

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMMON COMMERCIAL POLICY

COMMISSION

Notice of initiation of an examination procedure concerning obstacles to trade within the meaning of Council Regulation (EC) No 3286/94 consisting of the US ban on foreign internet gambling and its enforcement

(2008/C 65/07)

On 20 December 2007, the Commission received a complaint under Article 4 of Regulation (EC) No 3286/94 ⁽¹⁾ (hereinafter 'the Regulation'). The period of time referred to in Article 5(4) of the Regulation was suspended with the agreement of the complainant until 15 January 2008.

1. Complainant

The complaint was lodged by the Remote Gambling Association (hereinafter 'RGA').

RGA is a London-based trade association including in its membership most of the world's largest internet gambling companies. Nine of the top ten Community suppliers belong to the RGA, as well as 16 of the first 20. It therefore represents a substantial proportion of the Community internet gambling industry.

The RGA is therefore an association acting on behalf of one or more Community enterprises within the meaning of Articles 4(1) and 2(6) of the Regulation.

2. Service concerned

The complaint concerns the supply of commercial gambling and betting services delivered via remote communication and primarily the internet.

The service is identified as falling under sub sector 96492 'gambling and betting services', sector 964 'Sporting and other

recreational services' of the 'Services sectoral classification list' (the so called 'W/120 list') used in the GATS context.

There is no specific EU legislation, although a number of EU jurisdictions do licence internet gambling operators (Austria, Ireland, Italy, Malta, the United Kingdom and Gibraltar) on the basis of national legislation or regulation.

3. Subject

The complaint focuses on US (i) legislation imposing a ban on internet gambling; (ii) measures taken to enforce that legislation; (iii) the fact that the legislation is enforced in a discriminatory way.

In this respect, the complaint explicitly identifies the relevant provisions in the US Wire Act and the safe harbour allegedly created by the Interstate Horse Racing Act (IHA); the Travel Act; the Illegal Gambling Business Act (IGBA); the Wagering Paraphernalia Act, and Federal anti-money laundering legislation; prohibitions contained in State laws; the Unlawful Internet Gambling Enforcement Act (UIGEA); and the differential and discriminatory treatment of EU suppliers compared to US suppliers based on these laws.

4. Allegations of obstacles to Trade

The complainant considers that the measures described in Section 3 constitute an obstacle to trade within the meaning of Article 2(1) of the Regulation.

⁽¹⁾ Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (WTO) (OJ L 349, 31.12.1994, p. 71). Regulation as last amended by Regulation (EC) No 125/2008 (OJ L 40, 14.2.2008, p. 1).

The complainant alleges that the measures described in Section 3 are inconsistent with several provisions of the General Agreement on Trade in Services (hereinafter 'GATS').

The complainant alleges that, by maintaining the Wire Act, the Travel Act and the IGBA — which were found to violate Article XVI of the GATS in the US-Gambling dispute (WT/DS285) — and by taking enforcement measures against foreign service suppliers, the US is denying market access inconsistently with Article XVI of the GATS. Moreover, the complainant argues that the adoption of UIGEA, in which the US Congress recognises that internet gambling can be regulated, and the selective enforcement of the law, notably through possible criminal sanctions, against foreign service providers but not against US based providers, both make the violation of Article XVI GATS more clear cut and undermine very considerably the US position with regard to a possible Article XVI defence.

Second, the complainant alleges that the measures described in Section 3 are inconsistent with Article XVII of the GATS. The complaint argues that US based operators of internet horse race betting and non-US based operators of internet gambling are like service suppliers or like services, and that the US violates Article XVII of the GATS by applying less favourable treatment to non-US based operators of internet gambling. The complaint claims that the fact that some EU operators did not offer gambling on horse racing is entirely related to the regulatory measures applied by the US, distorting the competitive relationship between US-based operators and non-US based operators. Moreover, it is argued that the selective enforcement of the prohibition to provide remote gambling services against foreign service providers but not against US-based providers, notably through possible criminal sanctions, constitutes a clear instance of discrimination which is inconsistent with Article XVII of the GATS.

The complainant gives consideration as well to the fact that the relevant GATS legal framework is expected to undergo significant changes in the coming months as a result of the intention of the US to withdraw its GATS commitments on gambling and betting services. The complainant argues that this withdrawal would not have retroactive effects, and would therefore not affect the US obligations in respect of any act or fact occurred while the commitment was still in place. Given that the only relevant trade ('act or fact') at issue in the complaint is the remote gambling that a number of EU based operators offered to persons in the US prior to their withdrawal from the US market, and therefore while the US commitments were in place, the US would according to the complainant be under the obligation not to take or continue any measure that would constitute a violation of its obligations in relation to such past trade.

In light of the factual information available and the evidence submitted, the Commission is satisfied that the complaint contains sufficient *prima facie* evidence of the existence of obstacles to trade within the meaning of Article 2(1) of the Regulation.

5. Allegation of adverse trade effects

The complainant claims that the obstacles to trade identified in the complaint have forced their total withdrawal from the US market and have significant additional negative effects on their business outside the US. It points out therefore that the obstacles to trade can be considered as causing and threatening to cause adverse trade effects.

The complaint contains information and evidence showing that the impact of the measures has been serious both on the services trade between the EU and the US and on the Community gambling sector, with potential significant impact on the economy of the Community. It further maintains that the existing threats in the form of possible criminal sanctions may have further serious impact on the affected companies and the gambling sector. The main relevant indicators referred to in the complaint are a loss of revenue for one financial year in the US for the three main EU companies of USD 3 billion; a loss of stock market value of more than USD 11 billion for the same three companies following the adoption of UIGEA and their withdrawal from the US market; the payment of substantial fines in settlements with the US Department of Justice; reference to the potential impact of possible sanctions on the ability of the companies to operate their business under normal conditions outside the US; and knock-on effects on sectors that supply services to the gambling sector as well as on banks that have provided payment services.

The Commission considers that the complaint contains sufficient *prima facie* evidence of the adverse trade effects of the measure on the complainant and a sector or sectors of economic activity in the Community within the meaning of Article 2(4) of the Regulation.

6. Community interest

The complainant indicates that the EU has developed the world's leading internet gaming business and has a strong lead over the US in this sector. Many of the world's largest companies are licensed in and operate from the United Kingdom, Gibraltar, Malta, Ireland and Austria. There are significant back office operations providing technology, marketing and customer service support in Sweden, Cyprus, Bulgaria and Estonia. The complaint remarks that accurate statistics on this fast growing e-commerce sector are not readily available, but offers some indicators of the economic significance of the sector including an estimate of 15 000 staff employed by the internet gaming industry in the EU, with a proportion of high value knowledge jobs higher than in many other industries. It further points out that the internet gaming sector has a significant indirect economic impact on other sectors of the economy which are involved in providing the infrastructure that an internet business requires (primarily financial services, information technology and professional services).

The Global Europe Communication from October 2006 is also an important factor to take into account. This Communication states that that rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad. Its most relevant section is the Action Plan for EU External Competitiveness, which includes plans for a renewed Market Access Strategy, building on the one launched in 1996 to help enforce multilateral and bilateral trade deals and open third country markets. It is important in this respect to ensure that other WTO Members abide by their WTO commitments.

In view of the above, it is considered to be in the Community's interest to initiate an examination procedure.

7. Procedure

Having decided, after due consultation of the Advisory Committee established by the Regulation, that there is sufficient evidence to justify initiating an examination procedure for the purpose of considering the legal and factual issues involved, and that this is in the interest of the Community, the Commission has commenced an examination in accordance with Article 8 of the Regulation.

Interested parties may make themselves known and make known their views in writing on specific issues raised by the complaint, providing supporting evidence.

Furthermore, the Commission will hear the parties who so request in writing when they make themselves known, provided that they are primarily concerned by the result of the procedure.

This notice is published in accordance with Article 8(1)(a) of the Regulation.

8. Time limit

Any information relating to the matter and any request for a hearing should reach the Commission not later than 30 days following the date of publication of this notice and should be sent in writing to:

European Commission
Directorate-General for Trade
Mr Jean-François Brakeland, DG Trade F.2
CHAR 9/74
B-1049 Brussels
Fax (32-2) 299 32 64.

It is also noted that if interested parties consider that they are encountering difficulties in the exercise of their rights of defence, they may request the intervention of the Hearing Officer of DG Trade. He acts as an interface between the interested parties and the Commission services, offering, where necessary, mediation on procedural matters affecting the protection of their interests in this proceeding, in particular, with regard to issues concerning access to the file, confidentiality, extension of time limits and the treatment of written and/or oral submission of views. For further information and contact details, interested parties may consult the Hearing Officer's web pages on the website of DG Trade (<http://ec.europa.eu/trade>).