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European Commission to take a more coherent approach to (online) gaming

After years of ad hoc rulings by the European Court of Justice and several hints from the European Parliament and the EU Council in that sense, the EU Executive body finally seems to be planning a more systematic and pan-European approach to gaming and betting in the Internal Market.

On 11 February 2010, Internal Market Commissioner Michel Barnier announced that the European Commission "does not exclude" alternative solutions to individual infringement procedures against member states on gambling. Little over a year ago, the European Parliament and the EU Council of Ministers had already called upon the European Commission to start a European-wide dialogue in view of reaching a political agreement with regard to the regulatory framework applying to gaming and betting. The need for such an agreement increases as the sector and technology both evolve and become less national/territorial.

From the start, gaming and betting have been considered to be 'special' services in light of EU law. National authorities wish to regulate this area according to their own views on public morality, consumer protection and the need to combat all sorts of fraud and manipulation. All these reasons that are invoked for restricting the freedom to provide (online) betting and gaming activities across the European Union. For this same reason, gaming and betting activities have been excluded from the EU's Services Directive at the time of its adoption. Obviously, betting and gaming can also be a significant source of revenue for Member States and their policy decisions may therefore also often be inspired by financial considerations.

In the last couple of years, there have been a growing number of complaints by sports betting service providers and online gaming companies licensed and authorized in one Member State and seeing their access to other national markets within the EU restricted. This has led to a number of European Court of Justice rulings on the issue as well as to several Commission infringement proceedings against Member States. All these cases relate to the question whether national measures restricting the cross-border supply of online betting and gaming services are compatible with Article 49 of the EC Treaty (now Article 56 of

the new Treaty on the Functioning of the European Union), which guarantees the free movement of services within the Internal Market. Some of the rulings by the European Court appear to be inconsistent. The tend to be interpreted very differently by national gaming authorities on the one hand, and gaming and betting service providers on the other. Moreover, no less than nine Commission infringement procedures are said to be currently pending in the area of cross-border betting on sports events online. In other words : a more consistent top-down initiative seems appropriate.

As said, while the legal frameworks differ, there are significant similarities in the Member States' objectives as regards gaming and betting. As shown in December 2008 by the French EU Presidency in an overview of the different legal frameworks and policies , virtually all Member States are claiming to be pursuing considerations of public order and prevention of crime (combating money laundering, organized crime, fraud, corruption etc.), social order (prevention of addiction, protection of minors and vulnerable persons etc.), and consumer protection (ensuring that gambling operations and operators are trustworthy, etc.). Only the methods differ, although some are widely spread among Member States : a ban on access to gambling by minors or vulnerable persons, obligatory identity checks at the entrances to casinos and gaming arcades, restrictions on amounts of bets or winnings, advertising restrictions , obligations to inform players of the risks associated with gambling, checks with regard to the owners and managers of private companies before granting authorizations or licenses, rules on the player return rate, mandatory reporting of transactions, etc.

T he development of online gaming and betting raises some additional challenges : the services are permanently available, are crossing borders and are easy to access. The Member States have opted for widely differing responses to this development, ranging from opening up the market in a regulated framework to a complete ban. However, in light of the common issues surrounding the regulation of cross-border betting and gaming, the current discrepancies do not seem tenable in the long run. In addition, certain legislations are clearly inconsistent with basic principles of EU law. The new Belgian Gaming Act, for instance, provides for an obligation to have the company's servers located in a permanent establishment on the Belgian territory. It is clear that, if every Member State would instate such rule, it would defeat the purpose of the internet's ubiquity, convenience in terms of access and low cost. It would simply be impossible for an online provider to comply with every such regulation in the EU. Plus, apart from the state levies to which they are subject, gaming and betting very frequently contribute substantial amounts, totaling billions of euros annually EU-wide, to numerous causes: social, charitable or cultural activities, support for sport or equine organizations, etc. Hence, there is a consensus to be sought.

In light of the foregoing background, Mr. Barnier's proposal seems the sensible road to follow. Unfortunately, mentalities do not change overnight and Member States do not yet seem prepared to abandon their power of appreciation in this matter. That is also the reason why the Commissioner is being rather careful, and takes it one step at a time : "I want to launch a constructive dialogue with the Parliament and member states and concerned stakeholders," he said, explaining that an EU Green Paper would be the first step forward.

Meaning of "All Reasonable Endeavours"

The English High Court, in the recent judgment of CEP Holdings Limited and Another v. Steni AS [2009] EWHC 2447 (QB), considered what it means to use “all reasonable endeavours”. Some useful practical implications for contractual parties agreeing to such an obligation can be drawn from the judgement.

Background
CEP Holdings Limited ("CEP") entered into an exclusive 20 year distribution agreement with Steni AS ("Steni") under which it agreed to distribute Steni products in the UK and Ireland. The agreement allowed Steni to terminate for breach of contract, but only after it had first notified CEP of the breach and given CEP a 30 day period in which to remedy the same.

CEP had agreed in the agreement to use all reasonable endeavours to market and sell Steni products. Steni notified CEP that CEP had breached this obligation and terminated the agreement after the 30 day remedy period had expired. The basis of Steni's claim that CEP had failed to use "all reasonable endeavours" was falling sales data - at the time of the termination Steni had not been provided, despite Steni's requests, with any other data about CEP's marketing and selling of Steni products.

CEP treated the termination by Steni as a wrongful early repudiation of the contract and sued Steni for damages.

Court Judgment
The court concluded that "all reasonable endeavours" meant that CEP "*should do everything that a reasonably competent and energetic distributor would do to promote the marketing and sales of the supplier's products in the relevant territory, knowing that the supplier was entirely dependent upon his, the distributor's, efforts to achieve sales in that territory over a period of many years.*" The court also confirmed that such a test would still afford CEP "*a reasonable margin of appreciation or discretion in deciding how best to market and promote the sale of Steni's products*".

CEP argued that the "all reasonable endeavours" obligation was too general and vague to allow Steni to invoke the 30 day termination provision – how could CEP remedy without Steni identifying particular, specific breaches capable of being cured within 30 days?

The court disagreed and stated that Steni was not required "*to identify … the particular respects in which [CEP] had failed to use all reasonable endeavours …, let alone to spell out what Steni contended [CEP] had to do to put matters right*."

In addition, Steni was entitled to rely solely on falling sales data as justifying a "provisional conclusion" that CEP was failing to use all reasonable endeavours, even though the evidence of falling sales was not on its own conclusive and could be attributed to many causes other than a failure on the part of CEP adequately to market and sell Steni products.

The court stated that the appropriate response for CEP, upon receiving the notice of termination, would have been either to persuade Steni that CEP had, in fact, been using all reasonable endeavours to promote the marketing and sale of Steni products or, if CEP had not been using all reasonable endeavours, to inform Steni as to what steps CEP had taken, and was planning to take, to rectify that failure before the end of the 30 day remedy period.

CEP further argued that because Steni only relied on the falling sales data to justify its termination it should not be allowed to rely on any other evidence which might come to light during the course of the trial. Again, the court disagreed and stated that Steni, to support its allegation, was also entitled to rely on the evidence which emerged at trial.

The court found that CEP had failed to use all reasonable endeavours and was in breach of the agreement. The court cited the following about CEP in support of its finding:

- inadequate structuring within the CEP organisation to successfully perform marketing and promotion of Steni products;

- "haphazard and poorly maintained" systems for the preparation of rolling forecasts and information about Steni products;
- an unwillingness to cooperate with Steni and share information;
- a failure to distribute marketing literature with Steni's logo and include Steni's logo on its webpage and an otherwise failure to promote Steni's brand; and
- insufficient attendance at relevant trade fairs and seminars.

Practical Consequences

It seems safe to conclude that, unless the relevant contract states otherwise, an obligation to use all reasonable endeavours coupled with a right to terminate in the event of a breach is capable of being relied upon by a party without the need to provide the party in breach with specific details of the matters constituting the breach.

It also seems clear that the lack of precision about the meaning of "all reasonable endeavours" does not mean the obligation is of limited importance. As CEP found out, it has potentially expensive and far-reaching implications. As such, if parties can usefully identify in a contract what "all reasonable endeavours" should mean in practice they should consider doing so. If the contract between Steni and CEP had made clear what was expected of CEP in terms of minimum sales and specific marketing, the decision to terminate may well have been more clear-cut and the dispute may well have been avoided.

The case is also helpful with respect to the question of a party's motive in seeking to invoke a reasonable endeavours clause. Steni wanted to terminate the agreement for commercial reasons unconnected with the breach by CEP and was motivated to find anything in the agreement that allowed it to do so. The court recognised this but, in overruling CEP's arguments to the contrary, made clear that the motive of a party in seeking to terminate is immaterial - all that matters is whether or not the breach has occurred.

The case also indicates that, when terminating an agreement, a party which relies upon particular information available to it at the time will not later be prevented in principle from relying upon evidence which subsequently comes to light during legal proceedings.

Finally, the case makes clear that a person seeking to invoke a "reasonable endeavours" clause while in possession of incomplete information will be taking a risk. It is on the party claiming the breach that the burden of proof lies and, while the court established that CEP was indeed in default, it also confirmed that falling sales data was by no means conclusive in establishing this and that a whole range of factual circumstances has to be examined before a judgment could be made.

Had the court found that, despite the falling sales data, CEP was not in breach of the agreement, Steni, in terminating, would have breached the contract with all the financially adverse consequences that would have brought. Thus, while the case is in several ways helpful to potential claimants, it should not be interpreted as giving them carte blanche to bring claims with dubious factual foundation.

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