

worldonline gamblinglawreport

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New Jersey to vote on online gambling bill

New Jersey Senator, Raymond Lesniak, introduced a bill on 12 January that would enable the state's licensed casinos to extend their offer of games to the online platform for a renewable term of one year. The proposed bill - Senate Bill 490 - would allow traditional casino games, such as poker and roulette, to be played online by the state's residents, provided that the internet equipment is located within the licensed casino itself. The bill reads that its regulation of online gambling 'will be subject to the provisions of, and pre-empted and superseded by, any applicable federal law'.

"This could limit or even negate the initiative", said Paul Bargren, a Partner at Foley & Lardner LLP. "At a minimum, it is likely to mean that even if the bill is approved, internet gambling would be available only to residents of New Jersey."

Joe Brennan Jr., Chairman of the Interactive Media Entertainment & Gaming Association (iMEGA) said that "internet gambling will have a great home [in New Jersey] and the opportunity to begin normalizing the industry".

Senate Bill 490 needs to be reviewed by a Senate committee before being voted upon.

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UK proposes new criteria for foreign online operators

The UK Government has proposed new licence requirements for foreign gambling operators who want to serve the British market. On 7 January, Sports Minister Gerry Sutcliffe announced his proposals will force operators, based outside Britain, to apply for a licence from the Gambling Commission if they want to advertise or offer their gambling services to British customers. "The new system outlined today will ensure that all businesses offering online gambling to our consumers adhere to our rules - not someone else's", said Gerry Sutcliffe. "It sets the standard for all online gambling companies that target British consumers. This is also about making sure overseas firms contribute their fair share towards regulatory costs and vital services like problem gambling treatment." The Minister emphasized that

many European countries had taken similar approaches and 'it would be wrong of us to stand still'. "The plan goes against our belief that licences should be mutually recognised throughout the EU," said Ari Last, Spokesman for Right2Bet. "We believe that consumers should be able to benefit from the services of any licensed betting operator, no matter where in the EU that provider is operating from. In this way UK consumers would not be deprived of a highly competitive gambling market, like millions of their fellow Europeans."

Under the proposals, which will be subject to a consultation period, all foreign online gambling operators active in the UK will be required to share information about 'suspicious betting patterns' with the UK's sports governing bodies, as well as the Gambling Commission.

The plans will increase tax revenues from gambling activities significantly. "There have been rumours for a number of months about a move of this type. I think it is was inevitable," said Carl Rohsler, a Partner at Hammonds. "The Government needs to generate revenue, and looking back at the developments in Italy and France, they realised that they had missed a trick".

Operators will have to meet requirements relating to the protection of children and vulnerable people, and they will have to prove how they contribute to research, education and treatment of problem gambling in the UK. Rohsler believes the proposal "is likely to be carried through whatever the colour of the next government". He said: "This type of regulation may encourage the large section of the UK public that still fears gambling online."

Online gambling provisions in force since January in Estonia

Legislation regulating online gambling in Estonia came into force at the beginning of January, following the delayed enactment of specific measures in the Gambling Act 2008. All operators must now apply for a licence to operate in the country - the first licence was issued on 21 January to Baltic casino group, Olympic Casino.

"The online gambling chapter of the Gambling Act 2008 is a rather general piece of legislation, which was not thought through enough, unfortunately", said Kaupo Lepasepp, a

Partner at Sorainen. "Operators who are presently in the process of applying for licences are treading on unknown territory - there are practical, legal and technical questions, notably in terms of IT and data protection, that remain unanswered at the moment."

Under the Estonian Gambling Act 2008, online gambling platforms wishing to operate in the country will need to have servers located on Estonian territory, although the implications - financial and technological - raised by this

requirement are currently being debated by operators and authorities.

"There is no specific requirement that the operator be registered as a company in Estonia", said Lepasepp. "I believe the law did not exactly intend to make Estonia a haven for online gambling operators and bring in more revenue for the country. The legislator just put an end to the 'grey zone' that was online gambling in Estonia before 2008, by introducing proper regulation to this specific category of services."

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It's a women's world

If you thought online gambling is merely for old, cigar-smoking men, sitting behind their PCs late at night, you need to think again. The UK Gambling Commission conducted a survey in 2009 which found that the number of women gambling online has increased enormously, especially during daytime, when the kids are at school. The survey concluded that women feel safer gambling

online than in a casino and many websites are taking advantage of that. Marketing strategies are gradually more aimed at women, with 'female-friendly' gimmicks, including pink formats, gambling horoscopes and 'hunk of the month' pictures. The typical age for women who gamble online is 25 to 34, according to the survey, and some websites have an 80%, or more, female audience, such as getminted-

bingo.com. The National Problem Gambling Clinic has confirmed that more women than in previous years have sought help. Overall, online gambling has gone up. In June 2009, the Gambling Commission's survey found that 10.2% of adults questioned said they had gambled online in the previous year, up from 7.2% in 2006 and – as we now know – many of these 'new gamblers' are women.

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Predictions for 2010

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The online gambling industry approaches 2010 with some degree of uncertainty. The recession has stalled for many what had previously been rapid growth, regulation remains in flux and consolidation in Europe looks to be on the agenda.

In Britain, the government is rumoured to be on the verge of responding to the issue of bookmakers moving their online operations offshore. However, instead of looking at how the tax regime can be made more favourable for these companies, it appears that the government may instead opt to introduce primary legislation to require overseas bookmakers also to be licensed in Great Britain.

As for Europe, the political and judicial winds seem to have turned. The European Court of Justice's decision in *Bwin Liga/Santa Casa*, followed by the Advocate General's Opinion in the *Betfair/Ladbrokes Dutch* cases, suggest that the days of a European gambling market have retreated further into the distance.

It is regulation in the US, however, which is likely to be the key stimulus to consolidation in the European online gambling sector. There was some consolidation in 2009, with the UK bingo sector being the most high-profile (PartyGaming purchasing Cashcade, reportedly from under the nose of 888, which then purchased Wink Bingo). However, the end game is consolidation amongst the biggest players, with recent rumours of a PartyGaming/Bwin combination. It is highly likely that these two companies, along with 888 and Sportingbet, will be the focus of any consolidation, or even a move by the US land-based operators into Europe. This is, however, unlikely to happen without those companies who haven't already done so, settling their disputes with the Department of Justice. The more remote prospect of at least some of the proposed legislation to legalise online gambling in the US becoming law will also impact on who gets together with whom in 2010.

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Canada: Although the British Columbia Lottery Corp (BLLC) and the Atlantic Lottery Corp (ALC) are expanding their online operations to include casino style games, I expect that they will encounter stiff competition from the well-established existing offshore operators. Unless strong inducements are offered by the BCLC and the ALC to residents of these provinces who chose to play on their sites, neither will encounter financial success.

US: With midterm elections in November 2010, I predict that little progress will be made in Congress to advance either Barney Frank's bill or Senator Menendez's bill. Frank will be successful in postponing the implementation of the Unlawful Internet Gambling Enforcement Act regulations for a further six

months. After the election in November, I expect that, in 2011, the Senate will pass Senator Menendez's bill to legalise and regulate online poker.

Europe: France, Spain, Italy and Denmark are the next frontiers for regulated online gaming. Who would have thought this would be the case three years ago? I expect that there will be no change in Germany in 2010. However, watch out for the liberalisation of online gaming laws in Sweden, Poland and the Netherlands, with tougher restrictions to be enacted in Norway.

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2010 promises to be a fascinating year, in respect of the regulation of online gambling in Australia. This potential exists in connection with the possible liberalisation of online gaming regulation, as well as further developments in the regulation of online wagering.

The Draft Report issued by the Australian Productivity Commission in November 2009 recommended the repeal of Australia's 2001 Interactive Gambling Act (IGA), which prohibits the provision of online gaming services to Australian customers. The Draft Report advised that a process be initiated to enable the regulation of online gaming, which would involve the introduction of a regime that permits the licensing of online gaming in Australia. The Productivity Commission's final report is due to be released in late February 2010 and, although there have been a number of submissions by harm minimisation interests - which have questioned whether it is in the public interest for the prohibitions in the IGA to be repealed - it will be of great interest whether the Productivity Commission confirms its initial view.

If so, it will then be a matter for the federal government to consider whether or not it is prepared to promote a policy that critics would consider as an expansion of gambling opportunities, particularly as 2010 is an election year. On the other hand, strong arguments exist which indicate that the prohibitionist approach included in the IGA does not work.

There exists the prospect of significant change in the regulation of online wagering during 2010. Again, the Productivity Commission recommended a national approach to address the funding of the racing industry and the use of race fields information in its Draft Report. This would involve the payment of a levy calculated on a gross revenues basis by wagering operators.

There has been substantial criticism by racing industry participants of this Draft Report, in submissions made to the Productivity Commission in public hearings during December. There exists considerable interest in whether or not the Productivity Commission confirms its Draft Report in its final report, which is due to be published in February 2010.

US

The privatisation of gambling activities in the US

US states are increasingly looking to gambling and related activities to boost falling public revenue, despite many national regulations outlawing these practices. Paul Bargren, Elizabeth L. Corey, Howard W. Fogt, Jr. and Miriam C. Beezy, of Foley & Lardner LLP, examine recent developments in the US.

Increased interest in privatizing state lotteries could add pressure in Washington to legalize some forms of internet gambling in the US, marking the first inroads into this now forbidden territory.

As the recession continues to erode tax income when public services are already underfunded, a significant number of states are looking at privatization of lotteries and other operations as a means to increase revenues. In turn, the private firms that would take on state lotteries could be expected to advocate for even higher revenues, by expanding the lotteries' reach through the internet. If that pressure grows strong enough, the US could see its federal bans on internet gambling start to soften.

Pervasive and aggressively enforced federal laws and regulations currently prohibit - or at least severely restrict - internet gambling in the US. The Wire Act is the principal mechanism used to prosecute internet gambling activities across state borders. This Act prohibits use of interstate or international communications wires to knowingly transmit or receive bets or information that could be used to place bets. The Travel Act provides criminal penalties for anyone who undertakes interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity. The Illegal Gambling Business Act (IGBA) makes it a crime to operate an

'illegal gambling business'. Like the Wire Act, it applies only to gambling businesses, not individual gamblers.

Most recently, in 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA). The UIGEA does not itself prohibit gambling but seeks to facilitate enforcement of other anti-gambling provisions. The United States Court of Appeals for the Third Circuit recently rejected a broad challenge to the UIGEA¹. The UIGEA enabling regulations were set to go into effect 1 December 2009, but the Federal Reserve and Department of the Treasury imposed an extension on 27 November 2009, delaying implementation to 1 June 2010. The delay came after requests by gambling organizations, supported by banks and others².

Recently, there has been strong and vocal support in Congress for a relaxation of the current restrictions on internet gaming, spearheaded by Congressman Barney Frank, Chair of the House Financial Services Committee. Chairman Frank has introduced the so-called 'Internet Gambling Regulation and Enforcement Act' in the last successive Congresses. The legislation has attracted a large number of co-sponsors in the House of Representatives. There also have been more narrowly focused efforts to legalize internet poker, bridge and chess, etc. Similar legislation has been introduced in the Senate. These legislative proposals have sparked initiatives to impose taxes on internet gaming operations, as a *quid pro quo* to the relaxation of current restrictions. Nevertheless, these legislative campaigns continue to face significant opposition from a wide array of forces, who remain strongly opposed to internet gaming on public order and religious grounds.

Accordingly, the prospects for Congressional action remain uncertain.

Another federal impediment to privatization is a 2008 advisory opinion, issued by the Department of Justice under the Bush administration. Federal anti-gambling law allows for lotteries 'conducted by [a] State acting under the authority of State law'³. The Department of Justice's opinion concluded this requires the state to 'exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a *de minimis* share of the equity interest in the profits and losses of the business'⁴. Whether this opinion represents the views of the new Obama administration remains to be seen.

Despite all of the federal gambling prohibitions, there is, even today, a small window of legality through which a number of states conduct at least a portion of their lotteries on the internet. However, among the many restrictions, is a requirement that only residents of that state are eligible, and they must register and personally appear to claim their prize.

In the states, the push toward privatization continues, if slowly. State lawmakers faced with mounting deficits are attracted by the promise of large revenues. For example, Christiansen Capital Advisors LLC, recently estimated the potential privatized equity value of United States lotteries at \$203 billion. Even a fraction of that would be a boon to states. However, it's not clear those levels could be reached without modifications to existing game play and delivery mechanisms. That is, full potential for privatized returns may require, among other things, the ability to offer state lotteries on the internet.

Critics and proponents of privatization are maintaining a close watch on Illinois. Mindful of the Department of Justice's opinion, Illinois has stopped short of the sort of complete privatization that might be achieved through a mechanism such as leasing the entire operation of the lottery for a term of years in exchange for a large upfront payment. However, Illinois has taken a first step by enacting legislation 'to conduct the functions of the Lottery with the assistance of a private manager under a management agreement overseen by' the state⁵. The goal is to maximize sales and profits, near and long term, to feed the coffers of the state's depleted treasury. After more than two years of consideration across two administrations, the legislation was passed in July 2009 (with amendments in October), and became effective as Public Acts 96-0034 and 96-0037, upon Governor Patrick Quinn's approval on 13 July. The private manager's compensation will be limited to 5% of lottery ticket sales.

Importantly, the Illinois plan includes an 'internet pilot program', acknowledging that 'the current practices of selling lottery tickets do not appeal to the new form of market participants who prefer to make purchases on the internet at their own convenience'⁶. In a notable bit of understatement, the legislature observed that with the advent of the internet, 'the consumer market in Illinois has changed since the creation of the Illinois State Lottery in 1974'⁷. However, recognizing the barriers posed by the federal Wire Act and other statutes, the Illinois enabling legislation contains this provision: before beginning the pilot program, the Department of Revenue must seek a clarifying memorandum from the federal

Despite all of the federal gambling prohibitions, there is, even today, a small window of legality through which a number of states conduct at least a portion of their lotteries on the internet

Department of Justice that it is legal for Illinois residents and non-Illinois residents to purchase and for the private company to sell lottery tickets on the internet on behalf of the State of Illinois, under the federal Unlawful Internet Gambling Enforcement Act of 2006.

The legislation also allows for an expanded state video lottery terminal locations, with hefty license fees to create revenue, and a new video poker law.

After a period of false starts in the ambitious process, the State of Illinois has now requested proposals for a financial advisor to guide the process for reviewing lottery revenue, lottery players, technology and potential for revenue expansion. Attempting to avoid the political scandals that have plagued the state in the past, Illinois is trying to engage an advisor who will provide independent data and advice to the Department of Revenue and the Governor on the bids submitted by hopeful lottery managers. Given Illinois' stated intent to expand lottery offerings to the internet, the progress of its initiatives will be monitored closely.

Privatization is not only an intriguing approach, but in some cases it may be the only approach available. Budgets are already pared thin. One Arizona legislator said: "we have no place else to go...we can't cut or tax our way out of this". Rhode Island, Texas, New York, Minnesota, Iowa, Texas and Florida have all considered lottery privatization at some level in recent years, and proposals continue to simmer.

Lottery privatization seemed to be on the fast track in California in 2007, when Governor Arnold Schwarzenegger publicly announced he wanted to study the concept. Investment bankers flocked to California to push the

proposal amid state revenue estimates of \$12 billion to \$24 billion, with some as high as \$37 billion. Now, enthusiasm appears to have cooled, but with a population of 36.7 million, the state presents a huge market for privatization - should efforts move forward.

Whether legal internet gambling will arrive anytime soon in the US is difficult to say. Opposition remains strong in many quarters, but the growing interest in privatization of state lotteries could provide a new source of pressure on the federal government to remove historic prohibitions on internet gambling, as a means to enhance governmental revenues.

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1. See Interactive Media and Entertainment Association, Inc., v United States (1 September 2009).
2. Fed. Reg., 1 December 2009, Vol. 74, No. 229, pp 62687-88, <http://edocket.access.gpo.gov/2009/E9-28746.htm>.
3. See, e.g., 18 U.S.C. § 1307(a)(1).
4. US Department of Justice, Office of Legal Counsel, Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law (2008).
5. 20 ILCS 1605/2.
6. 20 ILCS 1605/7.12.
7. Id.

OFFSHORING

UK spread betting firms looking offshore

Many firms in the non-financial services gambling sector have, over the course of the last few years, moved operations offshore, primarily to achieve a more favourable tax treatment. Spread betting firms find themselves in a sector regulated by the Financial Services Authority, where a different set of factors will apply to considerations in relation to offshoring. Brian McDonnell, a Partner at Olswang, examines what scope there is for spread betting firms mitigating the effects of more aggressive regulation by going offshore.

Introduction

Generally, the geopolitical environment is looking increasingly unfavourable for offshoring. The UK Government recently announced plans to regulate offshore gambling websites aimed at UK customers and to apply the Horserace Betting Levy to these operations. While, usually, the primary consideration for a company in any prospective move offshore is the avoidance of tax (corporation tax and general betting duty), the international efforts of bodies such as the Organisation for Economic Cooperation and Development have been directed at thwarting such avoidance. On 2 April 2009, at the London G20 summit, G20 countries agreed to define a blacklist for tax havens, classified according to a four-tier system, based on compliance with an 'internationally agreed tax standard'. With more local relevance in November 2009, The Foot Report on the British Overseas Territories stated that while many offshore jurisdictions 'have a good story to tell...there is no room for complacency. Others

have more to do, particularly on regulation and tackling financial crime'.

While acknowledging the current uncertainty as to the status of offshore locations, moving business offshore may still represent an attractive commercial option for financial spread betting firms prepared to rise to the legal and regulatory challenges, and countenance the risk that offshoring may become a less attractive option in the future.

The regulatory perimeter for spread betting firms

In the UK

In order for a financial spread betting firm to establish itself offshore for the purpose of UK taxation, it would usually also need to operate outside of the regulatory perimeter of the Financial Services and Markets Act 2000 (FSMA). A key consideration, in this regard, would be the extent to which the activity would be regarded as being carried out 'in the UK'. The little case law on whether an activity is carried out 'in the UK', for the purposes of the FSMA, adopts a restrictive approach taking into account any aspect of the general business of the firm that continues to be undertaken in the UK. However, there remain ways of structuring the business of a financial spread betting organisation, such that they can operate outside the UK for the purposes of the FSMA.

Although Financial Services Authority (FSA) guidance in the FSA Handbook considers the link between regulated activities and the UK, neither the FSMA nor the FSA's rules specify where particular regulated activities are regarded as carried on. While only rules of thumb, it is generally accepted that, where a communication of an acceptance is instantaneous, dealing in investments will

generally be carried on at the place where acceptance of the offer is received by the offering party (in the case of online spread betting, where the computer server is located). Further, arrangements relating to investments are normally carried on at the place where the arranger is when the arrangements are made.

However, courts consider many other factors. In one of the few relevant cases, *Financial Services Authority v Fradley & Woodward*, the Court of Appeal held that the issue of territorial scope was to be determined by whether the activities taking place in the UK formed a significant part of the relevant regulated activity. As such, it was not necessary for all the elements of a regulated activity to be carried on in the UK. In *Fradley*, communications sent to UK clients together with the maintenance of a UK bank account and UK business address were all business activities that took place in the UK and were of sufficient regularity and substance to amount to the regulated activity of 'operating a collective investment scheme' being carried on in the UK. Further, the FSA provides that a non-UK person may also be carrying on activities in the UK, by means of the internet or other telecommunications system.

Statutory extension of territorial scope

Section 418 FSMA extends the territorial scope of the FSMA, in five cases, by deeming activities that would otherwise be carried on outside the UK to be carried on in the UK. Scenarios where activity would be deemed to be undertaken in the UK include, *inter alia*, cases where:

- a regulated activity is carried on from an establishment maintained in the UK by a person who does not have a UK head office; and

● a person has a UK registered or head office and the day-to-day management of the regulated activity is the responsibility of that office or another UK establishment maintained by him.

While an 'establishment' is likely to involve a degree of permanence, there is no certainty as regards this concept and it could be satisfied by, for example, temporary office accommodation. 'Day-to-day management' is likely to involve the practical implementation and administration of strategic decisions - including having responsibility for those involved in practical administration.

The overseas persons exclusion

Even if a firm is caught within the territorial scope of FSMA, it may be able to take advantage of the overseas persons exclusion in article 72 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544).

This exclusion can be relied upon by persons who do not maintain a permanent place of business in the UK and who carry on certain activities that would otherwise be regulated with or through an authorised or exempt person, or the transaction is the result of a 'legitimate approach' (meaning that it is in compliance with the UK financial promotion regime). As such, for spread betting firms, the exclusion is available in relation to dealing as principal where a firm is entering into a transaction as principal with a person in the UK, if the transaction is in compliance with the UK financial promotion regime - which, in the case of an offshore entity, will generally mean that it has had its financial promotions approved by a third party firm which is authorised by the FSA. In consequence of this exclusion, spread betting with UK-based customers from an offshore

In order for a financial spread betting firm to establish itself offshore for the purpose of UK taxation, it would usually also need to operate outside of the regulatory perimeter of the Financial Services and Markets Act 2000

location need not be a regulated activity.

If a firm did succeed in establishing itself offshore, it would need to be careful not to commit the offence of 'holding out' by misrepresenting itself as an authorised or exempt person.

The financial promotion restriction

Apart from the operation of the overseas persons exclusion, even where a firm concluded that it did not carry on regulated activities in the UK, it would still need to ensure that it did not breach the UK financial promotion regime under section 21 FSMA. Section 21 FSMA provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity, unless he is an authorised person, or the content of the communication is approved by an authorised person, or the communication is covered by an exemption. Section 21(3) of FSMA provides that promotions originating outside the UK will be caught if they are 'capable of having an effect in the UK'.

The Gibraltar connection

Gibraltar enjoys a separate status to other offshore jurisdictions, like the Channel Islands and Isle of Man, as the EU's Single Market directives apply to it in full. A Gibraltar-based investment firm can offer services into the UK on a cross-border basis (or by establishing a branch), without needing to avail itself of, for instance, the overseas' persons exclusion.

However, passporting rights between Gibraltar and the UK apply only under special arrangements pursuant to the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, and careful consideration would need

to be given to whether the exercise of such a passport would bring a spread betting firm within the UK tax net.

Conclusion

While it is likely that uncertainties in the tax treatment of offshore companies will continue, and any currently FSA authorised firm would expect to meet supervisory resistance to an offshoring strategy, the regulated sector, and in particular spread betting firms, are not precluded by the regulation itself from exploring offshoring options.

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COMMENT

What future for online gambling services in the EU?

Advocate General (AG) Bot recently issued an Opinion, in which he discusses the delicate balance Member States must achieve between the free provision of gambling services and the precautionary principle, under EU law. Martin Lycka, Legal Adviser in cooperation with Betfair, analyses the AG's Opinion and what it could mean for EU gambling regulations.

This annotation will deal with the Opinion of Advocate General (AG) Bot in the Sporting Exchange and Ladbrokes cases ('the Opinion')¹. These two Court of Justice of the European Union (the Court) cases deal with the compatibility of the Dutch single licensing system with EU law. The AG had to decide upon the compatibility of this system with the provisions on free movement and the application of the principles of equal treatment and transparency, within this system. I will argue that, in relation to the first issue, the AG failed to distinguish between the concepts of mutual recognition and passive acceptance of services. The AG also did not sufficiently review the proportionality of the practical application of Dutch legislation and overstretched the scope of the precautionary principle. As far as the transparency issue is concerned, I will concur with the AG that this principle applies within the framework of a single licensing system established by any EU Member State.

Facts

Betfair and Ladbrokes are UK-based companies that offer online sports and horse racing betting services. They also sought to provide their services in the Netherlands. Betfair filed a request with the Dutch Ministry of Justice to obtain a Dutch licence, but the

request was refused. Equally, Betfair's objections to the extension of the validity of the licences granted to De Lotto, for acceptance of sports bets, and to the Paardentotalisator-Scientific Games Racing BV (SGR), in the horse-racing domain, were dismissed. Ladbrokes' case originates from a civil action instituted against it by De Lotto for violation of the Dutch Gambling Act. De Lotto sought an order against Ladbrokes, in the form of a prohibition of offering of its games on a Dutch internet site.

The Netherlands have instituted a single licensing system for acceptance of sports and horse racing bets. One exclusive licence is issued for each of these types of betting, for a duration of five years. Upon expiry of this period, a new licensing procedure is to be launched. However, De Lotto has held its licence since 1961 and its rights have been renewed ever since, without any licensing procedure being launched. Also, the SGR's licence has been automatically renewed several times.

AG Bot's Opinion

The AG recalls that gambling is subject to the provisions on free movement. As neither Betfair nor Ladbrokes intended to establish themselves in the Netherlands, the cases at hand had to be dealt with exclusively under Article 49EC. Although the Court upheld that Member States have a broad discretion in the field of gambling, any restrictive measures they adopt must be non-discriminatory, justified by the mandatory requirements and proportionate, i.e. suitable and not going beyond what is necessary.

Case law does not exclude that a Member State can opt for a single licensing system. Nonetheless, this choice must be conducive to

achieving a decrease in gambling opportunities, in a systematic and consistent manner. The AG emphasised that a single licensing system is a suitable tool for supervision of a gambling market. He sought to support this view by arguing that the gambling industry should not be opened to competition, as competition would give rise to negative consequences, namely that it would 'push households to spend more than their available resources for leisure purposes'. There are two observations to be made here.

Firstly, Member States are capable of establishing such licensing conditions that would protect consumers without having to introduce a competition-free licensing system. Secondly, regulated competition in the gambling market is likely to prompt gambling operators to further reinforce their consumer protection standards and help prevent betting scandals.

The key issue for evaluation of compatibility of national restrictive measures with EU law is proportionality. In the view of the AG, the measures adopted in the Netherlands are suitable and proportionate to the attainment of the goals of the Dutch betting and gaming laws, namely preventing gaming addiction and fraud. With reference to the Placanica case, the AG argues that the licence holders may introduce new games and advertise them to keep their offer of games attractive and reliable². The AG distinguishes the factual situation in the Netherlands from the one in the Gambelli case, where Italy incited its population to gamble³. In his view, this is not the case in the Netherlands, where the positive feeling for gaming has been countered by the state, who can rely on the precautionary principle as a justification for preventing excessive online

gambling. A couple of points need to be raised here. Firstly, it is recognised that the precautionary principle applies only where there is evidence of the risk of potential harm occurring⁴ - no recent medical studies have shown that sports betting is prone to give rise to such harm⁵. The Netherlands has not shown, as is its duty under the precautionary principle and under ECJ case law⁶, that such a risk exists. Secondly, the AG failed to appreciate that the practical application of Dutch gambling legislation is tainted with several inconsistencies, in particular that De Lotto offers online games which it does not offer offline and that SGR invites its customers to access the websites of other horse racing betting providers.

Furthermore, the AG refuses the argument that the compatibility of each restrictive measure adopted by a Member State with EU law, must be examined separately. In his view, any such measure is compatible with EU law provided that a Member State's general gambling policy is compatible. Nonetheless, the AG emphasises that the plausibility of the general policy cannot be examined only on the grounds of the relevant legislation. Its practical application must be examined as well.

Following the Bwin case⁷, the AG does not accept that mutual recognition applies in the domain of online gambling. However, the AG does not substantiate his view that online gambling is more dangerous than its offline older sibling. More importantly, the AG overlooks the fact that the claimants have not sought recognition of their licences but confirmation of the right of Dutch customers to access their services and, thus, to benefit from their right to passive movement of services. The right to receive services from foreign operators is

Although the Dutch licences are technically issued for five years, their automatic renewal is in contradiction with EU law and operators from other Member States must be permitted to take part in the licensing procedure

the backbone of the Internal Market. In the event this right is not upheld by the Court, one can only ask what is left from the free movement of services.

In the final part of the Opinion, the AG states that the principles of equal treatment and transparency apply in the context of a single licensing system. Although Member States can opt for this system once this decision is taken, they must respect these principles. The AG states that 'a call for tenders for the contract would not have detrimental effects' and that the risks relating to gambling can be tackled by the imposition of efficient licensing conditions. Any conceivable licence seeker must be informed of the licensing procedure' launch, which must be conducted on the grounds of objective and non-discriminatory criteria that are known in advance. The principles of transparency and equal treatment also preclude Member States, save very exceptional circumstances, from granting gambling licences for an unlimited period of time. Although the Dutch licences are technically issued for five years, their automatic renewal is in contradiction with EU law and operators from other Member States must be permitted to take part in the licensing procedure.

Conclusion

The Sporting Exchange and Ladbrokes cases are different from the Bwin case, back in September. As opposed to Bwin in Portugal, Betfair and Ladbrokes have sought only passive acceptance of their services. AG Bot failed to distinguish this concept from the concept of the mutual recognition of gambling licences. It is imperative that the right of Dutch customers to receive services provided by foreign operators be upheld. Otherwise, the *raison d'être*

of the Internal Market will be irreparably distorted.

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1. Opinion of AG Bot in C-203/08 Sporting Exchange and C-258/08 Ladbrokes dated December 17, 2009.
2. Joined Cases C-338/04, C-359/04 and C-360/04 Placanica [2006] ECR I-I-01891, para 55.
3. C-243/01 Gambelli [2003] ECR I-13031, para. 68.
4. Communication from the Commission on the precautionary principle, COM (2000) 1.
5. Labrie, R.: 'Assessing the playing field: A Prospective Longitudinal Study of Internet Sports Gambling Behaviour', (2008) Vol. 23 J Gambli Stud. 347.
6. C-42/02 Lindman [2003] ECR I-13519, para. 25.
7. C-42/07 Liga Portuguesa [2009] ECR, not yet published, para. 69.

SPAIN

The liberalisation of the Spanish gambling market

Fragmented gambling legislation in Spain has triggered efforts to be made at national level to create a harmonised framework for the regulation of the provision of gambling services. Albert Agustinoy Guilayn, an Attorney at Cuatrecasas, Gonçalves Pereira, examines the progress being made to offer a stable regulatory background 'for consumers and operators involved in the provision of remote gambling services'.

From a legal standpoint, the Spanish e-gaming market has been based for years on a permanent paradox: while applicable regulations set forth a very strict regime (that may lead to severe fines and even to criminal sanctions), Spanish authorities have decided to adopt a tolerant approach that has led to consolidate a flourishing industry in Spain. Indeed, Spain has become an attractive field of operation for online gambling companies so that, at present, the Spanish market is one of the references for the industry in Europe - a large number of operators focus their activities in this jurisdiction.

This lack of coherence - existing between applicable regulations and the actual market reality - constitutes an obvious problem for all the players involved in this game. While a reasonable and workable regulatory framework does not exist, Spanish consumers do not count on satisfactory legal instruments for defending their rights. Responsible gambling companies must coexist with opportunistic operators aiming to obtain quick earnings without fulfilling minimum reliability standards. Authorities cannot adopt an active role in the market as the legislation they count on is

clearly inoperative - as it was enacted without taking into account the possibility of operating this type of activities through remote means.

Taking into account the above-mentioned circumstances, it is clear that there exists a strong demand for reasonable and workable regulations in this field in Spain. Given the existing demand and the passive attitude of Spanish State authorities, some regional governments (such as those from Madrid or the Basque Country, in the North) have tried to break this regulatory paralysis by enacting their own regulations, as they have powers to regulate gambling activities taking place within their respective territories. These new regulations have allowed the operation of certain remote gambling activities (basically, sport betting) by creating systems of regional authorisations.

Nevertheless, this regional approach has not become an operative alternative for online gambling operators. The main reason for this is that the legal effects of any such authorisations are restricted to the territory of the region at issue, without allowing the operation of the authorised activities in other regions. This limitation poses an obvious problem for remote operators as, pursuant to one of these authorisations, they would only be entitled to accept players physically located in the territory where they have been authorised to operate.

Therefore, an authorised operator would be obliged to put in place expensive technical measures and, in most cases, the turnover that would be obtained would be lower than the costs of launching and operating this type of platform. Other circumstances have also limited the attractiveness of this regulatory model for remote gambling companies. The

limitation of games that can be offered through this system of authorisations, as well as the high costs deriving from applying and obtaining these authorisations, have confirmed the lack of compatibility of this regional approach with online gaming operators.

Given these circumstances, any regulatory solution in Spain must derive from state authorities, which are legally empowered to regulate gaming activities taking place in two or more regions. The path for the adoption of new regulations was initiated in late 2007. Indeed, during that year, the Spanish Parliament passed the so-called Act for the Promotion of the Information Society (Act no. 56/2007, dated 28 December). Among other provisions, this Act introduced an obligation for the Spanish Government to adopt regulations specifically focusing on the provision of e-gaming services. Pursuant to this Act, the Spanish Government was obliged to file a bill before Parliament (the Bill), regulating the gambling and betting industry and, in particular, establishing a system of authorisations allowing the operation of gaming services by online means.

This new regulation should be able to offer a stable legal background for consumers and operators involved in the provision of remote gambling services. Moreover, Spanish authorities should count on reasonable and operative rules allowing them to take a workable approach towards the remote gambling industry in Spain.

Since no specific deadline was set forth in the above-mentioned Act, almost two years elapsed since its enactment without any major development having taken place. Nonetheless, the situation has changed quite recently. Indeed, the

entity charged with the operation of the gambling state monopoly in Spain - *Loterías y Apuestas del Estado* - has been preparing a first draft of the Bill to be filed before the Spanish Parliament. As a matter of fact, during the meeting held on 13 January 2010 by the so-called *Comisión Sectorial del Juego* (a forum for discussing major developments connected with the gaming industry and composed by the State authorities - namely, the Economy and Taxation Ministry, the Home Affairs Ministry and the Industry Ministry, the gaming authorities of all the Regional Governments and *Loterías y Apuestas del Estado*), the first version of the document was distributed to the representatives of the regional governments in order to be discussed, and allowing the state and regional authorities to reach an agreement on the general principles to be established in the Bill.

The document is currently being reviewed and, once an agreement has been reached within the *Comisión Sectorial del Juego*, a process of public consultation with members of the industry will be opened. In any case - and considering the goals of the Spanish authorities in connection with this piece of legislation - it appears the draft should be based on the following principles:

- The Bill would be filed as a general act, setting forth the general principles of the new regulatory framework. Hence, the actual details of the new regulation - for example, types of games open to authorisation - would be subject to further regulatory developments by a new national gambling agency (as described below).

Any regulatory solution in Spain must derive from state authorities, which are legally empowered to regulate gaming activities taking place in two or more regions

in this respect will be whether such an application will be possible at any moment or just in case the Spanish authorities have previously launched a public call for applications.

- As indicated above, a new Spanish gambling agency would be created. This entity would be charged with regulatory competences (developing the general principles set forth in the Act to be approved by the Parliament) and enforcement powers. This agency would take up the current regulatory powers of *Loterías y Apuestas del Estado*, which would remain as an 'ordinary' operator in the Spanish market.

- Incorporating a Spanish company or locating within the Spanish territory the technical infrastructure required for the operation of gambling activities would not be required for obtaining an authorisation under the new system. On the contrary, in compliance with European law, merely holding a designated representative in Spain or granting remote access to the technical systems of the authorised operators should suffice.

- The new regulatory system should offer an appropriate framework for any remote gambling operator. Hence, from the first moment the new system of authorisations is operative, the Spanish authorities will take a vigilant approach *vis-à-vis* non-authorised companies operating in Spain, adopting any enforcement actions they deem necessary under the new regulations.

Taking into consideration similar legislative experiences in other jurisdictions, it seems clear that this is going to be a difficult process that may require time. Indeed, there are a number of sensitive issues that are still to be decided and agreed. The clearest

example, in this respect, is the taxation regime to be applied, as well as the system of distribution of the corresponding tax income. Moreover, reaching an agreement with the regional governments (particularly in connection with the distribution of tax income deriving from authorised gaming activities) and the political groups in Parliament may be difficult tasks.

In conclusion, even though the Spanish authorities have already put in motion the legislative process for new regulations on the remote gambling industry, the process is still far from crystallising in a piece of legislation. In any case, what is clear is that today we are closer to new regulations that should offer a reliable regulatory framework for consumers, operators and authorities.

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AUSTRIA

The Engelmann case: social objectives and licensing

On 14 January 2010, the oral hearing for the Austrian Engelmann case (C-64/08), took place before the European Court of Justice. Several licensing systems and gambling market ideologies clashed. Thomas Talos and Arthur Stadler, of Brandl & Talos Attorneys At-Law, outline licensing requirements under European as well as Austrian regulations.

Pleading for Engelmann

'What does the famous Viennese 'Sachertorte' have to do with gaming?', Thomas Talos asked the court, representing German citizen Engelmann, who argued that he would have never have a chance to receive a casino licence, in Austria, due to various restrictions within the Austrian Gambling Act.

Thomas Talos continued by saying that the answer to the above question is quite easy. The Sacher Hotel gains financial profit from the Austrian gaming monopoly. It is part of a privileged group of private investors, who significantly influence the Austrian gaming market. Seventy-seven % of the shares in Casinos Austria AG are held by private investors, such as Raiffeisen Banking Group, large insurance groups, like UNIQA or Vienna Insurance Group, as well as by private foundations and other individuals. The Republic of Austria holds 23% of Casinos Austria's shares through the participation of Austria's National Bank. However, the state is not merely participating in Casinos Austria's profits through the shares held, but also through tax revenues. The supervision of Casinos Austria's activities is carried out by the Ministry of Finance's tax department.

Therefore, the Austrian system cannot be compared to the Portuguese one, which has recently

been under examination in the course of the Liga Portuguesa ruling of the European Court of Justice (ECJ). The Portuguese gaming monopoly is carried out by Santa Casa, a non-profit organisation which devotes all its revenues to charity. Contrary to that, the Austrian monopoly is operated by a private company, set up under private law, and devoting its revenues to a few private investors. Furthermore, gaming in Austria is considered a true economic activity which yields maximum profits.

The first preliminary question submitted to the ECJ concerned the requirement of a corporate seat in Austria, on the one hand, and the requirement of a joint-stock company on the other. The defendant argued that the requirement of a seat in Austria is discriminatory. Although the Austrian Government may consider this necessary in order to secure sufficient supervision and control during the phase of business operations, the ECJ has stated, in its Placanica judgment, that there are less restrictive means to control the economic activities of some operators than excluding them from the market. Regarding the requirement of a legal entity of a joint-stock company (*Aktiengesellschaft*, under Austrian law), the defendant outlined that this requirement also exceeds what is necessary to guarantee sufficient control. As evidence, he compared the requirements for obtaining a lottery licence in Austria, for which a limited liability company (*GmbH*, under Austrian law) is adequate. No factual difference or justification can be found.

The second preliminary question concerns the compatibility of Austria's restrictive licensing system for casinos with European fundamental freedoms. While the Austrian Government cited a series

of justification objectives - mainly, on grounds of public order, combating fraud, and player protection - the organisation of the Austrian *de facto* monopoly, however, is in severe tension with these objectives. Austria actually does not consistently and systematically pursue these legitimate objectives. For example, Austria does not effectively combat fraud in other areas of gaming: slot machines are subject to an open private licensing system in four federal states, including Vienna. Likewise, anyone is allowed to operate sports bets as long as the conditions are met.

Regarding the protection of players, a key provision renders all licence holders obligations moot. Section 25 (3) of the Austrian Gambling Act imposes massive restrictions on possible compensation claims by aggrieved players. A pathological player, who loses, for example €50,000 over a period of two years, can claim compensation of no more than €4,500 - this, however, only if he has ruined his livelihood and if Casinos Austria have violated their obligations by gross negligence. All other claims under general civil law, even in cases of legal incompetence, are thus ruled out. Even the Ministry of Consumer Protection has criticised this provision as 'absolutely detrimental to the consumer'.

A most recent amendment to Section 56 of the Austrian Gambling Act also demonstrates just how keen Austria is on protecting its casinos and their shareholders - at the expense of consumers. The 2008 amendment provides that licence holders must adhere to a responsible standard in advertising. However, only the Ministry of Finance, holding 23% of shares, in the monopolist company is to supervise this. The supervision by means of

competition law, as effective in all other industrial sectors, and the control by competitors, consumers, and consumer protection boards is explicitly excluded by Section 56 (1) of the Austrian Gambling Act. This exclusion of competitors is clearly not compatible with curbing the propensity to gamble or reducing gaming opportunities. Quite the contrary - in Austria, gaming is an everywhere available and normal 'good of daily life', even openly advertised in supermarket flyers next to meat and cheese. Following the ECJ ruling in Placanica, the defendant illustrated that monopolists in Austria ubiquitously encourage consumers to play.

The third preliminary question submitted to the ECJ deals with the fact that all Austrian licences, for a period of 15 years, were issued and extended under circumstances that exclude competitors from other Member States, which is clearly in breach of European law, namely of the principles of transparency and publicity. In Placanica, the ECJ considered the revocation and redistribution of old licences as well as the award of a sufficient number of new licences. The ECJ also found that sanctions could not be imposed on any person unlawfully barred from any possibility of obtaining a licence by the Member State in violation of European law. According to the defendant, this is exactly what happened in the case of Mr. Engelmann, who was and still is excluded from being awarded a licence, in violation of European law. The argument that Mr. Engelmann does not hold a licence therefore may not be used to impose a sanction.

Pleading for the European Commission

The European Commission's representative, Dr. Krämer, listed

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the pertinent justification grounds as follows: consumer protection, more specifically the protection of consumers of games of chance against fraud on part of the operators, and combating crime as a general need to preserve public order. It is not evident if and which one of these grounds Austria is pursuing. Merely abstract assumptions by the Member States are not sufficient as the ECJ is bound to assess the specific measure by applying the 'four-part-test' and the principle of proportionality.

Regarding the protection of consumers, the national judge may examine whether or not Austrian monopolists show aggressive market behaviour. For this purpose, the national judge shall apply the criteria elaborated by the ECJ in its landmark gaming rulings, such as Gambelli and Placanica. Furthermore, a national measure is inadequate if there is a substitution effect of consumers changing from one restrictive sector of gaming to another non-restrictive sector of gaming within the Member State.

As regards the requirement of a joint-stock company with a seat in Austria, Mr. Krämer stated that this goes beyond what is necessary to guarantee any public interest. This would be the end of the fundamental freedoms.

The issuance of licences, without applying the principles of transparency and publicity, may only be accepted in exceptional cases. There is no evidence for circumstances in the Austrian case which may justify the exclusion of transparency and publicity.

Impact for the award of licences

In his recent Opinion for the Betfair and Ladbrokes cases (cases C-203/08 and C-258/08), Advocate General Bot stated that 'Article 49

EC must be interpreted as meaning that the principle of equal treatment and the associated obligation of transparency apply also to the gaming sector in the context of a system where a licence is issued to a single operator.

Article 49 EC precludes a national law whereby a single authorised operator's licence is extended without competitive tendering unless such extension addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement in the public interest as laid down in the case-law and unless it conforms to the principle of proportionality. It is for the national court to determine whether that is the case.'

After the hearing in the Engelmann case and the implications of Advocate General Bot's Opinion, the principles of transparency and publicity when issuing or renewing gaming licences seem to become a crucial obligation for the Member States to comply with in the future.

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BELGIUM

The new Gaming Act : freedom of services restricted

Belgium has recently implemented new gambling legislation that is, in some parts, not compatible with EU law. Some restrictive measures seem to contradict the freedom to provide services on any territory in the EU. Axel Clerens, an Associate at Crowell & Moring LLP, examines the contents of the law, with particular focus on two of the most restrictive measures.

During the night of 4 December 2009 the Belgian House of Representatives passed a new act, laying down significant changes to existing regulation on betting and gaming. The new Act¹ was passed in its entirety as proposed by the government, despite a negative detailed Opinion issued by the European Commission, some seven months earlier, with regard to some of the most substantial provisions contained therein. The Act itself will come into force on 1 January 2011, although Royal Decrees may provide for some provisions to enter into force earlier.

The new Act has the merit of finally making an attempt to modernise and introduce more coherence in the gaming and betting legislation in Belgium. Indeed, not only is the current legislation silent on all forms of online gaming and betting, it also rather arbitrarily distinguishes between certain types of games of chance and does not even regulate some of them at all. Pool betting on sports results, for example, is currently excluded from the federal system of licensing by the Gaming Commission and is regulated on a regional level, while other forms of pool betting and all forms of fixed odds betting are not regulated in Belgium at all. Highly addictive 'call TV' games can also be offered without a licence. The new Act tries to remedy these inconsistencies and seeks to expand the scope of the initial 1999 Act to include sports betting, online gaming and betting and media games.

Unfortunately, the way in which the Belgian legislator purports to achieve this more comprehensive and modernised regulation does not appear to be fully compatible with European law. Indeed, the new Act contains a number of far-reaching restrictions on the

principle of free movement of services, as embodied in Article 56² of the Treaty on the Functioning of the European Union (the Treaty), which do not seem to pass the proportionality test, as developed by the case law of the Court of Justice of the European Union (CJEU). This article will briefly discuss two of them, namely the requirement of a Belgian land-based licence and establishment for foreign operators and the criminalisation of players.

The requirement for a Belgian land-based licence

In order to be able to offer gambling or betting services via information society means such as the internet, the new Act requires operators from other Member States to already hold a licence for land-based gambling or betting operations in Belgium and to (re)locate their server in a permanent establishment on the Belgian territory. This means that a foreign operator, duly licensed and operating from another Member State, must first become the licensed operator of a casino (licence A), a gaming arcade (licence B) or a betting service (licence F1) in Belgium, in order to then be able to apply for a '+-licence' to offer the same or similar services online to the Belgian public (A+, B+ or F1+ licence, as the case may be). In addition, in order to be granted the '+-licence' applied for, such operator is required to relocate its servers into a permanent establishment in Belgium. As though this would not yet suffice, the new Act also provides for a limitation by Royal Decree of the maximum number of land-based licences for casinos, gaming arcades and betting services. In order to determine this maximum amount, account will mainly be taken of the number of operators already existing on the

Belgian market.

Needless to say, these requirements not only rule out any account that could (and should) be taken of obligations to which an operator is already subjected in the Member State in which it is established. They are also, especially seen the *numerus clausus* for land-based operations, discriminatory towards any foreign operators not yet established in Belgium. For example, there are only nine licensed casinos in Belgium, and these licences have already been awarded for a (renewable) period of 15 years. In these circumstances, it would indeed seem very difficult, if not impossible, for a foreign EU operator to obtain one of those licences as a prerequisite for obtaining an online license for casino games in Belgium.

The Belgian Government seems to take the view that, pursuant to the CJEU's Santa Casa ruling on 8 September 2009³, the principle of mutual recognition has finally completely been set aside and the Member States' power of appreciation has been increased accordingly. Hence, the restrictions on the free movement of services contained in the new Act can be considered to be authorised national policy, justified by overriding reasons that are in the public interest. Moreover, the Belgian Government seems to be taking an even bolder stance, since it explicitly admits that its *numerus clausus* licensing system is, in reality, mostly driven by the need it feels to tolerate the existing players and physical establishments on its territory⁴.

The latter aim is clearly not one that has been recognised by the CJEU as justifying restrictions on the free movement of services. In addition, although the CJEU has consistently held that certain other overriding reasons in the public

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interest, such as objectives of consumer protection and prevention of fraud and incitement to squander money on gambling, may justify a restriction on the freedom to provide services, those objectives can never be relied upon to justify discriminatory restrictions. This was only recently confirmed by the CJEU, in its ruling of 6 October 2009, in the matter of the EU Commission v the Kingdom of Spain⁵. In this same ruling, the CJEU also clearly reminded that the requirements already imposed upon a foreign operator in its Member State of establishment should duly be taken into account by the restricting Member State, and that a right to a treatment equal to similar national operators may not be denied solely on the ground that the foreign operator is not established in the latter Member State⁶. Finally, as the European Commission rightly reminded the Belgian Government in its detailed Opinion on the draft Act, the CJEU also ruled, in the Placanica case⁷, that the fact that a Member State considered a certain number of licences to be sufficient for the whole territory was not an appropriate justification for the obstacles to the freedom to provide services that the licensing regime represented.

Taking into account the aforementioned case law of the CJEU, it would seem that the Belgian government is treating itself to a self-soothing - but unfortunately erroneous - interpretation of the Santa Casa ruling, an interpretation which does not seem to be shared by the European Commission either. Indeed, in its detailed Opinion regarding the draft Act, the European Commission warned the Belgian Government that, were the draft Act to be adopted in its notified form without taking into account its remarks (similar to the

ones mentioned in the present article), it would infringe Article 49 of the EC Treaty (now Article 56 of the Treaty).

The fact that the Belgian draft Act was passed regardless of the European Commission's Opinion (an issue that was raised at the House of Representatives' hearing of 3 December by one of its members, just prior to the vote) and without the problematic provisions being modified, is all the more disappointing since Belgium has already been condemned by the CJEU for similar violations. This was in 2000, when the CJEU ruled that Belgium did not comply with its obligations under Article 49 of the EC Treaty (now Article 56 of the Treaty) when it required surveillance companies, established in other Member States, to have a registered office in Belgium. Belgium also did not take into account the justifications and guarantees already offered by the foreign operator in its Member State of establishment⁸.

The criminalisation of players

A second important change that rightly gave rise to warning by the European Commission is the fact that, under the new Act, the current list of persons liable for criminal sanctions is extended to include consumers who participate in games of chance not licensed in Belgium. The question that immediately comes to mind, when reading this provision, is indeed whether such criminal sanctions - ranging from one month up to three years of imprisonment and fines between € 143 and € 137,500 - are really necessary to achieve the Act's objectives of consumer protection and fraud prevention. Moreover, one is left to wonder whether such heavy criminal sanctions are even at all suitable to attain these objectives, especially

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considering the financial difficulties in which most of the so-called 'problem gamblers' already find themselves. It would appear that, by criminalising the players themselves, the playing of non-licensed games of chance will more probably than not be pushed further underground, bringing it in closer vicinity to all kinds of organised crime and fraud. At the same time, the prospect of criminal sanctions will also likely deter addicted gamblers from seeking help through official channels, leaving them with less suitable options.

However reasonable the above objections may seem to some, fact is that the new Belgian Act was passed, that it will be published in the Belgian State Gazette very soon and that it will enter into force in little over 11 months. What the industry's reaction will be remains to be seen, but one thing is for certain: this Act will not pass unnoticed.

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1. To be more precise, the vote actually concerned two separate draft Acts : (1) the draft Act amending the law on games of chance, gambling establishments and the protection of players, the code of taxes comparable to income tax, the law on the encouragement of physical education, sports and outdoor activities, as well as on the control of enterprises which organise pool betting on sports results and the law on the rationalisation of the operation and management of the National Lottery; and (2) the draft Act amending the law on games of chance, gambling establishments and the protection of players as regards the Gaming Commission.
2. i.e. the old Article 49 of the EC Treaty.
3. CJEU, 8 September 2009, Liga

Portuguesa de Futebol Profissional and Bwin International / Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07.

4. See p. 1 of the preparatory works for the draft Act.

5. CJEU, 6 October 2009, Commission of the European Communities v. Kingdom of Spain, C-153/08, paragraph 36, with reference to cases C-55/94 Gebhard [1995] ECR I-4165, paragraph 37; Gambelli and Others, paragraph 65; Placanica and Others, paragraph 49, and Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 60.

6. CJEU, 6 October 2009, Commission of the European Communities / Kingdom of Spain, C-153/08, paragraph 31, with reference to cases C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-8203, paragraph 40; C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849, paragraph 81 and Persche, paragraph 49.

7. CJEU, 6 March 2007, C-338/04, Placanica.

8. CJEU, 9 March 2000, C-355/98, Commission / the Kingdom of Belgium.

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