

## EP resolution on match-fixing and illegal sites

The European Parliament adopted a resolution on 14 March that calls on the European Commission to develop a coordinated approach for Member States to combat match-fixing and illegal betting websites.

“Most of what the resolution suggests is common sense. If match-fixing can be eliminated by collating different strands of information then it’s eminently sensible to do that, but the devil is in the implementation,” said Charles Gerada, Director at Jeffrey Green Russell. “The challenge lies in creating the bodies with the authority, credibility and funding to succeed.”

The resolution states that for successful law enforcement in this field, ‘Member States should set up joint investigation units to take out illegal and anonymous betting websites across the EU’ and that ultimately Member States should set up national bodies to improve coordination and information sharing.

“Success,” concludes Gerada, “will probably be determined by how able and willing the authorities are to invest in the infrastructure needed and then how able and willing the authorities are in taking action.”

**IN THIS ISSUE**  
**US** State i-gaming legislative efforts **03**  
**Australia** IGA Final Report **05**  
**Germany** **06**  
**Northern Ireland** **08**  
**EU** Concessions Directive & gambling **10**  
**Belgium** Case law **13**  
**Nevada** Interstate i-gaming bill **14**  
**The Bahamas** **16**

## New Jersey sports betting law ruled to violate PASPA

The Federal District Court of New Jersey issued on 28 February a permanent injunction against a New Jersey law which allowed wagers on sports betting, ruling it in violation of the Professional and Amateur Sports Protection Act (PASPA), in a case brought by four major sports leagues, supported by the US Department of Justice.

New Jersey argued that PASPA, which effectively bans sports gambling, is in violation of the US constitution, in particular the Fifth and Tenth Amendments; the court disagreed. “The court found that PASPA was a valid exercise of Congress’s Commerce Clause powers and did not violate the anti-commandeering principle which prohibits the federal government from imposing duties on state legislators or executive officials to carry out a federal initiative,” explains Jeff Ifrah, Founder of

Ifrah Law.

“It is fairly rare for lower courts to disturb what is settled law,” said Martin Owens, Attorney-at-Law. “Whatever its faults, PASPA has been the law of the land since 1992. [But] in my opinion New Jersey’s arguments do not fall short, whether or not a particular court chooses to give them their fair value.”

New Jersey has appealed against the court’s decision to the US Court of Appeals for the Third Circuit. “I believe overturning PASPA will be a tough fight,” said Harsh Parikh, Associate at Snell & Wilmer. “But depending on the panel of justices, the Circuit Court may strike the law as unconstitutional on Tenth Amendment grounds.”

The court’s decision came after New Jersey passed on 26 February a bill enabling online gambling within Atlantic City

casinos. The state has also announced regulations, to take effect 22 April, for fantasy sports participation in these casinos. “This is likely a strategic reaction to the PASPA decision,” said Ryan Rodenberg, Assistant Professor at Florida State University. “The major sports leagues generally consider fantasy sports distinct from gambling. So it’s a difficult argument for the sports leagues to make [to be against the fantasy sports regulations].”

“With the spread of legal gambling around the nation, now being joined by intra-state online gambling, prohibiting most, but not all, states from permitting sports gambling is structurally untenable,” believes Jeremy Frey, Attorney-at-Law at Pepper Hamilton. “Sooner or later, the US will surely become all one thing or all the other. However, that is up to Congress to decide.”

## Australia’s Interactive Gambling Act Report released to little avail

The Australian government has stalled key recommendations put forward by the Final Report of the Review of the Interactive Gambling Act 2001 (IGA), released on 12 March, until a national standard for harm minimisation and consumer protection is established.

The Final Report compiled by the Australian Department of Broadband, Communications and the Digital Economy to assess the impact of the IGA on reducing problem gambling states that “The IGA may, in fact, be exacerbating the risk of harm

because of the high level of usage by Australians of prohibited services.’ One of the key recommendations put forward to combat this problem is the trial of online tournament poker. “The aim of a 5 year trial of online tournament poker was to give unlicensed operators the incentive to enter the regulated market. This would have the effect of requiring compliance with Australian standards, thereby reducing consumer harm and providing evidence as to whether other gaming options should be liber-

alised,” said Jamie Nettleton, Partner at Addisons Lawyers. The IGA prohibits all forms of i-gaming except for online wagering, leaving consumers with few regulated options.

A standard for harm minimisation will be developed. “The risk with this approach is the implementation of a national standard will be delayed by a consultation process with the States and Territories,” said Cheng Lim, Partner at King & Wood Mallesons. “If a consensus can be reached at all,” adds Nettleton.

## Editorial: Apps & data protection

On 27 February the European Article 29 Data Protection Working Party adopted an Opinion, 'Opinion 02/2013 on apps on smart devices,' which sets out the legal obligations for the processing of personal data gathered by apps on smart devices. The Opinion outlines the ways that data collected by apps can be exposed: for instance, weak security measures used by app developers could put data at risk. Parties such as device manufacturers could expose data too.

It's no secret that mobile gaming is big business for gambling operators. Mobile gaming apps on smart devices

are no different to any other app in that they can collect personal data. Those involved with these apps must therefore pay heed to the Opinion. An app provider must adhere to EU Data Protection laws - specifically the Data Protection Directive and the ePrivacy Directive - when processing data.

Operators may not have considered data protection. If the app's developer is not EU-based, an operator may presume EU rules don't apply, but the Opinion states: 'These rules apply to any app targeted to app users within the EU, regardless of the location of the app developer or app store.'

App providers must consider how

data is stored, for example, and how long for, to meet security requirements. They must also understand that user consent to personal data processing is distinct from gaining consent to download the app; the user must be made aware if an app wishes to process personal data.

It is clear from the attention the Working Party is paying to this space that understanding EU laws governing data protection should be a priority for mobile gaming app providers. Failure to protect user data could have significant financial and reputational consequences.

## EDITORIAL BOARD

### KEVIN DE HAAN QC

Francis Taylor Building, London  
Kevin is a specialist in licensing. His practice includes all aspects, particularly betting, gaming and lotteries. He has considerable experience of proceedings before various regulatory bodies, appeals and associated judicial reviews, with particular expertise and experience in all aspects of internet gambling.

### JUSTIN FRANSSSEN

Kalf Katz & Franssen, Amsterdam  
Justin is a partner at Kalf Katz & Franssen. He founded the KPMG European Gaming and Entertainment Services Group and co-founded [gaminglaw.eu](http://gaminglaw.eu), the EU portal on gaming law and regulation. Justin is the Dutch General Member of the International Masters of Gaming Law. He is a Board Member for the Research Program on Gambling Law at the University of Leuven.  
[jf@kalkkatzfranssen.com](mailto:jf@kalkkatzfranssen.com)

### JULIAN HARRIS

Harris Hagan  
Julian is internationally known for his expertise on gaming law and was one of the first UK gaming law specialists to see the potential of internet gaming. Julian has also represented the Gaming Board for GB and advises the British Casino Assoc. He is a member of the International Assoc. of Gaming Attorneys, the International Internet Gaming Assoc., the European Forum for the study of Gambling and the International Masters of Gaming Law.  
[harris@harrishagan.com](mailto:harris@harrishagan.com)

### KRYSTALLIA IATRIDOU

Karageorgiou and Associates  
Krystallia's areas of practice include competition law and gaming law while in the past she has worked for the DG for Competition of the Hellenic Competition Commission. Krystallia has followed the implementation of the Greek gaming law by contributions related to Competition Law and crucial European Law questions arising from the new Greek gaming law.  
[iatridou.k@kalaw.gr](mailto:iatridou.k@kalaw.gr)

### JEFF IFRAH

Ifrac Law  
Jeff Ifrah is the founding partner of Washington, D.C. based Ifrac Law. He

represents many of the largest igaming companies and industry associations, at the intersection of interactive gaming and government regulation. His clients include the online poker sites Full Tilt Poker and PokerStars and the Interactive Gaming Council. In 2012, Jeff was honoured as one of Gaming Intelligence Magazine Hot 50 Winners in the Category of Law and Regulation.  
[jeff@ifrahlaw.com](mailto:jeff@ifrahlaw.com)

### JAMIE NETTLETON

Addisons Lawyers, Australia  
Jamie is a partner based in the Sydney office. He advises on all legal issues relating to the gambling industry, including strategic issues relating to locating operations and the regulation of gambling in a number of jurisdictions around the world. He is also Chair of the Sports and Gaming Law Committee of the International Bar Association.  
[jamie.nettleton@addisonslawyers.com.au](mailto:jamie.nettleton@addisonslawyers.com.au)

### MICHAEL LIPTON QC

Dickinson Wright LLP, Canada  
Michael has been involved in all aspects of gaming law, including representing and counselling casinos, pari-mutuel operators, racetracks and a large variety of gaming related suppliers throughout Canada. He has lectured extensively and written several papers on business and gaming law including internet gaming. Michael is a founding member of the International Masters of Gaming Law, a member of the International Association of Gaming Attorneys.  
[mdliponqc@aol.com](mailto:mdliponqc@aol.com)

### QUIRINO MANCINI

Sinisi Ceschini Mancini, Italy  
Main areas of practice: telecoms, new media, sports & entertainment (film and television distribution & co-production deals); legal counsel to various professional sports clubs & bodies; engagement, sponsorship, and endorsement deals; copyright and image rights).  
[qmancini@scm-partners.it](mailto:qmancini@scm-partners.it)

### VALÉRIE PEANO

Studio di Consulenza Societaria e Tributaria  
Valérie has expertise in the gambling, telecommunications & IT fields. Studio di Consulenza Societaria e Tributaria currently advises on all legal issues regarding the Italian gambling market.

Valérie is a member of the International Gambling Observatory established by the Italian Autonomous Administration of State Monopolies and of the European Association for the Study of Gambling.  
[peano@studiodiconsulenza.eu](mailto:peano@studiodiconsulenza.eu)

### WARREN PHELOPS

K&L Gates LLP  
Warren is a partner in the Intellectual Property, Technologies & Sports Department. He heads up the firm's Sports Law practice. He is recognised in Legal Business 2002 as a leading expert in sports legal work and is a director of the Institute of Sport Sponsorship. He has particular experience of advising on sports media rights and betting, gaming and competition issues.  
[warren.phelops@klgates.com](mailto:warren.phelops@klgates.com)

### CARL ROHSLER

Squire Sanders Hammonds, London  
Carl is a Partner in the Commercial and IP Department and heads Squire Sanders Hammonds' e-gambling team. Recognised by the Legal 500 for his strong following in the field, Carl acts for leading players. His work includes advising on gambling schemes, advertising and marketing campaigns, brand licensing and the gambling aspects of IPO's and take-overs.  
[carl.rohslers@squiresanders.com](mailto:carl.rohslers@squiresanders.com)

### HILARY STEWART-JONES

DLA Piper, London  
Hilary has extensive experience in the betting and gaming sector, including international betting and gaming compliance, as well as new betting and gaming products, particularly online. Hilary was in-house counsel with Labrokes for five years. Her experience in this sector also extends to mergers & acquisitions, IP, software licensing, joint venture and broadcast activity.  
[hilary.stewart-jones@dlapiper.com](mailto:hilary.stewart-jones@dlapiper.com)

### DAVID ZEFFMAN

Olswang  
David heads the gambling practice at Olswang which advises on all aspects of betting and gaming law, and is currently a member of the panel advising the Government on the future funding of British horse racing following the decision of the European Court of Justice in the BHB v William Hill case.  
[david.zeffman@olswang.com](mailto:david.zeffman@olswang.com)

## CECILE PARK PUBLISHING

**Managing Editor** Lindsey Greig  
[lindsey.greig@e-comlaw.com](mailto:lindsey.greig@e-comlaw.com)  
**Associate Editor** Sophie Cameron  
[sophie.cameron@e-comlaw.com](mailto:sophie.cameron@e-comlaw.com)  
**Editorial Assistant** Simon Fuller  
[simon.fuller@e-comlaw.com](mailto:simon.fuller@e-comlaw.com)  
**Subscriptions** David Guati  
[david.guati@e-comlaw.com](mailto:david.guati@e-comlaw.com)  
telephone +44 (0)20 7012 1387  
**Design** MadelnEarnest  
[www.madeinearnest.com](http://www.madeinearnest.com)

World Online Gambling Law Report is published monthly by Cecile Park Publishing Limited 17 The Timber Yard, Drysdale Street, London N1 6ND  
telephone +44 (0)20 7012 1380  
facsimile +44 (0)20 7729 6093  
[www.e-comlaw.com](http://www.e-comlaw.com)  
© Cecile Park Publishing Limited. All rights reserved. Publication in whole or in part in any medium, electronic or otherwise, without written permission is strictly prohibited. ISSN 1477-2922

## CECILE PARK PUBLICATIONS

### E-Commerce Law & Policy

Monthly: launched February 1999  
E-Commerce Law & Policy is a unique source of analysis and commentary on global developments in e-business legislation. The journal was nominated for the prestigious British & Irish Association of Law Librarians (BIALL) Serial Publication of the Year Award in 2001, 2004 and 2006.  
PRICE: £480 (£500 overseas).

### E-Commerce Law Reports

Six issues a year: launched May 2001  
The reports are authoritative, topical and relevant, the definitive practitioners' guide to e-commerce cases. Each case is summarised, with commentary by practising lawyers from leading firms specialising in e-commerce.  
PRICE: £480 (£500 overseas).

### E-Finance & Payments Law & Policy

Monthly: launched October 2006  
E-Finance & Payments Law & Policy provides all those involved in this fast evolving sector with practical information on legal, regulatory and policy developments.  
PRICE: £600 (£620 overseas).

### Data Protection Law & Policy

Monthly: launched February 2004  
Data Protection Law & Policy is dedicated to making sure that businesses and public services alike can find their way through the regulatory maze to win the rewards of effective, well-regulated use of data.  
PRICE: £450 (£470 overseas / £345 Govt).

### World Online Gambling Law Report

Monthly: launched April 2002  
World Online Gambling Law Report provides up-to-date information and opinion on the key issues confronting the industry.  
PRICE: £600 (£620 overseas).

### World Sports Law Report

Monthly: launched September 2003  
World Sports Law Report is designed to address the key legal and business issues that face those involved in the sports industry.  
PRICE: £600 (£620 overseas).

### DataGuidance

Launched December 2007  
The global platform for data protection and privacy compliance.  
[www.dataguidance.com](http://www.dataguidance.com)

# US state legislative efforts to authorise internet gambling

Three US states have authorised some form of intrastate internet gambling - Nevada, Delaware, and New Jersey. The law in each of those states provides for the state to enter into an internet gambling-related agreement or compact with other states. Linda J. Shorey and Anthony R. Holtzman, of K&L Gates look at the bills currently pending in three other US states - California, Illinois, and Massachusetts - that would authorise some form of intrastate internet gambling, and determine whether those bills provide for the possibility of an agreement or compact with other states, whether they contain any restrictions on who can apply for a licence, and point out some potential hurdles to enactment.

California is once again considering legislation that would authorise intrastate internet gambling. California has the largest population of any US state, by more than 10 million people. Based on the 2010 census data, the population of California is 37,253,956. Because of its large population, California is a particularly attractive venue for internet poker, for which liquidity is considered a critical requirement<sup>1</sup>. Two internet gambling bills have been introduced in the current legislative session - Senate Bills 51 and 678. Both bills would authorise intrastate internet poker and provide for a regulatory framework for the licensure of those seeking to operate internet poker sites and for the operation of those sites. At this time, Senate Bill 678, introduced by Senator Correa, contains no details on eligibility for a licence or the regulatory framework. Senate Bill 51 is similar in many respects to the bills introduced by Senator Wright in two prior legislative sessions.

Senate Bill 51, introduced by Senator Wright, identifies the entities eligible to apply for a licence - federally-recognised Indian tribes operating casinos in California, licensed card rooms, racetracks, and advance deposit wagering entities operating in California - and directs that certain provisions be included in the regulatory framework for licensure and operation. The bill mandates a finding of unsuitability for a licence applicant that 'knowingly and willfully accepted any wager from a person in the United States on any form of Internet gaming that has not been affirmatively authorized by law in this state or the United States after December 31, 2006, or has been the holder of a direct or indirect financial interest in a person or entity that

has accepted such a wager.' The bill also provides that the California Legislature may, by statute, enter into agreements with other states or foreign jurisdictions to facilitate cross-border internet gambling activities, but only if the US Department of Justice notifies the California Department of Justice that such arrangements are permissible under federal law.

Enactment of an internet poker bill in California is complicated by the divergent interests of those that are currently involved with offering gambling activities in the state - federally-recognised Indian tribes, licensed card rooms, race track operators, and advance deposit wagering entities. There are divergent interests not only between the four groups, but also within each group. Coalitions in favour of internet gambling legislation have formed within and between the groups in the past. Those coalitions may form again. For now, however, passage of an internet poker bill in California in the near future is far from a sure bet.

In Illinois, SB 1739, a 555-page bill concerning gambling, was amended on 6 March 2013 to address internet gambling and then approved by the Senate Executive Committee. The amendment would create a Division of Internet Gaming in the Illinois Department of the Lottery to administer, regulate, and enforce internet gaming activities. The amendment defines 'Internet game' as 'a fee-based or non-fee-based game of skill or chance that is offered by an Internet gaming licensee, as authorized by the Division.' Eligibility to apply for an internet gaming licence is limited to those holding an owner or electronic gaming licence issued under the Illinois Gaming Act and those holding an advanced deposit wagering licence issued under the

Illinois Horse Racing Act. Licences could not be granted to applicants that 'accepted wagers via the Internet in contravention of [the amendment's provisions] or United States law in the 10 years preceding the application date.' And a licensee could accept wagers from persons not present in Illinois only 'if the Division determines that such wagering is not inconsistent with federal law or the law of the jurisdiction, including any foreign nation, in which any such person is located, or such wagering is conducted pursuant to a multijurisdictional agreement that is not inconsistent with federal law to which [Illinois] is a party.'

Also in Illinois, SB 1955 would amend the Illinois Lottery Law to expand the pilot program for the online sale of individual lottery tickets, which is currently underway, to include (in addition to Lotto, Mega Millions, and Powerball) four additional types of lottery tickets - Lucky Day Lotto, My3, Pick 3, and Pick 4. While the passage of the Illinois legislation that provided for the pilot program was heralded as an authorisation of internet gambling, permitting the online sale of lottery tickets is not the same as permitting the games to be played via the internet. Accordingly, at this point in time, it does not appear that SB 1955's proposed expansion of the types of tickets the Illinois Lottery can sell over the internet is incompatible with SB 1739's proposal for the authorisation and regulation of internet gambling.

It is difficult to set the odds that SB 1739 will become law. The current Governor of Illinois has vetoed two prior gambling expansion bills, which were similar to one another. However, neither of them addressed internet gambling. Whether the inclusion of internet gambling in the current

**It is difficult to set the odds that SB 1739 will become law. The current Governor of Illinois has vetoed two prior gambling expansion bills, which were similar to one another. However, neither of them addressed internet gambling.**

bills will help or hinder enactment remains to be seen.

In Massachusetts, two bills have been introduced concerning internet gambling - one related to the Massachusetts Lottery and the other related to holders of the authorised casino licences that have yet to be awarded.

Senate Bill 101 would amend the law governing the Massachusetts Lottery to give the Massachusetts Lottery Commission authority to offer online lottery games. Two amendments are pertinent. Section 1 of the bill would expand the Commission's authority to conduct a state lottery, allowing it to conduct 'a lottery or lotteries conducted online or over the internet.' Section 2 of the bill would allow the Commission to enter into agreements with other states or jurisdictions to 'create and maintain multijurisdictional lottery games,' including games conducted online if 'any such lottery or lotteries conducted online or over the internet has been properly authorized by each state or other jurisdiction that is part of the group.' In this context, a 'group agreement' means 'any lottery activity in which the commission participates pursuant to a written agreement between the commission, on behalf of the commonwealth [of Massachusetts], and any state, territory, country or other sovereignty.'

Senate Bill 197 would permit those that eventually are awarded a casino licence under existing Massachusetts law to apply for an 'Internet Gaming License' that, if approved, would permit the licensee 'to conduct gaming operations via the internet, provided that such operations do not include or reflect gaming mechanisms operated by the state lottery program of those simulating or resembling slot

machines.'

The two bills, at least in their current form, can be read together without conflict. The Massachusetts Lottery would be able to offer lottery games, which are typically games of pure chance, over the internet, even if they looked like a slot machine. And it appears that casino operators who obtained an internet gaming licence could offer online poker and other table games. It is, however, too early to predict what may happen to these bills during the legislative process.

---

**Linda J. Shorey** Partner  
**Anthony R. Holtzman** Associate  
 K&L Gates  
 linda.shorey@klgates.com  
 anthony.holtzman@klgates.com

---

*Readers should be aware that this article reflects the state legislative situation as it existed when the article was drafted in mid-March 2013. Events may occur between drafting and publication that cause some or all of the information to be out-of-date at the time of publication. For example, the bills described in the article may be amended or bills may be introduced in other states.*

1. The next five most populous US states, based on the 2010 census, are: Texas (25,145,561); New York (19,378,102); Florida (18,801,310); Illinois (12,830,632); and Pennsylvania (12,743,948). For comparison's sake, the 2013 population estimates for six European countries that have authorised some form of Internet gambling are: France (65,951,611); Italy (61,482,297); Spain (47,370,542); Belgium (10,444,268); Bulgaria (6,981,642); and Denmark (5,556,452). See [http://en.wikipedia.org/wiki/List\\_of\\_European\\_countries\\_by\\_population](http://en.wikipedia.org/wiki/List_of_European_countries_by_population).

# Final Report on Australia's Interactive Gambling Act 2001

## The review of the IGA

The Australian Department of Broadband, Communications and the Digital Economy ('the Department') released the Final Report on its Review of the Interactive Gambling Act 2001 (IGA) on 12 March 2013. The IGA is federal legislation passed in 2001 with the aim of minimising the scope for problem gambling among Australians through interactive technologies such as the internet. The IGA makes it an offence to provide interactive gambling services, such as online gaming (for example, online poker and casino games) and certain types of online 'in-play' wagering (that is, bets made after the start of the sporting match/event), to customers present in Australia.

The release of the Final Report marks the end of the IGA Review, which started in 2011 with the goal of evaluating the IGA's effectiveness in the context of a growing number of Australian consumers gambling online in unregulated overseas environments. The Final Report considers submissions made by stakeholders in response to its Interim Report released last year, and embodies final recommendations to the Federal Government as to reform measures.

### Results of the IGA Review

Unfortunately, the Final Report and the Federal Government's ensuing response constitute a disappointing albeit predictable result. The major recommendations of the Final Report remain essentially the same as those made in the Interim Report. To briefly recap, these were, in effect to:

- Legalise and license currently unlicensed and prohibited online gambling service providers on the proviso that they:
  - do not offer 'higher risk' types of online gambling (e.g. online slot machines) to Australians and only offer services that are of a relatively lower risk (e.g. online tournament poker); and
  - agree to adopt the proposed national standard on harm minimisation and consumer protections recommended.
- Strengthen enforcement action available against online gambling service providers that are providing prohibited services in contravention of the IGA. Such action potentially includes placement of the names of principals /directors of the providers onto the Australian Movement Alert List.
- Prohibit 'micro-betting,' being wagering on particular high frequency events in sports games (e.g. ball-by-ball betting in a game of cricket), through all electronic platforms.
- Allow 'in play' sports wagering, irrespective of the electronic platform by which bets are placed, if allowed by the relevant state/territory regulatory authority and/or relevant sports controlling body.
- Limit all sports wagering types to those approved by the relevant state/territory regulatory authority and where appropriate the relevant sports controlling body.

### Australian government's response

Despite being a key factor in both the Interim and Final Report,

the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, announced in a press release that the government 'will not be pursuing the recommended changes relating to the trial of online tournament poker or "in-play" sports wagering,' at least for now. Assumedly, this includes the proposed platform neutrality changes for approved 'in-play' sports betting. This recommendation, which had wide support, would have fixed a current anomaly which allows customers to make certain 'in-play' sports bets at physical venues and over the phone but not via the internet. It was a sensible recommendation, especially considering the current restrictions are likely leading to Australians using services provided by offshore operators. By not pursuing the change, this anomaly, noted in the Final Report as being 'unsustainable in the long run and confusing for consumers,' will continue to the chagrin of the industry.

The Minister's press release noted that the Federal Government will instead focus on working with the Australian States and Territories to develop and 'implement a national harm minimisation and consumer protection standard for all licensed online gambling activities.' The development of a national standard was a key objective in both the Interim and Final Reports. Both reports recommended several key protection measures that should be included: for example, extending pre-commitment to online gambling.

However, unlike the recent national poker machine reforms, it appears that the Federal Government will not itself be directly intervening at this stage. Instead, it will be up to the individual States and Territories to negotiate and implement the national standard, a process that is likely to be far more drawn out and ultimately less effective (if, indeed, ever agreed) in achieving the stated goals due to the different demographics and priorities. This is compared to the alternative of having universal standards developed and rolled out as federal law.

### Looking to the future

With the upcoming federal election and the current political environment, it remains to be seen whether any recommendations of the Final Report will be adopted into law. The IGA Review is one of numerous inquiries that have been conducted into the online gaming space in Australia. Considering the expense of these inquiries, it is critical that they result in meaningful outcomes; there is a real risk that the IGA Review will not achieve this.

**Tony Rein** Partner  
Thomsons Lawyers  
trein@thomsonslawyers.com.au

To view the Final Report visit [http://www.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0007/162277/Final\\_Report\\_-\\_Review\\_of\\_the\\_Interactive\\_Gambling\\_Act\\_2001.pdf](http://www.dbcde.gov.au/__data/assets/pdf_file/0007/162277/Final_Report_-_Review_of_the_Interactive_Gambling_Act_2001.pdf)

# Germany: the hottest candidate for infringement proceedings?

The complexities created by the existence of two contradictory gaming regulations in Germany are rife - for example 'online poker': a game of skill or a game of chance? - licensed and banned at the same time. Dr. Wulf Hambach and Maximilian Riege, of Hambach & Hambach law firm, discuss the regulatory complexity in Germany and the potential for EU infringement proceedings.

Germany's gambling regulation remains torn. Although the former maverick state Schleswig-Holstein (SH) officially joined the regime of the Interstate Treaty on Gambling (ITG) of the other 15 states at the beginning of 2013, the much more liberal Gaming Reform Act (GRA) has to remain applicable to regulate and supervise gambling licence holders in Schleswig-Holstein. Nearly 50 gambling licenses for online sports betting, online casinos and online poker, each valid for 6 years, were granted before the GRA was withdrawn.

The new regulatory situation is more than complex and the legal consequences are unclear. Germany's Federal Court of Justice (FCJ) has already referred four questions concerning the compliance of the German gambling regime with EU law (resolution of 24 Jan. 2013, court ref. I ZR 171/10 - digibet) to the European Court of Justice. The main question is whether the coexistence of two different regulatory systems for gambling contradicts the requirement under European law to ensure a consistent and coherent legal regime in a Member State.

The main point of conflict in the German gambling regulations is online poker. While the GRA

regulates online casinos, the ITG strictly prohibits all kinds of online casino games. Another conflict exists in the different regulation of online sports betting. While there are already 25 sports betting operators licensed under the GRA, the ITG only allows up to 20 sports betting operators for the entire German market. Furthermore sports betting operators in SH are allowed to offer different kinds of bets on sports events, while the ITG only allows bets on the final or intermediate results. In addition, the ITG stipulates a general betting limit for players: 1000 Euros per month.

## The ITG: incoherent in itself?

Another legal controversy lies in the regime of the ITG itself. It is questionable if the restrictions are proportionate and if the ITG's regulation of the different kinds of games is consistent and coherent.

Regulation of terrestrial gaming arcades and slots is relatively modest, although there is hardly any controversy that slot games offered in gaming arcades and bars have the highest addiction potential of all games of chance. The recently published draft of the new regulation for slot and gambling machines stipulates some stricter rules for these kinds of games, but does not go as far as to constitute a total prohibition of slot and gambling machines.

Through the so-called 'experimentation clause,' 20 online sports betting operators could be exempted from the general online gambling ban stipulated by the ITG. Federal sports betting licences will be granted by the ministry of the interior in Hesse. The tender procedure for issuing nation-wide sports betting licences has just entered its third and final round of assessments. Since there were more than 90 applicants who made it to the second round, it is only a

question of time before the arbitrary limitation of licenses and the somewhat confusing tender procedure, which was initially managed by the law firm that normally represents the German gambling state monopoly, will be challenged in court.

Finally, besides this partial exemption for online sports betting, all online casino games, including poker, remain prohibited. The grounds of the ITG only gives a short justification for the ban: an alleged 'high manipulation risk and the extraordinary addiction potential' would not allow a regulation of these kind of games. The authors of the ITG state that terrestrial casino games offered by state owned casinos have to suffice to meet the customer's demand.

It seems that these justifications are as short as they are superficial. Recent scientific research regarding online poker comes to different conclusions.

## Poker: a game of skill?

With regard to the alleged addiction potential the study 'Measuring and Evaluating the Potential Addiction Risk of the Online Poker Game Texas Hold'em No Limit' shows that, at least, the most popular online poker game 'Texas Hold'em' has the same addiction potential as sports betting. Hence, addiction potential cannot be a valid argument to allow up to 20 sports betting providers in Germany while prohibiting online poker in total.

Furthermore recent court rulings in the US and Germany reanimate the general discussion as to whether poker is a game of chance. Jack B. Weinstein, Senior United States District Judge, ruled in August 2012 that 'Poker is predominated by skill rather than chance.' And in fall 2012, the 12th senate of the Finance Court of

Cologne ruled that poker is a game of skill, at least for professional players (court ref. 12 K 1136/11). These questions were raised by the head of the liberal party's parliamentary group in the Schleswig-Holstein parliament, Wolfgang Kubicki, but the ministry of the interior was not able to give a straight answer<sup>2</sup>.

And what about the alleged manipulation risk? Online casino games are often named in the context of money laundering and fraud. Jürgen Creutzmann, member of the European Parliament (EP), former rapporteur and now shadow rapporteur of the EP for the pending report on online gaming (the so-called Fox-Report), wanted to get more in-depth information on the topic. On his invitation, representatives of the European Commission, the EP, national regulators as well as scientists and industry experts came together for a workshop in the EP to discuss: 'Online Poker - Need for European Safety Standards?'<sup>3</sup> The result of the workshop was crystal clear: there is no reason not to regulate online poker. In fact, poker should be regulated not only on a national but also on an EU level, since customer protection in the EU can be achieved best if regulated national markets agree on common security standards.

Professor Friedrich Georg Schneider of Johannes-Kepler-Universität Linz, a leading expert on issues relating to the shadow economy, challenged the perceived threat of money laundering via online poker. According to his analyses, illegal gambling plays a minor role in global money laundering activities, running at approximately 0.5 per cent. In view of a study by Goldmedia on the German gaming market, he explained that, even if all online poker activities were used

**Professor Friedrich Georg Schneider of Johannes-Kepler-Universität Linz, a leading expert on issues relating to the shadow economy, challenged the perceived threat of money laundering via online poker.**

exclusively for money laundering, the total volume of laundered money would be small in comparison to other areas of the economy and therefore unattractive to criminals. He added that money laundering via online poker is associated with large outlay and high transaction costs. As the business model works with non-cash payment transactions, funds paid in have in most cases already been part of the banking circuit, and been subject to the financial institutions' money-laundering examinations before they are paid into player accounts.

Prof. Schneider's thesis was supported by Rapporteur Ashley Fox himself, who presented the draft of his long awaited Fox-Report to the Internal Market and Consumer Protection (IMCO) committee on 20 March 2013. During a conference in Brussels on 19 March he stressed that money laundering via EU regulated online gambling sites is not attractive for criminals since they would always leave "an electronic link behind, which can be traced." The 'ML issue' would therefore "not be a big problem for the regulated markets."

In addition, most regulated markets require 'safe-servers' that record all transactions and gaming behaviour, so that they are verifiable and associated with high detection risks for potential criminals. Finally, in-house safety standards are already very high, since online poker providers themselves have a vital interest in safe and fraud-free offers.

Against this scientific and factual evidence, there are more than reasonable doubts regarding the regulatory approach of the ITG, especially concerning the justification of the total ban on online poker. The future will tell if the German regulatory authorities leave the decision about EU

compliance to the ECJ and national courts, or if the minister presidents of the 16 German states and their gambling regulators take a more proactive approach.

The GRA has shown that a modern, non-discriminatory and EU law compliant regulation of online gambling can work in Germany. As a first step, the minister presidents of the 16 states could partially adopt the modern regulations from Schleswig-Holstein by opening the ITG's 'experimentation clause.' Schleswig-Holstein generated significant tax revenues from the 23 licensed casino operators. And even before online poker was allowed in Schleswig-Holstein, Germany had already become the second largest poker market in the world. The minister presidents should calculate the possible tax revenues in case of a nation-wide poker regulation. If neither scientific nor legal arguments are convincing enough for the decision makers in Germany, perhaps the financial arguments are.

All in all: if Germany's chief gambling regulators continue the ITG-track, Germany - next to France - remains the hottest candidate for infringement proceedings initiated by EU Commissioner Michael Barnier. Rapporteur Fox is already urging the EU Commission to take more action in this regard.

---

**Dr. Wulf Hambach** Partner  
**Maximilian Riege** Junior Partner  
Hambach & Hambach  
Contact via [n.tonelli@timelaw.de](mailto:n.tonelli@timelaw.de)

---

1. <http://online.liebertpub.com/doi/abs/10.1089/gire.2012.16125?journalCode=gire>

2. <http://www.itsh.de/pressticker/2012-09/19/10-19-47-525a/>

3. <http://www.gaminglaw.eu/news/workshop-online-poker-at-the-eu-parliament-does-europe-need-uniform-safety-standards-experts-attest-providers-effective-control-mechanisms-against-fraud-attempts/>

# Proposed reforms to Northern Irish gambling law

A February 2011 consultation by the Department for Social Development in Northern Ireland examined gambling legislation and made a number of observations; since the consultation, the Northern Irish Executive announced on 10 January that Northern Ireland's gambling laws will be updated. However, there has been little provision in the proposed updates for online gambling. Gareth Walls, Partner at A&L Goodbody, analyses the background and current state of the gambling laws in Northern Ireland and discusses whether there is a need for such legislation to mirror to a greater extent regulations in Great Britain.

Currently Northern Ireland's gambling law is much more conservative than the rest of Great Britain (GB) and the Republic of Ireland (ROI), and has been as a consequence of two principle factors. First, Northern Irish society is more conservative than its counterparts, partly because the majority party, the Democratic Unionist Party (DUP), are anti-gambling. Secondly, the Northern Irish legislation has certain devolved powers, but there have been long periods of political deadlock in the recent past, with the consequence that betting and gaming legislation remains a low priority. Having kept a keen eye on the proposed reforms, it remains our understanding that the process, largely due to the political sensitivities in Northern Ireland, still has some way to run before any changes are implemented.

The Department of Social Development in Northern Ireland (the DSD) conducted a thorough

review of gambling legislation in Northern Ireland, in a similar vein to that which was completed in GB prior to the implementation of the Gambling Act 2005. While it is anticipated that Northern Ireland will follow some of the GB-based reforms in terms of modernising technology, it will reject more 'controversial' reforms in terms of modernising the gambling industry. And if the DUP retain a position of dominance, then a conservative approach will be maintained, especially in regard to the taxation of providers.

In Northern Ireland the relevant legislation governing gambling is the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (the 1985 Order), amended (in part) by the Betting and Gaming (Northern Ireland) Order 2004 (the 2004 Order). Reform of some kind is required, as Northern Ireland has become a jurisdiction that has failed to keep policies in this field up-to-date with changes in society and technology. As a consequence, Northern Ireland remains more heavily regulated than England, Scotland and Wales; it is important to note that the Gambling Act 2005<sup>1</sup> (the Gambling Act), introduced in GB, does not apply in Northern Ireland, where the regulation of bookmakers licences remains wholly devolved to the Social Policy Unit (SPU).

The DSD recognises that Northern Ireland's gambling law has become 'increasingly out of date due to changes in industry practices and the development of new forms of gambling.' In particular, many argue that the lack of consistency across neighbouring jurisdictions is damaging to business in Northern Ireland and prejudices Northern Irish consumers.

Further, and in contrast to the present 1985 Order, there is an

understanding that the culture and mind-set of the Northern Irish people has changed. Moreover, the ability of Northern Irish residents to participate in 24-hour online gambling through the internet, telephone, television, hand-held devices etc, means that the legislative framework must change.

The need to align the gambling policy of the three separate jurisdictions of GB, ROI and Northern Ireland is highlighted by considering the different rules which apply to the running of competitions in that geographic area. The lack of consistency between gambling policies in Northern Ireland and GB has brought a level of opposition from a number of business leaders within Northern Ireland, who argue that for Northern Ireland to remain out of step with the rest of GB is damaging to business and also prejudices Northern Irish consumers, who are being excluded from many prize promotions.

For example, drinks promotions on 'soft' drinks are subject to different legislation in Northern Ireland as divisible from GB and ROI, so that bottling plants need to consider alternative labelling, distribution, merchandising etc, for Northern Ireland. Frequently, British businesses are dealing with this in one of two ways. Firstly, by excluding Northern Ireland from many promotions, which limits the ability of British companies to market their goods and services within the UK as a whole while denying people in Northern Ireland the opportunity to participate in promotional offers. Alternatively, some producers ignore the legislation, run the competition in Northern Ireland 'as part of the UK' and take a commercial view of potential enforcement action by the DSD.

Similarly, GB categories and standards for gaming machines are

proposed to be adopted in Northern Ireland. Following lengthy debates leading up to the 2005 Gambling Act, Fixed Odds Betting Terminals (FOBT) were included within the definition 'gaming machine.' FOBTs currently occupy an extremely uncertain area within Northern Irish gambling policy. The principal legal issue is whether the operation of FOBT's constitutes a 'bet' or 'gaming' and, if their operation falls under 'gaming,' whether the operation would constitute 'unlawful gaming.' What is clear, however, is that FOBTs are currently in use in a number of bookmaking offices in Northern Ireland but these FOBTs are operating in line with the regulations currently in place in GB in terms of stakes, prize levels and maximum numbers of such machines permitted in a single bookmaking office. The ambiguity of this area of Northern Irish law is significant given the substantial profits which FOBTs are capable of generating.

One major issue bearing upon the reform of the industry in Northern Ireland is the issue of online betting and gambling through modern technological media, which effectively permits gambling 24/7 despite regulations in place in Northern Ireland preventing gambling on a Sunday. In the outline of the proposed reforms there is a notable absence of any attempt to deal with the issue of online gambling. As a phenomenon which has soared in popularity over the last few years, online gambling effectively permits gambling 365 days of the year. This would support the proposed attempts to bring Northern Ireland's gambling policy in line with that of GB and Ireland as a first step, but there is a need for guidance in this area to be further reaching, as online gambling currently represents a major

**While not a huge influence in Northern Ireland at present, it would be judicious to include such legislation, in order to clarify Northern Ireland's online gambling laws. The need for direction in this area is crucial, but in terms of content, the only guidance we have at present is that which is provided in the Gambling Act 2005.**

loophole in gambling regulation in Northern Ireland.

A draft report on the integrity of online gambling by the Committee on the Internal Market and Consumer Protection of the European Parliament highlights its alarm at 'the increasing cross-over between interactive television, mobile phones and internet sites in offering remote or online games and making it easy and socially acceptable to participate in such games.' The Committee calls for Member States, together with the industry, to cooperate at EU level, which would support the need of the DSD's reforms to bring the policy of Northern Ireland in line with that of GB and ROI.

Turning to the consultation paper<sup>2</sup> for clues as to how online gambling might be addressed in the proposed reforms, it is difficult to reconcile comments made at page 5 - 'unlikely to be the subject of separate legislation in Northern Ireland' - with those made at page 18: 'However it would seem prudent to provide for this eventuality in the local gambling law.' On one hand the DSD suggest that no legislation will be required due to the fact that most, if not all, of online gambling bases are located outside Northern Ireland in tax free jurisdictions. But on the other hand they suggest that they may implement such policies for the eventuality that a Northern Irish company may seek to base operations in this jurisdiction. While not a huge influence in Northern Ireland at present, it would be judicious to include such legislation, in order to clarify Northern Ireland's online gambling laws. The need for direction in this area is crucial, but in terms of content, the only guidance we have at present is that which is provided in the Gambling Act 2005.

While the consultation paper

addresses reform it nevertheless maintains a conservative approach, and in reality most of the proposed reforms are not controversial.

The consultation paper also discusses in detail the imposition of various measures on the gambling industry to redress potential damage caused by gambling. This is of particular relevance in Northern Ireland as the Gambling Prevalence Survey completed in 2010 revealed that 2 percent of the population had a gambling problem - three times the average in the rest of GB. And fittingly, the new proposals for reform outlined recently by the DSD include a section dealing specifically with the protection of children and young people.

In any case, draft legislation is not due before the Assembly until May 2015, so there is much scope for further discussion and modification in the interim.

**Gareth Walls** Partner  
A&L Goodbody  
gwalls@algoodbody.com

1. The 2005 Gambling Act governs all forms of gambling (with the exception of betting on financial instruments and the National Lottery), including betting, gaming and lotteries in Great Britain and created a single regulator, the Gambling Commission, to oversee the gambling industry in the round. The Act also opened the way for the development of large casinos and tackled new forms of gambling, such as online gaming.

2. DSD Consultation Document entitled 'Future Regulation of Gambling Law in Northern Ireland' dated February 2011.

# The proposed Concessions Directive and gambling services

The EU Commission has issued proposals for a Directive on the award of concession contracts, but was recently put under pressure by opponents of the Directive. The Directive shall ensure transparency and equal treatment when it comes to the award of services concessions. Gambling services are - for questionable reasons - excluded from this proposal. Arthur Stadler and Nicholas Aquilina of Brandl & Talos Attorneys at Law explain why the granting of concessions for gambling services should run through a public and transparent proceeding, according to CJEU case law and should not receive any special treatment under the proposed Directive.

## Unjustified blanket exclusion of gambling services

A recent uproar, criticising the EU Commission's alleged attempt to privatise public water supply, has gone through the media and brought back attention to the Commission's proposal for a Directive on the award of concession contracts (the 'Directive')<sup>1</sup>. Pursuant to Art 2 para 1 of the Directive, 'concessions' shall mean 'public works concessions' or 'services concessions' relating to a contract concluded between economic operators and contracting authorities or entities having as their object either the execution of works or the provision of services and the consideration consisting of either solely the right to exploit the works or services or in that right together with payment. In any case, according to the Commission this public fear is without any reason: 'The Commission denies all

allegations of such an intention which is a deliberately erroneous reading of the legislative proposal.' Respecting the EU's principle of subsidiarity, the Directive does not force local governments to privatise public water supply 'and supports the autonomy of local government regarding the provision and organisation of such services of general economic interest.'<sup>2</sup> However, if a local government has privatised or aims at privatising the distribution of water, the Directive shall ensure transparency in awarding such contracts, thereby adhering to the principle of transparency as a specific expression of the principle of equal treatment in order to prevent any discrimination against potential concessionaires established in other Member States. Whereas the granting of concessions regarding the distribution of water - clearly a service of general interest - has made it into the public debate, the blanket exclusion of gambling services - most likely less probable to be qualified as a service in the general interest - has not gained as much media attention despite its potential to considerably water down the fundamental principle of equal treatment.

But where is all this coming from? Back in 2007, the Court of Justice of the European Union ('CJEU') considered the award of gambling concessions as constituting a public service concession<sup>3</sup>. Unlike other forms of public contracts, the award of public service concessions has not been subject to secondary legislation, but only covered by the general principles stipulated within the Treaty on the Functioning of the European Union ('TFEU'), which the Commission considers a loophole that 'gives rise to serious distortions of the internal market, in particular limiting access by

European businesses [...] to the economic opportunities offered by concession contracts'<sup>4</sup>. According to the draft legislation's aim such unequal treatment shall be eliminated. However, various stakeholders pressed for amendments<sup>5</sup> that give rise to concerns whether the Directive will actually effectively pursue the aim of eliminating loopholes that are harmful to the internal market. And this is the key difference between the distribution of water and the operation of gambling services: whereas the fear regarding the forced privatisation of the distribution of water is unfounded, the blanket exclusion of gambling services from the Directive's scope of applicability gives rise to concerns.

The amendments argue that the blanket exclusion of gambling services from the Directive is justified by objectives of public interest, such as combating illegal gambling, fraud, money laundering and gambling addiction<sup>6</sup>. It is further argued that Member States would be deprived of flexibility and are consequently impeded in their ability to act, if gambling was included in the Directive'. The 'exclusion would be justified by the granting of exclusive rights to a single body at national level, making a competitive procedure inapplicable [...]'<sup>8</sup>. In this context, it must not be forgotten that gambling - again as a result of lobbying activity - is excluded from various other sources of secondary EU law, such as the E-Commerce Directive<sup>9</sup>, the Consumer Rights Directive<sup>10</sup> or the Services Directive<sup>11</sup> by questionable arguments.

The exclusion from the Directive currently under discussion clearly contravenes the statements made in consistent CJEU case law regarding the award of concessions and the gambling sector as well as

the Commission's approach in relation to (online) gambling services in its Communication 'Towards a comprehensive European framework on online gambling'<sup>12</sup>, which, in absence of harmonisation, intends at pushing for national compliance with EU law.

### **CJEU case law on the award of concessions and the gambling sector**

In principle, consistent CJEU case law calls for a public and transparent award of gambling concessions, following the core intent of the internal market, in particular protected by Art 49 and 56 TFEU, namely the freedom of establishment and the freedom to provide services. When awarding gambling concession, Member States 'will be required to observe the fundamental rules of the Treaties, including in particular Articles [49 and 56 TFEU], the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency.'<sup>13</sup> The award of concessions must be based '[...] on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.'<sup>14</sup> It follows that 'all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way [...].'<sup>15</sup> Applying these criteria is necessary to provide all potential concessionaires with equal chances. If the principle of equal treatment was disregarded, operators potentially interested in applying for a concession could not 'express their interest and, therefore, [...]

exercise their rights deriving from Articles [49 and 56 TFEU]'.<sup>16</sup> Exactly this fact makes the principle of transparency 'a mandatory prior condition of the right of a Member State to award to one or more private operators the exclusive right to carry on an economic activity [...].'<sup>17</sup>

Also the award of a single licence must not take place without obeying the fundamental rules of transparency and non-discrimination. Even though the Commission has stressed the importance of competition on the gambling market in its Communication, some Member States have excluded competition by implementing a monopoly or awarding exclusive rights to a single operator. This major restriction of the freedom to provide services is justifiable only under very stringent conditions that have been constantly specified by the CJEU, most recently in the Stanleybet decision on the Greek gambling monopoly rendered in January 2013<sup>18</sup>. Even if Member States have used their discretionary power to exclude competition on the gambling market, the competition for the gambling market, relating to the process of awarding exclusive rights to a single operator (monopoly) or to a limited number of operators (oligopoly) must adhere to the principles of transparency and equal treatment and the consistent CJEU case law on the award of concessions in the gambling sector<sup>19</sup>.

Granting concessions without applying the principle of transparency is possible only under narrow circumstances derived from CJEU case law. Like any exception, these circumstances may not be applied broadly. The CJEU's landmark decision relating to the possible exemptions from the principle of transparency is the

Teckal case of 1999. There are only two exceptions from the principle of transparency: (i) operations without cross-border interest, particularly by reason of very modest economic stake and (ii) 'in-house-operations.'

As regards operations without cross-border interest, even if 'the conditions imposed by the Member State are such as to dissuade undertakings from expressing their interest in the activity in question, those conditions must still be actually made known to them so that they can make a decision.' Otherwise a potentially interested operator would be deprived of the possibility to assess the feasibility of applying for such a concession. In other words, the principle of transparency needs to be applied even if the respective Member State is of the opinion that no operator would seriously consider applying for a licence due to the unattractiveness of the market<sup>20</sup>.

The 'in-house' award of licences may take place if four cumulative conditions are given (the first three being referred to as the 'Teckal-criteria'):

- the licensing relation must be between a public authority and a legal entity different from this authority;
- the public authority exercises similar control as it exercises over its own departments - this similar control meaning that the public authority must have 'decisive influence over both strategic objectives and significant decisions'<sup>21</sup> and thereby must be able to exercise structural and functional<sup>22</sup> as well as effective<sup>23</sup> control, which means that in case of joint control a purely formal affiliation is not sufficient as this would lead to a circumvention of the criterion of 'similar control'<sup>24</sup>;
- the entity carries out most of its activity with the public

authority controlling it<sup>25</sup>; and

- the legal entity must not be (partly) owned by private investors as such an owner's structure would per se exclude that the public authority exercises similar control as over its own departments<sup>26</sup>.

These criteria have been - consistently with the Directive's aim to foster the application of the principle of transparency - written into the draft text of the Directive in Art 15. It follows that in any case, state-controlled operators (also of gambling services) will be exempt from the scope of the Directive: Art 15 para 1 of the Directive provides for an *expressis verbis* 'in-house' exemption: The Directive is not applicable if

- the public authorities have decisive influence over strategic objectives and significant decisions of the legal entity to which the concession shall be awarded;

- 90% of the activities are carried out for the State, regional or local authorities; and

- there is no private participation in the legal entity.

Therefore, Art 15 of the draft Directive already excludes all state operators of lotteries and casinos from its scope of applicability if the above-mentioned criteria are fulfilled. A further-reaching exclusion of gambling activities therefore lacks justification and is clearly contrary to the Directive's aim, the market freedoms protecting the internal market and fundamental EU principles, namely the principles of transparency, equal treatment and non-discrimination.

## Conclusion

The draft Directive expressly mentions the aim to provide for a minimum coordination of national procedures, objective award criteria ensuring compliance with the principles of transparency, non-discrimination and equal

treatment. While almost all services without exemptions are subject to stringent rules, the gambling sector is set aside - with no further justification - and considered as a 'particular sector of economy' by questionable parameters. If transparent, non-discriminatory granting of concessions is considered to be crucial also in the gambling sector, it is logical for gambling services to be covered and not exempt from legislation. If the Directive is actually - as intended and as its name suggests - a harmonising legal framework, it is more than evident to include gambling services.

---

**Arthur Stadler** Attorney  
**Nicholas Aquilina** Research Assistant  
 Brandl & Talos Attorneys at Law  
 stadler@btp.at  
 aquilina@btp.at

---

1. Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, 2011/0437 (COD), SEC(2011) 1588 final, SEC(2011) 1589 final, COM(2011) 897 final.
2. European Commission, Press Release of 23 January 2013, available at [http://ec.europa.eu/commission\\_2010-2014/barnier/docs/news/2013/130124\\_water-services\\_en.pdf](http://ec.europa.eu/commission_2010-2014/barnier/docs/news/2013/130124_water-services_en.pdf)
3. CJEU 13 September 2007, C-260/04, Commission vs. Italy, para 20.
4. Explanatory Memorandum, indent 1, regarding COM(2011)0897 final; emphasis added.
5. See in particular Amendments ('AM') 75, 311, 510.
6. AM 75, justification.
7. AM 75, explanatory statement.
8. AM 311, Recital (13a) new; justification, AM 510; emphasis added.
9. Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178, 1-16.
10. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304, p 64-88.
11. Directive 2006/123/EC of the

European Parliament and of the Council of 12 December 2006 on services in the Internal Market, OJ 2006 L 376, 36-68.

12. European Commission, 'Communication towards a comprehensive European framework for online gambling,' COM (2012) 596 of 23 October 2012, available at [http://ec.europa.eu/internal\\_market/services/docs/gambling/comm\\_121023\\_onlin\\_egambling\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/gambling/comm_121023_onlin_egambling_en.pdf).

13. CJEU 16 February 2012, C-72/10, Costa and Cifone, para 54, CJEU 24 January 2013, C-186/11, Stanleybet, para 47.

14. CJEU 3 June 2010, C-203/08, Sporting Exchange, para 50, CJEU 19 July 2012, C-470/11, Garkalns, para 42 and most recently CJEU 24 January 2013, C-186/11, Stanleybet, para 47; emphasis added.

15. CJEU 16 February 2012, C-72/10, Costa and Cifone, para 73; emphasis added.

16. Opinion AG Bot, 17 December 2009, on joined cases C-203/08, Sporting Exchange, and C-258/08, Ladbrokes, para 153.

17. Ibid, para 154, see also Talos/Aquilina, WOGLR 3/2010, 14.

18. See Aquilina/Pichler, WOGLR 2/2013, 10.

19. See Talos/Aquilina, WOGLR 3/2010, 14; Stadler/Aquilina, ELR 1/2013, 2 (6).

20. Opinion AG Bot, 17 December 2009, on joined cases C-203/08, Sporting Exchange, and C-258/08, Ladbrokes, para 167; see also Talos/Aquilina, WOGLR 3/2010, 14 (14-15).

21. CJEU 13 October 2005, C-458/03, Parking Brixen, para 65; CJEU 13 November 2008, C-324/07, Coditel Brabant, para 28.

22. CJEU 17 July 2008, C-371/05, Commission vs. Italy, para 26.

23. CJEU 13 November 2008, C-324/07 Coditel Brabant, para 46.

24. CJEU 21 July 2005, C-231/03, Coname, para 24; CJEU 29 November 2012, C-182/11, Econord, paras 27, 31.

25. CJEU 18 November 1999, C-107/98, Teckal, para 50; CJEU 13 October 2005, C-458/03, Parking Brixen, para 58.

26. CJEU 13 November 2008, C-324/07, Coditel Brabant, para 30; CJEU 10 September 2009, C-573/07, Sea, para 46.

# Belgium's recent case law regarding website blacklisting

## The blacklisting and blocking of gambling websites

Two blacklisted operators<sup>1</sup> initiated legal proceedings against the Belgian State, stating that the blacklisting or blocking mechanism as used by the Gaming Commission in cooperation with the ISPs is unlawful. Both of these proceedings have resulted in a judgment against the online operators. A summary of the court's most pertinent considerations is provided here.

In a first case, an online betting operator<sup>2</sup> initiated interlocutory proceedings before Brussels' Court of First Instance requiring the Belgian State/Belgian Gaming Commission to immediately cease the plaintiff's listing on the Commission's blacklist. The court ruled on 13 June 2012 that granting the demand of the plaintiff to de-block the website would result in the court making accessible a website on which activities are exploited that are not lawful under the current Belgian legal framework. Thus, this claim was rejected due to a lack of a legitimate interest for the plaintiff to make such a claim.

As to the blacklisting practice and its legality under Belgian law, the court ruled that the absence of specific provisions in Belgian legislation granting the Gaming Commission the authority to blacklist websites on the Commission's website, does not as such lead to the illegality of such practice as long as general principles such as reasonable decision-making and proper governance are met. The court held that the blacklisting practice is a preventive measure destined to protect potential players or third parties, and to prevent illegal activities, thus falling within the normal exercise by the Commission of its legal competences. Further, the judge also ruled that the blacklisting practice does not result in disproportionate damages for the blacklisted operator as, in the court's opinion, the Gaming Commission already informs Belgian residents on the unlawful character by two other means, in particular by using a 'white list' and by (through the protocol with the ISPs) blocking access to the blacklisted websites. Moreover, the court held, due to the strictly Belgian context of the blacklist no disproportionate damages result therefrom for the operators listed on it.

The court also briefly touched on the EU freedoms in relation with the Belgian laws by referring to case law of the European Court of Justice in which a large margin of appreciation is given to national legislators in this area. Due to its limited competence during interlocutory proceedings, the court stated that it saw no clear infringement by the Belgian legal provisions with EU law.

Recently, a second judgment was passed on 11 February 2013 in a similar case before the same Brussels' court. In this case, another blacklisted operator<sup>3</sup> argued mainly that the blocking of gambling websites by ISPs on the Gaming Commission's request, infringes Belgian legal provisions on electronic commerce as set out in the Act of 11 March 2003 (eCommerce Act), which prohibits to impose on internet intermediaries a general surveillance duty with respect to internet content. The plaintiff also stated that the mandatory blocking mechanism

infringes fundamental rights and freedoms of the ISPs, the confidentiality of communication and EU law principles.

The court held that because of the legal basis invoked by the plaintiff, the claim is based on the rights of third parties (the ISPs). As a result of this, the court ruled that the plaintiff lacked the required capacity to issue the claim. In addition, the court was also of the opinion that the actual de-blocking of websites cannot be done by the Belgian State (the defendant) but only by the ISPs themselves (who were no party in the proceedings) and that even if the blacklisting practice was considered unlawful, the ISPs could still decide to block unlicensed websites on their own initiative as a result of being aware of their illegality under the current legal framework. Further, the judge also based its decision on the consideration that in case it would have granted the operator's claim, this would lead to allowing unlicensed websites to operate in Belgium, which is contrary to Belgian law in its current state (this was also judged in the above case).

In this case, the plaintiff also argued that the Belgian legal framework runs foul to EU law. This was not further investigated by the judge as it ruled that the plaintiff did not request for a licence, and hence there was no need for the judge to rule on a theoretical question regarding the conformity of Belgian law (imposing the licensing regime) with EU law.

### Aftermath of the legal proceedings

Where do the judgments of the Brussels' Court of First Instance leave the Belgian market at this point? Several online operators have partnered up with licensed Belgian bricks-and-mortar gaming establishments. However, this leaves the several thousands of unlicensed websites, on which Belgians can technically play, operating unlawfully. From the court cases it is clear that the Belgian judges are not inclined to easily accept the illegality of the blacklisting practice nor the blocking mechanism of the websites (at least insofar as this last argument is invoked by the operators themselves).

Legal arguments based upon EU law, although invoked by the plaintiffs in both cases, have not yet been thoroughly investigated by the court; this is also due to the court's limited competences during interlocutory proceedings. Hence it is at this point unknown to what extent such arguments could suffice to question the legality of the Belgian legal framework in itself.

---

**Patrick Van Eecke** Partner  
**Antoon Dierick** Associate  
 DLA Piper, Belgium  
 Patrick.VanEecke@dlapiper.com  
 Antoon.Dierick@dlapiper.com

---

1. Editor's note: The two operators referred to are Bwin.party and Bet-at-home respectively.

2. Editor's note: Bwin.party.

3. Editor's note: Bet-at-home.

# Assembly Bill 114: Nevada cleared for interstate i-gaming

With much fanfare, Nevada Governor Brian Sandoval signed into law Assembly Bill 114, which authorises interstate online gaming in Nevada. Mark A. Clayton, Shareholder at Lionel Sawyer & Collins, discusses the legislative background to Nevada's quest to liberalise online gaming in the state and the details of the Bill.

On 21 February 2013, Nevada Governor Brian Sandoval signed into law Assembly Bill 114 (2013) ('A.B. 114')<sup>1</sup>, which clears the way for Nevada to permit interstate internet gaming<sup>2</sup>.

## Background

In 2001, the Nevada Legislature amended the Nevada Gaming Control Act to provide for the licensing of 'interactive gaming',<sup>3</sup> which was defined to be the conduct of gaming through communication technology<sup>4</sup>, including the internet (the '2001 Interactive Gaming Legislation').

However, before the Nevada Gaming Commission (the 'Commission') could adopt enabling regulations for the 2001 Interactive Gaming Legislation, the Commission had to find that, among other things, 'interactive gaming can be operated in compliance with all applicable laws.'<sup>5</sup> The State Gaming Control Board (the 'Board') and the Commission engaged the US Department of Justice on the question of the legality of interactive gaming under US federal law. In August 2002, the US Department of Justice, Criminal Division, issued a letter to the Board Chairman stating that the Department 'believes that federal law prohibits gambling over the internet, including, casino-style

gambling.' Given this position, the Commission was unable to make the necessary findings under the 2001 Interactive Gaming Legislation and the efforts in this regard ceased.

In 2011, proponents of internet poker entered into the legislative process in Nevada. The 2001 Interactive Gaming Legislation, as amended by Assembly Bill 258 (2011)<sup>6</sup> (collectively, the 'Interactive Gaming Law'), established a comprehensive framework for the regulation of interactive gaming by the Board and Commission. The Interactive Gaming Law specifically mandated that the Commission adopt regulations to govern the licensing and operation of interactive gaming. While the Interactive Gaming Law is not so limited, the Commission, by regulation, currently only permits poker to be played on an interactive gaming system<sup>7</sup>.

Similar to the 2001 Interactive Gaming Legislation, the Interactive Gaming Law provided that licences to operate interstate (meaning players located outside the state of Nevada) interactive gaming do not become effective until US federal law authorises such gaming or the US Department of Justice advised the Board or Commission that such gaming is permissible under federal law. Absent either of such actions, interactive gaming could be operated in Nevada only on an in-state basis.

## Assembly Bill 114

With much fanfare, A.B. 114 became law the same day it was initially heard and considered by the Nevada Assembly and Nevada Senate<sup>8</sup>. A.B. 114 amended the Interactive Gaming Law in three ways: (i) it removed any limitation on the offering of interstate internet gaming; (ii) defined prior activities that would preclude the granting of a licence to be involved

in interactive gaming; and (iii) provided the Commission with the means to adjust the licensing fees for operators of interactive gaming.

Sections 10 of A.B. 114 deleted the requirement that before interstate interactive gaming can be offered there must have been either (a) the adoption of a United States federal law authorising such or (b) an opinion from the US Department of Justice that such interstate interactive gaming is permissible under US federal law.

Given the small population of the state of Nevada, and the corresponding desire to increase the number of players available, Section 6 of A.B. 114 provides that the Commission shall adopt regulations that authorise the Governor of Nevada to '[e]nter into agreements with other states, or authorized agencies thereof, to enable patrons in the signatory states to participate in interactive gaming offered by [Nevada gaming] licensees in those signatory states.' As this authorisation is limited to entering agreements with other States, the Nevada Governor could not enter into agreements with non-US jurisdictions or Native American authorities.

Historically, Nevada gaming licensees did not offer internet gaming to US residents, and, certain other companies that did offer internet gaming to US residents ceased such offerings upon the passage in 2006 of the 'Unlawful Internet Gaming Enforcement Act' ('UIGEA'). Therefore, proponents of A.B. 114 wanted to create a 'penalty box' for companies that continued to provide internet gaming to US residents after the passage of UIGEA.

Section 10 of A.B. 114 provides that 'covered persons' may not be found suitable for licensure under the Interactive Gaming Law for five

years from the passage of A.B. 114.

A 'covered person' is defined to be any person who: (a) owns an 'interactive gaming facility or an entity operating an interactive gaming facility that after December 31, 2006, knowingly and intentionally operated interactive gaming that involved patrons located in the United States, unless and to the extent such activity was licensed at all times by a state or the Federal Government;' (b) 'acted, or proposed to act, on behalf of a person described in paragraph (a) and knowingly and intentionally provided, or proposed to provide, to such person any services as an interactive gaming service provider, with knowledge that the interactive gaming facility's operation of interactive gaming involved patrons located in the United States;' or (c) purchased or acquired a person described in (a) or (b); or any covered assets of such person.

'Covered assets' are defined to be any asset 'specifically designed for use in, and used in connection with, the operation of an interactive gaming facility that, after December 31, 2006, knowingly and intentionally operated interactive gaming that involved patrons located in the United States,' unless it was licensed by a state or the Federal Government, including, without limitation: (a) 'any trademark, trade name, service mark or similar intellectual property under which an interactive gaming facility was identified to the patrons of the interactive gaming facility;' (b) 'any information regarding persons via a database, customer list or any derivative of a database or customer list;' and (c) 'any software or hardware relating to the management, administration, development, testing or control of an interactive

**Before the Nevada Gaming Commission could adopt enabling regulations for the 2001 Interactive Gaming Legislation, the Commission had to find that, among other things, 'interactive gaming can be operated in compliance with all applicable laws.'**

gaming facility.'

Further, any person who uses a 'covered asset' for the operation of interactive gaming may not be found suitable for licensure within 5 years after the effective date of A.B. 114.

The Commission may waive these prohibitions on licensure if it finds that the covered person did not directly or indirectly violate any federal or state law in connection with the ownership and/or operation of an interactive gaming facility that, after 31 December 2006, operated interactive gaming to patrons located in the United States and that its assets or 'covered assets' were not used in violation of state or federal law after 31 December 2006.

Lastly, Section 11 of A.B. 114 provides that the Commission may increase or decrease, within a range, the licensing fees for operators of interactive gaming. Currently, the Interactive Gaming Law provides that for an operator of interactive gaming the initial licensing fee for the first two years is \$500,000 and \$250,000 annually thereafter. A.B. 114 provides that by regulation the Commission may increase or decrease the initial licensing fee to no more than \$1 million and no less than \$150,000; and for the renewal fee, the Commission may increase it or decrease it to no more than \$500,000 and no less than \$75,000.

### Conclusion

Prior to the passage of A.B. 114, Nevada licensed operators could offer internet poker to patrons within the state of Nevada. With the passage of A.B. 114, the statutory basis allows Nevada licensees to offer internet poker to players in other States. As other States consider internet gaming, Nevada is posed to be on the leading edge of such expansion in

the United States.

**Mark A. Clayton** Shareholder  
Lionel Sawyer & Collins  
mclayton@lionsawyer.com

1. [http://www.leg.state.nv.us/Session/77th2013/Bills/AB/AB114\\_EN.pdf](http://www.leg.state.nv.us/Session/77th2013/Bills/AB/AB114_EN.pdf)
2. Note that while the law is not so limited, by regulation, the Nevada Gaming Commission currently only allows the play of internet poker on an interactive gaming system. NGC Reg. 5A.140(1)(a).
3. NRS 463.750 to NRS 463.780, inclusive.
4. NRS 463.016425.
5. NRS 463.750(2)(a).
6. See <http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=561>
7. NGC Reg. 5A.140(1)(a).
8. See generally, <http://www.lvrj.com/news/sandoval-testifies-for-interactive-gaming-bill-before-legislature-192307221.htm>

# Referendum decides the fate of gambling in the Bahamas

## Bahamians asked for opinion on ‘web-shops’ and lottery

I am a Bahamian, but I am not allowed to gamble in my country. At least not legally. However, should I decide to partake in the buying of ‘numbers’ - the local vernacular for playing a game of chance - albeit illegally, there are many ‘web-shops’ that I may choose from to try my luck. The existence of the web-shops or internet cafés (as these businesses are officially classified with governmental agencies) attempts to disguise the true activities of gaming contained therein. However, the need for a disguise appears to be unnecessary as it is common and widely accepted knowledge among the citizenry and law enforcement officials of the locations and activities of said establishments.

The current gaming laws do not permit a citizen of the Bahamas to participate in casino gambling except as card dealers. As a direct result of this the extent of lottery gaming is almost necessarily limited to number houses. These operations make use of the various state games in the United States lottery and distribute winnings according to the value of the bets placed by the customer. With the increased popularity of the internet, online gambling has sped years ahead of the current laws that fail to address this latest phenomenon. This complex conundrum was the catalyst for a much anticipated referendum, one of the most controversial in Bahamian history.

On 23 January 2013, the Bahamas government submitted the question to the voting public to

**The weeks leading up to the much anticipated referendum on the issues of gambling closely mirrored the events of a general election in the Bahamas.**

gauge public sentiment on two key issues: the regulation of web-shop gaming and the establishment of a national lottery. Leading up to the vote, a heated debate ensued between two major sectors of Bahamian society - the religious sector and the pro-gaming establishment. The former expounded the message that gambling is morally wrong and would be a key ingredient in the recipe for continued and long term moral decay in society. The pro-gaming establishment (funded primarily by owners of web-shops), on the other hand, called for regulation and taxation. With the national debt of the country surpassing US\$4.2 billion and high rates of unemployment (14% est. 2013) the regulation and taxation of the gaming industry was touted as an untapped source of revenue for the government and a veritable source of employment. It was also argued that, like in neighbouring jurisdictions, revenue derived from gaming could be used to support initiatives in healthcare, social services and sports.

The weeks leading up to the much anticipated referendum on the issues of gambling closely mirrored the events of a general election in the Bahamas. Speeches on mega stages rang out over the various media forums, music concerts attracted thousands of persons taking advantage of the free giveaways, and talk shows, town hall meetings and social media outlets were dominated with diverse opinion on the gambling issues in the Bahamas. Bahamians clothed in a ‘Vote Yes!’ or a ‘Vote

No!’ t-shirt personified the decision the voting populace was being called on to make.

Two questions comprised the referendum's ballot. The first was: ‘Do you support the taxation and regulation of web-shops?’ and the second was: ‘Do you support a national lottery?’ At the conclusion of the voting period the ‘Vote Yes!’ campaign conceded defeat. The Bahamian public overwhelmingly rejected both initiatives. Within hours of the final results being made public the Prime Minister of the Bahamas, the Honourable Perry Gladstone Christie, called for the closure of all web-shops. Web-shop owners however sought legal recourse and petitioned the intervention of the Judiciary by seeking an injunction to stop the closure of their businesses, based on the grounds that the existing laws regarding gaming do not speak to the practice of web-shop gaming and hence the activity is not illegal as is being purported by some in the public domain. The injunction was granted until the substantive issues are heard before the court. From all indications, it is clear that a battle may have been won but the war continues. In the meantime, I can still enter a web-shop and buy a number albeit illegally...or perhaps legally depending on who one asks.

---

**Cassietta Z. McIntosh** Attorney  
McIntosh & Co  
cassiettam@hotmail.com

---

**READ MORE EXCLUSIVE CONTENT AT [WWW.E-COMLAW.COM/WORLD-ONLINE-GAMBLING-LAW-REPORT/](http://WWW.E-COMLAW.COM/WORLD-ONLINE-GAMBLING-LAW-REPORT/)**

Head on to the **World Online Gambling Law Report** website to read an interview with Tom Russell of DLA Piper on the subject of **stopping corruption in sports**, and a Q&A with Dr. George Häberling, Attorney-at-Law, about the **Swiss i-gaming landscape**.