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Analysis of PartyGaming's non-prosecution agreement

PartyGaming recently agreed to pay \$105 million over three years in a non-prosecution agreement with the US Attorney's Office for the Southern District of New York. Linda J. Shorey and colleagues at K&L Gates LLP examine the Agreement and the requirements PartyGaming must meet to avoid US prosecution.

After nearly two years of negotiations, on 6 April, PartyGaming PLC, the parent company of Party Poker, entered into a non-prosecution agreement ('Agreement') with the United States Attorney's Office for the Southern District of New York (USAO). As part of the Agreement, PartyGaming admitted to violating a number of federal statutes, including the Illegal Gambling Business Act 18 U.S.C. §1955; the Wire Fraud statute 18 U.S.C. §1343; and the Bank Fraud statute 18 U.S.C. §1344. In the Agreement, PartyGaming agreed to forfeit \$105 million and provide future cooperation in exchange for the assurance that the USAO will not prosecute the company or any of its subsidiaries 'for any crimes related to PartyGaming's internet gambling business with customers in the United States from 1997 through and including 2006'.

After the announcement of PartyGaming's Agreement with the USAO, the value of PartyGaming's stock on the London Stock Exchange shot up and the blogs were abuzz with talk suggesting that PartyGaming could no longer be prosecuted in the United States. However, a review of the Agreement reveals that suggestion is not a certainty. There are limitations, for both parties, on the reach of the Agreement. For example, if PartyGaming violates or fails to comply with the Agreement's terms - including the

ongoing cooperation requirements - it could again be subject to prosecution by the USAO and all statements it had made as part of its cooperation would be admissible as part of the case.

This article will examine the Agreement, looking at the scope of the non-prosecution protections, the obligations PartyGaming must meet to ensure those protections are preserved, and what can happen if PartyGaming does not meet its obligations.

The Agreement

The Agreement defines the scope of the protection from prosecution that PartyGaming gained.

Significant aspects include:

- The USAO will not criminally prosecute PartyGaming or its subsidiaries for any crimes, except criminal tax violations, related to PartyGaming's internet gambling transactions with customers in the US from 1997 through 2006.
- The USAO will not use information provided to it by PartyGaming in any prosecution against PartyGaming for tax violations.
- No protection is given against prosecution for any crimes except those related to PartyGaming's internet gambling transactions with US-based customers from 1997 through 2006.
- No other federal, State, or local agencies - including licensing and regulatory authorities - are bound by the Agreement.

Non-prosecution and other cooperation agreements are contractual in nature. Therefore, the Agreement covers only what it states and binds only those who consented to be bound by it'. Indeed, the United States Attorney's Manual suggests that non-prosecution agreements be drawn in narrow terms that do not bind non-party prosecutors or agencies (USAM 9-27.630). By its

terms, the PartyGaming Agreement binds only the USAO. It does not prevent a United States Attorney from another federal district, a State Attorney General, or a local District Attorney within a State from deciding to pursue their own investigations and prosecutions of PartyGaming, based on PartyGaming's activities in the US between 1997 and 2006.

As a practical matter, however, were other prosecuting agencies to pursue prosecutions in the face of the Agreement, it would undermine the use of non-prosecution agreements generally. What motivation would there be for a prosecution target to cooperate if the target could still face prosecution by another prosecuting agency for the conduct at issue? The type of cooperation provisions that are often included in non-prosecution agreements, like those in the PartyGaming Agreement, can be valuable to prosecuting agencies, even those who are not signatories. Therefore, cooperation provisions operate as a restraint on other prosecuting agencies and, in practice, additional prosecutions are rare.

The consequences of failing to fulfill obligations

PartyGaming's continuing cooperation obligations include:

- Cooperating fully and actively with the USAO, the FBI and any other designated agency regarding any matter relating to the USAO's investigation.
- Truthful and complete disclosure of all information with respect to the activities of PartyGaming, its officers and employees concerning anything about which the USAO inquires.
- Using its best efforts to assist the USAO in any prosecution or investigation by providing logistical and technical support for any meeting, interview, grand jury

proceeding, or trial or other court proceeding identified by USAO.

- Using its best efforts to secure the attendance and truthful statements of current and former officers, agents, and employees at any meeting, interview, grand jury proceeding, trial or other court proceeding identified by USAO.

- Using its best efforts to provide any document, record, or other evidence relating to the continuing investigation in its own and related internet gambling matters, including evidence concerning payment processing methods.
- Informing the USAO of all criminal conduct by - and any investigation of - it or its employees that come to the attention of its Board of Directors or senior management, as well as any government action in which it is a party (aside from routine licensing-related proceedings in foreign jurisdictions).

The Agreement establishes consequences if PartyGaming 'commit[s] any crimes subsequent to the date of the signing of [the] Agreement' or 'fail[s] to comply with its forfeiture/disgorgement obligations', or if it is determined that 'PartyGaming or any of its representatives have given false, incomplete, or misleading testimony or information, or has otherwise violated a provision of the Agreement'. Those consequences are that:

- PartyGaming would be 'subject to prosecution for any federal offense of which [the USAO] has knowledge';

- 'all statements made by PartyGaming representatives [would] be admissible in evidence in any criminal proceeding brought against PartyGaming and relied upon as evidence to support any penalty imposed on PartyGaming'; and

- PartyGaming would be prohibited from asserting a claim

The USAO might determine that PartyGaming had not fulfilled its duties under the Agreement and, therefore, would move forward with prosecution

under the United States Constitution or any statute or federal rule that such statements or leads therefrom should be suppressed, or that prosecution should be barred by any applicable statute of limitations.

The broad nature of the PartyGaming Agreement, the ongoing obligation to cooperate, and the reservation by the USAO of the right to prosecute in the event of non-compliance makes possible a scenario in which the USAO might determine that PartyGaming had not fulfilled its duties under the Agreement and, therefore, would move forward with prosecution.

Can a determination of non-compliance be challenged?

One issue that can arise in relation to non-prosecution and other agreements with the government that impose extended cooperation obligations is what recourse a defendant has if the government determines the provisions of a non-prosecution agreement have been breached? The due process protection provided by the US Constitution requires that when the government determines there has been non-compliance with a non-prosecution agreement and wishes to be relieved of performing its part of the bargain, it may not make this decision unilaterally².

In practice, however, due process protection may not protect against the harm sought to be avoided by entering into a non-prosecution agreement - i.e. the investigation, indictment, and other elements of the prosecution. In many jurisdictions, courts have held that due process only entitles a defendant claiming the agreement was not breached to a judicial determination of the issue prior to conviction rather than prior to indictment, because the interest alleged to be deprived is in

avoiding conviction, not in avoiding a prosecution³.

In seeking to enter into non-prosecution agreements, companies typically want to avoid indictment and trial and the likely business consequences of both. Although courts will review the bases for a declaration of non-compliance, the post-indictment nature of the review might negate much of the reason for entering into a non-prosecution agreement in the first instance. Even with this choice, however, many companies choose to accept the risk of possible indictment due to an alleged future breach rather than face the near-term likelihood of an indictment and trial in the absence of a non-prosecution agreement.

Conclusion

While a non-prosecution agreement may have benefits that outweigh the consequences of failure to cooperate with the government, it is important for companies to understand that, generally, such agreements are not binding on non-signatory jurisdictions and that the obligations in the agreement must be fulfilled throughout its term in order for it to be binding in the signatory jurisdiction.

Linda J. Shorey Partner
Dennis M.P. Ehling Partner
Fred A. Heather Partner
Ashley J. Camron Associate
Anthony R. Holtzman Associate
 K&L Gates LLP
linda.shorey@klgates.com
dennis.ehling@klgates.com
fred.heather@klgates.com
ashley.camron@klgates.com
anthony.holtzman@klgates.com

1. See, e.g., *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998), *United States v. Yemitan*, 70 F.3d 746, 747 (2nd Cir. 1995).

2. See, e.g., *United States v. Castaneda*, 162 F.3d 832, 836 (5th Cir. 1998).

3. See, e.g., *United States v. Meyer*, 157 F.3d 1067, 1076-77 (7th Cir. 1998); *Stolt-Neilsen, S.A. v. United States*, 442 F.3d 177, 184 (3rd Cir. 2006).



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