

Internet Gambling: Legislation determined by jurisdiction. Regulation enforced by international agencies.

By Philippe Vlaemminck



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Gambling services are currently still regulated on a jurisdictional level (e.g. national level in Europe and state level in the U.S.). As such, there is no reason this would be different for online Internet gambling services. Therefore, with regard to Internet gambling services, the jurisdictions need to be empowered to determine for themselves what level of consumer protection against crime and fraud should be applied in their jurisdiction.

However, since gambling has taken on a trans-national character, especially with Internet and Mobile, there is a clear need for EU and/or international legislative provisions to guarantee the judicial protection of the consumer and to supplement and support the national legislation. Under EU law this is the exact meaning of the so-called "subsidiarity principle". Regulate at the appropriate national/regional/state level whatever can be effectively done at that level, and refer to other bodies only those questions which require a trans-national answer or enforcement mechanism. In the EU, this is currently the subject of a six months exploratory debate set up inside the Council of Ministers of the EU and under the French Presidency. In December, the French Presidency of the EU will report to the so-called Competitiveness Council and raise the points of common interest. Hopefully, this will be the first step to proper regulatory solutions.

The challenge is to ensure that public and regulatory policy be based on the fact that Internet gambling services are in the first place gambling services. The fact that Internet gambling is distributed digitally instead of through physical points of sale does not mitigate the imperative for all gambling services to comply with the laws. This was confirmed in the WTO Dispute Settlement report in the WTO US-Gambling dispute[1], wherein remote gambling and lottery services are deemed to be 'like' non-remote gambling and lottery services, and so should be compliant with the laws pertaining to those non-remote gambling and lottery services.

Moreover, according to the WTO Dispute Settlement report (WTO case of 13 March 2003, United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, Appellate Body Report.), the remote provision of gambling services is to be considered to be a cross-border supply and not a consumption of those services abroad. This means that the point of supply of the gambling service is considered to be the country where the consumer has its residence and not in the country where the operator has its server. This is an important distinction. In the WTO dispute on cross-border gambling services, it was also accepted by the Appellate Body that the exception of public order can be invoked by the country of consumption, independently of the country of supply.

Furthermore, a British court has already acknowledged that cross-border gambling services are considered to be delivered in the country of consumption, regardless of the location of the supplier. This court also ruled that it is for the national authorities to determine to which extent they are prepared to expose their citizens to the risks posed by remote gambling services. (Case of 14 June 1999 of the UK High Court of Justice, Queen's Bench division, Secretary of State for Home Department ex parte International Lottery in Liechtenstein Foundation and Electronic fundraising company plc., EWHC admin 547.)

The specific characteristics and concerns of a remote supply of gambling services were emphasized by the WTO Appellate Body in the context of the WTO US-Gambling dispute:

- the volume, speed and international reach of remote gambling transactions
- the virtual anonymity of such transactions
- the low barriers to entry in the context of remote supply of gambling services
- the isolated and anonymous environment in which such gambling takes place

On 23 September, I chaired a panel discussing "Internet Gambling" at the annual conference of IAGR, the International Association of Gaming Regulators. I began by asking the different Panel members (the CEO of the UK Gambling Commission, the Chairman of the Nevada Gaming Control Board, the Head of remote gambling of AAMS and the senior adviser of the Norwegian Ministry of Culture) to respond to a number of questions regarding the need and possibilities to regulate Internet gambling. The result of that discussion demonstrates that we are still far away from an international consensus or solution on this matter. The views expressed on how to regulate remote gambling are extremely different from one another. It is acknowledged, though, that the Appellate Body of the WTO insisted upon the fact that the USA was perfectly entitled to decide upon its own public order without being obliged to negotiate with Antigua on alternative, less restrictive, solutions. Negotiating on an international scale is needed, however, to establish friendly cooperation among states to fight illegal and/or unregulated remote gambling. The WTO and the OECD could be the appropriate forum to build an international approach to enforcing jurisdictional laws.

Based upon this reasoning, it is difficult to argue (as the UK remote Gambling Association does in the EU Trade Barriers Regulation case) that the USA should not be allowed to prosecute the RGA members who did violate US laws, even if those laws do not entirely satisfy the former GATS commitments.

If we could agree on one common philosophy, it should clearly be that laws need to be respected, and that the law applies to operators in the Internet environment as well as everywhere else. ♦

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