DAVID CLIFTON – LICENSING EXPERT – CJEU TO RULE ON EU LAW ISSUES RAISED BY GBGA CHALLENGE TO POC TAX

Posted by: Ted Menmuir August 13, 2015 in Comment, Europe, Features, Latest News, Slider Images, UK
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David Clifton

Gambling industry legal expert David Clifton (Clifton Davies Consultancy), examines the GBGA's tax and competition based challenge against the UK POC regime, as the case reaches the higher courts of European Union Law.

The Gibraltar Betting and Gaming Association (GBGA) has been celebrating what must by any account be regarded as an **intermediate victory in its judicial challenge to the remote gambling point of consumption (POC) tax** that came into force in the UK on 1 December 2014, whereby remote betting and gaming activities conducted by a *"UK person"* are subject to a 15% tax wherever the operator is located.

On 14 July, Mr Justice Charles gave judgement that the **tax raises issues of European law that should be decided by the Court of Justice of the European Union ("CJEU").**

The GBGA had argued that the new tax regime is discriminatory and is ***"liable to hinder or make less attractive"*** **the fundamental freedoms provided by the Treaty on the Functioning of the European Union ("TFEU").**

HM Revenue & Customs ("HMRC") has counter-argued that the GBGA has no enforceable EU rights as the movement of services between Gibraltar and the UK is not caught by EU law and, as an indistinctly applicable tax measure, the new regime cannot be said to be a restriction within the meaning of Article 56 of the TFEU and in any event it is justified by the need to rationalise the UK's tax regime.

This was the second judicial review commenced by the GBGA. Its first JR was directed at the licensing and regulatory regime introduced by the Gambling (Licensing and Advertising) Act 2014. However, that challenge was dismissed by Mr Justice Green in what he described as a *"clearcut case"* on the basis that the new regulatory framework introduced by the 2014 Act was justified under European law as it had a legitimate aim and was not disproportionate or discriminatory.

By way of contrast, in this second judicial review, **Mr Justice Charles found that, in seeking to justify the tax regime, HMRC had relied on a principle of law that has no clear precedent under European law.** He also agreed with the GBGA and the Government of Gibraltar (which had intervened in the proceedings) that the case raises issues of constitutional importance for Gibraltar.

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The absence of any decided caselaw providing clear guidance on the issues, coupled with the conclusion of Mr Justice Green in the first judicial review challenge that the constitutional issues raised by the Government of Gibraltar were *"par excellence issues for the CJEU"*, provided the judge with plenty of reason to make the reference to the CJEU. He also considered there to be a high probability of the need for a reference at some stage to the CJEU of European law issues raised in the case and, in light of the CJEU's heavy caseload, he wanted to ensure this was done at an early stage so that the reference joins the queue as soon as possible.

A formal reference of the case will now be made by the High Court to the CJEU, which will be asked to decide:

1. whether a restriction on the provision of services from Gibraltar to the UK engages the right to free movement under Article 56 TFEU
2. whether the taxes payable under the new regime constitute restrictions on the right to the free movement of services for the purposes of Article 56 TFEU and
3. whether the main purpose relied on by the UK Government to justify the new tax regime is legitimate.

In theory, if **the tax regime (which has been expected to raise £300 million per year) is found by the CJEU to be in breach of European law**, HMRC could be ordered to repay all of the tax it has taken.

Responding to the judgment, **GBGA chief executive Peter Howitt said:** *"This is an important decision for all industries and it is quite correct that it should be determined by the European Court rather than within the country that has created this unfair position. We maintain that the tax regime introduced by Her Majesty's Government skews the market in favour of domestic providers to the detriment of law-abiding operators like our members, in clear breach of European law. Because of this sensible decision we now look forward to European judges considering this matter and believe they will confirm our position."*

However, the battle lines remain firmly drawn with a spokesman for HMRC reported as saying: "*The judgment has not found against any aspects of the UK gambling tax regime, and we remain confident that the place of consumption reform for the gambling tax regime is lawful. We are considering the judgment in full before deciding how to respond".*

What is abundantly clear is that (as Olswang, the solicitors acting for the GBGA, have already said themselves), *"the case raises important questions for the future of online gambling in the UK"* and *"also touches on broader issues about the UK Government's ability to tax businesses outside its jurisdiction".*

So what next? The answer is potentially a long wait for interpretation of the relevant European law issues to be decided by the CJEU. Its role will be limited to that function. It will not decide the substance of the case brought by the GBGA. Instead, once it has given its above-mentioned interpretation, **the case will return to the High Court for it to reach a decision based on the CJEU's interpretation.**

David Clifton – Director – Clifton Davies

David Clifton will be speaking on at the upcoming Betting on Football Conference – 10 September Emirates Stadium