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THE NEWSLETTER FOR THE GAMBLING AND GAMING INDUSTRY

MAY 2012

Legal challenge to the Belgian licensing regime

Bwin.party initiated legal proceedings, on 18 May, against the Belgian State and the Belgian Gaming Commission following substantial financial losses after being added to the black list of websites prohibited from operating in Belgium.

"In Belgium, providers of games of chance cannot operate without a license issued by the Belgian Gaming Commission," said Antoon Dierick, Lawyer at DLA Piper. The Belgian licensing regime for online gambling requires applicants to have an existing license for land-based gambling in Belgium or to partner with one of the country's brick-and-mortar casinos. "Hence, the Belgium market is closed," adds Dierick, and "all sites not licensed are black listed".

Despite objection from the European Commission as to the discriminatory nature of such a requirement, the system continues to be implemented. "To what extent the Belgian government will be able to justify its restriction on free provision of online games is unknown," said Dierick. There are now more than 30 operators on the black list. The hearing will take place on 25 May at the Court of First Instance in Brussels.

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Spain enters new era of site blocking and taxes

The Spanish gambling regulator, The General Direction of Gaming (DGOJ), is getting ready for a showdown with internet service providers (ISPs) over the blocking of soon-to-be illegal gambling websites, while businesses are preparing for the country's new tax regime, since the Spanish Ministry of Finance confirmed on 8 May the new regulatory framework will come into force on 1 June. From then - until the first licences are granted - "the market becomes illegal", says Cristina Romero, Partner at Lloyra, while Pedro Lopez, of Martín Andino Abogados, adds that "illegal operators are supposed to pull out of the market [on 1 June] and, in fact, the Spanish regulator will be capable of sending injunctions to ISPs or payment providers asking them to block [unregulated] sites and transactions".

Although no licences have

been issued yet, the DGOJ has confirmed it will start granting licences after 1 June. So far, more than 60 operators have applied, including PokerStars, Ladbrokes and Betfair.

Although there is great interest, businesses are bracing themselves for the country's new tax regime. From 1 June, a gross gambling revenue tax of 25% will be enforced. "Authorities expect massive revenues, since the market is substantial", said Romero. "But we will see, the current rates are too high." Lopez also thinks "the tax rate is high". Although he expects "movements to lower it down, that won't be in the near future".

Lopez points out that the "the most troublesome issue is the taxes for players. Their winnings will be subject to their personal income tax, and therefore, depending on the level of personal income of the player,

could be as high as 52%". Lopez also stresses that "players cannot compensate winnings against losses, so professional players will be critically affected by this situation".

The new tax regime might drive some parts of the industry underground or offshore. "This has happened in other recently regulated countries in which there was a grey market out of the control of the tax authorities", said Lopez, as website blocking "is, of course, not 100% effective".

The new gambling law in Spain was passed in February 2011, but implementation was delayed several times. A number of reports have suggested the Spanish market is currently worth between €210m and €450m. The DGOJ has announced a code of conduct for advertising which will be published by the end of May.

Michiel Willems

States in US move as "federal regulation a long, long way off"

The US State of New Jersey (NJ) passed an amended version of Senator Lesniak's online gambling bill on 10 May, which aims to legalise online gambling in the state. One of the amendments, includes suitability requirements implicitly denying licenses to operators that took bets from American players after the Unlawful Internet Gambling Enforcement Act came into force in 2006.

"It is not surprising amendments were made to the Assembly Bill," said Linda Shorey, Partner at K&L Gates. "The passage of legislation

requires compromise." NJ was set to become the first US state to approve online gambling, but Governor Christie vetoed the bill. Lawmakers have worked to address his concerns about the constitutionality of the bill.

"Sponsors of the legislation desire NJ to be a leader in i-gambling and want to move quickly," said Shorey. But "federal regulation is a long, long way off," adds Jim Quigley, President of the Off Shore Gaming Association. "The current Congress can't pass anything let alone something as politically volatile as internet

gambling."

Shorey explains: "Many states have constitutional prohibitions; tribal-state gambling compacts; and strong anti-gambling lobbies". But, she adds, "state legislators are light years ahead of where they were five years ago in understanding online gaming".

The date for a full Assembly vote in NJ has yet to be announced. "My crystal ball is murky," said Shorey. "There is a lot of activity but no clear direction on what will happen in the near term in regards to online gaming legalisation."

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Playing means paying

Last week, *World Online Gambling Law Report* organised the 5th annual Global Gambling Payments Intensive. During the one-day event in central London payment processors, gambling operators, regulators and lawyers came together to discuss issues affecting the gambling payments industry on business, regulatory and financial levels, in the worldwide legal landscape. What became clear during the conference is the rapid growth of the mobile gaming market. Globally, mobile gaming is 'hotter' than ever.

More and more Europeans turn to their mobile phone to play a game or – if their national laws allow them to – place a bet. Even guests of certain hotels in Nevada can place bets on their phone since last September, which is pretty unique considering online gambling is still strictly forbidden in the United States.

Undoubtedly, the rise in mobile gaming is being propelled by the popularity of smartphones. The entertainment value of mobile games has increased significantly, since mobile

games evolved from simple, pre-installed games to challenging and visually attractive forms of entertainment.

Gambling operators as well as mobile phone companies are currently making huge efforts to be at the forefront of what is considered to be the next commercial battle. Many are investing in mobile apps, innovative software and mobile phone technology to make sure they will be part of this growing market.

The increasing use of mobile games, however, does mean they will be subject to more scrutiny by regulators and other relevant parties, not to mention the rapid increase in lawsuits against businesses in the mobile gaming sector; legal cases that affect both developers and platforms. Until a year ago, patent infringement cases were mostly limited to legal battles between the biggest industry players, such as the ongoing battle between Samsung and Apple. This is, however, no longer a realistic assessment of the current legal situation in the market.

A growing number of

companies are considering legal action against game and app developers, who are becoming more and more aware that intellectual property rights need to be taken into account when developing a gaming app. Copyrights, patents and trademarks are increasingly a headache for developers and businesses, not to mention the data protection issues that have arisen as well as advertising and marketing rules and guidelines developers and businesses need to stick to. All this means a rapidly growing client base for many law firms, especially for those practices that offer gambling and gaming, data protection and TMT advice. And one is talking about some of the biggest companies in the world; mobile phone companies, banks, investors, gaming businesses and payments processors who see the opportunities and have recognised the commercial outlook. The market seems to be on a high, as one lawyer pointed out during last week's gambling conference: "the more people play, the more our clients pay".

Michiel Willems

AT A GLANCE

Chile – Legislation has been introduced in Chile to legalise online gambling, in order to bring gambling activity under the control of licensed land-based operators.

EU – The European Lotteries Association has proposed a number of measures in its Sports Charter, to protect the integrity of sports events, unanimously agreed by its members. Measures include the prohibition of betting exchanges and spread betting.

US – The US state of Delaware made its first step to authorise internet gambling on 17 May, the house Gaming and Parimutuals Committee voting to pass the legislation to the House for a vote.

EU – The European Gaming and Betting Association has published a manifesto on sustainable EU policy for online gambling.

Malta – Malta's Lotteries and Gaming Authority has signed an MoU with the International Olympic Committee's International Sports Monitoring body.

Spain – Spain's new online gaming regulations will come into force on 1 June 2012, the Ministry of Finance has confirmed.

Global – Online poker giant PokerStars has threatened legal action against Poker Table Ratings, with claims that the company is infringing its intellectual property rights and breaching the terms of its software license.

Sweden – The Swedish Christian Democrat party is the last of the four centre-right coalition parties to announce support of online gambling regulation and the need for liberalisation of the gambling market.

Italy – The Italian football federation is investigating 22 clubs and 61 individuals in association with match-fixing, including the clubs Atalanta, Novara and Siena, 52 active players, four club officials and three club coaches.

US – California's Senate Governmental Organisation Committee has approved a bill, which would legalise sports betting within the state if the federal government repeals the Professional and Amateur Sports Protection Act.

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Social gaming and children: the real need for regulation

The sudden rise of social gaming goes hand in hand with the increasing number of complaints concerning the vulnerability of children in pursuit of virtual prizes, which has seen questions raised as to whether regulation is necessary to protect those most vulnerable to gambling-like games, much like gambling regulation strives to do. Stephen Ketteley, a Partner at DLA Piper, examines the social gaming industry and the potential for regulation in a new industry that is not part of the real-money gambling landscape, but offers status-driven virtual prizes instead.

In early May 2012, reports emerged from Japan that suggested the extraordinarily successful social gaming phenomenon would come under increasing (and, indeed rapid) threat as the local Consumer Affairs Agency (the 'Agency') announced the results of its investigations into certain activities by game operators conducted through social networks. A dramatic increase in complaints led the Agency to examine the effects that social gaming was having on individuals and society as a whole. A number of the complaints to the Agency were from parents protesting against their children ratcheting up significant costs in pursuit of virtual prizes as well as the understandable effect that this was having on their general well-being.

This is not an isolated event. The situation in Japan came hot on the heels of a similar case in California. A group of California parents gets to proceed with a class-action lawsuit; a San Jose judge denied in late April Apple's effort to get the case dismissed. The parents' complaints are similar in nature to those in Japan. They allege their offspring were being exploited by the 'highly addictive' nature of the downloaded games, which 'compel children playing them to purchase large quantities of game currency, amounting to as much as \$100 per purchase or more'. The whole concept of in-app purchasing is suddenly the subject of judicial and regulatory scrutiny. Are these interventions a sign of things to come? This article examines the way in which the explosive success of social gaming and, in particular, the innovative use of social networks by the gambling industry, could lead to increased scrutiny by gambling (or indeed other) regulators.

A paradigm shift, right before

our eyes

A common method of extracting revenue from visitors to Japanese social game environments is to exploit the undeniable desire to attain some form of status that sets an individual apart, either from their friends or from the world at large. As the online gambling industry has woken up to the power of social gaming, there still remains a sense of puzzlement that people would be willing to spend real money to buy fake money to then use that to buy things that don't even exist.

The attraction of kudos, ownership and achievement is strong in social gaming and success is not necessarily calculated by reference to how much money you have in your wallet once the show is over. Of course, people don't only play social games to achieve status and such-like. Some simply play these games because they enjoy them and they are happy to part with a few bucks in order to kill some time. As a result, we need to look at behaviour differently in the context of social gaming, as the 'losses' could be minimal and the effect on someone's well-being less easily quantifiable.

Social gaming operators in Japan, such as Gree and DeNA, relied heavily on the concept of 'kompu gacha' or 'complete gacha'. Players would pay for the pleasure of collecting virtual rewards with the ultimate aim of obtaining the 'Grand Prize' being a rare item (albeit a virtual one) that can only be achieved by successfully passing through a series of chance-based processes, each of which are paid for. The Consumer Affairs Agency claimed that this concept had become a 'social problem' and required an overlay of regulation. The chance-based determination is clearly an important factor for the Agency not least as players had no way of knowing if they were being

SOCIAL GAMING

fairly treated and had no idea of the odds they faced.

But, it's not gambling, so that's ok, right?

Legal advisers to the online gambling industry are used to advising on game categorisation and on occasion assist clients in adapting a product to keep it outside of gambling regulation altogether, if that is their client's wish. Similar advice can be given in the context of social games as the social networks do not permit gambling within their environments and the providers of such games probably wish to target players around the world without the fear of prosecution for operating illegal gambling businesses. The legalities around social gaming and, particularly, the use of virtual currency are fairly well understood now. It is generally accepted that an individual needs to stake something of value and have the opportunity to win something of value in return, if the activity is to be considered gambling. Jurisdictions all approached this in slightly different ways but the result is largely the same. In France, for example, the legislation concentrates on whether there is hope of any 'gain'¹. In the UK a player would need the opportunity to win, by playing a game of chance, a 'prize' meaning money or monies worth². In Italy there may need to be a 'prize in cash or other economically relevant utility' being awarded³.

Within most social games and, pertinently, within the casino and poker-type products available through Facebook, a business model prevails that requires a player to pay to play but will not allow them to win anything of any real economic value from the process, meaning they remain largely regulation-free. Things get

complicated when players win virtual benefits that other players may choose to purchase directly, but the arguments remain mostly robust as the rewards still have no real economic value outside of the virtual world. However, try telling that to the parents of school children in Japan who complained to the Agency. To their offspring, such virtual prizes clearly have some 'value' judging by the considerable sums being spent on them, often through mobile phone bills with no alert mechanism allowing them to gauge their spending.

Whilst academics and, indeed, clever attorneys come up with reasoned arguments as to why any particular mechanism would not fall within the strict definition of 'gambling' within a particular jurisdiction, what is particularly striking in the Japanese case is the sense, clearly capable of extrapolation outside Japan, that the way certain social games interact with players may make them deserving of some form of regulation.

So, what is the point of regulation?

The UK's Gambling Act neatly explains what gambling regulation is designed to achieve. One of the licensing objectives is stated as being the 'Protecting [of] children and other vulnerable persons from being harmed or exploited by gambling'⁴.

Regulation protects us by keeping crime out of gambling and ensuring gambling is conducted in a fair and open way. In the same way that gambling regulation ensures, for example, that any random result determination is truly random, one might argue similar mechanisms within the social gaming environment might also warrant a degree of control. Whilst the argument for this is

strong, the issue of regulation in the social gaming environment is likely to come to the fore in the context of player harm and potential exploitation.

Regulation is designed to protect players and needs to adapt in order to do so. Whilst we can satisfy ourselves that gambling regulations do not apply on the basis that social gaming activities do not fall within the strict definitions of 'gambling' in most jurisdictions, the question that will, in the author's view, be increasingly asked is whether such activities should be caught by regulation. The regulation of remote gambling has taken its time to catch up with the technological innovations that facilitated these activities to take place. The question remains whether gambling regulation is broad enough to cover all the activities that should fall within its domain. Should other forms of digital entertainment be the subject of similar scrutiny?

Whilst there have been some very successful proponents of gambling-like products within social networks for some time, it has only really been in the last 2 years that such activities have really taken off and have become a bubble all of its own. Indeed, it is probably fair to say, such activities only drew the attention of the mainstream media following IGT's acquisition of DoubleDown Interactive in January 2012. The astonishing valuation placed upon this business raised many eyebrows and made many sit up for the first time and appreciate that the social gaming world and the established gambling industry were undoubtedly converging. It is this point of convergence that may prompt the need for carefully considered regulation in the future, to the extent that existing consumer protection and advertising regulations may appear

inadequate. Social networks, by their nature, remain highly accessible and the absence of any meaningful age verification within Facebook, particularly, allows what looks and feels like casino activity to be readily available to minors. Furthermore, prolonged participation is commonplace, without any duty of care being afforded to users by the operators or the social networks themselves.

Regulation, currently, keeps social gaming and real money gambling a distance apart, but they are certainly tiptoeing towards each other. As has happened in Japan, it may be the effects of playing chance-based games that tips the balance. Whilst advertising regulations and gambling regulations may police the ways in which a social game can be used to fertilise a real money game, one is left wondering whether the ability to win money should be the sole determinant of whether a form of entertainment activity becomes worthy of regulation. Or, to put it another way, whether the ability to win money should be the sole determinant of whether a participant in an entertainment activity becomes worthy of protection.

'Social' responsibility

Social responsibility requirements, to the extent that they are even vaguely well developed, do not solely focus on the financial impacts of gambling but also on the impacts to participants' lives and the lives of those around them. Whilst participation in a casino or poker game within a social network may not generally involve the loss of significant amounts of money (when compared with how much a player could lose in an online casino), the effect on the day-to-day lives of the participants could be yet significant where a participant spends many hours

Regulation, currently, keeps social gaming and real money gambling a distance apart, but they are certainly tiptoeing towards each other. As has happened in Japan, it may be the effects of playing chance-based games that tips the balance

playing. Of course, the same could be said for someone obsessively building their own farm on Facebook or playing a MMORPG every evening.

The imposition of some form of social responsibility obligations on video game distributors, for example, seems rather fanciful and yet many a parent of teenagers will complain about the amount of time their offspring spends playing such games and the effect that this has on their family lives. The idea of extending some form of social responsibility programme into this environment seems unrealistic. Is the idea of regulating activity in social networks similarly unrealistic?

It is telling to read the British Gambling Prevalence Study 2010 in light of this⁵. Section 5 of the Study provides an analysis of the fundamental criteria used to assist in the identification of 'problem gambling'⁶. Whilst a number of criteria are financial in nature, not all are. References are made to people treating an activity as escapism, being restless without it and trying to cut back but being unable to do so⁷. Such pointers clearly apply in the gambling context, where participants can win money. Could these also apply in circumstances where they can't win money? And need it just be where a chance element is present? Many jurisdictions permit games of pure skill to remain free from regulation; one wonders whether participation in these pastimes could also warrant attention.

As the Japanese Consumer Affairs Agency acts on complaints brought against social gaming providers in Japan, one can but guess as to whether there are conspiratorial reasons behind these moves, as the overwhelming growth of these games has been at the expense of traditional pachinko parlours. But the points being raised are worth

consideration by the gambling industry, as what is particularly striking is the attention a regulatory body is paying to chance-based activity within social networks. The Agency has decided that the participants should not be allowed to transact with operators without a form of regulatory overlay. Ironically, whilst the social gaming operators have forged ahead without the headache of regulation, were it to come, the gambling industry would be well placed to cope.

The idea that the social gaming phenomenon could fall within a gambling regulator's remit in the coming years may seem odd to some. Yet, if we leave the definitional niceties to one side (which could cloud our reasoning on this issue), then the establishment of a framework aimed at 'protecting children and other vulnerable persons from being harmed or exploited' by an activity within a social network may not seem so fanciful after all.

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1. Article 2 of the law of May 21 18:36 amended by the Online Gambling Act May 2010.
2. Section 6 of the Gambling Act 2005.
3. Decision of the court of Cassation, 6 May 2010.
4. s1(c) Gambling Act 2005.
5. British Gambling Prevalence Study 2010, published by the National Centre for Social Research.
6. See Table A2.4, Appendix 2, British Gambling Prevalence Study 2010.
7. Criteria based on the 4th edition of the Diagnostic and Statistical Manual published by the American Psychiatric Association, 1993.

EU

More regulatory co-operation in the EU: setting standards

Operators, regulators and players are calling for greater harmonisation and common standards for the European gaming and betting industries. Charles Gerada, Partner at Jeffrey Green Russell, discusses how the industry could benefit from common rules and standards concerning responsible gaming, cybercrime, liquidity and anti-money laundering.

The extent to which greater regulatory co-operation may be needed or achievable in practice continues to be an important topic in the industry and is likely to remain so for as long as the regulation of the industry in the European Union, continues to fragment along national (and often sectorial) lines.

To date, the operators and trade associations have been the main drivers of the debate, with occasional input from several interested regulators. This is not surprising since the adoption of common standards should deliver tangible benefits to the operators. But operators are not the only parties with an interest in the direction and outcome of the debate.

This article seeks to analyse the issues from the perspective of various stakeholders: the regulators who have responsibility for implementing gambling laws and regulations, the operators who are interested in commercially exploiting gambling activity and the end user (players/consumers) who are attracted to the operators' offering.

Since the stated purpose behind the regulation of gambling by Member States generally involves the consideration of abstract objectives (the prevention of crime, the protection of the

vulnerable, etc) the need to identify which standards might first be the subject of greater regulatory co-operation, as well as the means of and hindrances likely to be encountered in achieving that end, often takes on a subjective, sometimes political flavour. After all, 'one man's sunset is another man's dawn' and each stakeholder may have subtly different, sometimes competing, interests and tolerances on the subject.

Greater co-operation

Of the various areas on which greater regulatory co-operation might first be achieved, responsible gaming seems to be an obvious candidate. From the regulators' perspective, this is at the heart of their *raison d'être*. For consumers this is arguably the most important and identifiable function of an effective regulatory framework, even if, the convenience of having a common standard is likely to go unnoticed by the majority of them. With some justification, external commentators might expect operators to resist co-operation on this front, at least ahead of other areas, but in practice this is rarely the case. Many reputable EU facing operators have long accepted the importance of reliable and effective responsible gaming procedures, and can deftly turn such policies to their distinct advantage.

On the face of it, attaining greater co-operation on responsible gaming might also be the easiest area on which regulators can deliver actual progress. Subtle nuances aside, most jurisdictions have principally the same regulatory objectives when it comes to responsible gaming. But to what end? Any progress on this front is most likely to be achieved through the signing of regulator-to-regulator Memoranda of Understanding. But merely signing another Memorandum is unlikely

to confer any tangible benefits on the industry as a whole (or even a sector of it) because the style and manner in which different regulators actually regulate, differs markedly in practice. Regulators will not change their style of governance nor the manner in which they interpret their objectives overnight and any commonality in the definition or meaning of responsible gaming standards needs to be transposed to the wider regulated environment and must touch broadcasting and advertising regulators too, to enable a coherent approach to positioning gambling offerings across national markets.

Cybercrime

Of all the standards on which the stakeholders might unify, a common standard aimed at combatting cybercrime might, in the abstract, be one of the most attractive to all and be deserving of an unambiguous approach. But conflicts will inevitably emerge as different approaches impact stakeholders at different levels. A common standard aimed at fighting cybercrime would surely benefit both regulators and operators, each of whom are in a constant game of 'cat and mouse' in order to keep ahead of the cyber criminals by both understanding the threat and by countering it with new technologies. But to develop and maintain a successful standard, regulators and operators (brand owners or software developers) would need to collaborate intensively and on an ongoing basis. To succeed the operators would need to admit areas of vulnerability on the one hand and share preventative technologies on the other; both things that a typical operator would probably prefer to keep confidential. And consumers, petrified by the possibility of data

theft, are unlikely to champion this cause, particularly in the online gaming sector so the need and desire to see it tackled is more likely to manifest itself in respect of financial services where the scale and adverse effects of the threat is more pronounced and easier to comprehend by those consumers.

Further, given the global nature and reach of cybercrime, tackling the problem would no doubt require the co-operation of many other governmental and quasi-governmental bodies across national, regional and global boundaries, while at the same time both igniting a debate and exposing different national perceptions on the relative importance of civil liberties, not least within the various member states. So it seems unlikely, though not impossible, that EU gambling regulators will deliver on a common standard in the context of combatting cybercrime before any other standards.

Liquidity

Of all the areas on which a common standard might emerge, a standard on liquidity might deliver the greatest happiness for the greatest number. As is evident from the growth of arrangements under which operators have agreed to pool their liquidity in order to create mass in restricted markets (either through b2b arrangements or as part of a white label platform), shared liquidity allows more operators to get a piece of the action. Players, particularly those who play community games such as poker and bingo, would doubtless welcome a common standard. For such players, shared liquidity, affording them the opportunity to play at the right price and at the right time, is key. A common standard on liquidity ought also to be attractive to the regulators but for rather different

The Green Paper on online gambling in the internal market seems to clearly signal a desire for Member States to act in concert in devising common quality standards for national licensing

reasons. Absent of such a standard, a regulator is faced with the situation where a player, registered from within that regulator's own jurisdiction, might end up playing on an unregulated site and against unknown and unidentifiable players, having been transferred from the relative safety of an EU regulated site. Similarly, the inverse can happen, with players from unregulated jurisdictions playing games on licensed websites - without the regulator being able to ascertain whether the opposing players have been age or identity verified.

The challenge to achieving a common standard on this front arises out of political factors, with some jurisdictions continuing to promote their monopoly providers allegedly on the basis of containing a desire to 'channel' gambling offerings to 'approved' providers. Yet too restrictive a stance on liquidity tends to drive consumers to 'rogue' or non-regulated sites.

Anti-money laundering

The scope for common standards in anti-money laundering (AML) / know your client procedures is clear enough although the challenge here arises out of the variation in the availability of data and the differing personal privacy limitations which are a hallmark of the European identity market. A number of market leading providers of identity and age verification service providers provide a number of tools to aid verification, particularly in the online world. But despite the relatively few parameters that would need to be overcome to achieve a consistent identity standard, this has not materialised.

Here, operators and consumers alike would surely welcome a common standard and each would likely benefit from a common cohesive approach that meets

AML, age and ID verification requirements without undue delay or inconvenience. Benefits exist for regulators too; simplifying their obligation to analyse and audit AML procedures proposed by would be licensees.

But of course there is an interplay with local data protection laws which, whilst founded on the same EU directive, are in fact subtly different in practice.

Whether the desires and hopes for greater regulatory co-operation are attainable now depend to a large extent on the regulators and their political paymasters. The Green Paper on online gambling in the internal market seems to clearly signal a desire for Member States to act in concert in devising common quality standards for national licensing. The operators, and to a lesser extent player consumers, will no doubt continue to lobby for co-operation and will be a helpful resource in developing common standards but to actually deliver common standards in any of these areas is easier said than done. So the onus rests with the regulators who will have to find additional time from their already busy schedules to develop and implement these standards.

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Gambling law in Scotland: the 2005 Act in practice

Scottish gambling law is regulated by the UK Gambling Act 2005. However, a number of problems occur when applying this law to the situation in Scotland, as significant differences between England and Scotland were not taken into consideration when the Act was created, inaccuracies that are still yet to be rectified and remain a blight on the Scottish gambling industry, as Stephen McGowan, Director of Licensing and Gambling at Lindsays, argues. McGowan discusses the current situation in Scotland and the necessary amendments to ensure the regulation of Scottish gambling improves.

Scotland is regulated along with England & Wales by the Gambling Act 2005, but there are some key differences in how the law applies. Scotland has its own legal system, and, through that, its own alcohol licensing system. There are then four general areas of concern which I wish to address in this article: (a) drafting errors; (b) the lack of knowledge of gambling law north of the border; (c) enforcement issues, and (d) the role of the Gambling Commission itself.

Drafting errors

Let me give you just two examples of drafting errors and mistakes that have impacted gambling in Scotland. The first of these is the problem with the definition of who can conduct gambling enforcement. The Gambling Act 2005 provides for enforcement to be carried out by police, the UK Gambling Commission compliance officers, and licensing authority officers. It is the last of these which poses a problem in Scotland. The definition of 'licensing authority' ignores that in Scotland the licensing authority is not the local authority (i.e. the council) but is in fact the separate licensing board, which is the licensing board established for alcohol regulation under the Licensing (Scotland) Act 2005. This Board is not a committee or arm of the council; it is a legally separate creature, a quasi-judicial body created by statute. And therein lies the rub. In order for there to be a licensing authority officer, the licensing authority has to be able to employ such officers, and a Scottish licensing board does not have employees. What this means is that, in Scotland, there can be no enforcement by a licensing authority officer.

The second example relates to gaming machines used in pubs and

clubs. The relevant regulations, which provide for Licensed Premises Gaming Machine Permits and Club Permits, rely on a particular definition for what constitutes an alcohol licensed premises. In Scotland, alcohol is regulated under the Licensing (Scotland) Act 2005 which came into force on 1 September 2009. But these gaming machine regulations referred to alcohol licences under the old system, namely the Licensing (Scotland) Act 1976. This meant that every single permit issued by Scottish licensing boards since 1 September 2009 had been issued illegally, and every machine which was being used in reliance of one of these permits since that time was also illegal. The drafting error was eventually fixed, after I brought it to the attention of the Scottish Government.

Knowledge

At the time that the Gambling Act 2005 came into force, on 1 September 2007, Scotland was going through a seismic change in alcohol licensing. This was the Licensing (Scotland) Act 2005 which completely overhauled alcohol licensing law. Licensing Boards (and private practice solicitors) were busier than they ever have been, as every single alcohol licence in Scotland had to 'convert' through to the new system. The result of this was that gambling applications, and gambling law generally, was lumped into the difficult pile and forgotten about by licensing boards. This has had an impact on the general knowledge of gambling law which persists even now (although it is a lot better). A number of local council administration staff were tasked with trying to administer a system they knew nothing of and had no experience in. This resulted in

gambling applications taking literally years to be processed. Even to this day, a client of mine has still to receive his premises licence from a particular licensing authority in Scotland even though it was granted back in 2007. Gambling licences are often issued with numerous mistakes and formatting errors. I have had to return countless licences to licensing boards and spell out line by line what the licence should actually say. This is not the fault of the hard working administration staff. I have a lot of sympathy for them and they are in an invidious position. It is only in the last year that training has become better. I myself have trained dozens of licensing board staff (and councillors) to try and get people up to speed. I must also congratulate the UK Gambling Commission on their elevated efforts to have a presence in Scotland, they have upped their game considerably in the last year.

Enforcement

This brings me back to the drafting error which prevents any licensing authority officer from conducting enforcement in Scotland. We have a situation that local authority enforcement of gambling law is illegal in Scotland. This has been known about for some time now. I raised it through the Law Society of Scotland licensing sub-committee back in 2010 and the point was conceded by the Gambling Commission and the Scottish Government. I have been advised that, finally, perhaps, someone will pay attention to this and get the offending section amended. It really is a minor change and only requires a couple of extra words - the Law Society of Scotland has even offered to provide the wording.

In the interim, it is interesting to note that it was only in the most

The UK Gambling Commission is enforcing a principle which they created themselves and that does not exist in law: 'primary purpose', which requires a premises licence to provide a 'primary' form of gambling above other forms.

recent issue of statistics by the UK Gambling Commission that any enforcement visits had been reported to them by Scottish authorities. Those visits had been carried out illegally but I doubt the authorities were aware of that. To date there has not been a single review of a gambling premises licence by a Scottish licensing board. Not one since the Act came into force in September 2007.

Just who - from the Scottish licensing authority - should actually carry out the enforcement? It has been suggested that alcohol Licensing Standards Officers should do the job. However, there are a number of issues with that. First of all, they are not trained in gambling law. They should not be expected or asked to conduct gambling enforcement unless their statutory role contains sufficient and proper gambling law training.

Secondly, they have no jurisdiction under the Licensing (Scotland) Act 2005 to enforce anything other than alcohol licensing. So that Act would need to be amended also. And thirdly, their wages are paid through alcohol licensing fees - the alcohol licensed trade will not be entirely happy if their fees are subsidising the enforcement of gambling premises.

Primary Purpose

The UK Gambling Commission is enforcing a principle which they created themselves and that does not exist in law: 'primary purpose'.

'Primary purpose' requires a premises licence to provide a 'primary' form of gambling above other forms: for example a betting premises should primarily be for betting. The problem is, this rule does not exist in the 2005 Act and the Commission has invented it and now seek to enforce the rule by targeting small independent betting operators through formal

operating licence reviews, but continually change the goalposts with concepts such as 'typical betting shop', 'actual use' and 'expected use', none of which exists in the legislation; whilst at the same time they ignore the national betting firms who by their own figures have a split of some 80% in favour of machines and only 20% on betting - hardly the 'primary' form of gambling then.

In my view things are not working. There seems to be, amongst other issues, an internally imposed deadline culture with one rule for the Commission and another for the rest of us. The Gambling Commission itself is currently under review by a Select Committee of the Department of Culture Media and Sport (DCMS). I do hope that there can be a change for the better.

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DENMARK

Five months down the line: the new regime in Denmark

Until January 2012, Danish gambling regulation was based on a state monopoly, allowing only the state-owned company Danske Spil A/S to provide gambling services within the Danish Market. This changed radically when a new gambling law came into force on 1 January and liberalised the Danish market, as Pernille Nørkær and Maria Thomsen, of Moalem Weitemeyer Bendtsen, discuss.

The new legislative framework, the Act on Gambling (the Act), includes a licence scheme, according to which gambling providers must have a Danish licence in order to provide gambling services in Denmark. Licences from other jurisdictions will not be sufficient in Denmark, and consequently foreign providers of gambling services must apply likewise if gambling services are arranged or provided to the Danish market.

Licences are available for internet casinos, internet poker as well as land-based and online betting. On the other hand, lottery, bingo, scratch cards, keno and betting on dogs and horseracing are still provided on a monopoly basis by Danske Spil A/S, as they - according to the preparatory works - are important cultural institutions which need to be protected.

Definitions

Gambling in Denmark is divided into three main areas: lottery, combined gambling and betting. Lottery is defined as an activity in which a participant gets a chance to win a prize and where the winner is decided solely by chance. Examples hereof are the National Lottery, joker, the state lottery, bingo, and scratch games.

Combined gambling is defined as an activity in which a participant gets a chance to win a prize, and where the winner is decided by a combination of skill and chance. Examples hereof are bridge, poker, backgammon, whist, and guessing competitions, if decided by a prize draw. However, any gambling based solely on skill may be defined as combined gambling if an element of chance is added in determining the winner, e.g. a prize draw between the best players.

Betting is defined as an activity in which a participant gets a chance to win a prize by betting on either a future event or the occurrence of a future event. Examples hereof are bets on a race or a sports game.

Licences

The Danish system is based on nine different types of licences, of which the most popular ones up until now have been the betting licence and the online casino licence.

- The betting licence is granted on a non-exclusive basis for a period of up to five years. No specific types of betting are determined in these provisions, opening up a wide range of possibilities.

However, certain limitations do apply. Fixed odds gambling and live betting, etc. will be comprised by the licence, as well as land-based Trackside.

- The online casino licence is non-exclusive and will be granted for a period of up to five years. The licence will comprise the provision of roulette, baccarat, punto banco, black jack, poker and gambling on prize-paying gambling machines in an online casino, thereby in principle making it possible to provide the same types of gambling which are provided by a land-based casino. Other types of gambling, including the online combined gambling provided by Danske Spil today (called 'Zezam

fællesspil), will be comprised by the licence, and may be provided by the licence-holder, e.g. whist, hearts-free, yatzy, and ludo, as well as other games like bridge and backgammon. A licence may be limited to only one or more types of gambling.

A licence may be either indefinite or restricted, whereas the restricted revenue licence limits the yearly gross gambling revenue to a maximum of DKK 1,000,000 (£109,000). Such restricted licences are granted for one year at a time.

Normally, licences will be granted for the maximum period. However, certain circumstances may lead to a shorter period.

Terms for obtaining licences

Any gambling provider established in Denmark, the EU or the EEA may apply for the licence. Companies established outside of Denmark, the EU and the EEA might also apply. However, these companies must appoint a representative in Denmark, and the Danish Gambling Authority must approve this representative.

Overall, a licence applicant must show the Danish Gambling Authority that the applicant will operate the gambling activity on an appropriate and professionally and financially sound and safe basis. A licence may not be granted if a conduct causing reasonable doubts regarding the terms for operating an appropriate and financially safe gambling activity has been shown by the applicant itself, members of the management or the board of directors or others who may exercise controlling influence on the running of the company.

The Act states that a licence may be granted to both natural persons and legal persons such as companies. Applicants and members of the management and the board of directors will have to comply with the following set of

requirements:

- If the applicant is a natural person, the person must be at least 21 years of age and may not be under guardianship or co-guardianship;
- The applicant must not have applied for an administration order, filed a petition for compulsory composition, bankruptcy, debt rescheduling or be under an administration order, have gone into bankruptcy proceedings, debt rescheduling or compulsory composition;
- The applicant must not have been convicted of a crime which could substantiate obvious risks of abuse of the possibility to work with gambling; and
- The applicant must not have government debt due for payment.

If an applicant resides or is established within a non-EU or non-EEA-country and appoints a representative domiciled within Denmark, this representative must comply fully with the same requirements as the above. Furthermore, the applicant must appoint a fiscal representative who is jointly and severally liable with the licence holder for taxes and fees owed to the Danish authorities in relation to the licence.

Licences may be revoked by the Danish Gambling Authority under certain conditions, e.g. if the licence holder or their representative seriously or repeatedly violates the provisions of the Act. Licences may also lapse under certain circumstances, e.g. if requested by the licence holder or if the licence is not actively used within certain time limits.

In addition to the requirements for an appropriate and professionally and financially sound activity, there is a wide range of technical requirements that the gambling providers must be in compliance with. The technical requirements must be

The willingness from the Authorities to issue licences combined with the risk of severe measures against illegal services will motivate gambling providers to seek to obtain a licence in Denmark

met before a licence is issued.

These requirements include the establishing and testing of special systems SAFE (data storage), ROFUS (register of voluntary excluded players) and Tamper Token (security system) and certification of the system.

As a main rule technical equipment must be located in Denmark unless the Danish Gaming Board accepts the equipment being located in a EU/EEA country where the relevant gambling authority has a reciprocal agreement with said authority. Application for a restricted licence is easier, as particularly the technical requirements are looser. The Danish Gambling Authority supervises persons and companies who have been granted a licence pursuant to the Act.

Fees and taxation

When applying for a betting licence or an online casino licence, the applicant must pay an application fee of DKK 250,000 (2010 fees, roughly £27,000). When applying for both a betting licence and an online casino licence simultaneously, the total fee is reduced to DKK 350,000 (2010). The fee of a restricted licence is reduced to DKK 50,000.

Persons and companies subject to taxation pursuant to the Act on Duty of Gambling must register their taxable activities with the Danish Tax and Customs Administration. The betting licence holder must pay a tax of 20% of the gross gambling revenue. Online casino licence holders must pay a tax of 20% of the gross gambling revenue.

For betting and online casino licences, the licence holder must pay an annual fee calculated based on the annual taxable gambling revenue. The fee spans from DKK 50,000 to 1,500,000.

Status on the Danish market

The Danish system is four months old. Some initial difficulties have been encountered. However, they have, to some extent, continuously been addressed by the Authorities. As of 29 March 2012, a total of 42 providers have obtained a licence. Between those 42 licence holders, 32 have been granted a full online casino licence, 19 have been granted a betting licence, 6 have been granted a restricted online casino licence, and 2 have been granted a restricted betting licence.

The licencing process in Denmark is an ongoing process. Therefore, it is still possible for operators to apply. New waves of applicants should expect the processing time of the licencing procedure to last between three to six months. Incidentally, the Gambling Authority has announced that it will take in all the experiences from the first round of the licencing process, meaning that both the application forms and/or the application procedure might change continuously.

Although the application process requires some administrative work, the licence system seems to be flexible. Moreover, based on the number of licences issued, the Authorities seem to be willing to grant licences. We believe that the willingness from the Authorities to issue licences combined with the risk of severe measures against illegal services will motivate gambling providers to seek to obtain a licence in Denmark. At the end of the day, this will lead to the Danish market being an open and fair market.

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BULGARIA

Bulgaria's new Law on online gambling: an open door?

The Bulgarian Ministry of Finance expects to gain BGN 100m in tax revenues from online gaming operations in the next year as regulation comes into force. As of 1 July 2012 online gaming will be regulated in Bulgaria following the adoption of a new Gaming Law. The new Law sets out requirements for operators that wish to enter the Bulgarian market, but a number of requirements are yet to be clarified by the Bulgarian Parliament, such as exactly how much tax online operators will pay. Nadia Hristova, a Member of the Management Board of the Bulgarian Gaming Association, discusses the details and requirements of the new Law.

Since 2008 there have been numerous debates, consultations and steps towards the adoption of a new Gaming Law in Bulgaria dedicated to regulating remote gambling and keeping up with the rapidly changing gaming environment, new technologies and international standards.

On the 1 July 2012 the new Gaming Law will come into force, which will regulate online gaming operations in Bulgaria for the first time. The new Law published in the Official Gazette on the 30 March 2012 after being adopted in the Bulgarian Parliament on the 15 March 2012. Meanwhile it passed a public discussion within the State Commission on gambling, notification to the European Commission, public discussions in the working groups and Parliamentary commissions and first reading in the Parliament and proposals thereafter.

Existing off-line licence holders have 15 months to adjust their activity to the new requirements after the 1 July 2012.

For the online operators, who now have a chance to get a licence and operate legally in the Bulgarian market, the doors are open, but not completely. The law is not codified and coherent and still some important Ordinances, which the new Law refers to, need to be adopted by the Council of Ministers. These Ordinances may significantly influence the regulation. Among them are the documents required for obtaining Licences under the Law; the technical requirement and testing of gaming equipment and software; approval of gaming labs; collecting and storing data and assuring real-time information flow to a National Revenue Agency server; and adjustment of the registers kept by the State Commission on gambling. Subject to the law, these Ordinances will be adopted within 3 months after the Gaming Law comes into force, though this term is instructive not compulsory. So far no public consultation on these matters has been initiated by the State Commission on gambling. It is very likely officials are still drafting them before announcing a public consultation and proposing them to the Ministers of Councils.

There is another important question mark: what will the taxation levy be on online operations? The new Gaming Law does not answer this question. An answer to it will be in another law - the law on corporate income tax, which needs to be supplemented for the new sales channels for gaming. Unofficially there have been two approaches discussed within the Ministry. The first is to keep the general principle of taxation applied to off-line operators i.e. taxation as a percentage of the gross revenue. The second is to change the existing principle and regulate the taxation as a percentage of gross

profits. At the moment the tax is 15 % on gross revenue on all games of chance (except gambling halls and casinos). Now MPs are discussing unofficially the revenue to be levied. The percentage for remote gambling will definitely not be 15%; it will most likely be 10%. If the percentage is reduced, it will not be less than 10%, to stop a big gap between online and off-line operators. But a lower tax is definitely under consideration as the government aims to attract more online operators to get a Bulgarian licence.

The Law outlines the different types of gaming which can be licensed and are therefore legal in Bulgaria. These are table games at casinos, slot machines, lotteries, bingo and keno, sports betting, betting on uncertain events and facts, and betting on dogs and horse racing. Almost all of these can be organised by remote means upon a license granted by the Bulgarian State Commission on gambling.

License conditions

To be eligible to apply for a remote gambling licence, an operator must meet all of the following criteria:

- Be a Bulgarian legal entity or a legal entity registered in an EU Member State, as well as in another European Economic Area Member State or in Switzerland;
- In a term not less than five years before the application date have no administrative enforcement measures subject to the Bulgarian gaming regulation;
- Have its communication equipment and central computer system onsite in Bulgaria or an EU or European Economic Area Member State or in Switzerland (though a control local server onsite in Bulgaria is required);
- Have a bank account for depositing bets and pay outs in a bank licensed in Bulgaria or in an

EU or European Economic Area Member State or in Switzerland;

- Have a central computer system able to register and verify players and provide real-time information flow to a National Revenue Agency server assuring compulsory online registration for each gaming transaction;

- Use gaming software approved by the State Commission on Gambling or any of the approved gaming labs;

- Make an investment in Bulgaria or in another EU or European Economic Area Member State or in Switzerland of no less than BGN 600,000 for online gambling and BGN 300,000 for remote gambling organised via electronic transmission and to have funds for operational costs of no less than BGN 1m. The Gaming Law provides a legal definition and description of the approved assets for investment and funds for organising games.

The Gaming Law prohibits foreign operators (apart from foreign persons registered or residents of an EU Member State or a European Economic Area Member State or Switzerland) from getting a gaming license in Bulgaria, unless they organise games in a casino purchased and built by the operator and have a 4 star rating or higher; or the operator has invested EUR10m, and has created more than 500 jobs in Bulgaria.

Further, ineligible licence applicants include legal entities that have as beneficial capital owners (possessing more than 33% of the capital), managers who:

- have been criminally convicted (unless rehabilitated);
- have been insolvent and unsatisfied creditors have been left;
- have committed a crime against financial, tax and social security systems;
- have been previously

Many of the provisions prescribe that any breach of the draft gaming regulations, irrespective of its severity or degree, is grounds for imposing fines and temporary or final revocation of the license, which opens the door to subjectivity. The Penal Code also makes it a criminal offence to organise gambling without a license

sanctioned for illegal gambling operations or have unpaid duties to the state budget;

- cannot prove the origin of the funds
- are legal entities registered in an offshore zone.

Blacklists

A black list of illegal online gambling operators shall be maintained by the State Commission on gambling and made publicly accessible on its website. If within three days of the offence, the website has not been suspended, the Commission will submit a request to the chairman of the Sofia District Court to issue a court order to force ISPs to block access to unlicensed offerings. ISP blocking should be done within 24 hours of the order by the court. There are still negative opinions concerning these measures, but for now most MPs are convinced of the results.

Online companies need to operate under a strict advertising ban. Only licensed operators may advertise. There is a ban not only on direct advertising, but also submission of any electronic messages with information about gaming. The only admissible announcements are the terms and conditions of participation and the results of the games, together with names and the registered trade mark of the operator. Sponsoring of sports, cultural and social events is allowed. This ban is imposed indirectly in the supplementary provisions of the new law, there is a legal definition of direct advertising of gaming as a provision of any information by any means, which aims to attract the interest of people in gaming. Although the State Commission on gambling still claims that the advertising restrictions in the old regulation were the same, it is clear that the new restrictions are

broader.

The Gaming Law provides administrative penalties for almost every possible violation of its provisions. They can reach BGN 5m for organising gaming without a license. Administrative enforcement measures include temporary or permanent revocation of a license. Many of the provisions prescribe that any breach of the draft gaming regulations, irrespective of its severity or degree, is grounds for imposing fines and temporary or final revocation of the license, which opens the door to subjectivity. The Penal Code also makes it a criminal offence to organise gambling without a license. Punishment is up to 6 years imprisonment and a fine of up to BGN 10000. On 21 July 2011 the Bulgarian Parliament approved amendments to the country's Penal Code in order to add sports crimes to the Law. In addition to illegal betting and match-fixing, the amendments criminalise operating illegal online betting as well. Whether the new Gaming Law meets the requirements of the European Commission's criticism, received on notification of the procedure, or not, is not clear. Some of the provisions were loosened in order to meet EU requirements. Whether this will attract more operators to obtain a Bulgarian license will not become clear until the full regulatory framework is built up - together with Ordinances and the taxation regime. Nevertheless, the Ministry of Finance is expecting BGN 100m tax revenues from the online gaming operations in the next year.

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AUSTRIA

The Austrian Gambling Act: under EU scrutiny again

The Austrian Gambling Act has been put before the Court of Justice of the European Union (CJEU) for the third time to deal with legal uncertainties surrounding the 'Hit and Larix' case. The current case, concerns Austria's ban on advertising foreign casinos and how far such a restriction is compatible with fundamental freedoms guaranteed by EU law. Nicholas Aquilina and Stephan Strass of Brandl & Talos Attorneys-at-law examine the case, its conclusion and the legislation in question.

Repetitive assessment of Austrian Gambling Act unveils violations of EU law

Although the Court of Justice of the European Union has already assessed the Austrian Gambling Act (*Glücksspielgesetz*, GSpG) twice in the preliminary ruling cases 'Engelmann'¹ and 'Dickinger und Ömer'², the Austrian legislator has still not managed to eliminate weaknesses in the GSpG, a fact that seems to annoy the Advocate General (AG) Ján Mazák in his Opinion on the pending case 'Hit and Hit Larix': 'This is the third occasion on which the provisions of the GSpG have prompted the Austrian courts to refer questions to the Court for a preliminary ruling in order to clarify the rules relating to the freedom to provide services'³. No other gambling law has ever been the subject of CJEU case law in such a short period of time.

In the case at hand, two land-based Slovenian-licensed casino operators, 'Hit and Hit Larix', had applied for a permit to advertise their Slovenian casinos in Austria. Austrian authorities will only grant an advertising permit for land-based operators located in another EU Member State if the operator

has obtained a 'comparable license' in the other Member State and the player protection rules provide the same level of protection as under Austrian provisions⁴. The Austrian Minister of Finance rejected the application stating that the level of player protection in Slovenia was not equal to the level of protection granted in Austria.

'Hit and Hit Larix' filed an administrative complaint against this decision. The Austrian Supreme Administrative Court expressed its doubts as to the conformity of this restrictive provision with EU law and referred a question to the CJEU seeking clarification, whether § 56 GSpG was compatible with the freedom to provide services pursuant to Article 56 of the Treaty on the Functioning of the European Union (TFEU). Advertising is a service accessory to offering gambling services and therefore protected by Article 56 TFEU just as the gambling service itself⁵. This leads to the conclusion that granting Austrian gambling licenses the right to advertise their services without any further administrative effort, but requiring operators from other Member States to obtain a permit constitutes a violation of EU law as the latter are discriminated against on grounds of nationality⁶.

Oral hearing: feasible to compare player protection?

Although in the oral hearing of 9 February 2012 the representatives of Austria, Belgium, Spain, Greece and Portugal unanimously agreed that the relevant provision constitutes an obstacle to the freedom to provide services, they stressed that this measure was justified for consumer protection reasons. According to the representative of the European Commission the national court should evaluate and compare the

levels of consumer protection in respective Member States. However, in his Opinion AG Mazák expressed his 'doubts as to the possibility of properly carrying out such a comparison, given the lack of harmonisation in the area of gambling [...] as well as the diversity of national legislation'⁷. He concluded that not being able to compare Member States' gambling legislation would lead to discrimination because the authorities would only evaluate where Member State operators are established and not the player protection measures these operators are actually enforcing.

The representative of 'Hit and Hit Larix' argued that even if his clients had complied with requirements equivalent to those set forth in the Austrian law they would have been banned because the contested provision of the GSpG refers to the level of consumer protection prescribed by the national law of the respective Member State but not to the player protection standards provided by the casino operator. Foreign gambling operators could implement the Austrian standards of consumer protection so that enforcement would easily be possible before any national court. However, the Minister of Finance does not take this into account when assessing whether to grant a permit.

Provisions lead to 'hidden' prohibition and discrimination

In his Opinion AG Mazák points out that the contested provision 'amounts to a system of prior authorisation for the advertising of casinos located outside the national territory'⁸. '[...M]aking the grant of a permit [...] under Austrian law constitute an obstacle to the freedom to provide services'⁹. According to CJEU case law, such a restriction may be justified either by the reasons

expressly stated in Art 51 and 52 TFEU¹⁰ or by reasons of overriding public interest if the relevant provisions are pursued in a consistent and systematic manner¹¹ and if they meet the requirement of proportionality in light of the pursued objective¹². In assessing the obligation to obtain a permit, Mazák states that the relevant provision clearly 'goes beyond what is necessary to achieve the objective of protecting consumers'¹³ because:

'First, the system of prior authorisation in question could represent a 'hidden' total prohibition of the advertising of foreign casinos. This would be the case if the authorities of the Member State in question systematically held that the legal protection of gamblers in all other Member States was inferior to that of their own State¹⁴. This argument is substantiated by the fact that the Austrian government has not once granted an advertising permit to a foreign operator. AG Mazák is of the opinion that the lack of harmonisation between national gambling laws makes it much easier to proclaim that the level of player protection cannot be achieved by any other Member State. This makes it very simple for the Austrian authorities to 'assess' the inferiority of any foreign legislation and refuse to grant permits. Unlimited discretionary power of the authorities must lead to the conclusion that the provision in question does not meet the requirement of proportionality. There will always be a less restrictive measure than granting State authorities unlimited discretion, e.g. obliging operators to adhere to standardised player protection rules, like those published by the European Committee for Standardisation in early 2010¹⁵.

Secondly, the AG argues that 'the

Foreign gambling operators could implement the Austrian standards of consumer protection so that enforcement would easily be possible before any national court. However, the Minister of Finance does not take this into account when assessing whether to grant a permit

system of prior authorisation leads, ultimately, to discrimination based on the origin of the applicant'. Mazák's explanation is simple: '[T]he casino operators who requests a permit [...] are assessed on the basis of the Member State in which the casino is established and, more specifically, its legal system.' He explains that responsible authorities would not judge applicants individually but 'compile a list of Member States whose legal systems do not satisfy the condition of an equivalent level of protection and consequently, subsequent applicants will be judged solely on the basis of the Member State in which the casino in question is established'¹⁶. As a consequence, the contested provision is incompatible with EU law, which prohibits any form of discrimination on grounds of nationality¹⁷.

Furthermore, the AG criticises that the grant of a permit proceeds 'without taking account of the level of protection provided by the operator'¹⁸. Even implementing the Austrian player protection standards would still be considered insufficient as only the legal system of the foreign Member State is 'assessed'. This situation indicates that player protection is not the real objective but rather keeping competition away from the Austrian incumbents. Land-based casinos from other EU Member States are de facto banned from advertising in Austria.

Gambling Act designed to favour de facto monopolists

Reserving revenues for the de facto monopolists is the objective of other provisions of the GSpG.

In the context of player protection it is vital to demonstrate that the Austrian government bases the alleged high level of protection on § 25 para 3 GSpG. This provision obliges the casinos to

warn and block players gambling too often and too intensely and those at risk of falling below the poverty line. The Austrian government regularly praises this provision as unique in Europe as it provides players with a *lex specialis* claim against casino operators. The casino is only liable in cases of gross negligence in breaching its duty to warn and block vulnerable players and its liability is limited to the amount constituting the poverty line (EUR 814.82 per month for the year 2012¹⁹) irrespective of how much the player has lost. The *lex specialis* rule excludes players from filing civil claims against casinos²⁰. For this reason this provision has repeatedly been scrutinised by the Austrian Constitutional Court. In November 2011, the Constitutional Court once again declared parts of the provision unconstitutional²¹ and the Austrian Supreme Court, which had to deal with this section in March 2012, reiterated the Constitutional Court's critics²². It is not surprising that the de facto monopolists are in favour of this provision and so § 25 para 3 GSpG has found its way back into the law after having previously been declared unconstitutional. This inglorious provision is unsuitable to proclaim a unique level of player protection as it tightens the protection of players to the benefit of the casino monopolists²³.

The latest amendments to the GSpG also demonstrate that Austria is strictly pursuing the expansion of the gambling sector rather than limiting the possibilities for consumers to take part in gambling. In 1997 a second weekly lottery draw was introduced²⁴ and most recently the number of casino licenses was increased from twelve to fifteen and a new license for a poker salon was introduced²⁵.

The criteria to obtain the

AUSTRIA

Austrian casino licences that were established following the CJEU's 'Engelmann' ruling²⁶ are obviously tailored to the needs of the current de facto monopolist Casinos Austria. Currently Casinos Austria holds all twelve casino licenses. In the tender procedure two packages of six licenses are put to tender. It is obvious that obtaining six licenses at one time is only feasible for the current licensee who already has the necessary infrastructure and has made substantial investments, relying on an untouchable market position. Tendering the licenses in packages makes market entry less attractive to other operators than Casinos Austria²⁷. However, for the CJEU it is clear that 'grounds of an economic nature [...] cannot be accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom guaranteed by the Treaty'²⁸.

A Swiss quality newspaper described the Act as 'Law on the Protection of Casinos Austria from Competition camouflaged as Law on Gambling'²⁹. If the protection of players was the real motive behind the provisions contested in the 'Hit and Hit Larix' case, the Austrian Gambling Act would not only focus on the protection of legislation but on the actual player protection provided by the operators. The real objective is to exclude foreign operators from advertising their services, to protect the monopoly of Casinos Austria. In the recent ruling 'Costa and Cifone', the CJEU declared that protectionism is incompatible with EU law. The Court stated that

restrictions to market freedoms could only be justified if they 'did not have as their true objective the protection of the market positions of the existing operators'³⁰. If the gambling policy of a Member State 'has long been marked by a policy of expanding activity with the aim of increasing tax revenue, [...] no justification can be found in that context in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling'³¹.

The current system of prior authorisation for advertising foreign casinos in Austria must be brought into line with EU law. Given that this preliminary procedure is already the third examination of the GSpG before the CJEU and will lead to yet another harsh criticism of Austrian gambling legislation, it is time for the Austrian legislator to understand that merely talking about high standards of protection, and on the other hand acting towards protecting the investments of a de facto monopolist will no longer be tolerated by the CJEU. Such legislation is not in line with EU law and the requirement of a consistent and systematic gambling policy.

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1. CJEU, 9 Sept 2010, C-64/08, Engelmann.
2. CJEU, 15 Sept 2011, C-347/09, Dickinger und Ömer.
3. Opinion AG Mazák, 17 April 2012, C-176/11, "Hit and Hit Larix", para 8.
4. § 56 para 2 GSpG.
5. Opinion AG Mazák, 17 April 2012, C-176/11, "Hit and Hit Larix", para 11 with

- reference to CJEU, 24 March 1994, C-275/92, Schindler, para 22 and CJEU, 8 Sept 2010, C-316/07, Markus Stoß, para 56.
6. Stadler/Aquilina, *ecolex* 2011, 571 (572).
 7. Opinion AG Mazák of 17 April 2012, case C-176/11, "Hit and Hit Larix", para 10 and para 24.
 8. *Ibid.*, para.19.
 9. *Ibid.*, para 12.
 10. Art 51 and 52 TFEU by virtue of Art 62 TFEU.
 11. CJEU, 6 March 2007, C-338-04, Placanica, para 53; CJEU, 12 Feb 2012, C-72/10, Costa and Cifone, para 63.
 12. CJEU, 21 Sept 1999, C-124/97, Läära, para 39; CJEU, 16 Feb 2012, C-72/10, Costa and Cifone, para 71.
 13. Opinion AG Mazák of 17 April 2012 on the case C-176/11, "Hit and Hit Larix", para 23.
 14. *Ibid.*, para 24.
 15. <http://www.cen.eu/cen/News/PressReleases/Pages/ResponsibleRemoteGamblingMeasures.aspx>
 16. Opinion AG Mazák of 17 April 2012 on the case C-176/11, "Hit and Hit Larix", para 25.
 17. Discrimination prohibited by virtue of Art 18 TFEU.
 18. Opinion AG Mazák of 17 April 2012 on the case C-176/11, "Hit and Hit Larix", para 26.
 19. Austrian Official Gazette, BGBl. II Nr. 398/2011.
 20. Stadler/Aquilina, *ecolex* 2011, 571 (573).
 21. Austrian Constitutional Court, 27 Sept 2011, case G34/10.
 22. Austrian Supreme Court, 15 March 2012, case 6 Ob 250/11z.
 23. P. Bydliński, *ÖJZ* 2010, 689.
 24. http://www.lotterien.at/olg/CS_lotto_untermehrmern.htm?sessionID=456fe04d-1401-583d54-bf05-0b0037682bd9
 25. Austrian Official Gazette, BGBl II Nr. 73/2010.
 26. CJEU, 9 Sept 2010, C-64/08, Engelmann.
 27. Weissel/Vogelsberger, *ecolex* 2012, 181 (182).
 28. CJEU, 16 Feb 2012, C-72/10, C-77/10, Costa and Cifone, para 59.
 29. Neue Züricher Zeitung, 4 March 2011, Österreich als Modell des regulierten Wettbewerbs.
 30. CJEU, 16 Feb 2012, C-72/10, C-77/10, Costa and Cifone, para 65.
 31. *Ibid.*, para 62.

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