

August 2010

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## France and the U.S. Attempt to Use Internet Service Providers to Keep Unauthorized Internet Gambling Operators from Reaching Their Markets

A question vexing governments in many jurisdictions is how to deal with unlicensed Internet gambling operators. Because participants in the gambling offered over the Internet typically use an Internet service provider (“ISP”) to access the websites with those offerings, some jurisdictions seek to use ISPs as their agents. This Alert reviews such attempts in France and in the United States.<sup>1</sup>

### FRANCE

#### The Law

On May 12, 2010, the law n° 2010-476 loi relative à l'ouverture de la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (the “Online Gambling Law”) finally brought an end to the monopoly enjoyed by the Pari Mutuel Urbain (horserace wagering), la Française des Jeux (French lottery), and casinos in the online gambling market by opening France to new gambling companies. The Online Gambling Law set up an independent regulator – l'Autorité de Régulation des Jeux en Ligne – (“ARJEL”) whose main responsibilities are to grant licenses to the new online operators and to pursue unauthorized (i.e. illegal) operators or operators not acting in compliance with their license for sanctions.

The Online Gambling Law provides that a court may sanction (i) unauthorized operators that practice online gambling activities without any license (three years imprisonment and a fine of €90,000) and (ii) authorized operators that are in breach of their license obligations (reduction of the granted license time, suspension or cancellation of the license, fines). In addition, the Online Gambling Law permits a court, upon ARJEL’s request, to direct ISPs (or Internet hosting companies) to block the access of individuals using their services to unauthorized operators and to fine those ISPs that do not comply.

Article 61 of the Online Gambling Law gives ARJEL the power to decide which entity should be sanctioned – the illegal operator, the ISP/hosting company, or both – depending on which sanction ARJEL deems most appropriate. The aim of Article 61 of the Online Gambling Law is to allow a court to restrain access of an illegal website to the French market as quickly as possible and not to have to wait for the

<sup>1</sup> Israel is making a similar attempt. The Israeli police are reported to have served injunction orders requiring ISPs to block access by Israeli residents to certain unlicensed gambling sites. See, e.g., “Israel Extends ISP Blocking Moves,” *Gambling Compliance* (Aug. 20, 2010); “Police bar access to online gambling sites: Injunctions sent to internet service providers for Victor Chandler, Stan James gambling sites,” *Ynetnews.com* (Aug. 18, 2010) (available at <http://www.ynet.co.il/english/articles/0,7340,L-3938596,00.html>).

enforcement of a French decision against a foreign company, which, depending on the country, could be uncertain and take time.

### Using the Law

In June 2010, ARJEL identified several online gambling operators that were marketing to French customers without a license, including the Gibraltar-based operator Stan James. ARJEL notified and requested Stan James to stop marketing to French customers. On July 7, 2010, in the absence of a response by Stan James, ARJEL brought an action before the Civil Court of Paris (*Tribunal de Grande Instance de Paris*) against seven major French ISPs and one UK hosting company. This is the first major action ARJEL has taken against ISPs and hosting companies rather than the illegal operator.

On August 6, 2010, the *Tribunal de Grande Instance de Paris* directed the French ISPs to take all necessary measures to stop their French customers from accessing the illegal website operated by Stan James. The Court imposed a fine of €10,000 per day, if such measures were not implemented two months after the date of judgment and ordered the ISPs to liaise with ARJEL, in order that ARJEL could verify that the measures directed by the Court had been applied. The Court did not require the ISPs to use any specific method to block access to the illegal operator but gave each ISP the responsibility to determine appropriate measures to prevent access by the illegal operator to the French market. With respect to the UK hosting company, the Court postponed its decision due to a procedural error.

During the trial, all the ISPs challenged the option chosen by ARJEL and the fact that despite being the main actor, the illegal website was not directly included in the lawsuit. ARJEL and the court rejected those claims based on Article 61 of the Online Gambling Law. Some of the ISPs also argued that Article 61 violates the European Human Right law. They also argued that the sanction imposed on them was pointless, given that the illegal operator can circumnavigate any measures that might be applied by the ISP by doing such things as setting up alternative domain names and URLs.

This judgment is not necessarily the end of the case, since it was rendered by a court of first instance

jurisdiction and is still subject to appeal. According to commentators, a court of appeal may take into consideration certain of the ISP's claims and overrule the decision.

## UNITED STATES

### The Law

Subsection (a) of the federal Wire Act provides that “[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest...shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C. §1084(a). Subsection (d) of the Wire Act permits federal, state or local law enforcement agencies to direct, in writing, any common carrier under the jurisdiction of the Federal Communications Commission (“FCC”), if its facilities are “being used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law,” to “discontinue or refuse” to provide those facilities. 18 U.S.C. §1084(d).

### Minnesota's Attempted Use of the Law

On April 24, 2009, the Alcohol and Gambling Enforcement Division of the Minnesota Department of Public Safety (“Division”) notified eleven major ISP and telephone carriers that their telephone or Internet facilities, or both, were being used by operators of alleged Internet gambling websites to transmit gambling information in violation of Minnesota law. The Division instructed the carriers to “block access to these sites by customers located within Minnesota” and provided them with a list of the sites, which contained approximately 200 entries. It also informed the FCC of its actions, noting that “[o]nline gambling is illegal in our jurisdiction” and “[i]f this process proves successful[,] we will continue with more sites and more providers.”

In response, on May 6, 2009, the Interactive Media Entertainment & Gaming Association (“iMEGA”), on behalf of its members (including some of the operators of the listed gambling websites), filed a complaint in the federal district court for the District

of Minnesota. The complaint challenged the Division's direction to the ISPs to block Minnesota-based persons from accessing the gambling websites. *See* Civil No. 0:09-cv-01065-JNE-JJG (D. Minn.) (Complaint filed May 6, 2009). The lawsuit was based, in part, on language in subsection (d) of the Wire Act providing that "[n]othing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facilit[ies] should not be discontinued or removed, or should be restored." 18 U.S.C. §1084(d).

The complaint alleged, among other things, that the Division's actions did not comport with subsection (d) and infringed upon the rights of iMEGA's members under the First Amendment and under the dormant Commerce Clause of the U.S. Constitution.

The court, however, never had the chance to rule on these issues. Instead, the parties reached an amicable resolution of the case, pursuant to which the Division withdrew the notices directing the ISPs to block the alleged gambling websites and iMEGA filed a notice of dismissal of the case.

## CONCLUSION

It is difficult for governments to shut down gambling websites believed to be illegally providing gambling services to its residents because most of the operators of the sites are located outside the governments' jurisdictional reach. As a result, governments look for other ways to stop the activity. Using ISPs as tools, by directing them to block gambling websites, is an attractive option. It is likely that other jurisdictions will attempt it, either by enacting new legislation or adapting legislation already in place.

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