

## Singapore to regulate online gambling

The Singaporean government is to review online gambling regulations, S. Iswaran, a Minister, announced on 17 November, intending to safeguard citizens and to achieve legal clarity.

"A review is definitely welcome," said Lau Kok Keng, a Partner at Rajah & Tann LLP, adding "We do not have any specific legislation that relates to internet gaming." Stephen Ketteley, a Partner at DLA Piper, explains that the legislative gap "provides businesses with a coherent argument that the law doesn't apply to them."

S. Iswaran highlighted "mobile devices" as a threat in terms of problem gambling, while Elle Todd, a Partner at Olswang Asia LLP, believes "social gaming is likely to concern."

The Singaporean government will consider other jurisdictions before issuing its own framework, following a 2010 Singapore Law Reform Committee report which highlighted the US, UK, Australia and Hong Kong as offering precedent. "It is difficult to imagine Singapore opting for an open model," said Todd. "I would expect the framework to be a combination of proscriptive and licensing."

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## Greece issues ultimatum to unlicensed online operators

The Hellenic Gaming Commission (HGC) issued on 5 November a notice for unlicensed online operators to cease operations in Greece by 6 December or receive a maximum €500,000 fine and potentially a custodial sentence. The move, which would also blacklist non-compliant operators, has received European Commission approval, but angered the Remote Gambling Association (RGA), which has threatened legal action over what it views as an attempt to protect the monopoly of the Hellenic Football Prognostics Organisation (OPAP).

"HGC's decision is based fully upon the existing legislative framework [law 4002/2011, approved 4 August 2011] and I believe fully complies with EU law," said Constantinos N. Coucoullis, Managing Partner at Constantinos N. Coucoullis & Associates. However, Martin

Lycka, Legal Advisor at Betfair, argues that "Under EU law, sanctions cannot be imposed against EU licensed operators if the national regulation breaches EU law, arguably the case with Greek legislation." The European Gaming and Betting Association holds aspects of Greek gambling legislation, such as server location requirements, as contrary to EU law.

RGA's legal threat comes as the Greek government is selling its share in OPAP. "[As] the EU approved the extension of OPAP's monopoly, any legal challenge has a very small possibility of success," Coucoullis explains.

In a 18 November letter to the Financial Times, twelve operators urged European Commission (EC) action against certain Member States, stating "Belgium and Greece [are] in clear breach of EU law." RGA Chief Executive Clive

Hawkswood wishes the EC to "see the infringement proceedings to their conclusion and if necessary take Belgium and Greece to the CJEU."

These comments follow the EC's Communication on building a legal framework for European online gambling, published on 23 October, wherein the EC announced its intention to pursue non-EU compliant Member States, and the detention of Norbert Teufelberger, Bwin.party co-founder, on 13 November by the Belgian Gambling Commission (BGC).

"[We asked Teufelberger] why he continues to offer illegal games of chance," said Peter Naessens, Head of the Regulatory Advice Unit at the BGC. "Nearly all Member States have to defend themselves to the EC. [Yet] no gambling operator has to defend its criminal activities."

## Unauthorised tribal gaming offering in Canadian province

A member of the White Bear First Nation launched a tribal online gambling offering in the provincial Canadian state of Saskatchewan on 6 November, despite online gambling being prohibited in the province.

"The activity is a clear contravention of the Canadian Criminal Code," said Danielle Bush, Partner at Chitiz Pathak. "Canadian First Nations have attempted to justify gambling under their sovereign rights, but Canadian courts have held that offering gambling products are not an aboriginal right," said

John M. Tuzyk, Partner at Blakes. Under the Canadian Criminal Code only provincial governments can operate gaming offerings to Canadian residents. "Accordingly," adds Tuzyk, "for First Nations to operate gaming facilities it must be done under provincial government authority."

The owner of the online offering, Bernie Shepherd, is co-creator of the Wapi Muskwa Gaming Act, which governs White Bear gaming activity. Bush is keen to stress that the Act, "cannot constitute a statute

with legislative force."

In contrast to the forced closure of most unauthorised First Nation gaming operations, Peter Newell, Lead Partner at Norton Rose, points out an exception. "In the territory of the Mohawk people, an online gaming community has been established without action by enforcement agencies, despite controversy as to whether the operation is actually legal." Paul Seaman, Associate at Gowlings, concludes: "All eyes will be on the Saskatchewan government's response."

## Editorial: Ring wrath

The Tolkien estate and publisher HarperCollins have filed an \$80m lawsuit against Warner Brothers this month over alleged exploitative merchandising of The Lord of the Rings brand in online and casino gambling games.

Described in court papers, 'as the second most-read book in the United States after the Bible,' it seems that the crux of the matter centres on the alleged 'irreparable harm' done to Tolkien's legacy by associating his work with gambling. The fact that Warner Brothers - who own limited merchandising rights to The Lord of the Rings and The Hobbit brands - looks to have gone beyond their rights to produce 'tangible' merchandise (i.e. physical goods) appears secondary to

the seemingly damaging association with gambling.

Without doubt the potential reputational damage a brand can suffer from an association with gambling is very real, but the case put forward by the Tolkien estate appears to vilify gambling. For example, the Tolkien lawsuit insists that gambling itself is a category beyond merely exploiting merchandising rights, gambling rights which the plaintiffs themselves 'intend never to exploit.' In addition to this Tolkien fans are apparently up-in-arms about the infringing conduct.

The court papers explain that Tolkien fans have 'expressed confusion and consternation at seeing The Lord of the Rings associated with the morally questionable (and decidedly non-literary) world of online

and casino gambling.' Tolkien fans are a little naïve – a simple search on Amazon reveals a range of non-literary Lord of the Rings games for Xbox, PS3 and the like. Concern from fans is 'rampant' apparently: 'I actually feel angry about this...this insults Tolkien'... 'if this isn't prostituting art, I don't know what is.'

The truth is gambling games are becoming more and more sophisticated, so it is easy to see the appeal of using an established brand to tap into an already developed relationship with the player, but caution must be taken by developers and operators to ensure the relationship with established brands and rights holders is clear and legally grounded to avoid such attacks looking to demonise the industry.

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# Two perspectives on the EC Communication paper

The European Commission has adopted the Communication 'Towards a comprehensive European framework on online gambling,' which sets out the future of online gambling regulation in Europe. In particular, Member States will continue to have the ability to regulate their own markets, subject to their conformity with the EU Treaties. Morten Ronde and Pierre Tournier of Policy Action Limited, and Annabelle Richard and Anne-Sophie Mouren of Ichay & Mullenex Avocats, offer an industry and a legal view respectively on the Commission's Communication.

*The industry view: Morten Ronde & Pierre Tournier*

The Communication consists of 27 actions which, according to the EU Commission, are seeking to enhance legal certainty and establish policies based on available evidence. To that end, the Communication, along with the accompanying Staff Working Document, identifies five priority challenges posed by the coexistence of national regulatory frameworks within the internal market. These are: compliance with EU law, administrative cooperation, consumer protection, money laundering, and sport integrity. Although the scope of the Communication does not raise any major surprises as it is very much in line with that of the Green Paper consultation, there are two remarkable changes that must be underlined. Firstly, the 'funding of good causes' has been purely and simply set aside and is no longer considered by the Commission as a relevant topic in this context.

Furthermore, the Commission has adopted a new approach to sports and has shifted in focus from considering 'a fair return to sports' to tackling 'match-fixing'<sup>1</sup>.

From a purely regulatory perspective, the Communication has however triggered mixed feelings. Proponents of an EU harmonising instrument may be disappointed given that the document does not set out any actual legislative proposal, save for the extension of the scope of the Anti-Money Laundering Directive to all types of gambling product and the clarifications brought to Article 14 of the E-Commerce Directive providing for notification and action procedures against illegal online content. The vast majority of the actions proposed constitute only soft measures and no EU-wide legislation is to be expected before the end of the term. The Commission will eventually carry out a review of all the proposed measures in 2014 and decide on the need for further legal clarity and sector-specific legislation. Despite the general lack of direction, we argue that at least two key actions can potentially fulfil the main objective pursued by the Communication, i.e. seeking to establish a comprehensive EU framework. Firstly, the Commission committed to re-opening the pending infringement proceedings against Member States, investigating outstanding complaints, and taking enforcement actions wherever deemed necessary. Several years of virtual inaction by the Commission have indeed resulted in an acute fragmentation of EU markets, which poses obvious problems of legal certainty, market access, and effective consumer protection. Many countries have in practice proved to have very little regard for internal market rules as interpreted by the Court of Justice

of the EU (CJEU). Secondly, the creation of an expert group consisting of Member States' regulators will provide a valuable platform for the adoption of best practices, technical standards, and possibly administrative cooperation instruments. It is hoped that the work of the expert group will ultimately bring in partial mutual recognition, which would constitute a significant step towards a more integrated EU market. The outcome of both actions - enforcement of EU law and the setting up of the expert group - will nonetheless rely heavily on the Commission's political will which has often been questionable since infringement proceedings were frozen in 2008.

## Enforcing EU law: legal certainty

It is clear from the Communication that the Commission is committed to resuming investigations against non-compliant Member States and, if necessary, to opening new proceedings. To this end, the Staff Working Document accompanying the Communication provides 'red lines' that Member States should not cross when regulating or seeking to prohibit online gambling. The red lines simply stem from the rich case-law developed by the CJEU since the landmark judgment in the Schindler case (1994). As such, more explicit regulation in the field of gambling is arguably not as needed as enforcement of the existing jurisprudence, which must be regarded as the primary EU framework.

The Commission sends a number of information requests both to the Member States facing an infringement procedure and those with outstanding complaints. These are sent mostly through the EU pilot system, essentially an IT tool. However, a general 20 week

deadline applies for responses to be provided (10 weeks for Member States and another 10 weeks for the Commission). The EU pilot demonstrates that the Commission is reluctant to force national authorities to act in a timely fashion. Needless to say that timing has become critical as many countries are moving towards more restrictive regulations.

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#### Expert group: partial mutual recognition

As in many different sectors, the Commission will establish an expert group on gambling, composed of Member States' regulators with the view of exchanging good practices and to provide advice on the preparation of future EU initiatives<sup>2</sup>. Although the stated objectives of the group remain for the time being vague and non-committal, there are positive elements in the Communication and the Staff Working Document which could indicate a move towards closer administrative cooperation and ultimately towards partial mutual recognition. We argue that the Communication paves the way to partial mutual recognition at least in three ways. Firstly, the Commission is to explore the Internal Market Information (IMI) system for the purpose of gambling. The IMI simply constitutes an IT system designed with a view of facilitating the exchange of information between national authorities. While being mostly utilised by the regulators, it would however remain under the control of the Commission and therefore build mutual trust and confidence between the users. Secondly, just like the Council and the Parliament, the Commission is concerned with inefficient administrative burdens and stresses and the need to reduce them. There cannot be any reduction in

administrative burdens without at least parts of the technical tests being recognised from one state to another. Thirdly, the adoption of common standards will lessen the risk of multiple sets of rules and effectively reduce bureaucratic inefficiencies, which again cannot be achieved without any partial mutual recognition.

The success of the expert group in working towards partial mutual recognition will strongly depend on the capability of the Commission to impose its leadership to the regulators, which has yet to be tested.

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#### Conclusion

The proper implementation of the action plan will undoubtedly be dependent on the Commission's willingness to face the Member States, either individually where conformity with EU law and legal certainty are at stake, or collectively where mutual trust and confidence are to be built. The path towards an EU framework for online gambling in any case is a matter of political will.

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1. The creation of a new levy imposed on operators to the benefit of sport federations remains however a topical concern to the online gambling industry as the Commission is about to launch a study on this matter.

2. The first meeting of the expert group is expected to be held on 5 December.

*The legal view: Annabelle Richard & Anne-Sophie Mouren*

The Commission underlines how great the economic capacities of online gambling are in Europe and estimates for 2015 an annual revenue of 13 billion euros generated by the European online gambling industry, representing 14.2% of the overall gambling market. For the record, in 2011, the annual revenue of online gambling in Europe represented 9.3 billion euros. On a smaller scale, in France, more than one billion euros were deposited by French players on their gaming accounts in 2011 (ARJEL Annual Activity Report 2011).

The EU Commission wants to implement an action plan for the next two years during which online gambling regulation should be looked at to become clearer and the Member States' collaboration should be enhanced. Firstly the Commission wants to ensure that EU Member States do comply with the European Gambling regulation.

The Commission will also review the Member States' licensing system to review their transparency and ensure the absence of any discrimination. The Commission's move was cheered by the European Gaming and Betting Association (EGBA): according to its secretary general, Sigrid Ligné, a chase against non-compliant Member States is a great opportunity for the European Gambling Market as "unjustified restrictions and protectionist regimes have been hampering the sustainability of EU operators for far too long."<sup>1</sup>

The Commission underlined the necessity to ensure real security on the gambling platforms, guaranteeing efficient protection for the players, especially regarding gambling addiction. The Green Paper's answers permitted to assess between 0.5% and 3% of the

**The absence of tax harmonisation represents a great issue for online gambling operators considering that such harmonisation could be an important factor of viability for the European market.**

European population suffering from gambling addiction. Recommendations will be provided for Member States to implement responsible advertisement policies as well as efficient consumer protection measures, including but not limited to:

- A serious registration process (age verification and identity controls);
- The enforcement of a no credit policy;
- An efficient policy to fight against addiction (self-restriction solutions, in terms of time or financial limitations, etc).

The Commission highlighted the importance of fighting fraud and money laundering, from a transnational perspective, and therefore the deep need for collaboration between EU Member States. The Commission will consider 'extending the scope of the Anti-Money Laundering Directive to all forms of gambling' as well as defining new EU standards for equipment and software used in online gambling.

#### Analysis

In practical terms, these initiatives should not result in the drafting of a new European regulation, but clarify the specific measures directly implemented by the Member States and policies to be applied by the stakeholders.

The Commission's initiative can be praised, as the European Gambling market needs attention, but it seems that some other issues could have been raised as priorities to deal with urgently.

The absence of tax harmonisation represents a great issue for online gambling operators considering that such harmonisation could be an important factor of viability for the European market.

The Commission underlined that 'cooperation within the EU will

not respond to all the challenges in the online gambling market'. Also, as this market encounters great cross-border issues i.e. 'originating from outside the EU', the European authority plans to identify such issues and 'seek to strengthen dialogue' with the third party countries involved.

From the operators' point of view, because the loss of revenue related to illegal gambling activities by European players is significant, it should be better represented in the current action plan. Such an issue is indeed a matter of emergency not only for the stakeholders suffering from unfair competition, but also for the players and especially vulnerable players, gambling without the safety net provided by the licensed operators. Europe has almost 6.84 million online gamblers<sup>2</sup> to protect.

The Commission claims that these initiatives will clarify European regulation and therefore facilitate its enforcement on a national level. The resulting higher level of protection would beneficiate all the actors in the gambling market.

A meeting should be held in December between the group of experts from Member States and a conference should also take place in 2013 with all actors involved. Let us at least bet that the European gambling community will be behind the European authorities' to ensure such an action plan moves efficiently.

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1. <http://www.egba.eu/en/press/615/EC-communication-EGBA-gambling-commission-commits-to-take-member-states-to-CJEU-over-illegal-national-gambling-laws>

2. H2 Gambling Capital.

# The Tribal Online Gambling Act 2012: the legal debate begins

US Indian Tribes took a large step forward in their involvement in the legalisation of internet gaming in the US, when in July the Senate Committee on Indian Affairs held a hearing to discuss the regulation of gambling from brick-and-mortar casinos to the internet. Christopher L. Soriano, an Associate at Duane Morris LLP, discusses the draft legislation the 'Tribal Online Gambling Act of 2012', which intends to start the discussion surrounding the inclusion of Indian Tribes in the legalisation of internet gambling in the US.

It should come as no surprise that the legal status of internet gaming in the US has been in a state of flux for a number of years. 2011 was a particularly interesting year, as in April the Department of Justice announced the so-called 'Black Friday' indictments, followed five weeks later by the 'Blue Monday' indictments. Both of those actions resulted in the shutdown and seizure of assets from some of the biggest names in the industry that were accepting online poker bets from US customers through third-party payment processors. Many thought that this was a clear indication that the US government's position on online poker had moved further in the direction of prohibition.

But, in December 2011, the Department of Justice released a clarified interpretation of the federal Wire Act, one of the primary statutes that had been used to prosecute those who facilitated online gaming in the US. The specific question in the December 2011 opinion was whether a state could sell lottery tickets over the internet if the data to process those transactions was

routed out of state. The Department of Justice concluded that the Wire Act did not prohibit those transactions. More surprising were the Department of Justice's comments that, in its view, the Wire Act does not apply to prohibit online gaming transactions that do not involve sports wagering.

By concluding that the Wire Act did not prohibit online gaming transactions (except for sports wagering) where those transactions were otherwise legal, a path towards either legalisation of internet gaming in the US on the federal level, or a path where a number of states could form internet gaming consortia, came into view. In the discussions of these possibilities, the role of Indian tribes that have brick-and-mortar casinos was somewhat lost, at least initially. Like most brick-and-mortar resort operators, Indian tribes are concerned about the significant economic questions surrounding internet gaming in the US - will it be an enhancement and an overall growth of the gaming market, or will it simply take existing customers and keep them at home rather than at the operator's facility? For operators that depend heavily on ancillaries, such as hotel revenue and entertainment in addition to gaming, this is no small question. For many Indian tribes - especially tribes in states that also have non-Indian brick-and-mortar gaming or border states with a significant non-Indian brick-and-mortar industry - the risk of a wider scale implementation of internet gaming without tribal participation is also significant. As a result, a number of tribes, and Indian gaming regulators, have been working on various frameworks that might govern internet gaming hosted by Indian tribes.

A major step in this process

occurred on 26 July 2012, when the Senate Committee on Indian Affairs held a hearing titled 'Regulation of Tribal Gaming: From Brick-and-Mortar to the Internet.' In addition to the testimony from regulators and Indian tribes received at this hearing, a significant development was the release of a discussion draft of a piece of legislation, the 'Tribal Online Gaming Act of 2012.' It should be noted at the outset that this legislation has not been introduced or formally considered by any committee, and thus, is a long way from final passage - especially late in a US presidential and congressional election year, when, historically, the pace of legislative activity slows considerably. But, the discussion draft provides a number of insights on how US Indian tribes might ultimately become involved in internet gambling.

The discussion draft is presently limited to 'tribal online gaming,' which is defined as internet poker conducted by an Indian tribe. Thus, at least initially, there is the possibility that any internet gaming by Indian tribes will be limited to poker, rather than opened up to electronic versions of other casino games. Interestingly, the regulator with final authority over internet gaming by Indian tribes will be the Secretary of Commerce, rather than the National Indian Gaming Commission or the Secretary of the Interior, both of which are more closely connected to gaming operations currently conducted by tribes. The Secretary of Commerce is required to establish an Office of Tribal Online Gaming to assist with oversight and regulatory responsibilities.

Once a tribe decides it wants to offer internet poker, it must adopt a tribal ordinance governing internet poker. That ordinance must be approved by the Secretary

of Commerce before it can go into effect. Notably, the discussion draft provides that while the legislation does not affect any existing tribal-state compact, no tribal-state compact need be renegotiated to address internet poker. The avoidance of the need to renegotiate a compact will lead to a more rapid implementation of internet poker if the legislation is adopted.

A tribe must have a qualified regulatory body to oversee internet poker conducted by the tribe. A regulatory body is qualified if it has regulated an Indian gaming facility for at least two years prior to the adoption of the Tribal Online Gaming Act, as certified by the National Indian Gaming Commission. If a regulatory body has not regulated a facility for at least two years, then it must apply to the Secretary of Commerce for a finding of qualification. Before doing so, the Secretary of Commerce must investigate the regulatory body and determine that the regulatory body has sufficient staff, resources, and ability to appropriately regulate internet poker. An Indian tribe may use an existing regulatory body within its state to regulate its online poker activity. Thus, tribes that already have a well-established regulatory framework will be at a timing advantage in terms of their ability to offer internet poker, because the need for review and approval by the federal government of the tribal regulatory process will be obviated.

To become operational, the Secretary of Commerce must issue a tribal online gaming licence to the tribe. More than one tribe may form a consortium, provided that each tribe has an approved ordinance and meets the suitability standards. To receive a licence, a tribe must establish its own suitability and the suitability of

**Notably, the discussion draft provides that while the legislation does not affect any existing tribal-state compact, no tribal-state compact need be renegotiated to address internet poker.**

each significant vendor that will assist the tribe in carrying out internet poker. If a significant vendor is an entity, then key individuals within the entity will be subject to background checks. The tribe must demonstrate, by clear and convincing evidence, that each member of the tribal governing body and any person who will have responsibility for the tribal gaming activities is a person of good character, honesty, and integrity; whose background does not pose a threat to the public interest if the person is permitted to participate in internet poker; is capable of conducting online poker; and has or will obtain sufficient financing to conduct gaming operations.

A tribe may accept a bet only from a person located within the US, and may only offer play in a game or tournament to a person located in the US. A tribe must prohibit wagers from persons under 21 years of age, and must prohibit wagers from persons in jurisdictions that have prohibited such wagers. Thus, if this legislation is adopted, there could be states that prohibit their own residents from participating in online poker run by tribes.

Two other short provisions are worth noting. First, there is a reservation in the discussion draft that, if subsequent federal laws allow states to conduct online gaming in addition to online poker, tribes are to be afforded the same opportunities as the states. Second, there is no federal or state tax imposed on internet poker revenues, but the use of revenues is restricted to tribal government operations, general welfare of the tribe, economic development, charitable purposes, or local governmental purposes. Each tribe that offers internet poker, however, is required to contribute 1% of its gross revenue from internet poker

to a fund that will be distributed to the tribes that choose to opt out of offering internet poker.

In testimony presented by the Tulalip Tribe at the 26 July hearing, the tribal secretary pointed out the values that many tribes view as important in connection with internet poker: respect for tribal sovereignty; not opening up the Indian Gaming Regulatory Act for amendment; respecting existing tribal compacts; ensuring positive economic benefits; and allowing the acceptance of wagers from any jurisdiction in which those wagers are not criminally prohibited. In that respect, it appears that the discussion draft gives Indian tribes a seat at the table while respecting important values. Some concern has been expressed, however, about implementing a parallel regulatory system administered by the Secretary of Commerce rather than the National Indian Gaming Commission. In that regard, it will be interesting to see how the federal government ultimately decides to regulate internet poker by tribes. Regardless of the regulatory methodology used, discussion drafts and hearings are leading to the likelihood that the question is no longer whether internet poker will be permitted in the US, but when and under whose regulatory supervision. Indian tribes may well be at the forefront in the near future.

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# The EU Money Laundering Directive and online gaming

The world of online gaming may not be the most obvious place of operation for money laundering criminals, but this is an area where such activity can still occur despite the insulation the sector - by its very nature - provides. Mark Dunster, a Partner, and Tabreez Ahmed, an Associate at Carey Olsen examine the threat of money laundering within the online gaming sector and assess the impact of the EU's Third Money Laundering Directive.

The development of anti-money laundering law in the past 20 years reflects the evolution, and in some cases the sophistication, of criminals' methods in laundering money.

The Financial Action Task Force (FATF) was set up in 1989 by the G7 predominantly to focus on organised crime and the proceeds of money from drugs. The First Money Laundering Directive in 1991 and the FATF's Forty Recommendations were mainly geared towards combating the laundering of drug money through the 'traditional' finance sector. Ten years later, the Second Directive extended the scope to a number of non-financial professions including lawyers, accountants and 'casinos'. Post 9/11, the FATF's recommendations were comprehensively revised to reflect the changing landscape and in order to extend requirements to cover money used to potentially fund terrorist offences.

The Third Money Laundering Directive (3MLD) followed these revised recommendations and provided the EU with a basis to remain consistent with international standards set by the FATF. In February 2012, the FATF published its further

recommendations, after which, in April, the European Commission followed with its report (the Report) on the application of 3MLD and the consideration of possible changes. In light of the Report, it is anticipated that a Fourth Money Laundering Directive (4MLD) is going to be proposed sometime this autumn.

## Are money laundering directives necessary for online gaming?

The Second Money Laundering Directive extended its scope outside of 'traditional' financial professions (including law firms, accountants and casinos) owing to the perceived vulnerability of industries in which cash regularly flows between customer, business and third parties. Historically, cash has been the preferred currency of criminals looking to launder money, given the difficulty to trace its origins. However today, arguably, money can be transferred more quickly online and on occasion between multiple accounts, individuals and third parties and so clearly such perceived vulnerabilities apply to both land-based and online gaming.

The goal of the money-lauderer is to disguise the origins of their criminal proceeds. The money could potentially emanate from undesirable activities such as drugs, arms sales, prostitution and trafficking, not to mention the funding of terrorism. Times have long changed since an individual could walk into a bank and deposit a significant amount of cash without either attracting suspicion or having questions asked about its origins. Criminals would be faced with either the scrutiny of having to explain the origin of the funds or even be subject to the funds being traced to their origins. The attraction of disguising this with

legitimate origins is clear, and online gaming is therefore potentially a tool through which money may be laundered.

Given the favour of a cash element of such proceeds of crime, it is assumed that online gaming would be relatively insulated as deposits are largely taken directly online from highly regulated financial institutions (who would in turn have carried out their own due diligence). Also, online gaming companies will keep records of transactions by customers from sign-up to cashing out, meaning there will be a distinct audit trail seemingly making money laundering in online gaming unattractive.

Of course, no industry can be immune even with the most stringent measures in place, and the fact that online gaming would not be an attractive vehicle in which to launder money should not be taken for granted. Criminals continue to become more sophisticated in methods used to circumvent barriers put in place. But one example is that a number of large online gaming sites include land-based casinos and/or betting shops. Criminals could potentially regularly furnish the land-based outlets with 'small' quantities of cash for onward transfer to their online accounts. Withdrawing the funds online accordingly make it appear as though the origins are legitimate if not extremely difficult to trace. It is clearly important for the online gaming industry to remain diligent.

## The impact of 3MLD on online gaming

A key addition implemented following 3MLD was the more detailed, risk-based approach to due diligence. Significantly, for online gaming, such risks do not only apply to customers and their identity. For example:

● There may be certain games for which the risk of large quantities of money moving from person to person is higher than others. Multiplayer games in particular may attract collusion in which criminals can deliberately lose to others in order to move funds to that player.

● Certain traits or gambling behaviours may signify an increased 'level' of risk. For example, depositing specific amounts of money regularly or stakes placed on certain types of games.

The above examples indicate how an online gaming company may, in adopting the risk-based approach, allocate certain weighting to certain behaviours, a combination of which may trigger an investigation into the user/customer. This allows each company to effect measures in a proportionate way according to how it has allocated risk thereby avoiding spending time/money on those they do not consider to be high risk.

Article 11 of 3MLD provided another practical aspect for online gaming in that it gives examples of situations where 'simplified' due diligence could be appropriate. Following the above, and whilst not directly applicable to all customers of online gaming companies, it is acknowledged that due diligence should not be a process viewed as treating one and all with the utmost suspicion, rather conducting due diligence on a case-by-case basis. It would be neither appropriate nor proportionate for every customer to be subject to enhanced due diligence.

Whilst the risk-based approach to an extent allows companies more freedom to apply practical and cost-effective procedures, a subjective approach can also attract questions. Particularly in business

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relationships with clients outside of jurisdictions which apply similar stringent money laundering regulations, we have found a range of responses from surprise to confusion at why certain countries or businesses may be deemed 'high-risk' by us but not by another jurisdiction or entity.

#### 4MLD

The report of the European Commission, published in April, does not suggest that wholesale changes are required; rather, it highlights a number of areas in which improvements could be made.

#### Risk-based approach

The report acknowledges that whilst a risk-based approach enables resources to be more focused towards assessing risk, there is no practical guidance available. Specifically, individual countries are entitled to design their own risk-based approach, which the report acknowledges can complicate cross-border compliance when all parties presume they are applying the same rules and find they are actually at odds.

The report suggests obligations for Member States to update risk assessments in line with the FATF's latest recommendations and potentially a common approach between them.

#### Scope - online gambling

The report acknowledges that 3MLD includes casinos within its scope but without definition (online casinos being covered by recital 14 which includes 'activities...performed on the internet'). It appears that following consultations, a broader definition of 'gambling' is likely to be adopted in 4MLD. Importantly, the precise scope of this is to be determined on a risk-based basis at national

level with specific consideration being given to capture activities considered to pose a higher risk to money laundering/funding of terrorism whilst avoiding imposing an excessive burden on lower risk activities. The approach will be in tandem with the Commission's action plan on online gambling which is expected to be published in October.

Whilst little is known at this stage the above appears to be good news for the industry. A view to taking an approach which is tailored specifically to activities viewed by each country as high risk is a positive one.

#### Conclusion

The trend of legislative and regulatory burden is only going one way. This means higher levels of checks on customers and hence higher overheads. The risk-based approach is most welcome. This may mean the average bingo customer attracts little further demands from the operator. On the other hand, high stakes poker games where tens of thousands of dollars may move in a hand from one person to another, and player account balances may run into hundreds of thousands of dollars, may require an increased level of scrutiny. Of course when it comes to such scrutiny it must be documented for regulators to review - if it is not documented (as all regulators say) then it did not happen.

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# The creation and application of gaming licence case law

Over the last five years, the Court of Justice of the European Union (CJEU) has pronounced several decisions on gaming licences, setting out a system of detailed rules. These criteria are now settled case-law and are quoted by the CJEU and national courts, as Martin Arendts, Attorney at Law at Arendts Anwälte, explains.

In six major decisions, the CJEU developed criteria on how gambling licences should be awarded under EU law. After a decision on the infringement procedure against Italy with regard to horse betting licenses in 2007<sup>1</sup>, the CJEU (then ECJ) had to deal with referral cases. The Sporting Exchange decision concerned the licensing of gambling operators in the Netherlands<sup>2</sup>. In September 2010, the CJEU had to look into requirements for licensing procedures in referral cases from Germany (Carmen Media Group decision<sup>3</sup>) and from Austria (Engelmann decision<sup>4</sup>). In two more recent judgments, the CJEU revisited the situation in Austria (Dickinger decision<sup>5</sup>) and Italy (Costa decision<sup>6</sup>).

These criteria can be regarded as settled case-law. In its Garkalns decision, regarding the licensing of an arcade in Latvia<sup>7</sup>, the CJEU cited the obligation of transparency. Several national courts have referred to the criteria of the CJEU. The Administrative Court of Justice of the EEA Member State Liechtenstein declared the licensing procedure for a casino null and void, quoting the Costa and Engelmann decisions<sup>8</sup>. In August 2012, the Administrative Tribunal of Upper Austria cited the CJEU and referred a new case to the CJEU<sup>9</sup>.

## Freedoms and principles

Betting and gaming are not regulated by secondary EU law<sup>10</sup>. However, primary EU law, here the fundamental freedoms and the basic legal principles, apply to gaming. According to the settled case-law of the CJEU since its Schindler decision<sup>11</sup>, services with regard to gaming services are economic activities under EU law. From the basic freedoms and the principles of equal treatment and non-discrimination, the CJEU developed a detailed obligation of transparency. According to the CJEU, 'the public authorities which grant betting and gaming licences have a duty to comply with the fundamental rules of the Treaties and, in particular, with Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency'<sup>12</sup>. Even if only a single licence is issued, the Member State has to give regard to the requirements arising from the freedom to provide services, the principle of equal treatment and the obligation of transparency, when granting a licence<sup>13</sup>.

The CJEU also reviews the freedom of establishment. In the Engelmann decision, the CJEU held that the condition that persons wishing to operate gaming establishments must adopt the legal form of a public limited company is a restriction on freedom of establishment. Such a condition prevents operators who are natural persons and undertakings which, in the country they are established, have chosen another form from setting up a secondary establishment<sup>14</sup>.

## Principle of proportionality

According to EU law, requirements for licence-holders, which infringe fundamental freedoms, have to be proportionate. Restrictions must

satisfy the principle of proportionality. National legislation is appropriate for achieving the objective invoked only if the means used are consistent and systematic<sup>15</sup>. The CJEU, in its Dickinger decision, pointed to the fact that the requirement for a share capital<sup>16</sup> may be of use in order to ensure a financial capacity on the part of the operator to guarantee that he is in a position to meet obligations. However, the restriction imposed must not go beyond achieving the aim<sup>17</sup>. Also, the prohibition of setting up branches outside the Member State is not justified<sup>18</sup>. The withdrawal of a licence is only proportionate to combat criminality, if it is based on a judgment which has the force of *res judicata* and concerns a serious offence<sup>19</sup>. The long duration of a concession constitutes a restriction on the exercise of the freedom to provide services and the freedom of establishment<sup>20</sup>. A duration of 15 years for a casino licence is only justified if the licence-holder needs time to recoup the investments required to set up a gaming establishment<sup>21</sup>. Such a duration would not be proportionate for games of chance that do not require premises.

## Effectiveness & judicial review

The CJEU connects material law with procedural law as it points to the obligation of the competent authorities to exercise their powers in a transparent manner, so that the impartiality of procedures can be monitored. When a licensing system is introduced in a Member State, such a licensing system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to the fundamental freedoms<sup>22</sup>.

Anyone affected by a restrictive measure must have a judicial remedy available to them<sup>23</sup>. National law must ensure the protection of the rights of operators and tenderers. Those rules must not be less favourable than those governing similar domestic situations<sup>24</sup>. They must not make it excessively difficult to exercise the rights conferred by EU law<sup>25</sup>. A court can only effectively review a licensing procedure, if all relevant documents are available.

#### Obligation of transparency

The obligation of transparency must be met before a Member State can award licences because the effects of the award on undertakings established in other Member States are the same as those of a service concession contract<sup>26</sup>. According to the CJEU, the licensing procedure has to be transparent and must be based on objective, non-discriminatory criteria known in advance<sup>27</sup>.

A duty of transparency shall enable the concession-granting public authority to ensure that the principles of equal treatment and non-discrimination are complied with<sup>28</sup>. The whole licensing procedure must be transparent. Therefore, 'the concession-granting authority has to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed.'<sup>29</sup> The absence of transparency for the purposes of the grant of concessions infringes fundamental freedoms<sup>30</sup>. Not only gaming operators from other Member States, but also potential market entrants, must have the possibility to know the licensing criteria. In order for the impartiality of the authorisation procedures to be monitored, the competent

**In its Costa decision, the CJEU expressly requires a level playing field for established licence-holders and new applicants. The unlawful exclusion of certain operators can only be remedied by allowing new licence-holders to engage in activity under the same conditions as existing operators.**

authority has to base each decision on reasoning which is accessible to the public. The authority has to state precisely the reasons for which authorisation has been refused<sup>31</sup>.

Licensing requirements and selection criteria have to be published to be known in advance. There is no obligation to publish the tender of a gaming licence in the Official Journal of the EU<sup>32</sup>. However, without a pan-European publication, the strict transparency requirements cannot be fulfilled. According to the CJEU, it 'is essential to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority.'<sup>33</sup>

The obligation of transparency implies that all conditions and rules of the procedure must be drawn up in a clear, precise and unequivocal manner. The CJEU deducts from the principle of legal certainty 'that rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings'.<sup>34</sup> Therefore, it raises doubts whether a reference to 'any other offence liable to breach the relationship of trust with the AAMS' can be understood by a reasonably informed tenderer exercising ordinary care<sup>35</sup>. Conditions that can be interpreted differently are not precise. So, a provision in a model contract with 'two alternative outcomes based on radically different interpretations' is unclear<sup>36</sup>.

#### Prohibition of discrimination

The principle of equal treatment requires that all potential tenderers be afforded equality of opportunity and implies that all tenderers must

be subject to the same conditions<sup>37</sup>. The grant of a concession, in the absence of transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, contrary to the principle of equal treatment and the prohibition of discrimination, and constitutes indirect discrimination<sup>38</sup>. The obligation on concessions to operate gaming establishments in national territory constitutes a restriction on freedom of establishment<sup>39</sup>. If requirements for a licence can more easily be fulfilled by applicants located in the awarding Member State, this could also be indirect discrimination.

#### Equal treatment

In its Costa decision, the CJEU expressly requires a level playing field for established licence-holders and new applicants. The unlawful exclusion of certain operators can only be remedied by allowing new licence-holders to engage in activity under the same conditions as existing operators<sup>40</sup>. The obligation for new licence-holders to observe a minimum distance between existing establishments protects the market position acquired by operators already established<sup>41</sup>. Financial stability or return on past investments cannot be accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom<sup>42</sup>.

#### Liechtenstein

The Administrative Court of Liechtenstein had to review the licensing procedure for the single casino licence granted under the Liechtenstein Gaming Act. The court held that the procedure did not fulfil these criteria and declared the licence null and void<sup>43</sup>. The

deadline for the licence application was 31 March 2011. An evaluation sheet with selection criteria was notified with the government in April 2011, but not published. The two applications received were ranked according to the points scheme. The applicant who was not awarded the licence filed an action against the decision.

The Administrative Court of Liechtenstein quoted the Costa decision and applied the criteria of the CJEU. The fact that the weighting of the selection criteria was determined retroactively infringed the requirement of 'criteria known in advance'<sup>44</sup>. The applicants could not foresee how the criteria were evaluated. The suspicion caused by the non-objective determination of selection criteria, could amount to a breach of the prohibition of discrimination<sup>45</sup>. The court concluded that the licensing procedure infringed the principle of equal treatment and the obligation of transparency<sup>46</sup>.

#### Austria

In August 2012, the Administrative Tribunal of Upper Austria raised doubts whether the Slot Machines Act of Upper Austria (and the licensing procedure) was in conformity with EU law and constitutional law. The Tribunal referred two cases to the Austrian Constitutional Court<sup>47</sup>. The Tribunal, *inter alia*, questioned the justification of the maximum three licences awarded according to the act. The Tribunal also referred a case to the CJEU for a preliminary ruling<sup>48</sup>. The Tribunal posed four questions and asked for a clarification of the principle of proportionality with regard to gaming and the justification of a (quasi-)monopoly for gaming services. In this aspect, it also wants the CJEU to explain the rule of law principle, underlying Article 16

Charter of Fundamental Rights of the EU, and/or the fairness and effective remedy rule according to Article 47.

#### Germany

The Liechtenstein and Austrian cases show that the current licensing procedure in Germany, in which 20 sports betting licences shall be issued under the new Interstate Treaty on Gambling, will not survive the inevitable judicial review. There is no factual basis for the maximum amount of 20 licences. Even more essential is the fact that the detailed licensing criteria have not been published yet, although the deadline for applications was 12 September 2012. The European Commission has already criticised the fact that the licensing criteria were not clear and should be specified in the tender<sup>49</sup>. However, the tender document only referred to an 'information memorandum' with more detailed criteria, especially for the five concepts to be elaborated by the applicants in the second step of the procedure. This information memorandum has not been published yet, so not all material information is known in advance, as required by the obligation of transparency. Even the 'reasonable informed tenderer' could not evaluate his chances. Some of the required documents for the application are not available in all Member States, which might be regarded as indirect discrimination. The principle of equal treatment is clearly infringed by the fact that the former monopoly operators can use their distribution network of 26,000 agencies, while new licence-holders will be allowed to have only limited betting shops.

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1. ECJ, C-260/04, Commission v Italy.
2. CJEU, judgment of 3.6.2010 - C-203/08.
3. CJEU, judgment of 8.9.2010 - C-46/08.
4. CJEU, judgment of 9.9.2010 - C-64/08.
5. CJEU, C-347/09, Dickinger and Ömer.
6. CJEU, Costa & Cifone, C-72/10, C-77/10.
7. CJEU, judgment of 19.7.2012 - C-470/11.
8. Liechtenstein, 31.5.2012, VGH 2012/030.
9. Oberösterreich, VwSen-740121/2/Gf/Rt.
10. An exception is only the obligation of the Member States according to directive 98/34/EC which lays down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, cf. with regard to gaming CJEU, Fortuna (C-213/11), Grand (C-214/11) and Forta (C-217/11) and C-31/12 - Wojciech Ziemiński and Andrzej Kozak.
11. CJEU, Schindler, C-275/92, para. 25. Confirmed in Carmen Media Group para. 40.
12. Costa decision, para. 54.
13. Sporting Exchange decision, para. 46.
14. Engelmann decision, para. 28.
15. Costa decision, para. 63.
16. Austrian Gambling Act: an applicant for the single lottery licence must have a paid-up nominal/share capital of at least EUR 109 m.
17. Dickinger decision, para. 77.
18. Cf. Dickinger decision, para. 88.
19. Costa decision, para. 81.
20. Engelmann decision, para. 46.
21. Cf. Engelmann decision, para. 48.
22. Sporting Exchange, para. 49; Carmen Media Group, para. 86; Engelmann, para. 54.
23. Sporting Exchange decision, para. 50.
24. Costa decision, para. 51.
25. Costa decision, para. 51.
26. Engelmann decision, para. 53.
27. Sporting Exchange, para. 50; Carmen Media Group, para. 87; Costa, para. 56.
28. ECJ, C-260/04, para. 24.
29. CJEU, Engelmann, para. 50, Sporting Exchange, para. 40 and 41.
30. Engelmann decision, para. 56.
31. Garkalns decision, para. 43.
32. The licensing procedure under the new German Interstate Treaty on Gambling published in the Official Journal on 08.08.2012.
33. Costa decision, para. 73.
34. Costa decision, para. 74.
35. Costa decision, para. 79.
36. Costa decision, para. 87.
37. Costa decision, para. 57.
38. Engelmann decision, para. 51.
39. Engelmann decision, para. 32.
40. CJEU, Costa, para. 52.
41. Costa decision, para. 58.
42. Costa decision, para. 59.
43. VGH Liechtenstein, VGH 2012/030.
44. VGH Liechtenstein, para. 5.1.
45. VGH Liechtenstein, para. 5.2.
46. VGH Liechtenstein, para. 5.3.
47. UVS Oberösterreich, VwSen-740042/5/Gf/Rt and VwSen-700050/6/Gf/Rt.
48. UVS Oberösterreich, VwSen-740121/2/Gf/Rt.
49. European Commission, letter of 20 March 2012 in the notification procedure 2011/0188/D.

# Australia: Retail exclusivity and the 'Betbox' controversy

Sportsbet's online betting kiosks - 'Betboxes' - have been the subject of controversy ever since the first appearance of a 'Betbox' in May 2010 in Ballarat, Victoria. The state and the exclusive wagering operator, Tabcorp, argued that the hotel contravened state law under the Gambling Regulation Act 2003 (Victoria), and while a Federal Court ruled in Sportsbet's favour, the full Federal Court of Australia overturned the decision and effectively banned the 'Betbox'. Bill Brown, Principal at Rockwell Bates, discusses the latest decision.

The full Federal Court of Australia has found that statutory provisions which prohibit the use of devices enabling customers to access their online betting accounts in licensed venues in the State of Victoria, Australia, are not unconstitutional<sup>1</sup>. The target of the proceedings was the aptly named 'Betbox' device, supplied by Sportsbet Pty Ltd (Sportsbet) to a venue located in the State. The 'Betbox' is a kiosk-style device that enables Sportsbet account holders to directly access their accounts from the venue via the internet. The result of the decision is that the retail exclusivity in Victoria now held by Tabcorp Holdings Limited (Tabcorp) is not under immediate threat.

## Background

Sportsbet originally placed its 'Betbox' device in the Eureka Hotel in the Victorian regional city of Ballarat in May 2010. The device enables Sportsbet account holders to access their accounts and place bets with Sportsbet, operating under its Northern Territory online betting licence. The device was seized by the Victorian gaming

regulator<sup>2</sup>, on the basis that it was an illegal instrument of betting under the Gambling Regulation Act 2003 (Victoria) (GRA)<sup>3</sup>.

The regulator also took the view that use of the device in the hotel would make the hotel premises an illegal betting house under the GRA<sup>4</sup> and would separately breach liquor legislation prohibitions against permitting a person to bet on the licensed premises<sup>5</sup>.

Sportsbet and the hotel took action against both the gaming regulator and the State of Victoria. Their main argument was that the various prohibitions described above were contrary to the constitutional requirement that trade and commerce between the Northern Territory and the State of Victoria should be absolutely free. This requirement has its source in section 92 of the Australian Constitution.

In a commercial sense, the 'Betbox' device poses a real threat to the exclusive wagering licence held, and recently renewed for a further 12 years, to Tabcorp in Victoria. Amongst other exclusive rights given by this licence, Tabcorp has the exclusive right to provide wagering and sports betting services to venues in the State. While the original action was commenced by Sportsbet and the hotel against the State of Victoria and the gaming regulator, Tabcorp applied in its own right to make its own submissions to the court.

In September 2011, a single Federal Court judge found in favour of Sportsbet and the hotel. The State and Tabcorp appealed that decision<sup>6</sup>.

## The appeal was successful

In two separate judgements (by Judge Emmett alone and in a joint judgement by Judges Kenny and Middleton) all three members of the court said the original judge was wrong. All three held that the

prohibitions did not engage the constitutional protection and, by not doing so, the prohibitions are lawful. The separate judgements (over 107 pages in total) reach this outcome in different ways.

Judge Emmett held that the prohibitions did not impose a restraint that had the effect of interfering with trade or commerce between the Northern Territory and Victoria in a way that constitutes a discriminatory burden of a protectionist kind. He found that, because the Betbox gives Sportsbet a physical presence in Victoria, Sportsbet effectively became a Victorian operator and is not, as an intrastate operator as opposed to an inter-State operator, being discriminated against by the prohibitions<sup>7</sup>. He waves away the fact that Tabcorp has been given retail exclusivity by saying that '...the creation of an exception [to Tabcorp] does not render the prohibition protectionist<sup>8</sup>'.

In their longer joint judgement, Judges Kennedy and Middleton approach the matter in a different and more comprehensive way. Significantly, they rejected Sportsbet's arguments on the basis that they are an attempt to re-introduce a line of argument (around the protection of individual rights) that had been rejected earlier by the courts when considering the freedom of interstate trade and commerce protection<sup>9</sup>. The judges accepted Tabcorp's submission that what Sportsbet was trying to do was to place out-of-State trade in a better position than in-State trade<sup>10</sup>. The judges said this would give Sportsbet preferential treatment, which the constitutional protections are not there to do<sup>11</sup>. Ultimately, the judges held that Sportsbet had failed to satisfy the requirement that the prohibitions constituted discrimination of a protectionist kind in relation to

trade between the Northern Territory and Victoria<sup>12</sup>.  
 The judges also found no evidence that the prohibitions were aimed at Sportbet's trade between the Northern Territory and Victoria<sup>13</sup>. Rather, they found that the prohibitions were intended (back in 1994 when they were originally introduced at the time of Tabcorp's sale by the government and float on the Australian stock exchange) to be a quid pro quo for the payments Tabcorp made for the wagering licence and its assumption of obligations to fund the racing industry. Indeed, the judges found that there was ample evidence that the prohibitions were reasonably necessary for the promotion and funding of a successful racing industry, and had achieved that objective<sup>14</sup>.

**Monopoly/exclusivity**

In the joint judgement, Judges Kenny and Middleton commented that the width of the prohibitions was a concomitant of the monopoly that was part of the State's legislative scheme for funding racing and regulating gambling in Victoria. The judges said that: '...funding [of the racing industry] via this monopoly is integral to the success of the Victorian racing industry....Tabcorp's contributions are an 'essential part' of keeping the Victorian racing industry 'vibrant and successful'...'<sup>15</sup>

The judges went on to state: 'Tabcorp's retail exclusivity is vital for maintaining a successful totalisator and Tabcorp's funding level for the Victorian racing industry. It should be borne in mind that there was no evidence that any increase in wagering overall would offset the loss in funding from Tabcorp in the event that Tabcorp lost its retail exclusivity. There was also no evidence that there was an

**While the judge made no particular finding, it follows logically that the use of a mobile phone to perform the same function as a 'Betbox' could therefore render that mobile phone as an illegal instrument of betting.**

alternative viable funding model that would confer the same or more benefits than the current model.<sup>16</sup>

These comments, while not determinative in the joint judgement, will no doubt be considered closely by Sportsbet in considering grounds for appeal. They bring into sharp focus the issue as to whether the protectionist prohibitions are reasonably necessary for achieving a legitimate purpose. The comments were based on the funding structure under the old licence and funding regime that was replaced by a new licence and funding structure in August 2012. That funding structure is more dependent on product fees being paid to the racing industry by all wagering and betting operators, and not just Tabcorp.

**Mobile phones**

Judge Emmett considers that the 'Betbox' device does not differ from a personal computer or a mobile phone in a functional sense. While the judge made no particular finding, it follows logically that the use of a mobile phone to perform the same function as a 'Betbox' could therefore render that mobile phone as an illegal instrument of betting, and turn the venue where that mobile phone is used into an illegal betting house. We will have to wait and see whether this view is shared by Tabcorp or the Victorian gaming regulator. If they do, and they pursue it, licensed venues may have to prohibit use by their customers of their own mobile phones, while they are in the venue, to access their non-Tabcorp betting accounts.

**Commercial consequences**

Licensed venues in Victoria will break the law if they agree to provide devices that operate like

'Betbox' to their customers. Suppliers of those types of device will therefore be unlikely to persuade Victorian licensed venues to possess and operate them.

Suppliers like Sportsbet will need to consider whether: (a) there is any other form or method of delivery which will not offend the specific prohibitions in Victoria; or (b) there is another form or method of delivery in Victoria which can be configured so that the constitutional protections can be engaged.

**Can Sportsbet appeal?**

Given this is a judgement of the Full Federal Court, the only avenue of appeal is to the High Court of Australia, for which an application must be made to the High Court for leave to appeal. At the time of writing, Sportsbet's intentions were not known.

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1. The State of Victoria v Sportsbet Pty Ltd [2012] FCAFC 143.
2. Then known as the Victorian Commission for Gambling Regulation, and now known as the Victorian Commission for Gambling and Liquor Regulation.
3. Section 2.1.2(1) defines "instrument of betting" and section 2.6.1(1) provides that a person must not possess an unauthorised instrument of betting.
4. Section 2.5.2(1) contains the prohibition and section 2.5.1(1) defines "betting house."
5. Liquor Control Reform Act 1998 (Vic) section 115(1).
6. Sportsbet Pty Ltd v Victoria [2011] FCA 961, per Gordon J.
7. Ibid 4, paragraph 100.
8. Ibid, paragraph 102.
9. Ibid, paragraph 301.
10. Ibid, paragraph 265.
11. Ibid, paragraph 285.
12. Ibid, paragraph 286 and 288.
13. Ibid, paragraph 274.
14. Ibid, paragraph 309.
15. Ibid, paragraph 310.
- 16 Ibid, paragraph 311 and 312.

# The International Convention on match-fixing and betting

Match-fixing has increasingly and, arguably, quite erroneously, become synonymous with betting in the minds of many. Khalid Ali, Secretary General of the European Sports Security Association (ESSA), the betting industry's integrity body, sets out the timeline and key issues in the development of the International Convention on match-fixing and betting.

Some people within the sporting sector claim betting related incidents to be as dangerous to the future of sport as doping. There is no clear evidence to support that allegation; indeed the Coventry University report from 2011 shows that instances of doping and match-fixing are in no way comparable in purely numerical terms; the latter is significantly greater. Nevertheless, match-fixing is a concern to both the regulated betting and sporting sectors and there has been a significant reaction to this by policymakers, notably at transnational levels.

The Council of Europe is one such transnational institution which has been seeking to develop solutions to this issue since late 2008 when its Sports Ministers adopted a resolution on ethics in sport. That included a political commitment to address the issues of match-fixing, corruption and illegal betting. A number of additional recommendations and resolutions have followed leading to the present exploration of a possible legally binding International Convention on match-fixing.

The betting industry has been seeking to engage in this process as an equitable partner from its early stages. However, the process has not always been as productive in terms of its interaction with us as

we would have preferred. Nevertheless, there is much that we support in the draft Convention, which features some 50 Articles and is packaged into sections relating to its key elements and specific aspects relevant to sports, regulators and betting operators in particular.

It proposes the introduction of a range of basic rules and sanctions by sporting bodies surrounding betting, which are unfortunately still lacking in the regulations of many associations. Proposals that the manipulation of sport be a criminal offence along with the withdrawal of public financial support for those involved in match-fixing are also included. As is the swift reporting of suspicious bets to regulators and sports, along with a welcome focus on player education.

There are two main areas of the Convention which we have considerable concerns about, both with regard to their justification and from a purely practical perspective. Firstly, we oppose any proposal to provide the sporting sector with the ability to determine the scope of regulated betting markets. For us, this is clearly an issue for independent and statutorily accountable gambling regulators to determine.

This 'sports right' as it has been termed, whether it be for commercial or integrity reasons, will simply impose an unjustified fiscal burden on regulated betting operators who support integrity measures. As such, it will adversely impact on their ability to offer competitive prices and retain consumers in the face of significant competition from the unregulated sector which is unhindered by such artificial and manufactured fiscal measures and has little concern for the integrity of sport.

A 'sports right' can cause a loss of income for small and medium

sized sports when those regulated betting operators are forced to withdraw funding for advertising, sponsorship and live streaming of sporting events in the face of increased costs.

In France, the only EU country to adopt a betting right and one supposedly on integrity grounds, the majority of bets and thereby revenues go towards football (55%) and tennis (25%). This has resulted in very little going back into the coffers of other sports such as basketball and rugby which could have potentially been used for their integrity programmes. How much of the income from that 'sports right' going to those bigger sports is allocated to integrity, as it is supposed to, rather than commercial issues is also a moot point.

Sports can provide regulators with their views, but the scope of betting markets and the assessment of the types of bets offered should always be a decision determined and led by independent statutory regulators alone and where commercial issues do not override integrity ones.

Secondly, we are concerned that there is an unsubstantiated belief that limiting the types of bets regulated operators can provide will stamp out the activities of criminals and those sporting people colluding with them. ESSA believes that betting integrity policy should be practical, proportionate and evidence-based. We have seen no evidence to suggest that limiting markets is necessary or effective, and we oppose any inclusion of this in the Convention.

The British Gambling Commission concluded on this matter that there were no overriding reasons to limit markets. Indeed, we have yet to see any substantiated and independently verified evidence

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that underpins many of the Convention proposals which will have significant bearing on all stakeholders.

In particular, we contend that detailed economic and regulatory impact assessments should be undertaken on the application of the Convention. That will provide important information regarding the proportionality and necessity for the promotion and implementation of those provisions before they are put to the Council's members: surely the most appropriate policy approach.

The Council is not alone in considering and advancing match-fixing policy proposals. The European Commission, for example, has been considering ways to assist its Member States and other stakeholders on this matter.

The Commission involved ESSA from an early stage in its integrity discussions and working groups helping to shape its policy response. We believe that industry engagement is an important factor in what so far represents a sensible, practical and proportionate evidence-led approach. It reflects many of the concepts being promoted by betting operators for some years, notably on education.

As with the Council, the Commission's policy actions are not necessarily confined within its jurisdictional boundaries. In the recent Nicosia Declaration and response to the Online Gambling Green Paper it has announced that it will explore this matter in discussions with third countries and the competent international organisations in the field of sport.

**The implications of the Council's Member States and others signing up to a convention covering match-fixing is therefore potentially very significant for the key stakeholders engaged in this debate, most notably the sporting and betting sectors.**

Indeed, it is working closely with the Council of Europe. In addition, UNESCO and the Commonwealth have shown a desire to be active in this area and to consider what positive policy impact they can have on this debate.

What sets the Council of Europe apart is that it is in a position where it is seeking to deliver a policy which would potentially be implemented on a global scale within five years and is seeking to address match-fixing as a whole.

We cannot ignore the many examples of non-betting related match-fixing in sport. Whilst we have no indication of any betting related corruption during the 2012 London Games - the betting industry worked closely with the IOC on the event - there were unfortunately non-betting related incidents.

That is not to deflect from betting related corruption or to suggest that the London Games wasn't a fantastic sporting spectacle. It is simply an acknowledgement that this is a wider issue than betting and potential solutions need to recognise that, which the Council's Convention is presently aimed at and which we fully support.

Sporting related match-fixing also has an adverse impact on betting markets and consumers. It attacks the fairness of those sporting competitions and outcomes, thereby adversely impacting on those that have bet on those events. There is, therefore, a clear business reason why the Council's work is important to us with regard to match-fixing as a whole.

This project is now entering a critical stage. The finalisation of

the text of an International Convention is due to be agreed during 2013 and then delivered to the Council's 47 Member States for adoption and implementation, presently planned for late 2014. The Convention does not need all 47 Council members to agree to it for it to become active. The text currently requires a mere five states, including only three Council members, to sign up for it to become active. Those not signatories will of course not be bound by it.

However, the Council does have some experience in delivering multi-jurisdictional policy programmes with its Anti-Doping Convention currently adopted by 51 states, including non-Council states.

The implications of the Council's Member States and others signing up to a convention covering match-fixing is therefore potentially very significant for the key stakeholders engaged in this debate, most notably the sporting and betting sectors. However, there is still a great deal of discussion to be done regarding the nature of the final text to be sent to Ministers.

As part of the Council's drafting group, ESSA will be working closely with other stakeholders to find solutions to areas of concern. We remain committed to playing a positive role and seeking to deliver a practical, proportionate and evidence-led set of policies.

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