

LGA's contentions on interim order against Zeturf

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Malta was the first European Union member state to publish remote gaming regulations last year. The Remote Gaming Regulations have so far proved to be an unprecedented success, attracting foreign investment and creating jobs.

To date, the Lotteries and Gaming Authority (LGA) has 97 remote gaming operators, who already have a remote gaming licence or are in the process of getting a licence. These are generating an income of one billion euros.

Malta is tapping a market that, in spite of its sheer size, is nowhere close to reaching its full potential, according to insiders. The iGaming industry has transcended the limitations of bricks and mortar casinos and high street betting shops, relying ever more on high tech innovations that have increased player interactivity and made it possible to deliver gaming any time, anywhere and on any telecommunication device.

Many remote gaming operators consider Malta to be an ideal jurisdiction to weigh anchor. According to Dr Anthony Axisa, director, Lotteries and Gaming Authority, the Remote Gaming Regulations are "a feasible proposition to many operators, who will readily acquiesce that the accruing advantages of regulation are the hallmark of their success".

Malta's regulations put a strong emphasis on the promotion of responsible gaming and player protection. Every licensee must undergo a due diligence process before being granted a licence. Anti-money laundering provisions are also strictly enforced, in an ongoing drive to keep this industry untainted by criminal activities.

"Unfortunately, there is still another lurking danger for bona fide operators who have endorsed regulation - highly institutionalised state monopolies," Dr Axisa said. "To date the only EU member state that has decided to follow in the same steps of Malta, is the UK. It liberalised gaming when the Gambling Act received royal assent earlier this year and is expected to publish its remote gaming regulations and grant the first remote gaming licences some time next year."

Gaming in all other EU member states and EFTA is still a state monopoly. "This has inevitably pitted state monopolies against Malta's stance on remote gaming," he added.

Remote gaming, as licensed by the LGA, has to take place in cyberspace through any means of distance communication. Accordingly, an operator established in a member state can offer his services via any means of distance communication, to recipients in another member state. This cross-border gaming is highly resented by state monopolies, given that private operators now have the opportunity to take a fair share of the revenue that used to go directly into the state's coffers.

Turning to the interim court order by the Tribunal de Grande Instance of Paris against Zeturf Ltd, Dr Axisa said the action by the French Groupement d'Internet Economique Pari Mutuel Urbain (PMU) had all the traits of a disgruntled monopoly. "On a wider scale, it is an effort to buttress the strongholds of monopolies, which lately have shown clear signs of losing their resilience," he observed.

PMU has sought comfort in the French horse betting statute of 1891 and a decree of 1997 whereby bets may be offered outside horse racing tracks, including via the Internet, only by racing companies authorised by the French Minister of Agriculture and who offer their betting services through the PMU, Dr Axisa said.

"PMU makes no effort to disguise its protectionist policy," he said. "Indeed, their writ made it very clear that Zeturf's operations jeopardised the entire racing network, employment, 'as well as the interests of the French State... deprived as a result of (Zeturf's) operations, of receipts taken from deductions made on bets'.

"It is also an onerous order for Zeturf - 'close down your operation or pay a hefty fine per day' (15,000 euros per day). It is pertinent to ask whether French law and the French tribunal's application of the law is at odds with the primary principles of EU law, foremost of which in this particular scenario, is the freedom of movement of services."

Dr Axisa said that to date gaming is not regulated at the EU level. The European Commission decided not to regulate gaming at EU level following the European Council's conclusion at the EU summit in Edinburgh on December 12, 1992. The EU Council had found that gaming, in the light of the principle of subsidiarity, is unsuitable for Community legislation and said it was better dealt with at national level.

So gaming remained a quasi-exclusive competence of the member states, subject to the observance of the primary principles of EU law. Eight years later, the Electronic Commerce Directive explicitly excluded gambling activities from its scope of application, with the exception of those gambling activities that are carried out for commercial communication purposes.

On January 13, 2004, the European Commission adopted a proposal for a Directive on Services in the Internal Market. The objective of the Services Directive is to remove the barriers to the freedom of establishment for service providers in the member states and the free movement of services between member states.

"Gambling was meant to be included in the scope of this directive," Dr Axisa said. "However, there is every probability of history repeating itself, and once more gaming services will be left out in the cold."

In default of EU legislation on the matter, he said it was left to the European Court of Justice (ECJ) to determine the parameters in which member states could impose restrictions on the cross-border provision of gaming services and whether these restrictions were compatible with the EC Treaty.

Dr Axisa sees two salient points standing out from the ECJ's main judgments on the matter: 1) a national legislative instrument that confers exclusive rights to certain undertakings to offer gaming services does not, as such, constitute a violation of the EC Treaty - as long as the legislation is justified by objectives of social policy and consumer protection aimed at limiting the harmful effects of gaming activities. Restrictions also have to be non-discriminatory and proportionate to these objectives; and 2) National gambling restrictions are only acceptable if they reflect a concern to bring about a genuine diminution in gambling opportunities. The financing of good causes, or the state, through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy.

"When these ECJ rulings and the French tribunal's order to Zeturf Ltd are juxtaposed, the evidence against French law becomes damning," he said. "The PMU is allowed to offer Internet betting to French citizens and their stated concern is not social negatives, but loss of revenue to the French government.

"Application of the law by the French tribunal is also in complete disregard of the most prominent judgments delivered by the ECJ."

Dr Axisa also finds PMU's attack on Eturf, a company that provides to Zeturf, services related to a databank on French horse racing as questionable. Eturf have been ordered to stop providing services to Zeturf or face a fine of 8,000 euros per day.

"In the light of a recent British Horseracing Board judgement by the ECJ, it is doubtful whether PMU has a sui generis right over its database, in such a way that the act of extraction and re-utilisation of data by Eturf would be deemed to seriously prejudice the investment of the maker.

Asked where all this leaves Malta, Dr Axisa said the LGA is confident of the unquestionable legality and equity of the Remote Gaming Regulations. "These regulations are in complete harmony with the principle of freedom of movement of services enshrined in the EC Treaty. Zeturf were granted authorisation to operate in cyberspace, and it's a neat operation. The Lotteries and Gaming Authorities will stand its ground and will do all it takes to see that justice is done and that Malta's jurisdiction is not encroached directly or indirectly."

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