

EGBA NEWS

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Editorial



The first 2017 edition of the EGBA news is about the regulation of **gambling advertisements**, to ensure a high level of **consumer protection** in a responsible advertising environment for online gambling companies.

In light of the revision of the Audiovisual Media Services Directive, which provides for sector specific advertising requirements, **Nicola Caputo**, a socialist Italian Member of the European Parliament, shares his views. Mr. Caputo underlines that the Directive should continue to cover gambling advertising, but **should strictly prohibit gambling advertising targeting minors**.

We also feature an article from **Guy Parker**, CEO of the UK Advertising Standards Authority, on **how an independent regulator can ensure that gambling advertising remains within the boundaries of the law**. Of noteworthy relevance is the fact that only 6% of the total complaints received were referring to gambling ads.

Gambling advertising has also been the subject of substantial **jurisprudence** by the Court of Justice of the European Union. In his piece, **Prof. Dr. Dr. Ehlermann**, from WilmerHale, draws our attention to the current case law and the level of advertising that Member States are allowed to provide, to ensure that **consumers are channeled to the regulated offer**.

Maarten Haijer,
Secretary General, EGBA



The advertisement of online gambling services

AVMS Directive to exclude minors from gambling advertisements

Nicola Caputo, Member of the European Parliament, talks to the EGBA about the need to strictly prohibit gambling advertising targeting minors to ensure consumers at large are better protected.

European countries have shifted their views from viewing gambling as something to be repressed, even morally questionable, to an activity seen as a normal part of the leisure industry, which has to be regulated and monitored.

Since its dematerialization in the early 2000s, online gambling has gradually become an attractive service to European consumers representing today almost 15% of the total European gambling market.

In December 2014 I presented, together with 13 other Members of the European Parliament, a written declaration on this specific issue, highlighting the concerns related to gambling and new technologies. In the context of the increased accessibility to gambling options, such as the possibility to gamble through mobile phones, as well as unregulated gambling, European lawmakers have to pay particular attention to commercial



"European lawmakers have to pay particular attention to commercial communications to ensure the same level of regulation and monitoring as with gambling itself."

Nicola Caputo, Member of the European Parliament

communications to ensure the same level of regulation and monitoring as with gambling itself.

The Audiovisual Media Services Directive (AVMSD), which is currently under revision and will be voted by the European Parliament in the coming

“ The proposed AVMS Directive keeps gambling advertisement among the regulated audiovisual media services. ”



AVMS Directive to exclude minors from gambling advertisements (Cont from the page 1)



weeks, regulates both traditional TV broadcasts as well as on-demand services. Today, many audiovisual services fall outside the range of application of the AVMS Directive. This is because the content is not hosted by traditional TVs anymore, but by online video-sharing platforms or online intermediaries. The change in this audiovisual landscape means that there is a need to guarantee greater flexibility to ensure commercial's fairness, objectivity and control. The platforms or intermediaries under a «lighter» version of control (on demand services) need to be subdued into a more regulated and controlled field.

Regardless of this evolution, it is necessary that the proposed AVMS Directive keeps gambling advertisement among the regulated audiovisual media services, since all the core principles of the AVMSD – including Article 3, known as «freedom of reception» -- should be consistently applied to the audiovisual promotion of gambling. This will have a positive outcome for the overall safety of the sector, and will provide guidelines to be followed by every audiovisual

media provider. In fact, monitoring advertisements would have the effect of channelling consumers into regulated, supervised markets. This would be an advantage for the general public, as channelling protects them by legally raising the public awareness and fostering a fair use of this type of entertainment.

Since one of the AVMS Directive's main goal is to protect the public from the possible risks of certain audiovisual media content, including gambling advertisement in the scope of the revised Directive is a matter of consumer protection. Such measure protects the most vulnerable citizens, in particular those who are exposed to the consequences of an indiscriminate use of audiovisual advertisements. Specific provisions to protect minors are necessary. Gambling advertisements should not target minors and should always carry a no “underage gambling” sign.

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Including a prohibition of targeting minors will increase consumer protection, by harmonising the already established national practices, based on the Commission’s 2014’s Recommendation on consumer protection. Regardless of this evolution,

it is necessary that the new version of the AVMSD keeps gambling advertisement among the regulated audiovisual media services.

Last but not least, stronger rules on gambling advertisements are in line with the direction indicated by the Commission and the Council. Both the Commission and the Council have highlighted the necessity to promote public campaigns to inform and educate European citizens about potential risks of gambling and to take coordinated action in order to fight illegal gambling across the whole Europe. ■

5th Anti-Money Laundering Directive (AMLD):

In February 2017, the Parliament’s leading committees (ECON & LIBE) adopted some key amendments with relevance to gambling. They include:

- Lowering the threshold for anonymous prepaid cards from €250 to €150;
- Extending the scope to providers of exchange services between virtual currencies and fiat currencies, to wallet providers, to electronic money issuers and distributors:

The adoption of the 5th AMLD at the EP plenary is scheduled for the second quarter of 2017.

A regulator's assessment of gambling advertisements compliance with the law

Guy Parker, Chief Executive of the UK Advertising Standards Authority explains how as an independent regulator they ensure the advertisement of gambling products stays within the boundaries of the law.

Gambling. It's an emotive subject and one that can polarise opinion. For some it may conjure up images of a sophisticated, suave and glamorous pursuit that takes place in a world of social high flyers; where huge sums are won and lost without consequence. For many, it is seen as a mainstream leisure activity, a bit of harmless fun that brings pleasure and excitement and that is enjoyed responsibly by the vast majority. For a small number of people however, gambling represents a social ill; a harmful addiction that can ruin lives.

Since September 2007, betting and gaming companies have been permitted to advertise across all media, posing new challenges for us, The Advertising Standards Authority (ASA), and our rule-writing sister body, The Committees of Advertising Practice (CAP).

The ASA is the UK's independent advertising regulator, responsible for ensuring that ads are legal, decent, honest and truthful. Our effective and proportionate advertising regulation strikes a balance between the crucial protection of consumers, including children and the vulnerable, while allowing companies the commercial freedom to advertise their products responsibly.

Following the introduction of the Gambling Act 2005, strict content rules were introduced to ensure that gambling products are advertised in a socially responsible way across all media. We reviewed the enforcement of those rules in 2014.



"Our effective and proportionate advertising regulation strikes a balance between the crucial protection of consumers, while allowing companies the commercial freedom to advertise their products responsibly."

Last year complaints about the gambling sector made up around 6% of the total complaints received by the ASA. Following these complaints, we investigated 595 ads. 62 ads were either

withdrawn or amended as a result of our work, showing that although the majority were compliant with our rules, we took action to stop those ads that broke them.

Currently the rules state that advertisements for gambling must not:

- Portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm;
- Exploit the susceptibilities, aspirations, credulity, inexperience or lack of knowledge of children, young people or other vulnerable people;
- Suggest that gambling can be a solution to financial concerns;
- Link gambling to seduction, sexual success or enhanced attractiveness;

"Last year complaints about the gambling sector made up around 6% of the total complaints received by the ASA."

- Be of particular appeal to children or young people, especially by reflecting, or being associated with, youth culture or
- Feature anyone gambling or playing a significant role in the ad if they are under, or appear to be under, 25 years old.

As technology evolves, consumers are accessing gambling products in new and different ways such as online and via mobile devices; it's more important than ever for us to ensure that consumers continue to be properly protected. That's why we are committed to continuing our work with the Competition and Markets Authority (CMA) and the Gambling Commission on misleading gambling promotions and our joint enforcement work with the Gambling Commission addressing the issues arising from operators using affiliates to market products.

"In the next year we will also be publishing new guidance for industry to help them get their ads right in the first place."

In the next year we will also be publishing new guidance for industry to help them get their ads right in the first place.

This guidance will address marketers placing age-restricted ads on social media, and help them ensure they are using the sophisticated targeting tools available to reduce children's exposure to age-restricted ads. It will also make clear how operators can guarantee they don't place ads for age-restricted products, such as gambling, in children or young people's media or in media where they make up a significant proportion of the audience. ■



In each issue of *EGBA News*, Professor Dr. Dr. h.c. Claus-Dieter Ehlermann provides his opinion on legal questions at the heart of the online gambling debate.



Professor Dr. Dr. h.c. Ehlermann, Senior Counsel at WilmerHale and a former Director General of the Legal Service of the

European Commission, gives us his insights on the treatment of advertisement of gambling services under EU law.

European consumers are increasingly given a broad choice of audiovisual media services, from television and internet to portable devices. Thus, the current revision of the Audiovisual Media Services (AVMS) Directive is a hot topic, which raises interesting issues linked to commercial communications for gambling services in the EU. In examining such issues, however, it is important to understand the existing case law of the CJEU and its underlying reasoning together with other instruments such as the Charter of Fundamental Rights of the EU and the Recommendation on the protection of players and the prevention of minors from gambling online (the Recommendation), which are examined below.

Due to the direct impact of advertising both on EU-regulated gambling operators and consumers, the main regulatory objective recognized by the CJEU is to guarantee the protection of players while ensuring that an appropriate level of advertising is allowed to channel them to the regulated offer. Accordingly, in the Recommendation, the European Commission stressed that Member States should require that operators provide clear and correct information about gambling, on the protection of minors, on the risks of problem gambling, as well as display appropriate warning messages¹.

In this context, Member States may adopt a policy of controlled expansion, in which legitimate advertisement has a role to play, consistent with the objective of drawing players away from unregulated operators to services which are authorised and regulated in the EU². The measures adopted must respect overriding requirements of general public interest, the freedom to provide services, be proportionate and the least restrictive measure possible must be selected³.

For instance, advertisement of public monopolies aimed at expanding the market must not trivialize gambling, give it a positive image or promise consumers major winnings, since such advertising could not be considered to be strictly limited to what is necessary in order to channel consumers towards authorised gaming networks⁴. The Court has recognised, in several cases, the inconsistency between, simultaneously, the restrictive effect of a monopoly aimed to protect consumers from problem gambling and an expansive commercial policy pursued by the same monopoly operator⁵. Accordingly, a monopoly must be suitable to guarantee achievement of the objective to which the Member State is committed, for example, preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reduce opportunities for gambling and limiting activities from other operators in a consistent and systematic manner⁶.

Consequently, protecting sources of income from the organisation of games of chance by protecting national monopolies or the income for charities cannot be a consideration when choosing a national gambling model⁷ and thus cannot be grounds for imposing

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restrictions on advertising or commercial speech/editorial content.

Likewise, national authorities should not interfere with commercial and editorial content originating in other Member States. This may infringe not only the freedom to provide services under EU law⁸ but also the obligation to safeguard media pluralism and preserve freedom of expression. Thus, if a Member State takes action against an advertiser, for example by blocking access to its market, the European Court of Human Rights case law also applies. It holds that commercial speech also enjoys protection, in addition to editorial material, and such speech is in principle protected by the freedom of expression⁹.

To conclude, the Recommendation, combined with the case law of the CJEU, prohibits protectionist measures taken against advertisement by authorized operators established in other Member States, as well as aggressive advertisement by public monopolies. Again, a legitimate purpose of national regulation is to channel consumers to the regulated offer and to implement specific provisions on consumer protection, in particular when it comes to vulnerable groups and minors. Stakeholders should be mindful of these principles in the review of the AVMS Directive. ■

¹ EC Recommendation (2014/478/EU), OJ L214/38, indent 11.

² Case *Ladbrokes Betting* (C-258/08) §30.

³ Cf. Joint cases *De Agostini* (C-34/95, C-35/95 and C-36/95) §54.

⁴ Joint cases *Markus Stoß* (C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07) §103; Case *Dickinger and Ömer* (C-347/09) §100.

⁵ Case *Dickinger and Ömer* (C-347/09) §67; Case *Carmen Media* (C-46/08) §71; Joint cases *Markus Stoß* (C-316/07, C-358/07,

C-359/07, C-360/07, C-409/07 and C-410/07) §107.

⁶ Joint cases *Markus Stoß* (C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07) §107.

⁷ Joint cases *Costa and Cifone* (C-72/10 and C-77/10) §59.

⁸ Case *Hit and Hit Larix* (C-176/11) §31-32.

⁹ See e.g. *Hertel v. Switzerland*, Application no. 25181/94, and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, Application no. 32772/02.