

Research to delay Swedish i-gaming bill

Sweden's Culture Committee Minister announced on 5 June that Sweden will produce a study on potential online gambling regulations, delaying proposed i-gaming legislation for at least two years.

"A new Regulation must in social terms be a better one than the existing, not just another that does not work," said Bengt Palmgren, General Counsel at AB Svenska Spel.

The study will analyse regulations in other jurisdictions such as Norway and Denmark. "One may assume that there is no simple solution outside Sweden that could be copied," said Palmgren. "A decision on a modern and sustainable Swedish online regime contains not just technical and legal issues, but embraces various political considerations that may differ from the models in other jurisdictions."

As to when the i-gaming bill itself will be drafted, Johan Röhr, Senior Legal Adviser at the Swedish Gambling Authority, explains that "Looking at the formal process and taking EU notification into account, 2015-2017 could be realistic. However, some items might require even more time if tied to constitutional aspects."

Dutch draft remote gaming bill raises several concerns

The Dutch Finance Ministry and Ministry of Security jointly released the draft Remote Gambling Act for public consultation on 22 May, with the intention of liberalising the online gambling market. The legislative proposal stipulates the conditions under which online gambling will be allowed in the Netherlands, and poses a 20% tax rate on gross gaming revenue for online operators, 9% lower than the rate imposed on land-based operators.

"Overall we consider the bill to be fairly well balanced and a solid starting point for further discussions. However, there are several concerns," observes Dr Alan Littler, Gaming Lawyer at Kalf Katz & Franssen Lawyers. "Firstly licensees will be required to locate their server in the Netherlands unless an agreement has been signed between the Dutch Gaming Authority and the regulator in

the jurisdiction where the server is located. Secondly, in addition to the 20% tax rate, there are a host of further levies and fees, which are likely to push the effective tax rate up to a level which may call the economic viability of the regulatory system into question. Thirdly, whilst the bill foresees a comprehensive approach to protecting consumers from addiction, as the bill is currently worded there appears to be a considerable danger that licensees will be highly exposed to 'duty of care' litigation."

The proposed bill requires applicants for a Dutch online gambling licence to be either established in the EU, or in a country appointed by the Dutch Minister of Justice, considered to guarantee an adequate level of protection. However, add Richard van Schaik and Marloes Dankert of DLA Piper, "The Explanatory

Memorandum mentions that a foreign licence, even from another EU Member State, does not guarantee the granting of a Dutch licence."

There has been much criticism of the proposed 20% tax rate, both from incumbent land-based and online operators. Roelien van Neck and Arnoud Knijnenburg of Bird & Bird LLP explain that "The government has carried out research into the measures that encourage players to engage with licensed and non-licensed games of chance, and found that with a tax rate of 20% GGR, 76% of players would choose the licensed market. According to the government, this sits well with the intended legal and tax revenue objectives, however combined with the regulatory requirements and the costs to entry, new players may refrain from entering the Dutch market altogether."

King's US i-gaming bill "over-extends" in federal regulation bid

Congressman Peter King unveiled on 6 June the draft 'Internet Gambling Regulation, Enforcement, and Consumer Protection Act of 2013,' aimed at creating a federal regulatory structure for US i-gaming.

"There is no doubt that King's proposal over-extends," said Harsh Parikh, Associate at Snell & Wilmer, about the draft, which would regulate all gambling except sports betting, but enable states and tribes to opt-out to offer their own i-gaming. "Tribes are going to be very hesitant to support any bill

not strictly limited to i-poker. Many tribes believe that online gaming will cannibalise brick-and-mortar tribal casinos."

Jeremy Frey, Partner at Pepper Hamilton, does not believe "there is Republican support for this legislation, and legislators from states with significant existing casino operations also will not be able to support this bill." Jennifer Carleton, Shareholder at Brownstein Hyatt Farber Schreck, adds that "Rep Joe Barton is expected to introduce an i-poker bill in the near future that is likely to be

reconciled with King's bill before it makes it to the floor."

The concept of a federal i-gaming framework does however have some support as an alternative to what King's statement calls 'inconsistent state laws.' "Limiting liquidity in tournament-style games to intrastate players is a perfect example of how a state-by-state approach is disadvantageous," said Frey. Carleton explains "It is much more straightforward for an operator to be licensed and regulated by one jurisdiction than by 50."

IN THIS ISSUE	Italy ECJ rulings 03
	The Netherlands 05
	Problem Gambling ARJEL report 07
	Payment Processing In the US 08
	Macau 10
	Sweden ATG's 'robot bets' ban 12
	Fantasy Sports New Jersey regulations 14
	Spain 'Soft games' 16

Editorial: CrystalClearVille

The International Social Games Coalition, launched in May, has been set up by social games companies with the aim of being a voice for the industry. This coming together of the industry, which counts Zynga, Plumbie, Playtika, IGT, and Gamesys amongst its members, comes at an important time for the industry, which continues to be the subject of much scrutiny over fears associated with the convergence of social gaming and gambling.

What the ISGC hopes to do in light of this continued scrutiny is to provide some clarity around what until now has been a rather discreet industry in terms of how social gaming companies operate, to gain legitimacy and avoid regulation through the formation of industry standards.

The report commissioned by the UK Gambling Commission (GC), exploring social gaming risks, stresses the importance of social responsibility: 'it is the

responsibility of any vendor of products or services to ensure that consumers are well-informed and know what they are buying,' states the report.

So it would appear that the willingness of the industry to converse with regulators and consumers as to how the industry operates, may be just what regulators need to salve the concerns surrounding an industry that, to reiterate Philip Graf, Chairman of the GC, the regulators do not want to regulate if they don't have to, anyway.

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The ECJ to rule again on Italy's online gambling laws

On 18 April 2013 the European Court of Justice ('ECJ') discussed the last hearing of case C-660/11 (the 'Biasci Case'), a reference for a preliminary ruling filed by the administrative court of Tuscany and concerning the compatibility of some Italian gaming laws with articles 43 and 49 of the EC treaty on freedoms of establishment and to provide services. Yan Pecoraro, Partner at Portolano Cavallo Studio Legale, discusses the current gaming laws in Italy, the Biasci case and the Bersani decree, which partially liberalised the Italian online market by increasing the amount of licences available.

The ECJ has discussed several references for a preliminary ruling on gaming laws originating from Italian courts and two landmark decisions on gaming laws issued by the ECJ (Gambelli, 2003, and Placanica, 2007) originated in Italian cases. ECJ case law has indisputably influenced Italian gaming policies and Italy's gaming market over the past 10 years. In 2007, titles like 'the end of States' monopolies' appeared in the press commenting on the Placanica decision; the shares of operators who had declared expansion plans in Italy increased in value. In light of the Italian rulings which followed Placanica as well as the legislative reforms undertaken in Italy thereafter, these reactions were maybe disproportionate and the Italian gaming market cannot be defined as a fully liberalised market (the State monopoly is still in place and controls access to the market and to some extent the contents of the gaming services which can be offered). That being said, the Italian gaming laws have

significantly changed over the past 10 years; this is due to the need to adapt these rules to EU principles as interpreted by the ECJ rulings.

Therefore, the interpretations of the ECJ on Italian gaming laws are valuable for operators looking at the Italian gaming market.

Background

By and large the facts underlying the majority of cases referred to the ECJ by Italian courts with respect to gaming laws are the same: several operators duly licensed in other EU countries have established in Italy a network of data collection centres ('*centri trasmissione dati*' or 'CTD'). These are shops where players can send bets to foreign bookmakers through the net. Even if CTDs look like real betting shops, from the legal point of view some courts have rejected such a qualification on the grounds that bets are not placed in CTDs nor do CTDs collect bets on behalf of gaming operators; according to the courts, CTDs simply provide access to gaming services offered abroad. Such a difference is subtle, but has significant consequence from a legal stand point as under the Italian gaming laws anyone offering gaming services in Italy must hold an Italian gaming licence and any unauthorised offering of gaming services triggers civil and criminal liabilities. Thus, for a CTD not to qualify as a betting shop under Italian gaming law means that they avoid being required to hold a gaming licence.

Over the past few years several shops have been fined and seized by Italian police and their owners sued both before civil and criminal courts on the grounds of breaching the gaming laws; defendants have challenged these fines and seizing orders before civil, administrative and criminal courts, which in some instances have filed references for

preliminary ruling with the European Court of Justice to gather the European judges' views on the compatibility of the Italian gaming laws with EU laws.

Questions referred to the ECJ

With specific respect to the Biasci Case, the preliminary ruling request relates to the compatibility with EU laws of article 88 of royal decree no. 773/1931 (known in Italy as 'TULPS') and of law decree no. 40 of 2010; according to these gaming laws, authorisation to be issued by the local police under the TULPS in order to open a CTD in Italy should be granted exclusively to individuals/businesses holding an Italian gaming licence. The two gaming laws have been issued mainly to fight the phenomenon of CTDs in Italy.

The application of this set of gaming laws prevented Mr. Biasci (and several other managers of CTDs in similar situations), an affiliate of the Goldbet Sportwetten GmbH's network ('GoldBet'), from obtaining the authorisation required by TULPS, because GoldBet only holds a gaming licence issued by the Austrian Province of Tyrol and does not have an Italian gaming licence.

The administrative court of Tuscany also filed a request for preliminary ruling with respect to article 38 of decree no. 223/2006 (the 'Bersani Decree'), which is known to gaming operators as it introduced into Italy a large amount of additional gaming licences (mostly in response to the ECJ, which identified that the limited number of gaming licences available in Italy blocks access for EU gaming operators, which is in breach of the EC treaty).

Interestingly, in the Biasci case, prior to the referral to the ECJ by the administrative court of Tuscany, in a preliminary review of the matter, the court suspended the

denial of authorisation, which could be seen as anticipation of a favourable outcome for the plaintiff CTD.

Other Italian administrative courts have already issued rulings in favour of CTDs on the grounds that Italian gaming laws, in requiring an Italian gaming licence in order to grant the TULPS authorisation, would be contrary to the European freedoms of establishment and to provide services. In particular, these courts (Administrative Court of Emilia Romagna no. 462/2011; Administrative Court of Sicilia no. 5588/2010) have noted that the prevention of criminal or fraudulent interferences into gaming services (which, as indicated in *Placanica*, could in theory justify a licensing system such as the Italian one¹) could be achieved by other means rather than requiring applicants to hold an Italian gaming licence. To these courts the Italian regulations look inconsistent and disproportionate to the objectives pursued by the regulations restricting articles 43 and 49 of the EC treaty, in particular when the conditions to obtaining a gaming licence from other EU gaming bodies as well as the controls usually provided by domestic regulations and applicable to gaming operators holding a gaming licence issued in another EU state, could achieve the objective to prevent criminal activities in gaming.

The Italian state monopoly authority which filed its brief in the proceeding before the administrative court of Tuscany has argued that the Italian gaming laws have changed significantly after the substantial increase in the number of licences made by the Bersani decree which, in the administration's view, almost liberalised access to the gaming market in Italy by injecting a high

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number of gaming licences onto the market. In fact, according to the administration, the Bersani decree would have made the market accessible to the majority of (if not all) the operators willing to offer their services in Italy; the need to hold an Italian gaming licence would still be justified by public policies (i.e. for the prevention of fraud and criminal activities) which may justify, at certain conditions, the restrictions provided by the Italian gaming laws to the freedoms provided by articles 43 and 49 of the EC treaty. In this respect, the administrative court of Tuscany noted that if on the one hand the number of licences has been increased substantially by the Bersani decree, on the other hand several gaming rules contained in such a decree could be interpreted as 'protecting' the holders of old licences, in breach of European principles/freedoms. The administrative court of Tuscany refers in particular to article 38 of the Bersani Decree, which contains a set of gaming laws which protect the CTDs lawfully operated prior to the issuance of the Bersani Decree, for example by providing minimum distances between CTDs (this of course grants older CTDs the right to keep to the best locations available to the market) or by including in the standard agreement with operators an exclusivity provision according to which an operator would lose its gaming licence in Italy if it were to offer unlawful gaming services in Italy. This latter provision could be extremely powerful if one takes into account that foreign websites offering access to gaming services accessible from Italy could qualify under the Italian gaming laws as 'unlawful gaming services;' this is to say that in theory, if one had to apply the rule properly, any operator offering its services in

several jurisdictions could lose its Italian gaming licence if not restricting access to its foreign offering of gaming services.

In addition, the administrative court of Tuscany has asked the ECJ whether or not, assuming that the rules contained in the Bersani Decree are to be found compatible with EU principles, an Italian judge should investigate if the gaming laws applicable in the European State which issued a gaming licence to an operator willing to offer its services in Italy, already provides for adequate precautions to reduce the risk of criminal activities.

Conclusions

At this stage it is hard to predict the ECJ's decision. The last question referred to the ECJ (i.e. the obligation of the national judge to make an assessment on the contents of foreign regulations), if answered positively, could have relevant consequences, as Italian judges would ultimately be legitimised to ignore Italian gaming laws based on their own evaluation of the adequacy of other EU regulations to ensure the achievement of the same objectives pursued by Italian regulations (i.e. for the prevention of crimes). In our view, the ECJ is unlikely to confirm this interpretation, as this would ultimately not comply with the subsidiarity principle as defined in article 5 of the EC treaty. The decision from the ECJ on the *Biasci* case will be helpful to predict the evolution of gaming laws in Italy for the years to come.

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1. The ECJ stated: 'a licensing system could constitute an efficient mechanism enabling operators in the betting and gaming sector to be controlled [by the State] with a view to preventing the exploitation of those activities for criminal or fraudulent purposes.'

The Netherlands: draft remote gambling bill in consultation

The Dutch government has taken the next step in the development of gambling law in Europe, by initiating a public consultation on a long awaited draft remote gambling Bill. This draft aims at converting to a legalised market by creating a balance between responsible gambling on the one hand, and an attractive market on the other. Ewout Wierda, a Legal Consultant at Wierda Gambling Consultancy, discusses the detail of the draft bill, which he designed at the Ministry of Security and Justice prior to becoming a gambling law consultant.

The Netherlands, the EU's 7th largest EU gambling market with an estimated GGR of €2.30bn in 2012, targets a conversion of about 75% of players to the future licensing regime. While this seems low compared to neighbouring Denmark's 85% conversion, it may afford the Dutch government some extra room for responsible gambling requirements. Of course, an intended 20% gambling tax rate also hangs in the balance.

Aside from the conversion and tax rates, the Netherlands has clearly looked at Denmark for inspiration. In doing so, the Dutch government has set aside a parliamentary motion urging the government to follow Belgium's example of tying online licences to existing land-based licensees. Unlike Denmark, however, Holland is planning for a pure B2C licensing system. The regulatory regime is focused on players, and thereby on customer-facing operators. There will be no licence geared towards B2B companies, and B2C licensees will be held accountable for their B2B

providers. As a result, licensees will have to ensure that their B2B partners demonstrate compliance of systems and processes. The same may apply to showing that B2B providers and their key members of managing and customer-facing staff have the trustworthiness and skills expected from licensees. Secondary regulations are expected to provide more clarity in this regard, and also in respect of the prevention of unnecessary repetitions in scrutinising and auditing of B2B providers used by several B2C licensees.

Still, it is expected that Denmark will continue to be used as an example when the secondary regulations and the technical requirements will be drafted. But the Dutch eagerness to learn from regulatory experience abroad does not amount to a copying exercise. Instead, the Netherlands aims to have a so-called Dutch model.

The key word in the Dutch model is responsibility, and this does not just refer to operators. The Netherlands wants players to take responsibility for their own well-being, as is evident from a lack of measures such as loss limits that could be received as patronising. Instead, operators will be required to provide players with self-help tools. This player's tool kit is fairly complete, and includes well known instruments like on-screen information, gambling risk information, a self-test, time-outs, self-exclusion and links to professional help for problem gamblers. The consultation documents also propose a tool that is fairly common in the industry but perhaps less so as a licensing requirement. Players must complete a mandatory risk profile at registration. Some possible profile elements mentioned in the explanatory notes are the frequency of visits, the duration of play, the maximum amount for

single deposits and the maximum total amount in the player's account. Upward modifications to the profile will only be allowed after a waiting period of a few days. The player profile will constitute soft limits that can be exceeded but lead to operator intervention, and generic restrictions are not planned at this time.

Where the self-responsibility of players ends, the responsibility of operators continues. This includes many aspects already seen in other jurisdictions, but also some attempts at innovation.

For example, the draft Bill aims to achieve early detection of players at risk of becoming problem gamblers, to enable intervention to help players change their behaviour. Operators will be required to systematically monitor and analyse player behaviour, to investigate and intervene where necessary, and finally to take protective action with a view to the voluntary or involuntary registration of a problem gambler in a national database of excluded players. Secondary regulations will specify indicators to be monitored and analysed, but the explanatory notes to the draft Bill already mention long periods of play, frequent changes of the player risk profile or behaviour exceeding these self-set limits, and persistent unpleasant behaviour towards customer service personnel. A player who appears to be at risk of becoming a problem gambler must be investigated through personal contact by mail, chat or video chat. The operator must also point the player to the self-help tool kit. If it is reasonable to assume a player's behaviour can harm that player or others concerned, the operator must suggest voluntary registration in a national database of excluded players for a period of at least six months. Should a player refuse self-exclusion, the operator must

temporarily exclude that player and send a report to the Gambling Authority, which may involuntarily register the player in the national exclusion database.

Furthermore, the proposed regime will require licensees to have at least one compliance officer responsible for internal supervision of compliance with and the implementation of regulations. Also, this officer will maintain contact with the gambling authority and must be available for this purpose.

Operator responsibility is also expressed in the requirement that player funds will have to be held separate from other assets, protected from use for business costs or speculation. Various methods will be allowed, including Anglo-Saxon trusts, foundations, collecting payment service providers and Dutch special purpose accounts used by *inter alia* advocates to hold legally protected monies for third party beneficiaries.

The Dutch State itself has also taken responsibility by attempting to create sufficiently attractive market conditions. There will be no limit on the number of licensees. Instead, fairly strict licensing conditions are used to create a responsible, reliable and controllable environment.

Most common casino games, slot machine games and bets will be allowed, also in their live variants. Examples of games to be allowed are: several variants of poker such as seven card stud, texas hold'em, pai gow, double down stud, fast action hold'em, let it ride, caribbean stud, pot limit, omaha and three card poker; casino games which are currently offered in Dutch land-based gaming casinos such as French and American roulette, Blackjack, Baccarat, Punto Banco and Keno; slot machine games such as fruit games; and

If the development of gambling law in Europe is an evolutionary process, then the Netherlands has used the DNA of Denmark's regulation to come up with a regime that seems even fitter to pursue responsible gambling in an attractive market.

furthermore fixed odds betting, exchange betting or pari mutual betting on sports. However, not all games will be allowed. For example, betting on non-sports events will not be allowed, and online sales of lottery tickets will continue to be allowed solely under land-based licences.

Cross-border liquidity will be allowed for betting as well as poker.

Furthermore, the Netherlands has recognised that mandatory placement of systems within the Netherlands would result in high compliance costs for operators, most of whom are established in supplier-based licensing jurisdictions. The solution adopted by the government is very similar to the Danish approach. In principle, systems used in the organisation of licensed games will have to be placed in the Netherlands, but exceptions are allowed for systems located in a jurisdiction that has entered into a Memorandum of Understanding (MoU) with the Netherlands. Pursuant to such a MoU, the Gambling Authority will be able to supervise licensees with the help of a foreign regulator. Considering that the Dutch government has been under political pressure to require the location of systems on Dutch soil, this proposed solution will be a relief to operators.

Also of interest is that the Netherlands has stepped away from annual system certification. Instead of certificates, the Dutch regime will have audit reports that will be used to assess compliance in conjunction with other sources of information. Regular audits of the gaming system must be performed in the application phase and following later changes. Systems must also be inspected incidentally upon instruction of the Gambling Authority, which will take a risk-based approach. A grace period for initial audits is intended, allowing

systems to be checked within 6 or 12 months after the date on which a licence was issued. This will apply only if a recent positive audit has taken place in terms of sufficiently similar regulations of a EU/EEA member state or approved country where the operator is licensed. As to change management, audits should be made prior to the implementation of changes unless these are purely technical and inconsequential or concern system security. Ex post audits should be made within several months from the date of change.

Most electronic payment methods will be allowed, provided that they enable so-called name-number checks in terms of money laundering rules, and have been issued by EU banking licensees. The reason for this requirement is that a nominal deposit will be used for player identity verification. This means that anonymous credit cards and e-wallets further down the identity verification chain will be prohibited along with cash payments. Since around 85% of Dutch e-commerce transactions are conducted through the iDeal bank transfer system, this system will expectedly be preferred by most Dutch players.

If the development of gambling law in Europe is an evolutionary process, then the Netherlands has used the DNA of Denmark's regulation to come up with a regime that seems even fitter to pursue responsible gambling in an attractive market. But first, the draft Bill must show that it is also fit to withstand parliamentary scrutiny during the legislative process following the consultation.

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ARJEL's battlefield: the fight against gambling addiction

French regulator's report outlines 33 recommendations

ARJEL, France's online gambling regulator, issued a report about combating problem gambling in April 2013, with 33 recommendations. According to ARJEL's President, Mr. Jean-François Vilotte, half of the sums registered by licensed operators originate from stakes bet by only 1% of French online gamblers. Hence, the report emphasises the need to find a balance between the search for attractive legal offers against illegal and foreign offers and the need to protect gamblers against addiction. This becomes harder as online gambling creates greater chances to increase the risk of addiction; indeed, the report underlines that factors such as anonymity, isolation, virtual money, and easy access for underage or vulnerable persons, increase the risk of addiction.

Operators are already subject to various obligations regarding problem gambling. Operators are requested to display various information on the risks related to addiction on their websites and to control the online gambling practice through self-limitation or self-exclusion features and gambling moderators. According to article 48 of the French Gambling Act, licensed operators are requested to grant 1.8% of the stakes from online betting and 0.2% from poker games to the benefit of French social security, to enable the care of pathological players. Operators are required to issue an annual report summarising their actions and means to promote responsible gambling.

ARJEL issued these recent recommendations in compliance with article 34 of the French Gambling Act, which entitles ARJEL to suggest legal and regulatory amendments to the current regulation. ARJEL made suggestions that may be enforced at different levels and requested amendments impacting directly on the legislation or the licensed operators. As an example, ARJEL suggested that operators grant bonuses to players who have responsible gambling behaviour. We will focus on those recommendations which we feel are interesting.

Firstly, ARJEL asked for the limitation of the volume of advertisement during the broadcast of any sport or horse race event: ARJEL suggested the enforcement of a limitation equal to one advertising spot per operator and per time slot. Also, ARJEL suggested enforcing a limit (to be determined) of online gambling advertisements per time period and IP address. In addition, the broadcast of online advertisements in relation to online gambling offers is currently subject to the control of ARJEL and regulated by the Audiovisual Council's deliberations. However, ARJEL underlines that compliance with such regulation would be better guaranteed if ARJEL was expressly granted the right to apply sanctions to licensed operators in relation to internet advertising.

ARJEL noticed that many players had to wait for more than two months after their request before being enlisted on the banned players' list. Consequently, ARJEL recommended streamlining the application process so that players are taken care of as quickly as possible.

ARJEL also raises concerns regarding individuals under a legal protection measure, including individuals under guardianship by court order, and emphasises that their legal status should be clearly defined and assessed with regards to their ability to gamble online. ARJEL suggested the use of the 'double-click' feature, enforced by the digital contracts regulation, to confirm the execution of digital contracts. ARJEL recommended the enforcement of such a feature for players' subscriptions on gambling websites, as well as when they proceed to a deposit and before any self-exclusion.

ARJEL emphasised the need to protect players who give signals of problems and recommended prohibiting any contact or commercial actions towards players who requested the closing of their accounts or who temporarily stopped their gambling activity. Also, ARJEL regretted that operators would not let players choose their own thresholds within the gaming moderators, as most of the licensed operators, by default, apply pre-defined thresholds. ARJEL suggested that players should always have their gaming time displayed on the webpage, to ensure their awareness of time spent, and recommends that operators send annual letters to customers, informing them of the risks of problem gambling. ARJEL proposed to prohibit players' ability to credit their accounts with prepaid cards, as this may increase the risks of over-indebtedness and money laundering.

If these recommendations are the baby steps of a whole amendment process of the applicable regulation, these issues should be taken into serious consideration. It seems difficult to assess whether the recommendations made by ARJEL in the report will have an effective impact against addiction. Also, as online gambling creates a great number of cross-border issues, additional recommendations from ARJEL pertaining to international cooperation between ARJEL and other regulators would have been mostly welcomed.

On 18 June, the Minister for the Budget declared the French Government's intention to submit four legal amendments to the French National Assembly, regarding the protection of online gamblers against addiction, during the discussions of the draft bill 'Consumption 2013' starting on 24 June. These will:

- Reinforce the fight against illegal gambling websites and their advertising;
- Grant the '*Française des Jeux*' (France's lottery operator) the right to access the French banned players list;
- Reinforce the protection of the player's assets in case of an operator's default; and
- Streamline the referral procedure to the Sanction Committee of ARJEL.

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US: how financial institutions will process lawful i-gaming

Following the crackdown on internet gambling in the US that took place from around the middle of the last decade, the number of credit card transactions related to online gambling being processed by US financial institutions began to fall significantly, as US banks looked to avoid complicity in what had become deemed an illegal activity. This even prompted the code used for such transactions - '7995' - to become somewhat infamous. Neil Erlick, Executive Vice President, Business Development, at Optimal Payments and Behnam Dayanim, Partner at Paul Hastings LLP, explain the background to gambling transaction processing in the US and chart how this landscape has changed again now that a number of states have legalised online gambling.

A long time ago, in a legal environment far, far away, US financial institutions processed credit card transactions related to internet gambling. Those transactions were coded '7995.' The card associations permitted them, issuing banks approved the transactions and other banks - often through intermediary processors - acquired them. Everything was above board.

That started changing in the early to mid 'aughts' - around 2004-5 - as US law enforcement began pressing its position that internet gambling was unlawful, and many (although not all) US banks began declining internet gambling-related transactions. Many internet gambling merchants and processors started using ACH or other payment channels. The less scrupulous often resorted to disguising their transactions through the creation of virtual phone cards or similar products, or even outright miscoding transactions as golf or tee-shirts or other fictitious purchases. In some cases, acquiring banks may have participated in this chicanery; in many others, they were completely unaware.

It was, in part, to put a halt to that activity that the Federal Reserve Bank issued 'Regulation GG,' mandated by the 2006 Unlawful Internet Gambling Enforcement Act. 12 C.F.R. Part 233. Regulation GG imposes certain obligations of diligence on financial transaction providers, including both banks and processors, designed to determine whether transactions are related to unlawful internet gambling and, hence, should be blocked.

Before explaining how that regulation works, a brief (and oversimplified) description of the credit card process seems appropriate.

In short, when the cardholder

contacts the merchant to make a purchase, the merchant sends the cardholder's data, in the form of an authorisation request, through the card network via its processor and acquiring bank. The network transmits the authorisation request to the cardholder's issuing bank - the bank that issued the card the cardholder is attempting to use.

If the funds exist and the information provided is correct, the issuing bank advises the network that the transaction may proceed. The network, in turn, passes that approval back to the acquiring bank and ultimately to the merchant, who then accepts the transaction. The entire process occurs virtually instantaneously.

The acquiring and issuing banks later will reconcile their outstanding balances, aggregated across a whole range of card transactions involving the two institutions, and, on a periodic basis, the acquiring bank will deposit the funds in the merchant's account.

As a practical matter, acquiring banks depend heavily on processors to handle the transactions and on independent sales organisations (ISOs) or payment service providers (PSPs) to locate and sign new merchants to processing agreements.

It was against that backdrop that Regulation GG was enacted. The Regulation applies to all participants in the credit card transaction - the issuer, acquirer and third-party processor - collectively referred to as 'financial transaction providers.' It requires the development of policies and procedures for each type of payment system that are intended to prevent the processing of unlawful internet gambling transactions. As might be expected, the Regulation leans heavily on diligence upon account opening. Processors and acquirers are

expected to diligence their commercial customers in order to ascertain whether they are in the gaming business. Those that are must provide documentation that their activities are lawful - either a licence allowing them to conduct internet gambling in the relevant jurisdictions or a 'reasoned legal opinion' that the merchant's activities do not violate the UIGEA.

In practice, until now, this has meant all domestic internet gambling has been rejected since no 'reasoned legal opinion' could suffice to convince any acquirer or the card associations that a transaction was permissible (legal opinions sometimes have been utilised to explain why a merchant's games do not constitute 'gambling,' but that subject lies outside of the scope of this article).

For online horse-racing and state lottery purchases, both of which are considered by card associations to be permissible under certain circumstances, MasterCard has designated a new code - 9754 - to try to lower the high rate of rejection those merchants were experiencing when attempting 7995 transactions. To qualify for the new designation, merchants must provide their acquirers with a copy of their licence or similar authorisation and a legal opinion attesting to the legality of their operation. In addition, and more significantly, they must provide a certification from a qualified independent third party demonstrating that they have implemented effective geo-location and age verification controls to assure continued compliance (Visa has not instituted a new code, but its boarding procedures are substantively the same).

So what is changing?

Now, with three states - Nevada,

Under Regulation GG, compliance with a payment system's rules and procedures protects all system participants from liability. Thus, even if the operator later - unbeknownst to the financial transaction providers - acts unlawfully, those providers should be protected.

New Jersey and Delaware - legalising and regulating internet gambling, and more states sure to follow, the card associations' vetting processes will be expanded to include licensed internet gambling merchants.

There has been some discussion at the card associations of creating a new MCC for lawful internet gambling, but at present any plan for a new MCC remains unannounced. The card associations will require licensed internet gambling merchants to 'register' with the associations to demonstrate their legitimacy. Once approved, a registered merchant will be assigned a Merchant Verification Value (MVV) that will be attached to its merchant account and will attest to its lawful status. The intent is that transactions bearing an MVV will not be rejected. The registration process itself will involve the same sorts of certifications currently required of horse-racing and state lotteries.

The acquirers - which almost certainly will enter into direct processing agreements with the gambling operators - will be responsible for advising the operators of the requirements and ensuring that the registration process is complete. Once that is done, issuers, acquirers, gateways and other service providers involved in the registered operator's transactions should be able to rest comfortably. Under Regulation GG, compliance with a payment system's rules and procedures protects all system participants from liability. Thus, even if the operator later - unbeknownst to the financial transaction providers - acts unlawfully, those providers should be protected.

The potential market for lawful payment transactions relating to internet gambling in the United

States is enormous. Credit cards, along with other payment channels, will play an important role in it.

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Online gaming operators in Macau: lacking specific rules

The position of online gaming operators in Macau, a special administrative region belonging to the People's Republic of China, has yet to be truly defined. Land-based casinos are big business in Macau and online gambling is defined within the word of the law, yet there is not a framework as such for the granting of concessions to online operators. Luís Mesquita de Melo, a Partner at MdME Lawyers, examines the current situation, the position of SLOT - which currently has a monopoly on betting on football and basketball over the internet in Macau - and whether the Macau Government will at some point open up the sector to new entrants.

We can summarise the status of online gaming in Macau in two words: a legal concept.

In fact, all we have at this stage is a legal definition of online gaming (generically named as interactive gaming) contained in Law 16/2001 that defines the legal framework for operating games of fortune in casinos; interactive games means the games of fortune in which: (a) A prize in money or kind is offered or can be won in accordance with the terms of the respective rules; (b) The player enters or participates in a game by telecommunications, namely telephone, fax, internet access, data networks, transmission of video signals or digital data; (c) The player makes or agrees to make payment in money or in kind; and (d) The game is equally offered or approved as a game of fortune or as an electric or mechanic machine game in Macau casinos.

The qualification of interactive

gaming (which includes internet gaming or online gaming) depends, therefore, on the verification of the following cumulative requirements:

- (i) The game made available is a game of chance;
- (ii) It is available (or approved) as a game of chance or an electronic game in Macau casinos;
- (iii) A prize (in cash or otherwise) is offered and can be won according to the applicable rules;
- (iv) The player accesses the game and plays through a telecom media (phone, fax, internet, etc.); and
- (v) It performs or agrees to perform a payment in cash or otherwise.

Although there are no legal rules defining the type of connection that would render a certain online gaming operation subject to Macau's jurisdiction and therefore requiring a Government concession, we are of the opinion that the following indicators, not excluding others, should be considered:

- The management, administration or control of wagers that are initiated, received or made on an interactive gaming system takes place in Macau;
- The management, administration or control of the interactive games takes place in Macau;
- The operation of the software or hardware of the interactive gaming system takes place in Macau;
- The provider of the trademarks, trade names or other similar IP rights of the interactive gaming system is based in Macau;
- The provider of services, product information or assets to an interactive gaming operator, and who receives a percentage of gaming revenue, is based in Macau.

Article 4 of Law 16/2001 also states that the gaming

concessionaires and sub-concessionaires operating games of fortune in casinos in Macau are not authorised to operate any interactive games and that the concessions for the operation of interactive games are autonomous from the concessions for the operation of casino games of chance or games of other forms in Macau.

Currently there are no specific rules on interactive gaming concessions in Macau. We are of the opinion that at this stage the Macau Government would not be able to grant any interactive gaming concessions due to the lack of applicable legislation, although we don't reject the idea that many of the required rules and regulations could actually be inserted and form an integral part of the interactive gaming concession contract entered into by and between the Macau Government and the respective online operator.

Nevertheless, at this stage we find it very unlikely that the Macau Government would consider granting interactive gaming concessions.

We base this conclusion on the fact that, on one hand, the land-based casino industry is so huge and profitable (38 billion US dollars of gross gaming revenue in 2012) that none of the casino operators have shown any interest in pursuing this line of business. On the other hand, the Government (namely the Gaming Inspection and Coordination Bureau - the Macau gaming regulator) not only doesn't have the required structure or knowledge to deal with a very complex form of gambling but also doesn't seem to see any benefit for the Macau gaming industry that provides (through a special gaming tax of 35% and an additional 4% in social and tourism promotion

levies applicable to the gross gaming revenue) for all the Macau public revenue needs and keeps the gaming regulator's hands full with the existing 35 casinos operations.

In addition, the fact that Macau is geographically located at the doorstep of the People's Republic of China, of which it is a special administrative region, creates other political constraints considering the potential accessibility to online gaming from the mainland and the anti-gaming position of the central government.

In 1989 a concession agreement was signed between the Macau Special Administrative Region (at the time the Territory of Macau) and a company called SLOT - Sociedade de Lotarias e Apostas Mutuas de Macau, Limitada ('SLOT') for the operation of instant lotteries. This concession agreement granted SLOT an exclusive right to operate instant lotteries. Since this original agreement, SLOT's concession has been subsequently renewed a number of times, and its scope has, from time to time, been expanded to include permission to operate sports betting - on football and basketball - as well as an authorisation to operate, on a trial period basis, sports betting in these sports via internet betting.

The exclusive nature of the concession to operate instant lotteries and sports betting - football and basketball - in Macau has suffered changes over time. Its scope was actually reduced in 2004 by excluding from the exclusivity provision the areas used by the concessionaires and sub-concessionaires of casino games of chance or games of other forms for operating mutual betting and operations offered to the public (lotteries, raffles and tombola) within their developments and resorts approved by the Government, in the form of cash-

There is a clear expectation that the Government will, sooner or later, open the sports betting market to other players, ending SLOT's exclusive concession.

betting. In 2009 the SLOT concession was again amended and the exception applying to 'integrated resorts' was eliminated, thus reinstating SLOT's exclusive concession in relation to instant lottery and sports betting - football and basketball - in Macau.

The SLOT concession was then renewed under the same terms and conditions for a one-year term until 5 June 2010, and, thereafter has been renewed on a yearly basis.

On 17 July 2012, against the expectations of the analysts and the gaming market, the SLOT concession was renewed for another three years' term, which will expire on 5 June 2015.

Macau SLOT has monopolised internet, telephone and over-the-counter betting on both soccer and basketball for over a decade. There is a clear expectation that the Government will, sooner or later, open the sports betting market to other players, ending SLOT's exclusive concession. According to an interview given to Macau Business in 2011, the Gaming Inspection and Coordination Bureau, through its deputy director, outlined that: "Maybe in the future sport could be liberalised, maybe [to] have one more operator."

In addition, the gaming regulator has made public that the Government is 'still in the process of studying the feasibility of enhancing the current operational module of sports lottery in Macau.'

On the other hand, Economy and Finance Secretary Mr. Francis Tam told Macau's Legislative Assembly during the last Government Policy address that the government intends to "continue to strengthen administrative work in relation to the sports lottery...[and] accelerate research into opening up the sports gaming monopoly, and, in 2012, establish a working group that will formulate an associated program."

There is clearly a growing number of 'sports booking' operators interested in operating sports betting in Macau and obviously this creates additional pressure for the Government to accommodate other operators.

In addition to the above, the last few years have shown an unmistakable Government tendency towards making the Macau economy more open and competitive by ending monopoly driven sectors such as land-based gaming, the ferries' business, public transportation and telecommunications.

The opportunity to increase public revenue and to implement the diversification of the economy and the gaming/entertainment offer, especially within the integrated resorts, should motivate the Government to address, in the near future, the new challenges posed by the sports betting industry within a global transformation of the online gaming market and to seriously consider opening this attractive sector of the gaming market to new players, where the growing interest of the public and the margin for technical advancement of sport betting systems promises to bring innovative gaming concepts and a new source of public revenue.

By opening the market to other operators, the Government would be contributing to ending illegal underground sports betting; as we have learned recently, Macau and Guangdong police cracked a crime syndicate that had reportedly collected over RMB100billion in illegal soccer bets.

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For additional information on Macau's legal framework on online gaming and sports betting, please contact Luís.

The banning of statistically generated systems in Sweden

The Swedish Horse Racing Gaming entity ATG has issued a ban on the use of 'robot bets,' which allow gamblers to use computer software to assist with the placing of bets. ATG's ban on these 'robots' seems on the surface an attempt to ensure fair competition for all players, but the wording of the restriction does not limit the ban to machines. Peter Sederowsky, Of Counsel at Setterwalls, examines the background to the ban and its more controversial aspects.

In May 2013, ATG in Sweden initiated a ban on using so-called game robots in horse racing pool games. ATG continues however to offer customers its own game robot, called 'Harry Boy.'

Background

ATG, the Swedish Horse Racing Gaming entity, was established in 1974 by the Swedish state, with the aim of guaranteeing long-term financial stability for trotting and thoroughbred racing, and generating tax revenues. The company's business activity is regulated by a contract between ATG's owners and the state.

ATG has been very successful in building up a horse racing gaming revenue of SEK12,416 million¹, and generating interest in horse racing. There are in addition several other stakeholders to consider in order to understand the bigger picture. The interaction between the owners, breeders, employees of race tracks and ATG as well as the punters themselves are joint when it comes to the well-being of horse racing. The customers of ATG were paid SEK 8,720 millions in game-win and represent the largest beneficiary of ATG. The Swedish state itself is a recipient of a 30%

share of the game-net and receives a substantial amount out of these activities directly from ATG. The owners of ATG had a return of SEK 1,718 million, which can be said to be re-invested in horse racing. Hence, there is a vested interest by these stakeholders in the well-being of horse racing and in the pole position of ATG in the market. There are quite a few measures being taken by ATG to safeguard their business position and one of these is to ensure that the game itself is considered fair and reasonable by the customer. As it is a pool game, the size of the winnings are not controversial; it is more that participants have migrated away from 'humans of flesh and blood'² to algorithms and computer assisted probability deliberations and that this will further³ dampen customer interest in placing bets with ATG.

Recent gaming developments

There is an opportunity in horse racing to place computer generated (or computer assisted) bets in huge systems at very high stakes. These systems can be based on a customer's own knowledge and opinions, insider knowledge or another player's betting patterns, and then tweaked on probability outcomes. Such systems generally show success by generating many winning combinations at low dividends and fewer winning combinations at high dividends. Software designed to improve performance in the gaming sector exists. The existence of poker robots is well-known and disliked. Poker operators are constantly battling against these automated 'players' in order to find them and exclude them from participating. The reason for this is merely to generate a more appreciated environment for the customers, as these robots do not negatively affect the immediate business

model of the operators⁴. Other automated forms of gambling exist as well in the trading on the world's stock exchanges. This trading is well known to be partly conducted, and sometimes even driven, by fully automated systems.

ATG has found through mining data that customers have been placing a large number of bets through systems that were filed with ATG through a data lodging system, and where it was suspected that probability outcomes had been introduced. This is labeled by ATG as a 'game robot.' To label individual customers that make decisions partly based on mathematical and empirical assumptions as a 'game robot' is neither technically nor linguistically correct.

ATG informed the market in May that a dozen customers had used these 'game robots' or 'bots' and they accounted for approximately 2-2.5% of ATG's revenue (i.e. SEK300-350 million per annum). Typically, largely non-Swedish players have been pocketing these big wins via game bots. For example, last year a South African customer won over SEK 60 million when he was the sole winner on three winning V75 systems, purportedly 'designed by a robot.' ATG has identified five characteristics of a 'robot game': active in the pool race categories of V75, V86, V64, V65, V5 and V4; most, or all, horses are included in the overall system; huge number of systems and coupons; generally very high stakes; and the system plays the game itself, not the horses⁵.

Regulation introduced

To reduce the number of robot bets ATG has changed the rules⁶ that apply to the relationship between ATG and its customers. For example, ATG wants to set limits on the number of systems

and the size of the bets customers made. But so far, no such limits have been implemented. Once implemented, this will be displayed on the ATG website and included as part of the customer/provider agreement.

A revised § 25, 'Refuse to accept bets,' is the cornerstone of the Regulation change. This paragraph now states: 'ATG may, in some cases, refuse to accept a bet. Such [a] decision shall be taken prior to the game is closed. The customer must be informed of the measure and why ATG refused to accept the bet in question. If the customer violates this decision, ATG will have the right to terminate the customer's access to further gaming. Regarding race categories V4, V5, V65, V64, V75 and V86, it will no longer be permitted - in whole or in part - to use [your] own statistically generated system, based on pure probability outcome for any of the aforementioned race categories. Customers will forfeit their bets and their winnings will be confiscated if violations are repeated. ATG has the right to suspend the customer and terminate his ATG account.'¹⁷

One can note that this §25 does not specifically target bets that are computer generated or computer assisted. ATG targets the use of bets that are statistically generated and based on pure probability. There is no language introduced that requires bets to be machine made or machine assisted to be caught by the prohibition. It is enough that the bets are statistically generated and based on pure probability. Hence, the label 'robot game' seems somewhat unfortunate.

Initially, customers found in violation of these new rules will be given a warning. If the customer continues, the customer's stake and winnings will be forfeited. This is quite vague and unprecedented and several criteria in §25 seem to

There is no language introduced that requires bets to be machine made or machine assisted to be caught by the prohibition. It is enough that the bets are statistically generated and based on pure probability.

be in need of clarification. That ATG will issue an individual warning will perhaps not satisfy the goal ATG is trying to achieve. Most bets are not identical and to prove that several bets are statistically generated and based on pure probability will be an uphill battle. It may also be suspected that players prone to bet in systems that are statistically generated and based on pure probability will not be identical to anyone that has been provided a warning by ATG. Furthermore, customers will question if ATG has the right to single out individuals without hard evidence, seize their bets and winnings and close their accounts. Customers within the EU (but outside Sweden) might also have a case to argue in the event that unlawful protective measures from ATG may be found⁸.

Aftermath

ATG has voiced its own concern regarding the 'unlevelled playing field' created by the lack of domestic Swedish legislation⁹ and believes there is an immediate need to address these issues¹⁰. ATG's position on 'robot bets' is attributable to the need to safeguard future revenue, and while short term revenue might suffer, this is a way to commercially address the bigger issue of creating an attractive value offering. Of course policing these rules will be a gigantic task as the rules are not only vague but also questionable. Ultimately, enforcement issues may need to be clarified by decisions in Swedish courts of law and by the EU. Until then, the mere threat that customers' funds may be seized and forfeited by ATG may be the deciding factor for compliance by high level customers choosing to place bets that may be suspected as statistically generated and based on pure probability outcome.

Final comment

The most important clause of the restriction seems to be that customers' 'own statistically generated systems' are prohibited. However, ATG provides its customers with its own statistically generated system, which is based purely on probability outcome. This robot is marketed under the brand 'Harry Boy' and is sponsored and supported by ATG as one of its longstanding offers. All customers can feel safe in participating in this game robot and rest assured that their winnings will never be confiscated. My understanding is that the core of the regulation is based on the 'own statistically generated systems' issue. I believe that ATG desires bets that are statistically generated and based on pure probability outcome to be made exclusively through ATG's own robot - the only robot in town.

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1. ATG's 2012 Annual Report.
2. CEO Hans Skarplöth, ATG in press release of 15 May 2013.
3. 2011 was ATG's peak, also 2009 and 2010; see ATG's 2012 Annual Report.
4. The poker operator business model is to collect 'rake.' This rake is generated by robot players, which is why short term revenue is indifferent to robots.
5. Meaning that the system supposedly is based on how other bets are being made and not the likelihood of any particular horse to be successful.
6. New §14, §25, §28 and §29 to AB Trav och Galopps vadhållningsbestämmelser in force 15 May 2013.
7. "ATG kan besluta att i vissa fall vägra ta emot spel. Sådant beslut skall fattas innan spelet definitivt stängs. Kunden skall informeras om åtgärden och anledningen till att ATG vägrat ta emot spelet. Om kund försöker bryta mot ett sådant beslut har ATG rätt att stänga av kunden för fortsatt spel..."
8. Skarplöth stated in ATG's press release 15 May 2013 that this regulation is to protect regular clients in Sweden.
9. Intended to prevent EU regulated gaming companies.
10. ATG press release of 5 June 2013.

Fantasy sports in New Jersey and the shadow of PASPA

The defeat of New Jersey's sports betting regulations in a US District Court in March may have put a stop to the state's plans for licensed sports betting in its casinos, at least while the Professional and Amateur Sports Protection Act ('PASPA') is still in place. However, New Jersey followed its loss by introducing a Regulation enabling State casinos to offer 'fantasy sports tournaments.' David Gzesh, of Gzesh Law, examines the shape of this Regulation and explores just how far it pushes the envelope of what is permitted under PASPA.

On 1 March 2013, New Jersey lost a round in the US District Court for the District of New Jersey when the Court issued a permanent injunction against the State's moving forward, under a 2011 voter referendum alongside recent regulations, with providing for licensed casinos to offer sports-betting. New Jersey's proposed action was deemed contrary to the express federal ban on such activity enacted in the 1992 Professional and Amateur Sports Protection Act ('PASPA'). As discussed below, that fight is not over.

PASPA, ironically referred to as the Bradley bill at the time due to the sponsorship of the former basketball hero, Senator Bill Bradley (D-NJ), provides that: 'It shall be unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate or are intended to

participate or on one or more performances of such athletes in such games.'

On 18 March 2013, New Jersey reacted to the injunction with the authorisation of a regulated 'fantasy sports' business model for licensed New Jersey casinos. This 'next round' may find us watching/wagering on future conflict under PASPA, but fantasy sports is already a big business in the United States, one with the apparent backing of the professional sports entities in getting an express carve-out from the 2006 Unlawful Internet Gambling Enforcement Act.

Reasoning that the definition of gambling in the US has historically been a matter of State power, even under the UIGEA and IGBA if not PASPA, New Jersey took less than three weeks after the injunction to promulgate N.J.A.C 13:69P, to allow NJ casino licensees to offer 'fantasy sports tournaments' ('FSTs') to casino patrons. Chipping away at the effect of the injunction on NJ casinos, the Regulation provides that '[t]he conduct of a fantasy sports tournament shall not be considered "gaming" or "gambling" as defined in the New Jersey casino regulations]...'

Subsequent to the 1992 passage of PASPA, Congress again addressed illegal gambling, this time in the 2006 Unlawful Internet Gambling Enforcement Act. Instead of addressing 'fantasy sports' as some evil under PASPA, Congress exempted it from coverage, leaving it unhindered where allowed by State or Federal laws.

To make the New Jersey 2013 concept comply with the 'fantasy sports exemption' under the UIGEA, 18 U.S.C. §5361 et seq, New Jersey conditioned allowing casinos to offer such FSTs only if in compliance with the UIGEA,

meaning three rules applied:

- The value of prizes could not depend upon the number of participants, nor the amount of fees paid;
- All winning outcomes reflect the relative knowledge and skill of participants and are determined by accumulated results of individual performance in more than one real-world sporting event; and
- No winning outcome is based on the outcome of the score of games or a single individual performance in a single real world event.

New Jersey adopted these rules at N.J.A.C 13:69P, adding in express prohibitions on point spreads or combinations of real world team performances. As a side note, there is not presently any new Regulation specifically allowing fantasy sports to be operated by New Jersey casinos over the internet. However, casinos are expressly allowed to contract with third-party vendors, N.J.A.C. 13:69P-1.1(g), who presumably already have internet-based operations underway.

Can New Jersey just assume away its PASPA problem? We may see the battle resumed, this time regarding whether PASPA prohibits all fantasy sports, some fantasy sports or only 'sports gambling.' Regardless of the recent Regulation, the matter of casino FST offerings may be tested under the terms of the injunction, which is not reliant on State law. Indeed, Congress passed PASPA in 1992 in response to 'growing concerns over state sponsored gambling on sports,' as noted by Professor Edelman, in a 'A Short Treatise on Fantasy Sports and the Law,' Harvard Journal of Sports & Entertainment Law Vol 3, at p. 36-7 (2011). Edelman writes:

'On its face, it may seem that all fantasy sports lie within the scope of PASPA. However, that would be

an absurdity, as America's premier professional sports leagues were the chief lobbyists for PASPA and most American professional sports leagues both host and endorse seasonal fantasy sports.'

Professor Edelman's Treatise continues on, explaining a distinction between 'seasonal' fantasy sports and how more 'rapid' formats such as daily contests, auto-pick variations, and other emerging rapid forms push the element of 'chance' to the forefront of legal analysis under various States' laws against 'illegal gambling' (categorisation of a business as 'illegal gambling' under State laws triggers a variety of additional Federal law issues, including possible criminal liability under the UIGEA and the Illegal Gambling Business Act 18 USC §1950, among others).

Did the promulgation of FST regulations by New Jersey authorise 'a casino to operate a lottery, sweepstakes or other betting or wagering scheme based directly or indirectly on one or more performances of such athletes in such games'?

The New Jersey definition of a 'fantasy sports tournament' leaves out 'gambling,' but pushes the envelope under PASPA, as it reads: '[a] fantasy or simulated game or involving athletic events for a predetermined prize.' N.J.A.C. 13:69P-1.1(a).'

On the face of it, it appears that the New Jersey fantasy sports Regulation has authorised a variety of sports propositions to be offered to individual patrons as FSTs. For example, a patron could pick a 'fantasy team' that encompasses a series of propositions where two real world individuals who will play in separate games will be compared statistically, with a predetermined prize awarded for beating a target score of say 10 of 10 correct picks, 9 of 10 correct

On the face of it, it appears that the New Jersey fantasy sports Regulation has authorised a variety of sports propositions to be offered to individual patrons as fantasy sports tournaments.

picks, 9 of 9 correct picks, et cetera. Prizing might be made available for both 'competing against a target score' and concurrently competing against other FST patrons for a total performance prize, over some time period, whether weekly, monthly or season long.

Additionally, the New Jersey regulation provides that an FST outcome cannot be based 'solely' on the performance of an individual athlete (N.J.A.C 13:69-1.1(d)(2)), which allows for proposition contests comparing individual performances, whether scoring points first, throwing more passes, committing more fouls, et cetera. Such recreational propositions appeal to casual fans and can provide very lucrative margins as a result.

Traditionally, sports proposition bets appeal to recreational players, although 'wise guys' certainly review them as a matter of course, looking for opportunities. Typically, proposition bets are tied to a single athletic contest, but there is no reason for this constraint to hold if 'fantasy' teams are created. When 'fans' start putting money on games, they are not as price sensitive to the margins as 'bettors' seeking to grind out a return. Setting the margins high enough should allow a New Jersey casino offering fantasy sports play to avoid the pitfalls of taking 'wise guy' action. Fantasy sports may present a sucker proposition to wise guys, but if the casino patrons seek entertainment, rather than a net return, and the casinos provide a sports-entertainment experience that can be marketed to bring in patrons, the model makes business sense.

Combine the prize potential of parlays with the accessibility of proposition bets for a casual player, and one has a 'fun' product, with

'jackpot' size prizing. Accessible, interactive entertainment can attract even the most casual fan to create 'his/her' team to root for. The margins available on parlay wagers/fantasy sports picks would provide returns that, in the views of some, would justify initial testing, among casual visitors, to New Jersey casinos. Las Vegas casinos for years have offered free or paid-for football 'contests' to drive traffic; should New Jersey casinos give it a try? Perhaps. While it may be true that professional sports leagues both lobbied for PASPA and sanction 'seasonal' fantasy sports contests, as Professor Edelman noted, it remains to be seen how complacent they might remain if a thriving fantasy sports props model emerges in New Jersey casinos.

New Jersey has tried to make lemonade out of the lemons handed down by the District Court in March. However, it may ultimately come down to the sports leagues' willingness to risk their own fantasy sports income streams by mounting a direct challenge to the New Jersey Regulation. More likely, we may see a few collateral attacks over issues like trademarks, copyrights, and economic guerilla warfare, not unlike the bizarre ritual where, even in Nevada with its legal sports gambling, every year casinos can advertise that patrons can bet at the end of the NFL season on 'The Big Game' only, not on the trademarked term for the 'game that cannot be named.'

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'Soft games' in Spain and the market opportunities created

We refer to soft games as those games which are not traditional casino games and which normally have a stronger component of entertainment. The main attraction is normally not winning money but playing for fun. In relation to the Spanish regulatory framework, I would like to start off with the following classifications of games:

- **Standard regulated gambling:** This refers to the various types of sports betting, casino games and bingo played for money, all of which require a licence.
- **Non-standard regulated gambling:** This includes complementary games (*Juegos Complementarios*) and contests. The latter is offered on media channels such as TV, radio, and online. A gambling licence is also required for these games in Spain.
- **Draws:** Promotional draws, sponsored by a business brand. The main difference between these and contests is that, in the case of draws, no amount can be charged to users for their participation.
- **Social games:** These do not include a prize with a monetary value. However, users pay a subscription, or purchase credits, or use virtual goods. Because users cannot redeem their winnings and exchange those winnings for real currency or a prize with monetary value, these games fall outside the scope of the concept of gambling as established by EU Directives. Therefore, such games can be offered without a licence. Nevertheless, some of these games exist in greyer areas than others depending on how closely they resemble gambling-like games.
- **Skill games for money:** refers to games that are played for real money, however, as long as they are

pure skill games, they do not fall under the concept of gambling under EU Directives, which requires an 'element of chance' to be present.

Complementary games include popular card games and other types of table and family games. New games can be assessed and approved by the Gaming Regulator. There is an open window for introducing new games of this type. These games are of high interest for attracting users to the gambling site and fostering cross-selling with other games. However, Spanish regulations are not flexible enough for these games, which keeps the development of such games on hold.

Before the passing of the Spanish Gaming Law, contests were provided in Spain with premium rate phone or SMS numbers and a gambling licence was not required. At the moment, gaming operators, TV channels and telecoms operators have to come to an agreement for providing these services. Such agreements are not always easy and margins become tight. The main commercial advantage for running contests is the publicity generated (together with the benefits for the operator's brand), which can be shown on TV at any time (although the contest can only be played after the watershed as is the case with all forms of gambling), and that users do not need to register with the operator's platform in order to play. Most of these contests are organised so that users play with their mobile phones. If they play without registration it is much easier to create a database of mobile phone data, which can be used for pushing users to the

gaming operator's site. Contests are the only regulated game in Spain that allow play without prior registration.

Draws are exclusively of a promotional nature, usually organised online and through social networks and have proven to be an interesting promotional tool for gaming operators looking to create a buzz.

With an impressive rate of growth and success, we find social games. These games, not yet subject to stringent regulations, audits and technical controls, are a great source for innovation and present a huge opportunity in Spain.

Skill games for money can be offered without a gambling licence. Here we refer to any type of game where success is the result of pure skill and therefore no element of chance is involved. For instance, most regulators accept that chess is a game of pure skill. However, regulators start hesitating when it comes to any other type of online, mobile, console or PC video game. Players could wager against each other for real money. Such games do not include any random number generator and depend on the user's skills. The Spanish Gaming Regulator has expressed that it will carefully examine a game's pure skill nature. A discussion on such assessment may create legal uncertainty for these games in Spain and in other EU countries.

If used properly, and within the legal framework, the myriad of 'soft gaming' options can be useful marketing tools and, by all means, a great business in their own right.

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