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PRESENTE:

Electronic Commerce Directive soon applicable on online gambling?

25 Novembre 2003

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Thèmes: Commerce électronique , Criminalité et droit pénal

URL: http://www.droit-technologie.org/1_2.asp?actu_id= 855

On 21 November 2003, the European Commission announced that it would reconsider the Directive on electronic commerce, in particular in relation to online gambling.

At this moment, article 1.5 of the e-commerce Directive excludes gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions, from its scope of application. Therefore, the in article 3 foreseen principles concerning the cross-border provision of information society services cannot be invoked.

In its press release, it is stated that “*Online gambling, which is currently outside the scope of the Directive, is a new area in which action may be required because of significant Internal Market problems - see for example Case C-243/01s of the European Court of Justice (ECJ press release CJE/03/98), concerning criminal proceedings in Italy against persons collecting Internet bets on behalf of a bookmaker legally licensed in the UK. The Commission will examine the need for and scope of a possible new EU initiative. In addition, the Commission is examining a number of complaints it has received concerning cross-border gambling activities.*”

It can be defended that in the future the electronic commerce Directive will be of application on this important and booming sector.

In the first place, the report on the state of the Internal Market Strategy for Services clearly identifies gambling activities as activities reserved exclusively for certain operators. In light of this Market Strategy, the Commission is supposed to bring forward a package of initiatives dismantling the identified barriers.

In the second place and from a more philosophical point of view, it should be underscored that the electronic commerce Directive is and will be the legislative foundation upon which future relevant legislation will be enacted. This means that the principles laid down in the Directive should be applicable to all aspects of information society services including gaming services.

Eventually, one has to take into consideration the evolution in the jurisprudence of the European Court of Justice.

The case referred to is the notorious Gambelli case, the first online gambling case submitted to the jurisdiction of the European Court. According to the decision of the European Court of Justice of 6 November 2003, the Italian legislation imposed a non-justified and discriminatory restriction on the freedom to provide gaming services throughout the European union, this to the extent that the imposed restriction did not serve to limit gaming activities in a consistent and systematic manner.

Moreover, the European Court recognized that the UK established bookmaker was already subject to rigorous controls exercised in his country of establishment by a private audit company and by the Inland Revenue and Customs and Excise. For this reason, the authorities of the country of destination, i.e., Italy, should take into consideration the protection offered by the country of origin, i.e., the United Kingdom.

Although the European Court does not formally recognizes that the internal market clause of article 3 of Directive 2000/31/EC on electronic commerce is applicable, the reference hereto is not without relevance.

In this important article 3, it is stated that i) each Member State shall ensure that the information society services, including online gaming services, provided by a service provider established on its territory comply with the national provisions applicable in that Member State and ii) that Member States may not restrict the freedom to provide information society services from another Member State.

By virtue of this principle, a UK established bookmaker will only be subject to UK legislation and Italian authorities must recognize the adequate character of the protection offered in the UK. Therefore, they cannot impose additional restrictions on the operation of the UK bookmaker.

In the end, maybe it is too optimistic to state that the European Commission will fully liberalise the European gaming market. However, two weeks after the European Court of Justice, the Commission seems to give a similar message: Member States must stop to invoke imperative reasons of public order to justify gaming restrictions, while the actual objective pursued is the protection of the national markets from foreign competition.

For more information :

- [The Report of the EU Commission on the application of the e-commerce directive.](#)

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Thibault Verbiest, Ewout Keuleers, " Electronic Commerce Directive soon applicable on online gambling?",

http://www.droit-technologie.org/1_2.asp?actu_id=855 , 25 Novembre 2003

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