frameworks with EU law
- ii. Enhancing administrative cooperation and efficient enforcement
- iii. Protecting consumers and citizens, minors, and vulnerable groups
- iv. Preventing fraud and money laundering
- v. Safeguarding the integrity of sports and preventing match-fixing¹¹

The idea behind this Communication is to find a balance between a gaming sector legal framework that is wholly regulated by the EU and one that is entirely up to the Member States. It recognises that the Member States are entitled to their sovereignty and should be allowed to protect their public interest, however at the same time gaming law must fall in line with EU standards. The Communication makes it clear that 'national regulatory frameworks have to comply with EU law and internal market principles and rules',¹² and this with the purpose of creating a successful European Union policy on gaming.

There are a number of arguments that can be made for having a common European Union legal framework on gaming. A harmonised legal framework would provide legal certainty and the situation as it currently stands may cause confusion and lead to the fragmentation of the Internal Market.¹³ Legal certainty is always an advantage in an economic sector and increases confidence in the market and the level of protection that consumers enjoy. This confidence is even more essential to gaming as gaming in itself is a sensitive issue, usually linked to a number of negative matters such as gambling addiction. A harmonised regulatory framework would increase trust and communication amongst Member States. Communication is key to finding and preventing violations, and in fact the Commission specifically mentioned this in The Communication on Online Gambling: 'national authorities should be able to request information from competent authorities in other Member States and be certain that they will get an appropriate reply within a reasonable timeframe and vice versa'.¹⁴

The gaming and betting sector is quickly becoming one of the most important sectors in the European Union. Due to its rapid growth rate, its cross-border nature, and its tendency to endure negative connotations and consumer abuse, it is the

¹⁰Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 2012 1

¹¹ Ibid 4

¹² Ibid 4

¹³--, 'Manifesto for a Sustainable EU Policy for Online Gambling' (egba.eu 2012) 2 <<http://www.egba.eu/pdf/Manifesto-for-a-sustainable-EU-online-gambling-policy.pdf>> accessed 17 February 2014

¹⁴ Ibid 1

author's belief that gaming is a sector that should be regulated by the European Union. The principles of proportionality and subsidiarity ensure that in setting up such a common legal framework the sovereignty of the Member States is protected and kept intact, which only adds to the acceptance by the Member States themselves of a possible harmonised framework.