1 Introduction

The purpose of this paper is to analyse British perspectives on the respective roles of the national government and of the European Union in the regulation of commercial gambling. Commercial gambling, for this purpose, embraces both the variety of strictly profit-seeking enterprises, typically casino gaming, bingo and sports betting, together with their e-versions, and the semi-private and public lotteries that have as their objective the promotion of some ‘good cause’. These semi-private lotteries typically comprise a range of charity and sports lotteries. Public lotteries comprise those that may be promoted by a local authority, and, of far greater significance, the monopoly that is the National Lottery.

In approaching this task we must recognise some key changes that have taken place since H.M Customs v. Schindler was decided a dozen years ago.2 The first is the imminent change in the regulatory landscape that will follow the full implementation of the Gambling Act 2005. This Act does not apply to the regulation of the National Lottery, but there are here, secondly, important proposed structural changes. Thirdly, and a matter that has driven recent judicial activity in both national courts and the European Court of Justice (hereinafter ‘ECJ’), is the potency of technological change to effect cross-border provision of gambling services. That has, fourthly, generated uncertainty about either the desirability or the capacity of existing European law to manage a legal regime that will satisfy the sometimes competing, sometimes common, interests of 25 national governments, the Commission, the regulators, the various commercial sectors and, not least, those EU citizens who gamble.

1 I wish to thank Clive Hawkswood, Jo Hunt and Howard Johnson for their comments on the draft version, and Elke Klapproth for research assistance. The usual disclaimer applies.

Following this introduction, my paper is in three parts. The first summarises the present and potential EU regime governing the provision by a commercial operator in one Member State of gambling services to the citizens of another. The second reviews the essential elements of the new regulatory regime for Great Britain contained in the Gambling Act 2005, together with the steps that have been taken for its implementation. This section commences with a short overview of the commercial salience of the British gambling market in 2005 and draws attention to the position of the National Lottery. The third section comments on some important developments within this market that are the consequence of the recent application of European law and examines the changing regulatory landscape within the EU. I draw attention as appropriate to the perspectives of the various actors within the British market to these actual and proposed extensions in the European Union’s reach over the provision of commercial gambling services between Member States.

2 The Basic Picture

Both of the two potential areas of European law that seek to regulate the provision of gambling services across Member States, the Electronic Commerce Directive and the Draft Services Directive, have posed points of concern for the British market. Although neither for the time being is applicable to it, the former expressly excluding gambling services and the latter being only in draft form until May 2006, for some operators, they have represented obstacles to their commercial aspirations in other Member States. For those who prefer a protected market, they pose a threat in the predictable loss of that protection. For the UK government and regulators, the proliferation in particular of e-gambling services poses opportunities and threats, having both fiscal and regulatory impact, which we shall explore in the course of this paper. The actual area of control comprises Articles 49-55 of the EC Treaty, which seek to secure the free movement of services.\(^\text{3}\) But since the Schindler case their application by the Court and by national courts to the supply of cross-border gambling products has created both legal and commercial uncertainty,\(^\text{4}\) conditions that frustrate British operators who regard their products as much the most competitive in Europe.

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3 The Schindler case clearly established that gambling is an economic activity that comprises the supply of services within the meaning of Article 50; \textit{op. cit.}, paras. 25-36. Article 43 (freedom of establishment) is also relevant; but the European case law has to date largely concerned Articles 49 and 50 (formerly [59] and [60]).

4 For example, the Dutch courts’ decisions that the UK bookmaker, Ladbrokes, could not lawfully accept bets from Dutch gamblers either by phone or on its internet site. Ladbrokes did not have a gambling licence in the Netherlands, where only the state-owned gambling company, de Lotto, could hold licences. District Court, The Hague, 27 January 2003, at \url{www.rechtspraak.nl}. 