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Sports Betting: Law and Policy

Paul M. Anderson
Ian S. Blackshaw
Robert C. R. Siekmann
Janwillem Soek *Editors*

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Series Information

Books in the *ASSER International Sports Law Series* chart and comment upon the legal and policy developments in European and international sports law. The books contain materials on interstate organisations and the international sports governing bodies, and will serve as comprehensive and relevant reference tools for all those involved in the area on a professional basis.

The Series is developed, edited and published by the ASSER International Sports Law Centre in The Hague. The Centre's mission is to provide a centre of excellence in particular by providing high-quality research, services and products to the sporting world at large (sports ministries, international—intergovernmental—organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis. The Centre is the co-founder and coordinator of the Hague International Sports Law Academy (HISLA), the purpose of which is the organisation of academic conferences and workshops of international excellence which are held in various parts of the world. Apart from the Series, the Centre edits and publishes *The International Sports Law Journal.*

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Foreword

I am very pleased and honoured to have been invited to write the foreword to this timely book. I use the word 'timely' advisedly to characterise this book as, sadly, more and more cases of corruption—of one kind or another—in sport are regularly being exposed by the world's media. Not surprisingly, perhaps, because there is so much to play for, not only in sporting terms but also in financial ones as sport nowadays is big business and a global industry in its own right!

Take, for example, a couple of recent instances of corruption in sport. The disclosures by *The Sunday Times* newspaper of corruption in the bidding process for the 2018 FIFA World Cup, resulting in bans being imposed on the two members of the FIFA Executive Committee alleged to have been involved in this scandal by offering their votes to the England bidding team in return for substantial monetary payments. And also the exposure by the *News of the World* newspaper on 'match fixing' or—more properly described—'spot fixing' in cricket involving certain members of the Pakistan National Cricket Team during the 4th Test between England and Pakistan at Lords in which, it is alleged, that they deliberately bowled 'no balls' at predetermined points in an over, as pre-arranged and agreed with a certain bookmaker, who would take bets on when 'no balls' would be bowled during the match.

Betting and sport have been—to some extent—uneasy bedfellows probably since the dawn of time: for example, lottery games were originally played in China some three thousand years ago! Not only is it enjoyable to watch a sporting event, but added excitement and interest come from also being able to bet on the outcome of it. In fact, horse racing depends upon betting for its very survival as a sport. As David Forest points out in his contribution to this book:

> …betting has been a pervasive influence on sport. For example, betting companies have become a dominant source of sponsorship in English Premier League football and the famous shirts of Real Madrid are now adorned with the logo of a bookmaker.

This book looks at the Law and the Policy on Betting and Sport in many countries around the world—sport is a global phenomenon—and thus provides a very useful and valuable comparative survey on a subject that is so vital to

safeguarding and preserving the integrity of those sports in which betting is legally allowed.

In fact, the International Olympic Committee now requires all athletes participating in the Summer and Winter Games to sign a declaration that they will not be involved in betting. Also, the European Governing Body of Football (UEFA) has introduced a sophisticated system for monitoring betting markets on matches under its or its members' jurisdiction. And the United Kingdom Government has recently enunciated a formal policy requiring sports to defend themselves against 'fixers' (UK Department for Culture, Media and Sport, 2010).

Of course, with such preventive measures in place, sport and betting can—and do, in fact—coexist for their mutual benefit. Indeed, National Lotteries raise substantial sums of money for 'good causes,' which include the funding of sports events and sports persons.

I warmly congratulate Professors Paul Anderson, Ian Blackshaw and Robert Siekmann, the Editors of this book, as well as the contributors, in assembling such a mine of useful information on such an important subject; and also the TMC Asser Press for publishing this material.

I would, therefore, welcome and heartily commend this book to sports lawyers and all others with a particular professional, academic and policy interest in the subject, including those who are involved in the organisation and administration of National Lottery Schemes benefitting sport.

After all, the essence of sport is 'fair play' and illegal and unfair betting arrangements and the manipulation of the outcomes—in one way or another—of sporting events are completely anathema and contrary to this fundamental concept and principle. And long may this be so!

The Hague, January 2011

Tjeerd Veenstra
Director of the Dutch De Lotto
Second Vice-President, The European Lotteries

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Chapter 1
Introductory Remarks

Ian S. Blackshaw

Gambling is a significant global industry, which is worth around 0.6% of world trade, that is, around US$ 384 billion; and Gambling on the outcome of sports events is a very popular pastime for millions of people around the world, who combine a flutter with watching and enjoying their favourite sports. But, like any other human activity, sports betting is open to corruption and improper influence from unscrupulous sports persons, bookmakers and others who are out to make a quick—but substantial buck—unjustly and unfairly.

As Tjeerd Veenstra, Director of the Dutch Lotto and Second Vice President of The European Lotteries, quite rightly points out in his foreword to this book that, there is an uneasy relationship between sport and betting. In fact, they may be incompatible if the one influences the other, so that the outcome of the sporting event, as well as the betting itself, is not left to chance, but are—in one way or another—interfered with, or manipulated, to use the jargon, 'fixed.' Match-fixing, unfortunately, is quite prevalent in sport, from time to time.[1] But, one thing sport and betting do have in common is that, in their pure forms, they both require 'integrity' if they are to co-exist and fulfil their respective purposes. Put another way, sport and betting must be conducted in a fair and open manner, without criminals getting involved.

Ian S. Blackshaw—Member of the Court of Arbitration for Sport and Honorary Fellow of the ASSER International Sports Law Centre.

[1] For a recent high-profile example, see the article on the England Pakistan Fourth Test Cricket Match Fixing Case – '*It all comes down to proof*'—by Ian Blackshaw in *The Times* newspaper on 9 February, 2010. For an extended version of this article, see International Sports Law Journal, ISLJ 2010/3-4, at pp. 186 & 187.

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This point is well made by the UK Gambling Commission in a Policy Position Paper on its approach to Betting Integrity in general and Sports Betting in particular, which was published in March 2009, in the following terms:

> Betting integrity is important to the Commission because of the risks any failure would pose to the licensing objectives of keeping gambling fair and open and keeping crime out of gambling. While any lack of integrity in the way in which an event is managed, or the results reported, will detract from the fairness and openness of any betting on that event, the Commission's focus is on integrity directly related to betting, specifically where the outcome of an event has been influenced with the intention of benefiting through betting on it, or where inside information is used improperly or unfairly in placing a bet. For example, if an individual pays (directly or indirectly) another to deliberately lose a game with the intention of profiting through betting on that outcome (directly or indirectly), that is a matter of concern to the Commission. The Commission does not consider it to be part of its core role to promote event integrity more widely, but would expect sports governing bodies to do this. For example, if a team does not put out its best available players for one match simply in order to be better prepared for another match, this would not normally be a matter for the Commission even if bets had been placed on the outcome (unless inside information is used improperly or unfairly in placing a bet). Generally speaking, those betting are aware of such wider risks to sporting or event integrity.[2]

As it will be seen from the above extract, the onus of keeping sports event betting clean, according to the Commission, falls—fairly and squarely—on the shoulders of the sports governing bodies themselves. This is only logical as their purpose is to regulate their respective sports.

Again, according to the Commission, there is also a responsibility on the part of the 'punters' themselves to be aware of certain sporting situations in which, as mentioned above, there may not be a 'level playing field' in the sporting sense, which may affect the outcome of the sporting event on which bets have been placed. For example, in football, a club may field an inferior team for a less important match in order to rest the main players for a subsequent more important match. Whether or not this is a sporting thing to do is, of course, another matter, but this kind of thing does happen quite frequently.

Thus, Sports Betting is a very complex matter in order to keep everyone involved in it 'on side' and on the 'straight and narrow' and thus to keep the 'punters' happy.

Sports Betting in the last ten years or so has developed and changed quite fundamentally with the advent of modern technology—not least the omnipresence of the Internet and the rise of on-line Sports Betting. Therefore, those responsible for developing Sports Betting Policy and reflecting that Policy in the corresponding legal rules have quite a challenge on their hands. Not least because the World Wide Web has been described as the 'latter day wild west' on account of

[2] Section 1.4. See www.gamblingcommission.gov.uk/…/betting%20integrity%20policy%20position%20paper%20-….

the difficulty of policing and regulating it.[3] This is particularly true of offshore Betting Companies offering gambling possibilities to punters in countries where either gambling—in any form—is illegal or very restricted. Take the United States of America, for example, where on-line sports gambling is illegal, although few 'punters' have ever been prosecuted—at least, to date—and things are in state of flux!

The US Government is generally relaxed, allowing individual 'punters' to place sports bets online. However, the Government tends to focus its resources on trying to stop the websites that are offering Sports Betting services to U.S. citizens, as well as the payment processors who facilitate deposits and payouts related to Sports Betting accounts.

The problem for US Law Enforcement Agencies is that there is no law outlawing Sports Betting on the Internet. Many US legal experts suggested invoking the Wire Act, which outlaws Sports Betting over the telephone, but, in the age of satellite and cable Internet connections, the legal lines of attack are more blurred than ever.

Eventually, the US Department of Justice prosecuted a few companies for offering Sports Betting services to U.S. citizens. They also threatened prosecution of companies selling advertisements for the same services, but Antigua filed suit against the US in the International Court of Justice in The Hague—and won! The US filed appeals against the ruling, but all their appeals were also unsuccessful.

State Governments around the US are now legalising casino gambling and many are pushing to legalise Sports Betting as well. As a result, it is becoming more difficult and, indeed, pointless for the US Federal Government to waste resources trying to police an activity that is already legal in most of the world.

This book covers the law and policy on Sports Betting in a variety of countries, whose economic and social development, history and culture are quite different, and a few salient comments now follow on a random—but representative—selection from the many countries covered in this Book, which illustrate the different policy approaches to Sports Betting and its legal regulation and effects.

In China, for example, one of the so-called 'BRIC' countries, whose economy goes from strength to strength and whose citizens bet on poker and mah-jong, there is a State Lottery, which provides a consistent source of revenue for the Chinese Government. The Chinese Laws and Regulations on Sports Betting are out of date and need reforming. For example, China should legalise some forms of Sports Betting, which are commonplace in the west, such as horse racing. Furthermore, there is a need for the investment of private capital in the betting industry, which would add much needed competition in this sector, and also, it is believed, could reduce the corruption and match-fixing which is prevalent and widespread in sport in China.

[3] This is well borne out by the *WickiLeaks* website affair in which confidential and highly sensitive diplomatic cables, mainly from US diplomatic missions around the world, were leaked to and published by the world's media during December 2010, despite the protestations of the US State Department and the US Attorney General.

On the other hand, in Singapore, legalised Sports Betting provides a significant source of funding to the Sports Industry, allowing the building of new sports facilities, which benefit the community, even though gambling in its various forms, including Sports Betting, is generally regarded as being detrimental to the moral fibre of this rather special and unique Island State.

Likewise, in Switzerland, the home of many International Sports Federations, including the IOC and FIFA, there seems to be an ambivalent attitude to Sports Lotteries and Betting, although the proceeds are used for financing so-called 'good causes' which includes sport. The Federal Lotteries and Commercial Betting Law, which also, incidentally, governs on-line betting, is under revision, which has been in process since 4 April, 2001, but is now temporarily suspended. But any resulting new Law, whenever it appears, is expected to continue the current practise of licensing lottery schemes and commercial betting, which are organised and carried on for the 'public benefit,' which, of course, includes the advancement of sporting activities and facilities in the 26 Swiss Cantons.

In India—another 'BRIC' country with impressive economic growth, despite the world-wide recession—betting on Horse Racing is legal, as it is considered that it is not a game of chance, based on the fact that 'punters' do their research on the horses and the jockeys taking part in the races before placing their bets. As such, it is, therefore, a game of skill.

As for Sports Betting in general, it is arguable that it is not illegal in India, because, most of the States comprising India do not prohibit it through their Legislatures, and also Betting on other sports is also a game of skill. Although the outcome is uncertain, the result of a sports event depends upon the skill of the players/participants. And, in football, for example, a 'punter'—as in Horse Racing—goes on 'form.' In other words a 'punter' studies the form of the players; their statistics in winning games or contributing to the winning of games; the playing conditions; their opponents and their form; and any and all other relevant factors that may well affect the outcome of the game. Of course, there is still an element of luck—chance—involved. So, is Sports Betting in India really illegal? An interesting question and answered in the negative by the contributor of the Chapter on India!

In Brazil—also a 'BRIC' country—the manipulation of sport through, for example, betting is a crime under Brazilian Law, as is gaming and betting generally. Among the exceptions are the Government Lottery and Horse Racing, in which bets can be placed at racecourses, authorised Jockey Club branches and accredited betting stations, by telephone and also online. As regards betting online generally, it is not entirely clear, under Brazilian Law, whether it falls under the general criminal prohibition against gaming and betting, which was enacted in 1946, when there was no Internet and such a medium at that time was inconceivable, and which speaks of a 'space,' which probably should be interpreted as meaning a 'physical' rather than a 'virtual' or 'cyber space.'

In the United Kingdom, there is a long tradition of gambling generally and betting on sport in particular; and gambling has been regulated for some three hundred years. Sports betting is now regulated by the Gambling Act of 2005. This is a highly technical, complicated, sophisticated and comprehensive piece of

legislation, which regulates the different kinds of betting, including 'fixed odds' and 'pool' betting, and many other aspects of gambling and betting and its consequences and effects. There is also a very complex system of licensing arrangements in relation to carrying on the business of betting in the United Kingdom. Likewise, someone who manufactures, supplies, installs or adapts betting software without the required licence commits a criminal offence under the Act; however, it should be noted that, network operators and internet service providers are specifically excluded from this Statutory provision. Interestingly, The Act also creates the specific offence of 'cheating,' which may consist of actual or attempted deception or interference in connection with the betting process or with a real or virtual game, race or other event or process. It is irrelevant whether the offender improves his chances of winning anything or, indeed, wins anything at all! These provisions, of course, are highly relevant to match-fixing and the unlawful manipulation of the outcomes/results of sporting events generally. To guard against this kind of behaviour, and in line with the general adage that 'prevention is better than cure,' in the summer of 2009, a Sports Betting Integrity Panel was set up, on the initiative of the UK Government, with very precise and comprehensive terms of reference.

Finally, in this mini survey of some of the countries covered in this Book, we take a brief look at the legal situation of Sports Betting in New Zealand. There, Sports Betting is conducted by the New Zealand Racing Board, which acts through The Totalisator Agency Board (TAB), which, in turn, liaises with the various National Sporting Organisations, in order to provide on- and off-course betting facilities for the general public. Horse racing was traditionally the most substantial gambling activity in New Zealand, but gradually lotteries, instant kiwi, gaming machines, casinos, dog racing and general Sports Betting have come into play and changed the gambling scene. The TAB is a commercial entity and operates through outlets, the Internet, Phonebet, Touch Tone and a SKYBET channel, devoted, as its name suggests, to betting. Gambling on Sport inevitably involves attempts to 'throw' sports events results, but reasonably effective anti-corruption measures exist in New Zealand to counteract these practices. Nowadays, the ubiquitous Internet and betting on sporting transactions outside New Zealand present serious challenges for the TAB to control.

This Book also includes a fascinating review of Sports Betting under European Union (EU) Law, which, as one might expect, would have something to say on the subject. In fact, as far as the EU is concerned, betting in all its forms, including Sports Betting, is considered to be an economic activity and, as such, is subject to EU law in general and EU Competition Law in particular. In a landmark case handed down by the European Court of Justice (ECJ), lotteries involve the provision of services—not goods—and, as such, are subject to the rules on the freedom of provision of services within the EU Single Market. The fact that the winnings are not secure does not make a lottery a non-economic activity.[4]

[4] See Her Majesty's Customs and Excise v Gerhard Schindler and Jorg Schindler, C-275/92, Judgement of 24 March, 1994, [1994] ECR I- 01039.

As regards the argument put forward in this case that gambling is dangerous and should be prohibited, the ECJ also rejected this contention, holding that, in contrast to other illegal activities, such as illegal drugs, the Policy of the Member States is generally not to prohibit gambling, but rather to monitor its availability to the general public.[5] Furthermore, despite the 'specificity of sport' principle recognised by the EU and enshrined in the Lisbon Treaty,[6] Sports Betting does not enjoy any special favours when it comes to applying the rules of the EU Single Free Market and Competition in relation to Betting generally.

With these brief and general introductory remarks, the reader, whose appetite, I hope, has been suitably whetted, is now invited to read on and enter the complex, fascinating and challenging world of Sports Betting and its Legal Regulation, as discussed and explained in the following Country Chapters of this most interesting and comprehensive Book on such a vital subject for the present and future well-being of the sporting world!

[5] Ibid., para 32.

[6] See Article 165(1) of the Treaty on the Functioning of the European Union (TFEU).

Part I
General Aspects

Chapter 2
The Revolution

Declan Hill

This book is about a revolution. It is a revolution without riots, protests or street demonstrations, but with all its peacefulness, it is a revolution that is fundamentally changing our society. You can see the revolution in the growth of casinos. A generation ago, the only casinos in North America were in Las Vegas or the Caribbean: now they dot the cities and countryside more frequently than power plants. You can see the revolution in the growth of poker. Ten years ago what television executive would have predicted that the sight of five flabby, middle-aged men playing cards would make for high-ratings in prime time? Now you cannot switch on European cable television at any time of day and not watch poker games. You can see the revolution as we watch football matches. Two years ago, few commentators mentioned the betting line on the game, now you can see the live odds on some games superimposed onto the screen. This book is about this revolution. It is about sports gambling and how it is changing our society.

The European government-controlled sports lotteries have been swept up in the revolution. I spoke to one of sports odds compilers for a Scandinavian national lottery. His company offers gamblers the ability to bet on sporting events around Europe. 'The growth in this field has been incredible,' he told me. 'Five years ago, we had 90 per cent of the sports betting market in this country. Now our sports market has grown four times as large, but our share of the market has shrunk to 25 per cent.'

It is the same for the FBI cops working the investigations of the Southern District of New York. It is the place to be if you are a cop in the United States. It is from there that Rudolph Giuliani began to eat into the power of the Five Families

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of the New York mob. It is from there that the Department of Justice investigations into Osama bin Laden were held. And it is from there that the FBI is cracking down on illegal Internet sports gambling in the United States. Special Agent David Velazquez is one of the lead investigators on the frontline against Internet gambling. 'The power of this industry is mind-boggling,' he told me. 'We estimate that the size of the U.S. Internet sports betting industry – so that is including poker as well as sports – at $100 billion a year.'

Velazquez helped put together a case against two Canadian executives who ran an Internet gambling payment company, Neteller, out of an offshore haven on the Isle of Man. The company finances listed in court documents show the power of the revolution. In 2000, Neteller Inc. was a small company that had gross revenues of $289,000 in the United States; by 2006, when it had changed its corporate structure to Neteller PLC, that number had increased by over 58,000 per cent to $169 million. Perhaps more pertinently, the amount processed by the company from all gambling transactions in the entire world had gone from the low millions in 2000 to more than $10.6 billion by 2006. And Neteller was simply one of dozens of companies that helped gamblers pay their debts online.

This revolution is, for the most part, benign: a case of people innocently wagering on their favorite team. Even at UEFA headquarters in Nyon, it is possible to find soccer officials betting on games from their work computers. According to the optimists, it has made fixing of any sports event in the world next to impossible. But listening to the pessimists and the revolution in sports gambling has aided match-fixers in a clear and significant way. I belong, mostly, to the pessimists. In my research I have seen fixers using this revolution in sports gambling to bring sophisticated match corruption to European leagues that have never even dreamed of it.

There has always been corruption in sport. The ancient writer Pausanias described the site of the Olympics built in 776 B.C., outside the stadium was a whole collection of statues to the Gods. They were built with the fines levied on athletes who were caught cheating or fixing at the games. So corruption has had a long history in sport, back at least two-thousand eight-hundred years and that type of corruption will be with us for as long we continue to hold competitive sports. It is simply a part of human nature. However, we of this generation are facing something almost entirely new. It is a form of match-fixing as if someone has taken fixing and injected it with steroids. It is an utterly modern phenomenon and it will destroy sports as we know them.

Here is why. If we take the entire sports gambling world at 100%, most of the forms that Europeans are familiar with are relatively small. The Italian official sports lottery, popular as it is, is a tiny player. Factor in the mighty American market—Las Vegas—it too only has a small share of the total world market. Let us add in the offshore gambling sites in Costa Rica and the Caribbean. Actually, let us also add in the big British gambling companies like Ladbrokes, William Hill and Betfair. We will even throw in the European sports national lotteries, run mostly by governments, that are comparative midgets in terms of sports gambling, but the only way of legally gambling on sports in many European countries. Combine all

of those vastly different legal and illegal organizations and all their billions of Euro that they make in gross turn-over. Combine all of them into a large pot and you only have 30–40% of the total world sports gambling market.

The rest is the Asian market. It is huge. It dwarfs the European and North American markets. And most of it is illegal, run by the equivalent of Al Capone. This is a vast, powerful market. Because much of it is illegal it is difficult to give an accurate estimate of its total size, but the American journal *Foreign Policy* tried to do that in 2006 when it estimated the total size of the Asian gambling market at $450 billion, for comparison, the size of the entire Asian pharmaceutical industry is roughly $100 billion.

What is happening now is that where there were three, now there is one. All the worldwide gambling markets are merging into one vast pool of money and customers: and this market is becoming increasingly dominated by the large Asian market. This vast, illegal gambling market has corrupted sport across the continent of Asia. There is so much corruption in sport there that to an outsider the stories just seem extraordinary. Here are a few examples:

The Chinese soccer league is a national disgrace. Those are the words of Chinese Premier Hu Jintao, who declared in 2009 that there was so much match-fixing in their soccer league that it embarrassed China. We see the same circumstances in the soccer leagues across the region: Vietnam, Hong Kong, Indonesia, Cambodia, Laos, Thailand, Malaysia and Singapore have all faced similar scandals in their own leagues. In Malaysia, the corruption was so bad that a cabinet minister there estimated that seventy percent of the matches in their leagues were corrupted. Seventy percent! That means it was more usual for spectators to watch a corrupted match than a regularly played game.

The list of corruption stories in Asian sports goes on and on. The President of the Indonesian Football Association, the same people who recently tried an unsuccessful bid for the 2022 World Cup, was not just accused of corruption, he was not just charged with corruption, he was not just tried for corruption, but he was convicted and sentenced to 30 months in jail for corruption. However, at no point in that entire process did he ever resign or suspend himself from his post. In fact, he even continued to serve as President of the Indonesian FA and carried out its work from his prison cell. When he got out of prison he went on as the head of the Indonesian FA.

Possibly the best case that indicates the depth of corruption in Asian sport is the story of the South-East Asia Games of 2005. The South-East Asian Games are a kind of mini-Olympics of the region, with competitions in a range of athletics, team sports, etc. In November 2005, a few days before the tournament began, the Vietnamese sports executive in charge of the team held a press conference. At the conference, the Vietnamese journalists expressed concern that their team was not particularly strong and would not win a lot of medals. ‘Don’t worry,’ said the sports executive, ‘It is all fixed.’ He then explained how many medals each national team would get and for which sports. Most of the Vietnamese press corps showed that independence of spirit that makes Communist regimes bastions of freethinking and democracy and did not report the story. However, one lonely AFP

reporter at the press conference did write an article. It went out over the international wires where the Filipino journalists, who as a whole suffer from many problems but timidity is not one of them, splashed it all over their front pages. The Thai Prime Minister at the time, Thaksin Shinawatra, wearily responded when asked about these events at a press conference, that everyone knew that the SEA games were corrupt and they should think about abolishing the games. The Vietnamese government, faced with a barrage of public embarrassment, carefully reviewed the situation and realized what the problem was—the AFP reporter. So they pressured her to rescind her article. She apologized for 'causing national embarrassment' but did not withdraw the substance of her story.

At the end of the SEA Games in December 2005 two things happened. One, many Filipino journalists took great delight in pointing out that the medal tally of the games correlated exactly with the predictions of the Vietnamese sports executive. And two, eight Vietnamese soccer players were arrested for fixing matches with an international gambling ring.

Asian sports fans are not stupid. They know what is going on. They are not happy about all the corruption in their sports, in fact they are very angry. So what are they doing? They are turning their allegiances to teams in other leagues where they think the contests are honest. This is part of the reason why you cannot walk down a street in China and not see three people wearing Manchester United shirts. However, far more importantly, the punters in that vast illegal Asian gambling league are switching their bets from the local soccer leagues, with all the corruption in them, to European leagues. They are betting on all measures of matches from the big, prestigious Champions League, all the way down to tiny games in second division Women's Soccer in the Netherlands.

There are a number of gambling companies who organize monitors to go to matches across Europe. Some of the companies are legal and function perfectly fairly, but some of them are illegal and have no problem torturing and murdering anyone who betrays them. Just ask the relatives of the Chinese 'graduate students'—Kevin Zhen Xing Yang and Cici Xi Zhou. Their mutilated bodies were found in August 2008, in their flat in Newcastle, England, after they decided to make a little profit at the expenses of their gambling employers. When not torturing their former employees, these illegal gambling companies send people to the sidelines of these games where they stand with their mobile phones or laptops reporting back to the gambling market in Shanghai, or Johor Bahru, or Manila. They are not just reporting just on the Series A, or the English Premier League, or La Liga games. In July 2008, in Copenhagen, Denmark, there was the annual Tivoli Cup. The Tivoli Cup is a youth tournament for teams across Denmark aged 11–19. It is a big tournament, but most matches are played in parks and watched by a couple of dozen people, mostly parents. However, that year some of the coaches for the teams found four Chinese gambling monitors reporting on the games back to the gambling market. To repeat, the illegal gambling market in Asia is so powerful that it is profitable for them to monitor games of Danish teenagers playing in the park. To repeat, some of the people running this illegal gambling market are vicious and blood-thirsty enough to torture and kill two of their operatives for double-crossing them.

What are the Asian fixers doing? They too are not stupid and they are trying to do to European leagues what they so successfully did in their own leagues—corrupt them. Now with large amounts of money bet on small European games, the fixers are coming to Europe and forming alliances with local criminals. It is an ideal marriage. The Asian criminals get access to the teams and players; the European criminals get access to the lucrative Asian gambling market.

There has been a major European police investigation motivated, in part, by an earlier book that I wrote *The Fix*. The investigation was launched by the organized crime team of the Federal Police in Bochum, Germany. The detectives listened to thousands of hours of covertly recorded telephone conversations. They placed dozens of people under surveillance and worked tirelessly to try to uncover the true extent of the fixing network. After more than a year of this work, at exactly 6:24 a.m., on a cold November morning in 2009, hundreds of policemen across Europe moved in and arrested dozens of suspects. Over the next few days, they announced the preliminary findings of their work: two hundred suspicious matches across nine countries, and one hundred different players, referees, coaches, league officials, and gangsters were suspected of being involved. Over the ensuing weeks, the number of suspicious games and players involved climbed. It was a new type of globalized corruption that stretched across countries and continents: a fixer living in Germany, allegedly controlled players living in Switzerland, Turkey or Greece, defrauding the illegal gambling markets in Hong Kong and Malaysia, with the help of assistants in London and Holland.

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This book explores many of the issues arising from this revolution. It looks not just at corruption but many more of the legal and social aspects, decisions and choices that have framed the debates around the growth of sports gambling. It is a revolution that will be with our societies for a long time, it is worth reading this book to thoroughly understand it.

Chapter 3
Betting and the Integrity of Sport

David Forrest

Contents

3.1 Background

Most of the sports popular in the world today emerged and developed in the eighteenth and nineteenth centuries. Very quickly they became closely linked with wagering on the outcome of contests. Indeed, the rules of two leading sports, cricket and golf, were codified for the first time, in each case in 1774, by betting interests concerned that disputes on pay-outs should not arise because of ambiguity

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about how events should be conducted (Munting 1996). From then until now, betting has been a pervasive influence on sport. For example, betting companies have become a dominant source of sponsorship in English Premier League football and the famous shirts of Real Madrid are now adorned with the logo of a bookmaker.

All this is unsurprising. Sport provides the product to which gambling relates and sport itself becomes more popular when those following it can add to the excitement from a game by taking a financial stake in its outcome. Sports and bookmakers might then be thought to be natural commercial partners: contemporary sponsorship arrangements clearly have the potential to be advantageous to both sectors. However, in practice, in the past and now, sports governing bodies have, more often than not, displayed antagonism towards betting. The reason is that, from the earliest years of organised sport, they have feared manipulation of contests by those who can then profit from betting on outcomes which are supposed to be uncertain.

Their fears have always been justified to some extent. Fixing of cricket in nineteenth century England was widespread: professional matches were 'affairs of bettings and hedgings and cheatings' (Mitford 1832). Baseball, which subsequently displaced cricket as the dominant sport in the United States, soon encountered similar problems. A magazine article as early as 1874 claimed that 'There is no sport now in vogue in which so much fraud prevails as in baseball. Any professional team will throw a game if there is money' (cited in Cook 2005). Fixing has even contaminated the very highest level of competition in these two sports, for example the World Series of Baseball in 1920 and the South Africa–England cricket series in 2000. Of course, other sports have experienced similar scandals, as, for example, in horse racing, football, tennis and snooker.

Manipulation of sports events for the sake of betting gain has therefore been a problem since modern sports first emerged. And yet the level of anxiety has clearly increased in just the last few years. Sports governing bodies have commissioned major reports on the issues involved (Forrest et al. 2008a, Gunn and Rees 2008). The International Olympic Committee has introduced a requirement for competitors, from the Beijing Games on, to sign a declaration that they will not be involved in betting. The organisation heading football in Europe (UEFA) has introduced a sophisticated system for monitoring betting markets on matches under its or its members' jurisdiction. The United Kingdom government has set out formal policy requiring sports to defend themselves against fixers (Department for Culture, Media and Sports 2010). All this interest and activity reflects a consensus that the potential for corruption has reached a new plane. This chapter asks whether this consensus is likely to be valid, why attempts to manipulate sports events might have become more common and whether legislators, regulators and the sports and betting industries themselves are in a position to be able to do anything to contain the level of malpractice.

3.2 Fixing as a Crime

To organise our thoughts in trying to answer these questions, we adopt a theoretical framework suggested by Forrest and Simmons 2003 and adapted from the economic model of crime (Erlisch 1996). But in what sense is match fixing a crime?

In a general and important sense, manipulation of sport could be regarded as a *cultural crime*. Society loses something when sport is violated because its values are supposed to represent ideals and its followers are often indulging in dreams. The magic may be lost if events turn out to be a sham.

More prosaically, fixing can be regarded as a *financial crime*. Betting markets are essentially financial markets where participants trade state-contingent assets (for example, a bookmaker sells a betting slip that promises that he will pay the bearer fifty euros if a named outcome occurs and zero otherwise). Traders, i.e. bookmakers or bettors, decide whether to undertake such a transaction based on the information set available to them. If fixing takes place, they have been misled, for example the betting slip has a positive value in their judgement but, in reality, it is worth nothing if the athletes have already entered into an arrangement to bring about a contrary outcome. This is clearly fraud in which money is expropriated from bookmakers and/or other bettors to the instigators of the fix. It is criminal in the same way as an arsonist is guilty of a crime when he burns down his house after first insuring it. Legislation is normally adequate for police and judicial systems to make appropriate responses if evidence is found that athletes have in fact agreed to a fix: the instigators and the athletes have entered into a conspiracy to defraud.

A more ambiguous situation arises where athletes or others involved in sport act on or sell privileged information that will enable betting gain. For example, a coach may know that a tennis player is carrying an injury and this information may then be used to make gains at the expense of bookmakers and/or other bettors. This is a form of *insider trading* and would be regarded as criminal in many jurisdictions if it took place in financial markets other than betting (for example, the stock market). In the world of sport it may commonly be regarded as less serious than fixing to the extent that events on the field unfold as they would have done anyway. But there are still financial losers, making it a candidate for treatment as a financial crime. Further, detection of fixing itself may be compromised if insider trading is tolerated. For example, a coach 'rests' key players in a minor fixture; there are suspicious betting patterns ahead of his team losing; he justifies to investigators that he has rested players to make them less tired for the next fixture and news of this must have leaked out; it is impossible for the investigators to know if the story in fact masks a conspiracy to field a weak team solely to enable betting gain. For these reasons, both legislation and the rules of sports are likely to require greater clarity over whether insider trading is potentially a criminal/disciplinary offence if integrity risks are properly to be addressed.

Let us return to fixing proper. An athlete may of course fix for direct personal betting gain or else he may be paid by a bookmaker (as in the South African

cricket case, cited above, where the paymaster was an Indian illegal bookmaker). However, in most contemporary high profile cases, the instigator of the crime has been a syndicate of bettors (sometimes linked to organised crime). Those who carry out the crime in return for payment from the syndicate may be players, referees or coaches. By way of illustration, a footballer may be paid to get himself sent off (there are active markets on the number of cards in a match), a basketball referee might, as actually happened in the National Basketball Association, be paid to be lenient on allowing points to stand (there is an active market on total points scored in a match) or a coach might be paid to bring on weak players (in some American sports, betting is usually on margins of victory and, once a team has a safe lead, it can afford to slacken off).

What determines whether an athlete (or a referee or a coach) will accept such propositions from betting syndicates? Contemporary economic theory usually analyses choice in any sphere of life from the starting point of assuming that the decision will depend on the individual comparing *expected benefit* (in our case, from agreeing to fix) with *expected cost*.

The expected benefit (B) for a participant agreeing to fix is pecuniary and equal to the size of the bribe multiplied by the probability that the fix will be successful (the payment is likely to be paid conditional on success; not all fixes will be successful because the athlete cannot control what other players and officials do).

Forrest and Simmons 2003 proposed that the expected cost from the athlete deciding to take part in the crime would have three components. First, the expected pecuniary cost, F (for example, loss of prize money through 'throwing' a game or loss of future earnings from a suspension from the sport, the latter weighted of course by the probability of being caught). Second, the value the athlete places on any loss of glory and reputation (R) associated with the underperformance a fix normally requires. Third, the value to the athlete of the moral unease and shame he or she may experience from betraying the sport (C). All these will, of course, vary from player to player and determine which and how many players find it worthwhile to accept bribes: economic theory presumes that the opportunity to commit the crime will be accepted by any individual for whom expected benefit (B) exceeds expected cost ($F + R + C$).

There is nothing startling or profound in the way the model represents the world; but it provides a useful framework for understanding where integrity risks are highest and how they vary over time. Take each component in turn.

Often B is likely to be higher in individual than in team sports because the money available from the syndicate can all be offered to one player rather than several and because that individual has a strong chance of being able to succeed in generating the required outcome. In a general sense this helps us to understand why disciplines like boxing have experienced scandals more frequently than a complex, interactive sport like football where it is hard for particular players to manipulate outcomes.

F will reflect athletes' wage levels. Where these are high, as in the elite levels of many contemporary sports, few athletes are likely to agree to fix because the loss of income from a possible lifetime ban (if caught) will be dominant in the

calculus. But where they are low, many athletes may find it worthwhile. In a general sense this helps us to understand why the sector with the largest number of scandals in its recent history is American college sport. Here, athletes are paid nothing at all and yet betting interest (and therefore potential bribes) is sometimes high. Another risk factor for college sport is that, at least in American football and basketball, the dominant mode of betting is on whether the favourite will or will not win by a specified minimum number of points. The value of *R* is likely to be low for those in a favoured team that fails to 'beat the spread,' so long as it still wins and its championship chances are therefore enhanced. Accepting bribes to hold back on winning margin is known as 'point shaving' and several criminal prosecutions have proven the reality of this species of manipulation. Wolfers 2005 employed forensic statistics to suggest that the practice is fairly widespread in college basketball.

C is the cost from feeling guilt and shame because of participation in cheating. Corruption appears likely to be a greater risk in settings where players have a grievance and can therefore convince themselves that it is acceptable not to play their best. Some of the most prominent cases of fixing have been associated with just this situation. From the case of fixing by members of the Louisville Grays baseball team in 1877 to the current alleged manipulation in Chinese football, a common feature has been clubs falling behind with paying the players' wages.

The examples above illustrate that the economic model of crime, applied to fixing, can help us to understand where risks of occurrence may be highest. But it can also help to understand why variation occurs over time. Here, we are interested in whether and how far the risk to sport integrity may have grown since the Millennium.

3.3 The Contemporary Betting Market

The sports betting environment has been transformed over the last decade, principally by technological developments. Five major changes may be identified in the development of sports betting over this time period

3.3.1 Growth in Liquidity

Spectacular growth in the amounts wagered on sports events has marked the last ten years. Probably a major factor here is the increasing availability of even relatively minor sports events on television or via the internet. This stimulates interest as part of the thrill of betting lies in following an event in which the bettor has effectively become a stakeholder.

Of course, it is well known that amounts staked on events such as English Premier League football or cricket internationals are huge, particularly in Asia; but it is probably of more concern that there are sufficiently liquid markets on matches

in lower tier football leagues (such as those of Belgium and Portugal) for it to have become routine for (usually) Asian bookmakers to accept individual wagers of tens of thousands of euros.

Liquidity is the greatest friend of the fixer as it enables large amounts of money to be fed into the market without driving the odds inwards against himself and without attracting undue attention. Large bets enable illicit gains to be large and so bribes to players to be large, certainly relative to the wages they receive in minor leagues.

3.3.2 Increase in Competitiveness

The new widespread access to trading on the internet has shifted the balance of market power to bettors, away from bookmakers. Odds comparison services enable contemporary bettors to seek out the best odds available across jurisdictions throughout the world. Previously they may have had to accept poor value because of high domestic taxation of gambling or because they had to purchase from an (often state or state-sponsored) monopolist; but now paying such explicit or implicit taxes has effectively become optional for most bettors, given that they can trade easily on international markets. Inevitably, governments have been compelled to lower taxes[1] and bookmaker margins have been driven down.[2] Of course, any reduction in transactions costs makes fixing more profitable and the bribes available would be expected to rise.

A related point is that consumer power and competitive pressure have also induced bookmakers to become less restrictive in terms of the bets they will accept. For example, in the past, they were reluctant to accept wagers on single football matches, instead insisting on combination bets across three or more games. This made investment in arranging to fix either costly or uncertain. Given an ability to 'arrange' one result, a betting syndicate would have to place multiple bets on at least two other fixtures to cover all the possible combinations of outcomes, eroding or eliminating its potential profit, or else take risks in covering only some of the possible combinations. Steady consumer demand to place single bets eliminated these bookmaker rules and it is now possible to bet on just one match, even in minor and semi-professional leagues where players may be cheap to corrupt.

3.3.3 Increase in Live Betting

A strong trend in sports betting, facilitated by the emergence of new technology for placing bets electronically, is towards wagering markets still being active after the start of, indeed throughout, the events to which they relate. For example, live

[1] Paton et al. 2002.

[2] Deschamps and Gergaud 2007.

(sometimes termed in-play) betting appears more popular than pre-match betting in tennis and there is also substantial interest in the case of televised football and cricket fixtures. That trade continues during the match, with the odds responding to the incidents on the field, creates entirely new opportunities for manipulation by betting interests. Forrest et al. 2008a and Mitford 1832 illustrate this with an example from tennis. Suppose a syndicate agrees with a player that he should lose the first set (the same principle would apply, for example, in darts and snooker where the match is similarly divided into discrete units). Choosing appropriate levels of stake, the syndicate could then bet against the player before the match and for the player after he had duly lost the first set, exploiting the inevitable lengthening of his odds to lock itself into a guaranteed profit regardless of the final result. Probably the player targeted by the syndicate will be more likely to agree to such an approach compared with a proposition that he should lose the match. In terms of the economic model, his expected cost will be lower since there is still the possibility of his ending up the winner, with prize money and reputation for prowess intact. Further, there is a culture of 'tanking' in tennis whereby, because the schedule of tournaments is unrelenting in-season, players will sometimes opt to give less than maximum effort for a while, effectively resting on the job. Underperformance might therefore not be suspicious (lowering the probability of detection) and players might not interpret easing up in one set as serious malpractice (lowering the cost of the 'unease and shame' component in the calculus). Given these considerations and adequately liquidity in the in-play market, syndicates may therefore find it more profitable to try to fix a set than fix a match.

3.3.4 Increase in Proposition Betting

'Proposition bets' are those where the subject is some aspect, rather than the final outcome, of a match. Some of these are merely novelty bets (for example, how many cricketers will take to the field in sunglasses) and are no cause for concern because bookmakers invariably place very low limits on stakes. Some were more serious but were withdrawn quite quickly because of the ease with which they could be manipulated (an example was the time of the first throw-in in football matches). Others, however, have survived, notwithstanding their apparent ease of fixing, because of the strength of bettor demand. Thus popular and liquid markets exist on how many red and yellow cards will be awarded in a football game or how many runs a named player will make in a cricket international or how many total points will be scored in a basketball match. Suspicions have on occasions been aroused in respect of each of these examples and indeed it was the under/over market on NBA basketball (whether total points from the two teams will be greater or less than a named figure) that was the focus of a celebrated criminal case, at the end of which a referee was jailed for fixing, in 2007. Similarly, evidence emerged in the investigation into the Cronje Affair (events surrounding fixing in international cricket in 2000) that batsmen had been paid not to reach a certain score and bowlers paid to give away in excess of a certain number of runs.

Proposition bets present dangers principally because they make team sports more like individual sports in terms of manipulation being easy to carry out with the cooperation of only one player or official (who can therefore be offered the whole bribe rather than it being spread across several individuals). Amongst our examples, the cricket player needs to play just one misjudged shot to guarantee a low individual score and the number of disciplinary cards in a football match is obviously heavily influenced by the referee. It is to be noted here that the agent of a syndicate does not need to be successful every time: it may prove hard to manufacture sufficient red and yellow cards in a particular match but, so long as the referee can normally execute his instructions, betting by the syndicate will be profitable over time. Of course, referees are often much less well paid than players and so there are particular risks when liquid markets develop for propositions related to events on which a referee has significant influence. Cases of corrupt officials have emerged in Czech, Chinese and German football.

3.3.5 Emergence of Betting Exchanges

A disproportionate share of increased betting volumes over the last decade has been claimed by a new alternative to bookmakers, the betting exchange (of which by far the market leader is Betfair). This was again enabled by the development of the internet and is essentially person-to-person betting on the model of e-Bay. The exchange sets up a market such as 'outcome x will occur.' Gamblers can then make offers to 'back' or 'lay' outcome x, indicating to what level of stake they are willing to trade and at what odds. Offers to bet that x will occur (backing) and offers to accept bets that x will occur (laying) are then matched electronically, with the Exchange claiming a commission from the successful party in each transaction. Commissions are sufficiently low so that betting is typically financially more attractive than at bookmakers, one reason for the rapid growth in the sector.

Bookmakers, of course, claim that the introduction of exchanges introduced a serious threat to the integrity of sport. This is partly true because it is the exchanges that have popularised live betting and proposition bets. Mainly though, concern centres on the fact that, by offering to 'lay,' any individual can become a bookmaker, and without the need for a licence. In multi-outcome events, this is likely to introduce new risks (although exchanges would point out that all transactions generate electronic records that aid both detection and investigation of cases of fraud).

Consider a horse race with ten runners. A trainer or a betting syndicate knows with certainty that a particular horse cannot win because it has been fed vodka. If only bookmaker betting is available, the profit to be had from this knowledge is limited since it is not possible to bet that the horse will lose: there may be a number of possible alternative winners and wagers have to be placed on nine of them to be sure of a profit (if one is available at all after placing multiple bets). However, access to a betting exchange makes the information very valuable since,

by 'laying,' a bet is effectively made that the horse will lose. Money is won from accepting bets from 'backers' of the horse who think it will win because they are ignorant of the fix.

The Chief Executive Officer of the largest UK bookmaker, Ladbrokes speculated that the opportunity to 'lay' had been leading to one race per day being subject to a fix in Great Britain. And indeed some cases of 'laying' by trainers have come to light. But, although most attention has focussed on horse racing, there is also room for concern in team sports where multiple outcomes are possible in some proposition betting markets. For example, a popular bet in football is on which player will score the first goal in a match. Plainly, it is hard to arrange for a particular player to score the goal but it is relatively easy to ensure that that player will fail to score. The exchanges allow a profit to be made if a syndicate 'lays' one individual (one of the strikers) who it knows is going to shoot wide if any scoring opportunity presents itself. Again, the focus on a single player both increases the bribe (since it is not spread across several players) and reduces detection risk (since multiple players do not have to be approached).

3.4 How Serious are the Risks?

The casual impression is that news stories concerning fixing are becoming more frequent than in the past. For example, at the time of writing (June, 2010), major police investigations are in progress over alleged fixing in the football leagues of China, Switzerland, Turkey and several other European countries. Arrests have been made of players alleged to have fixed events in English domestic cricket. And newspaper accusations have been made against a recent snooker world champion concerning his supposed willingness to lose sets for payment. The frequency of media stories of this nature probably has no parallel in the past but, even if accusations in such cases were to prove true, this does not necessarily demonstrate that there is more fixing going on. As with all data on crime, trends could be driven more by variation in rates of reporting and detection than by changes in incidence.

On the other hand, the analysis above indicates that growth and innovation in the contemporary betting market would lead one to *expect* more fixing: every development in the list appears to raise incentives for fixes to occur, as revealed by employment of the economic framework. It would therefore appear proper and prudent for governing bodies and other stakeholders to consider more active policies to protect the integrity of sport.

Where might the threats to integrity be greatest? Liquidity is highest in markets on football, tennis and cricket, which makes these sports very susceptible. But liquidity in the market also has to be judged relative to wages in the sport: high liquidity increases the offer a syndicate can make to a player but whether this compensates for potential loss of wage income should the player be exposed will vary with the situation. In football particularly, liquidity can be high at levels of the sport where remuneration is relatively low and therefore its governing bodies

would be ill advised to focus only on matches in the highest level competitions. Similarly, sports such as darts, with less betting interest, could still generate offers from syndicates that are attractive in the context of low levels of prize money.

In all disciplines, a combination of relatively high liquidity and an event that has little significance for the players in terms of either prize money or reputation is likely to pose high risk. The expected benefit of fixing for the player is still high if there is a thick betting market but the expected cost will be low. This applies to, for example, 'dead rubbers' in cricket (a situation where the series winner is already decided), end of season matches between mid-table teams in football, early round matches in football and tennis tournaments where a team or player has little hope of progress to an advanced stage in the competition, and exhibition matches in snooker.

All these examples in fact correspond to recent high profile instances of corruption being either alleged or proven.

Considering the actors in sport, veteran players could present increased risk since, for them, there is less to lose in terms of future earnings. In the same way, referees may typically be cheap to 'buy' and, given their ability to influence events in, for example, football and cricket, are an obvious target for criminal syndicates, especially since the growth of proposition markets on for instance number of cards or number of runs by a named batsman. It is a matter for concern that, during two recent prosecutions relating to referee corruption in the Bundesliga and the National Basketball Association, the convicted referees named other officials in their respective leagues who were claimed also to be in the pay of syndicates. This suggests that the cases that came to light may not represent merely isolated examples of referee-led manipulation.

3.5 The Policy Response

Given the real grounds for concern, how should the problem of betting-related corruption be addressed? One point of consensus is that policy can hope to be effective only with the sports and betting industries each taking a measure of responsibility (and doing so with adequate support from legislators and the police and judicial systems). For example, detecting and proving match fixing is likely to involve identification and reporting of suspicious betting patterns and then evaluating whether these corresponded to particular patterns of events on the field. Thus cooperation between bookmakers and sports governing bodies is obviously desirable and the government[3] may see its role primarily as providing a framework which compels the parties to work together. In fact, the United Kingdom's Gambling Act 2005 obliges betting licence holders to inform governing bodies where irregularities are observed (though there is scope for setting out guidelines

[3] Department for Culture, Media and Sport 2010.

to ensure consistency across operators about when to report). On the other hand, Forrest et al. 2008b note that betting markets are global and corrupt money may be placed in any part of the world, implying that rigorous monitoring of betting markets in individual jurisdictions is likely to be less than fully effective. This necessarily puts a disproportionate onus on sports themselves to tackle corruption in the same way that they have evolved strong policies to attack doping.

In fact, proposals for action by sport (and governments) have reflected the same emphasis as in anti-doping policy on, first, policing (which includes disruption of supply, detection of use, and punishment of offenders) and, second, on education, particularly of young players.

Physical measures to disrupt criminal activity and lines of communication have been introduced in a number of sports. For example, telephones have been barred from dressing room areas in tennis and the National Basketball Association has introduced late assignment of referees to matches (the latter reduces the time available for syndicates to feed money into the market on a game officiated by a referee in their pay). Players are increasingly required by the rules of sport to report any approach or bribe from betting interests. An example of another potential measure would be random auditing of the finances of players and officials to deter any association with betting.

Regarding detection, sophisticated monitoring of betting markets has been introduced in a few sports, for example electronic searches are used to build up, for football matches in Europe, a picture of odds movements throughout the world. Unusual patterns can be detected and local governing bodies alerted. Such systems are operated by the football authorities themselves but also by two pan-European consortia of bookmakers (representing state and privately owned operators respectively). Appropriate technology can search for, for example, instances where the same players, teams or officials feature repeatedly in such alerts. Specialist investigatory bodies have been established, for example in cricket and tennis, to pursue such cases where corruption is suspected.

The rationale for the emphasis on education is that young players in particular may be unaware of the personal risks they face from involvement with bookmakers or betting syndicates. An example is that gangs may seek to entrap a young player in the hope that he will provide a vehicle for fixing throughout his career. This was vividly illustrated in the South African cricket case where the national team captain had been paid early in his career for ensuring his team would lose a particular match. Presumably Cronje considered the expected cost of accepting the bribe to be low, since the match was already all but lost at the time of his being approached. However, he may not have anticipated that his paymasters would subsequently ensure his delivery of more serious fixes by using the threat of exposure of earlier offences. Formal education programmes in some sports increase awareness of such dangers and also clarify for players what limitations the rules of their sport impose on their gambling and what penalties they face for transgression. They may also cover problem gambling issues since there is a history of sports people being induced to fix to pay off gambling debts.

All these policies are likely to be useful and to offer means of containing the extent of fixing. On the other hand, consideration needs to be given to the fact that closely parallel measures against doping have now been in place for a long time and have failed to eradicate the problem. The reason is that, while the governing bodies may take pro-active measures to keep sports drugs free, technology repeatedly provides new ways of evading the controls and, driven by increasing rewards for winning, some participants continue to have a demand for performance enhancers at all levels of competition from the Olympic Games to high school athletics in the United States. For gambling-related corruption, broadly the same set of considerations is likely to apply, suggesting that, in addition to policing and education, policy should incorporate measures to reduce athletes'/officials' desire and willingness to cheat.

The framework adopted above, from the economic model of crime, presents a number of ways of modifying incentives faced by individuals deciding whether or not to agree to fix. Of course, policing does have a role here since increased probability of detection increases the expected cost of fixing. However, more subtle measures might, for example, include rebalancing of prize money so that there is more paid for success in early rounds of knock-out tournaments and more for winning the last match in a cricket series. In the case of referees, an obvious precautionary measure would be to increase their pay. In return, they might be expected to accept that they will lose their positions if identified as having performed poorly. This is desirable to the extent that it is hard to prove that mistakes are deliberate and so all incompetents will have to be dismissed to be confident of getting rid of the fixers.

It is clear that governing bodies of several sports (and indeed the International Olympic Committee) have introduced policies such as those noted above that indicate that they are now taking betting-related offences as seriously as doping. But perhaps there is complacency in some important sports, such as badminton and golf, which have not traditionally attracted high volume betting. The increased availability of sports events on satellite television and the internet is creating new audiences for these sports and it would be prudent for them now to anticipate the emergence of significant betting markets with its attendant corruption risks. In the United Kingdom, the Government[4] has given all sports until 2011 to meet the minimum standards for protecting themselves. These include rewriting rules to forbid athletes and other insiders from betting on events in which they are involved and from selling or benefiting from privileged information to which they have access. Each sport must also establish credible units for investigating suspected corruption. The role of gambling regulators will include: providing a specialist investigatory unit for gathering intelligence; setting up a whistle blowers' helpline; and providing for greater clarity on the dividing line between cases which should be dealt with by the sport through its disciplinary procedures and those which should be dealt with in the judicial system.

[4] Department for Culture, Media and Sport 2010.

The policies sport should ideally adopt for itself or at the behest of government would no doubt be costly. The question arises of who should pay the costs. Naturally, sports will argue that the gambling sector generates the problems and so should be obliged to pay through, say, hypothecated gambling privilege taxes. The betting industry in any jurisdiction will feel aggrieved to the extent that tainted money associated with fixing, although related to domestic sports events, might pass entirely through extra-territorial jurisdictions where gambling is less bound by regulation and considerations of social responsibility. Practically, of course, national bookmakers have limited potential to pass on taxes and levies given the intensity of international competition. In the end, while there is likely to be a consensus on how to handle betting-related manipulation of sport, the question of who pays will be contentious and ultimately must be settled through a political decision.

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Chapter 4
European Union Law, Gambling, and Sport Betting: European Court of Justice Jurisprudence, Member States Case Law, and Policy

Anastasios Kaburakis

It is the mark of an inexperienced man not to believe in luck.
—Joseph Conrad

Fortune knocks at every man's door once in a lifetime, but in a good many cases the man is in a neighbouring saloon and does not hear her.
—Mark Twain

A number of moralists condemn lotteries and refuse to see anything noble in the passion of the ordinary gambler. They judge gambling as some atheists judge religion, by its excesses.
—Charles Lamb, Essays of Elia (1832)

A dollar won is twice as sweet as a dollar earned.
—Paul Newman, The Color of Money

It can be argued that man's instinct to gamble is the only reason he is still not a monkey up in the trees.
—Mario Puzo, Inside Las Vegas

Partly adapted from Kaburakis 2009.

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Contents

4.1 Introduction

"Rien ne va Plus" these words by Advocate General R. J. Colomer at the outset of his *Placanica* opinion left no doubts: it was time the highest court in Europe did its job, and provided clarifications for what had become a remarkably obfuscated environment for the gambling and sport betting industry. His prophetic words resonated with all involved stakeholders in ensuing years.

Carmen Media and *Engelmann* are the latest in a series of many cases handled by the European Court of Justice (ECJ) on matters dealing with gambling, sport betting practises, and member states' traditionally established monopolies. EU Law application on these cases has been problematic and fairly inconsistent among national courts and the ECJ itself. In an era where online gaming, in particular, is rapidly growing into a larger share of the gambling industry, and considering the ease of access and multitude of products, services, and transactions involved, the ECJ, European Commission (EC), and national governments are toiling over the most prudent, balanced, and practical approach and policy directions for the future of the industry in Europe. In this process, the burgeoning industry has been able to lobby and cooperate with political, regulatory, and key legal actors in order to promote interests of the rapidly expanding number of gaming providers. As per European Gaming and Betting Association's (EGBA's) rich vault of resources,[1] there has been an extensive educational effort about the industry's new players, private operators competing with traditionally established (usually) state-actors or state-supported and/or affiliated exclusive rights holders and monopolies maintained by European state governments. This has been a 'myth-busting' exercise,[2]

[1] http://www.egba.eu/en

[2] http://www.egba.eu/en/about/mythbusting

as well as a profound and elaborate research effort on the part of the industry's private gaming sector, considering how deeply ingrained certain conceptions of gambling and betting have been for centuries, i.e. that gambling is morally reprehensible, that gambling is intimately tied to corruption, fraud, money laundering, criminal elements of society, and organised crime networks reaping most of the revenue from it, as opposed to regulated gaming and betting on sport for the benefit of the state, generating revenue which will automatically flow back into the grass roots and the game, on which the betting activity is based. It is reported that both state-run gambling monopolies and private operators are experiencing approximately a 70% growth between 2008 and 2012, and given the global recession, the fact this number is considered slow progress for industry standards is astounding.[3]

In an eerie coincidence, these most recent ECJ decisions were reached on the 1-year anniversary of the *Liga Portuguesa* judgment by the ECJ's Grand Chamber, September 8th 2009, a day that delivered a significant blow to the private gaming sector, until *Carmen Media*, decided on September 8th, 2010. *Carmen Media* and *Engelmann* followed a group of other ECJ judgments in June and July 2010, in great part confirming dicta in *Liga Portuguesa* on challenges that dealt with monopolies and restrictive policies in the Netherlands and Sweden (*Betfair* and *Ladbrokes*; *Otto Sjöberg and Anders Gerdin v. Swedish State* respectively). This timing was 3 years removed from the *Placanica* decision by the ECJ, which was then believed to be strong confirmation that there is a clear turn towards liberalisation of the gambling sector in Europe, and against preservation of state monopolies; indeed, as will be elaborated below, *Placanica* followed the expected progress of legal theory and EU Law application, emanating from several cases that led to *Placanica* at the time. The most recent cases of the busy 2010 docket came 18 years following *Schindler*, the first case the ECJ had the opportunity to hear and decide on related issues.

What have we learnt in the process of these two decades of litigation and policy challenges? Has there truly been a dramatic shift in the way European institutions, courts, legislators, and citizens approach the exciting, yet 'immoral' subject of gambling? Can sport betting enterprises now freely roam the services market of the European Union? Can member states still run lotteries and betting monopolies in exclusion of competitors, embracing the revenue accrued, chastising the 'corrupt' competition, and justify the means under EU Law? Is the gambling market yet another 'failed' aspect of European integration, destined to be endlessly epitomised by procedural entanglement, lack of political will, conflicts between member states, and inability or reluctance of European collective bodies to assume initiatives and resolve these conflicts, promoting the European Treaty's purposes as revisited by the Treaty of Lisbon? Or could it just be that gambling, twisted as it may be, is in the forefront of a common market realisation? These and other questions are entertained by this chapter, one that aspires to unveil certain

[3] http://www.egba.eu/en/facts/marketreality

important concepts from past legal and policy developments in this exhilarating and controversial field. Additionally, this investigation prepares the reader for the ensuing chapters in this valuable contribution and volume of collected works by summarising the important jurisprudence that led to the reality of a regulated and competitive 2011 market.

To answer the questions posed above, this chapter will focus on the legal framework of gambling and sport betting in the European Union, the application of EU Law in what has become a very competitive and lucrative sport betting industry, the evolution of ECJ jurisprudence on the matter, and the ramifications for future policy developments in this controversial sector of EU business.

Putting things in perspective, the Study of Gambling Services in the Internal Market of the European Union,[4] composed by the Swiss Institute for Comparative Law (with the significant strategic approach of outsourcing to the Salford Business School Centre for the Study of Gambling[5]: at the request of the EC, reveals interesting findings. For example, whereas in the US the total revenue from gambling (Gross Gaming Revenue or GGR, as used in the study) was calculated at approximately €60.7 billion for 2003, the respective GGR for the EU was €51.5 billion. Interestingly, considering the regulatory differences between the US and the EU, US betting services, including on-track and off-track betting on horses and sports, amounted to only 5% of US GGR, while in the EU, the comparable statistic was 17% of the EU total.[6] This study extended for more than 1,500 pages, and concluded an all-encompassing research effort spanning the course of 2 years preceding its publication in the Summer of 2006. The timing could not have been more opportune, as the ECJ decision in *Gambelli*[7] was already available and under discussion, while the deliberations over *Placanica* (C-338/04) were under way, after the Advocate General's bold and drastic recommendations, which will be elaborated below.

This chapter commences with fundamental legal principles involved in the governance of the EU gambling and sport betting industry, such as the principle of subsidiarity and pertinent articles from the Treaty of Lisbon (amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01) and the Treaty on the functioning of the EU, 9.5.2008, C-115/47 et seq. (hereinafter: EC Treaty). The examination will continue with ECJ case law on the matter, leading to the important decisions in *Gambelli*, *Lindman*, *Placanica, Italian Republic, Liga Portuguesa, Betfair, Ladbrokes, Carmen Media, and Engelmann,* which encompassed a legal maelstrom that needs to be investigated for future national courts' application. In addition, the chapter briefly examines the contribution of the European Ombudsman in regard to complaints from adversely affected sport betting operators against the EC's handling of such cases, combined

[4] http://ec.europa.eu/internal_market/services/gambling_en.htm

[5] http://www.gamblingstudies.salford.ac.uk/consultancies.php

[6] Swiss Institute of Comparative Law 2006, p. 37.

[7] C-243/01.

with recent policy developments and member states' case law, the controversy about the Services' Directive, and the EC inquiries into restrictive practises of EU member states (MS). Finally, an analysis of the present situation in EU gambling and sport betting after the recent ECJ decisions will be attempted, via scenarios from primary (national MS practises, policies, and case law) and secondary[8] research.

4.2 Fundamental Legal Principles and the Rule of EU Law

Before any substantive analysis of EC Treaty provisions, it is useful to note the important procedural point of the principle of subsidiarity (currently Treaty of Lisbon Article 3b, formerly EC Treaty Article 5). In essence, the EC, as the executive arm of the EU, will act and intervene towards a resolution where the objectives pursued can be better attained at the Community level. On the other hand, there will be no action and intervention when such objectives can be satisfactorily attained by the MS, acting individually. On the matter of gambling, one notes the important decision reached during the UK presidency of 1992 and the Edinburgh European Council meetings; gambling was considered unsuitable for Community legislation and was thus entrusted upon national regulations.[9]

Considering traditional practises of gambling and sport betting being available to European citizens, but only through very controlled means by MS governments, Lisbon Treaty and EC Treaty provisions that are applicable in this examination are (*note that in this section the new Treaties' articles are utilised for future reference; however, for consistency purposes, in the ensuing ECJ jurisprudence analysis, the former Article numbers are used, as per official ECJ decisions' records*):

- Lisbon Treaty Article 3b, para 3: '…in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level…'
- EC Treaty Article 49 (formerly 43): '…restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms…'

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[8] Swiss Institute of Comparative Law 2006; EGBA 2010; GamingLaw.eu 2010.

[9] http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/92/8&format=HTML&aged=1&language=EN&guiLanguage=en, Annex 2, Sect. 3, para 1.

- Article 56 (formerly 49): '…restrictions on freedom to provide services… shall be prohibited…'

Wisely, however, the EC Treaty further forecasts:

- Article 61 (formerly 54): 'As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.'

For reference, the reader may wish to also keep in mind the EC Treaty provisions on competition (Articles 101–109, formerly 81–89), especially the ones on restriction or distortion of competition (Article 101, formerly 81) and abuse of a dominant position (Article 102, formerly 82). Engaging in an elaborate analysis of how EC Treaty Competition provisions may apply to MS gambling and sport betting monopolisation practises goes beyond the scope of this manuscript. However, for more discussion on such matters and a comparative analysis between US Antitrust Law and EU Competition Law refer to prior samples of this research stream.[10]

This manuscript also focuses on the procedural aspect of the issues dealt before the ECJ. From the ensuing analysis, certain steps are identified and could be posed as tests for plaintiffs and defendants in this sector wishing to meet their burden of proof:

- A first step is to confirm the jurisdiction of the ECJ. This could be problematic considering national courts have the first and most likely the last say in similar cases; when in doubt, the ECJ refers matters to the national courts.[11]
- Another precondition is to test whether precedent (from ECJ case law) is applicable to the industry at hand (e.g. are lotteries and sport betting regulations substantially similar for the purposes of ECJ examination?)[12]
- An immediate next step is to identify the section and principle of EU Law involved (e.g. freedom of establishment, freedom to provide services, principle of proportionality, etc).[13]
- After focusing on the legal elements of the case, the court will attempt to first deliberate on whether the challenged regulation, restrictive policy, etc is indeed a violation of the EC Treaty provisions. In a case (such as *Gambelli*) where more than one sections of the EC Treaty are examined, the court would progressively test the regulations against each one.[14]

[10] Kaburakis 2009a; Kaburakis 2008a, b; Kaburakis and Lawrence 2007.

[11] 338/04, paras 27, 73.

[12] 275/92, para 60; 67/98, para 19.

[13] 243/01, para 25.

[14] 243/01, para 45; 42/02, para 20; 338/04, para 42.

- Once the policy is found in violation of the EC Treaty, the most elaborate and puzzling part of the analysis in these cases commences. In order for the restrictions to be deemed justifiable, they need to be:
  - applied without distinction, in a non-discriminatory manner[15]
  - reasonable due to overriding reasons and imperative requirements the state advocates (e.g. public policy, security, health, consumer protection, social order, prevention of fraud and crime; note that state fortification via taxation or redistribution of the revenue accrued to other state interests alone would not suffice)[16]
  - suitable for achieving the objective which they pursue (e.g. limiting betting activities in a consistent and systematic manner)[17]
  - resulting in a genuine diminution of gambling opportunities (therein the inherent conflict between state-run lotteries and betting monopolies and contradictory restrictive practises against independent competitors)[18]
  - supported by statistical or other evidence, demonstrating the gravity of risks connected to participation in (foreign competition-sponsored) gambling, or establishing the causal relationship between the participation and the risks involved[19]
  - within what is necessary and not going beyond that point, in order to attain the objective pursued (thus needing comparative analysis to determine whether less restrictive means would be available as equally effective alternatives, i.e. reconsidering criminal prosecution, checking the status of registration, and the financial history of a prospective betting operator licenced in another jurisdiction).[20]

4.3 European Court of Justice Application of EU Law

4.3.1 Pre-Gambelli

The ECJ dealt with the matters of gambling and sport betting on a few occasions. Especially at the turn of the century the infiltration of many sport betting operators

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[15] 67/98, para 34; 243/01, paras 65, 70; 42/02, para 21; 338/04, Opinion, paras 38–42 per Colomer; 260/04, paras 34–36; 203/08, para 28; 447/08, paras 49–50; 46/08, paras 86–87; 64/08, paras 38–40, 49–55.

[16] 124/97, at 13; 67/98, paras 24, 26, 30, 33, 34, Opinion per A.G. Fennelly; 243/01, paras 41–43, 60; 42/02, paras 15, 23; 42/07, paras 63–65; 203/08, paras 27–34; 258/08, paras 38, 55; 447/08, paras 44–46; 46/08, paras 98–104.

[17] 243/01, paras 67 et seq.; 338/04, Opinion, paras 105–114 per Colomer; 260/04, paras 30 et seq.

[18] 67/98, para 24, per Fennelly; 243/01, paras 47–49, 68–72; 338/04, paras 57–58.

[19] 42/02, para 26.

[20] 67/98, para 28, per Fennelly, para 37; 243/01, para 65; 338/04, para 126 per Colomer; paras 57–58; 42/07, paras 59 et seq.

in the EU gambling market, and the developments in technology with the availability of internet-based sport betting ventures, gave rise to more cases appearing before the ECJ. These cases were handled by the ECJ after exhausting MS legal proceedings, or after the national court requested ECJ intervention.

In *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*[21] the case involved the importation of lottery advertisements and tickets in order to enable residents of one MS (UK) to participate in a lottery operated in another (the Netherlands). First and foremost, the definition of services under the EC Treaty was held to cover such services promoting and assisting transnational lottery participation. Importantly, the court in *Schindler* already (in March 1994) acknowledges that restrictions by one MS precluding operators from another MS to advertise and promote their services initially violate the fundamental EU principle of freedom to provide services. However, the court pontificates that such restrictive national regulations may be justified, when they do not discriminate on the grounds of nationality, and aim at promoting consumer protection and social order.

National legislation which prohibits, subject to specified exceptions, the holding of lotteries in a Member State and which thus wholly precludes lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or through independent agents, in the Member State which enacted that legislation, restricts, even though it is applicable without distinction, the freedom to provide services.

However, since the legislation in question involves no discrimination on grounds of nationality, that restriction may be justified if it is for the protection of consumers and the maintenance of order in society.

The particular features of lotteries justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield, and to decide either to restrict or to prohibit them.[22]

In essence, a series of cases commences with *Schindler*, erring on the side of national regulations and justifications for restrictive practises and even state monopolies in the field of sport betting. Still, ECJ jurisprudence does note that it will not suffice to merely demonstrate that restrictive policies are justifiable, but they need to be proportionate and promoting MS purposes via the least restrictive means possible. Thus, the field remained fertile for ensuing cases setting the tone for future handling of such matters. There were a few more important decisions that contributed to the evolution of ECJ Law on gambling and sport betting.

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[21] 275/92, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61992J0275.

[22] *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* (1994) 24 March, 275/92 at 61.

In *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*[23] the ECJ heard a case from Austria where Familiapress, an Austrian newspaper publisher, appealed seeking to cease the distribution of a German magazine ('Laura') in Austria, alleging a violation of competition regulations, as the magazine featured opportunities to participate in competitions for prizes. Austrian Law on unfair competition does not allow such practises, whereas such regulation was not the case in Germany. The ECJ sided with the Austrian side restricting such distribution, accepting the argument that the restrictive policy promotes press diversity.[24] The court did, however, instruct that such prohibition will only be tolerated: …provided that the prohibition is proportionate to maintain press diversity and that the objective cannot be achieved by less restrictive means.

This assumes, inter alia, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand.

Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles, or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize. It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.[25]

Under the same light, with a much closer factual scenario to sport betting services though, the ECJ deliberated on national legislation reserving the operation of slot machines to a public body in *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*.[26] In *Läärä* the ECJ did acknowledge that a national restriction that reserves the right for operating gaming machines to a state body, thus precluding another MS from offering similar products and services, constitutes an impediment to the provisions of the EC Treaty, 'even if it applies without distinction.'[27] However, the court engaged in a thorough examination of all the considerations involved therein, and ultimately decided that such restrictions could be justified by reasons of consumer protection and public order. Moreover, such restrictive policies should be pursuing the stated objectives via means that do not go beyond what is necessary to achieve these objectives. For example, in its conclusion the ECJ considers that a MS could collect the sums received by the state-run monopoly by taxation of the operators that would be granted a non-exclusive licence to operate competing products and provide services.

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[23] 368/95, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0368.

[24] 368/95 at 5.

[25] *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* (1997) 26 June, 368/95 at 6.

[26] 124/97, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0124.

[27] 124/97, para 1.

Nonetheless, 'given the risk of crime and fraud, [it] is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.'[28] So in *Läärä* the ECJ was again convinced by the public-interest objectives that may justify such restrictive practises. Similarly to *Schindler*, one notes that the ECJ does in fact consider the danger of moral corruption such gaming devices, gambling avenues, and lotteries could have on MS citizens. The court uses such wording as 'high risk of crime or fraud… an incitement to spend which may have damaging individual and social consequences…' (124/97, at 13). It follows that national authorities should be granted the latitude to determine what is required to protect their citizens, the aforementioned considerations notwithstanding. Consequently, one would anticipate a similar ECJ analysis in a per se sport betting services case; indeed, it did not take long after *Läärä* for such a case to come before the court.

The case of *Questore di Verona v. Diego Zenatti*[29] involved a preliminary reference by the State of Italy, requiring the ECJ to answer whether the judgment delivered in *Schindler* would indeed cover national restrictions regulating sport betting. The factual background of *Zenatti* is fascinating and revisited by the ECJ in the subsequent *Gambelli* and *Placanica* cases, which set the tone for modern legal handling of EU sport betting policies. Essentially Zenatti was a bookkeeper (he argued that he was merely facilitating the payments of Italian nationals' bets that took place in Britain and was simply providing pertinent information), acting as an agent in Italy for UK-based sport betting enterprises. He was passing on bets placed by Italian clients, including bank transfer documents. In the defendant's description, the practise was a 'data transmission site.'[30] The method of licensing sport betting operators was reserved by the National Olympic Committee and the National Equine Organization (CONI and UNIRE respectively). Other than the subjective difficulty in obtaining such a licence from Italian authorities, the Italian Penal Code criminalised such sport betting activities, as foreign sport betting operators would not be allowed to run their business without a licence.

It is important to note that, unlike ensuing cases, the Advocate General in this case recommended that the ECJ allows such restrictive policy, as a restriction of the freedom to provide bookmaking services 'is not incompatible' with the provisions of the EC Treaty, provided that such policy is 'part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting.'[31] In his opinion, the Advocate General acknowledges that such services have not been harmonised at the Community level.[32] These services

[28] 124/97, at 41.

[29] 67/98, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-67/98%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[30] *Questore di Verona v. Diego Zenatti* (1999) 67/98, para 2, Opinion per A.G. Fennelly.

[31] *Questore di Verona v. Diego Zenatti* (1999) 67/98, para 34, Opinion per A.G. Fennelly.

[32] 67/98, para 20, per Fennelly.

constitute cross-border services that fall within the scope of Article 49 of the EC Treaty. What is interesting, and different from the *Schindler* case, is the fact that there was not absolute prohibition, but rather 'an exception to the general prohibition.'[33] Nevertheless, the Advocate General acknowledged that the national monopoly in sport betting licences (by CONI and UNIRE) would be considered a violation of the freedom to provide services, as it preempted other MS sport betting operators from entering the Italian market.[34] Yet once again the opinion of the Advocate General, and eventually the ECJ, sides with the restrictive practise, allowed for 'overriding reasons relating to public interest.'[35] After commenting that these restrictions should not go beyond what is necessary to pursue the stated objectives, the latter are found to be similar to the ones at *Schindler*.

The prevention of crime and the protection of consumers against fraud; avoidance of the stimulation of demand for gambling and of the consequent moral and financial harm to participants and to society in general; and the interest in ensuring that gambling activity is not organised for personal or commercial profit but solely for charitable, sporting, or other good causes.[36]

What is further interesting is the continuous reluctance of the Advocates General and the ECJ to boldly declare that there are indeed other less restrictive legal, policy, and economic mechanisms to achieve the stated objectives. These matters are entrusted to the national legislature, and a comparison between competing regimes could be sufficiently undertaken by the national courts.[37]

Dormant in the Advocate General's opinion lies in the conflict between offering the opportunity on one hand to CONI and UNIRE to run similar business practises, and on the other to declare that competing sport betting ventures are disallowed (or indeed not granted a licence via the Italian licensing system) due to reasons of consumer protection and crime prevention. The Italian State was held to receive adequate assurances that the established mechanisms by the state monopolies would achieve the stated objectives, minimising corruption and crime risks.[38] Convincing for the court and the Advocate General is the moral and socio-cultural character of the activities that the state restriction aims to preserve. Perhaps the explosion in availability of internet-based sport betting avenues might alter the Advocate General's conclusion in *Zennati*: the fact that they 'can freely place bets with overseas bookmakers by telephone, fax or internet does not affect my analysis, because the likely effects of such activity on social order seem very small compared to those of unrestricted provision of organised betting services through representatives operating in Italian territory.'[39] Basically the argument there is that

[33] 67/98, para 24, per Fennelly.
[34] 67/98, para 24, per Fennelly.
[35] 67/98, para 26, per Fennelly.
[36] 67/98, para 24, per Fennelly.
[37] 67/98, para 28, per Fennelly.
[38] 67/98, para 30, per Fennelly.
[39] 67/98, para 33, per Fennelly.

liberalisation of national sport betting markets would have detrimental effects on the moral and social character of the state, which is not the case with the general availability of these avenues over the internet. Suffice to say a complete analysis of this particular subject is an excellent topic for a doctoral dissertation, which again is not the case herein. In a nutshell, in *Zenatti* the ECJ accepted the Advocate General's arguments above and essentially referred the matter to the national court to decide what should be concluded as a restrictive policy 'within reason', not going beyond what is necessary to achieve the stated objectives.[40]

Similar was the outcome of *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português*.[41] The *Anomar* case involved aspiring operators of amusement, gaming, and gambling machines against the Portuguese policy allowing such games to take place 'solely in casinos in permanent or temporary gaming areas created by decree-law.'[42] Once again, the prevention of fraud and social policy considerations tipped the scale in favour of the national restriction. Furthermore, the means and extent of such restrictive policy are again entrusted to the national government, tested by the national courts.

In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licenced for that purpose, falls within the margin of discretion which the national authorities enjoy.[43]

4.3.2 Gambelli et seq

Reference for a preliminary ruling from the Tribunale di Ascoli Piceno: Piergiorgio Gambelli and Others[44] involved a similar factual background to *Zenatti*, above. Gambelli and 137 other defendants were actually criminally prosecuted for 'organising clandestine bets and being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State' (243/01, para 2). The defendants, according to the

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[40] *Questore di Verona v. Diego Zenatti*, Judgment of 21/10/1999, 67/98, para 37 (Note: Judgment unavailable in English as of 10/11/2010; translation available upon request).

[41] 6/01, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6/01%20%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[42] 6/01, Judgment of 11/09/2003, para 4.

[43] Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português (2003) 11 September, 6/01, Judgment para 6.

[44] 243/01, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-243/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

investigating Judge at the Tribunale Di Fermo, had formed an elaborate system of betting agencies linked to the Liverpool, UK-based Stanley International Betting company (Stanley). As seen earlier in *Zenatti*, such services are reserved for state-affiliated and licenced organisations (CONI and UNIRE).

A somewhat interesting twist in the *Gambelli* case was that the defendants further argued that next to the freedom to provide services, the restrictive regulations at hand also violated the freedom of establishment,[45] by creating a local sport betting monopoly. This was an area—an analysis of the issue under Article 43 of the EC Treaty—the ECJ had not examined in the aforementioned cases. The defendants also argued, as one would expect from the precedent cases, that Italian policy was inconsistent, as on one hand it was creating barriers to entry in the sport betting market via the restricting regulations (indeed, under the cover of social order, consumer protection, and the moral objectives cited in the previous cases), and on the other it was actually inciting its citizens to participate in its own gambling activities. It even facilitated the payment of debts and regulated the industry by financial laws, making the objectives appear more economic than socio-cultural.[46]

On the matter of equal treatment of cross-border sport betting companies, the argument was that an established and lawful company under UK Law (Stanley), was essentially treated by Italian Law as an underground enterprise,[47] whose agents in Italy needed to be criminally prosecuted. As an extension, the latter treatment by Italian Law not only violated the freedom to provide services and the freedom of establishment, but also the fundamental EU principle of proportionality; criminal prosecution should be the last resort.[48]

What is also remarkable is the consistency and solidarity between the amicus curiae submitted by the Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish, and Swedish Governments, joined by a pertinent position by the EC, supporting that *Zenatti* should rule this case as well; restrictions justified, that is, by means of public policy within reason that the MS and the national courts can control. Nonetheless, at the hearings of *Gambelli* the EC advised that it was investigating the Italian Republic, and requested it to be conformed with the provisions of the EC Treaty for its sport betting and lotteries' strategies.[49]

In a much anticipated decision, the ECJ replied first that the restrictions imposed on Stanley and its agents in Italy were obstacles to the freedom of establishment, thus violating Article 43 of the EC Treaty.[50] The court actually admonished the Italian Government's position that Italian legislation regulating sport betting only allowed licences to the state-sponsored monopoly-holders;

[45] 243/01, para 25.
[46] 243/01, para 26.
[47] 243/01, para 28.
[48] 243/01, para 29.
[49] 243/01, paras 41–43.
[50] 243/01, paras 45–46.

the fact it is virtually impossible for a private company to obtain a licence under such a restrictive regime constitutes prima facie evidence of a freedom of establishment violation under EC Treaty Article 43.[51]

The ECJ thereafter handled the matter of the freedom to provide services. First the court reiterated that the definition of services under EC Treaty Article 50 covers such activities as lotteries, sport betting, and gaming, including the cross-border provision of such services via telephone, and, in the case of Stanley, the internet.[52] The court then clearly declared the interpretation of the Italian Law supported by the Italian Government a restriction of the freedom to provide services under EC Treaty Article 43.[53]

Immediately following that acknowledgment, the court attempted to deal with the most intriguing matter, of the restrictive policy's rationale, and whether it could be considered under the spirit of the exceptional measures expressly provided in Articles 45 and 46 of the EC Treaty (the ones mentioned above as public policy, security, or health), or in accordance with the ECJ's own case law for reasons of overriding interest.[54] The court dexterously delivers a blow to such arguments as the ones supported by the Greek and Portuguese governments, in regard to diminution of tax revenues, which are most certainly not considered reasons of overriding interest.[55] This is precisely the point that many would expect the ECJ to put forth a valiant effort (as purported by the Advocate General in the *Placanica* opinion shortly following) and clarify whether it believed such restrictions would be actually 'justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.'[56] The suspense was preserved with the court referring that crucial part of the issue's final decision to the national court.[57] Nevertheless, the court did provide the national court with invaluable guidance by pontificating in the ensuing sections of *Gambelli*.

First of all, the court reflected on the precedent cases of *Schindler*, *Läärä,* and *Zenatti,* advising that such restrictions need to be applied in a consistent and systematic manner.[58] Then, at last, the court notes the point made by the Tribunale di Ascoli that 'the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.'[59] In essence, perhaps the most important reference

[51] 243/01, paras 47–49.
[52] 243/01, paras 52–54.
[53] 243/01, paras 57–59.
[54] 243/01, para 60.
[55] 243/01, para 61.
[56] 243/01, para 65.
[57] 243/01, para 66.
[58] 243/01, para 67.
[59] 243/01, para 68.

point from *Gambelli* is that a State cannot concurrently incite its citizens to gambling ventures that serve state interests, while restricting the same services from other prospective operators, under the facade of socio-cultural and moral considerations.

Insofar as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance, and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.[60]

In succession, the ECJ advises that while the national court decides on the discriminatory character of the restrictive practise, it needs to decide whether the licence procedure is more easily accessible by and attainable to citizens than foreign operators.[61] The latter would not satisfy EC Treaty provisions. Finally, the ECJ suggests that the national court needs to decide whether the criminal prosecution of anyone who connects to the internet at home and places bets via a bookmaker established by another MS is disproportionate, in light of ECJ case law, in conjunction with the fact that the participation in similar betting is concomitantly encouraged by national licenced bodies.[62] Further, the national court is called to decide whether such criminal prosecution goes beyond what is necessary to combat fraud and the stated objectives. Under the same light, when deliberating on the principle of proportionality and the freedom of establishment, the scope of these restrictions might go beyond what is necessary to battle fraud, while the adversely affected companies are lawfully licenced by other MS and their accounts and activities could easily be verified.[63] This perhaps is the one element of the *Gambelli* decision that might serve as a 'Trojan Horse', when a MS could develop regulation that would ease the licensure of sport betting providers, in order to promote state interests via taxation and other avenues, and many prospective ventures would swarm that jurisdiction, in order to infiltrate the EU market through this open door (the principle of the 'Country of Origin', also discussed in the Services' Directive section). It remains to be seen if this was the 'Achilles heel' of the *Gambelli* decision, further quoted in later judgments. The final position of the court issuing the preliminary ruling at the request of the Tribunale di Ascoli left unanswered questions, referring matters to the national courts.

National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking, and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to offer services provided in Articles 43 and 49 EC, respectively. It is for the national court to determine whether such legislation, taking account of

[60] 243/01, para 69.

[61] 243/01, paras 70–71.

[62] 243/01, para 72.

[63] 243/01, para 73.

the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.[64]

It did not take long for the ECJ to revisit the issues discussed in *Gambelli*. As a matter of fact, the decision of the court on the request for another preliminary ruling by the Finnish court of Ålands Förvaltningsdomstol in *Diana Elisabeth Lindman v. Skatterättelsenämnde*[65] was delivered just a week after the *Gambelli* decision, and the proximity of the decisions is evident. In *Lindman*, the ECJ did not sit as a Grand Chamber; rather the Fifth Chamber delivered the decision.[66]

Ms. Lindman was a Finnish national, who had the good fortune of winning SEK 1,000,000 during a stay in Sweden. Although Finnish Law mentioned that earnings from lotteries organised in Finland would not be submitted to income tax regulations,[67] she was assessed income tax for the winnings from the Swedish lottery. A Finnish court interpreted the Finnish Law to encapsulate income tax-free winnings from Finnish lotteries, however excluding foreign ones from the income tax exemption. The Finnish Court held further proceedings, requesting the contribution of the ECJ on the interpretation of EC Treaty Article 49 and whether the latter would preclude a MS from enforcing such a rule distinguishing between different member states' lotteries. The Finnish Government's arguments in favour of foreign lottery taxation are of special interest:

More particularly, the Finnish Government contends that the reason for the taxation of winnings from games of chance organised outside Finland is the impossibility of taxing, in that Member State, foreign undertakings who offer gambling activities from abroad. Were it otherwise, taxpayers in Finland and the organisers of games of chance would share a tax advantage, regardless of whether the receipts were intended to fulfil objectives in the public interest in the State of origin or whether that State's legislation sought to take account of the objectives of consumer protection and prevention of social damage.[68]

The Finnish Government, while admitting that the national legislation is discriminatory, contends that it is justified by overriding reasons in the public interest such as the prevention of wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty.[69]

In a brief reply, the ECJ first commented that according to *Schindler*, lotteries do fall within the scope of EC Treaty Article 49. Then the court proceeds to note

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[64] 243/01 (2003) November 6.

[65] 42/02, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-42/02%20&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[66] http://curia.europa.eu/en/instit/presentationfr/index_cje.htm

[67] 42/02, para 5.

[68] 42/02, para 15.

[69] 42/02, para 23.

that Article 49 precludes 'not only any discrimination, on grounds of nationality, against a provider of services established in another Member State, but also any restriction on or obstacle to freedom to provide services, even if they apply to national providers of services and to those established in other Member States alike.'[70] The court further notes the acknowledgment of the Finnish Government for disparate treatment between local and foreign lotteries, as well as the contention that Finnish taxpayers prefer to participate in Finnish lotteries than foreign ones.[71] This remarkable contention has further extensions for sport betting practises as well, since there have been arguments that MS citizens prefer to gamble/bet via local providers, hoping their earnings would be delivered safer and faster. It is a matter of fact whether new developments in the—now expanding—sector would change these contentions and practises. Ultimately, the ECJ mentions that any alleged justification of such discriminatory and restrictive policy, constituting a prima facie violation of EC Treaty provisions, needs 'an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State.'[72] Unfortunately for the Finnish side:

The referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.[73]

Thus, the ECJ dismissed the Finnish claims by concluding:

Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.[74]

The ECJ was given a third opportunity to assume a definite stance on such matters of restrictive practises and national policies on sport betting in violation of the provisions of the EC Treaty, in *Procuratore della Repubblica v. Massimiliano Placanica, Christian Palazzese and Angelo Sorrichio*.[75] Once again, Stanley and its agents in Italy were involved; the latter were three defendants who were prosecuted by the Italian State for running the 'data transmission' sites one found in *Zenatti* and *Gambelli*. A somewhat noteworthy inclusion was that Stanley was not allowed to apply for licensure in Italy as it was a company quoted on the stock

[70] 42/02, para 20.

[71] 42/02, para 21.

[72] 42/02, para 25.

[73] 42/02, para 26.

[74] 42/02 (2003) November 13.

[75] 338/04, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-338/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

exchange.[76] Actually, Placanica himself had not applied for a licence, whereas the other two defendants had, receiving no reply by the police authorities in charge.[77]

The questions referred to the ECJ were dealing with the characterisation of the Italian sport betting licensure and authorisation system, as well as the criminal penalties involved for failure to comply with the legislation under examination. Specifically:

The District Court [of Teramo] needs to know, in particular, whether [the first paragraph of Article 43 EC and the first paragraph of Article 49 EC] may be interpreted as allowing the Member States to derogate temporarily (for 6–12 years) from the freedom of establishment and the freedom to provide services within the European Union, and to legislate as follows, without undermining those Community principles:

- allocating to certain persons licences for the pursuit of certain activities involving provision of services, valid for 6 or 12 years, on the basis of a body of rules which are excluded from the tender procedure certain kinds of (non-Italian) competitors;
- amending that system, after subsequently noting that it was not compatible with the principles enshrined in Articles 43 [EC] and 49 [EC], so as to allow in future the participation of those persons who had been excluded;
- not revoking the licences granted on the basis of the earlier system which, as stated, infringed the principles of freedom of establishment and of free movement of services or setting up a new tender procedure pursuant to the new rules which now comply with the above-mentioned principles;
- continuing, on the other hand, to bring criminal proceedings against anyone carrying on business via a link with operators who, [despite] being entitled to pursue such an activity in the Member State of origin, were nevertheless unable to seek an operating licence precisely because of the restrictions contained in the earlier licensing rules, later repealed.[78]

Procedurally, the *Placanica* case was fascinating as the two national courts referring their matters to the ECJ (the three defendants' cases were jointly reviewed by the ECJ's Grand Chamber) were dealing with a prior Corte suprema di cassazione (Supreme Court of Cassation) decision that followed the ECJ decision in *Gambelli*. The procedural problem of the ECJ's jurisdiction and the conflicts[79] within the Italian Justice system in regard to the interpretation of Community Law are well reviewed in paras 76–90 of the Advocate General's opinion. In a nutshell, the ECJ was held as not waiving its own jurisdiction; the Italian courts' application of *Gambelli* would have to go through ECJ review, as the court was characterised as 'principal interpreter of European law, the apex

[76] 338/04, Opinion, para 48 per Colomer.

[77] 338/04, Opinion, para 50 per Colomer.

[78] 338/04, para 31.

[79] 338/04, para 27.

essential to a true Community of law.'[80] Further, in a timeless lesson of procedural disentanglement, the Advocate General officiously declares:

I am also perfectly aware that, owing to the imprecision of the organisation of judicial power in the Union, confusion is sometimes caused by the Court of Justice itself, since it is not easy to achieve the appropriate level of accuracy in every situation, bearing in mind that, in law, what matters is to get the boundaries right.[81]

In that problematic case that essentially tested *Gambelli's* application[82] the Supreme Court of Cassation held that the national restrictions at hand were not violating the EC Treaty provisions of the freedom to provide services and the freedom of establishment. It is important to investigate the Italian high court's rationale.

Subsequently, taking as its starting point the fact that for years the Italian legislature has pursued a policy of expansion in the sector, in order to increase State revenues, the Corte suprema di cassazione found that this approach was adopted for reasons of public order and safety which justify the restrictions on the Community freedoms, since the gaming laws do not seek to limit supply and demand but to channel them into controllable systems in order to prevent crime.

In that connection, the Italian court argued that the British bookmaker was already subject to supervision by a Member State, since the authorisation issued in that country had territorial implications and the adoption of a regime for betting licences had not been discussed at Community level.

The Corte suprema di Cassazione also pointed out that the Italian system has a dual basis: licences and authorisations. The reasons of general interest which justify restricting the grant of licences are evident, at least in part. However, those relating to authorisations reflect subjective conditions geared to ex ante controls and continuous supervision in order to combat involvement in crime, such as fraud, money-laundering, and racketeering.

As regards the assessment of the appropriateness and proportionality of the restrictions, the Italian court drew a distinction in *Gesualdi* between licences and criminal penalties, holding that it was not for the courts to decide whether the latter were appropriate or proportionate.

It also denied that the national rules were discriminatory, since those which ensure the transparency of the share ownership of the licensees apply both to Italians and to foreigners. Furthermore, since 1 January 2004 all companies have been able to participate in tendering procedures because all the obstacles in that connection have been withdrawn.[83]

The Advocate General R. J. Colomer's opinion on the *Placanica* case in May 2006 stimulates scholarly interest and aims at clarifying the field of legal handling of sport betting in the EU. In his opening sentence he leaves no doubts: '"Rien ne

[80] 338/04, Opinion, para 89 per Colomer.

[81] 338/04, Opinion, para 90 per Colomer.

[82] 111/04 (2004) 26 April, '*Gesualdi*'.

[83] 338/04, Opinion, paras 38–42 per Colomer.

va plus." The Court of Justice can no longer avoid carrying out an in-depth examination of the consequences of the fundamental freedoms of the EC Treaty for the betting and gaming sector.'[84] Further, observing that the national courts in Italy and the national authorities did not appear to follow the ECJ's recommendations from *Gambelli* in their totality, the Advocate General purports that the *Placanica* case and the questions posed by the Italian courts to the ECJ 'give the Court of Justice the opportunity to define its doctrine, knowing that the Corte suprema di cassazione (Supreme Court of Cassation) has held that the system is compatible with Community law and aware of the circumstances surrounding the grant of licences to organise betting in Italy.'[85] On the same note, reflecting on *Gambelli*, and perhaps the lengths to which the ECJ did not deem prudent to go, the Advocate General mentions:

The Court of Justice should have been more specific and adjudicated on the implications of the Community freedoms for the provisions of national law, as suggested by the Advocate General, who had warned that the national courts found it difficult to carry out the task entrusted to them.

I have no doubt that the judgment in *Gambelli and Others* gauged the degree of thoroughness which the Court of Justice could employ without exceeding its powers, but, with the precedent of the judgment in *Zenatti*, which did not avoid a further reference, it erred on the side of caution, since it had sufficient details at its disposal to make a more in-depth analysis, which would have made the present references for a preliminary ruling unnecessary.

It is now necessary to take that missing step and put the finishing touches to the reply so as to dispel the uncertainty which has arisen, even if the task is more complicated, because we must examine whether there is any justification for the aforementioned restrictions on the Community freedoms, assessing whether they are discriminatory, appropriate, and proportional.[86]

One could probably not find a better way to alert the ECJ of the possible ramifications of undertaking such an important task, essentially clarifying matters for MS national courts. Once more, the Advocate General suggests that there may be no overriding reason established for the restrictive regulations at hand, as consumer protection and public order could not be served by contradictory actions of offering national betting monopolies on one hand, while disallowing the provision of such services by others; in addition, the argument in favour of fraud and money-laundering prevention does not appear supported by evidence to that end. Not only is the licensure process more taxing for foreign prospects, but there are no secure checks that would ensure crime prevention. Instead, such measures need to be non-discriminatory, appropriate, and proportionate.[87] The Italian State did

[84] 338/04 (2006) May 16, Opinion, para 1 per Colomer.

[85] 338/04, Opinion, para 4 per Colomer.

[86] 338/04, Opinion, paras 105–107 per Colomer.

[87] 338/04, Opinion, paras 108–114 per Colomer.

not demonstrate an effort to check the prospective operator's status, and did not try to measure effectiveness of the measures under investigation against others.[88]

The scope of the measures notwithstanding, Advocate General Colomer does not refrain from sharing the view expressed by Advocate General Alber in point 118 of his Opinion in *Gambelli and Others,* when he points out that gambling is regulated in all Member States, and that the grounds given for such regulation are largely the same. Therefore, if an operator from another Member State meets the requirements applicable in that State, the national authorities of the Member State in which the service is provided should accept that as a sufficient guarantee of the integrity of the operator.[89]

Reiterating a point from above, this could be the fallacy in the ECJ's handling of *Gambelli* and *Placanica*. One may argue that while trying to preserve the character of the Union and promote equal treatment and the EC Treaty's provisions, the pitfall of such a state-oriented approach might lead to the undesired effects discussed earlier.

Arguably the climax of the Advocate General's position comes following the analysis of licences, authorisations, and most importantly, penalties (as the subject involved criminal prosecution and imprisonment). Retorting to the Italian high court's handling of the *Gambelli* decision and interpretation of the national regulations, he recommends:

The Corte suprema di cassazione has not completed the task entrusted to it, on the pretext that it was prohibited from doing so. It is surprising that, although it identified the three fundamental parts of the Italian betting legislation, when it took its decision it took account only of authorisations, leaving penalties out of its examination entirely and considering licences only in part.

At this juncture, the Court of Justice should give a ruling, since it has all the information necessary to do so, and unreservedly declare that a penalty which consists in loss of liberty for up to 3 years is disproportionate to the circumstances described throughout this Opinion, in particular those relating to the legitimate good protected by criminal penalties and those relating to the State measures to encourage betting.[90]

In his conclusion, the Advocate General engages in a delightful discussion of the normative approach of the gambling and sport betting sectors in the EU. He actually notes that a harmonisation of the matter would be a great advantage over ECJ's deliberations.[91] Although he is careful not to advocate an absolute liberalisation of the gambling market,[92] he does encourage the EC to include the gambling sector in the Services Directive under development.[93] On this important

[88] 338/04, Opinion, para 126 per Colomer.

[89] 338/04, Opinion, para 130 per Colomer.

[90] 338/04, Opinion, para 141 per Colomer.

[91] 338/04, Opinion, para 144 per Colomer.

[92] Footnote 116 in 338/04, Opinion, para 147 per Colomer.

[93] 338/04, Opinion, paras 145–148 per Colomer.

issue the reader should bear in mind there has been significant controversy and in 2006 the EC leaned in favour of excluding gambling from the Services Directive.[94] Finally, as an excellent suggestion for future research, the Advocate General mentions the intriguing character of cross-border gambling, especially when it involves a MS and a state outside the EU.[95] Considering the documented friction within the World Trade Organisation[96] and new developments in the US both before and after recent Congressional elections,[97] there is fertile ground for further comparative analysis of these matters. This is the object of a separate comparative piece in the same research stream.

The ECJ in its *Placanica* decision is extremely careful. In its declaration of the questions referred for preliminary ruling from the Italian courts as admissible, the court notes:

> The interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.
>
> The Court is being asked to rule on the compatibility with Community law of a provision of national law. Nevertheless, although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.[98]

In regard to the licensure system, the ECJ essentially reflects on the Advocate General's points. After confirming its position in *Gambelli*, and after focusing on the fraud prevention objective supported by the Italian Government, it once more yields to the national court, in regard to the licensure and tender system.

A licensing system may, in those circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. However, as regards the limitation of the total number of such licences, the Court does not have sufficient facts before it to be able to assess that limitation, as such, in the light of the requirements flowing from Community law.

It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation

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[94] http://www.euractiv.com/en/sports/eu-sports-ministers-want-games-chance-services-directive/article-139467, and http://www.euractiv.com/en/innovation/cheers-jeers-services-vote/article-152692

[95] 338/04, Opinion, para 149 per Colomer.

[96] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

[97] http://www.govtrack.us/congress/billtext.xpd?bill=h109-4411; http://www.house.gov/apps/list/press/financialsvcs_dem/21frank_004_xml_(2).pdf; http://www.govtrack.us/congress/bill.xpd?bill=h111-2267; http://www.govtrack.us/congress/bill.xpd?bill=h111-4976

[98] 338/04, paras 36–37.

genuinely contributes to the objective invoked by the Italian Government, namely, that of prevent the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.[99]

The court then dealt with the framework and scope of the police authorisation and the criminal penalties reserved for violators. It reaches a consistent conclusion with *Gambelli*, it declares the pertinent regulations incompatible with the provisions of the EC Treaty, however it arguably does not go the length the Advocate General would have wished.

National legislation which prohibits the pursuit of the activities of collecting, taking, booking, and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services, provided in Articles 43 EC and 49 EC, respectively.

It is for the national courts to determine whether, insofar as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes—and, moreover, continues to exclude—from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a criminal penalty on persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons.[100]

A recent ECJ decision on these matters, *Commission of the European Communities v. Italian Republic*,[101] offers useful insight while revisiting and reiterating points from *Gambelli* and *Placanica*. The issue at hand was the renewal without a public tendering process by Italy of 329 existing licences to operate horse-racing betting offices. Crucially for Italy, there was an increase, in 1999, in the total number of betting centres, totalling 1,000. The 671 new betting centres were indeed awarded a licence after competing bids. The 329 existing centres were exempted from the bidding process and 'grandfathered in' the new regime, which

[99] 338/04, paras 57–58.

[100] 338/04, para 73.

[101] 260/04, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-260/04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

according to the EC constituted an infringement of transparency and publicity emanating from the EC Treaty provisions on freedom of establishment and freedom to provide services (Articles 43 and 49 EC Treaty).

Following infringement procedures, the EC pursued the three steps involved in such matters: according to EC Treaty Article 226, on 24/7/2001, the EC sent Italy the formal letter of inquiry concerning betting regulatory issues, including the renewal of the 329 licences without a biding process. At that point Italy's response did not satisfy the EC, holding that a ministerial decree in essence provided an exception for an unspecified time frame for these existing betting centres. Thus, the EC, on 18 October 2002, invited the Italian government to comply within 2 months with the provisions of the EC Treaty, practically advertising the licensing process for the 329 centres in open competition fashion. In response, on 10 December 2002, the Italian authorities invoked the need to certify the financial status of the holders of the concessions still in force, pending organisation of the tendering procedures.[102] More than two and a half years later, on 17 June 2004 (a point that becomes important considering the Special Report by the European Ombudsman in Germany's case, analysed in the ensuing section, combined with the fact that Italy did not deny that its Law in question did take effect after the expiration of the time limit set by the EC),[103] the EC proceeded with bringing action against Italy before the ECJ, since it received no information as to the completion of the financial certification process and the opening of the new tendering procedures.

A.G. Eleanor Sharpston's Opinion[104] is useful on various points. First, the EC held that betting services are public service concessions that need to comply with the general principles of the EC Treaty Articles 43 and 49. According to the undisputed facts, the Opinion of A.G. Sharpston finds a prima facie infringement case.[105] Very importantly, the Advocate General holds that 'considerations of a purely economic or administrative nature cannot justify restricting the freedoms laid down by the Treaty.'[106] Further, in response to Spain's supporting contentions for Italy (Spain and Denmark intervened in the case in favour of Italy, via substantive/socio-cultural, and moral factors in the case of Spain, and procedural/ECJ case-law interpretive factors in the case of Denmark), A.G. Sharpston remarks:

> Social and financial considerations of the kinds cited by Spain in its third and fourth considerations, or practical difficulties involved in changing from one regime to another, do not constitute such requirements [imperative in the general interest]. And the expressed intention of the Italian authorities is not relevant to an assessment of the factual situation …[107]

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[102] 260/04, Opinion, paras 11–14 per Sharpston.

[103] 260/04, para 15.

[104] 260/04, Opinion, 29 March 2007.

[105] 260/04, Opinion, para 20 per Sharpston.

[106] 260/04, Opinion, para 31 per Sharpston.

[107] 260/04, Opinion, para 37 per Sharpston.

In her concluding remarks, A.G. Sharpston assumes a somewhat conservative yet clear approach. Therein she posits:

> …I express no opinion as to other circumstances in which renewal of horse-race betting concessions without a tendering procedure might be justified by public-interest requirements. Nor do I consider it necessary to specify the precise kind or degree of publicity required where a tendering procedure is conducted. Suffice it to recall that, in the present case, 671 concessions were awarded after a tendering procedure which, in the Commission's view, complied with Community law, while 329 were at the same time renewed without the slightest degree of transparency or publicity which could have afforded interested parties access to the award procedure.[108]

Finding for the EC on 13/9/2007, the ECJ declared that Italy failed to fulfil its obligations under Article 43 and 49 EC Treaty, in particular infringing upon the general principles of transparency and publicity, by not ensuring a sufficient degree of advertising, and by renewing the existing 329 horse-racing betting licences without inviting competing bids. The case specifics were indicative of broader EU problems in the sport financing and betting licensing sectors.

It is useful to note Italy's points of defence: the extension of the existing licences was going to ensure continuity, financial stability, and a 'proper return on past investments for licence holders as well as the need to discourage recourse to clandestine activities…'[109] Italy felt that such justifications constitute overriding public-interest requirements. The Fourth Chamber, issuing ECJ's judgment, disagreed. The Court did recognize that its case law provided for reasons of overriding general interest, 'such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order.'[110]

In its examination of the restrictive policies' proportionality and investigating whether the licences' renewal was suitable for the objectives pursued, not going beyond what would be necessary to achieve those purposes, while abiding by the general principle of non-discrimination, the Court remarks that the Italian Government did not rely on any derogation such as the ones provided by Articles 45 and 46 EC Treaty. 'By contrast the Italian Government justifies its renewal of the licences without a tendering procedure by the need, in particular, to discourage the development of clandestine activities for collecting and allocating bets.'[111] Unfortunately for the Italian side, there was no justification of the necessity not to invite bids as compared to the existing regime for the 329 betting licences, and the EC's infringement allegations, in essence, were not addressed. Further, the Court chastises the Italian Government as it did not explain how the renewal of licences without inviting competing bids could prevent the development of clandestine

[108] 260/04, Opinion, para 43 per Sharpston.

[109] 260/04, para 15.

[110] Quoting *Placanica*, para 46, which further cites the aforementioned ECJ cases.

[111] 260/04, para 31.

activities.[112] The broad spectrum of the above ECJ Jurisprudence shows that it is instrumental to fully employ any quantitative and qualitative tools; any supporting evidence, documentation, testimony would be imperative for a defendant in such infringement cases. In effect, the ECJ reiterates the points set in *Gambelli* and *Placanica*, and calls national authorities to prove how these embedded restrictions in regulation serve reasons of overriding public interest according to EC Treaty Articles 45 and 46 or as posed in established ECJ case law, as well as demonstrate that such restrictions abide by the principle of proportionality. The Fourth Chamber concludes:

Accordingly, it must be stated that the renewal of UNIRE's old licences without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability, and a proper return on past investments for licence holders, suffice it to point out that those cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty…

It follows that none of the overriding reasons in the general interest pleaded by the Italian Government to justify the renewal of the 329 old licences without any competing bids being invited can be accepted.[113]

Shortly following the ECJ decision, the EGBA issued a release applauding the Court's judgment. According to the EGBA's Secretary General, Sigrid Ligné:

The Court's decision sends a clear signal to Member States currently offering, or planning to offer, licences to European gaming and betting operators. The Court clearly states that the licensing must be undertaken within a set of clear and strict parameters, which are in line with the EC treaty. The Court's decision also underlines that these licences cannot be awarded without a transparent, competitive, and fair tendering procedure.

The EGBA considers today's ECJ ruling marks as an important step towards a regulated European gaming and betting market and encourages Italy and other EU Member States to review their legislation.

Around the same time the Italian infringement case was handled before the ECJ, the Supreme Court of France also dealt a blow to related restrictive practises perpetuating in a MS. In its ruling of 10 July 2007 regarding the case of PMU, the state horse-race betting agency, versus the Malta-based private online provider, Zeturf, the French Cour de Cassation expressed serious doubts about the conformity of the French sports betting monopoly with Community Law. It implicitly argued that the French regulations are not in compliance with Article 49 of the EC Treaty on the freedom to provide services by holding that the French Court of

[112] 260/04, para 32.

[113] 260/04, paras 34–36.

Appeal was unable to prove that the access restrictions currently in place were proportional and appropriate. France's Supreme Court hence confirmed the opinion of the EC, which presented France with a reasoned opinion on 27 June 2007, refuting France's arguments for retaining the gaming monopoly. According to Sigrid Ligné:

This decision sets a precedent and strengthens the position of our association. We are calling for the establishment of fair conditions to ensure a regulated opening of the European gaming market. The aim is to protect consumers' interests by establishing uniform industry standards of the highest level across Europe, as well as develop a competitive tax model for the benefit of all stakeholder groups (EGBA release 135).

4.3.3 Liga Portuguesa, Betfair, Ladbrokes, Carmen Media, et al. ECJ Twists and Turns

During the latter part of the new millennium's first decade there was an influx of cases challenging gambling and sport betting monopolies in EU member states, and several questions brought forth by state courts to the ECJ. Considering the number of cases the latter hears, it has been fairly impressive to note that several gambling and sport betting-related cases have recently been decided by the ECJ, which usually issues an original interpretation of EU Law on each particular case, and defers to the state courts to decide its application and enforcement mechanisms per state law. A pivotal case was *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*.[114] Considering its *stare decisis*, the ECJ assumed an interesting position in *Liga Portuguesa*, allowing certain restrictions posed by state authorities. Thus, it introduced new interpretations and gambling-related application in respect to the establishment clause in the EC Treaty, importantly the services clause, and the principle of the Country of Origin. On these matters it is good to utilise the analysis by Doukas and Anderson 2008, framing the problem around vertical (EU vs. State law) and horizontal (State vs. other member state law) compatibility.[115]

The ECJ's Grand Chamber issued its judgment on *Liga Portuguesa* on 8 September 2009, and it truly sent a shockwave across the continent and beyond to all private sector industry stakeholders, who thus far believed they would

[114] 42/07, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=&nomusuel=Liga%20Portuguesa&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

[115] p. 256 et seq.

challenge traditionally established restrictions and member state monopolies successfully. The case revolved around the sponsorship of the Portuguese football league by Bwin, an online gambling company registered in Gibraltar, licenced, chartered, and abiding by UK Law. The league actually surrendered naming rights under Bwin's contract (the 'Bwin Liga'), and engaged in major sponsorship activation, advertising campaign, and gambling services utilisation efforts. Those actions resulted in fines levied against both the Liga and Bwin (approximately 75,000 € each) by the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Santa Casa'), the Portuguese state-authorised lottery and sport betting monopoly. As in other cases across Europe, and importantly in another Grand Chamber decision issued by the ECJ a year prior to *Liga Portuguesa*, in C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, 1 July 2008, there are several state entities that have been entrusted with both key functions: the commercial and the regulatory. And in the gambling sector, traditional state monopolies have enjoyed the commercial enterprise of lotteries, sport betting, etc, as well as the regulatory authority, including enforcement of sanctions against competitors of their exclusive licence; such was the case with Santa Casa. It run the sport betting, lottery, and related games of chance business in Portugal, and its Gaming Division was further authorised to prosecute cases, and issue fines, against competing gambling providers.

The major questions the Grand Chamber had to answer dealt with the applicability of EC Treaty Article 49, the freedom to provide services; Articles 43, freedom of establishment, and 56, free movement of capital and payments, were rendered inapplicable; the former did not apply as Bwin, established in Gibraltar, with its servers there and in Austria, never intended to establish a principal place of business and/or physical offices in Portugal, rather would continue offering gambling services over the internet; the latter, free movement of payments, was deemed secondary, embedded in Article 49, which would be the defining Article in this case. The Grand Chamber had to determine whether the Portuguese Law was in violation of EC Treaty Article 49, by granting an exclusive licence to Santa Casa over Bwin, which was lawfully established in another member state (note that Gibraltar is a British overseas territory, a separate jurisdiction from the UK, outside the customs zone and VAT area). Additionally, the Grand Chamber had to investigate the nature of the licence and its scope, granting Santa Casa the sole authority over gambling services in Portugal, including internet-based lotteries and gambling transactions.

There was a significant procedural point to the *Liga Portuguesa* case. Bwin requested that the Court re-opened the oral examination process. The ECJ can do so if it deems that it lacks sufficient information, or if it decides that it is about to adjudicate on a matter on which the parties' positions have not been heard. Neither the ECJ Statutes nor its procedural rules allow a party's position on the Advocate General's opinion. However, it is important to note Bwin and Liga submitted that the Advocate General Bot's opinion was confined to arguments brought forth by Santa Casa and the Portuguese government. Instead of factual items, Bwin and Liga argued that the A.G. used points which were the subject of dispute,

discounting their own counter arguments. Particularly the A.G. Bot's opinion[116] and its sections on problem gambling and the risks inherent in the gambling and betting sector[117] were recorded as *de facto* and not as disputable arguments. It is insightful to quote from the A.G. Bot's opinion:

> 245. In my view, Community law does not aim to subject games of chance and gambling to the laws of the market. The establishment of a market which would be as open as possible was intended by the Member States as the basis of the European Economic Community because competition, if it is fair, generally ensures technological progress and improves the qualities of a service or product while ensuring a reduction in costs. It therefore benefits consumers because they can also benefit from products and services of better quality at a better price. In that way competition is a source of progress and development.
>
> 246. However, these advantages do not arise in the area of games of chance and gambling. Calling for tenders from service providers in that field, which would necessarily lead them to offer ever more attractive games in order to make bigger profits, does not seem to me a source of progress and development. Likewise I fail to see what progress there would be in making it easier for consumers to take part in national lotteries organised in each Member State and to bet on all the horse races or sporting events in the Union.
>
> 248. Games of chance and gambling, for their part, can only function and continue if the great majority of players lose more than they win. Opening the market in that field, which would increase the share of household budgets spent on gaming, would only have the inevitable consequence, for most of them, of reducing their resources.
>
> 249. Therefore limiting the powers of the Member States in the field of games of chance and gambling does not have the aim of establishing a common market and the liberalisation of that area of activity.
>
> 290. Liga and Bwin point out that in recent years the Portuguese Republic has had a policy of expansion in the field of lotteries and off-course betting, supported by very appealing advertising. They state that the range of the State's games of a social nature for which the Santa Casa has a monopoly on operation and which was originally confined to Totobola and Totoloto was enlarged in 1993 to include 'Joker', in 1994 the 'Lotaria instantânia', in 1998 'Totogolo' and in 2004 'Euromilhões'. They observe that the last mentioned doubled its profits between 2003 and 2006.
>
> 291. The Portuguese Government asserts that, on the contrary, it has a responsible gambling policy and that the Santa Casa's profits, mainly because of EuroMillions, fell significantly in 2007.
>
> 292. I am of the opinion that the arguments of the Liga and Bwin do not show, as such, that the Portuguese Republic is failing in its obligation to attain the objectives underlying the restrictions imposed by its legislation in a coherent and systematic manner.
>
> 293. It must be observed that the aims of the legislation in issue do not preclude a policy of controlled expansion. The extension of the Santa Casa's monopoly to on-line gaming arises from the fact that it actually exists. The extension of the monopoly is in response to

[116] Delivered on October 14, 2008. http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=&nomusuel=Liga%20Portuguesa&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

[117] A.G. opinion paras 28–33.

> the wish to channel gaming into a legal framework in order to prevent its operation for fraudulent or criminal purposes and to limit the supply, as well as to keep the revenue from gaming for financing social causes or causes of general interest.
> 297. The Portuguese Government stated that it had to cope with a worrying increase in illegal gaming and increasing risks of fraud. In that connection the Santa Casa observed that it had brought about ten prosecutions in the third quarter of 1995, 400 in 2005 and 600 in 2006.
> 298. Consequently the Portuguese Government could legitimately take the view that the increase in illegal gaming made it necessary to create new games of a social nature to satisfy Portuguese consumers' desire to gamble and to channel that desire into a legal framework. The Government was also justified in considering that the creation of new games could achieve that result only if it was accompanied by advertising on a certain scale to inform the public of their existence.
> 300. … Liga and Bwin also claim that the Portuguese Government has extended gaming in casinos, increasing the number of operating licences, installing more than 800 slot machines in the new Lisbon casino and announcing its opening in a wide advertising campaign. Between 1996 and 2006 the gross revenue of casinos in Portugal rose by 150%. Furthermore, negotiations are said to be in progress for permitting casinos to offer their games on the internet.
> 301. I do not think that these arguments are such as to demonstrate that the grant to the Santa Casa of a monopoly of the operation of lotteries and off-course betting on the internet is inappropriate for attaining the objectives for which that exclusive right was conferred.
> 311. Like the Portuguese Government, I am of the opinion that, in view of the above-mentioned circumstance, a Member State may legitimately consider that fair play is secured more effectively by the grant of an exclusive right to an entity operating under the Government's control and which, like the Santa Casa, is non-profit-making.
> 314. Furthermore, I agree with the Portuguese Government's argument that consumers are better protected against the risks connected with the games offered by unscrupulous operators by the grant of an exclusive right to the Santa Casa, the sole and historic holder to operate the monopoly to operate lotto games and betting, than by a licensing system open to several operators. The Portuguese system has the advantage of simplicity because consumers residing in Portugal can easily be warned that the lotteries and off-course betting offered by any provider of on-line games, other than the Santa Casa, are prohibited and are potentially risky.

While analysing whether the Portuguese monopoly favouring Santa Casa violated Article 49 and the freedom to provide services principle, the ECJ noted the Portuguese government's concession that such policy restricting access to internet gambling services provided by a lawfully established company in another member state does give rise to an Article 49 violation. Nonetheless, the justification for the restriction is the core issue and as per Article 46 and reasons of public policy, security, and health, such restrictions may be considered justifiable in certain cases. The ECJ proceeds to reiterate *Placanica et al.* precedent theorem on protection of consumers, prevention of fraud and incitement to gamble and squander money, and the general preservation of public order. It is accepted that gambling and the precise justifications for restricting access to it are one of the most challenging areas of European Union Law where major divergence of philosophical, legal, and political approaches exists among member states. Absent harmonisation (on the latter refer to the excellent analysis and forecast in Doukas and Anderson 2008, pp. 266 et seq), the fact that one member state considers one gambling

provider a legitimate company and grants it a licence does not—according to the ECJ Grand Chamber in *Liga Portuguesa*—mean that other member states should also accept it, contrary to their own determinations and policy considerations. 'The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality.'[118]

Thus, the ECJ entered the anticipated test of whether the restrictive policy is suitable to achieve its objective, whether it goes beyond what is necessary to achieve the objective, and whether the restriction is applied in a non-discriminatory, consistent, and systematic manner. The objective per Portuguese government's and Santa Casa's assertions has been the protection against crime and fraud on the part of gambling operators. It is indeed fascinating to observe that in the last part of the new millennium's first decade such assertions still pass ECJ muster, i.e. that the starting point of the analysis is still gambling operators trying to prove they are not the shoddy, shady, immoral, and untrustworthy businesses they traditionally were held to be. It appears that if the ECJ's judgment herein is broadly accepted, gambling operators commence competing at a disadvantage, not standing many chances of beating the odds against them.

The ECJ considers the fight against crime an overriding reason which may lead to such restrictive practises meeting the relative hurdle of an Article 49, freedom of services' violation. 'Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers.'[119] Further, '…limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation.'[120]

What may have been somewhat unique in the Santa Casa instance, however, was the long history and nature of the monopoly in Portuguese affairs and its societal, bona fide, tax-exempt as non-profit corporation, functions. 'Santa Casa's long existence, spanning more than five centuries, is evidence of that body's reliability…'[121] In one sense, one could argue that centuries of a particular European state practise would justify its status as legitimate, under this rationale by the ECJ Grand Chamber. Of course, to the contrary, European history is replete with samples of long-standing injustice and unfair treatment, discrimination, and deference to the institutions that have traditionally enjoyed European elite's preference.

The Portuguese Government points out that Santa Casa operates under its strict control. The legal framework for games of chance, Santa Casa's statutes and government involvement in appointing the members of its administrative organs

[118] *Placanica and Others*, para 48; 42/07, para 59.

[119] 42/07, para 63.

[120] 42/07, para 64.

[121] 42/07, para 65.

enable the State to exercise an effective power of supervision over Santa Casa. This system, based on legislation and Santa Casa's statutes, provides the State with sufficient guarantees that the rules for ensuring fairness in the games of chance organised by Santa Casa will be observed.[122]

In such a way, the ECJ considers the establishment of restrictive policy schemes as serving public-interest considerations. Still, it goes further; it declares that a monopoly such as the one granted to Santa Casa, encompassing both the commercial and administrative functions, may be justified given a member state's particular circumstances: '… The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.'[123]

In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.[124]

It is then the element of control and governmental oversight over the said entity that guarantees its legitimacy and prospects of successfully achieving its stated goals of preventing crime and fraud… Yet it remains to be seen whether the *de facto* or *de jure* state actor/gambling provider accomplishes such goals, and by which means.

As to whether the system in dispute in the main proceedings is necessary, the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.

In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

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[122] 42/07, para 65.

[123] 42/07, para 66.

[124] 42/07, para 67.

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.[125]

More questions are posed as per above lines from the ECJ decision. Not only does the ECJ defer to member states for an arbitrary, and possibly capricious, resolution on who would be worthy of an exclusive licence, but it additionally raises concerns over legitimate operators in member states conducting their business over the internet. The latter now is argued to be a site featuring 'more substantial risks of fraud' compared to 'live' gambling markets, due to the lack of direct contact. For everyone with rudimentary experience and fundamental understanding of secure internet transactions and coding, combined with the billions of transactions taking place each week over such secure sites, the internet would not be rendered the 'lawless-like place' it is argued to be. As Rebeggiani 2009 notes, '[i]f one has to protect consumers even from stock-listed companies like Bwin, why then not prohibit internet shopping at all, particularly portals such as EBay, with all the uncertified private sellers? … [R]emote transactions are a part of everyday life.' Furthermore, 'live' gambling markets arguably may feature more stealth ambushing techniques for customers, absent some stringent quality control measures, which are nowadays frequently patent on gambling sites, with the appropriate documentation.

Also alarming is the potential allegation that Bwin, or another sport betting and gambling provider, might be in a position to influence results of sporting competitions to increase profits and/or the rate of return on the pertinent sponsorships. Conversely, one might argue that it is precisely the contractual relationship and official sponsorship of the league that guarantees the legitimacy of the provider, and moreover ensures that profits will be directly invested into the actual product for which consumers care, the game, and the athletic competition. If there were any criminal elements to compromise the relationship with the sport organisation, the sponsorship would not be consummated or would be immediately discontinued (via contractual provision, litigation, or otherwise), as the clients/fans' interest and their desire to bet and play would be considerably diminished. Stated otherwise, the gambling public would pursue alternative options if there were any doubts about one of the most crucial and fundamental aspects of a sport competition, the integrity of the league and the uncertainty of outcome. Pure sport competition differs markedly from scripted entertainment such as cinema, theatre, or music.

[125] 42/07, paras 68–71.

The final holding of the court was thus expressed:

Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

In a nutshell, *Liga Portuguesa* perplexed matters that were marching towards clarification after the post *Gambelli* and *Placanica* developments. Proportionality, Country of Origin, Establishment and Services Clauses, as well as the precise burden of proof for a member state to uphold a monopoly were thrown into a cauldron, from which at that point it was uncertain what legal, policy, and practise outcomes would emanate. Certainly, after *Liga Portuguesa* lawyers and scholars continued to see their future agendas elongate.

The baton from *Liga Portuguesa* and ECJ's Grand Chamber was picked up by the Second Chamber in two decisions issues on the same day, 3 June 2010; 203/08, *Sporting Exchange Ltd, trading as 'Betfair' v. Minister van Justitie, intervening party: Stichting de Nationale Sporttotalisator* (*Betfair*),[126] and 258/08, *Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd v. Stichting de Nationale Sporttotalisator* (*Ladbrokes*).[127] Both these cases had extensive similarities, in being primarily online providers of gambling and sport betting services, maintaining a healthy clientele base in the Netherlands. Although Dutch Law allows licensure for private operators, albeit a single-licensing system for each game/lottery (favouring non-profit private actor 'for public benefit' De Lotto), as opposed to several European countries that opt for public entities, the key component to these cases was that in Holland, games of chance via the internet are prohibited.[128] Thus, the Second Chamber of the ECJ dealt with some difficult questions, answers to which would yield valuable insight for forthcoming cases across Europe.

Betfair took matters to court as it was precluded from competing for the single licence, which was renewed without justification for De Lotto. In addition, Betfair challenges Dutch Law's compliance with EU Law and specifically EC Treaty Article 49 on freedom to provide services, as it preempted Betfair and others from receiving licences for internet-based games, whereas Betfair was already offering legitimate games via the internet, based on a licence it received in the UK. Moreover, it was the Dutch Law's single-licensing system's compatibility with ECJ case law that was tested, i.e. whether it would pass ECJ muster in view of objective, fair, transparent, and consistent criteria for granting such exclusive licences. And depending on ECJ's decision on the compatibility question, could it

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126 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0203:EN:HTML

127 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&jurcdj=jurcdj&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALLTYP&numaff=&ddatefs=28&mdatefs=5&ydatefs=2010&ddatefe=4&mdatefe=6&ydatefe=2010&nomusuel=&domaine=&mots=&resmax=100&Submit=Rechercher

128 203/08, para 11; 258/08, para 7.

be that this system might not be suitable or proportionate for accomplishing the reasons of public interest it set to uphold?

In its analysis, the ECJ proceeds to some interesting, and somewhat alarming, theory and recap of prior case law components. After acknowledging that indeed Article 49 would *prima facie* be violated, nevertheless such a single-licensing system might still be enforceable under EU Law if it is held to promote reasons of public interest. On that note:

> 27 In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order.[129]
>
> 28 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality.[130]
>
> 29 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.[131]
>
> 30 Referring specifically to the judgments in *Gambelli and Others* and *Placanica and Others*, the national court found that the objectives—of ensuring the protection of consumers and combating both crime and gambling addiction—underpinning the system of exclusive licences provided for by the Wok can be regarded as overriding reasons in the public interest within the meaning of the case-law of the Court.

Hence, once more the ECJ assumes a controlled and conservative stance in respect to the scope of such restrictive systems, rendering them compatible with EU Law considering the important objectives they set to accomplish. As regards proportionality, '… the fact that only one operator is licenced simplifies not only the supervision of that operator, thus enabling monitoring of the rules associated with licences to be more effective, but also prevents strong competition from arising between licensees and resulting in an increase in gambling addiction.'[132]

These lines are tremendously enlightening and illustrative of ECJ's contemporary philosophy towards the gambling sector. As Planzer 2010 notes, '[t]he Court continues to rely on assumptions regarding the mechanisms of gambling addiction. The absence of an evidence-oriented approach prevents an adequate assessment of health risks inherent to gambling activities… [E]mpirical data

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[129] Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 47.

[130] See, to that effect, *Placanica and Others*, para 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 59.

[131] *Gambelli and Others*, para 75, and *Placanica and Others*, para 58.

[132] 203/08, para 31.

suggests that things are a bit more complex in reality. The 2005 Gambling Act liberalised the gambling market in the UK and substantially increased the exposure to gambling offers. Nevertheless, the British Gambling Prevalence Survey 2007 did not find increased levels of pathological gambling and participation in some form of gambling within the past year slightly dropped from 72% in 2000 to 68% in 2007. In the US, the life prevalence rate for pathological gambling was 0.7% in the 1970s. More than 30 years later, life prevalence of pathological gambling is at a rate of 0.6%. Despite a dramatically increased exposure to gambling offers (both in terms of numbers and variety of games), prevalence of pathological gambling is essentially at the same level as 30 years ago.'[133]

It would be useful to engage in a pan-European, all encompassing, multi-faceted study of gambling and gaming services' consumers. Contemporary analytical tools and a rich arsenal of statistical methods available to researchers and policy analysts may provide more ammunition to parties in future cases. Correlations between consumer preferences, perceptions, and addiction precursors on one hand, and licensing systems' restrictions, advertising and marketing schemes, and the tools available widely over the internet on the other, may demonstrate a different reality to one the ECJ currently subscribes; such research might even demonstrate that it is the promotion of the public gambling and sport betting monopoly that led certain populations to gambling addiction, whence they could have been led to other, more serious and illegal forms of gambling, addiction, and criminal behaviour. Alternatively, no statistically significant evidence might be found for declaring that such restrictive mechanisms lead to protection against gambling addiction. Consequently, overriding reasons for public interest would not be useful as defence for these restrictive practises.

The national court in *Betfair* concluded that there was no disparate treatment, as the prohibition against other potential licensees was applied in uniform fashion. Of course, that does not render that prohibition compliant with EU Law, rather it deems it more broadly restrictive and arguably the impediment to the common market for services the EC Treaty provisions were chartered to preempt.

The ECJ promptly rejected the principle of the Country of Origin, deferring once again to national courts to interpret national law as they deem fit, as long as the usual provisions apply (on which one still remains uncertain, given the ECJ's reluctance to issue more concrete guidance and benchmarks for national courts, and absent harmonisation attempts at the Commission, Council, and Parliament levels). What may be more intriguing is the Second Chamber reiterating the Grand Chamber's theorem in *Liga Portuguesa*'s para 70: '… [B]ecause of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.'[134] And to achieve perfect balance and consistency on decisions issued on the same day, the

[133] p. 294.

[134] 203/08, para 34.

Second Chamber used the exact wording, to the letter, in its analysis of *Ladbrokes*, arguing again that games of chance over the internet pose inherently more risks as compared to the traditional forms of 'live gambling.'[135] Instead of further commentary, one should revert to the aforementioned critique, in *Liga Portuguesa*.

Arguably the Second Chamber goes even further with its response to the questions pertaining to the EU Law compliance of the single licensure system for games in Holland. In a fairly bold series of statements, one reads:

> 59 [T]he restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.[136]
> 60 In such situations, the grant to such an operator of exclusive rights to operate games of chance, or the renewal of such rights, without any competitive tendering procedure would not appear to be disproportionate in the light of the objectives pursued by the Wok.
> 61 It is for the national court to ascertain whether the holders of licences in the Netherlands for the organisation of games of chance satisfy the conditions set out in para 59 of the present judgment.
> 62 In the light of the forego Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a licence to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.

Refraining from commentary on an 'Orwellian twist' the ECJ herein assumes, one may merely posit that it is precisely what the ECJ proposes that would be a clear deviation from the rule of transparency and consistency, directly favouring public (or private, yet public-sector-friendly and state-controlled) operators. Questions thus remain, in the best case scenario; in the worst, they would be answered in forthcoming cases under this ECJ Second Chamber light, i.e. deferring to the 'public function' test, where 'what is public (or public-like) is good…' Somewhat unanticipated, entertaining Jurisprudence nonetheless.

Ladbrokes has similar twists and sections in ECJ's judgment. It is worth reflecting on the national courts' front briefly, to illustrate such legal conflicts and interpretation problems between ECJ Jurisprudence and national courts. A great sample was the Dutch decision of *De Lotto vs. Ladbrokes*.[137] In brief, Ladbrokes attempted to infiltrate the Dutch gambling market via the internet, offering the opportunity to Dutch citizens to gamble and bet via a Dutch-specific website (Ladbrokes.nl) and a telephone centre in the Netherlands. The fate of many EU

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[135] 258/08, para 55.

[136] See, to that effect, Case C-124/97 *Läärä and Others* [1999] ECRI-6067, paras 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paras 66 and 67.

[137] Injunction before the Dutch Supreme Court, 18 February 2005, NJ 2005 404; Merits in favour of De Lotto in Court of Appeal of Arnhem, 17 October 2006.

institutions and norms was confirmed in the case of the Dutch Gaming Act as well, in a somewhat perverse way. It appears the closer EU administrative entities and the ECJ approach integration of the Union, the more hurdles and reluctance this integration approach is facing in national fronts. As the *Gambelli* case was decided, the Dutch Gaming Act—at least in its interpretations and policy updates—assumed a more restrictive stance towards gambling and sport betting.[138] Once again, one was confronted with state monopolies for lotteries and betting (De Lotto), essentially without an opportunity to obtain the necessary licence.[139] After conflicting opinions in the lower courts (among which a lower court in Arnhem argued that the Dutch Gaming Act was inconsistent with the self-defined goal of limiting fraud and preventing gambling addiction, and contradictory to ECJ's *Gambelli* decision), both the Minister of Justice and the Dutch Supreme Court concluded that the Dutch Gaming Act was valid, consistent with EU Law on freedom to provide services, and should be interpreted as excluding Ladbrokes from operating in the Dutch gaming market, practically reserved for De Lotto.[140] On the merits the matter had no other way than to be concluded in favour of De Lotto, after an October 2006 Court of Appeal of Arnhem decision.[141] This, despite the defendant's arguments that De Lotto spent €25 million annually for advertising and marketing (putting it into perspective, this ranked seventh among all industries), that De Lotto self proclaimed that sales' growth was an annual priority, that Dutch citizens were clearly aware of the national TV ads of De Lotto with Euros raining down on the screen, without any mention about curbing gambling compulsion and controlling betting.[142] It might come as intuitively obvious to the casual observer that such practises do not follow the stated objectives the Dutch Government wishes to pursue by means of the Gaming Act. Interestingly, a closely similar case featuring Ladbrokes in Germany concluded with an Administrative Court of Appeals finding that a section of the German Criminal Code penalising foreign bookmakers offering bets to German consumers was 'a blatant breach' of EC Treaty Article 49. In the interim, local providers were aggressively marketing their services for the 2006 World Cup. The Supreme Administrative Court of Finland sided with this logic as well, overturning a decision to preempt Ladbrokes from operating in Finland, whereas the respective case in Sweden led to the opposite conclusion, siding with the Swedish Government, as was the case in the De Lotto case of Holland above.[143] Once more, it becomes clear that there is a tremendous lack of uniformity in MS national courts' decisions on the matter.

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138 Veer et al. 2006, p. 3.

139 Veer et al. 2006, p. 3.

140 http://www.igamingnews.com/index.cfm?page=artlisting&tid=5687

141 http://www.debrauw.com/NR/rdonlyres/7BACD556-CD72-4A36-A586-F21421CC8B69/0/NewsletterIPICT200611.pdf

142 Veer et al. 2006, pp. 9–10.

143 http://www.bettingmarket.com/eurolaw222428.htm, http://www.casino.eu/eu-law.php

One may marvel at the placement of the Dutch national court's question in regard to restrictive policies attempting to curb pathological gambling[144]:

> 13.(1) Does a restrictive national gaming policy which is aimed at channelling (sic) the propensity to gamble and which in fact contributes to the achievement of the objectives pursued by the national legislation in question, namely the curbing of gambling addiction and the prevention of fraud, inasmuch as, by reason of the regulated offer of games of chance, participation in gambling activities occurs on a (much) more limited scale than would be the case if there were no national regulatory system, satisfy the condition set out in the case-law of the Court of Justice of the European Communities, particularly in the judgment in Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, that such restrictions must limit betting activities in a consistent and systematic manner, even where the licence-holder/s is/are permitted to make the games of chance which they offer attractive by introducing new games, to bring the games which they offer to the notice of a wide public by means of advertising and thereby to keep (potential) gamblers away from the unlawful offer of games of chance (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 55, *in fine*)?
>
> 23 In the present case, the wording of the first question put by the referring court shows that the objectives of the Wok are clearly identified by that court, namely protection of consumers by the curbing of addiction to games of chance and prevention of fraud, and that, in the referring court's view, the national legislation at issue in the main proceedings does in fact serve those objectives and does not go beyond what is required in order to achieve them.
>
> 24 The referring court nevertheless has doubts as to the consistent and systematic nature of the national legislation, since the legislation pursues the objectives referred to in the preceding paragraph while allowing economic operators who have exclusive rights to organise games of chance in the Netherlands, such as De Lotto, to offer new games and to use advertising to make what they are offering on the market attractive.

While deliberating *Ladbrokes*, the Second Chamber attempts to keep some semblance of balance and remarks that whereas outright aggressive marketing and bottom-line, profit-driven strategies by a state-licenced provider would not pass muster per se, it would still be possible to see advertisements and commercials, e.g. for the public-sector sport betting outlet, be considered as compliant practises, along the rationale of curbing overall gambling addiction and channelling betting into 'bona-fide' public benefit outlets. Here, Planzer's 2010 concerns in regard to ECJ's apparent lapse of attention to contemporary litigation and judicial trends, and the delay in demanding concrete data and research-based arguments, the evidence-oriented approach per Planzer 2010, echo a broader call for empirical analysis and statistical data, which would yield significant insight on the arguments of each side. The so called 'legal analytics,' which are so extensively utilised and increasingly popular in U.S. litigation, indeed entrenched in the legal history of America dating back to the 'Brandeis brief,'[145] as well as in progressively more international jurisdictions, provide the most sound research and a vault of methodological approaches from various disciplines for Law practitioners and

[144] 258/08.

[145] *Muller v. Oregon* 1907.

scholars to utilise towards more informed, justified, balanced, and fair decisions. When one reads, e.g. '…that demand for games of chance in the Netherlands has already increased noticeably, particularly at a clandestine level—*assuming that is established as De Lotto indicated at the hearing*…' (emphasis added), one cannot help but wonder why the ECJ and other top-level adjudicating bodies do not render such arguments dependant upon the corresponding research that should accompany each case file (note that in reference to 258/08, para 33, such kind of evidence-oriented approach per Planzer 2010 was absent from the case file). As Planzer 2010 notes: 'There is… no cogent reason for the ECJ to base its jurisprudence on assumptions rather than scientific evidence. Only on rare occasions has the ECJ mentioned the role of evidence in the assessment of health risks. It did so in its sixth case, *Lindman*, in an *obiter dictum* where it asked for "statistical or other evidence."[146] Only one week earlier, the Court had already realised that justifications like public health and public order may serve us pretexts for other purposes, i.e., financial interests, and had held in *Gambelli* that gambling offers needed to be limited in consistent and systematic manner…'[147] Planzer boldly concludes that ECJ's '… statements on gambling addiction are more reminiscent of moral views and conventional wisdom, in other words subjective views or assumptions, rather than scientific findings.'[148]

Furthermore, the ECJ appears to give significant value to the letters submitted by De Lotto on its advertising strategy and the request by the Dutch Ministry of Justice to keep such advertising to a minimum.[149] Nevertheless, the marketing campaign had taken place, and according to Ladbrokes' complaint in even an unfair competitive advantage fashion, due to the status of the Dutch licence and relation to public media outlets. Regardless of that disputed point, the ECJ traditionally defers to the national court for determination of what constitutes a balanced and appropriate level of such activity, considering the stated objectives towards the 'public good.' And it sounds fair to defer to national courts, knowing each jurisdiction's particular considerations, however as the record shows the vast majority of appeals and cases referred to national courts after a preliminary ruling do not side with the challengers, rather side with the state monopoly and perpetuate the single/exclusive licensing schemes, that arguably hinder the assimilation to the common market for trans-European entities and impede the unionisation progress.

Consequently, the Second Chamber's holding on the important first question, whether EC Treaty provisions and past case law on the charge to limit gambling in systematic and consistent fashion would be upheld in a case such as De Lotto's exclusive licence and allowable advertising efforts for the exclusive gambling/lottery/sport betting services granted by Dutch Law, does indeed consider both the

[146] 42/02, paras 25–26.

[147] p. 293; also see Doukas and Anderson 2008, p. 247 et seq.

[148] p. 294.

[149] 258/08, paras 34–37.

exclusive licence and such ads as compliant by EU Law application and ECJ precedent. The judgment reads:

[N]ational legislation, such as that at issue in the main proceedings, which seeks to curb addiction to games of chance and to combat fraud, and which *in fact contributes to the achievement of those objectives*, can be regarded as limiting betting activities in a consistent and systematic manner *even where the holder(s) of an exclusive licence are entitled to make what they are offering on the market attractive by introducing new games and by means of advertising. It is for the national court to determine* whether unlawful gaming activities constitute a problem in the Member State concerned which might be solved by the expansion of authorised and regulated activities, and whether that expansion is on such a scale as to make it impossible to reconcile with the objective of curbing such addiction.[150]

The second question the ECJ had to answer was referred as follows:

> 13.(2)(a) Assuming that national legislation governing gaming policy is compatible with Article 49 EC, is it for the national courts to determine, on every occasion on which they apply that legislation in practise in an actual case, whether the measure to be imposed, such as an order that a particular website be made inaccessible to residents of the Member State concerned by means of software designed for that purpose, in order to prevent them from participating in the games of chance offered thereon, in itself and as such satisfies the condition, in the specific circumstances of the case, that it should actually serve the objectives which might justify the national legislation in question, and whether the restriction resulting from that legislation and its application on the freedom to provide services is not disproportionate in the light of those objectives?
> (b) In answering Question 2a, does it make any difference if the measure to be implemented is not ordered and imposed in the context of the application of the national legislation by the authorities, but in the context of a civil action in which an organiser of games of chance operating with the required licence requests imposition of the measure on the ground that an unlawful act has been committed in its regard under civil law, inasmuch as the opposing party contravened the national legislation in question, thereby gaining an unfair advantage over the party operating with the required licence?

Delving into more procedural matters and into technical territory in this portion of the case, the Second Chamber held that the injunction that was imposed on Ladbrokes and the civil action were merely the way of the law in the Netherlands to enforce an otherwise applicable policy (as found in the first portion and by the analysis above abiding by EC Article 49). Specifically, the applicable law was interpreted as excluding Ladbrokes from licensure as well as operations, and the company was further preempted from conducting business over the internet with Dutch citizens. Via judicial decree, Ladbrokes was required to undertake technical measures to block access to its sites from Dutch customers, including telephone access to betting services. The ECJ herein emphasises that this procedure was not to be considered a double jeopardy, an additional restriction to the affected entities, rather an inherent component to the already deemed EU Law-abiding policy favouring De Lotto, in view of curtailing gambling addiction and the

[150] 258/08, para 38, emphasis added.

aforementioned objectives, which were analysed under the first portion and were instrumental in declaring the restrictive practise allowed by the ECJ. In each case, the ECJ's guidance herein remarks that it is up to the national court to decide the rule's conformity with the overarching EU Law principle, here Article 49. As an (intriguing) extension, the national courts are thus instructed to not be concerned with analysing each restrictive/enforcement measure on a case-by-case basis, rather defer to their broad-scope analysis of the restrictive policy's compatibility with, e.g. EC Treaty Article 49. Arguably a dangerous precedent set herein, considering: (a) the fact the ECJ has not truly given specific parameters for national courts on how to precisely conclude on which of these policies may or may not be in violation of Article 49, other than the general principles and some limited analysis in the recent cases; (b) that even if the national court decides that a national law is compatible, the state or public function authority enforcing it might engage in select means of enforcement that may truly go beyond what is necessary to achieve this objective, i.e. curtail gambling and limit exposure of sensitive populations to the risks of gambling addiction; (c) the patent inability of both the ECJ and national courts to assume a balanced stance between careful application of EU Law and traditionally established (possibly even politically popular) state-run monopolies (also see Doukas and Anderson 2008, p. 256 et seq). It is worth noting the ECJ's rejection here:

> 46 In those circumstances, contrary to what is submitted by the Ladbrokes companies, there is no further need to consider whether the implementing measure is actually justified by an overriding reason in the public interest, whether it is suitable for achieving the objectives of limiting addiction to gambling and preventing fraud or whether it does not go beyond what is necessary to achieve those objectives.
> 47 Moreover, whether that implementing measure was adopted as a result of action by the public authorities to ensure compliance with national legislation or of an application by an individual in the context of a civil action to protect his rights under that legislation has no bearing on the outcome of the dispute before the national court.

It follows from the foregoing observations that the answer to the second question is that, for the purpose of applying legislation of a Member State on games of chance which is compatible with Article 49 EC, the national courts are not required to determine, in each case, whether the implementing measure intended to ensure compliance with that legislation is suitable for achieving the objective of that legislation and is compatible with the principle of proportionality, insofar as that measure is necessary to ensure the effectiveness of that legislation and does not include any additional restrictions over and above that which arises from the legislation itself. Whether that implementing measure was adopted as a result of action by the public authorities to ensure compliance with national legislation or of an application by an individual in the context of a civil action to protect his rights under that legislation has no bearing on the outcome of the dispute before the national court.

As per the third question, the ECJ Second Chamber merely reiterates, and pastes therein, its earlier decision from the same day on Betfair, that is, it declares single entity licensing for each game and preclusion of other competitors from

entering the market as justifiable for the reasons of public interest that were analysed above. Interestingly, the ECJ further points out in this third portion of its *Ladbrokes* analysis that it does not so much matter whether the claimant/potential entrant in the gaming sector publicises and markets its products and services (by spending in adverts) more or less than the licensee of the state and single entity in gaming services as well as enforcer of its exclusive licence. What matters is the fact the exclusive licence and restrictive scheme was deemed compatible with EU Law and not violating fundamental principles such as Article 49.

Planzer 2010 gives an entertaining take on the inconsistency of ECJ Jurisprudence through the waves analysed above: 'Since *Läärä*, the ECJ has adhered to the view that limited authorisation through a single operator had the advantage of confining the desire to gamble within controlled channels. The argument has been mainly used in relation to prevention of crime. In *Ladbrokes*, the Court also expressly approved that argument in relation to gambling addiction. A comparison of the exact wording in different cases demonstrates that the guidance offered by the Court is quite confusing. Referring to the Court in *Gambelli*, national authorities were not allowed to "incite and encourage consumers to participate" in gambling offers. In *Placanica*, however, it found that "a policy of controlled expansion … may be entirely consistent … [An attractive offer] may … necessitate … advertising on a certain scale." In *Ladbrokes* finally, the Court found that a Member State was not allowed to pursue a policy of "substantially expanding" gambling by "excessively inciting and encouraging consumers to participate" in these offers. Hence, according to *Placanica*, a State can expand its gambling offers and advertise them, but according to *Gambelli*, it cannot (at all) incite and encourage consumers whereas referring to *Ladbrokes*, a State can incite and encourage consumers—but not excessively… It is a certain feeling of helplessness which transpires from such wording. These criteria will remain patchwork as long as the ECJ does not pursue an evidence-oriented approach…'[151]

Approximately a month following *Betfair* and *Ladbrokes*, on 8th July 2010, the ECJ's Fourth Chamber delivered a judgment that did not receive the publicity of the previous and ensuing cases, in *Otto Sjöberg and Anders Gerdin v. Swedish State*.[152] Therein, Swedish national legislation, which precluded marketing and promotions of online gambling operators chartered and operating in other member states, was found to be compliant with EU Law. However, differences in penalties for Swedish unlicenced gambling operators as opposed to other European member states' gambling providers were not found to be abiding by EU Law provisions. As Monov 2010 notes, the ECJ followed a general path outlined in *Liga Portuguesa*,

[151] pp. 293–293.

[152] Joint cases C-447/08 and C-448/08, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-448/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

thus deferring to national legislation and national courts for many of the crucial questions raised in respect to harmonisation and assimilation to the common market. The latter 'is far from being achieved.'[153]

It is useful to observe that the Swedish law had clearly defined objectives:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.[154]

The gaming law in Sweden affords the opportunity for Swedish non-profit legal entities to be licenced and operate gaming establishments and provide services; these non-profit legal entities under Swedish law share the gambling market and cooperate with the two state-controlled or operated providers in Sweden. In addition, the Criminal Code and the Gaming Law in Sweden have sanctions and penalties specifically for the scope of each legal framework's scope, which excluded gambling operations that have been established in other EU member states. Both the Criminal Code and the Gaming Law, however, do provide for fines and imprisonment of individuals (and accomplishes), who illegally establish foreign gambling (including, obviously, online) services, in particular with the participation of Swedish residents.

The two individuals involved in this case were editors and publishers of newspapers in Sweden, who promoted the gambling services of foreign-established companies (Expekt, Unibet, Ladbrokes and Centrebet), via advertisements in their publications. Thus, the consolidated question posed by the referring court was whether EC Treaty Article 49, on the freedom to provide services, precludes national legislation which would pertain to disallowing ads for gambling operators who have been established abroad. According to the Fourth Chamber:

> 44 In the cases in the main proceedings, the gaming operators which caused the advertisements on account of which the criminal proceedings were initiated to be published are private undertakings run for profit, which could never, as the Swedish Government confirmed at the hearing, have obtained licences for the operation of gambling under Swedish legislation.
> 45 The prohibition on the promotion of the services of such operators to consumers resident in Sweden therefore reflects the objective of the exclusion of private profit-making interests from the gambling sector and may moreover be regarded as necessary in order to meet such an objective.
> 46 … Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.

[153] Monov 2010, para 5.

[154] 447/08, para 5.

Next, the Court handled the problem of the different sanctions provided for the several gambling providers and stakeholders by Swedish Law. Namely, had the newspaper editors promoted unlicenced gambling providers in Sweden, they would only face an administrative decree, as opposed to the criminal charges the Criminal Code provided for promoters of foreign unlicenced providers. Hence, the question therein was 'whether Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence.'[155]

According to fundamental principles of EU Law, as well as dicta in *Placanica* and *Liga Portuguesa*, any such sanctions and restrictive practises, need to be proportionate and applied in non-discriminatory fashion.[156] In general, herein the ECJ defers to the national courts to interpret national law and determine scope and extent of discrimination posed, if any. There was indeed an argument between parties as to the application of the particular sanctions and the Swedish Law provisions. In a nutshell, nevertheless, the ECJ remarks: '…Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.'[157] It could be argued that the Swedish Law case yields some insight on what may take place in the minds and internal discussions among ECJ members, and foreseeably this was not the last case the court dealt with in 2010. Indeed, there were even more important judgments delivered that would arguably mark a new reality in the gambling industry and gaming law applications. Exactly 2 months subsequent to the Swedish Law case, that pivotal moment in ECJ Jurisprudence came, in impressive fashion, considering recent precedent.

Should one think that *Liga Portuguesa, Betfair,* and *Ladbrokes* signified a turn in ECJ jurisprudence and would serve as yardsticks for forthcoming cases in the field of European gaming law and international (internet) gambling policies, there is indeed much more… In true ECJ fashion, the Grand Chamber and the Fourth Chamber issued two decisions on consecutive days, 8th and 9th September 2010,[158] which were bound to challenge several of the dicta in the immediately

[155] 447/08, para 48.

[156] 447/08, paras 49–50.

[157] 447/08, para 57.

[158] C-46/08, *Carmen Media Group Ltd v. Land Schleswig–Holstein, Innenminister des Landes Schleswig–Holstein,* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-46/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&

preceding five cases, deferring to national courts and rendering single entities, exclusive licensing systems, with the embedded preclusions of private operators from entering the national gambling and betting market arenas, as compliant with EC Treaty provisions.

In *Carmen Media*, the complaint revolved around the restrictive regime in Schleswig–Holstein, denying the plaintiff access to games of chance and sport betting over the internet. It should be noted that the legislative framework in Germany up to this decision was very carefully drafted (particularly considering other member states against which the Commission had issued complaints in the past), and periodically revisited in the federal and state level for compliance, aligning policy with ECJ Jurisprudence. The *Glücksspielstaatsvertrag* (hereinafter: GlüStV) had four major goals:

1. to prevent dependency on games of chance and on bets, and to create the conditions for effectively combating dependency,
2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised games of chance,
3. to ensure the protection of minors and players,
4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.

Carmen Media had received a licence for online sport betting services in Gibraltar, as did Bwin, and other providers. It requested, in vain, to be licenced, or allowed through a special provision, to offer internet betting services for German customers. Interestingly, the licence Carmen Media has from Gibraltar encompasses 'offshore bookmaking,' yet it does not allow it to offer other broader betting services. Thus, the interior minister of the Land Schleswig–Holstein expectedly remarks that there should not be an obligation by a member state to allow a potential provider to receive a licence for services in which the said provider does not already engage in another member state. Moreover, as the referring court observed, the gambling monopoly in Germany did not appear to meet the 'consistent and systematic' criterion towards controlling gambling and curbing addiction; namely, it saw sport betting being severely curtailed on one hand with cases such as *Carmen Media*, and on the other a significant expansion in casinos

(Footnote 158 continued)
typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher; and C-64/08, *Staatsanwaltschaft Linz v. Ernst Engelmann*[158], http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-64/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher, respectively.

and other gambling methods (i.e. gaming machines). Hence, the four-pronged referral from the German court on which the Grand Chamber would have to adjudicate entailed the following questions:

(1) Is Article 49 EC to be interpreted as meaning that reliance on the freedom to provide services requires that a service provider be permitted, in accordance with the provisions of the Member State in which it is established, to provide that service there as well (in the present case, restriction of the Gibraltar gambling licence to 'offshore bookmaking')?
(2) Is Article 49 EC to be interpreted as precluding a national monopoly on the operation of sports betting and lotteries (with more than a low-potential risk of addiction), justified primarily on the grounds of combating the risk of gambling addiction, whereas other games of chance, with important potential risk of addiction, may be provided in that Member State by private service providers, and the different legal rules for sports betting and lotteries, on the one hand, and other games of chance, on the other, are based on the differing legislative powers of the *Bund* and the *Länder*?

Should the second question be answered in the affirmative:

(3) Is Article 49 EC to be interpreted as precluding national rules which make entitlement to the grant of a licence to operate and arrange games of chance subject to the discretion of the competent licensing authority, even where the conditions for the grant of a licence as laid down in the legislation have been fulfilled?
(4) Is Article 49 EC to be interpreted as precluding national rules prohibiting the operation and brokering of public games of chance on the internet, in particular where, at the same time, although only for a transitional period of 1 year, their online operation and brokering [are] permitted, subject to legislation protecting minors and players, for the purposes of compensation in line with the principle of proportionality and to enable two commercial gambling brokers who have previously operated exclusively online to switch over to those distribution channels permitted by the [GlüStV]?

Some fascinating insight can be derived by the Grand Chamber's exploration herein. First, it is deemed incompatible with EC Article 49 to render a licence dependent upon whether the prospective provider precisely offers the same services in the member state where it already holds a licence. Even more intriguingly, perhaps, is the input embedded in the Belgian and Austrian *amici curiae*, whence one may argue that the freedom to provide services protection should not apply in cases such as these gambling providers', since their major objective for applying and receiving a licence in Gibraltar was the tax benefit to be derived therefrom. Nonetheless, the ECJ does not delve into the due analysis on this problem, as it is considered beyond the scope of the questions posed. The first question is thus answered:

Having regard to all the foregoing, the answer to the first question is that, on a proper interpretation of Article 49 EC, an operator wishing to offer via the internet

bets on sporting competitions in a Member State other than the one in which it is established does not cease to fall within the scope of the said provision solely because that operator does not have an authorisation permitting it to offer such bets to persons within the territory of the Member State in which it is established, but holds only an authorisation to offer those services to persons located outside that territory.

The second question is obviously the meat of the case, and arguably an extremely pivotal moment for ECJ Jurisprudence and the future of the gambling sector and an eventual liberalisation of the industry. In essence it is inquired whether EC Article 49, the freedom to provide services, should allow exclusive state regulated providers and gambling monopolies on grounds of curtailing gambling and minimising addiction risks, whereas concurrently there is patent expansion on several aspects of the industry, in which the state-run, affiliated, or licenced provider possesses the main or only (if a monopoly) market share. It is further tested whether it would make a difference if the particular governance mechanism or relationship with the state (and perceived public benefits) would allow these restrictive practises.

Perhaps a very important point here is that the Grand Chamber appears greatly influenced by the referring court's concerns and critical stance towards Germany's own restrictive policy mechanism. Such a (carefully deliberated) position by a national court might heretofore not have been encountered. Thus, the thoughtful reader of these decisions should keep in mind that the backdrop of the German court's positions may have been instrumental in the Grand Chamber's final judgment. At this point, the ECJ in retrospect fully utilises its theorem from *Zenatti, Gambelli,* and *Placanica,* in regard to state authorities not being able to claim justifications of the public interest, benefits from curtailing gambling (competition), and minimising risk of gambling addiction, when the state operators themselves engage in the business, furthermore trying to incite potential clients to gamble and invest in their services. It was deemed a disconnect to observe that gaming machines' regulations were relaxed, casinos establishments increased from 66 to 81 in 6 years, yet the services Carmen Media wished to pursue were restricted by the state sector via the sport betting monopoly, federally introduced and passed in each German state, with differing aspects and results. On the latter, the ECJ is fairly clear; regardless of internal considerations, the Federal Republic of Germany cannot infringe on Article 49, rather work in conjunction with its constituent states upholding it. Although only a few weeks separated from the ECJ decision, it appears that this answer will be imperative for ensuing national courts' deliberations:

> [O]n a proper interpretation of Article 49 EC, where a regional public monopoly on sporting bets and lotteries has been established with the objective of preventing incitement to squander money on gambling and of combating gambling addiction, and yet a national court establishes at the same time:
>
> - that other types of games of chance may be exploited by private operators holding an authorisation; and
> - that in relation to other games of chance which do not fall within the said monopoly and which, moreover, pose a higher risk of addiction than the games which are subject to

> that monopoly, the competent authorities pursue policies of expanding supply, of such a nature as to develop and stimulate gaming activities, in particular with a view to maximising revenue derived from the latter;

This national court may legitimately be led to consider that such a monopoly is not suitable for ensuring the achievement of the objective for which it was established by contributing to reducing the opportunities for gambling and to limiting activities within that area in a consistent and systematic manner.

The fact that the games of chance subject to the said monopoly fall within the competence of the regional authorities, whereas those other types of games of chance fall within the competence of the federal authorities, is irrelevant in that respect.

The third question is of procedural and substantive value, as it is an endeavour to decide whether a member state authority has the opportunity to issue licences on its own discretion, even when the normative statutory obligations and licensure parameters have been satisfied. It is herein where the principle of proportionality enters. The value of paras 86 and 87 of the Carmen Media decision cannot be overstated; indeed they were much anticipated:

> 86 According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings.[159]
> 87 Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.[160]

It is precisely here where the ECJ delivers its tremendous guidance and impacts directly the practises of EU member states in ensuing months/years. The final outcome leaves little room now for objections by member states' representatives and gambling monopolies proponents:

> [O]n a proper interpretation of Article 49 EC, where a system of prior administrative authorisation is established in a Member State as regards the supply of certain types of gambling, such a system, which derogates from the freedom to provide services guaranteed by Article 49 EC, is capable of satisfying the requirements of that latter provision only if it is based on criteria which are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them.

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[159] See, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, para 49.

[160] See *Sporting Exchange*, para 50 and case-law cited.

The fourth question in *Carmen Media* is almost equally as important. It indirectly touches upon the legality of internet gambling in its entirety (at least where Schleswig–Holstein would like to lead the discussion and ECJ's analysis). As per ECJ case law and interpretations of Article 49 application, the Court may decide that a certain scope restriction may be 'regarded as suitable for achieving the objectives of preventing incitement to squander money on gambling, combating gambling addiction, and protecting young people.'[161] Sadly, as one is prepared for a lucid moment herein by the Grand Chamber, the internet gambling anecdote and *Liga Portuguesa* theorem is once more utilised: '… [B]ecause of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.'[162] Moreover, the Grand Chamber actually elaborates and expands in this case, and reverts to its more conservative positions in past judgments, by holding:

> 103 It should be noted that, in the same way, the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.
> 104 Moreover, it should be noted that, having regard to the discretion which Member States enjoy in determining the level of protection of consumers and the social order in the gaming sector, it is not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue.[163]

Thus, a prohibition under the non-discriminatory criteria and with deference to national courts' interpretation and enforcement is rendered suitable, given the objectives mentioned above. Nevertheless, any transitional period, licensing procedure, etc need to be applied in uniform fashion. Concluding its profound analysis in this case, the Grand Chamber leaves some room for (damage) control and restrictive practises in member states (internet) gambling policy:

> [N]ational legislation prohibiting the organisation and intermediation of games of chance on the internet for the purposes of preventing the squandering of money on gambling, combating addiction to the latter and protecting young persons may, in principle, be regarded as suitable for pursuing such legitimate objectives, even if the offer of such

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[161] 46/08, para 98.

[162] *Liga Portuguesa de Futebol Profissional and Bwin International*, para 70.

[163] See, by analogy, Case C-518/06 *Commission* v. *Italy* [2009] ECR I-3491, paras 83 and 84.

> games remains authorised through more traditional channels. The fact that such a prohibition is accompanied by a transitional measure such as that at issue in the main proceedings is not capable of depriving the said prohibition of that suitability.

As Hambach 2010 notes, the ECJ judgment in Carmen Media caused sufficient legal chaos in Germany. His collection of German headlines in the days following the decision is illuminating of the concerns and popular reactions.

The press coverage of the decision was widespread in Germany. The media suggested that the 'end of the German gambling monopoly' seems to be inevitable. Examples of headlines and statements of the German press and media were…

> The German monopoly on lotteries and sports betting and other games of chances is inapplicable with immediate effect.[164]
>
> Sport betting is now allowed in Germany.[165]
>
> The European Court of Justice stops the hypocrisy.[166] The Germany monopoly on gambling is illegitimate and—even transitionally—not applicable.[167]

As frequently noted and recently acknowledged by both sides, solutions may be provided via political will. In Germany, there were recent bi-partisan efforts to accomplish certain goals and make progress with the new reality the ECJ brings forth. As Hambach 2010 notes:

A clear reaction on the political front came immediately from the region of Schleswig–Holstein, whose proposal now becomes trend-setting. The press release sent out by the parliamentary parties of the CDU (conservatives) and the FDP (liberals) in Schleswig–Holstein on September 10 reads as follows:

> The parliamentary parties of the CDU and the FDP in Schleswig–Holstein today suggested a two-stage process for the development of a new gaming law. According to this, the new gaming law will come into force by the end of 2011 at the latest.
>
> 'The judgment by the European Court of Justice requires fast and at the same time well-coordinated measures,' said Dr Christian von Boetticher, head of the CDU parliamentary party. 'Otherwise, the courts will no longer be able to prosecute illegal gambling,' FDP leader Wolfgang Kubicki said. 'Therefore, we need a new regulation as quickly as possible.'

Von Boetticher and Kubicki named seven criteria which the new gaming law mandatorily needs to fulfil in the opinion of the coalition parties in Schleswig–Holstein:

- Compliance with European Union law
- Provision of funds for popular sports and public welfare work, at least at their present Level

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164 Tagesspiegel, September 8, 2010.

165 Sueddeutsche Zeitung, September 9, 2010.

166 Die Welt, September 9, 2010.

167 Tagesspiegel, September 9, 2010.

- Effective protection of players and minors
- Effective prevention of addiction
- Effective measures against manipulation of bets
- Prevention of bets whose contents are detrimental to the reputation of sports
- Drying up of the black market in gambling

Moreover, Ehlermann 2010 posits that there are far-reaching consequences across Europe after *Carmen Media*. He believes that the ECJ grasped the opportunity to ensure consistency and clarify some parameters for national courts, which was missed in *Liga Portuguesa*. He argues that there is a chance for EU member states to promote modern, EU Law-compliant regulation in reference to cross-border online gaming, since all member states post-*Carmen Media* need to revisit their regulatory frameworks and document their consistency. Furthermore, Ehlerman 2010 observes: '*Carmen Media* is a landmark ruling because it provides decisive clarifications of the scope of the consistency requirement in two respects: Firstly, the Court does not carry out the quantitative assessment separately for each type (or "sector") of game but rather compares different types of games with each other… Secondly, the Court does not even limit the comparison between different types of games to those types of games that are covered by the monopoly (or, for that matter, the respective legal act under scrutiny—which was the German gambling treaty in the case at hand). Rather, the Court makes the comparison between those types of games that are covered by the restriction (here the monopoly) and those games that are not covered by it.'

The other case of the pivotal September 2010 docket, *Ernst Engelmann,* teased out Austrian law restricting access to casino and gambling licences. It is enlightening to observe the Austrian Law explanatory notes that the ECJ's Fourth Chamber utilised during its legal context introduction. It is therein found that the Austrian law holds this position:

> [I]deally, a total prohibition on gaming would be the most judicious form of regulation but given that, as is well known, a passion for gambling seems inherent in the human condition, it is far wiser for that passion to be channeled in the interests of the individual and society. It is stated that two goals are thus achieved: first, gaming is prevented from entering the realm of illegality, as may be observed to happen in States which prohibit games of chance entirely; at the same time, the State is enabled to retain the possibility of supervising games of chance operated lawfully, the main objective of such supervision having to be to protect the gambler.

As to the fiscal objective, the explanatory notes identify an interest on the part of the federal State in being able to derive the maximum possible revenue from the gaming monopoly and, therefore, when adopting rules on gaming, the federal government must, while observing and protecting the goal of regulating gaming, ensure that games of chance are operated in such a way that the monopoly produces the maximum possible revenue for it.

Upon criminal penalties, the only means a gambling operation may be organised in Austria is through it fairly restrictive regime of 'concessions,' public licences, for which stringent parameters are introduced. Reserving the right for the

state to organise a 'games of chance state monopoly,'[168] the Austrian Ministry of Finance may only grant 12 such licences, and only one per municipal territory, for a period of up to 15 years. On the business law side, these providers need to be chartered as 'public limited companies having their seat in Austria and with a share capital of at least EUR 22 million; in the light of the circumstances the concessionaire must also offer the local public authorities the best prospects of maximising tax revenue, whilst observing the rules … on the protection of gamblers.'[169] Additionally, there are impressive conditions for the state's oversight over the business operations for such providers, allowing state authorities and an appointed state commissioner to periodically inspect accounts, conduct visits, and seek elaborate audits.

By Austrian law decree, the concessions had been awarded to a state-run company, Casinos Austria AG, for several gaming operations for a period of 15 years, as the Austrian government admitted without a public tender inviting competing bids. The plaintiff in this case, Mr Engelmann, a German national, was fined EUR 2,000, resulting from his offer of games of chance, absent receiving a licence from state authorities. Thus the Austrian court referred the matter to the ECJ, seeking to know whether the Austrian Law restricting the opportunities to conduct such business were lawful under EC Treaty Articles 43 and 49. The usual concerns were raised by the national court, (a) in respect to an absence of analysis prior to assuming the restrictive policy, thus justifying its appropriateness, (b) considering that there is substantial advertising and enticement to gambling on the part of the Austrian monopoly company, (c) given that the latter is the only provider and indeed a public limited company causing the court to doubt whether this policy would sufficiently prevent crime, fraud, or addiction, and (d) taking into account the fact that Austria's declaration that a key objective is to pursue tax revenue from the gaming establishments conflicts with well-established ECJ case law on limitation of gambling opportunities as a justifiable rationale for restrictive policy, and not boosting state coffers. Hence, the three legal questions the Austrian national court posed and the Fourth Chamber was charged to answer were:

(1) Is Article 43 EC … to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?
(2) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming—such as public sports betting and lotteries—and advertise such gaming (on television and in newspapers and

[168] 64/08, para 7.
[169] 64/08, para 9.

magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made ('TOI TOI TOI—Believe in luck!')?

(3) Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?

The first question tests applicability of EC Article 43 in regard to the two limitations posed by Austrian Law, namely setting up a public limited company and have their seat in Austria. The ECJ very promptly and in one sentence declares such a regime a violation of the freedom of establishment enshrined in EC Treaty Article 43, and proceeds to examine whether such a violation may be deemed justifiable, either via the expressed derogation embedded in the Treaty provisions, or via the ECJ's case law for overriding reasons in the public interest. Without going into much analysis, the Fourth Chamber considers such restrictions as disproportionate, and although usually deferring to the state court for deliberations, does provide with sufficient guidance based on its own precedent as investigated above. Thus, in Sections 38–40 of its judgment, the ECJ provides alternative measures for Austria, an interesting approach herein, and succinctly declares its policy a violation of the freedom of establishment, Article 43 of the Treaty:

> 38 Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition, as the Advocate General has stated in point 60 of his Opinion, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers.
>
> 39 Moreover, having regard to the activity at issue, namely the operation of gaming establishments located in Austrian territory, there is nothing to prevent supervision being carried out on the premises of those establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.
>
> 40 The answer to the first question is therefore that Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State.

Thereafter the Fourth Chamber decided to delve into the related third question, essentially asking whether EC Treaty Articles 43 and 49 preclude a policy such as Austria's wherein there is no competitive, open, biding procedure and a finite number of licences are granted to public companies for 15 years. These three restrictions (number of licences, limitation in duration of licence, and absence of transparency) were tested by the Fourth Chamber in its analysis. 12 licenced facilities meant that each site would correspond with approximately a population

of 750,000, thus resulting in a direct impact of curtailing gambling opportunities for the public, long accepted as a justified reason for restrictive policy. The Fourth Chamber also considered the limitation in duration a policy that could be justified, subject to verification by the state court; the ECJ acknowledges herein that the concessionaire needs a reasonable period of time to experience a return on its investment. The lack of transparency, however, did not sit well with the Fourth Chamber. Although services' contracts were excluded from Commission directives in respect to public procurement, nevertheless the ECJ pontificates that member states are bound by the general provisions of Articles 43 and 49, and the overarching precondition of transparency, frequently set as imperative by ECJ precedent.[170] In Sections 50 and 51 the ECJ further explains that although there is no true obligation to call for tenders, there needs to be a sufficient amount of publicity in respect to competition, and a fundamental transparency in the review process. It is very clearly indicated that interest from other member states should be considered in the decision-making process, and no discrimination and alienation of other states' prospective contractors should take place. The criteria need to be set forth well in advance, and the affected parties need to have recourse within the state system.[171] Hence, in para 58 the Fourth Chamber promptly rejects Austria's restrictive regulatory regime as set in the proceedings: 'In the light of all of those considerations, the answer to the third question is that the obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.'

The second question was rendered moot and the Fourth Chamber explains: 'In view of the answers given to the first and third questions and of the fact that the national court, as pointed out in para 26 of the present judgment, has established a link between the facts satisfying the definition of the offence with which Mr Engelmann has been charged and the question whether he was lawfully excluded from the possibility of obtaining a concession, it is not necessary to answer the second question.'[172]

Regarding the Austrian case, the secretary-general of the EGBA**,** Sigrid Ligné, stressed that it confirms clearly that member states does not require EU licenced online operators to be physically present on their territory. Clive Hawkswood, chief executive of the Remote Gambling Association (RGA), added that Austria is not alone in having gambling laws and arbitrary practises that seek to protect particular local operators. 'We hope that this ruling will convince other member states to introduce changes in their legislation,' he said.[173]

[170] 64/08, para 49.

[171] 64/08, para 55.

[172] 64/08, para 59.

[173] EurActiv 2010.

As an overall reception subsequent to these latest ECJ rulings, there was considerable backlash among European lotteries and the state-interests' organisations, and definite celebration among gambling industry shareholders. Professor Siegbert Alber, who represented most of the private gambling industry during the latest litigation process, and was Advocate General in *Gambelli*, remarked 'that EU Commissioner Barnier will propose a new EU regulation to liberalise the European gambling market—and end the national discussions.'[174]

4.4 The European Ombudsman's Special Report

A refreshing take on the issues discussed was the contribution of the European Ombudsman.[175] In a nutshell, the Ombudsman investigates complaints about maladministration in EU institutions. After the record of high numbers of complaints in 2004 and 2005, the level essentially 'stabilised at the previously unprecedented rate of 320 per month.'[176] The number fell to 260 in 2009.[177] The most active role and important intervention the Ombudsman can take in order to promote EU citizens' interests encountering multi-faceted problems by EU institutions and move the process of a conflict resolution is a 'special report'. As of Fall 2010, there have only been 17 special reports issued by the office of the Ombudsman since 1995.[178] Special report No. 13 was appropriately pertaining to a citizen's complaint about sport betting services. To fully capture the EC's stance on the matter, one should bear in mind the expectation of the *Gambelli* decision and the controversy following shortly thereafter. The EC hesitated to take significant action right after the ECJ decision, and was evidently, as is documented by the Ombudsman's report below, procrastinating, gauging the consensus around EU jurisdictions, institutions, and the interest around the upcoming Services Directive discussions.

In January 2005, a provider of sports betting services in Germany complained[179] to the Ombudsman about the inactivity of the EC regarding his infringement complaint against Germany, filed in February of 2004.[180] The German authorities had ordered the complainant to stop offering sports betting services, thus forcing him to close his business. In the complainant's view this constituted a violation of the freedom to provide services under the EC Treaty. He had therefore asked the EC to take steps against Germany. The EC admitted that it

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174 EurActiv 2010.

175 http://www.ombudsman.europa.eu

176 Diamandouros 2006b, p. 9.

177 Diamandouros 2010.

178 http://www.ombudsman.europa.eu/special/en/default.htm

179 289/2005/(WP)GG.

180 Diamandouros 2006a, p. 2.

had not yet taken a decision regarding this infringement complaint. According to the EC, the issue was politically highly sensitive and the College of Commissioners had not been able to take such a decision.[181]

During the fact-finding process, the Ombudsman's report established that the EC had received letters requesting a reply and significant action (investigating Germany's policy on sport betting and the restrictions posed thereupon) in 2004 and 2005. These requests were either unanswered or addressed in untimely fashion (6 months after reception). What intensified the EC's apparent unwillingness to attend to the citizen's complaint against Germany was the (delayed) reply to the second request of 2005, stating: '… due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission *can probably not be expected in the near future.*'[182]

The Ombudsman's special report indicates that:

> The Ombudsman considers that the present case raises an *important issue of principle*, namely the question as to whether the Commission is entitled indefinitely to delay its handling of complaints alleging an infringement of Community law by a member state on the grounds that it is *unable to reach a political consensus on how to proceed*.[183]

The Ombudsman report states that the Commission has a duty to deal properly with all infringement complaints, even if they are 'highly politically sensitive or controversial.'[184] He thus recommends the EC to 'deal with the complainant's infringement complaint diligently and without undue delay.'[185] The next procedural step was for the European Parliament (EP) to adopt this recommendation as a resolution, forcing the EC to act. In the Ombudsman's final report for the year 2006, the matter fell under Section 3.7: 'Cases closed after a special report.'[186] The EC subsequently informed the Ombudsman that it had, in the meantime, decided to open infringement proceedings by sending a letter of formal notice to Germany.[187]

4.5 Policy Developments, EC Inquiries, and the Services Directive Controversy

The last part of the first decade of the new millennium demonstrated that gambling has been one of the most volatile and dynamic sectors in EU economy and indeed one of the most fertile for both further growth and regulation. As of December

[181] Diamandouros 2006a, pp. 2–3.
[182] Diamandouros 2006a, p. 3, italics added.
[183] Diamandouros 2006a, p. 1, italics added.
[184] Diamandouros 2006a, p. 1.
[185] Diamandouros 2006a, p. 9.
[186] Diamandouros 2006b, p. 5.
[187] Diamandouros 2006b, p. 111.

2010, the most recent legal and policy developments in EU member states in brief are:

An impressive turn and developing political change in the Netherlands, where for the first time there is the prospect of regulation (v. liberalisation per Franssen 2010). As Franssen 2010 notes subsequent to the Dutch elections and only days following the formation of a new government in the Fall of 2010, it is 'of paramount importance for the remote gaming sector to step forward and explain to the government how regulation works in the other member states…' and particularly focus on matters of taxation, international liquidity, and a framework that according to Dutch authorities should bring in approximately 10 million Euros shortly upon licensing online gambling,[188] and up to 270 million Euros annually.[189] Furthermore, Franssen 2010 joins other law and economics practitioners and scholars,[190] and the collective voice of the gaming sector[191] calling for harmonisation that would behove every EU stakeholder. In addition, the Dutch Ministry of Justice commissioned the Janssen Report (Fall 2009 to Summer 2010), which yields useful insight and assumes a balance, promoting regulation for online poker yet remaining short of the liberalisation the gaming industry would strongly advocate.[192]

One of the most important and arguably most progressive policy developments in the betting sector came in the form of the new French regime for regulating the gambling industry. Verbiest 2010a explains the 'Right to Bet' policy in the new French Gaming Law, and underscores the important contractual relationship and licensing schemes necessary in order to offer sport betting in France; namely, sport betting providers would need to negotiate and receive fair terms by the sport organisations for betting services and products, monitored by the competition authorities, ensuring unfair and anticompetitive practises will be avoided. Verbiest 2010a expresses concerns on the matter of dominant position abuses, the traditionally established monopolies and state-run or -affiliated providers obtaining a favourable position in negotiations and licensing rights, and overall the prospects of competition distortion in favour of incumbents versus new entrants. Exclusionary and concealed or patently anticompetitive practises (such as loyalty rebates, overly entangled and practically unenforceable or impossible to meet criteria in obtaining licensure, etc) need to be carefully monitored by competition authorities in this new regulatory framework.[193] Overall, new operators in France would need to acquire a French gambling licence and be regulated by the French gambling regulatory body. licenced operators will be subject to stakes-based tax rates of 8.5% for sports betting, 15.5% for horse racing betting, and 2% for online

[188] Franssen 2010.

[189] Naaktgeboren 2010.

[190] Europe Economics 2004; Vlaemminck and De Wael 2003.

[191] EGBA 2010.

[192] RGA 2010.

[193] Verbiest 2010a.

poker. Licences will only be granted to operators established in the EEA and these operators will not have to relocate to France.[194]

Asensi 2010 reflects on some of the respective policy (non) developments in Spain as of December 2010, and recapitulates some of the directions set forth by the Spanish state in view of upcoming regulation of the online sector. These policy directions have been funnelled through media outlets, but at time of print there is no concrete legislative delivery after the passing of the Ley 56/07 de Madidas de Impulso de la Sociedad de la Información—Law on Measures to Develop the Information Society. Importantly, the licensing provisions that have been floated through the Spanish press include:

- Each type of game will require a specific class of licence.
- The operator can be a Spanish or European Union company, but it will be necessary to have a permanent establishment in Spain.
- The operator will have to deposit a bond as a 'general solvency guarantee' and 'additional guarantees' for each class of game that if offers.
- The operator will have to present an operational plan for the activity that it wants to develop.
- Technical systems will have to be endorsed prior to the request for the licence.
- The Central Game Unit will have to be connected with the regulator 24/7 so that it is possible to register all of the activities.
- Servers need not be located in Spain, but it will have to be possible to monitor them from Spain.
- The period to resolve a licence application will be 3 months from filing. Administrative silence (i.e., no formal response within 3 months) will constitute a refusal.
- LAE (the state lottery) reserves for itself the activity related to lotteries.
- A distinction is drawn between licences (with a permanent character) and authorisations (with an occasional or sporadic character).[195]

The Spanish government has on a number of occasions communicated to Spanish newspapers several options of taxation systems, which are as follows:

- Corporate tax, levying gaming activities like those performed by any other firm, together with a tax on players' wins. An initial deduction of 19 per cent in each prize—in accordance with the capital return tax—would be applied to the player together with a definitive payment at the income tax return; or
- To follow the French system (8.5 per cent tax on each bet); or
- To follow the model of the Madrid and the Basque Country regions (10 per cent tax on the win).[196]

[194] Hagan 2009.

[195] Asensi 2010.

[196] *Idem*.

What has been a difficult process, due to LAE's internal restructuring and the usual financial struggles several European states have been experiencing in the state sector, has created on one hand the initiative by regional authorities (e.g. Madrid, Basque Country) to issue their own sport betting authorisations, and on the other the defensive tactic of preemptive litigation and administrative complaints filed by the traditional land-based sector to uphold hard-fought interests over an uncertain future posed by the expansion in the online gambling industry. It has been generally expected that clarification in the legal and policy regime over the online sector will ensue in the early part of 2011.[197]

Belgium, conversely, has proceeded with significant legislative intervention and regulatory evolution, by means of a new Gaming Law passed in December 2009, to take effect January 1st, 2011. A licensing system will be imposed for all kinds of games of chance, including but not limited to poker, sports betting (whether fixed-odd or mutual) and horse race betting, except for lotteries which remain the monopoly of the state-owned incumbent, *La Loterie Nationale*, and are thus excluded from the Gaming Law's scope of application. The Belgian Gaming Commission will be entrusted with the task of granting licences to both offline and online gambling operators.[198] It is important to note that fairly restrictive aspects of the policies embedded therein were introduced subsequent to the *Liga Portuguesa* judgment, yet prior to the ensuing ECJ decisions. As Verbiest 2010b observes they may surely raise anticompetitive and Articles 43/49 freedoms' concerns, in particular the obligation to receive a land-based licence for online providers, whereas there is a finite number of licences Belgium will grant. Verbiest 2010b intelligently posits the competition law scrutiny problem as well in view of the anticipated business-to-business transaction between online gaming operators and land-based providers already licenced in a member state. He alerts stakeholders of the national and European competition law scrutiny of the 'ex ante online gaming regulation and ex post competition rules' reality.

Amidst heavy activity in member state jurisdictions and in the gambling industry, the first highly regulated environment, and the one with the licences and territories which serve as catapults for global online gambling operators, the UK, proceeded with a few key initiatives in succession of the major legislative acts of the mid 2000s (arguably the most important Act in the world of gambling heretofore, the Gambling Act of 2005). The UK's Gambling Commission would have to licence any operator who targets British consumers online. '… [I]t remains to be seen how the UK Government intends ensuring that the above-mentioned measures can be directed towards those online operators *active* in the British market who are *targeting* British consumers, given the nature of the Internet and EU rules which require businesses to conduct trade and services openly and freely across EU Member State borders, including services rendered on the Internet …'[199]

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197 *Idem*.

198 Verbiest 2010b.

199 Verbiest 2010c.

Italy being the favourite defendant in key ECJ cases shaping the contemporary reality, the liberalisation of the gambling market took a few years to truly be implemented. Impressively, with a 2009 Law on fixed odds for online games of chance, there was the introduction of a 20% flat tax rate on all gross profits. Per Law 88/09, Italian gaming policy developments can be summarised as follows:

An AAMS (Italian gaming regulator)-granted licence is required for the offer of remote gaming services to Italian residents. Not only offshore-based, but even operators licenced elsewhere in the EU will not be allowed to carry out across-the-border services in Italy.The one-off cost of the licence will be €360,000 (VAT included) payable upon licence issuance. All licences, no matter when actually granted, will lapse on 30 June 2016. The remote gaming licence will cover fixed odds/pool sports and horse race betting, skill gaming (including online poker and any other card tournaments which are all eligible for skill gaming classification), online scratch-and-win (subject to a sub-distribution agreement with the current exclusive licence holder), online bingo (subject to payment of an extra €50,000 fee), online casino, online poker and other cash games, bets on virtual events and betting exchange (subject to these two games being regulated by AAMS). The AAMS licence is open to any applicant based on a European Economic Area jurisdiction. The licence may be issued directly to a foreign applicant provided he holds an EEA passport. The licence may be issued even to a non-operator (such as a start up or a company coming from a totally different business) subject to (i) release in favour of AAMS of an €1.5 million bank guarantee and (ii) certification by an independent auditing firm that the applicant holds all required technological infrastructure and management resources to run the licence. Remote gaming services can only be offered to Italian residents through a dedicated platform which must be linked up by the centralised system run by AAMS via its technological partner SOGEI so that each bet/wager placed by an Italian customer may be recorded, monitored, tracked, validated, and taxed in real time.

Provision of remote gaming services from a foreign-based '.com' platform to Italian residents is strictly forbidden and subject to the blacklist restrictions currently enforced by AAMS as well as to prosecution. Whoever offers online gaming services in Italy without holding an AAMS-granted licence is subject to imprisonment from 6 months up to 3 years.

Whoever organises, offers and takes remote bets in Italy on any games regulated by AAMS but in a way other than that required by the AAMS rules, is subject to arrest from 3 months up to 1 year and to a fine ranging from €500 to €5000 even if the violator does hold an AAMS licence. Foreign-based AAMS licensees are allowed to keep their gaming servers abroad provided they are located in the EEA space and a full, real time connection with the AAMS centralised system is in place. The gaming software running on all games offered on the Italian platform must be certified by an AAMS-approved testing laboratory.[200]

[200] Mancini 2010.

'[O]ther first-tier European markets do not seem to be proceeding at the same speedy and rather operator-friendly pace as Italy when it comes to opening up their respective gates to international operators eager to penetrate new territories and gain new customers across the Old Continent…'[201] It becomes evident that through Commission's infringement proceedings and ECJ decisions chastising the restrictive environment Italy imposed in the past, Italy has now become one of the frontrunners in modern gaming legislation, and indeed doing so in a way that immediately and very positively impacts the state coffers. Historically, it is important to note that the key procedural motions were put forth by the Italian government soon after the tragic L'Aquila earthquake, via the 'Abruzzo decree;'[202] the latter outlined the reconstruction plans, and encompassed gaming regulation and revenue distributions. Closely, in response to the global financial crisis, another Italian legislative intervention provided for the establishment of four additional lottery licences, upon the Lottomatica-owned Consorzio Lotterie Nazionali exclusivity's expiration in 2010. Mancini 2009 comments: '…[I]n addition to keeping its national licence regime fully in place with the official blessing of the Brussels authorities, Italy also became the champion of a pragmatic and reasonably flexible regulatory model which is currently the only realistic alternative to an Europe-wide harmonisation of the licensing rules … Other EU jurisdictions like France and Denmark… have largely drawn from it to open up their respective markets thereby combining a system of internal rules and controls still issued and enforced at local level, with less administrative red tape and lighter operational hurdles for licence applicants based and licenced in other EU jurisdictions …'

In his recap of Nordic countries' gaming law and policy developments, Aho 2010 remarks that Denmark and Sweden are setting the pace for liberalisation and further regulatory evolution in 2011. In both Denmark and Sweden, the impact of EC infringement proceedings and the risk of ensuing ECJ scrutiny led to some commotion and introduction of legislative bills and studies on the most appropriate options for gambling policy.

Ronde 2009 outlines the parameters of the Danish efforts: '…[T]he Danish Government announced in April 2009 plans to end the gambling monopoly held by the State-owned organisation, Danske Spil, and to proceed with plans to liberalise parts of the gambling market in order to offer better protection to the players, avoid economic crime related to gambling and to guarantee future revenues for social causes… [This] will create a national licensing and taxation framework for online sports betting, poker and casino games, allowing increased competition in these areas. The national lottery, LOTTO, and instant games will on the other hand continue under the exclusive provision of Danske Spil. Operators will be subject to taxation, licence fees and must abide by all Danish gambling regulations…' Danske Spil, the traditional Danish gambling monopoly, greeted the news

[201] *Idem*.

[202] Spring–Summer 2009.

positively, as it could now enter the roulette and poker markets. In addition, the sport organisations in Denmark and non-profits receiving gaming revenue also were looking forward to the new regime, since Danske Spil revenues and appropriations to sport were shrinking the 2 years preceding the new gaming framework. With an average tax rate of 30% of GGR for sport betting prior to the liberalisation shift,[203] there was a lot to celebrate in Denmark. It is useful to note that Ladbrokes had won cases in both Danish and Swedish national courts. On the other hand, Finland, although faced with ECJ castigation in the past, has not yet assumed the proactive approach that would convince the Commission of the country's progress towards upholding EU Law and relaxing restrictive measures in favour of national monopolies and gambling schemes.

By Summer 2008, the EC had proceeded with investigations as well as infringement procedures against Denmark, Finland, France, Germany, Greece, Hungary, Italy, the Netherlands, and Sweden.[204] These countries' restrictions were initially going to be tested for EC Treaty Article 49 compatibility. It appears that the ECJ's rulings in *Gambelli* and thereafter provide valuable guidance to that end.

> In sending these letters of formal notice, we are not seeking to liberalise the market in any way," said Internal Market and Services Commissioner Charlie McCreevy.'[205] '"In the context of rising national protectionism in various member states, the European remote gambling industry welcomes the Commission's strong determination to enforce Internal Market rules in this sector," states a joint press release of the European Betting Association and of the Remote Gambling Association. Both associations believe that this investigation "sends a clear message to consumers, the industry and member states on the need to clarify the legal situation in this sector.[206]

What is important to note in such a brief policy summation is the development of the Services Directive,[207] the EP and the Council of the EU (Council) reached a final document at the twilight of 2006. This policy initiative aims at alleviating many of the problems in applying EU Law and easing the process of integration. Freedom of establishment and freedom to provide services were the two main targets for the Directive. After careful deliberation, alongside other services,[208]

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[203] Ronde 2009.

[204] http://www.euractiv.com/en/sports/commission-investigates-national-restrictions-sports-betting/article-154029; http://ec.europa.eu/internal_market/services/infringements/index_en.htm

[205] Commission investigates…, para 2.

[206] Commission investigates…, para 3.

[207] Directive 2006/123/EC of the EP and Council, 12 December 2006, on services in the internal market. http://ec.europa.eu/internal_market/services/services-dir/index_en.htm, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_376/l_37620061227en00360068.pdf. After heated discussions and much controversy[207] http://www.euractiv.com/en/sports/eu-sports-ministers-want-games-chance-services-directive/article-139467, http://www.euractiv.com/en/innovation/cheers-jeers-services-vote/article-152692.

[208] Directive 2006/123/EC, Article 2.

gambling and sport betting were indeed excluded under section (h); the justification is found in Section 25 of the Directive's introduction: 'Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection'.

Further, after the EC's official positions in the White Paper on Sport, where gambling and lottery services were briefly mentioned as the means by which sport is financed in many states, the EP, on 8/5/2008, adopted a report by its Committee on Culture and Education.[209] In this report, state-run gambling monopolies are supported 'based on imperative requirements in the general interest… including control over a "fundamentally undesirable activity," prevention of compulsive gambling and maintenance of public order, pursuing such objectives in compliance with European Law and ECJ Jurisprudence … State-run or state-licenced gambling or lottery services will be harmed by competition and will restrict their support mainly to amateur sport…'[210]

Researching and trying to determine what these developments by the EC, EP, and Council may mean would be an outstanding opportunity for further analysis and a separate piece. At this early stage it may be premature to foresee whether i.e. any harmonisation attempts by the EC would lead to a broad interpretation of ECJ case law, thus arguably leading to liberalisation of the sport betting sector, or whether the 'country of origin' principle reiterated in the Services Directive could be applied to sport betting with the overarching consequences of jurisdictions' competition, forum shopping, and sport betting entrepreneurs pursuing the most viable solution for the elusive EU market share. The ensuing portion attempts to serve as a 'sneak preview' of what could be the object of forecasting analysis based on developments henceforth. To that end, the reader may treat it as both a conclusion and introduction for what is to follow.

4.6 Sum, Scenarios, and Conclusion

Although *Carmen Media* and *Engelmann* certainly provided much more guidance for national courts in forthcoming challenges of gambling and sport betting restrictions, the fact remains that ECJ's mercurial decision-making has contributed to a very inconsistent reality in EU member states' gambling and sport betting policies (*stare decisis?* Admittedly difficult in these malleable concepts). The above ECJ decisions, though truly insightful and instrumental in determining the legal 'boundaries,'[211] do not ensure that there will be uniform handling of sport

[209] EP 2008; Kaburakis 2008b.

[210] EP 2008.

[211] Per A.G. Colomer in the *Placanica* Opinion.

betting in the EU. Perhaps the EC efforts of harmonisation, occasionally by means of inquiries, intervention, and commencement of infringement procedures against a MS, may lead national authorities and courts to respect the ECJ's guidelines and prerequisites for sport betting restrictive practises. For the time being, however, truth is that there is tremendous variability and uncertainty in regard to national courts' decisions on sport betting licensure, authorisation, penalties, etc. The way a national court would decide, i.e. on the scope of the restrictive policy, the rationale of the measure under ECJ guidelines, the fit of the restrictions in light of the objectives pursued, appears to be a matter of local interpretation, philosophy, legal, and socio-economic background, as well as knowledge and understanding of the specific and rapidly changing particularities of the gambling industry. For example, when and how is a MS stimulating gambling in its territory? The lesson from *Carmen Media* and the national court's stance on the German state's restrictive policy is invaluable, and importantly illustrative of the impact well-researched, reasoned, and balanced national courts' decisions may have not only on a national scale, but now on a pan-European level, as translated by means of ECJ judgments.

Thus, the pressure is growing on an EU gambling model.[212] The present environment is characterised by political uncertainty (as the gambling sector tends to be emulating other industries according to EU policy makers, and state lotteries and gambling monopolies tend to resemble normal financial competitors); legal uncertainty (according to what was mentioned above on national, EC, and ECJ levels); competition (betting organisers collectively pursuing their interests and lobbying before EU bodies) and; national legislative efforts (such as the ones mentioned above in Holland, France, Belgium, Italy, Denmark, Sweden, the Gambling Act of 2005 in the UK, the Remote Gaming Regulations of 2004 in Malta, in conjunction with new MS regulatory evolution, which presumably will follow suit very shortly in Germany and Austria subsequent to *Carmen Media* and *Engelmann*). In such a milieu, policy guidelines may need to incorporate protection for vulnerable populations such as the poor and the young.[213] Furthermore, the political arguments are formidable, referring to the revenue generation from lotteries (which do amount for approximately 45% of EU GGR according to the Swiss Institute of Comparative Law 2006 study) and betting monopolies, which then are invested by means of state appropriations in sports, welfare, culture, health care, research, environment etc (indeed a key factor, i.e. Santa Casa's historical socio-cultural tradition and civic engagement in significant part deciding the *Liga Portuguesa* case; also worth noting herein the strategic business decision by Santa Casa executives to contract with Accenture while developing a new portal and future competition solutions.[214]

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[212] Veenstra 2005.

[213] *Idem*.

[214] http://www.accenture.com/Global/Services/By_Industry/Media_and_Entertainment/Portals/Client_Successes/SantaCasa.htm

The economic impact of a liberalisation of the gambling sector involves direct and indirect employment, retail infrastructure, as well as cost-saving for government spending.[215] Contemporary discussion among gambling, political, legal, and policy circles argues that the EU may lead the twenty-first century services revolution and even set the tone for global cooperation on these matters. Moreover, the EU may control illegal operators by regulating gambling and the aforementioned harmonisation with public order and relevant objectives in mind. Worth mentioning, albeit contrary to harmonisation attempts, is the opinion that a public order objective for the EU will remain elusive, as each MS has its own discernment of what would constitute public order within its jurisdiction. This opinion also supports the notion that the remote gambling industry will continue to target markets with legal interpretation problems, so it is not harmonisation that is really needed, but rather legal clarification. Regardless of the means, the objectives remain similar according to this alternative school of thought, aiming at protecting vulnerable populations, controlling gambling addictions and pathological phenomena associated with gambling, standardising advertising so as not to promote uncontrollable urges to gamble and participate in sport betting, even offering alternative gaming models after impact assessments.[216] In such a developing contemporary reality the 'Internet is not a lawless world without national borders.'[217] Liability of internet service providers and financial intermediaries for non-bona fide operators can be attained by policy initiatives meeting ECJ's requirements; additionally, bona fide operators may be requested to use geolocation software, avoiding uncertainty and streamlining the monitoring process.

In the new European and gambling order shaping post-*Carmen Media*, Teufelberger 2010 declares the last quarter of 2010 as the tipping point for the European gaming sector and reflects on initiatives from the industry and political forces in the Commission, Parliament, and Council levels,[218] including the recently announced Green Paper draft effort, unprecedented on a pan-European level. Also, he underscores the importance of the online gaming sector for upcoming regulatory reform[219]: 'While reforms are a step in the right direction, one needs to be cautious of how these markets reform. Often they fail to take into account the cross-border nature of the online gaming sector, thus paving the way for 27 Internet online gaming markets. As a consequence, a consumer in Manchester cannot enjoy the same gaming and betting services like a consumer in Porto—but how does this fit in with the Digital Single Market?'

The ECJ with its recent ruling in *Carmen Media* undoubtedly opened up the door for various operators to apply for sport betting licences. Matters could always be tested by the national courts (here assuming that these cases would follow ECJ

[215] Veenstra 2005.

[216] Vlaemminck 2005.

[217] Veenstra 2005.

[218] Also updates under: http://www.euromat.org/.

[219] As of late 2010 documented in 2/3 of the EU: http://www.egba.eu/en/press/553.

precedent and guidelines posed); national courts' volatile decision-making notwithstanding, the path of liberalisation has arguably opened, or at least the restrictive reality of traditional monopoly schemes has been emphatically revisited. As early as a few weeks after the *Placanica* decision was published, sport betting operators began making their way to national authorities' offices with applications for authorisations and licences, Ladbrokes, Stanley and William Hill leading the pack.[220] Stanley and William Hill actually led to the country with the biggest per capita spending on betting in Europe, Greece,[221] indeed ironic considering its recent financial hardship, to be referred to the ECJ by two judges of the highest administrative court, the Greek Council of State, who held that the Greek state gambling monopoly, OPAP (one of the highest revenue generating gaming operators in the world, and No. 901 on Forbes' Global 2000 top performing firms.[222]

Consequently, some forecasting is in order, bearing in mind that world-renowned economists and strategists such as Argyris and Mintzberg have commented that one cannot safely forecast, but can only wisely plan to generally handle the unexpected.[223] Hence, it would only be fair in an Orwellian way to delve into an extreme scenario; such a hypothetical framework is also analysed by the 'second alternative scenario' of the Swiss Institute of Comparative Law study.[224] The purpose of such hypotheses would be to cover any potential developments and embrace any conservative calculations simultaneously. Such a scenario would involve a considerable liberalisation of the sector, opening the market, and interpreting ECJ decisions under a favourable light for competitors in the industry, thus unfavourably towards restrictions to freedoms of establishment and services' provision. On strict economic terms, bearing in mind models used in the aforementioned study, GGR from sport betting might escalate to more than double its 2006 levels by the end of 2010.[225] At the same time, baseline prices for participation in sport betting ventures would considerably fall, due to available alternatives and growing competition. In regard to unintended consequences, the secondary data analysis conducted reveals that research produces inconclusive evidence in regard to 'social costs associated with increases in problem and pathological gambling, increases in crime associated with gambling, changes in bankruptcies, suicides, etc… Nonetheless… there very well may be … a subsequent political backlash because of the perception (if not the reality) of the consequences of such expansion.'[226] This research stream will side with the

[220] http://www.bettingmarket.com/eurolaw222428.htm, http://www.enet.gr/online/online_text/c=115,id=48821236.

[221] http://www.kaburakis.com/wp-content/uploads/2009/09/Gambling-links-for-SLA-abridged.pdf

[222] http://www.forbes.com/lists/2010/18/global-2000-10_The-Global-2000_Counrty_5.html, is not proportionate, justified, nor EU Law-compliant[222] http://gaminglaweu.eu/archive/archive2009/legitimacy-of-the-opap-monopoly-challenged/.

[223] Mintzberg 1994.

[224] Swiss Institute of Comparative Law 2006, p. 46.

[225] *Idem*.

[226] Swiss Institute of Comparative Law 2006, p. 1511.

conclusion in the final pages of the Swiss Institute of Comparative Law study and emphasise the need for more research conducted on the matters discussed. Comparative research unavoidably takes into consideration the social, cultural, legal, economic, and political differences at the areas of focus. Quoting the study, if there is going to be any meaningful scientific contribution towards drafting future EU policy (considering the EC's call for such in the recent example of the White Paper on Sport, and legal scholars and research colleagues' immediate answer): … There is going to have to be a greater commitment by Member States, service providers and other stakeholders in addressing these information and research shortcomings. The fact that gambling services in the EU are already characterised by revenues in excess of €50 billion as well as substantial contributions to tax revenues and good causes suggests that this should be a fairly high priority.[227]

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Chapter 5
Sports Betting and European Law

Marios Papaloukas

Contents

5.1 The Establishment of the Principle of Proportionality in Gambling Cases[1]

A study of the handling of sports betting cases by the European Court of Justice (ECJ) would not be complete without examining the handling of gambling in general by the ECJ. There are two ECJ decisions that ought to be mentioned at this point, because, although neither of them is of sports content, they played a major role in sports betting case law as all subsequent ECJ decisions relating to sports betting are based on them.

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[1] Emiliou 1996.

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The first relevant case concerning the issue of betting that came before the ECJ was the eminent Schindler case.[2] In this case the Schindlers, acting as independent agents for a German lottery, dispatched to the UK certain advertisements and application forms for a lottery organized in Germany urging the recipients to participate. The envelopes also contained a pre-printed reply envelope. Many Member States argued that because the scheme was, objectively, a gambling one, involved unsecured winnings, and because participation in the game was in the realm of entertainment, the activity should not be considered an economic activity within the meaning of the Treaty.[3]

The ECJ[4] rejected these views and made it clear that such activity is, in fact, economic, and indeed, that lottery activities are not related to goods but related to services and fall therefore within the scope of the freedom of the provision of services. The fact that the participants' winnings are not secure is not enough for the whole activity to be deemed noneconomic. The agent works on profit and the amount of money raised by the organizer of the game is not all awarded to the winner. With regard to the subject of entertainment, the ECJ has made very interesting parallels with the amateur sport,[5] where the nature of entertainment does not negate the fact that it falls within the rule of the freedom of the provision of services.

Finally, with regard to allegations that gambling is dangerous and should be prohibited, the Court responded that in contrast with other illegal activities, such as illegal drugs, the policy of the Member States is generally not to prohibit gambling but rather to monitor its availability to the public.[6] The European Union has not yet decided whether or not to adopt legislative measures to orchestrate the legislation of the member States[7] regarding gambling; it is evident that there is uncertainty about the extent of discretion enjoyed by Member States[8] with regard to limiting the availability of gambling services.[9, 10]

However, the ECJ has accepted that there are three reasons that may justify the restriction of gambling and its control by the State, and one argument that justifies

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[2] Case Her Majesty's Customs and Excise vs Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039.*

[3] See Case Her Majesty's customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039*, para 16.

[4] See The Case for state lotteries 2006.

[5] See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039*, para 34.

[6] See Case Her Majesty's Customs and Excise versus Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039*, para 32.

[7] See Institut Suisse de Droit Compare 2006.

[8] See The Case for a Single European Gambling Market 2004.

[9] Littler 2008, pp. 211–229.

[10] See European Parliament resolution of 10 March on the integrity of online gambling. (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EN)

a special treatment of gambling. Firstly, the ECJ has accepted that there are moral, religious and cultural aspects that 'prohibit' making gambling a source of private profit. Secondly, gambling involves a high risk of crime or fraud, given the size of the amounts at stake, particularly when operated on a large scale. Thirdly, it is the incitement to spend which may have damaging effects on the individual and social consequences. On the other hand, gambling may make a significant contribution to the financing of benevolent or public interest activities, such as social work, charity work, and sport or culture.[11]

> Therefore, the ECJ concludes that those particular factors justify national authorities having a sufficient degree of latitude in determining what is required in order to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess, not only whether it is necessary to restrict the activities of lotteries, but also whether they should be prohibited, provided that those restrictions are not discriminatory.[12]

The next case that came before the Court was Läärä.[13] In its ruling the ECJ seems to come to answer the question of whether or not a Member State has the right to prohibit the service of gambling to individuals while maintaining the right itself to monopolistically provide such services through a public body. The Member State party argued that the relevant legislation was passed in order to limit the exploitation of human passion for gambling, prevent infringement risks and crimes involving fraud and to ensure that activities are authorized only if they are designed to collect money for charitable projects or to strengthen benevolent purposes.[14]

Based on the reasoning in para 61 of Schindler, the ECJ held that the power to determine the extent of the protection to be afforded by a Member State on its territory, with regard to lotteries and other forms of gambling, forms part of the national authorities' power of assessment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially, to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms that may be more or less strict. The mere fact that a Member State has opted for a system of protection that differs from that adopted by another Member State cannot affect the assessment of the need for, and

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[11] See Case Her Majesty's Customs and Excise versus Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039*, para 60.

[12] See Case Her Majesty's Customs and Excise versus Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24th March 1994, [1994] ECR *I-01039*, para 61.

[13] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd versus Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR *I-06067*.

[14] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd versus Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR *I-06067*, para 32.

proportionality of, the provisions enacted to that end. Those provisions must be assessed solely with reference to the objectives pursued by the national authorities of the Member State concerned, and the level of protection that they are intended to provide.[15]

Therefore, in its rationale the ECJ also referred to the principle of proportionality. The ECJ indicated that the question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the provision that the choice made in that regard must not be disproportionate to the aim pursued.[16]

5.2 The Zenatti and Gambelli Cases

The ECJ followed the same policy of providing greater freedom of action in the next decision concerning Zenatti.,[17, 18] This decision was the first involving sport. However, in this case, the principle is implied not only in one paragraph in the decision but also stated clearly throughout the decision.

In this case the ECJ, explained that the Treaty provisions on freedom to provide services do not preclude national legislation reserving for certain bodies the right to take bets on sporting events if the legislation can actually be justified by the social policy objectives in order to reduce the harmful consequences of such activities, and also, if the restrictions imposed are not disproportionate in light of these objectives. Consequently, apart from proving that public interest does exist, it should also be considered whether the same amount of public interest could be achieved if fewer restrictions were imposed on the freedom to provide gambling services.

In the Gambelli case,[19, 20] after conducting a general overview of the relative case law to date,[21] the ECJ refers to previous case law in order to confirm the rule

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[15] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd versus Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR *I-06067*, para 35–36.

[16] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd versus Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21st September 1999, [1999] ECR *I-06067,* para 39.

[17] See Case Questore di Verona versus Diego Zenatti, C-67/98, Judgment of 21st October 1999, [1999] ECR *I-07289.*

[18] See Papaloukas 2008, p. 42.

[19] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031.*

[20] See Papaloukas 2008, p. 125.

[21] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031.*

of the principle of proportionality, which must be taken into account when setting the restrictions on freedom to provide services and freedom of establishment. It states that the restrictions on gambling imposed by a Member State should[22]:

- be justified by imperative requirements in the general interest,
- be suitable for achieving those objectives,
- not go beyond what is necessary in order to achieve this.

5.3 The Clarification of the Term "Not go Beyond What is Necessary"

After having clarified the implementation of the first two of the abovementioned elements of the principle of proportionality, the ECJ states some additional requirements. The ECJ establishes a general condition that should be considered after the determination of the terms of the principle of proportionality, and two special conditions that should be considered simultaneously with the first and second terms of the principle of proportionality.

The general requirement is based on the fact that the restrictions provided by the Member state should be imposed indiscriminately, in the sense that they should apply in the same manner and with the same criteria to operators established in that country and to those who come from other Member States.[23] However, the importance of this criterion is questioned if we consider those Member States where gaming services are provided monopolistically by the state.[24]

Insofar as concerns the first of the terms of the principle of proportionality, although the measures should be justified by imperative requirements in the general interest in cases where the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce the availability of betting facilities in order to justify measures in restricting gambling.[25]

Finally, in Gambelli, the ECJ ruled on the second of the terms of the principle of proportionality, that while restrictions on the activity of gambling should be practical enough to ensure that the public needs are met, restrictions should also serve to limit betting activities in a consistent and systematic manner.[26]

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[22] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031,* para 65.

[23] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031,* para 70.

[24] See Littler 2008, pp. 211–229.

[25] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031,* para 69.

[26] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6th November 2003, [2003] ECR *I-13031,* para 67.

5.4 The Lindman and Placanica Cases

After having clarified the terms of the principle of proportionality, there were still notions in the Gambelli rule, which needed further clarification. First, the reasons of general interest the Member States pleaded on could not be vague, and the Court had to make Member States specify the reasons they vaguely referred in order to impose restrictions on freedom to provide lottery services. In the Lindman case,[27, 28] the opportunity was seized to address this issue. Thus, the Court ruled that the reasons which may be invoked by a Member State by way of justification for an imposed restriction on betting must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State.[29]

It was then ruled that a Member State's vague allegations about public interest were not sufficient and that the Member State should bring forward statistics or other data enabling conclusions as to the gravity of the risks of gambling and the causal relationship between these risks and the participation of its nationals in gambling services organized in other Member States.[30]

However, as demonstrated in the Gambelli case, the general requirement that the Court accepted as necessary, i.e. that the legislation of the Member State restrictions should apply in the same manner and with the same criteria to operators, who are established in this country and those from other Member States, cannot be applied in those Member States where gaming services are provided by the state monopoly.[31]

In 2004, in the Placanica case,[32, 33] prima facie appears to signal the end-of-state monopolies in gambling; however, this is not correct. The ECJ ruled out a state regulation according to which entrepreneurs wishing to provide gambling services were required to apply for a license. This decision was based on the fact that the state regulation using the argument of general interest imposed far more restrictions than necessary to achieve the purposes sought, whereas the same general interest could be protected with less stringent restrictions. Thus, by excluding, for transparency reasons, all the profit-making companies from the right to receiving a licence, the Member State violated the principle of proportionality.

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[27] See Case Diana Elisabeth Lindman, C-42/02, Judgment of 13th November 2003, [2003] ECR *I-13519.*

[28] See Papaloukas 2008, p. 181.

[29] See Case Diana Elisabeth Lindman, C-42/02, Judgment of 13th November 2003, [2003] ECR *I-13519,* para 25.

[30] See Case Diana Elisabeth Lindman, C-42/02, Judgment of 13th November 2003, [2003] ECR *I-13519,* para 26.

[31] See Littler 2008, pp. 211–229.

[32] See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6th March 2007, [2007] ECR *I-01891.*

[33] See Papaloukas 2008, p. 309.

Therefore, since the ECJ decision in Placanica did not exclude expressis verbis, the monopoly in providing betting services, does this mean that each Member State reserves the right, invoking reasons of general/public interest, to retain the exclusive provision of these services for itself? Can the principle of proportionality accommodate this?

5.5 Beyond Placanica Case (The Bwin Liga Case)

The rationale of the decision in the Placanica case leaves little room for doubt. Short of a complete ban on any gambling services, when regulating sports betting a State has four hypothetical choices, which, in order of rigor, are:

1. State monopoly.
2. State-controlled licensing under certain conditions.
3. Licensing based on formal procedures.
4. Absolute freedom to provide betting services.

According to the third requirement of the principle of proportionality the state provision should not exceed what is necessary to achieve the objectives intended in the general interest. In order not to exceed what is necessary there should not be another more flexible way to regulate the matter that can achieve the same public interest objectives. It has now become even more difficult for Member States, imposing state monopoly, to present convincing arguments that the best way to protect public interest is by imposing the most radical measure from the point of view of competition rules, i.e., a state monopoly and not by using any other more flexible measure.

However, the ECJ found a way around this argument that can be found in the Placanica case. The Court ruled that it is possible that a policy of controlled expansion in the betting sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming—and, as such, activities which are prohibited—to activities which are authorized and regulated. In order to achieve that objective, authorized operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale, and the use of new distribution techniques.[34] However, this argument was referring to the imposition of a licensing system as an efficient mechanism enabling operators active in the betting and gaming sector to be controlled, and not a system of monopoly. The same argument was used by Advocate General Bot in his opinion in the Bwin Liga case.[35] But contrary to the Placanica case, this case

[34] See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6th March 2007, [2007] ECR *I-01891,* para 55.

[35] Case Liga Portuguesa de Futebol Profissional, Baw International Ltd versus Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07, opinion of Advocate General Bot delivered on 14 October 2008, para 85–88.

was not about the imposition of a licensing system, instead it was about the imposition of a state monopoly on betting.

5.6 Conclusions: The Future in Sports Betting

Since the Attorney General's opinion in the Bwin Liga case was adopted by the Court,[36] could this mean that state monopolies can be justified as a means of restricting gambling? Is this the end of the principle of proportionality?

One should not forget that in the Bwin Liga case the State monopoly in Portugal was imposed through a public company and not through a private company as for example is the case in Greece. In that sense the Bwin Liga decision does not mean that all sports betting State monopolies in Europe will be preserved. Even in cases where the purpose for the imposition of a monopoly was to impose a restriction in the expansion of betting, a monopoly granting a license to a single private company aiming to profit, seems to go beyond what is necessary to achieve its purpose. There are a few pending references before the ECJ. The Winner Wetten,[37,38] and SOBO Sport cases,[39,40] are concerning Germany and it is likely that the ECJ will soon have to deal with the case of Greek monopoly in sports betting.[41] It will be very interesting to see which State monopolies in sports betting can pass the test of the principle of proportionality.

However, there are also initiatives from other European Institutions. On the 10th of March 2009, the European Parliament voted on the integrity of online betting.[42] This resolution included, firstly, the observation 'that the protection of the integrity of sports events and competitions requires cooperation between sports rights owners, online betting operators and public authorities at national, as well as EU and international level.' It also refers to the risk of an uncontrolled non-state provision of betting services.[43]

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[36] See C-42/07 Decision 8 September 2009.

[37] See Reference for a preliminary ruling from the Verwaltungsgericht Köln (Germany) lodged on 9 October 2006—Winner Wetten GmbH versus Mayor of Bergheim, C-409/06.

[38] See Papaloukas 2008, p. 322.

[39] See Reference for a preliminary ruling from the Verwaltungsgericht Stuttgart (Germany), lodged on 2 August 2007—SOBO Sport and Entertainment GmbH versus Land Baden–Württemberg, C-359/07.

[40] See Papaloukas 2008, p. 324.

[41] See http://www.winneronline.com/articles/090216_article_stanleybetshutagain.html.

[42] See European Parliament resolution of 10 March on the integrity of online gambling, The Schaldemose Report. (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EN).

[43] See Betfair's Corporate Statement on the Schaldemose Report. (http://corporate.betfair.com/BETFAIR%20CORPORATE%20STATEMENT%20ON%20THE%20SCHALDEMOSE%20REPORT.pdf).

This resolution may be useful at this stage in order to observe the direction that the ECJ will move. If we take into account that online betting does not relate exclusively to sport, the interest in sport in this text can be interpreted as a harbinger of developments in ECJ case law in the area of sports betting.

Member States have been called on to ensure that organizers of sporting competitions, betting operators and regulating authorities collaborate to take measures in order to address the risks associated with illegal betting and match-fixing in sport and, to explore the establishment of a workable, equitable and sustainable regulatory framework to protect the integrity of sports.

Finally, this resolution stresses that sports bets are a form of commercial exploitation of sport. Member States are thus urged to protect their sports games from any commercial use where permission has not been granted, especially by granting the sports organizers' rights, and to implement regulations ensuring equitable economic revenue for all levels of professional and amateur sports.[44]

It seems therefore that the ECJ will most probably continue on the path that it has so far taken by applying the proportionality principle in future cases. It seems unlikely that it will distinguish sports betting cases from other betting cases and, based on the specificity of sport,[45] justify a greater flexibility when it comes to the rules of free market and competition.[46]

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[44] See paras 8–10 of the European parliaments resolution 2008/2215. (http://www.mrgc.org.mt/docs/AlternativeMotionResolutionDraft.pdf)

[45] See the White Paper on Sport (http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm).

[46] See Papaloukas 2009.

Chapter 6
Sports Betting in the Jurisprudence of the European Court of Justice: A Study into the Application of the *Stare Decisis* Principle, or: The Application of the "Reversal Method" of Content Analysis and the Essence of the ECJ Case Law on Sports Betting

Robert C. R. Siekmann

Contents

This contribution is an elaborated version of a paper that was presented by this author at the 6th international seminar on Sports Law and Taxation organized by NOLOT, Amsterdam, 4 December 2009. Since that time, the ECJ produced new jurisprudence on sports betting such as the Ladbrokes, Sporting Exchange ("Betfair"), Otto Sjöberg and Anders Gerdin v. Swedish State, and Carmen Media rulings. The information on the new case law was added and incorporated in this contribution.

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6.1 Introduction

Kaburakis' article on "ECJ Jurisprudence and Recent Developments in EU Sports Betting"[1] so far is the only substantial one on the matter.[2] From the article it becomes clear that to determine the evolution of the jurisprudence of the European Court of Justice (ECJ) on "sports betting" is a complex task. In this contribution I am presenting an innovative, although time-consuming method of research the purpose of which is to facilitate that effort considerably. The method starts from the fact that the ECJ jurisprudence is based on the *stare decisis* principle which is expressly applied by the Court when it makes references to the sources used, that is its previous decisions and the relevant paragraphs therein (this of course does not exclude the possibility that phrasing in previous decisions are used literally later on without an express reference to the paragraphs concerned). Kaburakis in fact uses the traditional method of analysis by showing how the jurisprudence evolved from the first "sports betting" case up to and including the at the time of his writing most recent one. According to the alternative method it is preferred to reverse the chronological order of study, starting from the most recent case and going back to the first one. This operational method is similar to the approach taken by the Court when drafting a new decision. The new method is supposed to be a more objective, neutral, non-arbitrary and non-impressionist combination of close reading and feed-back; it might be called the "reversal" or "retrospective" method. This method allows us to determine which paragraphs in previous

[1] Kaburakis 2009, pp. 555–580. A general work of reference on EU law and gambling/betting is: Littler and Fijnaut 2007.

[2] A short overview on "Sports Betting and European Law" is presented by Marios Papaloukas in: Papaloukas 2010, pp. 86–88.

decisions are most important (or relatively important). It is possible that express references to these paragraphs occur more than once in their successors. So, when we closely read the text of later decisions, they may give us feedback about the relative importance of their predecessors. If there is no reference to a "sports betting" case at all, it must logically be concluded that this is a (very) minor case and in any case not a landmark one. Of course, in this perspective the relative importance of the one most recent decision cannot be determined, since there are no succeeding references made to it yet. It is not only possible to determine what the relative importance of paragraphs in preceding "sports betting" decisions is, but also to determine what the influence of previous non-"sports betting" decisions, of a gambling type or not has been (see below for definitions of the concepts of "gambling" and "sports betting"). Finally, it should be observed that in principle in non-betting/gambling and non-sports betting cases express reference may be made to sports betting/gambling cases. This would illustrate the influence of "sports betting" jurisprudence the other way round.

Of course, in using the "reversal" method of analysis, one should also take into account if and to what extent the factual backgrounds of the cases differ from each other, and whether possibly the applicable law has changed in the meantime (the latter is not the case from a EU perspective, because EU "(sports) betting" law Is ECJ case law). Of course, other aspects are a changing membership of the Court as well as Court members changing their views over time, whether or not under the impact of changing views on "sports betting" in the society at large, in particular regarding state monopolies and the position of state-run operators. In this respect, the Advocate-General's Opinions may be of major importance, and it is to be seen whether express reference is made to them in the ECJ's decisions and rulings.

In this contribution, the "reversal" method will be systematically and consistently tested in practice. While using the method it will be refined in applying it, if necessary. "Rules" for the use of the method will be developed in the process of its application. By using this method, it should be possible to determine the essentials of the case law, its core content. Of course, it cannot be excluded that paragraphs that do not refer to previous ones in fact are of similar of even more importance than those. The latter of course is part of the test. I will present the "reversal" method in the process of its application, step-by-step—in order to verify its applicability with regard to the "sports betting" jurisprudence of the ECJ. So, this contribution has two purposes regarding questions to be answered: will the "reversal" method work and how will it work? What is the essence of the jurisprudence of the ECJ on sports betting, on the basis of the application of this method? An additional question of course would be whether and how the "reversal" method reasonably may be compared with the results of the traditional method in order to know whether the outcome is qualitatively better. If the ECJ has applied the stare decisis principle consistently, one would say that the essence of its jurisprudence logically should come to the surface by using the "reversal" method of analysis.

6.1.1 Definition of "Sports Betting"

Before being in a position to apply the "reversal" method to the case law of the ECJ on "sports betting," it must be determined which decisions of the ECJ belong to the case law. For that purpose, we need a definition which circumscribes "sports betting". In his article, Kaburakis gives no definition of "sports betting". With reference to previous jurisprudence, he states: "… one would anticipate a similar ECJ analysis in a *per se sport betting case* (italics added, RS); indeed it did not take long after *Läärä* for such a case to come before the court."[3] He continues: "The factual background of *Zenatti* is… revisited by the ECJ in the ensuing *Gambelli* an *Placanica* cases, which set the tone for modern legal handling of EU sport betting policies."[4]

In the Services Directive[5] it is stated in Article 2(h) that "gambling activities… involve wagering a stake with pecuniary value in games of chance…"[6]

In the EL Code of Conduct for Sports Betting[7] "gambling" is identified as "all types of games, including lotteries and betting transactions, involving wagering a stake with monetary value in games in which participants may win in full or in part, a monetary prize based, totally or partially, on chance or uncertainty of an outcome." According to the EL Code, "*sports betting*" includes "all sports betting-based games (i.e. fixed and running odds, totalisator/toto games, live betting, other games and football pools offered by sports betting operators, etc.)". In this context, sports is defined as "all physical human activities with specific rules, shared by a great number of participants, and involving competition amongst the different participants. Olympic sports, sports having as one's purpose to become Olympic sports and minor sports may be included in sports." So, the EL Code in fact has no definition of what sports betting is.

In *Zenatti* (para 18) the phrase reading "… bets on sporting events, even if they cannot be regarded as games of pure chance…" is found. So, generally speaking it may be concluded that "sports betting" are particularly games of, to a certain extent calculated chance, that are connected with a competitive sporting event ("… betting on sporting events is not a game of chance, but of informed prediction of the result"; "… an… in my view usual… distinction may be made between lotteries and betting on sporting events on the ground that the latter involves an element of skill absent from the former…," cf., Opinion of Advocate-General Fennelli re Zenatti, paras 14 and 23 respectively; "Sports bets are not dependent

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[3] Kaburakis 2009, p. 560.

[4] *Idem.*

[5] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. 2006 L 76/36.

[6] Similarly, Article 1(5)(d) of the E-commerce Directive, Directive 2000/31/EC of 8 June 2000, O.J. 2000 L.17/1.

[7] EL = European Lotteries, which is the non-profit-making association representing the state-licensed lotteries and toto companies In Europe.

on chance in the same way as lotteries. A bettor's chances of winning may also be affected by his skill and, above all, his knowledge. There is therefore some debate among legal commentators as to whether betting is to be classified as a game of skill or a game of chance. The fact that the events involved are largely dependent on chance, particularly in the case of bets placed on entire blocks of games, would suggest that it is a game of chance.", cf., Opinion of Advocate-General Alber re Gambelli, para 71). "Sports betting" (or spelled as "sport betting," see Kaburakis 2009) is not pure gambling. Apart from such "impressionist" considerations, "sports betting" purely is sport-related betting.

This contribution will commence with describing and comparing the factual backgrounds, the "facts" of the sport-related betting decisions and rulings of the ECJ which cover a period of now 20 years. It will be examined whether the societal context changed and the views on sports betting evolved in the course of time. Then, the "law," the case law will be analysed by using the "reversal" method and finally presenting the results of this analysis. It is supposed that the outcome will instruct us about the essence of the ECJ jurisprudence on "sports betting". Of course, the most recent ECJ ruling itself cannot be scrutinized by the "reversal" method, since by definition references to that ruling are non-existent. So, whether new aspects are to be added to the *stare decisis*, the doctrine of the ECJ on the basis of that ruling is to be determined in the future.

6.2 Legal and Factual Context of the Case Law

6.2.1 Zenatti (1999)[8]

In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931), "[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event."

Bets could be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, "CONI") or on the results of horse races organised though the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, "UNIRE"). The use of the funds collected in the form of bets and allocated to those two bodies was regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and

[8] Cf., Case C-67/98, Judgment of the Court of 21 October 1999, paras 3–7 of the preliminary ruling, ECR (1999) I-07289.

1997, arrangements for and the taking of bets reserved to CONI and UNIRE might be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.

Article 718 of the Italian Penal Code made it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibited the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting was covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, could any sum paid voluntarily be reclaimed.

Since 29 March 1997, Mr Zenatti had acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd (SSP), a licensed bookmaker. Mr Zenatti runned an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sent to London by fax or Internet forms which have been filled in by customers, together with bank transfer forms, and received faxes from SSP for transmission to the same customers.

By the decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease his activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allowed betting to be licensed only where it is essential for the proper conduct of competitive events.

Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

The Consignilio di Stato considered that the decision to be given called for an interpretation of the Treaty provisions on the freedom to provide services.

6.2.2 Gambelli (2003)[9]

Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931), no licence was to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets was essential for the proper conduct of the competitive event.

Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000), authorisation to

[9] Cf., Case C-243/01, Judgment of the Court of 6 November 2003, paras 7–15 of the preliminary ruling, ECT (2003) I-13031.

organise betting was granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets could relate to the outcome of sporting events taking place under the supervision of the CONI, or its subsidiary organisations, or to the results of horse races organised through the UNIRE.

Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, Article 37(5) of which inserted Articles 4a and 4b into Law No 401/89, provided as follows:

> Unlawful participation in the organisation of games or bets
> Article 4
>
> 1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.
> 2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
> 3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100,000 and ITL 1,000,000.
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> …
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> Article 4a
>
> The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.
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> Article 4b
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> … the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

The Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd ("Stanley"), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They were accused of having collaborated in Italy with a bookmaker abroad in the

activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.

Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.

Stanley was an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It was authorised to carry on its activity in the United Kingdom and abroad. It organised and managed bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley paid the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It was subject to rigorous controls in relation to the legality of its activities, which were carried out by a private audit company and by the Inland Revenue and Customs and Excise.

Stanley offered an extensive range of fixed sports bets on national, European and world sporting events. Individuals could participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.

Stanley's presence as an undertaking in Italy was consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres (DTCs). Those centres made electronic means of communication available to users, collect and register the intentions to bet and forward them to Stanley.

Gambelli and others were registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and had received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister for Post and Communications) to transmit data.

The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.

Gambelli and others brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the DTCs of which they are the proprietors.

The Tribunale di Ascoli Piceno decided to stay proceedings and to refer the question to the ECJ for a preliminary ruling.

6.2.3 Placanica (2007)[10]

The references for a preliminary ruling had been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 Zenatti [1999] ECR I-7289 and Case C-243/01 Gambelli and Others [2003] ECR I-13031.

Italian legislation essentially provided that participation in the organising of games of chance, including the collection of bets, is subject to possession of a licence and a police authorisation. Any infringement of that legislation carried criminal penalties of up to 3 years' imprisonment.

Until 2002 the awarding of licences for the organising of bets on sporting events was managed by the CONI and the UNIRE, which had the authority to organise bets relating to sporting events organised or conducted under their supervision. That resulted from Legislative Decree No 496 of 14 April 1948 (GURI No 118 of 14 April 1948), read in conjunction with Article 3(229) of Law No 549 of 28 December 1995 (GURI No 302 of 29 December 1995, Ordinary Supplement) and Article 3(78) of Law No 662 of 23 December 1996 (GURI No 303 of 28 December 1996, Ordinary Supplement).

Specific rules for the award of licences were laid down, in the case of CONI, by Decree No 174 of the Ministry of Economic Affairs and Finance of 2 June 1998 (GURI No 129 of 5 June 1998) and, in the case of UNIRE, by Decree No 169 of the President of the Republic of 8 April 1998 (GURI No 125 of 1 June 1998).

Decree No 174/98 provided that the award of licences by CONI was to be made by means of calls for tender. When awarding the licences, CONI had, in particular, to make sure that the share ownership of the licence holders was transparent and that the outlets for collecting and taking bets were rationally distributed across the national territory.

In order to ensure transparency of share ownership, Article 2(6) of Decree No 174/98 provided that where the licence holder took the form of a company, shares carrying voting rights had to be issued in the name of natural persons, general partnerships or limited partnerships, and could not be transferred by simple endorsement.

Similar provision was made with regard to the award of licences by UNIRE.

In 2002, following a number of legislative initiatives, the competences of CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance.

Pursuant to an amendment introduced at that time by Article 22(11) of Law No 289 of 27 December 2002 (GURI No 305 of 31 December 2002, Ordinary

[10] Cf., Joined cases C-338/04, C-359/04 and C-360/04, Judgment of the Court of 6 March 2007, paras 2–14 and 18–31 of the preliminary ruling, ECR (2007) I-1891.

Supplement) all companies—without any limitation as to their form—may now take part in tender procedures for the award of licences.

Police authorisation could be granted only to those who held a licence or authorisation granted by a Ministry or other body to which the law reserved the right to organise or manage betting. Those conditions were laid down in Article 88 of Royal Decree No 773, approving a single text of the laws on public security (Regio Decreto No 773, Testo unico delle leggi di pubblica sicurezza), of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (GURI No 302 of 29 December 2000, Ordinary Supplement).

Furthermore, by virtue of Article 11 of the Royal Decree, read in conjunction with Article 14 thereof, a police authorisation could not be issued to a person who had had certain penalties imposed on him or who had been convicted of certain offences, in particular offences reflecting a lack of probity or good conduct, and infringements of the betting and gaming legislation.

Once authorisation had been granted, the holder must, pursuant to Article 16 of the Royal Decree, permit law enforcement officials access at any time to the premises where the authorised activity was pursued.

Article 4 of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989) as amended by Article 37(5) of Law No 388) provided in respect of criminal penalties for malpractice in the organising of games of chance:

1. Any person who unlawfully participates in the organising of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, or by organisations under the authority of CONI, or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organising of betting on other contests between people or animals, or on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.
   …
2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.
3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1, albeit without being an accomplice to an offence defined therein, shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.
   …

4a. The penalties laid down in this article shall be applicable to any person who, without the concession, authorisation or licence required by Article 88 of [the Royal Decree], carries out activities in Italy for the purposes of accepting or collecting, or, in any case, of assisting the acceptance or in any way whatsoever the collection, including by telephone or by data transfer, of bets of any kind accepted by any person in Italy or abroad.
   …

According to the documents before the Court, CONI—acting in accordance with the Italian legislation—launched a call for tenders on 11 December 1998 for the award of 1,000 licences for sports betting operations, that being the number of licences considered on the basis of a specific assessment to be sufficient for the whole of the national territory. At the same time, a call for tenders in respect of 671 new licences for the taking of bets on competitive horse events was organised by the Ministry of Economic Affairs and Finance in agreement with the Ministry of Agricultural and Forestry Policy, and 329 existing licences were automatically renewed.

The application of the provisions concerning the transparency of share ownership that were in force at the time of those calls for tender had primarily the effect of excluding the participation of operators in the form of companies whose shares were quoted on the regulated markets, since in their case the precise identification of individual shareholders was not possible on an ongoing basis. Following those calls for tender, a number of licences—valid for 6 years and renewable for a further 6 years—were awarded in 1999.

Stanley International Betting Ltd is a company incorporated under English law and a member of the group Stanley Leisure plc, a company incorporated under English law and quoted on the London (United Kingdom) stock exchange. Both companies have their head office in Liverpool (United Kingdom). Stanley Leisure operates in the betting and gaming sector and is the fourth biggest bookmaker and the largest casino operator in the United Kingdom.

Stanley is one of Stanley Leisure's operational conduits outside the United Kingdom. It is duly authorised to operate as a bookmaker in the United Kingdom by virtue of a licence issued by the City of Liverpool. It is subject to controls by the British authorities in the interests of public order and safety; to internal controls over the lawfulness of its activities; to controls carried out by a private audit company; and to controls carried out by the Inland Revenue and the United Kingdom customs authorities.

In the hope of obtaining licences for at least 100 betting outlets in Italy, Stanley investigated the possibility of taking part in the tendering procedures, but realised that it could not meet the conditions concerning the transparency of share ownership because it formed part of a group quoted on the regulated markets. Accordingly, it did not participate in the tendering procedure and holds no licence for betting operations.

Stanley operated in Italy through more than 200 agencies, commonly called "DTCs". The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way, bettors are able—electronically—to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes and, where appropriate, to receive their winnings.

The DTCs are run by independent operators who have contractual links to Stanley. Mr Placanica, Mr Palazzese and Mr Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.

According to the case-file forwarded by the Tribunale (District Court) di Teramo (Italy), Mr Palazzese and Mr Sorricchio applied, before commencing their activities, to Atri Police Headquarters for police authorisation in accordance with Article 88 of the Royal Decree. Those applications met with no response.

Accusing Mr Placanica of the offence set out in Article 4(4a) of Law No 401/89 in that, as a DTC operator for Stanley, Mr Placanica had pursued the organised activity of collecting bets without the required police authorisation, the Public Prosecutor brought criminal proceedings against him before the Tribunale di Larino (Italy).

That court expressed misgivings as to the soundness of the conclusion reached by the Corte suprema di cassazione in Gesualdi, with regard to the compatibility of Article 4(4a) of Law No 401/89 with Community law. The Tribunale di Larino was uncertain whether the public order objectives invoked by the Corte suprema di cassazione justified the restrictions at issue.

Accordingly, the Tribunale di Larino decided to stay proceedings and to refer the question to the ECJ for a preliminary ruling.

The Atri police authorities charged Mr Palazzese and Mr Sorricchio with pursuing, without a licence or a police authorisation, an organised activity with a view to facilitating the collection of bets, and placed their premises and equipment under preventive seizure on the basis of Article 4(4a) of Law No 401/89. Upon confirmation of the seizure measures by the Public Prosecutor, Mr Palazzese and Mr Sorricchio each brought an action challenging those measures before the Tribunale di Teramo.

In the view of that court, the restrictions imposed on companies quoted on the regulated markets, which prevented them in 1999 from taking part in the last tender procedure for the award of licences for the operation of betting activities, are incompatible with the principles of Community law because they discriminate against operators who are not Italian. In consequence—like the Tribunale di Larino—the Tribunale di Teramo has doubts as to whether the judgment in Gesualdi is sound.

The Tribunale di Teramo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling.

6.2.4 Commission v. Italy (2007)[11]

In Italy, horse-race betting and gaming operations were originally run exclusively by the UNIRE, which had the option of operating the services of collecting and taking bets directly or delegating them to third parties. The UNIRE entrusted the operation of those services to bookmakers.

[11] Cf., Case C-260/04, judgment of the Court of 13 September 2007, paras 2–10 of the preliminary ruling, ECR (2007) I-7083.

Law No 662 of 23 December 1996 (ordinary supplement to the GURI No 303, of 28 December 1996) subsequently assigned responsibility for the organisation and management of horse-race betting and gaming to the Ministry of Finance and the Ministry of Agriculture, Food and Forestry Resources, which were authorised either to operate the activity directly or through public bodies, companies or bookmakers appointed by them. Paragraph 78 of Article 3 of Law No 662 states that there is to be a reorganisation, by way of regulation, of the organisational, functional, fiscal and penal aspects of horse-race betting and gaming, as well as the sharing out of revenue from such betting.

In implementation of Article 3 of Law No 662, the Italian Government adopted Presidential Decree No 169 of 8 April 1998 (GURI No 125 of 1 June 1998), which provided in Article 2 that the Ministry of Finance, in agreement with the Ministry of Agricultural and Forestry Policy, was to award licences for horse-race betting operations to natural persons or companies fulfilling the relevant conditions by means of calls for tender organised in accordance with Community rules. As a transitional measure, Article 25 of Decree No 169/1998 provided for an extension of the period of validity of the licences granted by UNIRE until 31 December 1998, or, if it proved impossible to organise calls for tender by that date, the end of 1999.

A Ministerial Decree of 7 April 1999 (GURI No 86 of 14 April 1999) subsequently approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1,000. Whereas 671 new licences were put out to tender, the directive of the Ministry of Finance of 9 December 1999 provided for the renewal of UNIRE's 329 "old licences". In implementation of that directive, the decision of the Ministry of Finance of 21 December 1999 (GURI No 300 of 23 December 1999) renewed the said licences for a period of 6 years starting 1 January 2000.

Decree-Law No 452 of 28 December 2001 (GURI No 301 of 29 December 2001), converted after amendment into Law No 16 of 27 February 2002 (GURI No 49 of 27 February 2002), subsequently provided that the "old licences" were to be reallocated in accordance with Decree No 169/1998, that is, by way of a Community call for tenders, and that they would remain valid until that reallocation had been finalised.

Finally, Decree-Law No 147 of 24 June 2003 extending time-limits and emergency provisions in budgetary matters (GURI No 145 of 25 June 2003), now Law No 200 of 1 August 2003 (GURI No 178 of 2 August 2003), provides in Article 8(1) that the financial status of each licence holder has to be assessed in order to resolve the problem of "the guaranteed minimum", a levy which every licence holder had to pay to UNIRE irrespective of the actual amount of revenue generated during the year, which had proven to be excessive and had led to an economic crisis in the horse-race betting sector. In implementation of that law, the special commissioner appointed by UNIRE adopted decision No 107/2003 of 14 October 2003, which extended the period of validity of the licences that had already been granted until the deadline for the last payment, set for 30 October 2011, and, in any event, until the date on which the new licences are allocated by

means of a call for tenders, in order to take the necessary steps to calculate the amounts to be paid by the licence holders.

Following a complaint lodged by a private operator in the horse-race betting sector, on 24 July 2001 the Commission sent the Italian authorities a letter of formal notice pursuant to Article 226 EC, drawing their attention to the incompatibility of the Italian system of granting licences for horse-race betting operations, and, in particular, the renewal by the contested decision of the 329 old licences granted by UNIRE without a competitive tendering procedure, with the general principle of transparency and the requirement of publication resulting from Articles 43 and 49 EC. In response, the Italian Government announced, by letters dated 30 November 2001 and 15 January 2002, respectively, the bill for and the adoption of Law No 16 of 27 February 2002

Since the Commission was not satisfied with the implementation of the provisions of that law, it issued a reasoned opinion on 16 October 2002 in which it asked the Italian Republic to adopt the necessary measures to comply with the reasoned opinion within 2 months of its receipt. By the letter of 10 December 2002, the Italian Government responded that it had to conduct a detailed assessment of the financial status of existing licence holders before issuing calls for tenders.

Since it received no further information concerning the completion of that assessment and the launching of a call for tenders for the purposes of reallocating the licences at issue, the Commission decided to bring the present action.

6.2.5 Liga Portuguesa de Futebol Profissional (2009) (Hereafter: Liga Portuguesa)[12]

In Portugal games of chance are, in principle, prohibited. However, the State has reserved the right to authorise, in accordance with the system which it deems most appropriate, the operation of one or more games directly, through a State body or a body controlled directly by the State, or to grant the right to operate such games to private entities, whether profit-making or not, by calls for tender conducted in accordance with the Code of Administrative Procedure.

Games of chance in the form of lotteries, lotto games and sports betting are known in Portugal as games of a social nature ("jogos sociais") and the operation of such games is systematically entrusted to Santa Casa.

Each type of game of chance organised by Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the various games offered by it, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the

[12] Cf., Case C-42/07, Judgment of the Court of 8 September 2009, paras 3–28 of the preliminary ruling, ECR (2009) I-7633.

method of selecting authorised distributors, and the methods and periods for payment of prizes, are covered by government regulation.

The first type of game in question was the national lottery (Lotaria Nacional), which was established by a royal edict of 18 November 1783, and a concession was awarded to Santa Casa, the concession being renewed regularly thereafter. Today that lottery consists in the monthly drawing of numbers by lot.

Following a number of legislative developments, Santa Casa acquired the right to organise other games of chance based on the drawing of numbers by lot or on sporting events. This led to the introduction of two games involving betting on football matches called "Totobola" and "Totogolo", respectively enabling participants to bet on the result (win, draw or loss) and the number of goals scored by the teams. There are also two lotto games, namely Totoloto, in which six numbers are chosen from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called "Joker", which consists in the drawing of a single number by lot. Lastly, there is also the Lotaria Instantânea, an instant game with a scratch card, commonly called "raspadinha".

In 2003 the legal framework governing lotteries, lotto games and sports betting was adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet. Those measures feature in Decree-Law No 282/2003 of 8 November 2003 (*Diário da República* I, series A, No 259, 8 November 2003). They seek essentially, first, to license Santa Casa to distribute its products by electronic means and, secondly, to extend Santa Casa's exclusive right of operation to include games offered by electronic means, in particular the internet, thereby prohibiting all other operators from using those means.

Article 2 of Decree-Law No 282/2003 confers on Santa Casa, through its Departamento de Jogos (Gaming Department), exclusive rights for the operation by electronic means of the games in question and for any other game the operation of which may be entrusted to Santa Casa, and states that that system covers all of the national territory, and includes, in particular, the internet.

Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences:

> (a) the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;
> (b) the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not; …

Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in, inter alia, Article 11(1)(a) and (b) of that Decree-Law. For legal persons, the fine is to be not less than EUR 2,000

or more than three times the total amount deemed to have been collected from organising the game in question, provided that the triple figure is greater than EUR 2,000 but does not exceed a maximum of EUR 44,890.

The activities of Santa Casa were, at the material time, regulated by Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa (*Diário da República* I, series A, No 195, 26 August 1991), as amended by Decree-Law No 469/99 of 6 November 1999 (*Diário da República* I, series A, No 259, 6 November 1999) ("Decree-Law No 322/91").

The preamble to Decree-Law No 322/91 emphasises the importance of the various aspects of Santa Casa—historical, social, cultural and economic—and concludes that the Government must pay "specific and continuous attention in order to prevent negligence and failures… while nevertheless granting [Santa Casa] the broadest possible autonomy in the management and operation of games of a social nature".

Under Article 1(1) of its statutes, Santa Casa is a "legal person in the public administrative interest." The administrative organs of Santa Casa consist, by virtue of Article 12(1) of its statutes, of a director and a board of management. Pursuant to Article 13 of those statutes, the director is appointed by decree of the Prime Minister, the other members of Santa Casa's board of management being appointed by decree of the members of the Government under whose supervision Santa Casa falls.

Under Article 20(1) of its statutes, Santa Casa has been given specific tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social situations of serious deprivation, and primary and specialised health care.

The earnings generated by the operation of games of chance are allocated between Santa Casa and other public-interest institutions or institutions involved in social projects. Those other public-interest institutions include associations of voluntary fire crews, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, and the cultural development fund.

The operation of games of chance falls within the responsibilities of the Gaming Department of Santa Casa. This department is governed by regulations adopted, as in the case of Santa Casa's statutes, by Decree-Law No 322/91, and has its own administrative and control organs.

In accordance with Article 5 of the regulations governing the Gaming Department, the administrative organ of that department consists of the director of Santa Casa, who is the ex officio chairman, and two deputy directors appointed by joint decree of the Minister for Employment and Solidarity and the Minister for Health. Pursuant to Articles 8, 12 and 16 of the regulations of the Gaming Department, the majority of the members of the committees in charge of games, draws and complaints are representatives of the public authorities, that is to say, the General Tax Inspectorate and the District Government in Lisbon. Accordingly, the chairman of the complaints committee, who has a casting vote, is a judge appointed by decree of the Minister for Justice. Two of the three members of that

committee are appointed by decree of the chief tax inspector and decree of the chief administrative officer (prefect) of the District of Lisbon respectively, while the third member of the committee is appointed by the director of Santa Casa.

The Gaming Department has the powers of an administrative authority to open, institute and prosecute proceedings concerning offences involving the illegal operation of games of chance in relation to which Santa Casa has the exclusive rights, and to investigate such offences. Decree-Law No 282/2003 confers upon the directors of the Gaming Department, inter alia, the necessary administrative powers to impose fines as provided for under Article 12(1) of that Decree-Law.

Bwin is an online gambling undertaking which has its registered office in Gibraltar. It offers games of chance on an internet site.

Bwin has no establishment in Portugal. Its servers for the online service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's internet site or by some other means of direct communication. Stakes on that site are paid by credit card in particular, but also by other means of electronic payment. The value of any winnings is credited to the gambling account opened for the gambler by Bwin. The gambler may use that money in order to gamble or ask for it to be transferred to his bank account.

Bwin offers a wide range of online games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Santa Casa.

Betting is on the results of football matches and other sporting events. The different games offered include bets on the result (win, draw or loss) of football matches in the Portuguese championship equivalent to the Totobola and Totogolo games operated exclusively by Santa Casa. Bwin also offers online betting in real time, in which the odds are variable and change as the sporting event in question unfolds. Information such as the match score, the time elapsed, yellow and red cards given, and so on, are displayed in real time on the Bwin internet site, thus enabling gamblers to place bets interactively as the sporting event unfolds.

The Liga is a private-law legal person with the structure of a non-profit-making association, made up of all the clubs taking part in football competitions at professional level in Portugal. It organises, inter alia, the football competition corresponding to the national First Division and is responsible for the commercial operation of that competition.

A sponsorship agreement, concluded by the Liga and Bwin on 18 August 2005 for four playing seasons starting in 2005/2006, made Bwin the main institutional sponsor of the First Football Division in Portugal. Under the terms of that agreement, the First Division, previously known as the "Super Liga", changed its name first to the Liga betandwin.com, and then subsequently to the Bwin Liga. In addition, the Bwin logos were displayed on the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The Liga's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

Subsequently, in exercising the powers conferred on them by Decree-Law No 282/2003, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of EUR 75,000 and EUR 74,500 respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of that Decree-Law. Those sums represent the aggregated amounts of two fines imposed on each of the Liga and Bwin for promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.

The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law.

The Tribunal de Pequena Instânza Criminal do Porto (Local Criminal Court, Oporto) (Portugal) decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling.

6.2.6 Sporting Exchange Ltd ("Betfair") (2010)[13]

Article 1 of the Law on games of chance (Wet op de kansspelen; "the Wok") provides:

> Subject to the provisions of Title Va of this Law, the following are prohibited:
>
> (a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;
> (b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities; …

Article 16(1) of the Wok is worded as follows:

> The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.

Article 23 of the Wok states:

> 1. A licence to organise a totalisator may be granted only in accordance with the provisions of this Title.
> 2. "Totalisator" shall mean any opportunity provided to bet on the outcome of trotting or other horse races, on the understanding that the total stake, apart from any deduction permitted by or by virtue of the law, will be distributed among those who have bet on the winner or on one of the prize winners.

[13] Cf., Case C-203/08, Judgment of the Court of 3 June 2010, paras 3–19.

According to Article 24 of the Wok, the Minister for Agriculture and Fisheries and the Minister for Justice may grant to one legal person with full legal capacity a licence to organise a totalisator for a period to be determined by them.

Article 25 of the Wok provides:

1. The Ministers referred to in Article 24 shall impose certain conditions on a licence to organise a totalisator.
2. Those conditions relate, inter alia, to:
   a. the number of trotting and other horse races;
   b. the maximum stake per person;
   c. the percentage retained before distribution among the winners and the particular use of that percentage;
   d. the supervision of the application of the Law by the authorities;
   e. the obligation to prevent or take measures to prevent, so far as possible, unauthorised betting or the use of intermediaries at venues where trotting or other horse races take place.
3. The conditions may be amended or supplemented.

Under Article 26 of the Wok:

> A licence granted in accordance with Article 24 may be withdrawn before its expiry by the Ministers referred to in that article in the event of a breach of the conditions imposed pursuant to Article 25.

Article 27 of the Wok prohibits the offer or provision to the public of an intermediary service in the placing of bets with the operator of a totalisator.

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

The Stichting de Nationale Sporttotalisator ("De Lotto"), which is a non-profit-making foundation governed by private law, has held the licence for the organisation of sports-related prize competitions, the lottery and numbers games since 1961. The licence for the organisation of a totalisator on the outcome of horse races was granted to a limited company, Scientific Games Racing BV (SGR), which is a subsidiary of Scientific Games Corporation Inc., a company established in the United States.

According to De Lotto's constitution, its objects are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture. De Lotto is managed by a five-member commission whose chairman is appointed by the Minister. The other members are designated by the Stichting Aanwending Loterijgelden

Nederland (Foundation for the Use of Lottery Funds) and by the Nederlands Olympisch Comité/Nederlandse Sport Federatie (Netherlands Olympic Committee/Netherlands Sports Federation).

Betfair operates within the gaming sector. Its services are provided solely via the internet and by telephone. From the United Kingdom, it provides the recipients of its services with a platform for betting on sporting events and horse races, known as a "betting exchange", on the basis of British and Maltese licences. Betfair has no office or sales outlet in the Netherlands.

As Betfair wished actively to offer its services on the Netherlands market, it requested the Minister to determine whether it required a licence in order to carry on such activities. It also applied to the Minister for a licence to organise sports-related prize competitions and a totalisator on the outcome of horse races, whether or not via the internet. By the decision of 29 April 2004, the Minister refused those requests.

The objection lodged in respect of that decision was dismissed by the Minister on 9 August 2004. In particular, the Minister took the view that the Wok provides for a closed system of licences which does not allow for the possibility of licences being granted to provide opportunities for participating in games of chance via the internet. As Betfair could not obtain a licence for its current internet activities under the Wok, it was prohibited from offering those services to recipients established in the Netherlands.

Betfair also lodged two objections to the Minister's decisions of 10 December 2004 and 21 June 2005 concerning the renewal of licences granted to De Lotto and to SGR, respectively.

Those objections were dismissed by decisions of the Minister dated 17 March and 4 November 2005, respectively.

By judgment of 8 December 2006, the Rechtbank's-Gravenhage (District Court, The Hague) declared Betfair's appeals against the dismissal decisions referred to above to be unfounded. Betfair subsequently appealed against that judgment to the Raad van State (Council of State).

6.2.7 Ladbrokes (2010)[14]

Article 1 of the Law on games of chance (Wet op de kansspelen; "the Wok") provides:

> Subject to the provisions of Title Va of this Law, the following are prohibited:
>
> (a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to

[14] Cf., Case C-258/08, Judgment of the Court of 3 June 2010, paras 3–13 of the preliminary ruling.

exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;
(b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom of the Netherlands in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities; …

Article 16 of the Wok is worded as follows:

1. The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.
2. The proceeds from prize competitions … shall be applied in respect of the interests which the legal person intends to serve by organising and operating sports-related prize competitions.
3. At least 47.5% of total proceeds from games of chance organised pursuant to this Title and to Title IVa, to be calculated on the basis of a calendar year, shall be allocated to the distribution of prizes …

Article 21 of the Wok states:

1. The Ministers referred to in Article 16 shall lay down rules concerning licences for the organisation of sports-related prize competitions.
2. Those rules relate, inter alia, to:

   a. the number of competitions to be organised;
   b. the method of determining results and the prize scheme;
   c. the management and covering of organisational costs;
   d. the allocation of revenue from competitions organised;
   e. the constitution and regulations of the legal person;
   f. monitoring of compliance with the legislation by the authorities;
   g. delivery and publication of the report to be drawn up annually by the legal person concerning its activities and financial results.

Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

Furthermore, there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

De Lotto is a non-profit-making foundation governed by private law which holds a licence for the organisation of sports-related prize competitions, the lottery and numbers games. Its objects, according to its constitution, are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture.

The Ladbrokes companies are engaged in the organisation of sports-related prize competitions and are particularly well known for their bookmaking business. They offer a number of mainly sports-related games of chance on their internet site. They also offer the possibility of participating via a freephone number in the betting activities which they organise. The companies do not physically carry on any activity in the Netherlands.

De Lotto alleged that the Ladbrokes companies were, via the internet, offering games of chance to persons residing in the Netherlands for which they did not have the requisite licence under the Wok, and made an application for interim relief to the Rechtbank Arnhem (District Court, Arnhem) for the Ladbrokes companies to be required to put an end to that activity.

By the judgment of 27 January 2003, the Rechtbank judge hearing the application for interim relief allowed the application and ordered the Ladbrokes companies to take steps to block access to their internet site for persons residing in the Netherlands and to make it impossible for such persons to participate in telephone betting. These measures were confirmed by the judgments of the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) and the Hoge Raad der Nederlanden (Supreme Court) of 2 September 2003 and 18 February 2005, respectively.

On 21 February 2003, De Lotto also issued proceedings against the Ladbrokes companies in a substantive action before the Rechtbank Arnhem. In its application, De Lotto sought confirmation of the coercive measures imposed on those companies by the judge who had heard the application for interim relief. By the decision of 31 August 2005, the Rechtbank allowed De Lotto's application and ordered the Ladbrokes companies, on pain of imposition of a periodic penalty, to maintain the measures blocking access to games of chance via the internet or by telephone for persons residing in the Netherlands. That decision was upheld by the judgment of the Gerechtshof te Arnhem of 17 October 2006; the Ladbrokes companies therefore appealed in cassation to the referring court.

The Hoge Raad der Nederlanden took the view that an interpretation of the European Union law was required to enable it to determine the dispute before it, and decided to stay the proceedings and to refer the questions to the ECJ for a preliminary ruling.

6.2.8 Otto Sjöberg and Anders Gerdin v. Swedish State (2010) (Hereafter: Sjöberg/Gerdin)[15]

The Lotterilag governs all categories of gambling offered to the public in Sweden.

The objectives of Swedish gaming policy were summarised as follows in the *travaux préparatoires* for the Lotterilag:

[15] Cf., Joined Cases C-447/08 and C-448/08, Judgment of the Court of 8 July 2010, paras 3–25 and 27 of the preliminary ruling.

> The main purpose underlying the gaming policy is … to have in future a healthy and safe gaming market in which social protection interests and the demand for gaming are provided for in controlled forms. Profits from gaming should be protected and always reserved for objectives which are in the public interest or socially beneficial, that is, the activities of associations, equestrian sports and the State. As has been the case hitherto, the focus should be on prioritising social protection considerations whilst offering a variety of gaming options and taking heed of the risk of fraud and unlawful gaming.

The Swedish legislation on gambling seeks to:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.

Paragraph 9 of the Lotterilag provides that a licence is, as a general rule, required to organise gambling in Sweden.

Under para 15 of the Lotterilag, a licence may be issued to a Swedish legal person which is a non-profit-making association and which under its statutes has as its main purpose the advancement of socially beneficial objectives in Sweden and carries on activities which serve mainly the advancement of that objective. Under para 45 of the Lotterilag, the Swedish Government may also grant a special licence to organise gambling in cases other than those provided for in that law.

In accordance with a fundamental principle of the Swedish legislation on gambling, which provides that the profits from the operation of gambling should be reserved for socially beneficial objectives or those which are in the public interest, the Swedish gambling market is shared between, on the one hand, non-profit-making associations whose purpose is the advancement of socially beneficial objectives in Sweden which have been granted licences under para 15 of the Lotterilag, and, on the other, two operators which are either State owned or mainly State controlled, namely, the State owned gaming company Svenska Spel AB and Trav och Galopp AB, which is jointly owned by the State and the equestrian sports organisations, those companies holding special licences under para 45 of the Lotterilag.

Under para 48 of the Lotterilag, a public authority, namely the Lotteriinspektion, is the central body responsible for monitoring compliance with the Lotterilag. On the basis of that law, the Lotteriinspektion is authorised to draw up the regulations relating to the monitoring and the internal rules necessary for the various games. It exercises supervision over Svenska Spel AB's activity and carries out inspections and regular checks.

Under Article 52 of the Lotterilag, the Lotteriinspektion can issue the directions and prohibitions necessary for compliance with the provisions of that law and decide on the rules and conditions adopted on the basis of it. Such a direction or prohibition may be accompanied by an administrative penal.

Under para 14 of Chap. 16 of the Criminal Code (Brottsbalken, "the Brottsbalk"), the organisation without a licence of gambling in Sweden constitutes an offence of

unlawful gaming. This is punishable with a fine or imprisonment of up to 2 years. If the infringement is deemed serious, it is punishable, as an offence of unlawful gaming set out in para 14a of Chap. 16, with imprisonment for between 6 months and 4 years.

In addition, under para 54(1) of the Lotterilag, anyone who, intentionally or through gross recklessness, organises unlawful gambling or unlawfully owns certain types of slot machines is liable to a fine or a prison sentence of up to 6 months.

The provisions of the Brottsbalk relating to the offence of unlawful gaming cover specifically described criminal offences. Criminal offences which are less serious and which, for this reason, do not fall within para 14 thereof, fall within the scope of para 54(1) of the Lotterilag. Under Article 57(1) of the Lotterilag, that latter provision does not apply where the criminal offence is subject to a penalty provided for by the Brottsbalk.

Since the Lotterilag applies only in Sweden, the prohibition on organising a lottery without a licence does not apply to gambling operated abroad. Nor does that prohibition apply to gambling offered on the internet from another State to Swedish consumers and the same law does not prohibit Swedish consumers from participating in gambling organised abroad. Similarly, a licence granted under that law confers on its holder a right to offer gambling services only within the territorial scope of the Lotterilag, that is to say, within Sweden.

Under para 38(1)(1) of the Lotterilag, it is prohibited, in commercial operations or otherwise to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organised within Sweden or abroad.

Under para 38(2), a derogation from the prohibition referred to in para 38(1) may be granted as regards gambling which is organised on the basis of international cooperation with Swedish participation by a foreign operator authorised to organise gambling, under the rules applicable in the State where he is established, and to cooperate on an international level.

Paragraph 54(2) of the Lotterilag provides that a fine or a maximum of 6 months' imprisonment may be imposed on persons who, in commercial operations or otherwise for the purpose of profit, illegally promote participation in gambling organised abroad, if the promotion specifically relates to consumers resident in Sweden.

Under para (4)(1) of Chap. 23 of the Brottsbalk, it is not only the perpetrator of certain criminal acts who is liable for them, but also the person who promotes them by aiding or abetting them. Furthermore, under para (4)(2), even a person who is not regarded as the co-perpetrator of the offence is held responsible if he has encouraged a third party to commit it, if he has provoked it or if he has aided its perpetrator in any other way.

At the material time, Mr Sjöberg was the editor-in-chief and the publisher of the Expressen newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and August 2004, of advertisements for gambling organised abroad by the companies Expekt, Unibet, Ladbrokes and Centrebet.

Mr Gerdin, for his part, was, at the material time, the editor-in-chief and publisher of the Aftonbladet newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and June 2004, of advertisements for gambling organised abroad by those companies.

Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than the Kingdom of Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting and poker.

The Åklagaren (Public Prosecutor's Office) subsequently took proceedings against Mr Sjöberg and Mr Gerdin for infringement of para 54(2) of the Loterrilagen, for having promoted, unlawfully and for profit, the participation of Swedish residents in gambling organised abroad.

On 21 June and 6 September 2005, Mr Sjöberg and Mr Gerdin were each ordered by the Stockholmstingsrätt (District Court, Stockholm) to pay a criminal penalty of SEK 50,000 in respect of infringement of the Lotterilag.

Mr Sjöberg and Mr Gerdin both appealed against the judgment concerning them before the Svea hovrätt (Court of Appeal, Svea). That court however refused to allow the admissibility of the appeal brought against those two judgments.

The parties concerned appealed against those decisions of the Svea hovrätt before the Högsta domstolen (Supreme Court) and that latter court, on 5 February 2008, issued a decision declaring that the appeals before the Svea hovrätt were admissible, thereby referring the two cases back to it.

The Svea Hovrätt decided to stay the proceedings and to refer to the ECJ the questions for a preliminary ruling.

6.2.9 Carmen Media (2010)[16]

Paragraph 284 of the Criminal Code (Strafgesetzbuch; "the StGB") provides:

1. Whosoever without the authorisation of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment of not more than two years or a fine.
   …
3. Whosoever in cases under subparagraph 1 above acts
   1. on a commercial basis.
      …
      shall be liable to imprisonment of between three months and five years.
      …

Apart from bets concerning official horse races, which fall primarily under the Law on Racing Bets and Lotteries (Rennwett- und Lotteriegesetz; "the RWLG"), and the installation and use of gambling machines in establishments other than

[16] Cf., Case C-46/08, Judgment of the Court of 8 September 2010, paras 3–25 and 38.

casinos (gaming arcades, cafes, hotels, restaurants and other accommodation), which fall primarily within the Trade and Industry Code (Gewerbeordnung) and the Regulation on Gambling Machines (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit), determination of the conditions under which authorisations within the meaning of para 284(1) of the StGB may be issued for games of chance has taken place at the level of the various *Länder*.

Paragraph 1(1) of the RWLG provides:

> An association wishing to operate a mutual betting undertaking on horse races or other public horse competitions must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*.

Paragraph 2(1) of the RWLG provides:

> Any person wishing, on a commercial basis, to conclude bets on public horse competitions or serve as intermediary for such bets (Bookmaker) must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*.

By the State treaty concerning lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; "the LottStV"), which entered into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and commercial placing of gambling, apart from casinos.

In a judgment of 28 March 2006, the Bundesverfassungsgericht (Federal Constitutional Court) held, concerning the legislation transposing the LottStV in the *Land* of Bavaria, that the public monopoly on bets on sporting competitions existing in that *Land* infringed para 12(1) of the Basic Law, guaranteeing freedom of occupation. That court held in particular that, by excluding private operators from the activity of organising bets, without at the same time providing a regulatory framework capable of ensuring, in form and in substance, both in law and in fact, effective pursuit of the aims of reducing the passion for gambling and combating addiction to it, that monopoly had a disproportionately adverse effect on the freedom of occupation thus guaranteed.

The State treaty on games of chance (Glücksspielstaatsvertrag; "the GlüStV"), concluded between the *Länder* and which entered into force on 1 January 2008, establishes a new uniform framework for the organisation, operation and intermediation of games of chance aiming to satisfy the requirements laid down by the Bundesverfassungsgericht in the said judgment of 28 March 2006.

The explanatory report on the draft of the GlüStV ("the explanatory report") shows that the main aim of the latter is the prevention and combating of addiction to games of chance. According to the explanatory report, a study dating from April 2006, carried out, at the request of the Commission of the European Communities, by the Swiss Institute of Comparative Law and concerning the market for games of chance in the European Union, clearly showed the effectiveness which may result, in that perspective, from legislation and a strict channelling of the activities concerned.

As regards the specific area of bets on sporting competitions, the explanatory report indicated that whilst, for the great majority of persons placing bets, such

bets might be only for relaxation and entertainment, it was very possible, on the evidence contained in the available scientific studies and expert reports, that, if the supply of those bets were significantly increased, the potential for dependency likely to be generated by them would be significant. It was thus necessary to adopt measures for preventing such dependency by imposing limits on the organisation, marketing and operation of such games of chance. The channelling and limitation of the market for those games by the GlüStV was to be obtained, in particular, by maintaining the existing monopoly on the organisation of bets on sporting competitions and on lotteries with particular risk potential.

According to para 1 of the GlüStV, the objectives of the latter are as follows:

1. to prevent dependency on games of chance and on bets, and to create the conditions for effectively combating dependency,
2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised games of chance,
3. to ensure the protection of minors and players,
4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.

Paragraph 2 of the GlüStV states that, with regard to casinos, only paras 1, 3–8, 20 and 23 apply.

Paragraph 4 of the GlüStV states:

(1) The organisation or intermediation of public games of chance may take place only with the authorisation of the competent authority of the *Land* concerned. All organisation or intermediation of such games is prohibited without such authorisation (unlawful games of chance).
(2) Such authorisation shall be refused where the organisation or intermediation of the game of chance is contrary to the objectives of Paragraph 1. Authorisation shall not be issued for the intermediation of games of chance unlawful according to the present State treaty. There is no established right to the obtaining of an authorisation.
…
(4) The organisation and intermediation of public games of chance on the internet are prohibited.

Paragraph 10 of the GlüStV provides:

(1) In order to attain the objectives set out in Paragraph 1, the *Länder* are under a statutory obligation to ensure a sufficient supply of games of chance. They shall be assisted by a technical committee composed of experts specialised in combating dependency on games of chance.
(2) In accordance with the law, the *Länder* may undertake that task either by themselves or through the intermediary of legal persons under public law or private law companies in which legal persons under public law hold a direct or indirect controlling shareholding.
…
(5) Persons other than those referred to in subparagraph 2 shall be authorised to organise only lotteries and games in accordance with the provisions of the third section.

The third section of the GlüStV concerns lotteries with a low risk of danger, which may be authorised under highly restrictive conditions and exclusively for organisers pursuing public interest or charitable aims.

Paragraph 25(6) of the GlüStV states:

> The *Länder* may, for a maximum period of one year after the entry into force of the State treaty, in derogation from Paragraph 4(4), permit the organisation and intermediation of lotteries on the internet where there is no reason to refuse them pursuant to Paragraph 4(2) and where the following conditions are met:
>
> - exclusion of minors or prohibited players guaranteed by identification and authentication measures, in compliance with the directives of the Commission for the protection of minors as a closed group of media users;
> - limitation of stakes, as fixed in the authorisation, to EUR 1,000 per month, and guarantee that credit is prohibited;
> - prohibition of particular incitements to dependency by rapid draws and of the possibility of participating interactively with publication of results in real time; as regards lotteries, limitation to two winning draws per week;
> - localisation by use of the most modern methods, in order to ensure that only persons within the scope of the authorisation may participate;
> - establishment and operation of a programme of social measures adapted to the specific conditions of the internet, the effectiveness of which is to be assessed scientifically.

According to the explanatory report, the transitional provision contained in para 25(6) of the GlüStV aims to provide equitable relief for two operators of commercial games who operate almost entirely on the internet and respectively employ 140 and 151 persons, by giving them sufficient time to bring their activity into conformity with the distribution channels authorised by the GlüStV.

The GlüStV was transposed by the Land Schleswig–Holstein by the law implementing the State treaty on games of chance in Germany (Gesetz zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland) of 13 December 2007 (GVOBl. 2007, p. 524; "the GlüStV AG").

Paragraph 4 of the GlüStV AG provides:

> (1) In order to achieve the objectives set out in Paragraph 1 of the GlüStV, the Land Schleswig–Holstein shall concern itself with supervision of games of chance, the guarantee of a sufficient provision of games of chance, and scientific research in order to avoid and prevent the dangers of dependency connected with games of chance.
> (2) In accordance with Paragraph 10(1) of the GlüStV, the Land Schleswig–Holstein shall fulfil that function through the intermediary of NordwestLotto Schleswig–Holstein GmbH & Co. KG. (NordwestLotto Schleswig–Holstein), the shares of which are held, directly or indirectly, in whole or in part, by the Land. …
> (3) NordwestLotto Schleswig–Holstein may organise lottery draws, scratch cards and sporting bets, as well as lotteries and additional games in the matter.
> …

Paragraph 5(1) of the GlüStV AG provides:

> Authorisation under Paragraph 4(1) of the GlüStV for games of chance which are not lotteries having a low potential for danger (Paragraph 6) presupposes:

1. the absence of grounds for refusal set out in Paragraph 4(2), first and second sentences, of the GlüStV,
2. compliance with:
   (a) the requirements concerning the protection of minors in accordance with Paragraph 4(3) of the GlüStV,
   (b) the internet prohibition contained in Paragraph 4(4) of the GlüStV,
   (c) the restrictions on advertising contained in Paragraph 5 of the GlüStV,
   (d) the requirements concerning the programme of social measures contained in Paragraph 6 of the GlüStV, and
   (e) the requirements on explanations concerning the risks of dependency in accordance with Paragraph 7 of the GlüStV,
3. the reliability of the organiser or the intermediary, who must, in particular, ensure that the organisation and intermediation are carried out in a regular manner and easily verifiable by players and the competent authorities,
4. the participation, in accordance with Paragraph 9(5) of the GlüStV, of the technical committee in the introduction of new games of chance, of new distribution channels or in considerable enlargement of existing distribution channels and a guarantee that a report on the social repercussions of the new or enlarged supply of games of chance has been drafted,
5. a guarantee that the organisers, within the meaning of Paragraph 10(2) of the GlüStV, participate in the concerted system for prohibiting certain players in accordance with Paragraphs 8 and 23 of the GlüStV,
6. a guarantee that players prohibited from gambling in accordance with the first sentence of Paragraph 21(3) and the first sentence of paragraph 22(2) of the GlüStV are excluded, and
7. compliance by intermediaries in commercial gambling with Paragraph 19 of the GlüStV.

If the conditions in the first sentence are met, authorisation should be given.

Paragraph 9 of the GlüStV AG provides:

> By derogation from Paragraph 4(4) of the GlüStV, in the case of lotteries, organisation and intermediation on the internet may be authorised until 31 December 2008 if compliance with the conditions set out in Paragraph 25(6) of the GlüStV is guaranteed. …

Carmen Media is established in Gibraltar, where it obtained a licence authorising it to market bets on sporting competitions. For tax reasons, however, that licence is limited to the marketing of bets abroad ("offshore bookmaking").

In February 2006, wishing to offer such bets via the internet in Germany, Carmen Media applied to the Land Schleswig–Holstein for a declaration that that activity was lawful, having regard to the licence which Carmen Media holds in Gibraltar. In the alternative, it applied for the issuing of an authorisation for its activity, or, failing that, for tolerance of that activity until the establishment of an authorisation procedure for private offerors of bets which complies with Community law.

Those applications having been rejected on 29 May 2006, Carmen Media brought an action on 30 June 2006 before the Schleswig–Holsteinisches Verwaltungsgericht (Schleswig–Holstein Administrative Court).

The Schleswig–Holsteinisches Verwaltungsgericht decided to stay the proceedings before it and to refer the questions to the ECJ for a preliminary ruling.

6.2.10 Summary of the Legal and Factual Context of the Case Law

The factual background of *Zenatti* was revisited by the ECJ in the ensuing Gambelli and Placanica cases, which set the tone for modern legal handling of EU sports betting policies. *Zenatti* concerned the prohibition imposed on the defendant from acting as an intermediary in Italy for a company established in the United Kingdom specializing in the taking of bets on sporting events.

Gambelli involved a similar background to *Zenatti*. The defendants were accused of having unlawfully organized clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constituted an offence of fraud against the State.

The ECJ was given a third opportunity to assume a definite stance on such matters of restrictive practices and national policies on sports betting in violation of the provisions of the EC Treaty, in *Placanica*. Once again, like in *Gambelli* Stanley and its agents in Italy were involved (in all three "Italian" cases, including *Zenatti* UK-based sports betting enterprises were involved; so, in fact these were "UK/Italian" cases); the latter (in *Placanica*) were three defendants who were prosecuted by the Italian State for running the "data transmission" sites one found in *Zenatti* and *Gambelli*. Until 2002, the method of licensing sport betting operators was reserved by and for the state-affiliated and licensed organizations CONI (Italian National Olympic Committee) and UNIRE (horse-racing) respectively. In 2002, the competences of the CONI and UNIRE with respect to bets on sporting events were transferred to the independent authority for the administration of State monopolies, acting under the supervision of the Ministry of Economic Affairs and Finance. Other than the subjective difficulty in obtaining such a license from Italian authorities, the Italian Penal Code criminalised such sport betting activities, as foreign sport betting operators would not be allowed to run their business without a license. It is expressly stated in *Placanica* that the legal and factual context of this case is similar to the situations that gave rise to the judgements in *Zenatti* and *Gambelli*.

The judgment in *Commission v. Italy* (all other sports betting cases mentioned here are preliminary rulings of the ECJ) concerned a complaint lodged by a private operator, Italy had failed to fulfil its obligations under the EC Treaty by renewing 329 licences for horse-race betting operations without inviting any competing bids.

The case of *Liga Portuguesa de Futebol Profissional* concerned fines imposed on the plaintiffs on the ground that they had infringed the Portuguese legislation governing the provision of certain games of chance via the internet. It is a case of modern times, that is a case of so-called "remote gambling"—without intermediaries like in *Zenatti*, *Gambelli* and *Placanica.* Bets are placed directly by the consumer on the internet or by some other means of direct communication. In 2003 the legal framework in Portugal governing *inter alia* sports betting had been adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet.

The conclusion is that the factual context of *Zenatti*, *Gambelli* and *Placanica* is similar, and *Liga Portuguesa de Futebol Profissional* is a case of "remote gambling," whereas *Commission v. Italy* is essentially different from these cases.

Since the Liga Portuguesa case, four new rulings were delivered by the ECJ in 2010 only, in chronological order: Ladbrokes and Sporting Exchange ("Betfair") on the same day (3 June 2010), Sjöberg/Gerdin, and Carmen Media. The first four cases were Ïtalian ones (Zenatti, Gambelli, Placanica and Commission v. Italy), followed by a Portuguese one; after these Southern European cases the focus now has shifted to Northern Europe: Betfair and Ladbrokes are Dutch cases, Sjöberg/Gerdin is a Swedish one, Carmen Media a German one, and Engelsmann an Austrian case.

In the Ladbrokes and Betfair cases UK-based sports betting enterprises were involved. The case concerned the possible unlawful conduct of Ladbrokes on the Netherlands market for games of chance, and the rejection of Betfair's applications for a licence to organize games of chance in the Netherlands. It is observed that Netherlands legislation in relation to games of chance is based on a system of exclusive licences, and there is no possibility at all of offering games of chance interactively via the internet in the Netherlands. De Lotto holds the licence for the organization of sports-related prize competitions and others.

In Sweden (Sjöberg/Gerdin case), under the Criminal Code the organization without a licence of gambling constitutes an unlawful act. Under the Lotteries Act it is prohibited to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organized within Sweden or abroad. Expekt, Unibet, Ladbrokes and Centrebet are private operators established in Member States other than Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting. The Swedish newspaper publishers Sjöberg and Gerdin promoted the participation of Swedish residents in gambling organized abroad.

The Carmen Media case concerned the refusal of a request by Carmen Media for acknowledgement of the right to offer bets on sporting competitions via the internet in the Land Schleswig–Holstein. Carmen Media is established in Gibraltar, where it obtained a licence authorizing it to market bets on sporting competitions abroad ("offshore bookmaking").

The Ladbrokes, Betfair, Sjöberg/Gerdin and Carmen Media cases like Liga Portuguesa are all remote gambling cases.

6.3 The Case Law Presented According to the "Reversal" Method

6.3.1 Carmen Media

40. In that regard, it should be noted that activities which consist in allowing users to participate, for remuneration, in a game of chance constitute "services" for the purposes of Article 49 EC (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, para 25, and Case C-67/98 *Zenatti* [1999] ECR I-7289, para 24).
41. Therefore, as consistent case-law shows, such services fall within the scope of Article 49 EC where the provider is established in a Member State other than the one in which the service is offered (see, to that effect, *Zenatti*, paras 24 and 25). That is particularly so in the case of services which the provider offers via the internet to potential recipients established in other Member States and which he provides without moving from the Member State in which he is established (see, to that effect, *Gambelli and Others*, paras 53 and 54).
44. Such a finding is, moreover, without prejudice to the ability of any Member State whose territory is covered by an offer of bets emanating, via the internet, from such an operator, to require the latter to comply with restrictions laid down by its legislation in that area, provided those restrictions comply with the requirements of European Union law ("EU law"), particularly that they be non-discriminatory and proportionate (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paras 48 and 49).
45. In that regard, it should be noted that, with regard to the justifications which may be accepted where internal measures restrict the freedom to provide services, the Court has held several times that the objectives pursued by national legislation in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question, and of consumers more generally, and the protection of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services (see to that effect, in particular, *Schindler*, para 58; *Läärä and Others*, para 33; *Zenatti*, para 31; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, para 73; and *Placanica and Others*, para 46).
46. The case-law of the Court of Justice thus shows that it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary wholly or partially to prohibit activities of that nature, or only to restrict them and to lay down more or less strict supervisory rules for that purpose, the necessity and the proportionality of the measures thus adopted having only to be assessed having regard to the objectives pursued and the level of protection sought to be ensured by the national authorities concerned (see to that effect, in particular, *Läärä and Others*, paras 35 and 36; *Zenatti*, paras 33 and 34; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, para 58).
55. As a preliminary observation, it should be noted that, in para 67 of the judgment in *Gambelli and Others*, after stating that restrictions on gaming activities might be justified by imperative requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling, the Court held that that applied only in so far as such restrictions, based on such grounds and on the need to preserve public order, were suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

60. The Court has also held that, in the matter of games of chance, it is in principle necessary to examine separately for each of the restrictions imposed by the national legislation whether, in particular, it is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (*Placanica and Others*, para 49).
65. The Court has, similarly, held that it is for the national courts to ensure, having regard in particular to the actual rules for applying the restrictive legislation concerned, that the latter genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see to that effect, in particular, *Zenatti*, paras 36 and 37, and *Placanica and Others*, paras 52 and 53).
66. As the Court has already held in those various respects, in *Gambelli and Others*, paras 7, 8 and 69, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance or betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for gambling in order to justify restrictive measures, even if, as in that case, the latter relate exclusively to betting activities.
85. However, the margin of discretion which the Member States thus enjoy in restricting gambling does not exonerate them from ensuring that the measures they impose satisfy the conditions laid down in the case-law of the Court, particularly as regards their proportionality (see, in particular, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 59 and case-law cited).
86. According to consistent case-law, where a system of authorisation pursuing legitimate objectives recognised by the case-law is established in a Member State, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, para 49).
87. Also, if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to them (see *Sporting Exchange*, para 50 and case-law cited).
101. The Court has already had occasion to emphasise the particularities concerned with the offering of games of chance on the internet (see *Liga Portuguesa de Futebol Profissional and Bwin International*, para 72).
102. It has thus observed in particular that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 70).

6.3.2 Sjöberg/Gerdin

32. It must be recalled at the outset that Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides

similar services. Moreover, the freedom to provide services covers both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, para 51 and the case-law cited).

36. Article 46(1) EC, applicable in this field by reason of Article 55 EC, allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the general interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 46 and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 56).
37. In that context, it must be observed that the legislation on gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 57).
38. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 58).
39. The Member States are therefore free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 59).
40. It is thus necessary to examine in particular whether, in the cases in the main action, the restriction on advertising imposed by the Lotterilag in respect of gambling organised in Member States other than the Kingdom of Sweden, by private operators for the purpose of profit, is suitable for achieving the legitimate objective or objectives invoked by that Member State, and whether it does not go beyond what is necessary in order to achieve those objectives. National legislation is moreover appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, those restrictions must be applied without discrimination (*Liga Portuguesa de Futebol Profissional and Bwin International*, paras 60 and 61).
49. Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that European Union law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by European Union law (*Placanica and Others*, para 68).
50. It follows moreover from the case-law of the Court that restrictive measures imposed by the Member States on account of the pursuit of objectives in the public interest must be applied without discrimination (*Placanica and Others*, para 49, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 60).
54. In that context, it must be recalled that the cooperation between the national courts and the Court of Justice established by Article 267 TFEU is based on a clear division of responsibilities. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice (see, to that effect, *Placanica and Others*, para 36, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 37).

6.3.3 Ladbrokes

15. Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, para 51 and the case-law cited).
16. It is common ground that the legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State, constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 52, and Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, para 24).
17. However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 55).
18. Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 56).
19. In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (*Gambelli and Others*, para 63, and *Placanica and Others*, para 47).
20. The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, para 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 59).
21. Specifically, restrictions based on the reasons referred to in para 18 of the present judgment must be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner (see, to that effect, *Gambelli and Others*, para 67).
22. According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, para 75, and *Placanica and Others*, para 58).
25. As the Court has already held, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing

players away from clandestine betting and gaming—and, as such, activities which are prohibited—to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques (*Placanica and Others*, para 55).

26. While it is true that the grounds of the judgment in *Placanica and Others* refer solely to the objective of crime prevention in the betting and gaming sector, whereas, in the present case, the Netherlands legislation is also designed to curb gambling addiction, the fact remains that those two objectives must be considered together, since they relate both to consumer protection and to the preservation of public order (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, para 58; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, para 33; and Case C-67/98 *Zenatti* [1999] ECR I-7289, para 31).
52. That question falls within the same legal framework as the first question referred in the case giving rise to the judgment in *Sporting Exchange* and is identical to it.
54. In that regard, it should be noted that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as the Ladbrokes companies lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, is not a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 69).
55. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 70).
57. It follows from this that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 72).

6.3.4 Sporting Exchange ("Betfair")

23. Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, para 51 and the case-law cited).
24. It is common ground that legislation of a Member State such as the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, *Liga Portuguesa de Futebol*

Profissional and Bwin International, para 52, and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-0000, para 16).

25. However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 55).
26. Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 56).
27. In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 47).
28. The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, para 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, para 59).
29. According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, para 75, and *Placanica and Others*, para 58).
33. It should be noted in that regard that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as Betfair lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 69).
34. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 70).
36. It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (*Liga Portuguesa de Futebol Profissional and Bwin International*, para 72).
49. Nevertheless, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of

European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services.

50. It has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily (Case C-389/05 *Commission* v. *France* [2008] ECR I-5397, para 94, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, para 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, para 38).
59. In any event, the restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities (see, to that effect, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paras 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paras 66 and 67).

6.3.5 Liga Portuguesa de Futebol Profissional (Hereafter: Liga Portuguesa)

37. In that connection, it should be noted that the cooperative arrangements established by Article 234 EC are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 36).
51. Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, para 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, para 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16).
52. It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 54).
55. It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 45 EC

and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

56. Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, para 46 and case-law cited).
57. In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (see, inter alia, Case 34/79 *Henn and Darby* [1979] ECR 3795, para 15; Case C-275/92 *Schindler* [1994] ECR I-1039, para 32; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paras 56 and 60, and *Placanica and Others*, para 47).
58. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, para 36, and Case C-67/98 *Zenatti* [1999] ECR I-7289, para 34).
59. The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, para 48).
60. In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, *Placanica and Others*, para 49).
61. In that context, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, para 55).
64. The Court has also recognised that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation (see *Läärä and Others*, para 37, and *Zenatti*, para 35).
66. In that regard, it is apparent from the national legal framework, set out in paras 12–19 of the present judgment, that the organisation and functioning of Santa Casa are governed by considerations and requirements relating to the pursuit of objectives in the public interest. The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.
67. In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa,

which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

69. In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.
70. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.
72. It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.

6.3.6 Commission v. Italy

20. As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in Placanica and Others (C-338/04, C-359/04 and C-360/04 [2007] ECR I-0000), in which it interprets Articles 43 and 49 EC in relation to the same national legislation.
26. In those circumstances, it is necessary to consider whether the renewal may be recognised as an exceptional measure, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-13031, para 60, and Placanica and Others, cited above, para 45).
27. On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (Placanica and Others, cited above, para 46).
28. Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (Placanica and Others, cited above, para 48).
29. It should therefore be examined whether the renewal of the licences without inviting any competing bids is suitable for achieving the objective pursued by the Italian Republic and does not go beyond what is necessary in order to achieve that objective. In any case, the renewal must be applied without discrimination (see, to that effect, Gambelli and Others, paras 64 and 65, and Placanica and Others, para 49).

6.3.7 Placanica

2. The references have been made in the course of criminal proceedings against Mr Placanica, Mr Palazzese and Mr Sorricchio for failure to comply with the Italian legislation governing the collection of bets. The legal and factual context of these references is similar to the situations that gave rise to the judgments in Case C-67/98 Zenatti [1999] ECR I-7289 and Case C-243/01 Gambelli and Others [2003] ECR I-13031.

36. Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see, in particular, Case C-55/94 Gebhard [1995] ECR I-4165, para 19, and Wilson, paras 34 and 35).

42. The Court has already ruled that, in so far as the national legislation at issue in the main proceedings prohibits—on pain of criminal penalties—the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services (see Gambelli and Others, para 59 and the operative part).

43. In the first place, the restrictions imposed on intermediaries such as the defendants in the main proceedings constitute obstacles to the freedom of establishment of companies established in another Member State, such as Stanley, which pursue the activity of collecting bets in other Member States through an organisation of agencies such as the DTCs operated by the defendants in the main proceedings (see Gambelli and Others, para 46).

44. Secondly, the prohibition imposed on intermediaries such as the defendants in the main proceedings, under which they are forbidden to facilitate the provision of betting services in relation to sporting events organised by a supplier, such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, constitutes a restriction on the right of that supplier freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services (see Gambelli and Others, para 58).

45. In those circumstances, it is necessary to consider whether the restrictions at issue in the main proceedings may be recognised as exceptional measures, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see Gambelli and Others, para 60).

46. On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92 Schindler [1994] ECR I-1039, paras 57–60; Case C-124/97 Läärä and Others [1999] ECR I-6067, paras 32 and 33; Zenatti, paras 30 and 31; and Gambelli and Others, para 67).

47. In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Gambelli and Others, para 63).

48. However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality.
49. The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect Gebhard, para 37, as well as Gambelli and Others, paras 64 and 65, and Case C-42/02 Lindman [2003] ECR I-13519, para 25).
52. As regards the objectives capable of justifying those obstacles, a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand—in so far as games of chance are permitted—the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.
53. With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and systematic manner (see, to that effect, Zenatti, paras 35 and 36, and Gambelli and Others, paras 62 and 67).
55. Indeed it is the second type of objective, namely that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems, that is identified, both by the Corte suprema di cassazione and by the Italian Government in its observations before the Court, as the true goal of the Italian legislation at issue in the main proceedings. Viewed from that perspective, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming—and, as such, activities which are prohibited—to activities which are authorised and regulated. As the Belgian and French Governments, in particular, have pointed out, in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.
58. It will be for the referring courts to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective invoked by the Italian Government, namely, that of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it will be for the referring courts to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality.
61. The Court has already ruled that, even if the exclusion from tender procedures is applied without distinction to all companies quoted on the regulated markets which could be interested in those licences—regardless of whether they are established in Italy or in another Member State—in so far as the lack of foreign operators among the licensees is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment (see Gambelli and Others, para 48).
68. Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to

their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law (see Case C-348/96 Calfa [1999] ECR I-11, para 17).

6.3.8 Gambelli

46. Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.
47. In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.
53. The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member states and provides without moving from the Member State in which he is established (Case C-384/93 Alpine Investments [1995] ECR I-1141, para 22).
54. Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet—and so without moving—to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.
58. The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.
59. It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.
60. In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.
62. As stated in para 36 of the judgment in Zenatti, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.
63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation

sufficient to enable them to determine what consumer protection and the preservation of public order require.

64. In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, para 32, and Case C-55/94 Gebhard [1995] ECR I-4165, para 37).
65. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.
67. First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.
68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.
69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.
75. It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

6.3.9 Zenatti

(…)

24. As the Court held in Schindler, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.
25. In this case, the services at issue are provided by the organizer of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.
30. According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in Schindler. The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.
31. As the Court acknowledged in para 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and,

more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v. Van Wesemael [1979] ECR 35, para 28, Case 220/83 Commission v. France [1986] ECR 3663, para 20, and Case 15/78 Société Générale Alsacienne de Banque v. Koestler [1978] ECR 1971, para 5). Moreover, as held in para 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

33. However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in para 61 of Schindler, recognized as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.
34. In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.
35. As the Court pointed out in para 37 of its judgment of 21 September 1999 in Case C-124/97 Läärä and Others [1999] ECR I-0000 in relation to slot machines, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.
36. However, as the Advocate General observes in para 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in para 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.
37. It is for the national court to verify whether, having regard to the specific rules for governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.

6.3.10 Analysis of the Case-Law

The paragraphs in *Carmen Media* which explicitly refer to previous rulings are: 40, 41, 44, 45, 46, 55, 60, 65, 66, 85, 86, 87, 101, and 102 (14 in total, making 26 references to previous rulings).

Carmen Media being the most recent case of all, not any reference is made to this ruling.

The paragraphs in *Sjöberg/Gerdin* which explicitly refer to previous rulings are:
32, 36, 37, 38, 39, 40, 49, 50, and 54 (nine in total, making 13 references to previous rulings).
There are no paragraphs in Sjöberg/Gerdin to which reference is made in a later ruling, that is Carmen Media.

The paragraphs in *Ladbrokes* which explicitly refer to previous rulings are:
15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 52, 54, 55, and 57 (14 in total, making 19 references to previous rulings).
There is one paragraph in Ladbrokes to which reference is made in another ruling:
16 (in Sporting Exchange 24).

The paragraphs in *Sporting Exchange* (*"Betfair"*) which explicitly refer to previous rulings are:
23, 24, 25, 26, 27, 28, 29, 33, 34, 36, and 59 (11 in total, making 15 references to previous rulings).
The paragraphs in Sporting Exchange to which reference is made in a later ruling are:
24 (in Ladbrokes 16), 49 (in Carmen Media 86), and 50 (in Carmen Media 87).
A general reference (without a specific paragraph or paragraphs mentioned) to Sporting Exchange is made in Ladbrokes 52 (N.B. Ladbrokes and Sporting Exchange are of the same date, 3 June 2010, and refer to each other, see also above). The total number of references to Sporting Exchange is: 4.

The paragraphs in *Liga Portuguesa* which explicitly refer to previous rulings are:
37, 52, 56, 57, 58, 59, 60, and 64 (eight in total, making ten references to previous rulings).

The paragraphs in Liga Portuguesa to which reference is made in later rulings are:
37 (in Sjöberg/Gerdin 54), 51 (in Sporting Exchange 23, in Ladbrokes 15, in Sjöberg/Gerdin 32), 52 (in Sporting Exchange 24, in Ladbrokes 16), 55 (in Sporting Exchange 25, in Ladbrokes 17), 56 (in Sporting Exchange 26, in Ladbrokes 18, in Sjöberg/Gerdin 36), 57 (in Sjöberg/Gerdin 37), 58 (in Sjöberg/Gerdin 38, in Carmen Media 46), 59 (in Sporting Exchange 28, in Ladbrokes 20, in Sjöberg/Gerdin 39, in Carmen Media 85), 60 (in Sjöberg/Gerdin 40, Sjöberg/Gerdin 50), 61 (in Sjöberg/Gerdin 40), 66 (Sporting Exchange 59), 67 (Sporting Exchange 59), 69 (in Sporting Exchange 33, in Ladbrokes 54), 70 (in Sporting Exchange 34, in Ladbrokes 55, in Carmen Media 102), and 72 (in Sporting Exchange 36, in Ladbrokes 57, in Carmen Media 101). The total number of references to Liga Portuguesa is: 31.

The paragraphs in *Commission v. Italy* which explicitly refer to previous rulings are:

20, 26, 27, 28, and 29 (five in total, making eight references to previous rulings).

There are no paragraphs in Commission v. Italy to which reference is made in any later ruling.

The paragraphs in *Placanica* which explicitly refer to previous rulings are:

2, 42, 43, 44, 45, 46, 47,49, 53, and 61 (ten in total, making 18 references to previous rulings).

The paragraphs in Placanica to which reference is made in later rulings are:

36 (in Liga Portuguesa 37, in Sjöberg/Gerdin 54), 45 (in Commission v. Italy 26), 46 (in Commission v. Italy 27, in Liga Portuguesa 56, in Sjöberg/Gerdin 36, in Carmen Media 45), 47 (in Liga Portuguesa 57, in Sporting Exchange 27, in Ladbrokes 19), 48 (in Commission v. Italy 28, in Liga Portuguesa 59, in Sporting Exchange 28, in Ladbrokes 20, in Carmen Media 44), 49 (in Commission v. Italy 29, in Liga Portuguesa 60, in Sjöberg/Gerdin 50, in Carmen Media 44, in Carmen Media 60), 52 (in Carmen Media 65), 53 (in Carmen Media 65), 55 (in Ladbrokes 25), 58 (in Sporting Exchange 29, in Ladbrokes 22), and 68 (Sjöberg/Gerdin 49).

A general reference to Placanica is made in Commission v. Italy 20 and Ladbrokes 26.

The total number of references to Placanica is: 28.

There is one paragraph in *Gambelli* which explicitly refers to a previous ruling: 67 (one reference).

The paragraphs in Gambelli to which reference is made in later rulings are:

46 (in Placanica 43), 48 (in Placanica 61), 53 (in Carmen Media 41), 54 (in Liga Portuguesa 52, in Carmen Media 41), 58 (in Placanica 44), 59 (in Placanica 42), 60 (in Placanica 45, Commission v. Italy 26), 62 (in Placanica 53), 63 (in Placanica 47, in Ladbrokes 19, in Sporting Exchange 27), 64 (in Placanica 49, in Commission v. Italy 29), 65 (in Placanica 49, in Commission v. Italy 29), 67 (in Placanica 46, in Placanica 53, in Ladbrokes 21, in Carmen Media 55, in Carmen Media 66), 68 (in Carmen Media 66), 69 (in Carmen Media 66), and 75 (in Ladbrokes 22, in Sporting Exchange 29).

A general reference to Gambelli is made in Placanica 2.

A reference to "the operative part" of Gambelli is found in Placanica 42.

A reference to "case-law cited" in Placanica 46 (including Gambelli 67) is made in Liga Portuguesa 56.

The total number of references to Gambelli is: 29.

Zenatti being the first ruling of all, there are no paragraphs in Zenatti which explicitly refer to previous rulings.

The paragraphs in Zenatti to which reference is made in later rulings are (Table 6.1):

24 (in Carmen Media 40, in Carmen Media 41), 25 (in Carmen Media 41), 30 (in Placanica 46), 31 (in Placanica 46, in Ladbrokes 26, in Carmen Media 45), 33 (in Carmen Media 46), 34 (in Liga Portuguesa 58, in Carmen Media 46), 35 (in Placanica 53, in Liga Portuguesa 64), 36 (in Gambelli 62, in Placanica 53, in Carmen Media 65),and 37 (in Carmen Media 65).

General references to Zenatti are made in Gambelli 63, Gambelli 67, and Placanica 2.

A reference to "case-law cited" in Placanica 46 (including Zenatti 30 and Zenatti 31) is made in Liga Portuguesa 56.

Total number of references to Zenatti: 20.

It is striking that Commission v. Italy (which is not a preliminary ruling like all others) is in an isolated position in relation to the other cases. No reference is made to this öld case. Liga Portuguesa is the ruling most referred to, although it succeeded to four previous rulings, and was followed by only four new ones.

However, it looks like a central position is a good position also with regard to contributing to stare decisis (in a "passive" manner). Zenatti, Gambelli and Placanica "score less," although the difference with Liga Portuguesa is not so impressive as with the newest four, of the year 2010. On the other hand, the "active" role of Liga Portuguesa is restricted. Placanica and the new rulings of, in particular, Ladbrokes and Carmen Media have a much higher score. Apart from "content" (see below), the total ("passive" and "active" references) of Placanica provides the number one position: 46 (Liga Portuguesa (42) is in second position, Gambelli (32) in third, and Carmen Media (26 äctive references!) in fourth). What are the average scores? On the one ultimate end, Zenatti, being the first ruling, could not refer to any previous case, and on the other ultimate end. Carmen Media, being the most recent ruling, could not be referred to. And the opposite is also true. Zenatti could be referred to in eight rulings; so, the average currently is: 20/8 = 2.5. The other averages as to "passive" references are as follows: Gambelli: 29/7 = appr. 4; Placanica: 28/6 = appr. 4.5; Commission v. Italy: 0/5 = 0; Liga Portuguesa: 31/4 = appr. 7.7; Sporting Exchange: 4/3 = 1.3; Ladbrokes and Sjöberg score less than 1. It is clear that Liga Portuguesa is by far most prominent, followed by Placanica and Gambelli. The averages as to "active" references are: Gambelli: 3/1 = 3, Placanica: 18/2 = 9, Commission v. Italy: 8/3 = appr. 3, Liga Portuguesa: 11/4 = appr. 3, Sporting Exchange: 15/5 = 3, Ladbrokes: 19/6 = appr. 3, Sjöberg: 13/7 = appr. 2, and Carmen Media: 26/8 = appr. 3. So, Placanica is by very far most prominent, The conclusion is that Placanica and Liga Portuguesa are the most prominent rulings of all in several respects.

Now, the "content" of the paragraphs which have been referred to more than once will be focused on:

six times: Gambelli 67; five times: Placanica 48 and 49; four times: Zenatti 31, Placanica 46, and Liga Portuguesa 59; three times: Zenatti 36; Gambelli 63,

Table 6.1 Analysis of the case-law

	Zenatti (0)	Gambelli (3)	Placanica (18)	Comm./It. (8)	Liga Port. (11)	Sport. Exch. (15)	Ladbrokes (19)	Sjöberg (13)	Carmen M. (26)
Zenatti (20)	x	3	5	0	3	0	1	0	8
Gambelli (29)		x	13	3	2	2	3	0	6
Placanica (28)			x	5	5	3	5	4	6
Comm./It. (0)				x	0	0	0	0	0
Liga Port. (31)					x	10	8	9	4
Sport. Exch. (4)						x	2	0	2
Ladbrokes (1)						1	x	0	0
Sjöberg (0)								x	0
Carmen M.									x
	[20]	[32]	[46]	[8]	[42]	[19]	[20]	[13]	[26]

N.B. The rulings at the horizontal line are the referring ones, the rulings at the vertical line are referred to. The number of times that a reference is made is indicated. The "Indirect" references from Liga Portuguesa 56 to "case-law cited" in Placanica 46—that is Zenatti 30–31 and Gambelli 67—have been counted twice. The totals are indicated between brackets on the left side after the (abbreviated) names of the rulings. The totals of references made per ruling are indicated between brackets under the (abbreviated) names of the rulings at the horizontal line. The totals of the vertical and horizontal lines per ruling are indicated underneath the table between square brackets. Each reference has two aspects: a stare decisis creating, generating one ("active reference," see also horizontal total numbers) and a stare decisis receiving one ("passive reference," see vertical total numbers). Stare decisis works both ways: because of the relevance of argument in the previous ruling it is referred back to, but this "recognition" materializes only if an (explicit) back-reference is made

Placanica 47, and Liga Portuguesa 51, 56, 70, and 72; twice: Zenatti 24, 30, 34, and 35; Gambelli 54, 60, 64, 65, and 75; Placanica: 36 and 58; Liga Portuguesa: 52, 55, 58, 60, and 69; once: Zenatti 25, 30, 33, and 37 (and three general references); Gambelli 46, 48, 53, 58, 59, 62, 68, and 69 (and a general reference, a reference to its operative paragraph and a reference to "case-law cited"), Placanica 45, 52, 53, 55, and 68 (and two general references); Liga Portuguesa: 37, 57, 61, 66, and 67; Sporting Exchange 24, 49, and 50; Ladbrokes 16.

The paragraphs referred to five and four times read in full as follows.

First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner (*Gambelli 67*).

However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica 48*).

The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination (see to that effect Gebhard, para 37, as well as Gambelli and Others, paras 64 and 65, and Case C-42/02 Lindman [2003] ECR I-13519, para 25) (*Placanica 49*).

As the Court acknowledged in para 58 of Schindler, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 Ministère Public v. Van Wesemael [1979] ECR 35, para 28, Case 220/83 Commission v. France [1986] ECR 3663, para 20, and Case 15/78 Société Générale Alsacienne de Banque v. Koestler [1978] ECR 1971, para 5). Moreover, as held in para 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them (*Zenatti 31*).

On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (see, to that effect, Case C-275/92

Schindler [1994] ECR I-1039, paras 57–60; Case C-124/97 Läärä and Others [1999] ECR I-6067, paras 32 and 33; Zenatti, paras 30 and 31; and Gambelli and Others, para 67). (*Placanica 46*).

The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, para 48) (*Liga Portuguesa 59*).

The above cited paragraphs may be generalized and summarized as follows (cross-references to immediately preceding, "scoring" and "non-scoring" paragraphs of course have been taken into account contextually).

Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality. (N.B. Since *Placanica 48* and *Liga Portuguesa 59* are identical (Liga Portuguesa referring to Placanica), the number of references in fact amounts to 9 for this reference.) Restrictions on gaming activities must be justified by imperative requirements (overriding reasons; *Zenatti 31*) in the general interest, such as consumer protection (protection of the recipients of the service, *Zenatti 31*) and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (*Gambelli 67*) Those objectives must be considered together. (*Zenatti 31*) The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. (*Placanica 49*) Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require (see below).

The paragraphs referred to three times read in full as follows:

> However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of Schindler, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services (*Zenatti 36*).

On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful

consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require (*Gambelli 63*).

In that context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Gambelli and Others, para 63) (*Placanica 47*).

Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, para 12, and Case C-58/98 *Corsten* [2000] ECR i-7919, para 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16). (*Liga Portuguesa 51*).

Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, para 46 and case-law cited) (*Liga Portuguesa 56*).

In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa 70*).

It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (*Liga Portuguesa 72*).

N.B. Since the paragraphs of *Gambelli 63* and *Placanica 47* are identical (Planacia referring to Gambelli), the number of references in fact amounts to six for this reference. So, its essence is (to be) added to the above summary: moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

6.4 Sports Betting and the Concept of "Sports Law"

Is "sports betting" part of sports law, international and European sports law, respectively, or is "sports betting" just an example of "sport and the law"?[17] Of course it is a part of sports law, if we take the broader concept of sports law as the standard of evaluation: everywhere that sport and law meet, we may speak of "sports law". But does sports betting also belong to the hard core of the concept, where sports rules and regulations, the specific "sporting law," is tested against regular public, societal law—to find out whether there is a conflict of law or not? It does not seem like that, since rules and regulations of sports governing bodies do not exist, at least not in the context of ECJ jurisprudence. In ECJ jurisprudence "sports betting" in principle is not treated differently from other forms of gambling which may be illustrated by the fact that in sports betting cases explicit reference is made to non-sports betting cases like *Schindler* and *Läärä* by way of *stare decisis.* Whereas in landmark cases of European Sports Law like *Walrave*, *Bosman,* and *Meca-Medina,* sporting measures and practices were tested, the ECJ jurisprudence on sports betting is not of a similar character; it is marginal. What is tested against EU law, is national public legislation on lotteries, including sport lotteries. So, Member States' law is the "intermediary" between the ECJ and organized sport. Sports betting, like, for example football hooliganism belongs to the world at large around sport, it is away from the playing field, off the pitch, and generally speaking not directly related to what happens on the field of play. In ECJ jurisprudence on sports betting there are only a few observations which show to some extent the specificity of sport in this context, for example it is said that an objective of national legislation may be to allow sports betting only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports (Zenatti, 30) Here sports betting is linked with the promotion of sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities (Zenatti, 4). Sports betting has a role in the broader context of sports funding at the amateur and recreational grass-roots level. Or: "… the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits." (*Liga Portuguesa 71*). Here sports betting clearly is connected to the threat of fraud and corruption in sport. In the White Paper on Sport it is said that, since in some Member States parts of the profits generated by lotteries may be allocated to public interest goals, including sport, questions were raised if "the specificity of sporting needs" may

[17] See, for a discussion whether sports law exists, whether there is a sports law, and what it is, what it consists of, the author's inaugural lecture as professor of International and European Sports Law at the School of Law of Erasmus University Rotterdam, 10 June 2010; see for the English-language version What is Sports Law? A Reappraisal of Content and Terminology 2011.

allow for restrictions on the free movement of gambling services in order not to decrease the level of these profits.[18]

6.5 Conclusion

The "reversal or retrospective method" of content analysis introduced in this contribution (see 6.1. Introduction for the detailed explanation of its meaning and way of application) in fact is kind of a statistical method of research applied to law. By its application, legal science moves to a certain extent into the direction of becoming exact science.

Sports betting is not defined in the jurisprudence of the ECJ. Generally speaking, it may be defined as sports-related betting.

The essence of the ECJ jurisprudence on sports betting may be summarized as follows on the basis of the application of the "reversal method" of content analysis:

> Member States are free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case law of the Court as regards their proportionality. Restrictions on gaming activities must be justified by imperative requirements or overriding reasons in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming; restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. Those objectives must be considered together. The measures must not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination. Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

The ECJ jurisprudence on sports betting is part of "sports law," in particular international (EU) sports law, although it does not belong to its hard core from a doctrinal point of view, the specificity of sport not playing any systematic role in relation to this subject of sports law. The ECJ has tested and will continue testing national legislation and policy on sports betting against EU law; in this context it does not test any rules and regulations of sports organisations whether they might be acceptable under EU law (such rules and regulations are non-existent in this context).

[18] Commission Staff Working Document 2007, p. 109

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Chapter 7
Match-Fixing: FK Pobeda et al. v. UEFA (CAS 2009/A/1920)

Jean-Samuel Leuba

Contents

7.1 Introduction

The arbitral award issued by the Court of arbitration for sport on 15 April 2010 in the case FK Pobeda—Prilep, Aleksandar Zabrcanec, Nikolce Zdraveski v/UEFA (hereinafter "the award or the award against Pobeda") is a first in several respects, not only for UEFA but also for the CAS.

With regard to the substance first of all, it is one of the very first procedures that has led to sanctions being imposed against a club and individuals in relation to the fixing of football matches. The subject of match-fixing has attracted a great deal of

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media attention since the revelations made by the Bochum public prosecutor's office. However, the Pobeda case is totally unconnected to those revelations. It is the result of numerous investigative measures taken by the UEFA disciplinary bodies without the help, it should be stressed, of any state investigative or judicial authority.

This arbitral award is also first from a procedural point of view, since the most important among numerous procedural questions that the arbitrators had to consider concerned whether or not they should accept UEFA's request that the identity of certain witnesses should be withheld and that they should therefore be examined by the CAS without their identity being made known to the appellants.

Finally, this award represents a first in terms of its outcome, since it is the first time a club and its president have been sanctioned for match-fixing in a European competition.

7.2 Summary of the Facts

Insofar as the present publication contains the full text of the arbitral award, there is no need to describe the facts of the case in detail, but readers are invited to examine the facts as they appear in the award.

Readers are therefore merely reminded that UEFA had opened a disciplinary investigation against FK Pobeda, a club from the Macedonian city of Prilep, on the basis of information suggesting that the home and away matches between FK Pobeda and FC Pyunik, an Armenian club, in the 2004/05 UEFA Champions League had been fixed. The UEFA control and disciplinary body (first instance body), on the basis of the findings of the investigation, sanctioned FK Pobeda, its president and the team captain at the time.

Following an appeal lodged by the three parties (club, president and captain, hereinafter "the appellants"), the UEFA appeals body (second instance body) confirmed the first instance decision. The three appellants lodged an appeal against this UEFA appeals body decision with the CAS.

7.3 In Substance

For various reasons, particularly certain procedural reasons which are discussed later, the Panel carried out a full review of the case. The CAS confirmed the decision of the UEFA Appeals Body in relation to the sanctions imposed against the club and its president, but set aside the sanction imposed against the captain.

In the examination on the merits, the arbitral award contains some extremely important recitals.

7.3.1 Fundamental Principles for Sport

Firstly, while noting that the regulations applicable in 2004 did not contain any specific provisions on the sanctioning of match-fixing activities, the award states that match-fixing "touches at the very essence of the principle of loyalty, integrity and sportsmanship."

The CAS therefore considered that match-fixing and sports betting activities violated the general clause of Article 5 of the UEFA disciplinary regulations, which states that "member associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship." Similarly, the CAS pointed out the high-social significance of football in Europe. It is therefore fundamental that the public is sure that all players (in the broad sense) act with the sole objective of beating their opponent and that all decisions are based on that objective (award, p. 14, rec. 76–78; see also CAS 98/2000/AEK Athens and SK Slavia Prague v/UEFA).

It is therefore clear that the rule prohibiting match-fixing activities is based on conduct rather than on the outcome of such activities. In other words, it is not necessary for the match to have actually been fixed. The result is not indispensable. As soon as club officials or players behave in a way which violates the principles of loyalty, integrity and sportsmanship, they may be sanctioned. This also means that any attempt and any action in breach of these principles, even if it does not result in a match being fixed, should be punished. Conduct that infringes the aforementioned principles cannot be allowed to go unpunished simply because the intended outcome did not materialize.

7.3.2 Reasoning of the CAS

7.3.2.1 Fixed Matches

When examining the merits, in particular the appellants' culpability, the CAS considered, firstly, whether the matches between Pobeda and Pyunik had been fixed.[1] The Panel explained very clearly its opinion that they had indeed been fixed. It mentioned various reasons for this conclusion, particularly the report of the sports betting expert, who had stated that the variations in betting patterns and odds for the first leg had clearly been extraordinary and abnormal, which proved that the match had been fixed. The appellants made no attempt to refute this.

[1] It should be noted that a fixed match does not necessarily have to be fixed by both teams. In the present case, there was no evidence that the Pyunik club was involved. Generally, only the team that is meant to lose or concede a certain number of goals fixes the match, while the other team, which is not involved, plays its best in order to achieve the best possible result.

The Panel also based its view on the testimony of the various witnesses, who reported not only that the Pobeda club was in financial difficulty, but also that the club president had mentioned his intention to fix the match against Pyunik. The witness statements on which the Panel's conclusion was based were not made by anyone who had seen money being exchanged between an intermediary and a club representative. It must therefore be concluded that, in order to establish that a match was fixed, it is not necessary to have direct proof (documentary evidence or witness statements) of every stage of the fixing of a match, particularly real evidence that money was given to a player or club representative. The witness statements contained elements confirming, sometimes indirectly, that the match had been fixed. For example, one witness stated that Pobeda players had bet on their own team losing. Reference should also be made to the recitals of the award. It is important to note that the convergence of a range of clues and evidence, even indirect, can be sufficient to justify the decision of disciplinary bodies required to rule on possible match-fixing. Finally, the Panel stated that the degree of proof required should be the same as in doping cases, i.e. "to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made" (award, rec. 85, p. 17, and CAS 2005/A/908).

It can also therefore be noted that, in order to establish that a match was fixed, technical data linked to sports betting and unusual variations in odds and/or betting patterns represent significant evidence.[2]

7.3.2.2 Involvement of the Appellants

Having concluded that the match had been fixed, the CAS considered the extent to which the appellants had been involved in the match-fixing plot. On the basis of the witness statements, the CAS decided that the president, Zabrcanec, had been actively involved in attempts to ensure that his team would lose the matches against Pyunik.

As mentioned above, the Panel considered that the witness statements were not sufficient to establish that the captain had been involved.

One interesting aspect concerns the club's involvement. The CAS firstly confirmed the application of Article 11 of the UEFA Disciplinary Regulations, which provides for the possibility to sanction member associations or clubs, particularly if "a team, player, official or member is in breach of article 5." In other words, the club may be sanctioned for acts committed by its officials. Since the Panel was "comfortably satisfied" that the president was guilty of influencing players and the coach in order to fix the match, the club could be sanctioned on the basis of Article 11.

[2] The media have recently reported on the control and monitoring measures that have been implemented, in particular by UEFA, and then by FIFA, in this area.

The award also states that, in the Panel's view, it was important to underline that there was no evidence that the president manipulated the games for personal gain.

This comment in the award raises a question. If the president had said that the match-fixing and his conduct had been exclusively dictated by a strictly personal interest and not by the interests of the club, could the club have been sanctioned in the same way? The award does not answer this question directly.

In the author's view, the answer must be yes. It is unacceptable that a club should be able to escape any sanction simply by arguing that one of its officials acted in his own personal interest and that the club should not, therefore, suffer the consequences of his actions. Such a scenario would provide too easy a way out for club officials found guilty of breaking the rules. Furthermore, by enabling the club to escape any sanction, it would go against the very objective laid down by the CAS in the same Pobeda award (see award, rec. 116, p. 25). According to the award, strong sanctions against clubs are likely to provoke reactions within the clubs when attempts are made to manipulate matches. As was pointed out in the Pobeda case, the president clearly could not have manipulated matches without the assistance of players on the pitch. This shows that it was possible, within a club, to fix a match without provoking adequate reactions. By imposing strong sanctions against the club, it is possible not only to prevent individuals from manipulating matches, but also to encourage other club officials, players or members to take action when they become aware of an attempt to manipulate a match. In other words, it is important that clubs or associations should be punishable when officials or players are involved in match-fixing activities. The prospect of a sanction against the club is likely to encourage the club's directors and other officials to keep a close eye on the proper running of the club and to fight against any attempt to fix matches, and even to encourage the players to refuse to participate in such activities.

Finally, it does not appear necessary to decide who will benefit from the crime. Even if the only beneficiary were a friend or acquaintance of the club president who fixed a match result with the help of certain players, it seems logical and well-founded to punish the club itself.

7.3.2.3 Sanctions

Finally, still concerning the merits, it should be noted that the CAS thought that the sanctions imposed against the club and the president were appropriate. The club was banned from all European competitions for eight years, while the president was given a life ban from all football-related activities. The fact that this sanction was considered appropriate demonstrates the gravity of the actions committed, which violated the very essence of sport and the fundamental principles of loyalty, integrity and sportsmanship.

7.4 Various Procedural Questions

During the appeal procedure instigated by Pobeda, the Court of Arbitration for Sport had to consider various procedural questions, some of which are examined in this chapter.

Firstly, we will study UEFA's request that certain witnesses be given anonymity. Unless the author is mistaken, this is the first time the Court of Arbitration for Sport has examined witnesses whose identity has been withheld from one of the parties.

A second question concerned Article R56 of the code of sports-related Arbitration, in particular UEFA's request, submitted after it had lodged its response that an additional witness be heard.

The Court of Arbitration for Sport also had to consider complaints made by the appellants concerning the procedure followed by the UEFA disciplinary bodies. On this occasion, the CAS confirmed its case-law relating to Article R57 of the Code. It should be noted that one of the questions relating to this provision was not dealt with in the award.

Finally, we will not go back over a point previously discussed: the degree of proof required by the CAS, i.e. "to the comfortable satisfaction" of the arbitrators. Reference is made to what has already been said on this subject.

7.4.1 Protection of Witnesses by Means of Anonymity

UEFA asked the CAS if it could examine witnesses without their identity being revealed to the appellants.

During the procedure before the UEFA disciplinary bodies, some witnesses had been heard without their identity being revealed. UEFA wanted to protect their anonymity mainly because of the risk to the lives and safety of the witnesses and their families. UEFA pointed out that, between the decisions of UEFA's first and second instance bodies, the identity of certain witnesses testifying against the club had been disclosed on the Pobeda club website, which had announced that it intended to publish photos of these witnesses. As a result, some witnesses had expressly asked for protection.

In support of its request, UEFA mentioned the practice of the Swiss state courts and the case-law of the Swiss Federal Court and the European Court of Human Rights.

The CAS decided to follow strictly the case-law of the Swiss Federal Court with regard to the protection of witnesses. It should be noted that the Swiss Federal Court itself applies the case-law of the European Court of Human Rights (Article 6 ECHR and Article 29 para 2 of the Swiss constitution, ATF 133 I 33).

Bearing in mind all the circumstances, the Panel considered that the fears expressed by some of the witnesses could not be ignored. It therefore maintained a

balance between the rights of the appellant, particularly the right to examine the witnesses, and the need to protect the witnesses.

The CAS therefore applied the case-law of the European Court of Human Rights and the Swiss Federal Tribunal. However, it should be noted that this case-law applies to criminal procedures. A disciplinary procedure within a sports organization cannot automatically be put in the same category as a criminal procedure. It is therefore questionable whether it is really necessary to demand that all the requirements of a criminal procedure are met.

In practical terms, the appellants received copies of the minutes of the interrogations of the protected witnesses, with all clues to the witnesses' identity deleted.

In addition, the witnesses were examined by telephone. Their voices were disguised. A CAS representative was with the witnesses during this process, in order to ensure that they were answering the questions alone and, of course, to check their identity, which was known to the Panel. In this way, the appellants, who did not know the identity of certain witnesses, were able to interrogate them remotely. This procedure therefore protected the interests of the appellants as well as those of the witnesses to have their identity protected.

It is possible that, in the future, the CAS will need to use the same procedure again for hearing witnesses who need protection. Since the CAS tries to apply Article R57 of the Code in a broad way, giving the panel full power to examine the facts and the law, it is indispensable that the examination of protected witnesses should be possible before the CAS. It should therefore be possible, where necessary, to apply practical procedures in accordance with the case-law of the Swiss Federal Tribunal and the European Court of Human Rights.[3]

7.4.2 Examination of an Additional Witness (Article R56)

After submitting its response, UEFA requested that an additional witness (anonymous witness Z) be examined. UEFA asked for permission to call this witness on the basis of Article R56 of the Code, particularly mentioning the existence of exceptional circumstances.

UEFA explained that it had not become aware of the testimony of witness Z until after it had filed its response. It also produced minutes of an interrogation carried out after its response had been submitted. The CAS refused to allow

[3] Incidentally, one of the witnesses who was meant to remain anonymous declared at the hearing that he was prepared to reveal his identity and be examined in the presence of the parties and the arbitrators. He was therefore taken to the hearing chamber and examined as an ordinary witness. This witness was a former coach of the Pobeda club, who was coaching another Macedonian team when the hearing took place. A few days after the hearing, he was sacked by his Macedonian club, particularly on the grounds that he had tarnished the image of Macedonian football. In principle, the club who sacked this coach has no links with the Pobeda club.

witness Z to be examined on the grounds that the existence of exceptional circumstances had not been established.

On reading the award, it is impossible not to imagine that the Panel refused to allow witness Z to be examined because it wanted to avoid another procedural problem. Should the fact that a party did not become aware of an additional piece of evidence until after it had submitted its written pleadings not be treated as an exceptional circumstance under Article R56? The discovery, after the submission of written pleadings, that an additional witness could provide important evidence should constitute an exceptional circumstance under Article R56.

When it filed its response, the respondent did not know what this witness might subsequently say. It therefore had no reason, at that time, to request that he be examined by the CAS.

It is logical that the CAS should have accepted that this was an exceptional circumstance in the sense of Article R56 of the Code.

When a party does not become aware of the existence of an additional piece of evidence until after the deadline fixed for the submission of its written pleadings, it should be allowed to submit that evidence to the CAS.

With regard to witness Z in the present case, the Panel probably felt uncomfortable about the issue of the minutes of the interrogation of witness Z.

UEFA requested that these minutes should not be transmitted to the appellants because their content would enable them to identify the witness. We cannot dismiss the idea that the Panel faced a twofold problem: on the one hand, it was asked not to transmit the minutes because the safety of the witness might have been endangered, while on the other hand, it feared it might infringe the appellants' rights by allowing the minutes to be submitted without allowing the appellants to see them.

In the author's opinion, this problem could have been resolved either by refusing to accept the minutes of the interrogation or by asking UEFA to submit excerpts from the minutes which would not lead to the identification of the witness.

In any case, it would have been possible to examine witness Z without agreeing to the submission of the written minutes.

While it may be admitted that the aim of Article R56 of the code is to define the parameters of the subject of arbitration and to avoid the submission of multiple written pleadings and evidence, it should not be applied in such a restrictive way that new evidence or evidence which a party did not discover until after it submitted its written pleadings is rejected.[4]

[4] The CAS applied the version of Article R56 that was in force before 1 January 2010. The amendment of this provision does not concern an element that was crucial to the question being dealt with here.

7.4.3 Procedural Error by the UEFA Disciplinary Bodies (Article R57)

The appellants complained, initially to the UEFA disciplinary bodies and then in their appeal pleadings to the CAS, that their procedural rights were breached by the UEFA disciplinary bodies. It may even be suggested that the main grounds of the appeal concerned the alleged procedural errors and the violation of the appellants' rights by the UEFA disciplinary bodies.

The award neither does examine these procedural complaints in detail, nor does answer them. Indeed, it dismisses them with reference to the rule laid down in Article R57 of the Code, under which the Panel can hear the case de novo. Article R57 states that "The Panel shall have full power to review the facts and the law."

According to CAS case-law, any procedural errors committed by a lower instance body are cured by the fact that the Panel carried out a full review. The award also points out that CAS case-law is in line with the decisions of the ECHR. The award mentions various examples of relevant case-law (award, p. 17, rec. 87).

This CAS case-law is helpful insofar as it avoids debate surrounding possible procedural errors allegedly committed by lower instance bodies. However, it does create a number of perverse effects. For example, since it does not re-examine in detail the procedure followed by the lower instance bodies, the CAS does not decide whether a particular form of procedure is acceptable or not. In other words, the lower instance bodies and the federations do not obtain a decision confirming that their procedure was correct or indicating what aspects of their procedure were incorrect. This creates the risk that procedural errors are perpetuated in different procedures before the federations, since the CAS does not comment on such errors.

Furthermore, the notion of hearing a case de novo, i.e. carrying out a free examination with full power to review the facts and the law, raises a problem in terms of appeal procedures against UEFA decisions.

Although the first sentence of Article 57 para 1 clearly states that "The Panel shall have full power to review the facts and the law," this provision is not in line with the UEFA Statutes.

Article 62 para 6 of the UEFA statutes stipulates that

> The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so.

Article 62 of the UEFA Statutes concerns the jurisdiction of the CAS as an appeals arbitration body. It is this same provision (Article 62 para 1) that recognizes the jurisdiction of the CAS to hear appeals against decisions taken by a UEFA organ.

In other words, the rules laid down in Article 62 of the UEFA Statutes form part of the arbitration clause that binds the parties (UEFA and the other parties). However, as an arbitration clause, it must also bind the CAS.

The CAS and some legal writers are very restrictive and doubtful as to the possibility of limiting the powers of the CAS to review cases in an arbitration clause (see Antonio Rigozzi, "L'arbitrage international en matière de sport," p. 557 ff and references to case-law). As far as we are concerned, it is hard to see why the restriction created by the UEFA Statutes should not validly limit the jurisdiction of the CAS.

Moreover, in a recent award in the "Valverde" case (CAS 2009/A/1879, p. 19), the CAS accepted the need to base its jurisdiction on the rules of the federation concerned. It wrote:

> The jurisdiction of the CAS to rule de novo must be based on the rules of the federation concerned, which the CAS follows. As a private arbitration body, the jurisdiction of the CAS is limited by the jurisdiction of the arbitral procedure on which the appeal is based.[5]

The restriction imposed by Article 62 para 6 of the UEFA Statutes is extremely precise and limited. It only concerns facts or evidence which the party could have submitted to an internal UEFA body, but did not.

In other words, if a procedural error was committed by a UEFA body and resulted in the violation of a party's right to a fair hearing, such as the right to examine or submit evidence, the limitation of Article 62 para 6 would not apply in any case. In such circumstances, the CAS would be able to conclude that the party did not have the opportunity, even with the diligence required, to submit the facts or evidence concerned.

Furthermore, the examination of an alleged procedural error could lead the CAS to set aside the decision and refer the case back to the UEFA bodies.

This limitation of Article R56 of the Code by Article 62 para 6 of the UEFA Statutes did not raise any particular problem in the Pobeda procedure. However, this question could one day become a serious issue.

It is not out of the question that the failure to respect the limitation set out in Article 62 para 6 of the UEFA Statutes might be considered as a valid reason to appeal to the Swiss Federal Tribunal against the CAS award, in accordance with Article 190 para 2 of the LDIP (Swiss Federal Code on Private International Law).

In other words, such a complaint could be one of the few grounds on which an appeal to the Swiss Federal Tribunal against a CAS award is allowed under Swiss law.

Perhaps this question will be answered in the future.

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[5] Unofficial translation of the following : "La compétence du TAS à juger de novo doit être fondée sur les règlements de la fédération intéressée, limite à laquelle souscrit ce Tribunal. En tant qu'instance arbitrale privée, la compétence du TAS se trouve limitée par la compétence de la procédure arbitrale sur laquelle est fondé l'appel."

7.5 Conclusions

As mentioned above, the CAS award in the case UEFA v/Pobeda is a first in several respects.

Quite clearly, it is extremely important because of the fact that it is the first decision connected with the fixing of football matches at European level. Unfortunately, it is unlikely to be the last.

This award also appears very significant insofar as it is sure to remain a reference point for some time as regards the evidence that is necessary and sufficient to establish the involvement of certain individuals or sports organizations and, therefore, to sanction them.

This award is also extremely important because it is the first time that CAS arbitrators have had to examine protected witnesses, i.e. witnesses whose identity was withheld from one of the parties.

Finally, as is often the case where CAS case-law is concerned, the award as a whole raises for discussing a number of interesting items related to the arbitration procedure.

Part II
Country Reports

From: André Buurman, 1,000 Paarden en een Prins—memoires van Hans Eysvogel [1,000 Horses and a Prince—memoirs of Hans Eysvogel], Eindhoven, De Boekenmakers 2008.

Chapter 8
Sports Betting in the Netherlands: A Legal Framework Study

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Contents

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8.1 History: Betting in the Netherlands

8.1.1 First Signs of Betting

Although at present gambling does not play a prominent role in the daily life of the average Dutch citizen, it does have a firm cultural and historical place in The Netherlands. This is the result of decades, if not centuries, of legalized gambling from the start of the affluent days of the Netherlands.

The first signs of active gambling in the Netherlands have been found on wall paintings and vases estimated to be more than 40,000 years old. These paintings show images of gods and people using particular bones as dice. These dice have been found at excavation sites in the eastern and southern parts of the Netherlands. The same bones with similar shapes have been discovered in Arabic and Asian regions.[1] The bones are said to be the predecessor of the modern cube dice known today, of which the first goes back to three thousand BC.

8.1.2 Three Centuries of Gambling Regulation

Gambling regulation in the Netherlands dates back to the early 18th century when lotteries were popular instruments to fund political campaigns.[2] Before the installation of a proper regulation in the Netherlands several debates were held about the addictive symptoms and ruined families due to legalised gambling.[3] It was thought that regulation would put a quick and consequent end to these negative effects. This development led to the establishment of the Dutch state lottery ("Staatloterij"), in the year 1726. In later days, the gambling laws would become more stringent and prohibit all competing (private) lotteries. At present, the *Staatsloterij* is the world's oldest existing state lottery.

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[1] In a poem from India the first warning on betting with dice is discovered. In this poem the god Savitr states: "Do not play with dices, but gratify yourself with your possessions, pay your attention to your cattle and wife."

[2] Huls 2002, p. 5. Inaugural address at Ersamus University Rotterdam, 14 may 2002.

[3] Dutch history even knows some famous gambling addicted persons. One of the most famous is Multatuli (1820–1887) who lost his fortune at least twice.

8.1.2.1 19th Century: Introduction of State Monopoly on Lotteries

In 1848, a Dutch legislation put a general prohibition on all lotteries except the state lottery, thus creating a full state monopoly. In the 19th and 20th centuries, during the industrialization era, gambling was regulated through criminal law. These gambling regulations were part of the public indecency rules, next to those regulating prostitution, drugs and alcohol.[4]

Other games of chance, particularly horse race betting, have been very popular since the 18th century. Although the Dutch government (influenced by the church) has fought games of chance, it has never been able to effectively exterminate them. Betting and gambling remain a socially accepted phenomenon.

8.1.2.2 1900–1964: Diversification of Regulatory Control and Maintenance of State Monopoly

Lotteries

The first law that specifically regulated games of chance was enacted in 1905. Lotteries continued to be prohibited under the new act, but additional exemptions were created on behalf of lotteries for charitable purposes. These exempted lotteries were not allowed to pay out prizes in money, but could only award goods and services. This restriction remained in force until the early sixties.

Sports Betting

In the early 20th century Dutch churches organized a resistance against horse betting which resulted in a ban in 1911. In 1949, a first experiment of legalized horse betting was initiated and received positive results. In 1961, after a period of positive experiences with horse betting, the Dutch government decided to legalize sports betting (football pool) as a monopoly.[5]

8.1.2.3 1964—Present: New Legal Framework and Erosion of the Betting and Gambling Restrictions

In 1964, a new legal framework for the regulation of gambling and betting was introduced in the Act on Games of Chance (Wks).[6] The Wks bundled the various

[4] Huls 2007, pp. 69–79.

[5] The football betting monopolies and the permit for charity lotteries to pay out prizes in money were introduced in the amendment of the Lottery Act of 1961.

[6] "Wet op de Kansspelen" (*Act on the Games of Chance*), Act of 10 December 1964, Stb 1964, 483.

legal instruments regulating specific games of chance. Lotteries (state owned and licensed private charity lotteries), sports betting (football pool) and horse betting were now regulated through a centralized legal system. Later, new forms of legalized gambling such as Lotto, casino games and charitable bingo were introduced through amendments of the Wks.[7] The first official Lotto draw was held on September 1, 1974 and 2 years later the first casino opened its doors in the city of Zandvoort. Both have been a booming success.

8.1.3 Recent Modernization (Attempts)

The Dutch government has been struggling with betting and gambling for ages. To date, this battle between the religious and liberal forces in the Dutch society has not had a clear winner. The government has always been aware of the fact that a total ban would initiate more illegal and financially dangerous ways of gambling and has therefore initiated a state monopoly in all the different forms of gambling.

In the present era of economic reasoning and promotion of free markets, the position of the Dutch government is that the market of games of chance is different from other markets and requires regulating as games of chance have side effects that can be very damaging. The Dutch government is desperately trying to uphold the current (state monopoly based) regulation system by incidentally legalizing new games of chance. It appears that these are intended to keep just enough pace with international and technological developments to avoid loss of credibility of the legal system and to control the number of Dutch inhabitants playing foreign games of chance.[8]

On the other hand it is commonly accepted that one day the current system will have to be changed more drastically. In the previous decades, several regulatory attempts have already been made. These, however, have either not survived at all, or resulted in new difficulties in definition and enforcement problems.

In 2000, the chapter of the Wks on slot machines was changed for the sake of public interest.[9] It introduced certain rules and technical requirements as well as linked jackpots and multiplayers in arcades. In this same period the Dutch ministers decided on major changes in the Netherlands gaming regulation, following a report by a commission to review the gaming legislation in the country. The main recommendation of this commission was to move towards an overall liberalization

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[7] Wet van 2 juli 1974 tot wijziging van de Wet op de kansspelen (Amendment of the Wks of 1974), Stb. 1974, 441.

[8] The number of Dutch inhabitants (online) participating in games of chance offered abroad is growing every year. The last official figures date back to 2004; the total amount spent on foreign games of chance in 2004 was €67 million, equalling 4% of the amount spent on domestic games of chance in the comparable gaming period in 2003, http://www.toezichtkansspelen.nl/cijfers/summaryblks.pdf.

[9] Amendment of the Wet op de kansspelen of 2000, Act of 24 December 1998, Stb. 1999, 9.

of the gaming sector. However, this liberalization was never adopted by the government. Worse still, in 2003, the earlier Cabinet decisions on changes in the gaming regulation were to a large degree turned back by the new government.

On April 1, 2008, by a 37–35 vote, the Senate voted down an amendment to the existing Gaming Act that would have allowed interactive internet gaming on an experimental 3-year basis for Holland Casino only (details in Sect. 8.5).

8.1.4 Dutch Participation in Games of Chance

Many Dutch inhabitants gamble once in a while. The latest figures show that at least 800,000 citizens like to play with slot machines, of which 50% gambles with the machines on a regular basis. Around 5.3 million people participate in De Lotto, 600,000 enjoy the instant lottery, 400,000 visit casinos and the bingo has over 200,000 participants.[10] In the past 10 years poker has become very popular in the Netherlands, at present having 500,000 players. Its popularity is best spread under younger adults between the ages of 18–35 years.

In 2001, a total of 73% of the Dutch bought a lottery ticket linked to charity objectives (this includes also the small lotteries for regional-based sport clubs and art centres etc.).[11] Despite this impressive figure the average amount spent by Dutch participants (54 Euro in 2002) is reasonably low as compared to other countries in Europe.[12] The turnover of the legalized games of chance market approaches to 2 billion euros.[13]

8.1.5 Enforcement and Supervision

Traditionally, gaming and betting regulations have been enforced through criminal law. In 1996, the Netherlands Gaming control board (*College van toezicht op de*

[10] De Bruijn et al. 2005.

[11] Schuyt 2003.

[12] See the research paper by Motivaction, 2003.

[13] The gambling organisations on which the Board applies its supervision achieved in the year 2007 a turnover of €1713.7 million. Profits, after reducing the turnover amount with 880.1 million of prize money (in which taxes also where included: about 92.7 million), accounted €833.6 million. If we also include the revenue of the legalized state casino's we could add €756.7 million and presents a total gambling income of €1,590.3 million.

kansspelen, "GCB") was established. The Gaming control board monitors the legal gambling institutions in The Netherlands and controls the distribution of gambling permits.[14]

The legal framework of the GCB is laid down in section VIa of the Wks (see Sect. 8.3 hereafter). The GCB is an independent advisory body to the Minister of Justice in respect of the national gaming monopolies. It advises the Minister on all applications for national permits and permit renewals. Transparency and consistency are the Board's leading principles. The Gaming Control Board advocates a socially acceptable performance of all national gaming monopolies and emphasizes the transparency of prizes, costs and proceeds for the good causes and the treasury. The Board endeavours a consistent gaming policy by the Ministry of Justice in gaming regulation, offering the national gaming monopolies the same set of conditions and regulations as far as possible. The GCB consists of seven independent members, appointed by the Crown. The permanent secretariat has a staff of four and forms a part of the civil service of the department of Justice. Although the GCB is an independent body, it comes under the political responsibility of the Ministry of Justice, which also provides for the Board's annual budget.

Recently, there have been plans to replace the GCB with a new independent regulator, the Gaming Authority. This Gaming Authority should be granted more powers, not only regulating the public gaming companies, but also the private gaming machine operators in the Netherlands. This initiative, however, did not make it as it was voted down together with the online gambling experiment law (see Sect. 8.1.3).

8.2 Legal Framework: The Policy on Games of Chance

As mentioned above, the gambling and betting market is being regulated by one comprehensive act (the Wks) since 1964. The principal objective of the Wks is to regulate and control games of chance, with special concern for preventing gambling addiction, protecting the consumer and combating illegality and crime. The Wks aims to channel the peoples' compulsion to gamble and to throttle the revenues to the Treasury (and certain designated charities). Consistent with this, the main rule of the Wks is that all games of chance are illegal, unless specifically exempted.[15]

The Wks prohibits any form of enabling/giving the opportunity to participate in a game of chance, and therefore, does not address a specific group of citizens,

[14] The Netherlands gaming control board (College van toezicht op de kansspelen) was established as an independent advisory body to the Minister of Justice in respect of the national gaming monopolies. The legal framework of the Board is contained in section VIa of the Act on games of chance, see also para 3.

[15] Clause 1 Wet op de kansspelen.

instead it simply regulates all persons and companies who organize games of chance.

There are three categories of exceptions to the general prohibition against organizing games of chance. First, the Wks contains certain generic exemptions. Second, the Ministry of Justice is entitled to grant certain gambling licenses to National monopolists, while other (smaller) games of chance may be permitted by the local authorities.

8.2.1 General Exceptions

For obvious reasons private and non-commercial initiatives are excluded from this prohibition.[16] This means that f.i. organizing card games and betting pools for employees, friends and/or relatives (popular during major sports events), is allowed under Dutch law as long as this is not considered a business activity.

Another category of exempted games of chance is the so-called "promotional games." If and insofar as a game of chance is organized for the promotion of a certain product or service, it shall be exempted from the prohibition provided the criteria set out in the "Gedragscode promotionele kansspelen" (GPK) are fulfilled.[17] The GPK is a code of conduct that is negotiated by the market parties and the ministry of justice in anticipation of future changes in the Wks. The Code differentiates between (i) "large promotional games" and (ii) "small promotional games." In order to qualify as a promotional game of chance, the game must not be an independent economic activity, which *inter alia* means that apart from communication costs no participation fee may be demanded.

Large promotional games may be organized only once per year and may include no more than 13 draws.[18] The total value of the prizes must not exceed €100,000 per annum (clause 4 GPK). The organizer must comply with detailed information obligations with respect to the process[19] and game rules,[20] as well as with regard to the prizes awarded.[21] Moreover, the organizer must take specific measures to protect minors against exposure.[22]

The requirements for *small promotional games* are less stringent. A promotional game of chance is considered "small" if (i) the aggregated value of the

[16] Clause 2a. Wet op de kansspelen.

[17] Gedragscode Promotionele Kansspelen http://www.justitie.nl/images/Gedragscode%20kansspelen_tcm74-99686_tcm34-16383.pdf.

[18] Clause 2 Gedragscode promotionele kansspelen.

[19] Clause 4 Gedragscode promotionele kansspelen.

[20] Clause 7 Gedragscode promotionele kansspelen.

[21] Clause 5 Gedragscode promotionele kansspelen.

[22] Clause 6 Gedragscode promotionele kansspelen.

prizes awarded does not exceed the amount of €4,500 and (ii) the communication costs do not exceed the price for a stamp or local telephone rates.[23]

For small-scale games of chance (bingo, wheel of fortune and similar games) consent for the organization of such games is given by local authorities, which means that no license is required, but due warning of sessions must be given in advance to the local authorities. Only Dutch associations that exist for at least 3 years at the moment of initiating a small-scale game can rely on this exemption.

Another statutory requirement is that the game itself is established and conducted for purposes not connected with gaming, betting or lotteries. Moreover, the total value of the prizes may not exceed €1,400 per meeting and any profits generated must be paid into the society's treasury or given to some deserving social cause. This means that no personal earnings may exist with the participants whatsoever.

8.2.2 Local Permits for Shoppingweek Actions

Certain specific games of chance can be licensed by the local authorities. These are small lotteries and so-called "winkelweekacties" (shoppingweek actions). A shoppingweek action is defined as a game of chance which is (i) organized for a limited period of time not exceeding 4 weeks, (ii) by a group of shops in the same territory and (iii) for special occasions.[24] The Chamber of Commerce can give a permit for such action if the value of the prizes awarded does not exceed €11,950 and participation in the game is free.[25]

Permits for organizing "small lotteries" (a lottery is considered small when the total value of the awarded prizes does not exceed €4,500) can be granted by the mayor if the revenues from the lottery are destined to serve a public interest.[26] These are mostly licenses for incidental lotteries.

8.2.3 One-Off National Permits

8.2.3.1 Premium Bond Loans

The Department of Justice can grant individual licenses for the issuance of premium bond loans if these are issues for investments to serve purposes of general interest.[27] In practice such permits are hardly ever granted.

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[23] Clause 8 Gedragscode promotionele kansspelen.

[24] Clause 7b.1 Wet op de kansspelen.

[25] Clause 7b.4 Wet op de kansspelen.

[26] Clause 3.1 Wet op de kansspelen.

[27] Clause 4 Wet op de kansspelen.

8.2.3.2 Incidental/One-Off Lottery Licenses

Only if the total value of the prizes of a game of chance exceeds €4,500 can the Department of Justice grant a license. These are often for annual (charity) lotteries for which the Department of Justice issues approximately 150 licenses each year.

8.2.4 National Games of Chance Licenses

The Dutch policy with respect to state monopolies is characterised as "dualistic." Monopolies are granted to Dutch private entities. The administrative structure of the policy regarding games of chance shows signs of ambivalence. On first sight one would say that the dualistic system of private initiative and governmental supervision cooperate perfectly. But a closer look reveals some sparkles from fringing elements. At the level of the national government, the Ministry of Finance is interested in the incomes created due to monopolizing gambling and the taxes applicable on the winnings. The Holland Casino is presented abroad as a tourist attraction by the Ministry of Economic Affairs, while at the same time the Ministry of Justice applies laws and licenses on games of chance. The Ministry of Health, Welfare and Sport is combating gambling addiction while it is also dependent on the gambling revenues in funding sport events and national soccer. Without the income from the several gambling institutions, sport and cultural events would be depending on governmental subsidies. To summarize: the Dutch government is combating a system that it has created itself.[28]

The following institutions have permits from the Ministry of Justice to organize legal gambling and are in fact the national gaming monopolies[29]:

- Netherlands State Lottery

The oldest existing state lottery in the world is the Netherlands State Lottery. A license to operate the state lottery is granted by the Ministry of Justice to the foundation for the Exploitation of the Netherlands State Lottery (SENS). The Wks sets out that only one license can be issued (monopoly). From the turnover, at least 60% must be marked out for prizes. The net profit of the State lottery is remitted to the exchequer.

- National Good Causes Lotteries

At present, three charity lotteries have been granted a license to organize lotteries with a total amount of prizes exceeding €4,500,000: bank giro lottery, postal

[28] Huls 2002.

[29] A complete overview of facts and figures of all concession holders can be found on the internet pages of the Board: http://www.toezichtkansspelen.nl/feiten_cijfers.html.

code lottery and sponsor lottery. The main regulations are that a license can only be given if the profits derived from a lottery serve purposes of general interest (charitable purposes), that from each lottery at least 50% of the turnover must be destined for these charitable purposes (the total amount of prices and other costs related to organizing a lottery may thus not exceed 50% of the turnover) and that participation for people under 18 years is forbidden. The Gaming Control Board acts as the supervisory body for these lotteries.

- De Lotto

Sportsbetting. The National Sports Totalizator Foundation (the Lotto) holds a license to operate sports betting activities. 65% of its net results are destined for the sports world, 35% for culture. The Gaming Control Board acts as the supervisory body.

Instant lottery. The Lotto also has a license for the issuance of scratch cards/the operation of instant lotteries. Similar to the State Lottery, the Wks sets out that there shall at all times be no more than one party licensed to organize instant lotteries. From the turnover, 47.5–65.0% is marked out for prizes. The net profit derived from the instant lottery is destined for sports, culture, welfare, public health and other deserving social causes.

- Scientific Games

Scientific Games is the exclusive licensee for the operation of horse betting in the Netherlands. It is licensed by the Ministry of Justice and supervised by the Gaming control board. The net profit derived from horse betting is predominantly destined for purposes related to equestrian sports.

- Holland Casino

Since 1976, a state monopoly is granted to the National Foundation for the Exploitation of Casinogames in the Netherlands (Holland Casino). Opening of a casino outlet not only requires a specific permit from the Department of Justice, but also requires the consent of the City Council of the local establishment.

Holland Casino now has 14 outlets. It is supervised by the Gaming Control Board.

8.3 Sports Betting Legislation

8.3.1 Introduction

The only sports-related betting and games of chance that are permitted under Netherlands law are those organized by the Sportsbetting Totalisator, and the individually licensed horse races totalisator.

Sports betting in the Netherlands rates for at least 35% of the total legalized gambling market share. The national treasury accounts for roughly €422.2 million and €376.6 million is handed over to the designated charity funds institutions. In the past 10 years the total gambling revenue has increased significantly, but strangely enough the profits did not increase with the same ratio. Merely the costs and taxes increased which pressed greatly on the net profit.

8.3.2 Sports Betting (Lotto)

Title III of the Wks regulates sports betting. The national monopoly on sports betting is licensed by the Department of Justice. The one and only licensee is the National Sports Totalizator Foundation (De Lotto) on which the Gaming Control Board acts as supervisor.

The main statutory requirements are that only one license can be issued (100% monopoly) and that from the turnover, 47.5–50.0% is marked out for prizes. The net profit derived from sports betting is destined for sports (65%) and culture, welfare, public health and other deserving social causes (35%). No participation is allowed for people under 18 years.

The National Sportstotaliser Foundation (Stichting de Nationale Sporttotalisator), acting under the name The Lotto, is the biggest sports betting organizer in the Netherlands, of which the TOTO mainly focuses on soccer. Since 1961, Lotto organizes sports contests, the weekly lotto (since 1974), the Euro lottery (since 1981), the daily lotto and the instant lottery (since 1994). The aim of TOTO is to predict the outcome of soccer games organized by the Dutch Football Association (KNVB). The first nationwide TOTO game was initiated in 1957. The aim of organizing a nationwide TOTO was to establish a centralized game to predict the outcome of soccer matches. In the years before this establishment, football clubs organized these games of chance themselves. It was thought that these clubs would benefit from a centralized system. After 50 years, we can conclude that these expectations have indeed turned out to be true: a total of more than €170 million has been paid out to the football clubs since the start. In 2007, the Lotto had a total revenue of €170 million.[30]

The establishment of the TOTO was a result of the above discussed political debate by the government on centralizing and monopolizing games of chance. In the 1960s, the National Sporttotalisator (now called De Lotto) was founded to create the possibility to share the TOTO profits not only for soccer-related funding but also for other forms of sport and charity institutions. In the early days TOTO was formed by just one prediction game as described above. Nowadays,TOTO provides its audience with over six different games to predict several events in the

[30] Jaarverslag College van Toezicht op de Kansspelen 2007, p. 35.

soccer league. The jackpot prizes started in the old days at 60 guilders (27 euros), but has since then been raised to several hundred thousand euros.

8.3.3 Horse Betting

Horse betting has been separated from the Lotto. As mentioned above, horse betting is seen as a special form of betting, with its own specific roots. For this reason Title IV of the Dutch Act on Games of Chance regulates horse betting.

Similar to the rules applicable to sports betting, the Department of Justice is the licensor for horse betting. Only one license can be issued at a time; the current licensee is Scientific Games Racing, a Dutch private company which is wholly owned by the American company Scientific Games Corporation, Inc. Its license was renewed on 19 June 2008, for the period 1 July 2008 until 30 June 2013.

A similar gambling system is operated for horse race betting, similar to that used for as the above discussed totalizator. There are several games known for horse betting in the Netherlands: all focused on predicting the results of a race. It is also possible to place bets on horse races abroad. Within the Netherlands, seven official tracks are available for professional horse racing. A bet can only be placed at the track itself or by one of the 23 booking offices. In total, 6.2 million bets were placed within the Dutch territory in 2007. This gained a total revenue of €34.3 million of which €8.4 million was bet on Dutch races (24.5%). The prize money in the same year was €25 million. At first sight, it appears somewhat strange that the turnover from horse racing bets exceeds the aggregated amount of the TOTO bets. But horse racing also exceeds Dutch soccer in other fields: the total volume of investments and revenues running through horse racing is larger than that of soccer (although soccer is much more popular).

At least 50% of the turnover is marked out for prizes. The net profit derived from horse betting is predominantly destined for purposes related to equestrian sports. Also, for this form of betting, no participation is allowed for people under 18 years. The Gaming Control Board supervises Scientific Games' compliance with these and all other statutory requirements and license terms.

8.4 Games of Chance Versus Games of Skill

One should be aware that under Dutch law not every game in which participants can win prizes is a game of chance. This depends on the participant's influence on the outcome. The decisive criterion for the qualification of a game is whether players can, in general, exert a "determining influence" on the selection of the winners. For a lottery this is clearly not the case; chance decides who wins a

prize. This applies not only to lotteries for which the participant buys a ticket with a lottery ticket number, but also, for instance, when sending in solutions to a rebus or crossword puzzle. Often, the correct solutions are the same and a lottery will have to be used to determine who receives the prize or prizes. If the participant does have a determining influence on the outcome, the action is not a game of chance.

Through the years, jurisprudence on what is and is not considered a game of chance has been established. Most of the relevant case laws concerned card games. Unsurprisingly, sports betting has always been considered a game of chance and hence subject to the Wks.

8.5 Internet Gambling

Pursuant to article 1, sub a, of the Games of Chance Act it is forbidden to compete for prizes or premiums if the winners are selected by any determination of chance on which the participants cannot exert their influence, unless a permit has been granted. At present, the Games of Chance Act does not provide for the granting of permits to organize games of chance via the internet. However, existing gambling permit holders are allowed to use the internet or another medium to sell tickets for a game of chance (e-commerce).

In 2005, the Ministry of Justice prepared a new whitepaper, which was created in close consultation with the Dutch Tax Department, the Public Prosecutor's Office, the KLPD, FIOD-ECD and Verispect B.V. (the agency monitoring gambling machines). This policy document "approach to combat games of chance via the internet"[31] was submitted to the House of Representatives in 2005.[32] This approach focuses on dealing with both parties offering games of chance and intermediaries. A key element in the approach is that providers and "hosting providers" are notified in writing of the fact that they violate the Games of Chance Act and the possible consequences of their actions. A violation of article 1 of the Wks is a felony.[33] A large number of providers and intermediaries have already been notified of their alleged violation of the Games of Chance Act.

The proposal to amend the Games of Chance Act, which provides for the availability of games of chance via the internet in the form of a trial, was approved by the Dutch House of Representatives in 2006.

The idea of the trial was to gain controlled experience with and insight into the effects of online betting and gambling, by allowing it under strict conditions. One

[31] Ministerie van Justitie, *Aanpak bestrijding van kansspelen* via *internet*, http://www.justitie.nl/images/Aanpak%20KVI_tcm34-9460.pdf.

[32] Letter of Minister of Justice of 6 September 2005 http://www.justitie.nl/images/Aanbiedingsbrief%20TK%20KOI_tcm34-9461.pdf.

[33] Violation of the Wks is qualified as an economic crime in the sense of the Economic Crimes Act.

single provider was to be allowed to organize games of chance via the internet by means of a temporary permit. The following criteria were used to select the provider; integrity, reliability, (technical) expertise, the nature of the offer, experience in offering participation via the internet and experience with a policy to prevent gambling addiction. After duly considering these criteria, it was decided to issue the permit for the trial period initially to Holland Casino. Based on the findings resulting from the trial, a decision would be made on whether or not it will be structurally allowed to offer games of chance via the internet as well as the conditions under which this may be done.

However, in 2008 the draft Act which was supposed to clear the road for the experiment was rejected by the Senate.[34] As a result, the complete ban on online betting was upheld. To date online games of chance are still prohibited under the Wks.[35]

The Dutch government is actively enforcing the general ban on internet gambling. The ministry of Justice has established a dedicated team and the criminal authorities are actively prosecuting both providers and intermediaries, such as credit card companies and banks who facilitate the money transfers from and to the online gambling operators. Also, the Ministry maintains a "blacklist" of organisations offering games of chance via the Internet.[36]

8.5.1 2010: New Attempts to Regulate Internet Gambling

In September 2009, a new advisory committee on online games of chance, the "Adviescommissie kansspelen via internet" was established.[37] This commission was assigned the task to advise the Ministry of Justice on the general conditions that may be set for the regulating of games of chance via the Internet. The desired output of the commission is a report, including a proposal for a regulatory regime for games of chance via the Internet. When preparing such a proposal, the commission is expected to pay particular attention to:

- the compliance of the Dutch policy on games of chance with European law;
- the nature and volume of the offerings of online games of chance;
- possible manners of permit granting;

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[34] On 1 April 2008, 37 senators voted against the draft act; 35 senators voted in favour of the draft act http://www.eerstekamer.nl/nieuws/20080401/senaat_tegen_proef_met_gokken_op.

[35] Most recently confirmed (and defended) in the letter of the Minister of Justice to the House of Representatives dated 8 October 2009, Kamerstukken II, 24 557, nr. 102.

[36] See letter of the Minister of Justice to the House of Representatives of 27 January, 2009 (TK 2008–2009, 24 557, nr. 95).

[37] Advice commission games of chance via internet, established by the decree of 9 September, 2009, State Journal 2009, no. 17046 (https://zoek.officielebekendmakingen.nl/stcrt-2009-17046.html).

- similar developments in other EU member states; and
- protection of vulnerable groups, such as minors and adolescents.

The Commission consists of five experts in the field of government, games of chance, enforcement and control, addiction care and prevention, and new media. The commission is expected to issue its report to the Ministry of Justice in March 2010.

8.6 Relationship with European Law

From a European perspective the organization of games of chance is also regarded as a "service" in the sense of the EC Treaty. While the EC Treaty prohibits it in principle, in its jurisprudence, the European Court of Justice (ECJ) has accepted that Member States may impose restrictions on the organization of games of chance if the said restrictions can be justified by compelling reasons of general interest (e.g. preventing gambling addiction). To date the Member States are allowed to pursue their own policy on games of chance.

In the recent Betwin case, the ECJ has ruled that the Portuguese statutory restrictions on betting and gambling were *not* in conflict with the EC treaty as they are being justified by a public health interest of the National government.[38] In the Netherlands, this decision was received as support for the current (conservative) approach of the Dutch government, which is aimed at maintaining the National monopolies, excluding foreign (national) operators and prohibiting the offering of online games of chance to Dutch citizens.[39]

8.7 Betting-Related Sports Sponsoring and Advertising

The statutory restrictions to the offering of games also apply to the advertising of games of chance to the Dutch public. That is, the Wks categorically prohibits the promotion of games of chance, and even the possession of associated marketing materials (art 1 sub b Wks).

As a result, it is effectively impossible for gaming companies (including foreign licensed operators) to enter into any sponsoring arrangement with a sports club or an individual athlete. Shirt sponsoring and the like will generally be considered a means of promotion amongst the Dutch public of an illegal game of chance. As

[38] The Minister of Justice has formally taken the position that the ECJ Decision in the Betwin case is considered as a "acknowledgement of the Dutch regulatory system for games of chance" (Letter of the Minister of Justice to the house of representatives dated 8 October 2009, No 24 557, 102.

[39] http://www.justitie.nl/images/europese%20gemeeschappen%20in%20kansspelzaak%20advies-commissie%20in%20kansspelen%20via%20internet_16734_tcm34-221939.pdf?cp=34&cs=15669

a result, not only the sponsoring company, but also the sponsored club or athlete would violate the law by only mentioning or carrying the name of its sponsor.

Since this statutory ban does not apply to the Dutch monopolists, those companies were not limited in their possibilities to market and advertise their offerings. This was criticized from many sides as the rationale behind the Wks was to control the people's impulse to gamble and to protect them from addiction. In its proceedings against the Dutch State, Betfair has used this in support of their argument that the Dutch gambling control policy is inconsistent. In the House of Representatives the lack of specific instruments to regulate the advertising and marketing activities of licensed operators was also an issue.

8.8 Self-Regulation by National Operators

The official gambling sector has anticipated statutory intervention by agreeing upon a code of conduct on advertisement for games of chance offered by licensed operators ("RvK").[40,41] The RvK is an instrument of self-regulation and is not a formal law. Violation of the rules set out in the RvK may lead to complaints with the Advertising Code Committee ("RCC"). If awarded, such decisions are published. If an advertising party repeatedly ignores recommendations of the committee, this party may be blacklisted. In that case the media partners of the RvK will cease to render this party advertising services. Other than that there is no enforcement of complying with the RvK.

The RvK sets out a set of general principles with respect to advertising for games of chance. For instance, game of chance providers may not provide misleading information, suggesting that gambling has no adverse consequences or present games of chance as an instrument to gain income. Moreover, they may not suggest that prize winners are obliged to co-operate with a recruitment or advertising campaign, radio and/or TV programmes.[42]

In addition, the RvK prohibits the operators to advertise in the media before 19:00 h and to use minors in their promotion materials (unless there is any specific ground for justification).[43] The operators may not advertise on billboards and other such locations close to schools and other buildings that are mainly populated by

[40] Reclamecode voor Kansspelen die worden aangeboden door vergunninghouders ingevolge de Wet op de kansspelen (advertising code for games of chance offered by licensees, by virtue of the games of chance act) http://www.justitie.nl/images/gedrags%20en%20reclamecode%20kansspelen_6979_tcm34-78554.pdf?cp=34&cs=15669.

[41] An English translation of the RvK is available on http://www.reclamecode.nl/bijlagen/20100209%20NRC%20Engels.pdf.

[42] Clause II.5 Reclamecode voor Kansspelen.

[43] See Chap. III of the RvK. NB: Justification is deemed present if, for example, the benefit of a particular lottery or other regulated game is a youth-related charity (such as scouting or "Jantje Beton").

minors. The RvK also prohibits advertising in media that specifically target minors, such as movies and magazines.

8.8.1 Evaluation of the Code of Conduct

The RvK entered into force on February 15, 2006. In 2007, the Ministry of Justice commissioned the first studies on behalf of the evaluation of the RvK. The actual evaluation was recently concluded and was presented to the House of Representatives.[44] In the relevant (2 years) period[45] 51 complaints have been filed with the Advertisement Code Commission. These complaints considered 40 different advertisements with respect to games of chance. 30 complaints were awarded. Since then at least 68 more complaints have been dealt with by the committee.[46]

The evaluation was overall positive. Against the background of (in particular) the fact that the evaluation study pointed out that since the start of the RvK the advertisement budgets have decreased instead of increasing, no material changes to the RvK were deemed necessary. Therefore, only minor changes were proposed by the RCC. In addition, clarification was given on the rules on sponsoring.[47]

8.8.2 Sponsoring

In the RvK it is specifically stipulated that the restrictions set therein fully apply to sponsoring. This means that media exposure in sports clubs is in contravention of the RvK to the extent that those clubs are mainly visited by minors.

All sponsoring agreements must contain a standard termination clause that can be relied upon if and when it becomes apparent that the sponsoring arrangement violates the principles of the Dutch policy on games of chance.

In case of sponsoring arrangements on the federal/sports association level, pre-existing agreements must be respected. Exclusivity can be negotiated and agreed upon, provided that the parties are willing and capable of finding practical solutions for (other) monopolists who fear they will suffer from the sponsoring.

If, pursuant to a sponsoring agreement, the sponsor provides prizes, this must be communicated to the public. The nature of the prizes and the associated

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[44] Letter of the Ministry of Justice to the House of Representatives dated 27 July, 2009, TK 2008–2009, 24 557, nr. 99.

[45] From 15 February 2006 to 31 December 2007.

[46] A query on the online database of the Advertisement Code Commission on all decisions on the RvK between January 2008 and February 2010 resulted in 68 search results.

[47] Letter of the Minister of Justice to the House of Representatives dated 27 July, 2009, TK 2008–2009, 24 557, nr. 99, p. 4.

advertisements must at all times comply with the RvK. Rules as to how to deal with prizes made available by the sponsor are set out in the relevant permits.

For the approved betting and gambling providers the benefits of sponsoring have decreased due to the RvK. For other parties (including foreign licensed betting operators) it is effectively impossible to sponsor, since all advertisement and media exposure would constitute a breach of the Wks for the sponsor and/or the sponsored club.

8.9 Case Law

Criminal proceedings (resulting from enforcement) mostly boiled down to the question of whether a certain game (for example Saturne,[48] Blackjack,[49] Golden Ten)[50] qualified as a game of chance. Although illegal, sports betting does exist, and it has not led to any criminal case law in the past decade.

At present, most of the case law on the laws on games of chance is a result of civil litigation between the authorized Dutch betting and gambling operators and their competitors from abroad. Since 2003, the existing permit holders litigated 19 times against other parties offering games of chance. The majority of these cases concerned civil actions against EU-licensed game of chance providers who operated web sites that were (inter alia) available to the Dutch public. The most commonly used arguments by the Dutch monopolists were that foreign sportsbook operators would have an unfair competition advantage if they were allowed to target the Dutch public, because the license terms of the Dutch operators are far more restrictive than for instance those of the English operators. One of the more recent examples of such battles is the Lotto/Betfair case, which was dealt with by the High Court of Arnhem (appeal of an injunction by the Regional Court of Zutphen). Betfair and the other defendants were ordered to change their web site in such a manner that it would become impossible for the Dutch public to use them for placing bets.[51]

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[48] HR 21 December 1965, NJ 1966, 364.

[49] HR 2 April 1985, NJ 1985, 739; HR 21 January 1986, NJ 1986, 444; HR 18 March 1986, NJ 1986, 719.

[50] HR 26 June 1984, NJ 1985, 76; Rb Almelo 4 September 1984, NJ 1985, 123; HR 26 March 1985, NJ 1985, 738; HR 25 June 1991, NJ 1991, 808.

[51] Hof Arnhem 14 November 2004, LJN: AR7476. NB: It appears that Betfair has only partially complied with the order. It has ceased the use of banners, but technically Dutch visitors can still place bets. On the web site www.betfair.com the following message is posted: "Welcome to the Betfair Affiliate Programme. Betfair.com can make you money today! All you need to do is make sure your customers click through on one of our specially designed creative; then you get the cash if they open an account at Betfair. We pay £25(EUR 30) for every customer you send through that deposits money on Betfair. Minimum deposit is £10. Please be aware the Betfair does not work with Publishers that target US, French or Dutch citizens."

Parallel to the—competition driven—civil litigation, in the past decades several companies have started administrative proceedings against the State for its refusal to grant (additional) permits. In matters where the restrictive system was questioned, the Dutch courts are increasingly critical in their appreciation of the Dutch policy.[52]

In the most recent matter the administrative court ruled that it was not convinced that limiting the total amount of permits to three was an adequate and proportionate instrument for achieving the goals that underpin the Netherlands' games of chance policy, and hence outweigh the interest of free movement of services.[53] The main observations supporting this view were that: (i) the government had issued a proposal for an experiment with permits for online betting offerings[54] (ii) the number of drawings and the marketing budgets of the permit holders had increased and (iii) the current permits are—as a rule—renewed, leaving no possibility for others to enter the Dutch market. The matter was sent back to the ministry and it appears that it has now been settled.[55]

In the Sporting Exchange/De Lotto case, the Supreme Court has submitted questions to the ECJ.[56] In the De Lotto/Ladbrokes case,[57] the Supreme Court questioned whether the restrictive Dutch policy on games of chance can justify the violation of the principle of free movement of services. In its non-binding statement of December 17, 2009, advocate-general Bot took the position that European Union member states are not in any way required to recognize the betting licenses of foreign companies.[58] Also, the advocate-general disagrees with the sportsbook operators that the monopolists should not be allowed to advertise their services to the public.

The ECJ has followed the above recommendations of the advocate general: in its decision of June 3, 2010, the Court decided that national legislation, which only allows the holders of an exclusive licence to operate certain games of chance, do not violate European law. Even if such monopolists are entitled to market their services by introducing new games and by means of advertising, the underlying legislation can be regarded as "limiting betting activities in a consistent and systematic manner" and hence pass the test.

Moreover, the national courts are not required to determine, in each case, whether the implementing measure intended to ensure compliance with that

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[52] ABRvS 18 juli 2007, AB 2007, 302.

[53] ABRvS 18 juli 2007, AB 2007, 302.

[54] At the time of this decision it was not clear that the proposed bill to amend the Wks in order to allow permits for internet games of chance would be rejected; see Sect. 8.5.

[55] Letter of the Ministry of Justice to the House of Representatives dated 27 januari 2009 (2008–2009, 24 557, nr. 95).

[56] ABRvS 14 mei 2008, LJN BD1483 (C-203/08, Sporting Exchange).

[57] HR 13 juni 2008, NJ 2008, 337.

[58] European court of Justice, press release nr. 112/09, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090112nl.pdf.

legislation is suitable for achieving the objective of that legislation and is compatible with the principle of proportionality.

Finally, the ECJ holds that national governments are free to prohibit any other operator but the national licensee (i.e. the Lotto) to offer games of chance via the internet. Even if such legislation excludes licensed operators from other Member States from offering the same, this does not violate Article 49 EC.

In May 2009, Sporting Exchange (Betfair) started litigation against the State of the Netherlands in an attempt to prevent new legislation, putting a ban on (facilitating) financial transactions for the benefit of suppliers of games of chance other than the state monopolists. Betfair has argued that there is no statutory basis for laws impeding banks from rendering their services to (licensed) foreign betting operators. The Betfair case was heard in November 2009; a date for the courts decision has not been made public.[59] Betfair has also announced that it intends to file a complaint with the European Commission.

Finally, in 2006 the European Commission submitted a request to the Dutch government to change its restrictive policy.[60] Subsequently, the next step in the so-called article 226 proceedings against the State of the Netherlands for infringement of the EC treaty, has been taken when the European Commission submitted its motivated advice to the State of the Netherlands.[61] It is said that infringement proceedings are in fact still being considered.

8.10 Conclusions

On a national level, the Netherlands' attitude in respect to games of chance is quite dualistic. On the one hand the government has been fighting gambling and betting for several ages, on the other hand its financial interest in the games of chance industry has only increased. By creating a financial link between the legalized games of chance industry and the charity sector, the latter has become a greater part of the establishment and an important sponsor of all kinds of cultural and social activities.

The sports industry does have a financial link with the games of chance operators (inter alia via the Lotto revenues) but can hardly benefit form individual

[59] *Staat behoudt gokmonopolie*, 9 September 2009, http://www.depers.nl/economie/335391/Staat-behoudt-gokmonopolie.html.

[60] *Vrij verkeer van diensten: Commissie grijpt in om obstakels voor het aanbieden van kansspeldiensten in Griekenland en Nederland uit de weg te ruimen*, Document IP/06/436, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/330&format=PDF&aged=1&language=NL&guiLanguage=en.

[61] European Committee, 28 February 2008, 2002/5443, http://www.justitie.nl/images/Met%20redenen%20omkleed%20advies%20Commissie%20van%20de%20Europese%20Gemeenschappen_tcm34-186226.pdf.

sponsorships of betting and gambling operators as not only organising, but also advertising and promoting games of chance is prohibited under the Wks.

From a competition law point of view, the Netherlands is one of Europe's most protectionist countries. Licensed betting and gambling operators have successfully litigated against their competitors from other European countries on the basis of the Dutch law and policy. The Dutch government feels supported by the recent ECJ decision in the Betwin case against Portugal and the subsequent cases of Ladbrokes and Betfair against the Netherlands (see para 8). Hence the Dutch government does not seem inclined to open its doors to operators other than the current licensed monopolists.

However, the international games of chance industry will continue to pressure the Dutch government to move toward a more flexible approach, in particular in respect to internet betting and gambling. Case law appears to show a trend where courts take a more and more critical position *vis a vis* the restrictive games of chance policy and openly doubt whether all restrictions are proportionate in respect to the rationale behind it (protecting the Dutch citizens against the adverse effects of gambling and addiction). Moreover, the Dutch government realizes that games of chance are already available for the average Internet user and that only for that reason modernisation of the current system is necessary. A study report containing recommendations for the Dutch government on this issue is expected in 2010.

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Chapter 9
Argentina

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Contents

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9.1 Method to be Used

The purpose of this study is to analyze gaming legislation in the Republic of Argentina. We shall be using the Cartesian method, which starts off with general issues then moves onto specific issues, commencing with an analysis of the general gaming system in the country.

Taking into account the prevailing federal system in Argentina, we also need to analyze the authorities who have the jurisdiction to legislate gaming and gambling. This analysis shall be made chronologically.

Therefore, we shall first consider the system originating from the National Constitution that was established in 1853, and was revised in 1860, as well as the jurisprudence based on the same.

In 1869, the Civil Code was promulgated, which analyzed the rules related to this matter. We shall then examine the rules pertaining to the Lotería Nacional. The first law regulating it dates back to 1895. The provisions of the Fair Trading Act of 1983 on gaming shall also be studied.

We shall then focus on the gaming system in the city of Buenos Aires. This city acquired autonomy under the constitutional reform of 1994, thereafter having the jurisdiction to provide rules on the matter. In addition, the Act 25.295 dates back to the year 2000 and governs the links to "Sports Forecasts" at federal level. Finally, we will refer to bets placed via the Internet and games organized by state.

9.2 The National Constitution of 1853/1860

The National Constitution, which was adopted in 1853, and amended in 1860,[1] established the federal system of government (Article 1 of the Nat. Const.). This implies that there are powers delegated to the national state, while other authority in this area is reserved for the provinces.

The delegated authority includes the powers of the National Congress to enact federal laws and codes that address the substantive law (that is, this includes the

[1] ADLA Supplement 1852–1880, p. 68.

authority to dictate civil, commercial, mining, labor and social security codes, Article 67 sub-para 12 of the Nat. Const.).

By contrast, the provinces retained all powers that had not been delegated to the National State (Article 121). These reserved powers include the establishment of rules related to police authority in terms of health, morality, and safety.

It is important to emphasize that under the Constitution of 1853/1860, the National Congress had the power to act as the local legislator for the City of Buenos Aires, as at that time the city did not have an autonomous status, which would then be recognized in the constitutional amendment of 1994. Therefore, the regulations on safety, health, and morality for the City of Buenos Aires were enacted by Congress, while in the provinces they were enacted by local legislatures.

In this context, in 1869 the Supreme Court ruled on the case "Plaza de Toros."[2] A province had enacted a law that prohibited bullfighting contests. The company "Plaza de Toros" planned to build a stadium to hold such shows, and stated that the provincial law was contrary to the provisions of the National Constitution because Article 14 granted all inhabitants the right to freely exercise their industry. The Supreme Court decided that:

> It is a fact and also a principle of constitutional law that local governments are responsible for the policing of the provinces, that is, the powers that have been granted with regard to providing security, safety and morality in their neighbourhoods; therefore they may lawfully adopt rules and regulations for these purposes, and article fourteen of the National Constitution provides no guarantees that the inhabitants of the Republic have the absolute right to exercise their industry or profession, but are subject to the laws governing such exercise; this being the case, the judicial system at national level would not have the jurisdiction to obligate a province that has banned bullfights to support the construction of a stadium where such shows would be held, even if it could be classified as industrial development and the exercise of the said industry does not offend common decency, culture and morality of public customs.

From this ruling, it emerges that:

- The provinces have jurisdiction in the area of safety, health, and hygiene, and this cannot be compromised by national courts.
- This jurisdiction includes that of regulating public entertainment.
- This does not prevent the activity to be regulated from being regarded as an industry or from not being contrary to public decency or morality

In another precedent, the constitutionality of Act 4097, enacted by the National Congress in the exercise of its powers as the local legislator of the city of Buenos Aires, was challenged. Act 4097[3] established restrictions on gaming in the Federal Capital and penalties for offenders. Those who supported the view of unconstitutionality argued that, even though the Act applied solely to the city of Buenos Aires, it violated the principle of equality before the law because it was sanctioning conduct that would not be punishable in other jurisdictions.

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[2] CSJN 10/04/1869. Ruling 7, p. 150.

[3] ADLA Supplement 1889–1919, p. 547.

The 17 June 1903, ruling of the Court of Appeals rejected the challenge indicating that the National Constitution establishes a principle of unity of criminal law, but that it does not preclude the right of provinces to penalize acts or omissions that do not include crimes or offenses, and are instead simple breaches of a police or municipal nature. If the provinces could not impose penalties, their power to legislate within the confines of their sovereignty would be reduced to a jurisdiction *sin imperium*, which would annul their respective sovereignty. The ruling of the Court of Appeals emphasizes that violations involving a crime or offense everywhere will have the same effect on the individual rights and interests of a society no matter where they occur, would be covered under the Penal Code, and should not be governed by provincial legislation. On the contrary, those involving the direct and immediate interests of a specific area and no other are not governed by the Criminal Code, but by the provinces. In addition, the ruling that gaming is an illegal act for the purposes of absolute justice is not true all the time, or in all places, unless it is banned due to reasons of utility or morality, or the fact that it does not guarantee the right of society or individuals. This neither modifies the significance of the penalty nor does it in anyway change the nature of the offense.

The Supreme Court[4] ratified the ruling in reference to Articles 2055 and 2069 of the Civil Code, which was promulgated after the judgment on the "Plaza de Toros." These articles grant local authorities the right to regulate gaming. Such power necessarily implies that of punishing violations.

There is another precedent of the Supreme Court referring to the constitutionality of Act 4097.[5] The validity of this Act is limited to the Federal Capital, which banned the introduction and distribution of any lottery that was not specifically authorized. In this case, the accused was found in possession of Montevideo Lottery tickets, which according to the law, were not allowed to be distributed. The Court noted that the rules governing issues of public morality fall under local jurisdiction and even if lottery tickets have been issued under a foreign law, this neither legalizes their distribution, nor it robs it of its illegal character. The decision-making body added that lottery tickets that are not allowed to be distributed are illegal items over which the holder cannot exercise any rights, and can therefore be confiscated.

A similar case[6] occurred, in which lottery tickets issued in one province were distributed in another without authorization, constituting a violation in accordance with local regulations. The Supreme Court observed that the regulations establishing breaches translated into a reasonable exercise of police authority in matters of public morality, and that the term "form a national union" contained in the

[4] CSJN, 22/10/1903 "Criminal, contra Ramón Leyva Alberto, Anderson Juan M. y otros, por infracción a la ley 4097, sobre procedencia del recurso del artículo 48 e inconstitucionalidad de la ley de juegos" Ruling 98, p. 156.

[5] CSJN, 16/12/1905 "Causa Criminal contra Ramón González por violación de la ley 4097 sobre juegos de azar, sobre inconstitucionalidad de la misma" Ruling 103, p. 255.

[6] CSJN, 19/12/1958 "Virgilio Fernández." Ruling 242, p. 496.

Preamble of the Constitution cannot be contrary to the federal system of government or deprive the provinces of powers that preserve and are inherent to the legal principle of autonomy, such as the legislation of failures and breaches.

9.3 Rules Contained in the Civil Code

The Argentine Civil Code, empowered through Act 340,[7] promulgated the rules applicable to gaming contracts and gambling on 29 September 1869, in Book II, Section III, Heading XI.

A gaming contract exists when there is a disagreement or division in which there is more than one participant, and those who win will receive a sum of money or other specific object from the other participants who will have lost the game (Article 2052 Civil Code). On the other hand, a betting contract exists when two or more people have different opinions about a subject and agree that the one with the winning opinion will receive a sum of money or other object from the other contracting party or parties (Article 2053 Civ. Cod.). The difference between a game and a bet is that when it is a game contractors are actively involved in the disagreement, while in a bet the acts are not carried out by the contractors who simply have an opinion about them.

In turn, Article 2054 indicates that the provisions of Heading XI of the Civil Code also apply to contracts which rely on chance, such as betting or gaming.

Article 2055 indicates that legal claims can only be made for the payment of gambling debts or bets related to displays of strength, skill in weaponry, races, or other games similar to those described above, provided that there has been no violation of the law or police regulations that would veto their implementation.

It has been said[8] that mental skill games, including chess, should be considered as games that are similar to those contained in the article, and therefore, they should also be protected by the ability to present court claims for payment originating from these games.

As a result of Article 2055, we often talk about games that are "allowed," which generate receivables that can be claimed before the law, and legally "prohibited" games, for which no action can be taken. Cazeaux y Trigo Represas[9] argue that the classification should be tripartite. They argue that in addition to permitted games that create legally binding obligations, there are games that are tolerated, which, even though they are not repressed under civil or criminal law, have obligations that are merely natural, i.e., no action can be taken to enforce them. Finally, we have

[7] ADLA Supplement 1852–1880, p. 496.

[8] Bueres and Highton 2003, p. 497.

[9] Cazeaux and Trigo Represas 1969, p. 419 et seq.

games that are prohibited by the local authority in the exercise of its policing powers that cannot generate valid obligations of any kind, and indeed any act resulting thereof is void. Even though it is normal that one cannot demand repayment of a sum paid for games that have been prohibited, this is not because no valid obligation exists, instead it is because those who could possibly claim a refund would have to reveal their own wrongful involvement in them (Articles 794, 795 and 2063 Civil Code).

The next question would therefore be, who can make demands for payment of credits, the people who participated in the actual exercise of skill, weaponry, races, or similar acts, or third parties who had betted in that game with that distinct possibility in mind.

Salvat[10] argues that Article 2055 has its precedent in Roman law, in which all games were forbidden, except for fighting games that were considered to be beneficial to society because they stimulated manly virtues. The author argues that there are three possible views:

1. Supporting recovery by gamblers, as the Civil Code considers betting to be a game, and those interested in the game should be granted the same benefits as the actual participants in the game.
2. Never allowing gamblers to recover funds because the legislator's social interest in certain games has nothing to do with betting. Salvat, with whom we agree, is inclined to this view.
3. A third position allows the gambler to take action, but only if the bet does not entirely depend on chance and an act of intelligence is involved.

Note that Article 2055 is not applied in respect of betting organized by a state agency, as these types of contracts are not governed by civil law but by administrative law.

As mentioned above, claims based on certain types of games (displays of strength, races, skill in weaponry, races, and the like) are legally enforceable. But this does not prevent judges from moderating debts arising from a game when they are extraordinary in relation to the debtor's income (Article 2056, Civil Code).

An obligation arising from a tolerated or prohibited game cannot be offset by another, or be subject to renewal (Article 2057 Civil Code).

Assuming that there is a simulated act that could conceal the fact that a debt was incurred in a tolerated or prohibited game, Article 2058 states that the debtor can prove the existence of simulation by any means (i.e., it is not essential for a counter-document to exist).

If the debtor of an obligation based on a prohibited or tolerated game have allowed the debt to be documented in a deed, they shall be obligated to pay the

[10] Salvat 1957, p. 315/316.

third party who holds the deed in good faith, but may repeat the sum to the one who issued the deed (Article 2059 Civil Code).

We have to bear in mind that gambling debts are considered to be those resulting directly from a gaming or betting contract. On the other hand, obligations undertaken with the aim of procuring the resources needed to play do not take on such a nature. Thus, the third party that has provided the means to gamble or play to one of the contractors may legally demand payment of the debt. On the other hand, this does not apply when a loan was made by one of the players (Article 2060 Civil Code).

Whoever has been mandated to pay a gambling debt, and complied with it, may demand repayment of the amount paid by the principal (Article 2061 Civil Code). In contrast, a third party who paid a gambling debt or wager without being mandated to do so, is not entitled to take action (Article 2062 Civil Code). If the mandate consists of playing on behalf of a client or in partnership with them, the representative cannot claim repayment of amounts he has advanced from the principal (Article 2061).

If you pay a gambling debt, you cannot demand recovery from the subscriber (Article 2063, Civil Code, Article 515 sub-para 5, Article 791 sub-para 5 Civil Code), unless:

- the winner of the game committed fraud or cheated (Article 2064 Civil Code). Cheating is considered to occur when the winner is sure of the results, or has used some device to ensure that he wins (Article 2065 Civil Code). If the loser committed fraud or cheated, no refund may be claimed for payments made (Article 2066 Civil Code):
- if there has been violence (Articles 941 and 1045 Civil Code)
- if the payment was not voluntary, which includes the case of a gambling debt paid by an incapacitated person (Article 2067 Civil Code). In the latter case, the representatives of the incapacitated person may take action to ensure repayment of the amount paid both against those who claimed, as well against those in whose homes the game took place. It is a joint obligation, and therefore, it may require full reimbursement of the amounts to any person with legitimate rights thereto.

Finally, Article 2069 states that when permitted, lotteries and raffles shall be governed by municipal ordinances and police regulations. Through these rules the Civil Code delegated the provinces to govern these matters in relation to these two contracts.

Such lotteries and raffles are deemed to be private law contracts, in cases where the contractors are private individuals, to whom local rules will apply as noted by Article 2069.

On the other hand, when raffles and lotteries are organized by the state the legal relationship shall be governed by local administrative law.

9.4 Lotería Nacional

In 1895, Act 3313[11] established the National Welfare Lottery. Regarding this law, the Supreme Court indicated[12] that it was not a federal rule, instead it was a local rule intended to govern the City of Buenos Aires and national territories.

In 1969, Act 18.226[13] was enacted. This act established the system of the National Welfare Lottery and Casinos, and arranged for their organization.

At the time when the law was enacted, the city of Buenos Aires was not autonomous. Therefore, the law may establish rules to govern police authority in this city and then in the National Territory of Tierra del Fuego, Antártica, and the South Atlantic Islands (Article 13 of the said act).

It is important to note that the law cited is not a federal issue in relation to gambling and betting. On contrary, in its Article 2, it authorizes the Executive to enter into agreements with the provinces, given that the autonomy of the latter includes the authority to govern matters relating to gaming.

Through the decree by the National Executive Authority 598/90,[14] the Lotería Nacional is legally established as a state-owned company.

The policing authority of the State Lottery Company (hereinafter referred to as the Lotería Nacional S.E. (State Enterprise)) in the city of Buenos Aires was ratified by december 1688/94.[15] This decree is no longer relevant under the 1994 constitutional amendment, which ruled on the autonomy of the city of Buenos Aires.

9.5 Provisions on the Fair Trading Act

The rule in question is Act 22.802 from 1983. Article 10, para (a) indicates that it is prohibited "to offer or deliver prizes or gifts for the direct or indirect purchase of goods or contracting of services when such awards or gifts are subject to games of chance."

Meanwhile, para (b) prohibits the "promotion or organization of competitions, contests or sweepstakes of any kind, in which participation depends in whole or in part on the acquisition of a product or a service contract."

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[11] ADLA Supplement 1889–1919, p. 353.

[12] CSJN 29/08/1928 "Filiberto Ahumada, criminal, contra, por homicidio, contienda de competencia negativa" Ruling 152, p. 197. In the same light, CSJN 18/9/1900 "Criminal contra Luis Duvini y Félix Antonio Mastronardi por adulteración de extracto y billetes de lotería de la Capital." Ruling 87, p. 315.

[13] ADLA XXIX-B, p. 1407.

[14] ADLA L-B, p. 1335.

[15] ADLA LIV-D, p. 4506.

The national authority of application shall be the National Ministry of Commerce (Article 11). This secretariat will intervene if the offense affects interjurisdictional trade (Article 15). In this case, the local authorities will be empowered to make prior efforts which can be implemented within the scope of their jurisdiction.

For their part, the provinces and the city of Buenos Aires shall be the local control authorities, and may establish regulations in respect of acts committed within their jurisdiction and exclusively involving only local trade (Article 13). This is subject to the power of the national authority to act concurrently (Article 16).

According to Article 28, this law applies to state agencies that are conducting business activities.

9.6 Constitutional amendment of 1994. Gaming system in the Autonomous City of Buenos Aires

9.6.1 Autonomy of the City of Buenos Aires

In 1994, the National Constitution was amended. The revised text[16] states, in Article 129, that the City of Buenos Aires shall have an autonomous system of government, with its own powers of legislation and jurisdiction. Accordingly, this article suggests that its inhabitants, through their representatives, shall have an Organizational Statute and that a law shall guarantee National state interests as long as the City of Buenos Aires is the capital of the nation.

In turn, Article 75 sub-para 30 of the National Constitution states that National Congress has the authority "to exercise exclusive legislation in the territory of the capital of the nation and enact the legislation necessary to carry out the specific purposes of national utilities in the territory of the Republic. Provincial and municipal authorities shall retain the authority to police and tax these facilities while not interfering with the fulfillment of these purposes."

Finally, the seventh transitional provision of the National Constitution clarifies that the powers referred to in Article 75 sub-para 30 should be exercised in accordance with Article 129, i.e., they should respect the autonomy of the City of Buenos Aires. Thus Article 75 sub-para 30 aims to legislate the protection of federal interests, but without interfering in matters of a local nature.

In order to protect federal interests, National Congress approved Act 24.588.[17] Article 2 of this Act indicates that the nation retains all powers not conferred by the Constitution to the autonomous government of the city of Buenos Aires and

[16] ADLA LIV-C, p. 2731.

[17] ADLA LV-E 5921.

holds all those assets, rights, powers and duties necessary for the exercise of their functions.

The scope of this article must be confined to the contents of Article 1, which stipulates that the law seeks to ensure the interests of national government in the city of Buenos Aires, the capital of the Republic, so as to ensure the full exercise of the powers conferred on the authorities of the Government of the Nation. As indicated in Article 1, the scope of Act 24.588 is to ensure federal interests without using this Act as a tool to subjugate the autonomy of the city of Buenos Aires.

It must be clarified that Act 24.588 does not grant the national state the authority to govern on matters relating to gaming and betting. Nor could it legitimately do so, because the law that seeks to ensure federal interests cannot interfere with the game, which is always considered to be a local governance issue.

In conclusion, the policing authority of the city of Buenos Aires in terms of games of chance, which before the 1994 reform was exercised by the Federal Government, is currently exercised by local authorities.

9.6.2 Rules on Betting and Gambling in the Autonomous City of Buenos Aires

The Autonomous City of Buenos Aires made its own constitution[18] which in Article 1 indicates that "the City exercises all powers not conferred by the Constitution to Federal Government."

In turn, Article 50 of the constitution indicates that "The City regulates, manages and operates games of chance, skill and betting, and is not allowed to privatize or grant concessions, except where distribution and sale agencies are concerned. Its place is to provide assistance and social development."

Among the powers of city legislature, the Constitution of the Autonomous City of Buenos Aires, in Article 80 sub-para 19, indicates that "It governs games of chance, skill and betting, according to Article 50." Furthermore, among the powers granted to the Head of Government of the City, sub-para 31 of Article 104 mentions that "he manages and operates games of chance, skill and betting, according to the respective laws."

Transitional clause nineteen states that "The City will make agreements with the government and the provinces on the operation and proceeds of games of chance, skill and betting of national and provincial jurisdiction which are marketed on its territory. Under the provisions of Article 50, the concessions and agreements existing on the date of signature of this Constitution shall be revised."

The legislature of the Autonomous City of Buenos Aires has enacted the following laws regarding gaming:

[18] ADLA LVI-D 5614.

- Act 255[19] of the year 1999, which legislates violations in the area of gaming.
- Act 538[20] of the year 2000, regarding Games of Chance, which defines its scope in Article 1, indicating that "all games of chance which are organizeorganized, managed, operated or sold in the area of the City remain subject to the provisions of this law." It goes on to indicate the jurisdiction of the City of Buenos Aires in Article 2: "the regulation, authorization, organization, operation, recovery, administration and control of gambling and related activities falls solely under the responsibility of the City."
- Act 916[21] of the year 2002. This law creates the Gaming Institute of the Autonomous City of Buenos Aires, which will be responsible, as per Article 1. "… for the organization, administration, regulation, operation, recovery and control of all gambling and gaming and will be the enforcement authority of Act 538 …"
- Act 1182[22] of 2003 approves the agreement made between the Lotería Nacional S.E. and the Government of the Autonomous City of Buenos Aires.

9.6.3 Jurisprudence of the Supreme Court of Justice of the Nation Regarding the Autonomy of the City of Buenos Aires in Terms of Gaming

The National Supreme Court of Justice has recognized the independence of the City of Buenos Aires in terms of games of chance. Thus, in the case "Esperanza Patricia Dandolo"[23] it stated, endorsing the statement by the Public prosecutor:

"The law on games of chance and their potential non-criminal violations is not a matter of federal scope, neither is it included in the reserve established on common legislation (Article 75 of the Constitution). The authorities of the City of Buenos Aires have legislative and judicial powers in relation to games of chance and their possible non-criminal violations."

The Supreme Court took a similar approach in the case "Pereyra Harling, Amilcar E.,"[24] taking into account the new constitutional status of the city of Buenos Aires, which granted jurisdiction over gambling offenses to the minor courts of that city.

[19] ADLA LIX-E, p. 5895.
[20] ADLA LXI-A, p. 592.
[21] B·O. 2002/11/28.
[22] B.O. 2003/12/01.
[23] CSJN, 31/05/1999, Ruling 322, p. 1142.
[24] CSJN 05/06/2001, JA 2002-III, p. 83.

9.6.4 Jurisprudence of the National Court of Appeals in Federal Administrative Contentious Cases

Section 5ª[25] nullified Decree 494/2001 by the National Executive Authority, which authorized the Lotería Nacional S.E. to implement games with immediate results through the use of electronic machines. The Court considered that its implementation in the city of Buenos Aires involved interference in the latter's exclusive jurisdiction, which is evident from the wording of Article 50 of the local constitution.

Note that the National State appealed this decision to the Supreme Court. This court did not rule on the issue because, on the date that it should have made its ruling, the National Executive Authority repealed the decree that had been challenged.[26]

9.6.5 Jurisprudence of the Superior Court of the City of Buenos Aires

The Superior Court of the City of Buenos Aires expressed the same opinion. In a case,[27] it was debated if the law of the City No. 538, which regulates gambling, was unconstitutional as it contravened Act 18.226 passed by National Congress. It must be said that the intention was to ignore the autonomy of the City of Buenos Aires in the area of games of chance, considering that the National State has the authority to govern on this matter.

The vote of the majority noted that:

- The local character of the authorities in terms of games of chance is a principle of constitutional law.
- While Article 129 of the National Constitution indicates that a law shall guarantee the interests of the National State while the City of Buenos Aires is the capital of the nation, the interests in reference are federal interests. It does not indicate which legitimate federal interests would justify federating the game in the City of Buenos Aires, taking a different approach from the rest of the country.
- Act 24.588, which guarantees the interests of the National State while the City of Buenos Aires is the capital of the nation, does not show that gaming is a

[25] CNCAF, Section 5ª, 27/12/2001 "Alimena, Atilio Domingo c/PEN dec. 494/2001s/Amparo ley 16.986" Administrative Act 2003 year 15, Depalma, Buenos Aires, 2003.

[26] CSJN16/11/2004, Ruling 327, p. 4905.

[27] TSCBA 17/09/2002 "Unión Transitoria S.A. y otros c/Gobierno de la Ciudad de Buenos Aires." JA 2003-IV, p. 664.

power reserved for the National State. Neither it could be stipulated to the contrary, since gaming was never a matter pertaining to the federal sphere.

- Act 18.226 is not of a federal nature, which is evident from its text. In addition, under the jurisprudence of the National Supreme Court of Justice, a law shall be of a federal nature, "whenever the intention of producing it is unambiguous and does not rely on the sole discretion of the legislature, but on real needs and legitimate federal purposes which are imposed due to specifically serious circumstances (Ruling 248:781)."
- Act 18.226 and Decree 1688/1994 were applicable in the City of Buenos Aires when it was not yet autonomous. Once it had acquired autonomy, the city took on the authority to legislate on local legal matters, which includes gaming.

9.6.6 Supreme Court Jurisprudence Regarding Conflicts of Jurisdiction Between Federal Judges and Judges of the Judiciary of the City of Buenos Aires

The Supreme Court had to deal with jurisdictional conflicts that arose between federal judges and judges belonging to the judiciary of the City of Buenos Aires, linked to cases in which they debated whether or not the autonomy of the city extends to gaming.

In the "Casino Estrella de la Fortuna" case,[28] a judge of the judicial authority of the City of Buenos Aires ordered a raid on a ship operating as a casino that was moored at the port of Buenos Aires. The raid was intended to enforce an administrative act issued by the local executive. As a result, a federal judge with jurisdiction in criminal and correctional misdemeanor cases ordered the City Government of Buenos Aires to refrain from carrying out any acts or actions that affect federal jurisdiction, including the casino ship Estrella de la Fortuna and its surrounds. To do this, it indicated that federal justice is responsible for analysis of cases occurring in Argentine ports and waters. In other words, the issue to decide is whether the port area was excluded from the jurisdiction of the judges of the City of Buenos Aires, even on issues related to local law (such as it pertains to gaming).

The Attorney-General's Office ruled:

- That the port is an integral part of the territory of the city.
- That the maritime jurisdiction of the National Legislative Authority and the Executive Branch does not exclude the local policing authority, so long as this does not interfere with the objectives expressly entrusted to the federal government by the Constitution and national laws (Article 75 sub-para 30; Article 2 Act 18.310, Article 21 Act 24.093).

[28] CSJN, 16/04/2002.

- That a ship moored at the port of the city can be attended to by national and local authorities, as long as no situations of incompatibility occur.

The Supreme Court stated that it endorsed what the Attorney-General said and declared the jurisdiction of the federal judge.

In the case of "Alicia Oliveira—Defensora del Pueblo de la Ciudad de Buenos Aires c/GCBA,"[29] the Court noted the jurisdiction of federal authorities, referring to the following arguments of the Attorney-General:

- This is one of the issues particularly governed by the National Constitution referred to in Article 2 sub-para 1 of Act 48[30] (this act establishes the jurisdiction of national courts), as it debates an issue related to the preservation of authority between the Argentine provinces, as although the City of Buenos Aires is not a province it has a "special constitutional status."
- The lawsuit involves a dispute about the validity and constitutionality of federal standards.
- In the case under analysis, the decision would affect an activity in the Argentine Hippodrome of Palermo, which carries out an activity of national interest (horse racing) and is also a property belonging to Federal Government and is therefore subject to federal jurisdiction (Article 3 Act 24.588).
- Lotería Nacional S.E., which should have been involved in the lawsuit, is a national body with the right to federal courts.

In another case,[31] the Supreme Court reiterated the same criteria, adding that it was considered that it involved a casino installed on a boat docked at a port of the city, which was why it had been asked to pass judgment in the case "Casino Estrella de la Fortuna."

9.7 Act 25295

Act 25.295,[32] known as the law governing "Sports Forecasts," was enacted on August 9, 2000 and promulgated on 20 September 2000.

[29] CSJN, 23/09/2003, Ruling 326, p. 3669. Idem CSJN, 10/04/2007 Roberto Andrés Gallardo, Ruling 330, p. 1587.

[30] ADLA Supplement 1852–1880, p. 364.

[31] CSJN, 10/04/2007 Ricardo Monner Sanz c/Gobierno de la Ciudad de Buenos Aires y otros, Administrative Act No. 64 April/June 2008, Lexis Nexos, Buenos Aires, 2008, p. 483.

[32] ADLA LX-D, p. 4124.

9.7.1 Purpose of the Act

The Act states in its Article 1 that its purpose is to raise funds with which to promote sporting activity and prevent violence in sports.

9.7.2 Concept of "Sports Forecasting Games"

Article 3 of the Act states "A Sports Forecast game is anything in which the future uncertain outcome is bound, in whole or in part, directly or indirectly, to fair or sporting competition of any kind created or established which involves one or more people, regardless of its mode of performance and/or type of gambling involved, with the exception of horse racing."

The said definition is somewhat vague because it talks about "games" as well as "betting." In our laws, the two terms differ in scope, as in gaming the contractors are involved in a disagreement, which does not happen in betting (cf. Civil Code Articles 2052 and 2053).

When Article 3 speaks of "sport forcastings games" they must be considered as "sports betting." We recall that Article 2053 indicates that betting is when two people have a different opinion on a given subject, with the one who has a winning opinion receiving a sum of money or other object. If there are different predictions on the outcome of a sporting event it is nothing other than the opinions mentioned in Article 2053. Therefore, if the participants in a sporting event have a gaming contract, the same shall not apply to the provisions of this Act.

The aforementioned Article 3 indicates that the Act applies in respect toany future or uncertain outcome that has any kind of link to a sport, no matter what it may be, with the exception of horse racing. By relying on an uncertain future result they have to apply the rules of random contracts anticipated under the Civil Code.

Also, Article 3 indicates that the Act is applicable regardless of the manner in which the bet is made, which includes bets made over the Internet.

9.7.3 Management and Operation of Sports Betting

Article 4 states that Lotería Nacional S.E. will be responsible for the administration and operation of this type of gambling in federal jurisdiction.

In our view such a statement can only be effective in respect to bets placed via the Internet, a medium in which we believe that the National State has the policing authority.

The law does not apply *ipso jure* to the provinces or the City of Buenos Aires, in view of its autonomous nature.

In order for Act 25.295 to be valid in the provinces and City of Buenos Aires, it will be necessary to sign an agreement to that effect with the Lotería Nacional S.E.. This is stated in the second para of Article 4: "provincial jurisdictions may participate in the operation and marketing of official member bodies, which must sign the relevant agreement with the National State Lottery Company."

Lotería Nacional S.E. and provincial authorities that adhere to the law will form a coordination body for issues relating to the operation of gambling (Article 5) and dictate its rules (Article 6).

Notwithstanding the above coordination body, the Lotería Nacional will govern sports betting, setting the forms of participation and value of betting, determining winners, paying out prizes, and setting the expiry date and all other circumstances tending toward the improved organization and conduct of gaming (Article 10).

9.7.4 Monopoly of Sports Betting Under Federal Jurisdiction

Article 19 provides the following prohibition: "It is prohibited to introduce in areas under federal jurisdiction, by any means, including postal, items for sale or free of charge, such as advertising, distribution or sale of any other sports forecasting competition which are not sold or marketed by the State Lottery Company."

9.7.5 Links with Sports Federations

Article 7 of the Act establishes that "for purposes of access to the benefits provided in this Act, the federation or association covering each sporting discipline at national level must agree with the State Lottery Company on the form, manner and conditions it has established and the provision of the programming necessary to carry out Sports Forecasting competitions." From this legal text it follows that the various associations governing each sport will provide the Lotería Nacional with details of fixtures that should be completed according to the regulations of the Lotería Nacional S.E.

According to how the rules have been drafted, it may be unconstitutional to violate the right of ownership of sports clubs and federations (National Constitution, Article 17).

The legal state seems to say that clubs and federations can only access the economic benefits of the law if they have previously complied with the provisions of the Lotería Nacional. In our opinion, the scheme should be the reverse: Lotería Nacional S.E. and the provinces adhering to the rule of law can only operate sports betting if they have previously reached an agreement with the sports federations and clubs.

Different theories have been formulated in order to explain the right of clubs and federations to events that they can organize and compete in. The following has been indicated:

- it is a "related" or "similar" patent, because the athlete's activity would be similar to the realization of an artistic work.[33]
- the right of clubs and sports federations relies on the theory of unfair competition, which is defined as all acts contrary to good morals or good commercial practice. This theory is based on the Argentine Civil Code in Articles 953 (prohibiting legal acts that harm others, that are illegal or contrary to the law or morality), 1071 (abuse of rights), and 1109 (relating to extracontractual responsibility).
- It is a "sports asset"[34] based on Article 17 of the Constitution, which states that "Every author or inventor is the exclusive owner of his work, invention or discovery."

Without considering whether the rights to economic exploitation of sporting events are for athletes, clubs, or associations, it is clear that Lotería Nacional S.E. is not the holder of that right, and that its exercise requires the agreement of holders.

As already mentioned, Article 7 of the Act stipulates that associations must provide the Lotería Nacional S.E. with programing of fixtures to be developed. Once it has been notified, fixtures cannot be modified (Article 8).

Once the scheduled competitions have taken place, the federations must provide Lotería Nacional S.E. with a report stating its findings, in order to determine successes in betting (Article 9).

9.7.6 Different Types of Bets

The law provides for three types of bets:

1. "Sports forecast pools," whereby the prize consists solely of a percentage of the revenue (Article 11).
2. "Banker sports forecasts," whereby the award is fixed and predetermined (Article 13).
3. "Sports" forecasts, in which the award is not determined but is determinable (Article 13).

[33] Spector 2001, p. 1179.

[34] De Bianchetti 2002, p. 993.

9.7.7 Non-Traditional Forms of Obtaining Bets

Article 15 states that bets can be obtained by using all the technological resources available. According to the same article, Lotería Nacional S.E. and each government entity shall establish the applicable form of authorization in their respective jurisdictions. Regarding bets obtained externally, Lotería Nacional S.E. and the official member bodies agreed on the form of its realization.

9.7.8 Implementing Agencies in the National State

At the national level, the application of this law falls under the responsibility of Lotería Nacional S.E. and the Secretariat of Sports (Article 22).

9.7.9 Supervisory Authority

The enforcement of this law falls under the responsibility of the Court of the Comptroller of Sports Forecast Resources, within the scope of the Secretariat of Sports of the Nation (Article 23). It consists of three representatives from the Ministry of Sports and two representatives from each federation involved in Sports Forecast competitions. This body can make its own rules, oversee the collection and distribution of funds, carry out audits and apply measures.

As pointed out in Article 25, an annual report must be submitted to both the National Houses of Congress.

9.7.10 Destination of the Funds Raised

The destination depends on the type of bet in question. If it is a "sports forecast pool," Article 12 indicates that at least 45% is allocated to the payment of prizes. The remaining balance will be allocated as follows:

a. Forty-seven percent shall be for Lotería Nacional S.E. or a government entity, depending on who carried out the collection. This percentage includes what each agency is required to pay at provincial or national level in respect of payments of commissions to agents receiving bets.
b. Thirty percent is allocated to Lotería Nacional S.E. in respect of operating costs and advertising and promotion. Of this, the provincial authorities keep 60% of the proceeds in their jurisdictions so as to cover operating costs, and under the agreements signed to that effect, Lotería Nacional S.E. must recognize costs incurred in consolidating and processing all bets.

c. 11.5% shall be for the Secretariat of Sports of the Nation.
d. 11.5% will be allocated to the respective sports federation.
e. If the State Lottery Company receives any surplus, it will go to the Ministry of Sports of the Nation and the respective sports association in equal portions.

If, on the contrary, the sports forecast is of a banker or sporting nature, according to Article 14, 65% of the fund will be allocated to pay out prizes. If the number of successes determines that the amount of prize to be paid is less than this percentage, the remaining amounts will be allocated to a reserve fund where the amount of prizes that must be paid are higher than the percentage indicated.

The remaining 35% will be allocated the same way as the balance of the percentage allocated to the payment of prizes for sports forecast pools.

9.7.11 Accounting and Payments

In the agreements that were made, the State Lottery Company and the relevant provincial bodies established the mechanisms corresponding with accountability and the relevant payments (Article 16).

The provincial authorities are authorized to deduct the amounts due to them from sums collected from the punters (Article 17).

At the end of each month, Lotería Nacional S.E. will pay off sums received from contests held during that period, and shall proceed with their deposit in the relevant accounts according to the corresponding participation rates (Article 26, first para).

Each sports association shall be entitled only to a percentage of the distribution of the proceeds commensurate with the stakes related to the skills in that sport (Article 26, second para).

The amounts corresponding to the Secretary of Sports will be deposited in the "National Sports Fund" account and will be used for the proper purposes of Act 20.655[35] (known as the Sports Act) and operating expenses of the Court of the Comptroller of Sports Forecast Resources (Article 26, third para). Before paying the sums corresponding to the sports federations, the Court of the Comptroller of Sports Forecasting Resources should be involved (Article 27).

Funds allocated to sports federations will be used for affiliated clubs, leagues, and expenses required for national team selections, contribution to spending on safety where necessary, the costs of organization of official tournaments, and athletes associations which can belong to sports federations (Article 28).

[35] ADLA XXXIV-A 185.

9.7.12 Tax Exemption

According to Article 17, any documentary evidence of betting regulated by this law, and its sale, is exempted from all taxes and/or direct or indirect charges of a national nature.

9.7.13 Crimes and Misdemeanors

Articles 20 and 21 show that the Criminal Code or the rules of the provinces shall be applicable when a violation of this law constitutes conduct repressed by the said legal bodies.

9.7.14 Violation

For the purpose of verifying the existence of a violation, the Court of the Comptroller of Sports Forecast Resources shall consider the severity of the offense, background or recurrences and whether the offense was recognized and/or adjusted (Article 30).

Minor offenses are considered to be the failure to produce documents, incomplete submissions, or submissions made after the deadline (Article 31), and a warning should be applied. If minor offenses are repeated, payment of funds from the relevant Sports Forecast competition (Article 29) may be suspended.

Serious offenses are the deliberate concealment of a violation, concealment of financial records in the event of audits, and repeated non-compliance (Article 32). The penalty in this latter case is a fine (Article 29).

Fines may not be less than the amount of funds in which non-compliance is registered, neither can they exceed three times that amount. This limit will increase by 50% for each recurrence (Article 33 first para).

The sums obtained from fines will be deposited within thirty calendar days in the account of the National Sports Fund (Article 33 second para).

9.8 Legislative Competence and Jurisdiction in Respect of Bets Placed Via the Internet

If we have understood that betting placed via the Internet must be governed by local authorities, in recognition of the jurisdiction that they have in terms of security, morality, and health, the local judges will then have jurisdiction over any

litigation that occurs. The jurisdiction of local courts in matters that relate to provincial law was stated by the Supreme Court,[36] which indicated that:

> Respect for provincial autonomy consists of allowing judges to be responsible for the analysis and discussion of cases which, in essence, deal with specific aspects of provincial law, in the exercise of the powers reserved for the provinces (Articles 121, 122 and 124 of the National Constitution).

Similarly, the Supreme Court[37] established that, for matters of local law the provincial jurisdiction shall have authority, subject to the possibility of extraordinary appeal to the National Supreme Court of Justice when lawsuits concerning matters of provincial law are also matters of a federal nature. This certainly applies in terms of bets placed according to traditional mechanisms. But where bets are placed via the Internet, it is conceivable that National Congress has legislative jurisdiction. This is why Germain Bidart Campos[38] taught that "Whenever at federal level, in relation to the common good of all people, it is necessary to limit rights due to health, morality or public safety reasons, the jurisdiction is federal." This has happened in respect to the policing authority connected to the entry of foreigners, control of film and broadcasting, legislation on plant and animal health protection, etc.

In addition, transactions made via the Internet go beyond the local scope, given the characteristics of the network. In that vein, the Supreme Court stated[39] that in Article 75 sub-para 13 of the National Constitution Congress granted the exclusive authority to regulate commerce between foreign nations and within provinces, defining specifically a federal scope in all matters relating to trade and national and international transport. It should be noted that there was a case debated on the validity of an auction conducted over the Internet and whether it should be judged by local or federal jurisdiction. It was felt that an operation performed in this way can be concluded throughout the country and even abroad, so the judgment to be passed goes beyond the local level.

In another case,[40] endorsing the arguments of the Attorney-General's Office, the Supreme Court stated that the Internet is a means of global interaction that allows activities of an extra-local nature. Thus, the power granted by Article 75 sub-para 13 of the National Constitution specifically determines the federal level in all matters concerning interprovincial and international trade.

In order to do so, the Supreme Court recognized the jurisdiction of federal courts in actions related to the Internet.[41]

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[36] CSJN, 25/09/2007 "Assupa c/Pcia de San Juan" Ruling 330, p. 4234.

[37] CSJN, 11/09/2007 "Luis Federico Arias c/Provincia de Buenos Aires" Ruling 330, p. 4055.

[38] Bidart Campos 1994, p. 733/734.

[39] CSJN, 01/06/2000 "Gabriel Andrés Campoli" Ruling 323, p. 1534.

[40] CSJN, 23/12/2004 "Asociación Vecinal de Belgrano C "Manuel Belgrano"" Ruling 327, p. 6043.

[41] See "P.S.A. c/Prima S.A. U.S. S.A," 25/11/2005, Ruling 328, p. 4087. idem CSJN 27/02/2007 "Romina Inés Rondinone c/Yahoo de Argentina S.R.L. y otros," Ruling 330, p. 251.

As a federal matter, Article 19 of the Act 25.295 is fully applicable. This article prohibits the introduction into federal jurisdiction by any means of all sports forecast contests, whether or not they are free or are in return for payment, as well as advertisements, advertising, distribution or sale, not operated or sold by Lotería Nacional S.E.

9.9 Games Organized by the State

Jurisprudence states that these cases belong to administrative law and not civil law:

> The gaming contracts monopolistically organized by the State include administrative contracts themselves and not merely private contracts under public administration, as they are governed by administrative law and not by common law, which is applicable only as necessary through a process of analogy or because it has to do with the general principles of law.[42]

When organizing the game, the state may grant concessions for marketing purposes. These concessions are characteristic of administrative law, and therefore, go beyond private law. Dealers in turn have a contractual legal relationship with the punter.[43]

The Supreme Court applied these principles in a case whereby a gambler could not collect his prize due to negligence incurred in registering the bet by the agency that had received a grant from the Lotería Nacional to sell tickets for a Sports Forecast contest. The complainant sued the dealer and also the Lotería Nacional. The Supreme Court noted that it is an administrative law contract, the clauses that exonerated the Lotería Nacional from liability in the event of negligence by the agency are valid, even if it is a membership agreement. These were the terms of the resolution:

> Despite its severity, the governance of games of chance monopolised by the state, generally imposed by membership agreements, must not have unreasonable or unfair results, and is based on the specific conditions of the activity (Rulings 292:190; 296:300, 301:130) as well as on the context of administrative law, in which admissible clauses are developed which go beyond the scope of private law.[44]

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[42] CNFed. Civ y Com. Sala III, 30/06/1981 "Vizcarra, Fernando c/Estado Nacional y otro" JA, 1982-III-57.

[43] Cfr Pita, Enrique Máximo, in Lorenzetti 2003, p. 46 et seq.

[44] CSJN, 10/05/1999 "Oscar Sebastián Guzmán c/ Lotería Nacional y Casinos y otros (Provincia de Neuquén)" Ruling 322, p. 736.

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Chapter 10
Sports Betting. Law and Policy in Austria

Ingo Braun and Amelie Starlinger

Contents

In Austrian law "Sports betting" means the "betting at the occasion of sport events." Generally laws on sports betting are autonomously enacted by the nine Austrian federal states which are also responsible for their enforcement. Besides that, the Austrian Gambling Act (*Glücksspielgesetz/GSpG*, Federal Gazette No 620/1989) provides for a state monopoly under which only very few licenses are issued. The Gambling Act could also apply on sports betting if betting relates to more than ten sportive events on a fixed quota basis (which is called "Toto"),

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in case of betting on a computer-generated sport competition, or in case of betting on a sport competition selected automatically by computer from a pool of recorded sports competitions.

10.1 History of Austrian Sports Betting Laws

The first rules on gambling came into existence in 1696. At that time, emperor Leopold I enacted rules for criminal prosecution concerning unlawful gambling. Betting at the occasion of sports events was first regulated by an imperial ordinance of August 29, 1916, concerning duties on betting and providing for measures to prohibit betting without concession [i.e. unlawful betting (*Winkelwettwesen*)]. Since the Austrian Hungarian Empire came to an end the same rules were enacted by the Austrian parliament on July 28, 1919. Already at that time, the enforcement of the law was done by the governments of the federal states, which had no legislative powers. Upon enactment of the Austrian Federal Constitution in 1920 certain legislative functions were vested with the parliaments of the federal states. As a result, the then existing law was enacted in all federal states without any changes. Since then Austria has enacted nine different laws on betting on the occasion of sport events. In two federal states, Carinthia and Burgenland, the law remained unchanged except for a few minor amendments because certain provisions became unconstitutional in the course of time. In other provinces new laws have been enacted since 1990. As of February 2010 the following laws exist in Austria:

Burgenland:	Act of July 28, 1919, as last amended in 1993, concerning duties of betting and measures for prohibiting illegal betting (the "Burgenland Betting Act")
Carinthia:	Act of June 13, 1996, as last amended in 2009, on the practice of bookmakers (the "Carinthia Betting Act")
Lower Austria:	Act of December 14, 1978, as last amended in 2006, on the practice of bookmakers (the "Lower Austria Betting Act")
Upper Austria:	Act of January 1, 2008, concerning the setting up and operation of gambling machines and the entering into or the arranging of betting (the "Upper Austria Betting Act")
Salzburg:	Act of November 15, 1994, as last amended in 2010, concerning the practice of bookmakers (the "Salzburg Betting Act")
Styria:	Act of betting of July 1, 2003, as last amended in 2010, concerning the entering into and the arranging (the "Styria Betting Act")
Tyrol:	Act of 20 March 2002, as last amended in 2008, concerning the practice of bookmakers (the "Tyrol Betting Act")
Vorarlberg:	Act of 2003, as last amended in 2008, concerning the entering into and the arranging of betting (the "Vorarlberg Betting Act")

Vienna:	Act of 1919, as last amended in 2001, concerning duties of bookmakers betting and measures to prohibit illegal betting (the "Vienna Betting Act")

The Austrian Gambling Act was enacted on November 28, 1989 (Federal Gazette No. 620/1989), and since then 25 amendments have been introduced, the last in 2010, for implementing *inter alia* the requirement of a public and transparent tender in which the grant of a concession is announced (in accordance with a recent decision of the European Court of Justice).[1]

10.2 Betting and Gambling

Gambling and betting are two different types of games under Austrian law and, depending on whether a game qualifies either as gambling or as betting, two different sets of rules apply. The Austrian Gambling Act applies to gambling. For betting, the respective betting laws of the federal states apply. Whether a game is classified as gambling or as betting depends on the extent to which the outcome of the game is influenced by the aleatoric element "luck."

A game is gambling if the outcome (i.e. winning or loosing) depends solely or predominately on the gambler's luck.[2] If the outcome also depends on knowledge (e.g. about the quality of sportsmen involved, weather, soil quality, etc.) a game is betting. Therefore, the risks in a game are more predicable for the bettor rather than for the gambler.

Apart from administrative laws in the above-mentioned betting laws and the Gambling Act, the law applicable on the contract, resulting in rights and obligations of the parties, is always the same. The Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch,* Federal Gazette No 946/1811) qualifies both betting and gambling as gaming contracts (i.e. a contract between at least two individuals who have different opinions about the outcome of an uncertain event and where the outcome depends on luck and the winner receives a price),[3] although in its last sentence Section 1271 of the General Civil Code clearly stipulates that the winner of a bet has no right to claim the price in Austrian courts. However, the Austrian Supreme Court (*Oberster Gerichtshof*) decided differently in 1998. According to the decisions of the Supreme Court the winner may claim for the price if:

- the loser has a concession for betting, or
- the winner paid the bet or deposited it.

[1] Decision of the European Court of Justice of 9 September 2010, no. C-64/08.

[2] Section 1(1) of the Gambling Act.

[3] Section 1270 ff of the General Civil Code.

Consequently the winner cannot claim the price if the loser is not licensed for betting or the winner did not pay or deposit his bet. If these requirements are not met, the winning price is only an "imperfect" obligation, which means that the loser can freely choose to fulfill this obligation or not.[4]

10.3 Provincial Betting Laws

10.3.1 Totalisator and Bookmaker

Individuals licensed to offer bets professionally are either called totalisators (*Totalisateur*) or bookmakers (*Buchmacher*). The betting laws of the federal states define both in the same way (except in Upper Austria). In Upper Austria only companies who can act as a totalisator and bookmaker can apply for a concession.[5]

A totalisator is a concessionaire who conveys bets between individuals. The totalisator does not bet in his own name or on his own account, but does manage the paid bets and receives an agency fee for his service. The winning amount (i.e. the sum of all paid bets reduced by the agency fee) is divided between the winners. If any amounts remain undistributed they are added to the winning amount of the next bet.[6]

Contrary to totalisator, a bookmaker bets in his own name and on his own account against another individual. If the bookmaker wins, he receives the winning amount (i.e. he keeps or receives the bet amount). If the bookmaker looses, he pays the winning amount (i.e. an amount calculated in relation of his bet paid to the initially odds agreed upon).[7]

Both totalisators and bookmakers offer betting at occasions of one or more sport events, which must not exceed more than ten sport events.[8] The bets may be on any kind of result, including interim results, final results, handicaps or goals. In any case, bets must not[9]:

- aim at the death of human beings or animals;
- grossly violate human dignity; or
- humiliate human beings for reason of their sex, race, color, nationality, ethical origin, religious believes or disabilities.

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[4] Judgements of the Supreme Court of 30 October 1998, no 1 Ob 107/98 m; of 26 May 2004, no 7 Ob 85/04 g; of 26 September 2007, no 7 Ob 137/07h.

[5] Section 2(10) and (11), Section 7(1) and Section 2(9) Upper Austria Betting Act.

[6] E.g Section 1(2) Burgenland, Vienna, Salzburg, Carinthia Betting Act; Section 2(2) Tyrol Betting Act; Section 1 Lower Austria Betting Act, Section 2(2) Styria Betting Act.

[7] E.g. Section 1(3) Burgenland and Vienna Betting Act; Section 2(1) Tyrol Betting Act; Section 1(2) Carinthia, Salzburg and Vorarlberg Betting Act; Section 1 Lower Austria Betting Act, Section 2(1) Styria Betting Act.

[8] If more than 10 bets are offered, the totalisator or bookmaker would need a concession under the Gambling Act.

[9] Expressly stipulated in Section 10 Upper Austria Betting Act, Section 7 Styria Betting Act.

10.3.2 Concession Procedure in Federal States

To act as a totalisator or bookmaker an individual needs to apply for a concession. Since state laws apply only in the respective federal state where it is enacted [principle of territoriality (*Territorialitätsprinzip*)], in order to pursue betting activities in all nine Austrian federal states, nine licenses need to be obtained.

Some federal states' laws do not require a concession to be obtained (but only a notification of the competent authority) if the betting is offered only

- for 2 weeks or 3 sportive events/year,
- at a specific event and/or series of events at a particular place; or
- by a totalisator or bookmaker who has a comparable concession in another Member State of the European Union.[10]

The concession is granted either by the government of the federal state (*Landesregierung*) or by the district authority (*Bezirkshauptmannschaft*) acting for the government of the federal state.[11]

After filing an application with all necessary ancillary documents, the authority may make further investigations (e.g. produce an expert report about the distance between the betting office and schools in order to fulfill the requirements of the law for the protection of children and young people; and hear the applicant in person, etc.) and obtain, if required, opinions of other institutions (e.g. the Chamber of Commerce, and municipal).[12] The respective authority decides on the application by way of a decree (*Bescheid*).

The competent authority may impose conditions and constraints, in particular, if they are necessary to ensure that the activity as totalisator or bookmaker is properly pursued.[13] Although it is within the discretion of the competent authority to impose conditions and constraints, the exercise of the discretion is at all times limited to criteria stipulated by the law (i.e. the administrative conduct has to be predictable for the applicant)[14] and shall not be excessive.[15]

If all legal requirements, conditions and constraints are fulfilled, the applicant is licensed.[16] If the authority rejects the application, if a decree is dispatched in full

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[10] Section 1 Carinthia and Salzburg Betting Act; Section 5 Tyrol Betting Act.

[11] Section 13 Upper Austria and Vorarlberg Betting Act; Section 1 Burgenland, Vienna, Salzburg, Carinthia and Lower Austria Betting Acts, Section 12 Tyrol Betting Act and Section 15 Styria Betting Act.

[12] Section 3(4) Vorarlberg Betting Act, Section 5(6) Tyrol Betting Act; Section 3(5) Salzburg Betting Act; Section 7(1) Upper Austria Betting Act.

[13] Section 3(5) Vorarlberg Betting Act; Section 7(6) Upper Austria Betting Act; Section 4(1) Salzburg Betting Act.

[14] Decision of the Constitutional Court of 27 September 1999, no G84/99; Tyrol, Styria and Vienna had to change their betting laws in order to comply with this decision.

[15] Decision of the Constitutional Court of 5 December 1998, no. G94/98; Section 18(1) and Section 130(2) of the Austrian Constitution.

[16] Report to the 79. Exhibit in 2001 of XXVII provincial parliament of Vorarlberg.

or in part, or if conditions and constraints exceeding the legal limitations are imposed, the applicant may appeal against it and, thereafter, file a complaint to the Austrian Administrative High Court (*Verwaltungsgerichtshof*) or the Austrian Constitutional Court (*Verfassungsgerichtshof*). If the authority grants the license, the applicant may start to work as totalisator or bookmaker at the time the decree is received.

The competent authorities may examine the totalisator's or bookmaker's compliance with the relevant betting laws. They may visit the business premises at any time and inspect all documents.[17]

The concession may either expire automatically, be terminated or put on rest by the totalisator or bookmaker, the totalisator or bookmaker as an individual dies or as a company is liquidated which does not apply if merely the legal form is changed,[18] or is withdrawn by the authority in case it becomes aware that the requirements are no longer fulfilled.[19]

Whether or not licenses expire automatically differs between the different federal states. In some federal states the license expires automatically after three years and in others the totalisator or bookmaker is licensed for an unlimited time.[20] In Upper Austria the expiration date of the license is linked to the duration of the security provided.[21] Of course, the totalisator or bookmaker may apply for another license.

The totalisator or bookmaker may at any time return the license or put it on rest. In such case the security rests with the authority for another year before it is returned.[22]

10.3.3 Requirements

Tyrol lists most requirements (seven). All betting laws require a totalisator or bookmaker to have fixed business premises where he offers bets and/or he may offer bets at particular sport events or a series of events at a specific place with the consent of the organizer.[23] Furthermore, as a principle of the General Civil Code, the totalisator or bookmaker has to be over the age of 18 and must not be under

[17] Section 14 Upper Austria Betting Act.

[18] Section 11(1)(3) and Section 11(1)(4) Upper Austria Betting Act.

[19] Section 11(2) Vorarlberg Betting Act, Section 13 Styria Betting Act Section 10 Upper Austria Betting Act.

[20] Section 3(5) Vorarlberg Betting Act, Section 4(1) Salzburg Betting Act.

[21] Section 7(6) Upper Austria Betting Act.

[22] Section 11 Vorarlberg Betting Act, Section 6(1) Styria Betting Act; Section 11(1) Upper Austria Betting Act; Section 6 Tyrol Betting Act; Section 4(2) Salzburg Betting Act.

[23] Section 3 Lower Austria Betting Act, Section 3(2) Styria Betting Act; Section 2(1) Carinthia Betting Act; Section 4(1) Tyrol Betting Act; Section 2 Salzburg Betting Act; Section 2(2) Vorarlberg Betting Act; Section 2(13) 7, 9 and 14 Upper Austria Betting Act.

custody of the court. However, the federal state of Carinthia requires an age of 24 for offering bets.[24]

Furthermore, the totalisator or bookmaker has to provide the competent authority with certain documents:

i. Proof of creditworthiness (*Bonitätsnachweis*)[25]:

All federal state laws require a proof of creditworthiness of the totalisator or bookmaker. The type of document that is sufficient proof of creditworthiness depends on the federal state where the application is filed. It may be proved by a bank guarantee, a confirmation of credit line or any similar document. For example, in addition to the proof of creditworthiness, Tyrol requires a clearance certificate (*Unbedenklichkeitsbescheinigung*) of the tax office.[26] The amount of such security or proof of creditworthiness depends not only on the respective federal state and but also on the application (i.e. application for business premises for betting or temporary business premises for certain sport events only). The amounts range between EUR 7,267 (in Salzburg for certain events or series of events at one particular location) and EUR 261,622.21 (in Vienna for a permanent business premises for betting).

ii. Proof of reliability (*Zuverlässigkeit*)[27]:

All state laws require (although to a different extent) the applicant to be reliable (*zuverlässig*). Except for Vienna, Burgenland and Lower Austria, the betting laws of all other federal states explicitly stipulate which means this requirement needs to be fulfilled. It is usually proved by a criminal record or any comparable certificate from another state. The applicant is not regarded to be reliable in particular if:

- the applicant was imprisoned for more than three months or convicted to pay a penalty by criminal courts, and such conviction was not deleted;
- the applicant was imprisoned and/or fined for committing a tax offense, e.g. smuggling (*Schmuggel*), evasion of taxes (*Hinterziehung von Abgaben*), or evasion of monopoly revenues (*Hinterziehung von Monopoleinnahmen*) in the last five years;

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[24] Section 11 Carinthia Betting Act in connection with Section 8(1) of the Austrian Industrial Code 1994 (*Gewerbeordnung*, Federal Gazette No 194/1994).

[25] Manual of the association of bookmakers 2009, p 98, 110 and 151; Section 3(1)(3) Salzburg Betting Act; Section 4(1)(4) Styria Betting Act; Section 5(9)(d) Tyrol Betting Act; Section 7(2)(3) Upper Austria Betting Act Section 3(1)(e) and Section 6(1) Vorarlberg Betting Act.

[26] Section 15(1)(e) Tyrol Betting Act.

[27] Section 3(1)(c), Section 5(2) and Section 5(3) Vorarlberg Betting Act; Section 4(1)(3), Section 4(4), Section 7(2)(1), Section 7(4) and Section 7(5) Upper Austria Betting Act; Section 3(1)(2) and Section 3(3) Salzburg Betting Act; Section 4(1)(3), Section 4(4) and Section 4(5) Styria Betting Act; Section 5(1)(c) and Section 5(4) Tyrol Betting Act; Section 3(1)(c) and Section 4 Carinthia Betting Act.

- the applicant was found guilty for having severely violated betting rules at least twice, e.g. for having breached a children and young people protection law in the last five years; or
- the applicant fell into insolvency or an application for insolvency was dismissed for lack of funds.

In 1990 the Austrian Administrative High Court[28] dismissed a complaint of an applicant to whom a license was denied on the ground of his lack of reliability. The applicant was a former director of two night clubs from 1970 to 1984. At that time he had dealings with a police officer who was later found guilty for having committed crimes due to his activities related to prostitution for acts against public order, deprivation of liberty, coercion and criminal assault. The applicant was also prosecuted for violating the laws on opening hours, foreigner employment law and for drunk driving. As the reliability is to be determined according to the public values in the view of the general public, he was found unreliable.

iii. Certificate for qualification (*Befähigungsnachweis*)[29]: A certificate of qualification is explicitly required in Salzburg and Tyrol. The Austrian Camber of Commerce and the Association of Bookmakers offer training and specific courses for the totalisator's and bookmaker's apprenticeship. After successfully passing an exam, the totalisator or bookmaker is qualified as examined manager of a betting establishment (*geprüfter Wettbüromanager*). It may be proved by the successful completion of:

- an economic study or commercial academy;
- an apprenticeship in a commercially organized business and five years of professional experience as a betting provider in a comparable professional school, or for at least three years and one year of professional experience at a betting provider;
- an exam on company analysis and controlling and one year of professional experience at a betting provider; or
- study at a university within the European Union, or a general higher education for at least three years and two years of professional experience at a betting provider.

iv. Proof of citizenship (*Staatsbürgerschaft*)[30]: Austrian citizenship is not required. Some state laws explicitly refer to the possibility of a citizen of another Member State of the European Union or of the European Economic Area applying for a concession. In addition, the Tyrol Betting Act refers to Swiss citizens.[31]

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[28] Decision of the Administrative High Court of 21 November 1990, no. 90/01/0130.

[29] Section 3(4) Salzburg Betting Act, Section 5(5) Tyrol Betting Act.

[30] Section 3(1)(b) Vorarlberg Betting Act, Section 3(1)(1) Salzburg Betting Act, Section 4(1)(2) Styria Betting Act; Section 3(1)(b) Carinthia Betting Act.

[31] Section 5(2) Tyrol Betting Act.

v. Proof of appointment of a person responsible (*Nennung einer verantwortlichen Person*)[32]: In case the totalisator or bookmaker does apply for more than one permanent betting establishment to offer his bets, for each such premises an individual has to be appointed to be responsible for non-violation of the law. This person has to fulfill all individual-related requirements, such as citizenship and trustability. He will be responsible for the activities in the respective betting establishment.

vi. General terms and conditions for betting[33]: The totalisator or bookmaker has to provide a copy of its general terms and conditions for betting at the time of application which used to be kept updated in accordance with the applicable laws. All amendments need to be notified to the authority. Such general terms and conditions need to be visibly posted in the business premises or made available by other appropriate means. The Austrian Association of Bookmakers[34] also publishes model general terms and conditions which, among others, include provisions on:

- the conclusion of the betting contract;
- the payment of the winning amount;
- the jurisdiction governing the betting contract;
- acts/circumstances which render the betting contract invalid; and
- the prohibition to enter into a contract with people under the age of 18; and
- the declaration of the bettor to have no knowledge about the outcome of the sport event before betting and that the bet paid did not result from an illegal act.

vii. Marking the business premises for betting (*Kennzeichnung des Wettbüros*)[35]: The totalisator or bookmaker has to mark his permanent betting establishment at all time so as to make his professional activity visible to the public in clear and readable letters. If the totalisator or bookmaker runs more than one permanent betting establishment, each of them has to be marked in the same way with a reference to the main betting establishment.

viii. Betting book (*Wettbuch*)[36]: The totalisator or bookmaker has to maintain an electronic betting book. All bets have to be chronologically recorded therein. It has to be ready for inspection by the authority at any time for at least one year.

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[32] Section 3(1)(g) Vorarlberg Betting Act; Section 7(3) Upper Austria Betting Act.

[33] Section 7, 8 and 10 Upper Austria Betting Act; Section 7 Vorarlberg Betting Act, Section 5 Salzburg Betting Act.

[34] www.buchmacherverband.at

[35] Section 9(2) Upper Austria Betting Act; Section 11 Styria Betting Act; Section 9 Carinthia Betting Act.

[36] Section 9(1) Vorarlberg Betting Act; Section 8 Styria Betting Act.

ix. Identity verification and money laundering (*Identifikationspflicht* and *Geldwäscherei*)[37]: If the bet paid exceeds a certain amount (e.g. EUR 50 in Tyrol or EUR 2,500 in Styria) the totalisator or bookmaker is obliged to verify and register the identity of the bettor, related data (e.g. day of birth), data provided for in the ID-card (e.g. passport) and the bet paid.

If any reasonable suspicion of money laundering is present, the totalisator or bookmaker is required to inform the respective authorities of the circumstances and to refrain from any further processing of the bet, unless it is at risk to complicate or hinder the investigation of the case. In case of doubt, bets may be accepted, but winning amounts must not be disbursed. This is explicitly stipulated in Vorarlberg. Although the betting laws of some federal states do not include such a provision, Article 165 of the Austrian Criminal Code applies in any case that does not allow to hide or obscure the origin of assets that originate from a criminal offense.[38] This also refers to money laundering.

10.3.4 Internet

In general, Austrian betting laws require the totalisator or bookmaker only to offer betting in person in a permanent betting establishment. Some betting laws do also allow betting by internet (e.g. Vorarlberg).[39] Nevertheless, these demand the server to be permanently located, if not within the federal state, in Austria. Furthermore, general provisions of the betting laws apply and, consequently, a concession to offer bets by internet in one federal state does not necessarily allow the concessionaire to offer bets in other federal states.

In 2006 a study on the administrative practice in respect to internet betting was published.[40] The study assumed that someone without a permanent betting establishment and having no residence in Austria tried to apply for a license to offer bets over the Internet. Only Vienna would have granted such a license because the Vienna Betting Act does not require a permanent betting establishment in Vienna. Most federal states would not have granted a license as the applicant did not have a permanent betting establishment in Austria. Lower Austria would have denied a concession because betting always needs to be offered in person in a permanent betting establishment.

If bets are offered by internet from outside Austria, the betting laws of most federal states assume that betting takes place in the country where the betting

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[37] Section 9(2) Vorarlberg Betting Act; Section 8 Syria Betting Act; Section 8(1) Tyrol Betting Act.

[38] Such as financing of terrorism, bribery, criminal organization, smuggling or evasion of taxes.

[39] Section 2(3) Vorarlberg Betting Act.

[40] Hasberger/Busta, Internetwettplattformen und Verwaltungspraxis, MR03/06, 175.

contract is entered into. According to the Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rom I Regulation) a consumer contract is generally governed by the law on which the parties agree, and if no law has been agreed upon by the parties, the law of the place of residence of the consumer applies. In Austria usually the information on a homepage of a totalisator or bookmaker qualifies only as an invitation to the public to make an offer for entering into a contract. If the user places a bet by internet, this is deemed to be an offer which needs to be accepted by the totalisator or bookmaker. If the betting provider then accepts this offer by way of performance (e.g. placing the bet), the contract is concluded at the place of residence of the betting provider (this could be Germany, France, etc.). If the betting provider needs to accept the offer of the user formally, e.g. by email, the contract is concluded within Austria.[41]

If a betting contract is concluded in Austria, the question arises if it is allowed to offer betting by internet. Federal states that do not grant licenses without a permanent betting establishment in that federal state, do create a lawless space. Due to the legal situation (i.e. necessity to fulfill the requirements in order to provide the service) a provider would generally breach federal state laws. In particular if the provider does not have a permanent residence within the respective federal state it is unlawful in Austria to provide such services. However, because it is very difficult to enforce betting laws against foreign providers, providing betting services is still illegal.

10.4 Austrian Gambling Act

The relevant provision in respect to sports-related betting is Article 7 of the Austrian Gambling Act about "Toto." "Toto" means offering bets on several cumulated sport events (i.e. more than 10). The winning amount is divided into several ranks. All winning amounts of the same rank are the same. In 1991 the Austrian Administrative High Court ruled that all requirements have to be applied cumulative.[42] The offer of "Toto" on the internet is equally covered by the Gambling Act.

At the moment a bettor may bet on 12 soccer games. The winning amount is distributed between 3 winning ranks. Therefore, bettors who correctly bet on 10, 11 or 12 soccer games receive a portion of the winning amount, which depends on the winning rank (10, 11 or 12).

The concession is granted by the Ministry of Finance[43] for 15 years, which also supervises the concessionaire.[44] In order to receive such concession the applicant has to:

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[41] Strejecek, Glücksspiele, Wetten und Internet, LexisNexis ARD Orac, p. 33.

[42] Decision of the Austrian Highest Administrative Court of 23 December 1991, no 89/17/0258.

[43] Section 14 Gambling Act.

[44] Section 19 Gambling Act.

- establish a company (*Kapitalgesellschaft*), such as a stock corporation, or a company with limited liability, in Austria (after having been granted the license), prior to that the applicant could be domiciled within the European Union or the European Economic Area;
- pay in an amount of at least EUR 109,000,000 whereby the lawful origin of the money has to be proven in an suitable way;
- employ a manager who can show sufficient professional experience;
- ensure having a measure by which gamblers are best protected and anti-money-laundering laws are well observed;
- provide for a group structure that does not hinder an effective supervision of the concessionaire;
- provide security for at least 10% of paid in capital; and
- have no permanent gaming establishment outside Austria; and
- be limited in his right to be a shareholder of other companies.[45]

If more than one applicant fulfills these qualifications, the Ministry of Finance has to grant the concession to the applicant who will best supervise and comply with provisions about the protection of gamblers and prohibiting money laundering.[46]

Contrary to the betting laws of the federal states, a concessionaire of "Toto" does not have the right to refrain from providing his service at any time. Even if he waives his concession he has to provide his service for a certain period of time (defined by the Ministry of Finance) in order to enable the Ministry of Finance to find a new concessionaire. Such period of time must not exceed one year.[47]

The general terms and conditions of a concessionaire of "Toto" have to include provisions on[48]:

- the minimum amount payable by the bettor and the administrative charges;
- the issuance and acceptance of betting slips, the confirmation of the bet or the acceptance of the betting slip data;
- the enforcement and the payout of the winning amount;
- the relation between the winning amount and the sum of the betting amounts;
- the winning ranks and the distribution of the winning amount on each winning rank;
- the drawing, the amount and the kind of sport events taken into the "Toto" program.

The concessionaire has to pay a concession tax. The assessment base is the sum of all bet amounts paid in/each calendar year. The concessionaire has to pay 18.5% thereof for the first EUR 400,000,000 and for all exceeding amounts 27.5% to the tax office at the registered seat of the concessionaire. In addition thereto, all

[45] Section 14(3)(1) and Section 15 Gambling Act.

[46] Section 14(6) in connection with Section 14(2)(5) Gambling Act.

[47] Section 14(4) Gambling Act.

[48] Section 16 Gambling Act.

documents enabling the tax authorities to control the calculation have to be filed. Furthermore, the concessionaire has to contribute to the promotion of sports. In total (including most other Austrian lotteries) an amount of EUR 80,000,000 has to be paid for the promotion of sports.[49]

10.5 Duties and Taxes

The concessionaire has to pay duties in accordance with the Austrian Stamp Duty Act (*Gebührengesetz*) and the laws of the federal states.

10.5.1 Duties Triggered at the Time of Granting the Concession

Pursuant to the Stamp Duty Act the concessionaire has to pay a fixed duty of EUR 42.60 upon its application. In addition the concessionaire has to pay EUR 77 at the time of delivery of a decision granting the license.[50]

The concessionaire has to pay the duty at the time of the delivery of the final decision. If the concessionaire does not pay, the authority will notify the tax office to enforce the payment obligation. Irrespective of the concessionaire's negligence, the duty increases by 50% if not paid in time. In case of negligence, the payable amount increases by another 50%.[51]

In addition, the governments of the federal states may charge further duties in respect to totalisators and bookmakers.[52] All federal states do so. The duties vary between EUR 43.60 (Lower Austria) and EUR 660 (Salzburg). In some federal states the duty decreases if further betting establishments are applied for in addition to a main betting establishment. The duty may arise only once for each permanent betting establishment. The Administrative High Court ruled in 2006 that the duty may not be charged for each permanent betting establishment if no separate decision for each betting establishment is required by law (i.e. if only one decision is rendered) and not more than one official act is necessary (i.e. if an application is dealt with only once).[53]

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[49] Section 17 and 20 Gambling Act.

[50] Fellner, Stempel-und Rechtsgebühren[8], Section 14 tariff item 2.

[51] Section 3(2), Section 9(1), Section 13(1) and Section 14 tarif 6(2) Stamp Duty Act.

[52] Section 6(1)(b) and Section 8(1) Financial Constitution Act (*Finanz-Verfassungsgesetz*, Federal Gazette No 45/1948 amended by No 100/2003) and Section 13 Financial Compensation Act (*Finanzausgleichsgesetz*, Federal Gazette No 103/2007).

[53] Decision of the Austrian Administrative High Court no 2006/05/0266, published in ZfV 2008, 867, Case-law/Administrative Decisions.

10.5.2 Duties Triggered at the Time of Offering Bets

Duties are triggered when the bettor pays the betting amount and when the winning amount is due (*Gewinnstgebühren*).

Duties that are triggered at the time when the bettor pays the betting amount are qualified as taxes in Austria although they are regulated under the Stamp Duty Act.[54] In contrast to games where the computer generates the events that already took place, in sports-related betting and "Toto" no VAT and no income tax is triggered.[55] The duty/tax amounts to 2% in case of the totalisator or bookmaker of the bet paid.[56] In case of "Toto" a duty/tax of 16% is triggered.[57] Furthermore, the concessionaire has to pay an amount of 25% on all winning amounts (*Gewinnst*).[58] Debtors of this duty/tax are both the concessionaire and the bettor. The general principle of the Austrian Stamp Duty Act according to which a duty is triggered only if a document which is generated does not apply in respect to sports-related betting. Consequently, the oral agreement to bet is sufficient and has to be paid without any further procedure.[59]

In addition, the governments of the federal states may charge further duties/taxes that must not exceed 90% of the amount paid by the bettor and 30% of the tax charged by the federal government on the winning amount. Debtors are the parties to the betting contract.[60] Municipalities must not charge any further duty or tax under the entertainment tax (*Vergnügungssteuer*) regime.[61]

10.6 Penalty Provisions

A violation of the betting laws of federal states or the Gambling Act constitute an administrative offense and/or a violation of the Criminal Code (*Strafgesetzbuch*).

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[54] Endfellner/Kuster: Gebührengesetz kompakt, p. 114.

[55] Section 6(1)(9)(d) Austrian VAT Act; Renner, Highlights der ersten EStR 2000—Wartungserlass 2008, ÖStZ 2008, 350; Lehner, Das Glücksspiel in Österreich, taxlex 2006, 106.

[56] Section 28(3) and Section 33 tarif item 17(1)(6) Stamp Duty Act.

[57] Section 33 tarif item 17(1)(8) Stamp Duty Act.

[58] Section 33(17)(1)(7) Stamp Duty Act.

[59] Züger, Die Besteuerung von Wetten und Glücksspielen im Internet, ÖStZ 2001, 421.

[60] ÖStZ 2005/438 dated 3 October 2005 Decision of the Constitutional Court, Section 13 Financial Compensation Act (*Finanzausgleichsgesetz*).

[61] Decision of the Constitutional Court of 9 March 2005, no V77/04, published in ÖStZ 2006/155 in respect to the municipality of St. Veit an der Glan (Carinthia) and no. V4/04 in respect to the municipality of Villach (Carinthia).

10.6.1 Administrative Offences

Betting laws of the federal states provide for penalties and other consequences in case of a breach. Such penalty provisions apply in particular, if[62]:

- someone offers bets without a concession, contributes to such act, or exceeds its license;
- a concessionaire accepts a bet of a person under the age of 18:
- someone offers, or contributes to, bets that are forbidden;
- a responsible person cannot supervise compliance with the law;
- bets are offered contrary to the generals terms and conditions;
- no valid bank guarantee is provided;
- the permanent betting establishment is not properly marked; and
- the betting book is not properly maintained or the identity of a bettor is not verified.

The consequences of such a breach may be the imposition of a fine of EUR 7.300–EUR 25.000 and the closure of the permanent betting establishment in part or in total.[63]

An administrative offense under the Gambling Act is committed, for example, if[64]:

- someone offers or organizes games that contravene the Gambling Act;
- someone offers games without a concession or sells a concession;
- someone does not comply with the conditions and constraints as set out in the concession;
- someone offers forbidden games; or
- the responsible person breaches his or her obligations.

Such breaches may lead to a fine of up to EUR 22,000 and the closing of the gaming establishment.[65]

10.6.2 Criminal Code

Section 168 Criminal Code is the most relevant provision in relation to gaming. It provides that a criminal offense is committed, which leads to fines or imprisonment, if someone, in order to make profit, offers or supports games of chance (*Glücksspiele*)

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[62] Section 2 Vienna Betting Act, Section 10 Lower Austria Betting Act, Section 12 Vorarlberg Betting Act, Section 15 Upper Austria Betting Act, and Section 7 Salzburg Betting Act.

[63] Section 12 Vorarlberg Betting Act, Section 10 Upper Austria Betting Act, and Section 7 Salzburg Betting Act.

[64] Section 52 Gambling Act.

[65] Section 52 and Section 56a Gambling Act.

- where winning or losing mainly or completely depend on luck; or
- that are explicitly forbidden.

Plainly read, this includes all games including also gaming covered by concessions ("Toto" and sport related betting as defined by Section 1272 General Civil Code). However, a concession justifies gaming covered thereby and, thus, games covered by a license are not a criminal offense.

10.7 Austria Within the European Union

In 2010 the European Court of Justice rendered a judgement in respect to the Austrian Gambling Act.[66] Although it primarily concerned the possibility of operating gaming establishments, it may also have an impact in respect to sports-related betting and "Toto." In this case the European Court of Justice found that the Gambling Act contradicts the law of the European Union, *inter alia,* because the categorical obligation of the concessionaire to operate gaming establishments with their seat in Austria, which may only be justified in accordance with Article 52 (ex Article 46 TEC) of the Treaty on the Functioning of the European Union (i.e. public policy, public security or public health) applied proportionally, is disproportionate as it goes beyond what is necessary to combat crime. There are various other means available to monitor the activities and accounts of gaming operators.

Generally the European Court of Justice accepts limitations if they comply with Article 51 (ex Article 45 TEC) and Article 52 (ex Article 46 TEC) of the Treaty on the Functioning of the European Union or are justified by the general public interest, except when disproportionate. More limitations are usually legitimate in the field of internet-gaming than when gaming is offered in a gaming establishment.[67] Fiscal reasons usually cannot justify restrictions.

Although the Gambling Act was amended in 2010, the requirement to operate gambling through an Austrian company or corporation was not changed. Consequently, the Gambling Act, in particular its provisions on "Toto," still contradict the laws of the European Union.

With respect to the betting laws of the federals states no decision of the European Court of Justice yet exists. However, the same principles set out above apply in relation to these laws. All betting laws still require a betting establishment to be permanently established in Austria, or even in the respective federal state. In contrast to the Gambling Act, federal state laws do not explicitly prohibit an individual or company incorporated in the European Union to operate such establishment. Consequently, they do violate European laws.

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[66] Decision of the European Court of Justice of 9 September 2010, no. C-64/08.

[67] Engel: EuGH: zu Online Glücksspiel, jusIT 2009, 177.

As described above, most federal state betting laws require the offerer of bets by internet to apply for a concession. This may certainly hinder the free movement of services within the European Union. It may be justified, although primarily made for fiscal reasons, as it also ensures that no illegal betting (*Winkelwettwesen*) takes place. Also, newer federal state laws, such as the Salzburg Betting Act and the Upper Austria Betting Act, primarily for fiscal reasons, no longer require that a concession be obtained. Instead, the newer laws focus on the prevention of betting and gambling addiction. This might well justify the requirement of a concession for reasons of public health and consumer protection.

Chapter 11
Sports Betting: Law and Policy. Belarus

Aliaksandr Danilevich and Natalia Yurieva

Contents

11.1 Legislation on Sports Betting

The activity of sports betting organizations in the Republic of Belarus is regulated by:

- Civil Code of the Republic of Belarus[1];
- Edict of the President of the Republic of Belarus dated 10.01.2005 No 9 "About the approval of Regulation about accomplishing of the activity in the area of gambling industry on the territory of the Republic of Belarus"[2];

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[1] National Register of Legal Acts of Republic of Belarus, 2001, No 2/744.
[2] *Ibid*. 2005, No 5; reg. No 1/6157.

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- Resolution of the Council of Ministers of the Republic of Belarus dated 10.02.2005 No 140 "About certain measures of realization of the Edict of the President of the Republic of Belarus dated 10.01.2005 No 9"[3];
- Decree of the President of the Republic of Belarus dated 14.07.2003 No 17 "About licensing of certain types of activity" (as amended by Decree of the President of the Republic of Belarus from 19.12.2008 No 23)[4];
- Resolution of the Council of Ministers of the Republic of Belarus dated 20.10.2003 No 1377 "About the approval of Regulation about licensing of activity in the area of gambling industry and tourist activity"[5]; and
- Other normative acts.

11.1.1 General Rules Under Civil Code of the Republic of Belarus

The Civil Code of the Republic of Belarus contains only two articles about the procedure of carrying out gaming. Still these articles set up the grounds for the regulation on gaming. Article 932 of Civil Code determines that relations between organizers of totalizators and other games based on risk are accomplished in accordance with legislation and based on the contract. Such a contract between organizers and gamblers is concluded on a voluntary basis and formalized by issuance of a receipt or other document, or by other methods stipulated by the rules of the game's organizer. These principles of the Civil Code have become the basis for adoption of special normative acts, which regulate the activity of sports betting organizations.

The Civil Code provides that the proposal to conclude a contract must include the following provisions; the term of carrying out of gaming, the procedure for determination of the winnings, and its rate. Organizers of gaming must pay winnings to those who, according to the rules of sports betting organizations, are the winners. The winning must be paid in the rate, form and term, provided by the provisions of carrying out of gaming. In cases where the term in which the winning must be paid is not specified, it must be paid by the sports betting organization within ten days from the moment when the demand for payment of the winning was produced.

Article 932 of Civil Code also provides one of the main gambler's rights: in cases where the organizer of gaming failed to fulfill its obligation to pay the winnings, the winner has a right to make a claim for the payment of the winnings and compensation for damages for breach of the contract caused by the organizer. The right for judicial protection is also provided for national and legal persons, who took part in gambling or betting and were affected by fraud, violence, threat

[3] *Ibid*. 2005, No 37; reg. No 5/15611.

[4] *Ibid*. 2003, No 79; reg. No 1/4779.

[5] *Ibid*. 2003, No 121; reg. No 5/13256.

or ill-intentioned agreements of its representative with the organizer of gambling or betting. However, under Article 931 of the Civil Code, other claims of individuals and legal persons dealing with the organization of gambling and betting, or with participation in them, are not subject to judicial protection in the Republic of Belarus.

11.1.2 Special Legislation on Gaming

The main normative acts that determine the rules of carrying out gambling in the territory of the Republic of Belarus are the following:

- Edict of the President of the Republic of Belarus dated 10.01.2005 No 9 "About the approval of Regulation about accomplishing of the activity in the area of gambling industry on the territory of the Republic of Belarus" (further—Edict No 9).
- Resolution of the Council of Ministers of the Republic of Belarus from 10.02.2005 No 140 "About certain measures of realization of the Edict of the President of the Republic of Belarus from 10.01.2005 No 9" (further—Resolution No 140). Resolution No 140 approves Regulations relating to maintaining of a totalizator, maintaining of betting organizations, rules of organization and carrying out games of betting, and Rules of organization and carrying out games of totalizator.
- Edict No 9 contains definitions of the main terms, such as "betting game, game of totalizator, totalizator" and others. Particularly, betting game is gambling in which the participant stakes on the result of event (makes a bet with betting organization), and the rate of the winning is determined before the beginning of the game and depends on partial or total coincidence of the made prediction with coming matters of record. Cash register of the betting organization—specially equipped place where the stakes are accepted and the winnings are paid. Game of totalizator is gambling in which the participant stakes on the result of the event (makes a bet with totalizator) and the rate of the winning depends on partial or total coincidence of the made prediction with coming real matters of record, and total sum of made stakes. Totalizator is a gambling establishment where the gaming is carried out in which gamblers make preliminary predictions (make a bet) about probable variant of playing, sporting and other socially significant event.
- Edict No 9 and Resolution No 140 determine that legal person and sole proprietor can keep betting organization and (or) totalizator only after acquisition of a license—special permission for the exercising activity in the sphere of the gambling industry issued by the Ministry of Sport and Tourism of the Republic of Belarus (further—Ministry of Sport and Tourism). The activity on maintenance of betting organizations and (or) totalizator is exercised in gambling establishment the location of which is pointed in the license. Cash registers of the betting organizations and totalizators must be registered in rating authorities

and must belong to legal persons and the sole proprietor on the right of private property. Those who exercise this type of activity have to remember that a notarized copy of the certificate of registration of the total amount of cash registers must be kept at their location. Alteration of the total amount of cash registers is allowed just after their registration in rating authorities and getting a new certificate of registration instead of the previous.

- Regulation about maintaining a betting organization determines that the activity of betting organizations can be exercised in stationary accommodation, in temporary places of sport and other events, on the pages of printing or in other mass media and also in the Internet. Placement of stationary betting organization is endorsed by the territorial department of domestic affairs.
- The bookmaker has a right to take stakes (make a bet) on the preliminary prediction of the sport, cultural and other socially significant event. Stakes can be made only on events, where influence of contending parties on the result of the event is excluded. The rate of winning is determined before the beginning of the game. Stakes that are set are not subject to cancellation or revision.
- Only adult individuals can work for a bookmaker. A contract about full liability for breakage must be concluded with such a worker in accordance with the Labor Code of the Republic of Belarus.
- The legislation determines that bookmakers have to use cash registers, special computer systems and (or) bookmaker's cards for receipt or payment of cash. The bookmaker's worker during making stakes gives out to the gambler a cash voucher and one copy of the document containing information about the name and location of the place of making stakes, conditions of stake, date and time of making a stake and the sum of the stake. The first copy of this card is given to the gambler who checks the accuracy of the terms of the stake appointed by the bookmaker. The second copy of this card is kept by the betting organization until the moment when the event on which the stake is made happens. The bookmaker pays the winnings after the event has happened and the first copy of the card has been shown. The betting organization's worker makes calculations of the winnings on the second copy of the card. The winnings are paid to the gambler just after the ID paper is shown. If the bookmaker has two copies of the card it means that the winning is paid.
- Winning cards are valid for receipt of the winning one month from the day the event happened. On the expiry of 1 month the winning card is canceled.
- Legislation of the Republic of Belarus prohibits bookmaker from getting stakes from individuals who are under 18 years old, under alcoholic or narcotic intoxication, or who try to stake but not in accordance with the rules of the betting organization.
- Regulation about maintaining of totalizator determines that in order to carry out the game of totalizator, special playing equipment must be used—equipment produced in Belarus or imported on the territory of Belarus is subject to obligatory certification and maintenance work. Usage of terminals and computers while getting stakes, information processing and distribution of the winnings, can be produced only after acquisition of positive results of examination of this

equipment in Operative Analytic Centre under the auspices of the President of the Republic of Belarus.

- Before the beginning of the registration of stakes the organizer of totalizator is obliged to open a special account (subaccount) for accumulation and keeping of the winning fund of the totalizator with a guarantee of its safety and designated usage. The gambler determines on which bet to make the stake, the sum of the stake and informs the organizer of totalizator. After the end of the event the winning fund is distributed between the gamblers according to the rules of the game. The winnings are paid to the gambler after the winning card and ID paper are shown.

11.2 Licensing of Sports Betting Activity

In the Republic of Belarus legal persons and individuals get the right to exercise certain types of activity only after receiving special permission (license). Such licenses are determined on behalf of national security, public order, protection of rights and freedoms, morality, health of population, and protection of environment. Licensing of certain types of activity gives the government the opportunity to exercise control upon observing the requirements determined for certain licensing types of activity.

The Decree of the President of the Republic of Belarus dated 14.07.2003 No 17 "About licensing of certain types of activity" (as amended by Decree of the President of the Republic of Belarus dated 19.12.2008 No 23) approves the list of types of activity to exercise for which special permissions (licenses) and the list of public authorities and state organizations authorized to issue these permissions are required (further—List). Para 11 of the list mentions the activity in the sphere of gambling industry. The Ministry of Sport and Tourism is authorized for issuance of licenses in Belarus.

In pursuance of Decree dated 14.07.2003 No 17 the Regulation about the licensing of activity in the sphere of gambling industry is approved by Resolution of the Council of Ministers of the Republic of Belarus dated 20.10.2003 No 1377 (Regulation). In accordance with Para 5 of the Regulation the mentioned activity has component works and services among which the activity of maintaining the totalizator and the activity of maintaining betting organizations are mentioned.

The license for exercising the mentioned types of activity is issued for the term of five years and the term can be prolonged by the request of the licensee (a person applying for receipt of license).

The Regulation contains the list of requirements and terms laid out for the applicant. If the applicant follows these requirements the license will be issued to the applicant. In particular the following requirements are determined:

- availability of standing (not less than 3 years) in the sphere of gambling industry at the position of chief (deputy administrator) of the legal person or sole proprietor registered on the territory of Belarus;
- availability of the certified playing equipment servicing in the center of maintenance works; and
- availability of the resolution about deficiency of information precluding the issuance of license issued by the territorial department of internal affairs. This resolution is issued by the territorial department of internal affairs located at the place of registration of legal persons and sole proprietors. It also should be mentioned that submission of this resolution in the licensing authority is not obligatory for the applicant. The resolution can be inquired by the Ministry of Sport and Tourism from the territorial department of internal affairs in case if the resolution was not submitted by the applicant.

The applicant should submit to the Ministry of Sport and Tourism the following documents in order to receive the license:

- application for issuing of license indicating
  - for legal person—name and its location;
  - for individuals—surname, name, passport details;
  - licensing type of activity which the applicant is intended to exercise;
- copies of constituent documents of legal person, copy of the document confirming state registration of the legal person or sole proprietor without notarial attestation;
- document on the state fee payment for the issuing of the license (according to the Law of the Republic of Belarus dated 10.01.1992 No 1394-XII "On state fee" as for 31.12.2009 the state fee for issuing of license is fixed in amount of eight primary insurance amount, what makes up 280,000 Belarusian roubles[6]);
- legalized extract from trade register of the country where a foreign organization is organized in case if the applicant is the foreign legal person;
- copy of the work record card of the head of the legal person or sole proprietor;
- copy of the application for registration cash registers and computer systems in rating authority;
- copies of documents confirming the right of property or another lawful grounds for usage of premises in which it is supposed to exercise this type of activity;
- copies of certificates on playing equipment;
- copy of the contract for servicing playing equipment, computer systems;
- act of the territorial department of domestic affairs with results of inspection of premises in which it is supposed to exercise licensing type of activity.

While submitting copies of documents to the licensing authority the applicant is obliged to submit their originals or notarized copies. It is prohibited to demand

[6] Equal to 67 euro.

from the applicant submission of other documents not determined by the Regulation.

The Ministry of Sport and Tourism should examine submitted documents in 1 month from the day of their submission. This term can be prolonged for the period of performing audit and (or) expertise, however, this cannot take more than 15 calendar days.

As a result of examination of the application and appurtenant documents and materials of the audit, and (or) with its expertise, the Ministry of Sport and Tourism resolves a decision on issuing or refusal in issuing license to the applicant. This decision is formalized in the order. Information about decision on issuing license is send to rating authority located at the placement of registration of the objects of taxation.

The Ministry of Sport and Tourism forms and keeps records of issued licenses in the register of licenses.

After legal person or sole proprietors have received the license they should observe the following licensing requirements and terms settled by the Regulation:

- observance of settled order of certification, servicing of playing equipment, registration of objects of taxation in rating authorities, and also provisions and rules determined by legislation;
- ensuring of:
  - lawfulness of carrying out gaming;
  - timely payment of tax on gambling industry;
  - payment of winning to the gambler;
  - protection of gambling establishment and security of its visitors;
  - unimpeded allowance of workers of the licensing authority for performing the audit;
- presence in the gambling establishment of cash registers registered in rating authorities and belonging to the licensee on the property right;
- exercise of works and services composed the licensing type of activity in the gambling establishments the location of which indicated in the license.

The licensing legislation of the Republic of Belarus also determines the obligation of the licensee to apply to the Ministry of Sport and Tourism within one month in order to alter license in case of:

- changing of the owner of the legal person, changing of name (trade name), location of licensee;
- coming to force of court decision or resolving of decision about license determination by the licensing authority;
- changing of normative acts regulating licensing activity;
- changing of other information, identified in the license.

If the licensee has violated the terms for applying to the licensing authority to alter the license, the duration of the license is terminated on the following day after expiration of the term, as long as the licensee does not submit the documents

without resolving the decision on termination of the license by the licensing authority.

The licensee has the right to prolong the license in case the duration of it is over. The licensee is obliged to submit to the Ministry of Sport and Tourism an application about prolongation of the license duration within 1 month but not earlier than two months. Licensee should also submit document on state fee payment for the prolongation of license duration (as for 31.12.2009 the state fee is fixed in amount of 140,000 Belarusian roubles[7]).

The licensing authority resolves decision on prolongation of license duration for the 5-year term, within 15 days.

11.3 Taxation of Sports Betting Activity

According to Para 10 of Edict No 9, the organizers of gaming are obliged to ensure the payment of taxes on gambling industry.

The tax payer on gambling industry is a legal person of Belarus, a foreign or international organization, including those who are not registered as legal persons or sole proprietors and who exercise activity in the sphere of gaming (taxpayers).

These taxpayers are not subject to income tax and profit tax, and value-added tax, due for financing expenses dealt with maintenance and renovation of housing, due to local purpose budget housing investment fund, etc.

Taxpayers are obliged to keep separate accounting of income and expense on every object of taxation.

The following are the objects for taxation:

- cash registers of totalizator;
- cash registers of betting organizations.

Tax on gambling industry is calculated on the assumption of the amount of objects for taxation on the first date of the month under review.

The total amount of objects for taxation is subject to obligatory registration in rating authorities. The registration is carried out after the taxpayer submits the application and till the moment the objects are installed. Rating authorities issue a certificate of registration with indication the total amount of objects for taxation.

Registration of objects for taxation is carried out by rating authorities only if a taxpayer has special permission (a license) for exercising activities in the sphere of gambling industry, and certificates and contracts for servicing of these objects.

A notarized copy of a certificate of the registration should be kept at the location of these objects.

Alteration of the total amount of objects for taxation in the gambling establishment is allowed after the objects of gambling industry are registered in the

[7] Equal to 33.50 euro.

rating authorities. The rating authorities should issue a new certificate of registration within five working days from the date of application submission.

In the gambling establishment it is prohibited to keep objects for taxation that are not registered in rating authorities and (or) that do not belong to taxpayers on the right of property. Violation of these requirements involves the abolition of the license.

Rates of tax on gambling industry are fixed in the following amount on unit of the object of taxation:

- 1,500 euro on cash register of totalizator in Minsk;
- 1,400 euro on cash register of totalizator in regional centre except Minsk;
- 1,300 euro on cash register of totalizator in another settlement;
- 200 euro on cash register of betting organization in Minsk;
- 150 euro on cash register of betting organization in regional centre except Minsk; and
- 130 euro on cash register of betting organization in another settlement.

Taxes on gambling industry is paid under the rates fixed for the object of taxation subject to its location in Belarusian roubles on the assumption of the official courses fixed by the National Bank on the first date of the month under review.

Taxpayers submit to the rating authorities their calculation of the sum of the tax on gambling industry subject to payment in budget within the twentieth day of the month coming after the month under review. The form of calculation is determined by the Ministry of Taxes of the Republic of Belarus. The payment of tax on the gambling industry is carried out monthly within the twenty-second day of the month coming after the month under review.

11.4 Responsibility of Sports Betting Organization

In cases where the legal person or sole proprietor does not observe the requirements set up by legislation for certain licensing type of activity, in particular:

- in the gambling establishment there are unregistered in the rating authorities cash registers and (or) these cash registers do not belong to the licensee on the right of property;
- exercising of licensing works and services not mentioned in the license;
- organization and (or) carrying out of gaming in cases prohibited by legislative acts; and
- unavailability of necessary record of service in the sphere of gambling industry, etc.

The Ministry of Sport and Tourism resolves decisions on license abolition.

Apart from that the Code on Administrative Infringements of the Republic of Belarus determines responsibility for violations of the rules of exercising gambling

industry, organization and carrying out prohibited gaming, and also for exercising activity in the sphere of gambling industry without a license.

Article 12.11 of the Code determines that violations of the fixed rules of confirmation of compliance of the playing equipment to the requirements of technical normative acts, the rules of registration of the objects for taxation in the rating authorities, etc., involves amercement of the officials and legal persons with seizure of playing equipment, funds and other valuables. Organization and carrying out prohibited gaming involves amercement of the officials with seizure of playing equipment, funds and other valuables.

Article 12.11 of the Code determines the responsibility of legal persons or sole proprietors for exercising activity in the sphere of gambling industry without receiving special permission (license)—it involves amercement and seizure of playing equipment, funds and other valuables.

According to Edict No 9 of the Committee of state control, the Ministry of Internal Affairs, the Ministry of Taxation and the Ministry of Sport and Tourism are made responsible for controlling the gambling industry and for observance of legislation in this sphere.

Chapter 12
Towards a B2B Model for Online Sports Betting Operators in Belgium: Is the New Business Model Viable for all Stakeholders?

Momtchil Monov and Thibault Verbiest

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12.1 Current Regulatory Framework with Respect to Sports Betting

12.1.1 Various Regimes for Offline Sports Betting Games

Pursuant to the Belgian Gaming Act of 1999,[1] betting falls under the following definition of games of chance: "any game or wager by which a stake of any kind is committed, the consequence of which is either the loss of the stake by at least one

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[1] May 7, 1999 Act, Chapter 1, Section 2 (1).

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of the players or bettors or a gain of any kind in favour of at least one of the players, bettors or organisers of the game or wager and in which chance is a factor, albeit ancillary, for the conduct of the game, determination of the winner or fixing of the gain."

As regards games of chance falling within the scope of application of the May 7, 1999, Act, an operator wishing to run money games in Belgium must obtain a license granted by the Belgian Gaming Commission.

However, the above-mentioned Law provides that the following are not games of chance within the meaning of this Act[2]: "games in relation to the playing of sports, as also wagers placed in connection with such games." Accordingly, sports betting falls outside the scope of application of the above-mentioned Law.

The June 26, 1963, Act governs sports betting. This Law provides for a license system on competitions and mutual betting concerning sports event results, license being granted by the Sport Ministers of the Belgian Communities (French, Dutch or German speaking).

- According to the conclusions of a study performed by the Université Catholique de Louvain,[3] bets having only an indirect relationship with sport competitions are not subjected to the 1963 Act license system, because they do not concern "betting on sport results." In addition, these bets should not be subjected to the 1999 Act, which excludes "betting on games concerning sport" (Article 3,1 1999 Act);
- The 1963 Act does not apply to fixed-odd betting. Subsequently, these are not regulated in Belgium. Nevertheless, the Ministry of Finances considers them to fall under the betting tax. Due to the lack of any applicable legislation, there is no obligation to obtain an authorization to organise fixed-odd sports betting. As a result, they are legal as long are they are fiscally declared.

Thus, two authorities are currently competent in the field of sports betting (whether fixed-odd or mutual):

- The Ministers of Sport of Communities are competent to grant authorization concerning competitions and betting on sports event results (at least concerning pool betting); and
- The Finance Minister is competent for fixed-odd betting, no special authorization being required.

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[2] May 7, 1999 Act, Chapter 1, Section 3 (1).

[3] *Game of chance: legal definition-enforcement. A legal analysis of a game of chance according to the May 7, 1999 law on gaming, gaming companies and the protection of gamers.* Professors B. Tilleman and A. Verbeke, N. Hoekx, K. Andries, N. Carette.

12.1.2 Online Sports Betting

In application of Articles 6 and 7 of the 19 April 2002 Act, the Belgian National Lottery ("Loterie Nationale") holds the monopoly right to organise lotteries, and the right to organise games of chance, betting and contests through means of the "information society" (online).

In practice, since fixed-odd sports betting is not regulated in Belgium, it is not prohibited to offer online fixed-odd sports betting, provided however, that a prior declaration is made to the Ministry of Finances. However, online fixed-odd sports betting is not offered so far due to a heavy tax burden (15% on stakes) on fixed-odd sports betting operators in Belgium.

12.1.2.1 Relevant Case Law

Pursuant to Article 4 of the 1999 Act, "it is prohibited to use, anywhere, in any form or by any direct or indirect means, whether one or more games of chance or games of chance establishments, other than those authorized under the present Law. No person may operate one or more games of chance or gambling establishments without a license previously granted by the Gaming Commission."

Pursuant to Article 64, 2° of the Gaming Law, shall be punished by imprisonment from one month to three years and a fine of 26 € up to 25 000 € or one of these penalties "2° any person who by any means, advertises or conducts the recruitment of players for a game of chance prohibited by the Law or not explicitly authorized under the Law or a similar institution located abroad."

In application of the above-mentioned provisions of the 1999 Act, on March 4, 2010, the Bruges Commercial Court delivered a ruling in Belgian State v. Club Brugge, Unibet and the Belgian Football Association, whereby it held that online advertising for sports betting is legal under Belgian law on the grounds of a narrow interpretation of the 1999 Act. Our understanding is that the 1999 Act's narrow construction by the above-mentioned ruling is consistent with sound principles under Belgian law, under the reasoning mentioned below.

The Bruges Commercial Court held that:

- advertising for sports betting cannot be considered as exploitation of games nor of a gaming establishment within the meaning of Article 4 of the Gaming Law;
- the Belgian Gaming Commission's report has probative value until proof of the contrary, but only as regards the mere factual findings, and not the interpretation of those facts or the case law cited in the report;
- since Unibet also offers sports betting services, which do not fall within the scope of application of the current regulatory framework, the mere placing of advertising boards with the UNIBET logo (no more and no less) is not an infringement of Article 64, Section 2 of the 1999 Act, which provides for sanctions against advertising for prohibited gaming establishments;

- the link on Club Brugge's web site can be considered to be at least indirect online advertising for sports betting, but the 1999 Act only prohibits advertising for a gaming establishment; thus, the online advertisement is not caught by the aforementioned prohibition;
- Unibet is not a (national or foreign) gaming establishment within the meaning of the 1999 Act since it only offers sports betting via the Internet and not in a gaming establishment within the meaning of Article 2, 3° of the 1999 Act (building or a place where one or more games of chance are exploited).

Although the above-mentioned ruling is not delivered by the Belgian Cour de cassation, its underpinning reasoning seems to rely on sound principles under Belgian law, such as the narrow interpretation of Laws providing for criminal sanctions. Accordingly, in the event of litigation, other Belgian Courts are likely to follow the same reasoning (persuasive value of the ruling), under all reservations.

12.1.2.2 Position of Both the Belgian Jury of Advertising Ethics and the Belgian Gaming Commission

It is worth mentioning that the analysis of the Bruges Commercial Court is not shared by both the Belgian Jury of Advertising Ethics (hereinafter referred to as the "JEP") and the Belgian Gaming Commission.

The JEP is a self-regulatory body created in 1974 by the Belgian Advertising Council, a Non-profit Association under Belgian law (ASBL), which groups associations representing advertisers, agencies and media and whose aim is to promote advertising as a factor of economic expansion and social integration.

The JEP's action is based on the voluntary cooperation of advertisers, agencies and media. The JEP has no legal standing to interpret the Law and its decisions do not constitute legally binding rulings (Article 2 of JEP's Internal Regulation).

The JEP is entrusted with the task of examining the compliance of advertisements broadcast in Belgium with:

(i) general legislation applicable in Belgium, unfair commercial practices legislation and sector-specific regulations;
(ii) codes of conduct, and more particularly, the consolidated version of the International Code on advertising practices and marketing communication of the International Chamber of Commerce.

In a recent decision, the JEP, relying upon the Belgian Gaming Commission's statement (referred to below) regarding online advertisement of gambling services, held that online advertisement of gambling services is illegal under Belgian law and should thus be prohibited.

The Belgian Gaming Commission issued the following statement in 2009:

> Although it is impossible to play for money on the website '.net,' the latter is directly related to the website '.com,' where one can play for money.
>
> Games of chance on the internet are prohibited in Belgium in accordance with Article 4 of the Belgian Gaming Law of 7 May 99: 'it is prohibited to use, anywhere, in any form or by any direct or indirect means, whether one or more games of chance or games of chance establishments, other than those authorized under the present Law. No person may operate one or more games of chance or gambling establishments without a license previously granted by the Gaming Commission.'
>
> Pursuant to Article 64,2°, shall be punished by imprisonment from one month to three years and a fine of 26 € up to 25 000 € or one of these penalties: '2 any person who by any means, advertises or conducts the recruitment of players for a game of chance prohibited by the Law or not explicitly authorized under the Law or a similar institution located abroad.'
>
> The Belgian Gaming Commission has decided, at the end of last year, to assimilate '.net' websites to '.com' websites.
>
> Thus, it is our understanding that this is an illegal advertisement of online gambling services.

In view of the foregoing, one cannot rule out the possibility that some sort of litigation could be initiated by either the JEP or the Belgian Gaming Commission, on the basis of their own interpretation of the current regulatory framework. However, as already mentioned above, such an interpretation is inconsistent with the relevant case law with respect to the current regulatory framework.

12.2 Gaming Law's Main Features

Put simply, under the new regulatory regime all kinds of games of chance (including sports betting) will be covered by the scope of application of the Gaming Law, whether such games of chance are provided offline or online, except when otherwise provided for. Concretely, a licensing system will be imposed for all kinds of games of chance, including but not limited to poker, sports betting (whether fixed-odd or mutual) and horse race betting, except for lotteries which remain the monopoly of the state-owned incumbent, La Loterie Nationale, and are thus excluded from the Gaming Law's scope of application. The Belgian Gaming Commission will be entrusted with the task of granting licenses to both offline and online sports betting operators.

12.2.1 The Requirement for a Belgian Land-Based License

In order to be able to offer online sports betting services, the Gaming Law requires operators from other Member States to already hold a license for land-based sports betting operations in Belgium and to (re)locate their server to a permanent establishment on the Belgian territory. This means that a foreign operator, duly

licensed and operating from another Member State, must first become the licensed operator of a betting service (license F1) in Belgium, in order to then apply for an online license to offer the same sports betting services to Belgian consumers (F1+ license). In addition, in order to obtain the online license applied for, such operator is required to relocate its servers to a permanent establishment in Belgium. Furthermore, the Gaming Law also provides for a limitation by Royal Decree of the maximum number of land-based licenses for betting services. In order to determine this maximum amount, account must be taken of the number of operators already present on the Belgian market.

Needless to say, these requirements not only rule out any account that could be taken of obligations to which a sports betting operator is already subjected in its home Member State. They also seem to be discriminatory towards any foreign sports betting operators not yet established in Belgium. In these circumstances, it would indeed seem very difficult, if not impossible, for a foreign EU sports betting operator to obtain one of those licenses as a prerequisite for obtaining an online license for sports betting in Belgium.

The Belgian Government's confidence in enacting such legislation may have been boosted by the ECJ's recent landmark ruling in Santa Casa v. Bwin (September 8th, 2009) which refused to uphold the mutual recognition principle, as set out *in Cassis de Dijon*, in the field of online gambling across the EU. It seems that the path inaugurated by the above-mentioned ruling has been upheld by the ECJ's latest ruling in Ladbrokes v. Stichting de Nationale Sporttotalisator (June 3, 2010). Hence, according to the Belgian Government, the restrictions on both the free movement of services and the freedom of establishment contained in the Gaming Law can be considered to be justified by mandatory requirements in accordance with the settled case law of the ECJ. Notwithstanding the above justifications put forward by the Belgian Government, we doubt that the Gaming Law could pass the proportionality test whose observance is incumbent upon Member States pursuant to consistent case law of the ECJ. Accordingly, one cannot rule out the possibility that the Gaming Law could be challenged on the basis of sound EU law principles, whether by private stakeholders or the EU Commission by way of infringement proceedings.

12.2.2 B2B Model for Online Sports Betting Operators

In view of the requirement for a Belgian land-based license, as a prerequisite for obtaining an online one, it is our understanding that major online sports betting operators could consider entering into cooperation agreements with Belgian land-based licensees who could then apply for a corresponding online license.

Clearly, this would be a win–win form of cooperation. On the one hand, Belgian land-based licensees do not necessarily have the marketing skills and software know-how to run online gambling services by their own means. On the other hand, online sports betting operators will not have to establish in Belgium to

offer their services to end users and will thus allocate their resources in the most efficient way, provided all stakeholders reach a mutually satisfactory agreement.

Our understanding is that such cooperation agreements will have to be scrutinized in light of both Commission Regulation No 330/2010 of April 20, 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and, where appropriate, Belgian Competition law in order to ensure their compliance with competition rules. The interface between ex ante online gambling sector-specific regulation and ex post competition rules is likely to become a reality in the gambling industry.

12.2.3 Is the New Business Model Viable for all Stakeholders?

It goes without saying that Belgian land-based licensees are willing to enter into cooperation agreements with online sports betting operators provided, however, that all stakeholders reach a mutually satisfactory agreement. This raises the question of the allocation of profits between land-based licensees and online sports betting operators. Will land-based licensees be remunerated on the basis of the number of players registered with the online sports betting operator's web site? Will land-based licensees be remunerated on a fixed basis (e.g., an annual lump sum)? Or, will land-based licensees be paid in the form of marketing and/or promotional campaigns whose cost shall be incurred by online sports betting operators?

Notwithstanding the above-mentioned issues, it is worth noting that the Walloon Regional Government (one of the three Regions composing Belgium) adopted in May the Draft Fiscal Framework applicable to online gambling activities (including online sports betting). Pursuant to the Draft Fiscal Framework, the new tax rate is set at 11% and shall apply to the gross gaming product, that is to say, the gross amount of money involved in online sports betting and reduced by the amount of earnings distributed to players.

The Walloon Regional Government aims to attract or retain in Wallonia online sports betting operators. Therefore, the Draft Fiscal Framework provides that payments are made or deemed incurred in Wallonia where the online game is received via a server located in or operated in Wallonia.

Chapter 13
Sports Betting: Brazil

Maurício Ferrão Pereira Borges

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13.1 Introduction

According to a European Commission study, the global gambling Industry worldwide generates a huge sum of money, around US $384 billion, or 0.6% of global gross domestic product (GDP). Latin America represents 7% of all the

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resources generated. As such, sports betting, if properly managed, can yield a lot of money.[1] It is a complex, fast developing and exciting subject. However, betting on sport is increasingly being used and exploited to manipulate the outcome of sports events, especially football matches. On account of this, the chapter on Brazilian Law of 'Sports Betting: Law and Policy,' as part of a book that will certainly fill a yawning gap in the existing comparative literature on sports law, explains Brazilian legal provisions governing sports betting and gaming. We have also tried to set out our impressions on this subject below.

In the first part of this chapter we shall begin by looking briefly at the manipulation of sport through illegal betting. In the second part, we will provide an overview of the Brazilian law on betting and gaming before going into the legality of sports betting and gaming in Brazil, especially in its online form. The focus in the final part is on the recent legal amendments to the Fans' Bill of Rights Act and its influence on the so-called 'Edílson case.'

13.2 Manipulation of Sport

13.2.1 Manipulation of Sport Through Illegal Betting

Manipulation of sport through illegal betting is the most recent controversy to be discussed in sports law, undermining and affecting, as it does, the sporting integrity of championships. Therefore, fighting irregular betting and match-fixing is something that must be fought in the legislative sphere and should also be a basic demand of sports federations for those who belong to the international sports community.

For most people betting on the outcome of sporting events, especially football matches, is a fun pastime. This is why gaming and betting have been treated alike in Brazilian Law. In Portuguese, the first activity is known as 'jogos de azar' and the second as 'apostas.'

These business activities have become a very sensitive and controversial topic in Brazil, since, throughout Brazil's recent history, they have been regarded as an area that goes hand-in-hand with illicit activities, such as money laundering and organized crime. For a minority that deals with criminal activity in the field of sports betting, it is away of getting rich by fixing and throwing the results of matches and betting a lot of money on them.

[1] A report issued by Crowe Horwath RCS—an independent audit firm—concludes that important companies are offering sports betting services in Europe. Ladbrokes, the biggest betting firm in the UK, for example, generated more than £ 1.1 billion in revenues in 2008. These sports betting firms are investing in clubs' sponsorship strategies. According to a study conducted by Sport + Markt, 10 significant betting companies invested more than €90 million in football club sponsorship in Europe in 2009–10.

Gaming, betting, manipulation, and cheating, should be treated separately, although these four concepts are similar and can sometimes interact. We will focus only on the activities off the field, but we recognize that cheating occurs on the field and may be practiced by some players. In fact, it is not so easy to define. What kinds of behavior constitute cheating in sport and its relationship with fair play is a complex philosophical phenomenon.[2] In this regard, codes of ethics are able to challenge such behavior, which in high performance sports has invariably developed to circumvent the rules of play to the advantage of the athlete.[3]

13.2.2 Match-Fixing in Brazilian football: the 'Edilson Case'

The so-called 'Edilson case' is considered to be the worst corruption-related scandal in Brazilian sporting history. It was made public on September 23, 2005, when the former FIFA referee, Edilson Pereira de Carvalho, and his colleague, Paulo José Danelon, were found to have accepted bribes to fix matches in the highest division of Brazilian association football.[4] They were connected with the gambler Nagib Fayad, who used cash to bribe Edilson and his assistant with the aim of profiting from fixed match results through betting activities. Together they built a criminal organization that worked as follows: (i) Edilson was paid by the gambler and, as result, (ii) manipulated several football games in order to secure payoffs from high-stakes gamblers.[5]

Because of this, disciplinary proceedings were initiated before Brazil′s highest sports law court, the STJD (*Superior Tribunal de Justiça Desportiva*). Before the STJD, Edilson admitted to having influenced the outcomes of several games with "hidden criminal acts" in the form of factual decisions. In its original report, the STJD provided the following:

> He, more than anyone, knew how to manipulate the results of matches … carefully grounded in the so-called factual errors, in an attempt to conceal his criminal acts.[6]

Due to a breach of sports dignity, a concept detailed in Article 275 of the Brazilian Sports Justice Code (CBJD),[7] eleven matches were ordered to be

[2] See Leaman 1981, pp. 25–30; Luschen 1977.

[3] Some scholars have treated cheating in sport as a playing culture, see Gardiner et al. 2005, pp. 66–67.

[4] On September 23, 2005, the *Veja* magazine published a cover story exposing how deeply the betting mafia has penetrated Brazilian football to make easy money from internet gambling and bribing referees (Edilson and his assistant Paulo Danelon).

[5] For an overview of the Edilson case see Borges 2009b, pp. 24–26.

[6] STJD decision, December 1, 2005, process No. 195/05.

[7] On December 10, 2009, by means of Bill No. 29 of the Sports National Council (CNE) the aforementioned CBJD version was replaced. The cited Article 275 of CBJD, therefore no longer exists.

replayed and Edilson was banned from refereeing for life.[8] This decision was taken with due consideration to the sporting integrity of the ongoing competition that was endangered by the referee′s intentional errors as a result of negative betting influence.

FIFA accepts that games could be replayed in match-fixing cases. In accordance with Article 72 of its Disciplinary Code, only the referee takes disciplinary decisions during matches, which are ordinarily final.[9] However, in certain circumstances, as in cases of manipulation, the jurisdiction of the FIFA judicial bodies may apply to annul matches.

Although not solely a football matter, the Court of Arbitration for Sport (TAS/CAS) analyzed those circumstances in the case of Vanderlei Cordeiro de Lima vs. IAAF.[10] It concerned a Brazilian marathon runner who was attacked in the late stages of the event by a non-participant while leading the Athens 2004 Olympic marathon. On behalf of him, the Brazilian Athletics Federation requested that an extra gold medal be awarded to him and posed the question of under what circumstances it may be reasonable for the Court of Arbitration for Sport to retrospectively alter the results of sports events.

Notwithstanding the CAS arbitration panel's denial of the athlete's appeal, the decision was very instructive in examining at some length the limits of the circumstances in which a sporting event can be annulled.[11] In this regard, the CAS panel confirmed that it could review a decision in the field of play only if a decision was made in bad faith, e.g., as a consequence of corruption.[12] Otherwise,

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[8] First Disciplinary Commission of STJD, October 6, 2005, Process No. 95/05.

[9] Manipulation is an exception to the theory of factual error and breach of rules in football association. See Borges 2009a, pp. 119–134. See also Hilpert 2010.

[10] See CAS 2004/A/727, V. C. de Lima v/ International Association of Athletics Federations (IAAF), award of September 8, 2005. Over the past few decades, the rights of sport have crystallized into a settled body of Law: the jurisprudence of the CAS, which has come to be known as the *Lex Sportiva*. It has consistently been applied and followed around the world by sport's regulating entities, federations and national associations.

[11] See Hilpert 2007, p. 169.

[12] "Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases mean there must be some evidence of preference for, or prejudice against, a particular team or individual … The Athlete is requesting to be awarded a gold medal. He does not request that such gold medal change the results of the race. To award a gold medal without changing the results of the race is, however, beyond the scope of review of the CAS. Had the appealed decision been taken arbitrarily or in bad faith, the remedy would not have been a change of the announced results, let alone awarding a supplementary gold medal without changing the results of the race. The only available remedy would have been to invalidate the race and order it be rerun. There is no regulatory basis upon which the Panel could award a medal alongside the medal already won by Stefano Baldini."

"the flood gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision."[13]

In addition to disciplinary proceedings before the STJD, Edilson, Danelon, and the gambler, were prosecuted for fraud and conspiracy. On August 20, 2009, however, the 7th Criminal Chamber of São Paulo's Court of Justice ordered the termination of the criminal proceeding. The reason for this was that the conduct of the accused was not typically criminal under applicable Brazilian laws.

The most complex situation concerns the civil proceedings before the ordinary courts. In this regard, the State of São Paulo has prosecuted not only Edílson Pereira de Carvalho, Paulo José Danelon and Nagib Fayad, but also the Brazilian Football Confederation (*Confederação Brasileira de Futebol*/CBF) and the Paulista Football Federation (*Federação Paulista de Futebol*/FPF).

A class action lawsuit has been filed in São Paulo against them all seeking compensation for injuries to fans. Under Brazilian law, a relationship between fans and clubs or sporting governing bodies is considered as being a consumer relationship. The rights of fans as consumers are safeguarded by Law No. 10.671, dated May 15, 2003, widely known as the Fans' Bill of Rights Act (*Estatuto do Torcedor*). It is a vital instrument in Brazilian sports relationships for equating a fan as a consumer, and clubs and sports governing bodies as providers and, as a result, covers almost all problems that may arise from the legal (consumer) relationship between fans and providers of games and championships.[14]

Brazilian society was deeply shocked by the extent of the orchestrated manipulation carried out by the so-called 'whistle mafia,' so the 'Edilson case' has been covered by the Brazilian press for a long time now. Nevertheless, at the time of writing, the Court still has not made a final decision on this issue.

The above discussion examined the consequences of the biggest match-fixing scandal in Brazilian sporting history and its relation to irregular betting. As Brazil has legislation regulating gaming, betting, and manipulation, the following section will focus on Brazilian betting law.

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[13] CAS OG 02/007, Korean Olympic Committee (KOC) v. International Skating Union (ISU), award of February 23, 2002. In para 29 the CAS panel V. C. de Lima v. IAAF specifically refers to the approach taken in KOC v. ISU as is set out in the following passage of that decision: "The jurisprudence of CAS in regard to the issue raised by the application is clear, although the language used to explain such jurisprudence is not always consistent and can be confusing. Thus, different phrases such as 'arbitrary,' 'bad faith,' 'breach of duty,' 'malicious intent,' 'committed a wrong' and 'other actionable wrongs' are used apparently interchangeably, to express the same test (M. v/AIBA, CAS OG 96/006 and Segura v/IAAF, CAS OG 00/013). In the Panel's view, each of those phrases means more than that the decision is wrong or that no sensible person could have reached (it). If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. Viewed in this light, each of those phrases means there must be some evidence of preference for, or prejudice against, a particular team or individual."

[14] See Article 3 of the Fanś Bill of Rights and Articles 3 and 17 of the Consumer Defense Code (Law No. 8.078/1990).

13.3 Overview of the Brazilian Law on Betting and Gaming

13.3.1 Betting in the Domestic Law

Betting and gaming activities were definitively prohibited in Brazil with Decree-Law No. 9.215, of April 30, 1946. By means of such legislation, the last official roulette game was held at 11:00 p.m., on April 30, 1946, at the casino of the Copacabana Palace Hotel, in Rio de Janeiro. The preamble of this Decree-Law reflects the spirit that has generally been adopted in Brazil to ban unauthorized gaming and betting:

> Whereas the repression of gaming and betting is an imperative of the universal conscience; whereas the criminal legislation of all knowledgeable peoples contains provisions aiming at such objective; whereas the moral, legal and religious tradition of the Brazilian people is contrary to the practice and exploitations of gaming and betting…

After a short comeback during the 1990 s and 2000 s due to the "Pelé Law"—legislation which governs sporting activities in Brazil—bingo parlors were definitively closed down in Brazil in 2004 by means of the enactment of a Provisional Measure. Nowadays, the legal framework governing gaming, betting and lotteries in Brazil includes:

(i) The Criminal Contraventions Law (Articles 50 to 58 of Decree-Law No. 3,688/1941);
(ii) Brazilian Civil Code (Articles 814 to 817 of Law No. 10,406/2002);
(iii) Pelé Law (Articles 59 to 81 of Law No. 9,615/1998), which contains Bingo-related provisions;
(iv) Law No. 9,981/2000, which revokes Articles 59 to 81 of Law No. 9,615/1998 closing down bingo parlors.
(v) Federal Constitution, Article 22, clause XX, which provides that the Federal Union has the exclusive authority to legislate on consortiums and draws.
(vi) Binding Precedent (*Súmula Vinculante*) No. 2 of the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*): "All state or district laws or normative acts dealing with consortiums and draws, including bingos and lotteries."[15]

It follows from the above-mentioned legal framework that offline gaming, betting, and lotteries are legal in Brazil solely in the following situations:

(i) The Government Lottery (governed by Decree-Law No. 204/1967 and Law No. 6,717/1979) including the Mega-Sena, Dupla-Sena, Quina, Loteria Federal etc.
(ii) Horse Racing (governed by Law No. 7,291/1984), whereby bets can be placed at racecourses, authorized Jockey Club branches and accredited betting stations, by telephone and online.

[15] Binding Precedent No. 2 of the Brazilian Supreme Federal Court approved on May 30, 2007.

(iii) The new sporting lottery named Timemania (governed by Law No. 11,345/2006, as subsequently amended by Law No. 11,505/2007). As far as permission for the use of their insignias is concerned, sports clubs involved in Timemania receive 22% of the earnings to be allocated to the payment of debts with the Federal Union (FGTS, Social Security and Federal Tax Authorities).

Sport is internally governed and subject to a complex interaction of normative rules, which comprise: (i) playing and administrative rules; (ii) unwritten conventions and values that have developed informally; and, most importantly; (iii) state law. The approach indicated above attempts to show that sport has to pay due respect to mandatory national law, even more if the sport's internal regulatory structure is inconsistent or ineffective. Note that the direct application of national law is determined on a case-by-case basis and, as in the case of online betting and gaming in Brazil, even the application of the law of the land is questionable.

13.3.2 Online Betting in Domestic Law

As far as online betting is concerned, the application of the above-mentioned legal framework within the industry is controversial because there are no specific regulations on this form of betting.[16] Accordingly, a detailed review of Article 50 of the Criminal Contraventions Law is required. In this regard, note that the following is stipulated:

> Article 50. Establishing or exploiting gaming/betting in a public place or place accessible by the public, with or without payment of an entrance ticket:
> Penalty—simple imprisonment of three months to a year and fine … the effects of the conviction being extended to the loss of chattel and decorating objects at the venue.
> Section 1 The penalty is increased by a third, if there are, amongst the employees or those participating in the game, persons under 18.
> Section 2 He/she who is found participating in the game, as a pointer or better, shall be subject to a fine of …
> Section 4 The following places are, for criminal effects, put on a par with publicly accessible places:
>
> a) a private home in which gaming is conducted, where the usual participants are not the household family members;
> b) the hotel or collective household to whose guests or dwellers gaming is offered;
> c) the head offices or premises of a company or association in which gaming is conducted;
> d) the establishment used for the exploitation of gaming, even if such activity is dissimulated.

[16] As per data provided by Crowe Horwath RCS online sports betting worldwide generated around US$ 40 billion or 10.4% of the global gambling industry in 2009.

The main discussion relating to the application of the above-mentioned Article 50 to online betting is over whether the Internet may be considered a public place or one accessible by the public. First of all, it must be ascertained whether the language of Article 50 is sufficiently broad to treat the Internet at least as a place accessible by the public. Second, the Criminal Contraventions Law was established during a period in time in which technology, such as the Internet, was inconceivable.

While Brazilian courts have not yet reviewed this issue, the general feeling in Brazil is certainly one that online gaming and betting does in fact satisfy the requirements established by Article 50 of the Criminal Contraventions Law, especially as it can indeed be considered a place or space accessible by the public (and is indeed probably the most accessible space worldwide). For this reason, it is important that the legislation cited uses the word "place,"[17] which can have several meanings, including space, site, location, etc. and not necessarily the need for a physical space. Given that there was no cyberspace or virtual world in the 1940 s, the general wording of Article 50 appears to mean only physical spaces.

In a lower court decision, CONAR,[18] as a self-regulatory body with non-binding authority to oversee the regularity and ethics of advertisements released in Brazil, suspended the advertising of a web site as well a variety of the online and offline advertising campaigns of a sports betting firm, including television advertisements and football stadium perimeter billboards.[19] According to this decision, the advertising itself was not irregular. However, it would have violated certain provisions of CONAR's Code of Ethics on the grounds that it promoted an offshore betting web site, which Brazilian residents could access and bet, unless such practices were to be considered a criminal contravention in Brazil. This decision was overturned on appeal and the proceedings dismissed because CONAR accepted the argument that Brazilian law does not expressly prohibit online gaming and betting and, therefore, it could not discuss the means used by such industry in advertising. In other words, CONAR failed to establish whether the form of the advertising was appropriate.

In this context, it is important to stress that a change in Brazilian jurisprudence has occurred in recent years. The two highest Brazilian Courts have been recognizing and enforcing foreign judgments awarded to overseas casinos seeking to collect outstanding debts of Brazilian players. Until 2004, the dominant position at the Brazilian Supreme Court was that debts owed by Brazilian residents and arising from gaming and betting activities overseas couldn't be enforced in Brazil due to the violation of Brazilian public policy. With the enactment of Constitutional Amendment No. 45/2004, and the shift in authority from the Supreme Court to the Superior Court of

[17] *Lugar*, in Portuguese.

[18] CONAR = Conselho Nacional de Auto-regulamentação Publicitária.

[19] In the UK alone, for example, betting on the 2010 FIFA World Cup generated more than £1 billion.

Justice,[20] the new trend ascertained is to permit the recovery in Brazil of gaming and betting debts incurred overseas, given that such activities are legal in the jurisdiction where they were conducted and the governing law would be the law of the jurisdiction in which the gaming activity was conducted.[21]

In light of the above, the question to be discussed is whether the concept of someone residing in Brazil and accessing the web site of an online betting entity located in a foreign jurisdiction where gaming and betting are legally permissible, with such entity being duly licensed to carry on its gaming and/or betting activities in such jurisdiction, could also be deemed to be legal and not constitute a criminal contravention in Brazil, thus avoiding any negative consequences deriving from the activity if it were considered illegal in Brazil.

Doubtless, it is easier to apply this to Brazilian residents physically travelling overseas to gamble and bet, than to online gaming and betting, since the Internet provides easy and quick access from the comfort of a persons' home in Brazil and there is a general principle contemplated by Brazilian criminal law that a crime is deemed to have been committed either in the jurisdiction where the action or omission was performed, in whole or in part, and also where the result thereof was or should be produced.[22] In accordance with Article 2 of the Criminal Contraventions Law, Brazilian law is only applicable to criminal contraventions committed in national territory. In this regard, it can be argued that offshore online betting providers may be committing such criminal contraventions in national territory by permitting access by Brazilian residents to their web sites.

It follows from the foregoing that it can be argued, under Brazilian law, that a criminal offense could be considered to be committed by the overseas authorized and licensed betting entity when it permits access to Brazilian residents, especially if the web site, despite being hosted in a foreign jurisdiction that legally permits online gaming and betting, is specifically aimed at the Brazilian market. This is the case if the instructions and other language contained therein are in Portuguese and bets can be placed on Brazilian-related sporting events. Additionally, it is important to say that there are also no express restrictions on advertising of offline or online betting activities in the Criminal Contraventions Law.

As far as poker is concerned, and in order for offline and online poker to escape falling under the scope of a criminal contravention in Brazil, it is imperative that it appears as a game of skill as opposed to a game of luck. Although there are some scholars who argue that poker is a game requiring skill,[23] since it has been ascertained that the skill of the player of this game depends on memorization of the characteristics (number and color) of the face cards appearing during the game and

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[20] *Superior Tribunal de Justiça* (STJ).

[21] See the following precedents: Special Appeal No. 307.104/DF dated February 1, 2005; Special Appeal No. 606.171/CE dated February 15, 2005.

[22] See Article 6 of the Brazilian Criminal Code.

[23] Including an official expert report issued by the Forensic Institute of the Public Security Secretariat of the State of São Paulo (*Instituto de Criminalística da Secretaria de Segurança Pública do Estado de São Paulo*) in 2009.

on the knowledge of the rules and strategy deriving from such functions, the final result of this type of game, however, being random, means that no private gaming operators can set up and provide such services in Brazil due the existing restrictions on the industry. However, the House of Representatives Bill No. 2254/2007 aims to legalize bingo parlors and all forms of e-gaming and e-betting.[24] Such bill provides that parts of the proceeds of such activities are to be destined to the public health system and investment in culture and sport. It is still moving through Congress and may shortly be submitted to the Plenary of the House of Representatives.

13.4 Fans' Bill of Rights Act

If there were a similar scheme of manipulation of sport in Brazil today, the people involved would face a totally different fate from those who got involved with the 'whistle mafia.' The reason is simple. Any kind of manipulation, whether it is through betting and gaming or not, has recently been typified as a crime by Articles 41-C, 41-D, 41-E, 41-F and 41-G of Law No. 12,299 of July 27, 2010. It has amended the Fans' Bill of Rights Act imposing prison sentences of 2–6 years plus a fine for anyone who:

(i) requests or accepts, for one's own benefit or for the benefit of any third party, any economic or non-economic advantage or promise of an advantage in regard to any act or omission intended to change or forge the result of a sports competition (Article 41-C);
(ii) gives or promises to give any economic or non-economic advantage for the purposes of changing or forging the result of a sports competition (Article 41-D);
(iii) promotes or contributes, by any means, to a fraud in the result of any sports competition (Article 41-E);
(iv) sells tickets for a sports event at prices higher than face value (Article 41-F);
(v) supplies, misguides or facilitates the distribution of tickets for sale at prices higher than face value (Article 41-G).

However, as there is no crime and punishment without a previous penal law,[25] those involved in the 'whistle mafia' in 2005 were acquitted in the criminal sphere. Concerning the class action lawsuit filed against Edílson Pereira de Carvalho,

[24] Article 1 of Bill No. 2254/2007: 'This Law deals with the exploitation of probability entertainment throughout the national territory' … Paragraph 1: "For the purposes of this Law, probability entertainment comprises the conducting of games on equipment of virtual rotating figures, or virtual cards or electromechanical rotating figures, or, further, any other virtual or electromechanical means in which the player, in order to win, is required to obtain a specific combination of symbols and/or figures, in a physical environment." In turn, para 2 of such Article provides that the average winning probability should be 70%.

[25] *Nullum crimen, nulla poena sine praevia lege poenali*.

Paulo José Danelon and Nagib Fayad seeking compensation for fans' injuries, it is expected that the state court of São Paulo will decide upon the matter in coming months.

13.5 Conclusion

Apart from the manipulation of sport, which is a crime under Brazilian law as may be seen from the above, the subject matter regarding gaming and betting is still highly controversial in Brazil. The general trend has historically been to prohibit offline and online gaming and betting. Notwithstanding, Bill No. 2254/2007 and favorable decisions like that mentioned above awarded by CONAR on appeal, are good indications that there is indeed space for sustaining the legality of online betting and gaming in Brazil, including in sport.

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Chapter 14
Legal Regulation of Sport and Betting in Bulgaria

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Contents

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14.1 Historical Overview of Gambling in Bulgaria[1]

The first legal rule on gambling in Bulgaria was introduced in 1892 in the then effective Law on the Obligations and Contracts. The rule provided that all obligations which have arisen as the result of a game or a bet were "natural" and, as such, their enforcement could not be sought by way of court proceedings. Four years later gambling was entirely forbidden by the law. In 1923, another attempt for legalization of gambling was made with the enactment of the Law on Imposition of Tax and Fee on the Betting and Entertainment Games, however, five years later the legal ban came into force again. Nevertheless, there is evidence that some forms of gambling activity continued to be practiced mainly in the major Bulgarian cities.

In 1922, for the first time the idea of establishing a state lottery emerged but the adoption of its legal basis and the actual commencement of its activity took significant time and it was not until December 3, 1935, when the Council of Ministers adopted the Decree-Law on the Bulgarian State Lottery and January 3, 1936, when the lottery started functioning. During World War II the activity of the State Lottery was temporarily suspended and ultimately terminated upon the establishment of a communist regime in Bulgaria in the fall of 1944. In 1958, the Presidium of the Parliament adopted a decree under which the State Lottery of the communist state was established.

The Bulgarian Sport Totalizer (BST) was established in 1957 by virtue of the Council of Minister's Decree 18/1957. It was called "sport totalizer" because the funds which were to be generated by its activity were designated to support Bulgarian sport. The BST commenced its activity on May 12, 1957, by offering the game called SPORT TOTO 1. This game required betting on 13 football matches from Bulgarian and foreign football championships. The player guessed the result of the game by indicating "1" for victory of the host team, "2" for victory of the visiting team and "X" for a draw, and then the player filled out the respective signs in 10 columns. Columns having 10, 11, 12 or 13 correct guesses were considered winning and these players participated in the distribution of the funds accumulated for the winnings on a pro rata basis. On December 29, 1957, the game SPORT TOTO 2 started. For this game players were supposed to guess 6 out of 49 numbers. Since September, 1975, drawings of the winning numbers have been broadcast on television. At the same time, a new game for betting on football matches, 10/10, was introduced. This game was similar to the SPORT TOTO 1 game but the players were supposed to guess all 10 matches in order to win.

After the collapse of the socialist system in 1989, the economic changes allowed for private ownership and free economic initiative. This way a lot of

[1] The historical development of gambling in Bulgaria is briefly outlined in the report "Gambling—Promotion and Modern Bulgarian Geography" presented at the scientific conference Development of Gambling in Bulgaria: In search for Highly Effective Decisions held in 2007.

activities and business areas previously controlled by the totalitarian state, became open for penetration by private actors. During the first years of the transitional period from central planned economy, to market economy, gambling was not regulated specifically and, in practice, was equated to all other business activities which could be exercised in accordance with the Law on Commerce enacted in 1991. The first legal document aiming to regulate gambling was the Decree of the Council of Ministers No 9 of May 26, 1993, by virtue of which the Regulations on the Procedure and Conditions for Issuance of Licenses for Organization of Gambling Games were adopted. These Regulations were subject to 8 amendments before the enactment of the first comprehensive piece of law in the field of gambling, namely the Law on Gambling enacted in 1999. This law was further subject to numerous changes and, at the time of writing this chapter there are still many aspects of gambling that are not regulated adequately and discussions for new amendments are constantly being held.

14.2 Current Legal Framework

14.2.1 The Law on Gambling

14.2.1.1 Conditions for Organizing Gambling Games and Eligible Persons

The Law on Gambling sets rules regarding the conditions and the procedure for organizing gambling games and the participation therein, as well as control over these activities. Gambling is defined in Article 2 of Law on Gambling as every game where betting is involved and there is likelihood that either winning will be achieved or the amount of the bet will be lost.

Only natural persons having full legal and factual capacity, and who are not subject to restrictions under the Law on Gambling or other laws, are entitled to take part in gambling games. The Law on Gambling specifies the activities that fall outside this definition despite the fact that they are similar to gambling, such as: sport competitions providing awards for the participants; games of entertaining nature—entertaining gaming facilities, mini football, billiard or ping pong, darts, bowling, paintball and speedball, mini basketball, bridge, backgammon; and others, although they may require betting or it is usually understood that the loosing player must suffer the expenses for the games on condition that the betting and the winning are insignificant.

Under the law, gambling activities may be organized only after obtaining a license from the State Commission for the Gambling (the Commission on Gambling) which is a body affiliated with the Minister of Finances. The Law on Gambling lays down certain requirements for persons who apply for a license. These requirements relate to the person's previous conduct and the history of such person's previous commitment of criminal offences; withdrawal of a license in

the past as a result of organization of gambling activities due to their misconduct; organization of gambling games without license; avoidance of income or any other taxation provided that three years from the entrance into force of the certificate of audit which established the fact of the avoidance have not been passed; insolvency; etc.

The Law on Gambling determines the types of persons who qualify as organizers of gambling games. Such persons may be: (i) Bulgarian commercial companies that meet the requirements of the Law on Gambling; (ii) commercial companies registered in a member state of the European Union (EU) or in any other member state of the European Economic Area (EEA), that meet the requirements of the Law on Gambling; (iii) sole traders, only with respect to games organized through gaming machines; (iv) non-profit legal entities, only with respect to lotteries and raffles for charitable purposes with the exception of political parties; and (v) the state, only in support of sport, culture, health protection, education and social welfare.

Foreigners may become organizers of gambling games through participation in Bulgarian companies only in certain cases enumerated in the Law on Gambling. The latter sets a condition precedent that foreigners must organize gambling games through a Bulgarian company and that such company has purchased or constructed a four star hotel, whereas gambling games are organized in the casino of the hotel. Another condition precedent, which is stated in the alternative in the Law, is for such Bulgarian company to have invested in another activity on the territory of the Republic of Bulgaria within one year following the issuance of the license. The amount of this investment shall not be less than the equivalent in BGN of 10,000,000 USD, and not less than 500 working positions must have been opened in the result of the investment. However, it should be noted that none of the conditions precedent shall apply to foreigners having nationality or registration in a member state of the EU or the EEA.

Bets and winnings for gambling games must be made and paid only in Bulgarian levs. A single exception may be made for games played in casinos only, provided that authorization has been given in advance by the Commission on Gambling. The organizers of gambling games are prohibited from providing loans to the participants in such games save for the cases of payments by credit cards recognized by the organizers.

14.2.1.2 The State Commission on Gambling

The Commission on Gambling is the body in charge. It exercises state control over the gambling games provided for in the Law on Gambling.

The powers of the Commission on Gambling are enumerated in Article 18 of the Law on Gambling. They include the following: (i) granting licenses, rejection of applications for granting licenses and revocation of licenses for organization of gambling games; (ii) adoption of general mandatory rules of the game with respect to the various types of gambling games for which it issues licenses, as well as rules

for the organization of gambling games; (iii) adopting general mandatory technical requirements for the systems of control over the gambling games; (iv) approving mandatory samples of forms and other documents certifying participation in gambling games; (v) approving mandatory samples for accounting of all types of gambling games and mandatory rules regarding the organization of financial control with respect to the conduct of gambling games; (vi) approving rules and systems for data transmission regarding the forming and distribution of winnings; (vii) maintaining registries; (viii) receiving written requests for issuance of the licenses provided for in the Law on Gambling; and (ix) conducting inspections and investigations regarding such requests, and ruling on them by way of motivated decisions that enter in the respective registries; etc.

14.2.1.3 Advertising of Gambling Games

The Law on Gambling prohibits the direct advertising of gambling games through the media. However, it allows for announcement of the procedure that must be used to participate. It also allows for announcement of the conditions for organization of the lottery games, Bingo and Keno, toto and lotto games, betting on the results from sporting events, betting on chance events and for guessing facts and events and the results from them, as well as the broadcasting of the drawings on television.

The wording of the above cited provisions of the law is obviously construed to not affect the advertising of the companies-organizers of gambling games because this practice is quite common in Bulgaria. The lack of legal definition of advertising in the context of the Law on Gambling does not allow for the development of a clear concept for distinguishing the cases where a particular advertisement has to be considered as direct advertising of a gambling game in breach of the prohibition under the Law on Gambling. The failure of the Law on Gambling in this respect has also been recognized in the Report of the Chairman of the Commission on Gambling titled "Problems of the Legal Regulation in the field of Gambling."[2] In the absence of a legal definition of the term "direct advertising" only very clear messages undoubtedly urging the participants to bet might qualify as such advertising. Nevertheless, as far as such messages are hidden, or constitute an integral part of the announcement of the procedure and the way to participate, as well as the conditions for organization of a particular game, it would be practically impossible for someone to prove infringement of the prohibition against direct advertising of gambling games through the media. Therefore, this prohibition is not enforceable in practice.

[2] See the Report of the Chairman of the Commission on Gambling Dimitar Terziev titled Problems of the Legal Regulation in the field of Gambling as presented at the Scientific Conference Development of Gambling in Bulgaria: In search for Highly Effective Decisions held in 2007.

14.2.1.4 Types of Gambling Games

Pursuant to Article 4, para 2 of the Law on Gambling only the gambling games expressly provided therein can be organized or licensed by the Commission on Gambling. Such games are specified in an exhaustive list in Article 36 and include the following; lotteries, raffles, toto, lotto, Bingo and Keno, games using gambling machines and similar facilities, games played on gambling tables in casino and betting on results from sports and chance events. Because the chapter is primarily focused on the link between sport and betting, and not generally on betting, only the legal regulation of betting on the results of sports events will be discussed. In addition, the toto games organized by the state fall within the scope of this chapter because these games are one of the main sources for financing the Bulgarian sport pursuant to the Law on the Physical Education and Sport (the Law on Sports).

Betting on the Results of Sporting Events

The games that require betting on the results of sporting events ("sports betting") are defined as gambling games, where the winning is made dependent on the correct guessing of the results from sporting events, horse races and other events. The winnings must be specified by way of betting coefficients that have been prepared in advance or in accordance with the ratio of the number of the winners, and the amount of the bets, under the share of winnings established in advance. The organizers of sports betting are obliged to present to the Commission on Gambling samples of the forms to be used before they are issued. Such organizers are further obliged to use rules and systems for submitting information for the formation and distribution of the winnings approved by the Commission on Gambling. These systems shall further guarantee the transmission of the necessary data to the information system of the National Revenue Agency[3] under mutually agreed rules before the occurrence of the respective result. The Law on Gambling also specifies the types of sports betting, which may be one-time or periodical—organized for a certain fixed number of sporting events, or with respect to certain periods of time. In case of periodical sports betting there might be unpaid winnings which may be used for the next betting or formation of funds for payment of a jackpot.

Games Organized by the State in Support of Bulgarian Sport

As already mentioned, the state is allowed to organize gambling games only in the pursuit of particular objectives, namely in support of sport, culture, health care, education and social welfare. Article 9, para 1 of the Law on Gambling also

[3] The National Revenue Agency is a state body in charge for the collection and administration of the state taxes and the mandatory social security contributions.

specifies the types of games that may be organized by the state, namely, lotteries, toto and lotto games and betting on the results of sporting events. In practice, the State organizes toto games and sports betting in support of the Bulgarian sport.

Toto and lotto games are defined in Article 39 of the Law on Gambling as gambling games in which the participants bet on one or more competitive combinations of numbers. Numbers are drawn and the participant who correctly guessed the winning numbers or combination of numbers is granted a premium. The latter is calculated based on the possible combinations, the numbers played and the number of the combinations realized, or as a sum that exceeds the amount of the single bet a fixed number of times. The rules on conducting toto and lotto games in all their forms are subject to approval by the Commission on Gambling and must be announced in a suitable manner prior to the first drawing. Regarding the toto and lotto games, the obligation for approval of the rules and systems by the Commission on Gambling, as well as the obligation for guaranteeing the data transmission to the National Revenue Agency, is also applicable. Drawings for the toto and lotto games shall be publicly held in the presence of authorized representatives of the organizer and of the Commission on Gambling, and at least 50 percent of the proceeds shall be distributed among the participants in the form of winning either in cash or in kind. It is the obligation of the organizer to guarantee the receipt of winnings.

Further, the Law on Gambling determines the legal form under which the state may organize the aforementioned games—through state companies affiliated with the Ministry of Finance and through the Bulgarian Sports Totalizer (BST) affiliated with the State Agency for Youth and Sports (the SAYS)—which companies are not commercial companies and where the state is the owner of the entire capital.

14.2.2 Criminal Liability of the Organizers of Illegal Gambling and the Participants in Illegal Gambling

The sanctions provided for in the Law on Gambling for natural persons and legal entities that organize gambling games without having a proper license, are fines and monetary sanctions at an amount ranging from BGN 20,000 to BGN 50,000. The organization of gambling game by natural persons also constitutes a crime under the Criminal Code and is punished with imprisonment, which shall not exceed 3 years or, as alternative a punishment, with a fine from BGN 100 to BGN 300. The same penalties may apply to persons who organize gambling games after obtaining license when the licensed games do not take place in the premises designated for that purpose.

It should be noted that the organizers of an unlicensed gambling game are not the only ones facing criminal liability, in fact, mere participation in such illegal gambling will trigger criminal liability under the Criminal Code. However, such

participation must be on a regular basis and requires that the participant is aware that the gambling has been organized without a license. The penalty for participation in illegal gambling cannot exceed one year of imprisonment and the individual may be alternatively penalized by a fine of between BGN 100 and BGN 300. As is clear, the insignificant amount of the fines envisaged for the persons organizing illegal gambling and its complete disproportion *vis-a-vis* the profits from this activity, have allowed the perpetrators to avail themselves of this alternative and by entering into agreements with the Prosecution Office they have avoided imprisonment by paying a maximum of BGN 300.

It should be further noted that the amounts of the administrative fines for organizing unlicensed gambling games provided for in the Law on Gambling are in compliance with the severity of the offence. However, the enforcement of the administrative penalties was indicated as problematic in the Report of the Chairman of the Commission on Gambling. The report further underlines the absence of similar prohibitions for participation in gambling organized by persons who have not obtained licenses from the Commission on Gambling. It is the opinion of the Chairman of this commission that sanctions against the participants in such gambling must be provided for in the Law on Gambling in order to prevent this conduct from occurring. Therefore, under the currently effective legal regime, participants in illegal gambling may be liable only under the respective provision of the Criminal Code, where the presence of the conditions for this liability must be proven, and even if so proven the sanctions would only result in a maximum fine of BGN 300.

14.3 The Bulgarian Sport Totalizer

In Bulgaria, the practice for the establishment of state companies operating similar to a fund in order to stimulate certain sectors of the economy that are considered important for society, but which for some reasons do not attract serious investments, is already very well established. The legal foundation for such state companies is contained in Article 62, para 3 of the Law on Commerce. This law states that state companies that are not commercial companies under the Law on Commerce may be established by virtue of the law. This means that said state companies are not commercial companies in either of the forms provided for in the Law on Commerce. Therefore, they may be defined as *sui generis* companies, which have to be established by virtue of a special law or by insertion of a special provision for their establishment in the existing laws governing the relationships in the particular sector of the economy. Such companies have already been formed in pursuit of objectives such as environmental protection, as well as in various sectors of the economy and social affairs—all kinds of transport—air, railway and marine, prison activity, etc.

The main functions of the state company, its management structure, financial sources, objectives and other elements, are provided for either in the law itself or

in the law authorizing the Council of Ministers to adopt the statute of the state company where all prerequisites are provided for or further elaborated on the basis of the provisions of the law. As a rule, such state companies do not have registered capital, and normally, they have the obligation to reinvest all profits gained in the course of their business activity for pursuing the objectives for which they have been established.

The BST has been established in the form of a state company under Article 62, para 3 of the Law on Commerce. The requirement that such establishment has to be provided for in the law is satisfied because Section 11 of the Transitional and Concluding Provisions of the Law on Gambling states explicitly that the BST is established having the status of a state company under the cited article, and as a legal entity having its seat in Sofia. Article 9, para 2 of the Law on Gambling authorizes the Council of Ministers to adopt the BST statutes and the Head of the SAYS to appoint its corporate bodies. The BST statute adopted by the Council of Ministers in 2000 determines its structure, way of management, games organized by the BST, its funds, the raising and distribution of the resources and provisions on international cooperation.

Pursuant to its statute, the BST accumulates its funds from the proceeds of the organized gambling games and also from donations, auxiliary and supportive activities and sale of forms. The difference between the proceeds from the gambling games, reduced by the tax charged thereon, and by certain percentages necessary for payment of winnings, for support of the BST activities and for maintaining some internal funds, and increased by the sum of unclaimed winnings, shall be used for support of physical education and sport and for servicing the BST's public obligations. The Head of the SAYS, acting upon proposals by the BST management board, is responsible for the particular distribution of the resources.

On the basis of the distribution schemes proposed by the Head of the SAYS, the use of the income after taxation, and deduction of the expenses and unpaid winnings, shall be approved by the Minister of Finances with respect to the funds directed for support of physical education and sport, and those for maintenance, repairs and establishment of new sports facilities in schools. In the latter case, the Head of the SAYS shall comply with the proposal of the Minister of Education and Science regarding the particular distribution of the funds among schools.

The Law on Sports also contains rules regarding the BST. It specifically empowers the Head of the SAYS to appoint the management bodies of the BST and to submit proposal for adoption of its statutes. Further, the Head of the SAYS is entitled to distribute the funds generated by the BST for the development of physical education and sport in compliance with the national program adopted by the Council of Ministers, as well as to submit for approval to the Minister of Finance the schemes for that distribution.

Article 59b of the Law on Sports determines the objectives for which the resources accumulated as a result of the BST activity may be used, namely: (i) activities of licensed sports organizations, sports clubs and members of licensed sports organizations; (ii) organizing internal championships and international

competitions on the territory of the country, included in the state and international sports calendar; (iii) preparation and participation of Bulgarian sportsmen and sportswomen in European and world championships and Olympic games; (iv) construction, restoration and management of sports sites and facilities and such for social tourism of national importance; and (v) granting monthly premiums for Olympic champions who have terminated their active competition activity.

The particular amounts of the funds designated for the payments of the monthly premiums to the Olympic medalists shall be determined as a percentage of three minimal monthly salaries for the country as the highest achievement shall be taken into account as follows: 100% for the first gold medal from the Olympic Games; 90% for the first silver medal from the Olympic Games; 80% for the first bronze medal from the Olympic Games; and for every next medal from the Olympic Games, 10% of the amount of the premium for the respective medal.

14.4 Latest Developments

The last significant changes in the Law on Gambling took place in 2005 as part of the process of harmonization of the Bulgarian law with the law of the EU and the preparation of the country for full membership. Bulgaria joined the EU on January 1, 2007. The most significant 2005 amendment recognized the right of commercial companies registered in an EU or EEA member state, and further meeting the other requirements of the Law on Gambling, to organize gambling games in Bulgaria. Since then there have been changes affecting mainly the internal organization and the efficiency of the working process of the Commission on Gambling in order to improve its technical and administrative capacity and its level of competence for exercising effective control of gambling in Bulgaria.

Following the accession of Bulgaria to the EU in 2007 public debates have started regarding the weaknesses of the current legal framework and the need for new amendments in the Law on Gambling. The ideas of the Commission on Gambling for future changes in the law have been summarized and presented in the report titled "Problems of the Legal Regulation in the field of Gambling" prepared by its Chairman Dimitar Terziev. Two of the proposed amendments deserve special attention and are separately discussed below: (i) the proposal for introduction of a state monopoly in favor of the BST and the State Lottery, and the respective increase of their revenues, which are used in support of physical education and sport, culture, health care, education and social welfare; and (ii) introduction of a mandatory rule prohibiting participation in gambling games organized via the Internet or via other telecommunication means without authorization by the Commission on Gambling.

14.4.1 Possibilities and Legal Problems for Introduction of State Monopoly in Favor of the BST[4]

Under the currently effective regime the market for organization of toto and lotto games, as well as the one on sports betting, on which the BST operates, are not monopolized by the BST. There are opportunities for entrance of other private companies such as Bulgarian commercial companies and commercial companies registered in a Member State of the EU and members of the EEA provided that they meet the requirements of the Law on Gambling. In practice, the BST currently has one competitor on the national markets both regarding the toto and lotto games and sports betting.

The major company organizing sports betting in Bulgaria is the company Eurofootball. In a decision of the Commission on Protection of Competition, No 822 of September 27, 2007, while examining the competition on the market for sports betting, the members of the Commission concluded that Eurofootball is in direct competition only with the BST organizing the game TOTO-1 where the participants may bet on football matches. In their analysis, Eurofootball's share of this market is qualified as "significant and serious presence." In fact, Eurofootball is quite often indicated publicly as a private monopolist in the market for sports betting. Some members of the BST governing bodies have also stated publicly that in this segment of the national gambling market Eurofootball was always going to enjoy a monopolistic position. According to them, the reason is that Eurofootball has established technical and client networks, unlike the BST. Eurofootball posseses a centralized computer system for processing the drawings, via which the clients are served in the bookmakers' units without any delay, while the BST is still using the system for processing the forms which has been introduced in 1957. The forms have two layers—one for the client and one for the cashier who receives the bet. After that the forms are processed.

In respect to the national market for toto and lotto games, the organization of only one toto-like game resembling those organized by the BST and, therefore, in direct competition within the relevant market, has been licensed to the company Eurobet on July 8, 2005. In the above cited decision of the Commission on the Protection of Competition, whereby the latter gave permission for the acquisition by Eurofootball of shares from Eurobet, the market share of the latter company was determined as minor and insignificant and considering the whole market of gambling services it turned out to be even less than 1%. On the contrary, the presence of the BST on the market of toto and lotto games has been qualified in the decision as enormous and the BST itself as a market leader.

Regardless of this insignificant market share, the very fact that for the first time the factual monopoly of the BST within the market of toto and lotto games has been breached was enough to trigger the battle between the antagonistic interests

[4] See B. Kolev and Tzvetelin Simov, International Encyclopaedia of Laws: Sports Law—Supplement 10 Bulgaria, Wolters Kluwer, Law and Business, 2008.

of the state company, and the representatives and lobbyists for private businessmen in the arena of gambling. Representatives of the BST and members of the Parliament raised their concerns that the BST was placed in an unequal position *vis-à-vis* the private companies due to its obligation to transfer 22 percent of all proceeds of the gambling games to the SAYS in support of Bulgarian sport. This obligation is not applicable with respect to the other participants on the market. The most pessimistic opinions at that time even envisaged BST going bankrupt and financial losses for Bulgarian sport in an amount reaching BGN 20 million because that was the amount of the last contribution of BST at the time. The same amount has been indicated as expected to be received by the SAYS in the National Program for Development of the Physical Education and Sport in the Republic of Bulgaria for the period 2005–2008.

As a result of the above considerations, the BST representatives insisted on establishment of a state monopoly with respect to the organization of toto and lotto games and periodic lotteries to be exercised by the BST as a state company. In support of their claims they also maintained that such state monopoly exists in 23 countries in Europe regardless of whether this existence is as a matter of law or as a matter of fact.

Actually, the BST had enjoyed a monopolistic position for years. This position was not provided for in the law but was successfully maintained by the rigid licensing requirements applied to the potential new participants in the relevant market. As a result, their entrance was rendered practically impossible. However, in 2005, Eurobet took the advantage of the political situation characterized by a lack of clear vision for BST's future just before the new Parliament elections, and succeeded in meeting the requirements, which at that time were either weakened or even abolished.

The newly formed government after the elections also rejected the claims for establishment of a state monopoly as well as the claim for extension of BGN 20 million for modernization of the facilities managed by the BST in order to place the state company on equal footing with its competitors. In order to outweigh the negative competitiveness effect of the BST obligations to finance Bulgarian sport, it was suggested that the same obligations should be extended to the competitors of the state totalizer. However, the outcome of the discussions among the stakeholders is still uncertain and the Law on Gambling has not yet been changed.

According to the Executive Director of the Commission on Gambling at the end of 2006, a decision at a high-political level has been taken which was just the opposite to the claims of the BST representatives for establishment of a state-run monopoly on the toto and lotto games, i.e. full and complete liberalization of the gambling market, and an increase in the tax rates and direction of all the proceeds from gambling activities in support of Bulgarian sport. However, due to opposition against this idea not only on the part of the BST, but also by the other major stakeholder Eurofootball, the draft of the amendments to the Law on Gambling have not been ultimately discussed and voted on in the current Bulgarian Parliament whose members' mandate expired in the beginning of 2009.

In addition to the purely political and factual impediments for the introduction of a state monopoly over the toto and lotto games there are some legal aspects of this issue which have to be examined.

The EU law seems to be in favour of establishment of state monopolies. Section 25 of the Services Directive provides that "Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection." The issue about the establishment and maintenance of state monopolies was specifically mentioned in the report of the European Parliament on May 8, 2008, which stated that "state-run or state-licensed gambling or lottery services will be harmed by competition and will restrict their support mainly to amateur sport."

However, one should recall one of the most important points made in *Gambelli*[5] that a State cannot concurrently incite its citizens to gambling ventures that serve state interests, while also restricting the same services from other prospective operators under the façade of socio-cultural and moral considerations. The Advocate General in *Gambelli* suggested that there may be no overriding reason established for the restrictive regulations in the particular case, as consumer protection and public order could not be served by contradictory actions offering national betting monopolies on one hand, while disallowing the provision of such services by others. Nevertheless, it seems for the time being that member states are free to enforce state monopolies in the field of gambling and justify them by invoking considerations of local significance.

While EU law allows, or at least seems not to threaten for the moment the existence of national state monopolies in the field of gambling, this might not be true under local laws and legal regulations.

The likely establishment of a state monopoly over the toto and lotto games and periodic lotteries would contradict the Constitution of the Republic of Bulgaria. Indeed, the supreme legislative act allows the establishment of a state monopoly over certain economic activities, which may be entrusted to state companies or other legal entities by virtue of the law. The list of said activities is exhaustive because the state monopoly may exist only by way of exception and, therefore, this list cannot be amended or supplemented by the legislator on the latter's discretion.[6] As far as the organization of toto and lotto games and periodic lotteries is not specifically mentioned in Article 18, para 4 of the Constitution, the establishment of such a monopoly will definitely conflict the supreme legislative act.

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[5] C-243/01, Judgment of 06/11/2003, *Gambelli and others*.

[6] In this respect, Decision No 2 of 1996 under constitutional file No 26 of 1995, Decision No 33 of 1998 under constitutional file No 30 of 1998 and Decision No 6 of 2000 under constitutional file No 8 of 2000.

14.4.2 Legal Regulation of the Betting on the Internet

The Law on Gambling does not specifically mention betting on the Internet. However, Article 4 states that only the games provided for therein may be organized and licensed by the Commission on Gambling. The cited decision of the Commission on Protection of Competition also finds the lack of legal regulation of Internet betting as something specific for the Bulgarian gambling market. On the one hand, all companies that legally operate in Bulgaria are restricted from offering their products via the Internet and, on the other hand, no prohibition or mechanisms for control are in place for the participation of persons from Bulgaria in gambling organized via servers located abroad. This fact, in the opinion of the members of the Commission on the Protection of Competition, places the companies legally operating on the gambling market in Bulgaria in a disadvantageous position.

Therefore, any betting that is offered to be made by using the Internet by an organizer who has not obtained a license by the Commission on Gambling is to be considered as an infringement of the Law on Gambling. In practice, a lot of foreign bookmakers are offering on-line betting to Bulgarian citizens and even include matches from the Bulgarian football championship in their drawings. Such companies include Sportingbet, Bet and Win, Bet-at-Home and others. The Commission on Gambling has expressed the opinion that such betting is actually made outside the territory of Bulgaria and this prevents these companies from being controlled and sanctioned by this commission.

On the Bulgarian website of Sportingbet, among the frequently asked questions the following has been published: "I live in a country where betting is illegal. May I bet using Sportingbet?" The answer reads as follows: "Your betting is received and processed by our servers here in London where betting is legal. We have the legal right and a license to receive your bets on a strictly confidential basis. Pursuant to the laws of England a bet is a contract and the contract is concluded at the place where the acceptance is received. Please consult a person who is competent in that field in case any questions arise." Pursuant to Bulgarian law, however, organizing gambling games on the territory of Bulgaria without a license is illegal, and in the case of Internet-based gambling games, both betting and participation are made through telecommunication means, which are located on the territory of Bulgaria, despite the fact that servers that receive and process the bets might be located outside this territory. Without the use of such technical means on the territory of Bulgaria the data transmission to the servers abroad would be absolutely impossible. This is the reason why Bulgarian authorities, and pursuant to the current legal regulation in the Law on Gambling, the organizers of on-line betting who have not obtained the necessary license, will infringe on the provisions of the law.

In his report, the Chairman of the Commission on Gambling opines in favor of explicit legal regulation of gambling activity via the Internet, in order to make the organization of gambling by using the Internet legal, on the condition that certain

strict rules are respected. In this way the Commission on Gambling would be able to exercise control over these games, to guarantee the security of the participants in such games, and to limit the access of minors to this type of gambling. These are the justifications for the proposed introduction of a mandatory rule in the Law on Gambling prohibiting the organization of gambling games through the Internet without a license issued by the Commission on Gambling. The report further states some conditions regarding the servers and the other equipment necessary for organization of gambling games on the Internet—they must be placed on the territory of Bulgaria, and the inspectors of the Commission on Gambling must have access to them and to the information stored therein at any time. In addition, there must be a system ensuring transmission of the data for the bets and the winnings paid to the respective division of the National Revenue Agency. The report recommends the enactment of the legal regulation of the Internet betting in the shortest possible terms in the view of the already detected cases of gambling games on the Internet without authorization from the Commission on Gambling.

The potential legalization of Internet betting would be impossible under the currently effective Law on Gambling. The main legal obstacles for issuance of licenses for gambling and sports betting via the Internet have been summarized in the report "On-line betting" presented by Mario Kosturkov from the General Directorate for Combatting the Organized Crime with the Ministry of Interior at the conference: "Development of the Gambling in Bulgaria: *In search for highly effective decisions*." His comments are discussed below.

- As already mentioned, only natural persons having full legal capacity could be eligible for participation in gambling and the fulfillment of this requirement cannot be controlled by the Commission on Gambling when bets are made by anonymous persons using the global network for participating in on-line betting.
- Article 12, para 3 of the Law on Gambling prohibits betting made through telephone and other telecommunication means that belong to the state, municipal institutions and companies. Internet betting may be organized through telephones and telecommunication means belonging to such institutions and companies and the possibilities for control over their use is quite limited and may even be practically impossible.
- Article 11 of the Law on Gambling provides that gambling games may be organized if bets are made and winnings are paid in Bulgarian levs. The single exception from this rule is in respect to gambling in casinos and only following special authorization granted by the Commission on Gambling. Many of the on-line organizers of betting who attract participants from Bulgaria offer betting in other currencies—mainly in Euros and US dollars.

The necessity for the introduction of legal regulations with respect to betting on Internet is quite visible and compelling. The absence of such regulation and simply making on-line betting illegal apparently will not stop the organizers of that type of gambling from offering their services in Bulgaria. The number of websites offering betting in the Bulgarian language, and also with respect to football matches from the Bulgarian football championships, is constantly increasing.

Significant amounts of money are transferred abroad as a result of this unlawful activity and without being taxed in Bulgaria. Furthermore, Bulgarian citizens participating in on-line betting commit a crime pursuant to the Bulgarian Criminal Code.

On top of that and quite paradoxically, organizers of on-line betting largely advertise their activity through TV commercials. Moreover, one of the biggest bookmakers having an Internet-based business, Sportingbet, has been the sponsor of the football club Spartak Varna and is still sponsoring the football club Slavia Sofia, which players bear its logo on their T-shirts. The Company Bet-at-Home is a sponsor of the Bulgarian Football Union and largely advertises its brand during the various qualification matches played by the Bulgarian national football team, by placing advertising boards, printing its logo on the tickets for the matches and other materials, and showing it on the BFU website.

On-line betting is also suitable for being abused for the purpose of money laundering and for financing criminal groups on the territory of Bulgaria. There have been attempts to limit access to the websites offering gambling services from participants located on the territory of Bulgaria. Websites registered in the .bg domain have faced compulsory de-registration. This was the case with the website www.sportingbet.bg but very soon the company resumed its activity by moving the content of the website to www.bgsportingbet.com.

On the basis of the above considerations, the opinions of the experts from the Commission on Gambling, and the Bulgarian police, have been in support of the following amendments of the Law on Gambling set out below:

1. Introduction of a prohibition for licensing of organizers of gambling games whose legal entities or shares thereof are owned by companies registered in off-shore jurisdictions;
2. Introduction of a requirement for the applicants for organization of gambling games, whether Bulgarian companies, or companies from the EU and EEA, to prove experience in organizing such activity for a period not shorter than 5 yrs prior to the date of filing the application. Some of the proposals for amendments included a requirement for these organizers to have obtained a license for organizing some of the previous types of games under the Law on Gambling and to have organized in practice such games for a period of three years, if they plan to offer on-line betting;
3. Strengthening the requirements for the origin of the money for the investment in gambling activity, which amount should be between BGN 200,000 and 1,000,000;
4. Imposition of restrictions for advertisement of gambling games through broadcasting commercials and increasing the sanctions for breaching the restrictions so imposed. Proposed amendments included a total prohibition on on-line betting;
5. Introduction of requirements for the organizers of on-line gambling to obtain a license from the Commission on Gambling, to place all necessary equipment and facilities for organization of such games on the territory of Bulgaria, and to

provide access to the controlling bodies of the Commission on Gambling at any time, as well as to establish connections with the respective subdivision of the National Revenue Agency for transmission of information regarding the bets made and the winnings paid.

Many of the proposed amendments were severely criticized by representatives of the international companies offering on-line gambling, especially the contemplated requirements for previous experience in other gambling activity, and the requirement for placement of the servers and other technical equipment on the territory of Bulgaria. According to these companies, no company having its business entirely based on-line would invest in offline undertakings driven by the single purpose of being able to offer their on-line services lawfully on the Bulgarian market. The requirement for the transfer of the servers to Bulgaria was also qualified without precedent worldwide and as absolutely inadmissible by the biggest international companies offering on-line gambling.

As a result, although the conclusion of the Chairman of the Commission on Gambling in his report in 2007 was that the legal regulation of the betting on the Internet must be introduced within the shortest possible period of time, as of the time of writing this chapter, i.e. the beginning of 2009, the Law on Gambling still lacks any specific provisions on this matter.

14.5 Taxation of Gambling Services

Organization of gambling games in the context of the Law on Gambling is a service exempted from taxation with VAT under the Law on the Value Added Tax (LVAT). The Law on the Corporate Income Taxation (LCIT) further provides a special regime for taxation of gambling activities. The latter is taxed with the so-called alternative tax. Pursuant to LCIT the gambling activities of toto and lotto games, and betting on sports competitions and chance events, shall be taxed with a tax on gambling activity and the said tax shall be final. The tax basis is determined as the value of the bets made for each game. The tax rate of the tax on gambling activity is 10% of the tax basis. The receipts from auxiliary and subsidiary activities within the meaning of the Gambling Law shall be taxed with alternative tax at the amount of 10% of the value thereof.

At the end of 2007, an attempt was made for amendment of the LCIT, specifically where it deals with the taxation of gambling activity. The proposal was for maintaining the tax rate at 10%, but instead of the value of the bets, this rate would apply to the residual amount after deduction of the amount of the winnings paid. One of the main motives for the proposal of this amendment was the competition of the organizers of gambling games offering on-line betting without a license in breach of other provisions of the Law on Gambling, as well as the fact that they do not pay any taxes in Bulgaria. The idea of the proposal as officially stated was to allow the local and lawfully operating organizers of gambling games to neutralize

this particular unfair advantage from their competitors and to be able to accumulate more significant funds from the Bulgarian participants who would be taxed accordingly by the Bulgarian state. However, such tax regime could be easily abused by declaring formal payments of winnings to persons who have not participated in gambling games just for the purpose of having the tax basis reduced. Such regime would create, therefore, risks for money laundering. Regardless of the soundness of the motives for the proposed amendment it was strongly opposed based on the general negative impact and harmful effect of gambling that do not allow for any beneficial treatment of the persons who are making profits from this activity. In addition, the defenders of the proposal were suspected in lobbying for certain businessmen who would have taken advantage of the amendment. At the end of the day the proposal was not approved.

14.6 Potential New Legal Regime providing for Sports Organizer's Rights on Sports Betting

One revolutionary idea concerning sports betting has recently emerged, first in France, and currently it is becoming a hot topic for debates among the various stakeholders. Most of these stakeholders are united in the Sports Rights Owners Coalition—SROC. Members of SROC are international sports federations like FIFA and UEFA, IAAF, ITF, organizers of very big and popular sporting events such as Wimbledon, Tour du France, Formula 1 and some of the most popular national football leagues such as the English, German and French premier leagues. The members of the SROC initiated Public Consultation on Content Online in the Single Market[7] and called upon the national governments and international treaty organizations, such as the EU, and in particular the European Commission and the European Parliament, to create a regulatory regime for sports betting that allows sport to protect its integrity, and that establishes a fair return to sport for the use of their events and statistics by betting companies. In this respect, the members of SROC supported at the international level the initiative of the French sports organizations that first proclaimed this objective at national level. The idea for establishment of new regulatory regime on sports betting where the organizers of sporting events will be recognized by virtue of the law as the single holder of the rights for betting on such events, and therefore, will be able to license those rights against consideration, resembles the concept of broadcasting rights that are also held either centrally by the sports federation or by each sports club individually. There is a clear rationale behind this idea—it is apparently unfair that the organizers of betting on the results from sporting events, who generate significant

[7] The preliminary comments on the Public Consultation are available at http://ec.europa.eu/avpolicy/docs/other_actions/contributions/sroc_col_en.pdf.

profits from those events, do not contribute in any manner for the development of the sports they are actually using for their business.

In Bulgaria this injustice has not been faced for a long time due to the factual monopoly of the BST on the gambling market and its public obligation to provide a certain amount from its revenues in support of Bulgarian sport. Similar obligations were not provided with respect to private actors who were allowed to offer sports betting under the Law on Gambling. In this way the organizers of sports betting apart from the BST do not make any contributions to Bulgarian sport, moreover, by directly competing with the BST they prevent the latter from accumulating more funds for the support of Bulgarian sport. Despite the discussions in Parliament for enactment of such obligations for all organizers, the Law on Gambling has not yet been amended.

Furthermore, the very existence of the possibility for sports betting could be considered as a potential threat allowing for the manipulation of the results by the organizers or participants in such sporting events. This may cause significant harm to the idea of sport and at the same time sport is not compensated for bearing that risk. The lack of any obligation for the organizers of sports betting to support the Bulgarian sport is further in paradoxical contradiction with the amount of the money circulating as a result of that activity. For instance, according to information from the Commission on Gambling for the year 2006, the single competitor to the BST within the sports betting market, the company Eurofootball, accumulated revenue in the amount of BGN 176,000,000.

For all the above reasons the idea for adoption of a regulatory regime in favor of the sports competition organizers' rights and empowering them to authorize sports betting may be fully supported in Bulgaria as progressive and in line with the most recent international developments in this field. However, such adoption is quite unlikely and absolutely not realistic in view of the status quo in the sports betting market. Even the most compelling amendments of the Law on Gambling cannot find their way through all the lobbies and conflicting interests in the gambling industry in order to become effective law, despite the intensive and continuing debates on the subject. This is a very clear signal that any innovative ideas that may further significantly affect the interests of the current players on the sports betting market are doomed.

This is why the author of this chapter has decided to investigate the currently effective provisions of Bulgarian law in order to find other legal mechanisms through which an organizer of an ongoing sporting event may force an organizer of sports betting to discontinue offering the results from the event for betting.

On the basis of the analysis of the legal regulation on the sports betting in Bulgaria as provided above, it may be concluded that sports betting is a gambling game that is permitted under the law, and that the organizers of this game may organize it after receiving a license from the Commission on Gambling. The state holds the exclusive right to organize gambling games and this is the reason why the organization of such games by other parties requires licensing by the state.

Notwithstanding the possibility that for certain persons, after being licensed by the state in the latter's capacity as holder of the right for organizing gambling

games to provide this service legally on the Bulgarian market, their activity may not result in the infringement of third parties' rights arising from other laws. Such laws may be:

1. The Law on Sports, which creates a special regime for advertising rights held by the sports federations and sports clubs;
2. The Law on Marks and Geographical Indications (The Law on Marks), which should answer the issue of whether the placement of the sports club's name and trademark on the betting forms, as well as their broadcast on the radio and TV for betting purposes, constitute infringement of trademark rights pursuant to the Law on Marks.

14.7 Legal Regulation on the Rights for Advertising Under the Law on Sports and their Infringement by Organizers of Sports Betting

The Law on Sports does not contain an express provision regarding sports betting and does not explicitly provide for any right of the sports federations or sports clubs to forbid the inclusion of sports competitions in which they participate in the drawings of the bookmakers.

Article 13, Section 3 of the Law on Sports entitles sports clubs, after being accepted as members in the respective sports federation, to hold the rights for advertising for TV and radio broadcast of sports competitions organized by them, under the conditions and following procedure determined by the respective sports federation. The concept "rights for advertising" is not defined in the Law on Sports and the case law is also silent on the issue of what kinds of rights are covered by that concept. Obviously, the latter does not encompass the broadcasting of TV commercials during the sports competitions because the TV broadcasters and the other media that have purchased the broadcasting rights are entitled to broadcast such commercials due to the fact that they are the holders of those rights. The possibility for showing commercials during the radio or TV broadcasts of sporting events is the main reason for the broadcasting organizations to invest in such rights. Further, the rights for advertising mentioned in the Law on Sports are obviously something separate from the TV and radio broadcasting rights of sports competitions because they have been separated in the Law on Sports that is, to say that the sale or other form of transfer of the broadcasting rights does not necessarily trigger a transfer of the advertising rights. Therefore, the placement of advertising boards at the stadium would fall within the concept "rights for advertising."

It may be further claimed that broadcasting information via TV, radio or other media, regarding possible participation in sports betting, constitutes advertising of the services offered by the particular organizer of gambling games through the use

of the particular sports competition. This is so because the media provokes the interest in betting on the result of such sporting event.

The term "advertising" is defined in other laws and international treaties and may be used by analogy for the clarification of the meaning of the concept "rights for advertising" as used in the Law on Sports. For instance, such term is defined in the European Convention on Transfrontier Television, as well as the Bulgarian Law on the Radio and Television, as both texts are almost identical. Pursuant to the European Convention on Transfrontier Television, "advertising" means any public announcement in return for payment or similar consideration, or for self-promotional purposes, which is intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea, or to bring about some other effect desired by the advertiser or the broadcaster itself. The definition of advertising in the Law on the Consumer's Protection is "every announcement made in relation to commerce, business or profession aiming to stimulate the realization of goods or services."

An advertising announcement in the context of the above provisions may be presented in different forms in accordance with the type of the media used—video clip, advertising space, billboard, advertising boards, etc. The announcement may also consist only of words. Therefore, announcements shown on TV, radio, Internet or other media, containing information for particular sports competition, the names of the two teams, betting coefficients and the name of the bookmaker where the bet is offered and may be made, constitutes advertising of the services of this bookmaker because its objective is to stimulate such betting. In these circumstances it may be claimed that a case of advertising through the use of sports competition has taken place.

The holder of the rights for advertising is determined in accordance with the rules set forth in the Law on Sports. Identical provisions are provided for with respect to the sports federations. Article 19, para 1, Section 10 reads that "sports federations which have obtained sports license are entitled to: hold the rights for advertising, for TV and radio broadcasting of sports competitions organized by them by providing on contractual basis percentage from the revenues of the sports clubs—participants in the competition." The single possibility for overcoming the ostensible conflict between the provisions of Article 13, attributing these rights to the sports clubs, and Article 19, indicating the sports federations as holders of the very same rights, is by construction of the wording "organized by them." A sports federation holds the rights for advertising with respect to the sports competition organized by that sports federation, while a sports club holds the rights for advertising with respect to the sports competitions organized by that sports club. For example football matches that are included in the official fixtures of the Bulgarian Football Union (BFU) are considered to be organized by the BFU, albeit recognizing the roles of the clubs in the technical organization of their particular matches as hosts. Therefore, the rights of advertising with respect to football matches from the official fixtures, the results of which may be subject to betting, shall belong to the BFU.

These rights have been transferred as part of the package including the TV and radio broadcasting rights to the company SV–RSA, which has currently effective contract for all those rights with the BFU. In the cases where the organizers of sports betting are using football matches, and this use may qualify as advertising, it may be claimed that they need to compensate first the company that holds these rights, and then the economic value of these rights, to be considered for the calculation of the price of the whole package to be sold by the BFU in the future.

In case of printing the information regarding particular sports competition, including the names of the teams, on betting forms, it would be difficult to prove advertising, provided that the participants had already decided to bet when they went to the respective bookmakers unit, and the presence of the names of the teams on the form could not have the same stimulating effect as their TV or radio broadcasting might have had.

14.8 Legal Regulation of the Right of Trademark Under the Law on Marks and its Infringement by Organizers of Gambling Games

Each sports club may register the club's name as a trademark. The definition of trademark is given in Article 9 of the Law on Marks—"Mark is a sign which is capable of distinguishing the goods or services of one person from those of other persons and may be presented graphically. Such signs may be constituted of words including names of persons, letters, numbers, drawings, figures, the form of the product or its package, combinations of colors, signs of sounds or all kinds of combinations of such signs." Therefore, the name of a sports club may fall within the definition of trademark. The infringement of the right of trademark under Article 73, para 1 of the Law on Marks is "the use in the commercial activity of a sign in the context of Article 13 without the consent of the holder." This means that for each sports club whose name is used for sports betting it will be necessary to prove the three elements—(i) presence of a sign meeting the requirements of Article 13, (ii) presence of use and (iii) lack of consent for such a use;

Article 13, para 1, Section 1 of the Law on Marks provides that the right of trademark is consisted of the right of its holder to use it, to dispose of it, and to forbid to third persons without having his/her consent from using a sign that is identical to the mark for goods or services identical to those with respect to which the mark has been registered. It is necessary that the sign used in breach of the right of trademark is identical to the mark that has been registered, and that it is attached to goods and services that are identical to those for which the mark has been registered. Article 73 of the Law on Marks does not require the use of the other person's trademark to be likely to mislead consumers. The fact of the infringement, and the identity of the mark and the goods and services for which it is used, would suffice.

In the case when a party is successful proving the identity and presence of a sign in the context of Article 13, para 1 of the Law on Marks, the second element, that presence should be demonstrated, is the use of such a sign. Article 13, para 2 enumerates in an exhaustive list the cases of use of trademark. The use of the mark in the commercial books and for advertising purposes is included in the list. The forms for betting certify the bet made. Therefore, it may be claimed that they constitute commercial books. Examples of the latter are commercial contracts concluded by companies, invoices, custom's documents, bank documents, orders for payments, etc. The betting form for the organizer of a gambling game evidences the contract with the person who made the bet and such organizer carries out his commercial activity by issuing betting forms. Therefore, betting forms are commercial books and the placement of a mark on them consisting of the name of the particular sports club, should qualify as use of the mark in commercial books.

Broadcasting of information for the particular sports competition and the coefficients of the bets on TV or radio, or via other media, also constitutes advertising as discussed in this chapter. This means that broadcasting of a mark consisting of the name of the sports club for the purpose of offering bets to be made with a given bookmaker, may be considered a use of the mark in commercials which, in turn, would qualify as use in the context of Article 13, para 2 of the Law on Marks.

Pursuant to Article 75, para 1 of the Law on Marks the holder of the right of trademark is entitled to claim compensation for such use.

14.9 Conclusion

In Bulgaria only the forms of gambling explicitly provided for in the Law on Gambling may be organized after obtaining a special license from the State Commission on Gambling, i.e. after authorization granted by the State. Although gambling on the Internet is unlawful under the Bulgarian laws a lot of companies are offering this service on the Bulgarian market without any license. Moreover, such companies are largely advertising their services through different types of media and also by sponsoring football teams and even the Bulgarian Football Union.

Another big problem in the field of gambling has proven to be the disadvantageous position of the Bulgarian Sports Totalizer, which was established to support Bulgarian sport *vis-à-vis* its private competitors. The reason for this is that BST has public obligations, while such are not provided with respect to the private organizers of gambling games. Consequently, less and less revenues are generated by the BST that may be used in support of Bulgarian sport. As an alternative, a special regime for sports competition organizers' rights on sports betting may be introduced similar to such legal developments in France and following the ideas promoted by the SROC. In addition, the current regime for advertising rights and rights of trademark may be used for convincing the organizers of gambling games

that they need to pay to the sports clubs whose competitions they are using in their business. However, both alternatives are mainly theoretical and their realization in practice in Bulgaria is an unlikely development.

Despite the numerous problems that necessitate amendments of the Law on Gambling these amendments have not been among the priorities of the current Bulgarian Parliament whose mandate expires in the summer of 2009.

Chapter 15
Sports Betting in Canada

Garry J. Smith

Contents

15.1 Introduction

Sports betting predated the arrival of Europeans in Canada as First Nation peoples wagered on the outcome of toboggan, snowshoe and canoe races as well as archery, spear throwing and running events. Not only were these contests forms of entertainment for the spectator/bettors, they were also a way to sharpen essential survival skills (Belanger 2006).

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The history of Canadian gambling legislation can be separated into three relatively distinct eras: the colonial period (1497–1867), Confederation to modern times (1867–1969) and gambling expansion (1970–present).

15.2 Colonial Period (1497–1867)

Canada was discovered in 1497 by Giovanni Caboto, an Italian sailing under the British flag; however, shortly thereafter, a French colonizing expedition led by Jacques Cartier established settlements in Canada. Sovereignty over Canada was claimed by England in 1553 despite the existence of "New France" communities. Because the population of early Canada was so sparse and scattered, legislation in general, let alone specific gambling laws was a low priority.

British and French interests collided as a result of fur trade competition and, exacerbated by the Seven Year's War in Europe, hostilities in Canada between English and French colonials culminated with a British victory in the 1759 Plains of Abraham battle. The ensuing Quebec Act (1774) proscribed English criminal law and French civil law, thus initial Canadian gambling legislation was derived from English precedent but applied to Francophones as well. Early gambling legislation centered on the prohibition of dice games, unlawful gaming houses and restricted participation in gambling by certain classes of people (e.g., artificers and servants) (Robinson 1983).

15.3 Confederation to Modern Times

Confederation occurred in 1867, however British gambling law still applied with several new twists, including: (1) lotteries being forbidden because they had fallen into disfavor in England, (2) the concept of amnesty for informers was introduced; to wit, "found ins" at an illegal gaming house could escape a criminal charge by testifying against the house keeper, and (3) the term "wager" was replaced by the word "bet" and the term "betting house" was introduced (Robinson 1983).

The *Indian Act* of 1876 placed First Nations under federal government control for the purpose of their assimilation into the mainstream culture. Harsh measures such as residential schools and the reserve system were designed to break down First Nation traditions. Falling by the wayside in this process, were "historic gaming practices" which the federal government considered to be "illegal and immoral" (Belanger 2006, 38). Most First Nation games as well as any form of wagering by indigenous peoples were outlawed.

In 1892, the first *Criminal Code of Canada* codified existing criminal law, including crimes related to gambling. Criminal Code gambling provisions dealt with definitions of a "common gaming house" and a "common betting house" and listed indictable offences for keeping a "disorderly house" (the term encompassed bawdy, gaming and betting houses); gambling in public conveyances; bookmaking; buying, selling and distributing lottery products; keeping a cock-pit; and

cheating at play (Robinson 1983). Betting on a sports event by itself was not a crime as long as a betting transaction fee was not charged; the activity was however, illegal, if done through a bookmaker.

The following observations can be made about these early gambling provisions: (1) Canadian gambling laws relied heavily on English statutes, some dating back as far as 1541 (Robinson 1983); (2) gambling was clearly seen as a moral issue; and (3) despite official sanctions against gambling, the activity thrived.

After 1892, Canadian gambling legislation remained relatively constant for 75 years. The only changes pertaining to sports betting involved horse racing and occurred in the early 1900s; for example, in 1909–1910 a Special Committee of the House of Commons was established to inquire into the feasibility of legalizing horse race betting. In 1910 on-track betting at incorporated race tracks was permitted. In 1917 an Order-in-Council suspended horse race betting on the grounds that it was incommensurate with the war effort. And in 1920, the suspension of racetrack betting was lifted and the sport re-emerged using a pari-mutuel wagering system (Campbell et al. 2005).

The only legal forms of sports betting in Canada up until the early 1970s were horse racing, friendly wagers on the outcome of popular athletic events such as boxing matches, hockey or football games or on oneself in games of physical skill such as pool, golf, bowling and darts. Although betting on sports with a bookmaker was illegal, it was a commonplace activity among young males in the larger urban centers (Morton 2003).

Sports betting was almost exclusively a male preserve because (1) males had easy access to the public spaces where illegal gambling took place (e.g., pool halls, taverns, barber shops); (2) their interest in sports or race horses, ostensibly gave them a degree of expertise in picking winners (Morton 2003); and (3) sports betting was seen as a test of character; that is, a sphere of activity where valued masculine traits such as decision making, boldness and "coolness" could be displayed (Lyman and Scott 1970; Smith and Paley 2001).

The Irish Sweepstakes was another popular, albeit outlawed, gambling format that involved buying tickets on the results of Irish horse races (prizes often exceeded $100,000), the proceeds of which went to support Irish hospitals. Started in 1930 and run three times annually, the Irish Sweepstakes was in effect, a lottery featuring two draws; round one involved a selection of the fortunate few who moved on to round two whereby the remaining ticket numbers were matched with a horse running in the Irish Sweeps Derby. Prizes were allotted based on the horses' order of finish. Although barred in Canada, Irish Sweepstakes tickets were bought by both males and females and members of all social strata. In 1938 an estimated "one-third of Torontonians bought Irish Sweepstakes tickets, priced between $2.50 and $3.00 each" (Morton 2003, 54). Local distributors sold the contraband tickets smuggled in from Ireland for a commission of two free tickets for every 12 sold (Webb 1968). Ultimately, competition from the growth of international state lotteries caused the demise of the Irish Sweepstakes in the late 1980s.

The Canadian approach to gambling in the first half of the twentieth century was characterized as "unofficial tolerance and official condemnation"

(Morton 2003). This mindset facilitated the practice of sports betting through bookmakers. Illegal sports betting flourished because it was seen as a traditional part of male sporting culture and the police and judiciary generally treated bookmaking as a petty vice that warranted only a minor penalty.

The main opposition to sports betting in this era came from anti-gambling moralists; the wives of players who lost their pay cheques and thus could not support their families; employers who saw sports gambling as a distraction that lowered job productivity; and, for brief periods, the general public, whenever a scandal broke that involved bookmakers bribing police, politicians or public officials (Morton 2003).

15.4 Gambling Expansion

In 1969, an omnibus bill passed in parliament that amended several sections of the *Criminal Code;* including legalizing lottery schemes and permitting charity sponsored gambling under provincial license (Campbell and Smith 1998). These changes led to the establishment of lotteries in every province and territory and a separate federal government lottery whose proceeds helped to underwrite the 1976 Montreal Olympics. By the end of the 1970s, intense competition for lottery dollars spurred provincial lottery corporations to join forces in an effort to remove the federal government from the business.

A second watershed *Criminal Code amendment* in 1985 formalized an agreement between the federal and provincial governments. It stipulated that for abandoning its lottery operations, the federal government would receive $100 million over three years to help fund the 1988 Calgary Winter Olympics and an annual disbursement of $24 million (adjusted annually for inflation) from the provinces based on a proportion of lottery sales. Despite the radical shift from federal to provincial government authority over gambling, there was no public consultation on the matter; indeed, the lotteries bill was expedited through parliament (Osborne 1989; Goldlist and Clements 2008). The 1985 amendment created provincial monopolies over gambling and led to widespread profusion of the activity (Brodeur and Oullet 2004). (Patrick 2000) contended that the 1985 amendment allowed the provinces to purchase their gambling monopolies for a $100 million payment to the federal government.

15.5 History of Legal Canadian Sports Lottery Schemes

Despite these significant amendments to the *Criminal Code* gambling provisions, the law against bookmaking remained intact. However, if run or licensed by a government (federal or provincial), parlay or pool style sports betting was considered a lottery product and thus permissible. A variety of sports lotteries were tried throughout the 1970s and 1980s but failed to attract sufficient public interest.

It was not until 1990 that a workable sports lottery formula was devised. Following is a timeline of the government sanctioned sports lotteries:

- In 1971 Manitoba instituted a short-lived sports pool based on the results of NHL games.
- In 1972 the *Quebec quarte* was launched; to win, the bettor had to choose race horses correctly either in order of finish (higher odds) or in any order (lower odds). This was a pure luck game because neither the horses in the field nor the numbers they wore in the race were known to bettors in advance; in a ten horse field there are 5,040 possible permutations. Like all government sanctioned lottery schemes, the winners' share of net revenues was miserly (48%); track and horse owners received 25%; leaving 27% for Loto-Quebec. This game was dropped after several years because it achieved less than half the projected gross revenues of $1 million per week (Labrosse 1985).
- Loto-Quebec introduced hockey pools in 1981–1982, despite protests from the National Hockey League claiming unauthorized use of the league's copyrighted logo, schedule and team names. The game, which offered one chance in 1,190 of winning $500, lacked public support and was quickly abandoned by Loto-Quebec.
- In the fall of 1982 Loto-Quebec launched *Hockey-Select*, the first game based on predicting the outcome of sporting events. *Hockey-Select* required bettors to forecast the results of thirteen hockey games played during one week, by picking the winning team or tied games. This was a new game to the extent that, in theory, player knowledge could improve one's chances for success. However, since only 45% of the wagering pool was paid out in first, second and third prizes to players who had correctly chosen the results of 11–13 games, the effect of player skill was negligible. *Hockey-Select* was removed from the market in the spring of 1983 after sales dropped to less than $20,000 per week.
- The Canadian Sports Pool Corporation, created by the federal government in the fall of 1983, began offering a game called *Sport Select Baseball* in May, 1984. Plagued by competition from provincial lotteries, objections from the major leagues of baseball and public indifference, the scheme lasted 19 weeks. *Sport Select Baseball* produced only one winner and ran a $45 million deficit (Labrosse 1985).
- In the winter of 1990 the Western Canada Lottery Corporation conducted a ten-week pilot project with a game called *Power Play* which consisted of four separate contests based on the outcomes and scoring statistics of National Hockey League games (Smith 1992). The game was offered in a few strategic locations (major malls in urban centers) and contestants played for free, but could win lottery corporation merchandise such as sports bags, hats and T-shirts. The purpose of the pilot project was to determine the viability of the sports lottery scheme; that is, its appeal to sports fans, the comprehensibility of the format, and to what extent, if any, there was public opposition. These questions were apparently answered satisfactorily as a revised version of *Power Play*, named *Sport Select*, was introduced in October, 1990. Initially, *Sport Select* offered consumers a choice of two games: *Excel* and *Pro-Line. Excel* required players to

pick the winners of 15 NHL games; for making the correct choices winners received $1,000 on a $2 bet. This game proved to be a dismal failure, likely because players soon realized that the odds of successfully completing a 15 game parlay were astronomically higher than the meager payouts warranted. Lagging sales of the *Excel* game caused Western Canada Lottery Corporation officials to terminate the game in March 1991. *Pro-Line* was a more popular sports betting format as players could wager anywhere from $2 to $100 on the results of at least three, and up to six, professional sports events (Smith 1992). At first, only NHL games were listed; however, Canadian and American pro football soon followed and major league baseball became part of the package in April 1991.

- The success of *Pro-Line* in western Canada led other provincial and regional lottery corporations to introduce similar sports betting formats. Over the years new games emerged such as *Over/Under, Point Spread* and *Double Play* and sports such as basketball, soccer, tennis, auto racing and golf were added to the betting menu.

15.6 What Exists Now

Currently, Canadian sports lotteries make up a small portion of provincial government lottery proceeds (for example, in Alberta, sports lottery play accounts for only 8% of all lottery revenues). The market penetration of sports lotteries is limited to the extent that between 2.4 and 6% of the adult population (depending on the province) played a Canadian sports lottery in the previous year and the games attract mainly 18–44 year old males (Canadian Gambling Digest 2003–2004). Based on the most recent Alberta Gaming and Liquor Commission data, Tables 15.1 and 15.2 show player demographics and sports lottery sales trends over the last four years. (These figures are from one province, Alberta; however, it

Table 15.1 Sport lottery player demographics

% of population that has ever played (7%)
Gender of players (male 83%) (female 17%)
Age of players (18–24 = 18%), (25–34 = 27%), (35–44 = 23%), (45–54 = 17%), (55–64 = 5%), (65+ = 2%)

Table 15.2 Sports lottery sales and payout figures (province of Alberta)

Gross sales	% returned as prizes
Fiscal 2002 = $37,422 (millions)	57
Fiscal 2003 = $41,831	57
Fiscal 2004 = $42,189[a]	56
Fiscal 2005 = $32,216[b]	53

[a] *Double Play* game introduced in Feb. 2004

[b] NHL lockout in 2004/2005 decreased betting volume

can reasonably be surmised that sports lottery data from the other provinces is not significantly different.

15.7 Understanding Canadian Sports Lotteries

In analyzing the variables that affect winning or losing in playing Canadian sports lotteries, some background information is provided about how the games are played. Described below are the basic rules for three of the more popular Canadian sports lottery formats:

Pro-Line—players pick anywhere from 3 to 6 games from a game list (available through lottery ticket outlets, daily newspapers or lottery corporation web sites), wagering a minimum of $2 to a maximum of $100 (the maximum bet allowed by some lottery corporations is only $25). For each game played, bettors choose between three possible outcomes; (a) a home team win, (b) a visitor team win or (c) a tie (the definition of a tie varies depending on the sport). The odds for each outcome are posted on the game list and the expected prize amount for a winning bet is shown on the purchased ticket. For example, a successful $10 bet on three games with odds of 2.50, 1.70 and 3.55 would produce a win of $150.90 ($2.50 \times 1.70 \times 3.55 \times 10$). To win, all selections must be correct.

Point Spread—is a two outcome game (either a visiting or home team win against a posted point spread) whereby players can select between two and 12 games. Prizes are awarded for all correct picks or for picking winners in 9 of 10, 10 of 11, 10 of 12 or 11 of 12 games. The prize amount is determined by three factors; the amount bet, the number of games selected and the sport wagered on (the outcomes of hockey and baseball games are seen as easier to predict than either basketball or football games, hence the payout is slightly higher for the latter two sports.

Over/Under—is also a two outcome format (players choose whether the total score of both teams in an individual game will be over or under a posted number) and players choose from two up to ten games. Again, all selections must be correct to win.

Table 15.3 indicates payout ratios for *Point Spread* bets according to the number of games played for baseball or hockey wagers and applies to *Over/Under* bets on two up to ten games.

15.8 Factors Affecting Prize Amounts and the Ability to Predict Game Outcomes

Based on the previously outlined rules, the contents of Table 15.4 demonstrate why the odds against winning these games are so formidable and why sports knowledge is not enough to regularly overcome these unfair odds. In the case of

Table 15.3 Canadian sports lottery payout ratios for two outcome parlay games (*Point Spread and Over/Under)*

2 correct pays 2 × wager
3 correct pays 4 × wager
4 correct pays 8 × wager
5 correct pays 15 × wager
6 correct pays 30 × wager
7 correct pays 50 × wager
8 correct pays 90 × wager
9 correct pays 150 × wager
10 correct pays 200 × wager
11 correct pays 400 × wager
12 correct pays 500 × wager
9/10 correct pays 10 × wager
10/11 correct pays 15 × wager
10/12 correct pays 5 × wager
11/12 correct pays 20 × wager

Table 15.4 Two outcome parlay payouts versus the true odds

# of games bet	Lottery payout	True odds
02	2 to 1	4 to 1
03	4 to 1	8 to 1
04	8 to 1	16 to 1
05	15 to 1	32 to 1
06	30 to 1	64 to 1
07	50 to 1	128 to 1
08	90 to 1	256 to 1
09	150 to 1	512 to 1
10	200 to 1	1,024 to 1

two outcome games (*Point Spread* and *Over/Under*), the payouts are much lower than what the true odds of winning the parlay[1] are. For example, the odds of winning a two-game parlay (in a 50/50 betting proposition) are one in four (1/2 × 1/2), yet the official payout is only twice the wager; in effect, an exorbitant fee is charged on the consumer to play the game. Players face a double bind, in that, the more games they wager on, the less likelihood of successfully completing the parlay and the more the payout diminishes in comparison to the true odds. Table 15.4 contains the standard lottery corporation payouts on various parlay bets in comparison with the true odds of winning the parlay.

In addition to offering one-sided odds, lottery corporations impose payout limitations when the aggregate amount of prizes won on any day exceeds $2 million on *Pro-Line* or $1 million on *Over/Under*. In other words, if the aggregate

[1] A parlay is defined as "a bet on two or more teams whereby any money wagered and won on the first bet is placed on the second bet and, if there are more than two bets, that process is repeated on all bets. If any bet loses, the player gets no return. All bets are placed at the same time" (Reizner and Mendelsohn 1983).

win exceeds these amounts, winners receive a lower than expected pro-rated payout. This arbitrary limit on payouts cushions lottery corporations from excessive losses.

Pro-Line is more complicated to assess because of the three possible game results; game outcomes are weighted according to what lottery corporation odds makers think is their probability of occurrence. For example, a heavy favorite might be listed at odds of 1.10 (which would contribute minimally to the prize payout), whereas a serious underdog, listed at odds of 5.00 would significantly increase the prize payout, and, because ties occur less often than wins do, and are therefore harder to predict, the odds are typically higher on tie games.

The tie possibility in *Pro-Line* provides lottery corporations with a powerful edge over the player, because the odds against successfully completing the parlay increase dramatically. Also, because of the expansive way that ties are defined; for example, a tie in football is any result decided by three points or less, either way; whereas a tie in basketball is any result decided by five points or less, either way. Picking winners against the odds or a point spread is difficult enough by itself, let alone considering the possibility of ties. The three possible outcomes substantially decreases the amount of skill that can be applied to forecasting game results, thus relegating the selection exercise close to the realm of pure luck.

In Nevada sports books a tie game is an actual tie game (not several points either way) and considered a "wash" or a "push," that is, players get their money back. Similarly, when a tie game is part of a parlay bet, the tie game is removed from the parlay without penalty and the success or failure of the bet rests on the outcome of the remaining games (Lang 1992, 21).

15.9 The Role of Skill and Luck in Canadian Sports Lottery Play

One way to comprehend the overwhelming difficulty in succeeding in Canadian sports lottery play is to compare sports lottery payout percentages with other government sanctioned betting formats and other sports gambling outlets such as betting with an illegal bookmaker, a legal sports book in Nevada or an online bookmaker. Payout percentage is the key factor in determining the probability of beating a game in the long run. Payout percentage is the ratio of the amount paid out in prizes compared with the total amount wagered. Listed in Table 15.5 in descending order are the approximate payout percentages of popular Canadian legal gambling formats (the word approximate is used because payout percentages may vary somewhat by region).

As depicted in Table 15.5, all legal gambling formats are weighted against players "beating the house," some, more so than others. Except for raffles and *6/49* lotteries, Canadian sports lotteries keep the highest percentage of dollars wagered. Many of the formats higher on the payout percentage ladder (for example, bingo, electronic machine gambling and some casino games) are pure luck games, while

Table 15.5 Payout percentages of legal gambling formats

Horse racing 80%[a]
Casino games (not including slot machines) 78%[b]
Pull tickets 74%
Video lottery terminals/slot machines 70%
Bingo 65%
Sports lotteries 57%
649 type lotteries 45%
Raffles 43%

[a] In the case of horse racing, straight win, place or show wagers offer better odds than so-called exotic wagers (daily doubles, exactas, trifectas, perfectas, etc.)

[b] In the case of casinos, each game has different odds; for example, certain blackjack, craps, roulette or baccarat bets have a smaller house edge than games such as three card or Caribbean poker

sports betting supposedly allows for an element of skill (it is certainly marketed as if this was the case); however, with lottery corporations retaining 40% or more of the sports wagering dollar, no amount of skill can routinely neutralize the government's advantage. It is important to note that the 40% plus hold percentage is based on sports lottery play over an entire year and does not mean that consumers face these onerous odds on every bet.

The profit margin extracted by Canadian sports lotteries is extreme in comparison to that earned by legal and illegal bookmakers. For example, Nevada's legal sportsbooks make a profit margin of about 5%, while the commission for illegal bookmakers and Internet sports betting operations typically ranges between 5 and 10%. In addition to providing more favorable payout percentages, bookmakers are able to provide client services that are unmatched by government run sports lotteries, such as extending credit, telephone wagering, individual game bets, future and proposition bets. These services, which are valued by sports gamblers, are not offered by government run sports lotteries. Moreover, unlike Canadian sports lotteries, Nevada sportsbooks do not impose arbitrary loss limits to protect their profits.

Ironically, parlay betting in Nevada is considered a "sucker play" for two reasons (Rombola 1984; Mantaris 1991): (1) the poor payout percentages offered compared with individual game bets and (2) the fact that players can win a majority of their picks and still lose; for example, a player who selects four teams correctly in a five-game parlay has an 80% win ratio but still loses the bet. Despite the obvious drawbacks of parlay betting in general, the parlay payout percentages in Nevada are significantly better than those offered by Canadian sports lotteries. Typical parlay bet payouts in Nevada are 6 to 1 on three games, 11 to 1 on four games, 20 to 1 on five games and 500 to 1 on ten games (Mantaris 1991).

Facing Nevada sportsbook odds a player needs to win 52.38% of the time to break even against the standard 11 to 10 odds on individual game bets. A win ratio in the 58–60% range is considered excellent; nevertheless, despite the more

rewarding Nevada odds, the point spreads and betting lines are so precise that even under these circumstances, only a small percentage of those who try, can earn a livelihood through sports betting (Banker and Klein 1986).

15.10 Sports Pools and Fantasy Sports Leagues

Other popular legal sports betting formats in Canada are sports pools and fantasy sports leagues. There are generally two types of sports pools; those licensed by provincial governments and run by charities as a fundraiser and those privately organized. In the first instance, because many tickets or pool sheets are sold, prizes are large, even although the charity takes a hefty bite (usually at least 50%) of the proceeds. Obviously the odds of winning are poor and the games usually entirely luck based. An example of a charity sponsored sports pool is a "Grey Cup" (the Canadian Football League championship game featuring the top teams from the east and west) raffle. Tickets are sold for $2 on the outcome of the game; each ticket lists a score (e.g. west 21 east 14), those with the correct quarter or half-time scores receive lesser prizes and the game winning score a larger prize. Most participants play because of the low cost and to support the charity, and not because they are avid sports fans.

Privately organized pools are legal providing the entire entry fee, funds are paid back to winning bettors and no money is charged as handling or administration fee. Prizes are smaller in these games because there are fewer participants, but the odds of winning are better and there can be an element of skill involved. Typical of these private games are National Football League (NFL) pools and National Hockey League (NHL) play-off drafts: In both instances an entry fee is charged; in an NFL pool players try to pick the winners of each weekend slate of games against a posted point spread, with money paid out to weekly and year-end winners. Participants in an NHL play-off draft select players from amongst the 16 play-off teams (usually 10–12 players each) and the outcome is based on the NHL players scoring statistics. The skill involved is in choosing players that accumulate the most points and in picking players from teams that advance to the final round.

Fantasy sports leagues are a new gambling format, but growing at a rapid rate (Bernhard and Eade 2005). The sports most likely to attract fantasy league wagering are major league baseball, the National Football League (NFL), the National Basketball Association (NBA) and to a lesser extent the National Hockey League (NHL). The Common features of these leagues are (1) a sizable entry fee, (2) a draft, whereby players from the real leagues are selected to make up a participant's fantasy team, (3) a Commissioner to administer the league rules, settle disputes, arrange for league standings to be posted, etc. and (4) access to appropriate technology (e.g., computer, the Internet, cell phone, BlackBerry), as much of the league business is conducted via these media.

Winners are those who accumulate the most points over the professional league season based upon certain statistical categories (for example, in football,

touchdowns, pass receptions, rushing yards and so forth). Most leagues allow for injured players to be replaced and permit player trades.

The primary attractions of fantasy sports leagues as outlined by (Bernhard and Eade 2005) include:

- Role-playing—the opportunity to vicariously participate as the general manager of a professional sports team.
- Intellectual challenge—by knowing which of the many variables to attend to and which to discard, players can display their analytical prowess.
- Social networking—players enjoy the competition, bantering and camaraderie among league members and often develop enduring friendships based on their fantasy league involvement.
- The chance to win money—some leagues have hefty entrance fees and hence offer sizable pots to the winner.

The potential downsides to fantasy sports league participation include: (1) A major commitment of time and money (seasons last for six or more months and devoted players spend hours poring over box scores, watching games on TV and contemplating trade possibilities; activities that can detract from family life and work productivity). (2) While fantasy sports leaguers rarely become problem gamblers, many become jaded about professional sports; for example, showing disdain for underperforming players and (in their minds) biased referees and not caring about the final result of a game, but only the numbers generated by their players.

There is no way of accurately knowing how many Canadians partake in these activities; however, provincial studies of citizens' gambling patterns and behaviors typically show that about 10% of the population report having bet on sports events in the previous year and 2% claim they do it on a weekly basis (Ipsos Reid Public Affairs and Gemini Research 2008). The sports gambler profile from the most recent study in British Columbia is that of a younger (under the age of 35) male, who is somewhat more likely than the average British Columbian to be a problem gambler (Ipsos Reid Public Affairs and Gemini Research 2008).

15.11 Illegal Sports Gambling

15.11.1 Bookmaking

Bookmaking flourishes in the present era of liberalized legal gambling because of a growing public tolerance for minor vices or so-called victim-less crimes and the fact that illegal sports betting offers odds advantages *vis-à-vis* legal sports lotteries, superior service and convenience, and more attractive wagering propositions. Governments face a dilemma in terms of responding to bookmaking; essentially they have three options (prohibit and strictly enforce, prohibit and loosely enforce

or legalize); each choice creates its own set of social and public policy consequences (Smith 1990).

Many Canadian law enforcement agencies have adopted a policy of benign prohibition toward bookmaking because:

- The broad expansion of legal gambling formats has dissolved public moral sanctions against bookmaking and made Canadians largely indifferent to the activity.
- In a time of fiscal cutbacks, law enforcement agencies have placed a lower priority on what are perceived to be minor crimes and this policy has caused a reduction in resources for the vice or morality details that deal with illegal gambling.
- Within the scaled-down vice/morality units, public pressure has dictated that prostitution and child pornography, rather than illegal gambling, be the main investigative targets.
- And, bookmaking investigations are prohibitive because of the unfavorable cost/benefit ratio; that is, the considerable time and manpower required to secure a gambling conviction is unwarranted when the judicial system penalties are so lenient.

Another approach to monitoring illegal gambling in Canada has been the formation of joint forces operations (JFOs). These are units made up of provincial and municipal police (Ontario) or government regulators, Royal Canadian Mounted Police (RCMP) and municipal police (Alberta) that specialize in illegal gambling enforcement. Despite well trained staff and excellent resources (government paid salaries, vehicles, office space, etc.), JFOs are hard pressed to make a dent in bookmaking operations because of the sheer volume of activity; the bookmakers' use of the latest communications technology; and the lack of strong deterrents (rarely is jail time given for illegal gambling offenses). (Harvey 2005) noted that bookmaking brings in mega dollars and estimated that "there are over 1,000 bookmakers operating in Toronto alone." Because of these factors, bookmaking in Canada is a low risk criminal activity.

Despite the seemingly innocuous nature of illegal sports betting, police warn about the adverse side effects of the activity such as *organized crime involvement* (most Canadian bookmakers are "small time guys with only a few clientele; however, if they get too big they will get a call saying you are now working for organized crime—for a slice of the profits the organized crime group will offer protection" Harvey 2005); *loan sharking* problems can occur when a sports gambler who has been extended credit is unable to pay off the debt; getting money to pay the loan shark may lead to committing crimes such as *shoplifting and selling stolen property,* and failure to pay the debt promptly can lead to *assault* and *home invasion.*

A common rationale for a government to legalize a new gambling format is that "it will reduce illegal gambling and will divert illegal gambling revenues into the public purse" (Smith and Wynne 1999, 17). This has not been the case with the introduction of legal sports gambling in Canada, in fact, the opposite has occurred;

bookmaking has proliferated and continues to be associated with organized crime activity that provides working capital allowing diversification into other criminal enterprises as well as legitimate businesses (Rosecrance 1988).

15.11.2 Internet Sports Betting

The Internet was first used by the general public for the business of gambling in 1995, when lottery tickets were sold for the International Lottery in Liechtenstein (Wood and Williams 2007a). Since then, online gambling has become a major international industry featuring over 2,500 Internet web sites and generating an estimated $12 billion in revenue in 2005 (Wood and Williams 2007a). Sports betting accounted for more than half of Internet gambling profits in 2001 (American Gaming Association 2006). Most of the early Internet gambling sites were located offshore in Caribbean and Central American countries and not affiliated with established land-based gambling companies.

Canadian law dictates that only provincial governments and licensed charities can run gambling operations. Provincial governments can operate computer-based lottery schemes (this includes Internet gambling) but cannot license others to do so and cannot take bets from out of province residents unless the other province permits it. Moreover, any gambling format offered on the Internet would have to be legal in Canada, thus eliminating single event sports betting–a popular form of online gambling that is illegal in Canada (Lipton 2002).

At present, it is unclear whether Canadian courts have the legal authority to prosecute offshore Internet sports betting operations that cater to Canadian clients. And, so far, there is no indication that the law is interested in penalizing Canadian sports bettors who utilize online services.

Currently, the Atlantic and British Columbia Lottery Corporations sell lottery products (including Sport Select) online to residents of their provinces. And because horseracing is under federal jurisdiction, Canadian racetracks are allowed to accept bets placed online. A contentious and unresolved issue pertains to certain Canadian First Nation bands serving as hosting sites for all forms of online gambling. Notwithstanding the *Criminal Code* gambling provisions, the Kahnawake First Nation near Montreal, claiming jurisdiction as a "sovereign nation," has been leasing server space to Internet gambling operations since 1999 and making a profit of $2 million annually. Both Canada's Attorney General (Rex and Jackson (2008) and Quebec's Minister of Public Security (Lipton 2002) have called the Kahnawake operation illegal, yet no legal action has been taken. Given the Kahnawake First Nation's success with hosting online gambling, several other First Nations have shown interest in setting up similar operations (Rex and Jackson 2008).

Up until the early 2000s the prevalence of Internet gambling in the general population was well below 2%; however, the most recent Canada-wide estimate is 2.3% (Williams and Wood 2007). Of those who reported gambling on the Internet,

only 6.2% said that sports betting was their preferred game (Wood and Williams 2007b). This is a surprising finding given that Internet sports gambling sites offer much better odds and services (e.g., single event sports betting, proposition bets and higher maximum bets) than the legal Sport Select game discussed earlier, and is legal, whereas betting with a local bookmaker is not. Reasons for this incongruity may include sports bettors (1) not trusting Internet gambling providers; (2) not knowing about the better odds and services offered by online sites; (3) not knowing or caring about Sport Select's inferior odds and services or (4) preferring to play Sport Select because it is legal and offered by a provincial government.

15.12 Future Prospects for Canadian Sports Betting

Ontario gambling advocates (mainly border casino interests and politicians from those regions) are lobbying for single event sports betting. In theory, this proposed change would be welcomed by avid sports bettors because it should result in more appealing betting opportunities and better payouts on winning bets. The difficulty will be in getting provincial governments to provide a betting format that offers fair odds and consumer friendly services (Smith 1990).

Ostensibly, the availability of single event sports betting would bolster border casino attendance by drawing more American players (single event sports betting is illegal in every American state except Nevada) and Canadian players who have become disillusioned with the Sport Select game. Proponents of the idea, estimate that $700 million was wagered online by Canadians last year and that $100 million alone was bet on the Super Bowl in North America (Pearson 2008).

The problem with this proposal is that the *Criminal Code of Canada* would need amending and all provinces would have to agree with the change. This is a tall order given that Canada is already near the gambling saturation point in the minds of many citizens; while perhaps feasible in Ontario border communities, the idea is unlikely to have the same traction in the rest of the country; and there could be objections from Canadian professional sports teams who would want compensation for the use of their logos and schedules.

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Chapter 16
"Sports Betting: Law and Policy." The Regulation of Sports Betting in the Caribbean

J. Tyrone Marcus

Contents

16.1 Introduction

This chapter will examine the regulation of sports betting in the Caribbean from a legal, historical and policy perspective. The chapter will analyse the legislative regulation of sports-related betting as well as the relevant, albeit sparse, case law. The study will highlight the law and policy of Trinidad and Tobago and Jamaica in particular, with references being made to other Caribbean territories by way of comparison.

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This geographical region of the world has become associated with gambling primarily as a result of the wide practice of off shore betting and gaming in Caribbean countries among which the twin-island nations of Antigua and Barbuda stands out. The very expansion of the global sporting industry together with technological advances have added interesting new dimensions to regulating sports betting, including online or Internet gambling. As in many other jurisdictions, football, cricket and horse racing form the nucleus of what is a limited practice of sports betting in the Caribbean.

16.2 The Current Global Sports Betting Climate

> The manipulation of sport through illegal betting undermines its integrity. For most punters, betting on the outcome of sporting events, especially football matches, football being the world's most popular sport, is an innocent and harmless pastime.[1]

Blackshaw's discussion of FIFA's early earning warning system served as a timely reminder of the need for mechanisms to preserve and protect the integrity of sport. Recent allegations of corruption in global sporting events have confirmed that the regulation of betting and the general maintenance of sporting ethics will be a constant battle for regulators. In June 2009, the *Independent* newspaper reported that about a dozen tennis players scheduled to take part in the Wimbledon tennis tournament were placed under scrutiny by tennis authorities following betting irregularities on certain matches.[2] These occurrences reinforce the need for bodies like the Tennis Integrity Unit established between the International Tennis Federation (ITF) and the four Grand Slam tournaments.[3] In August 2009, the Anti-Corruption and Security Unit of the International Cricket Council was called into action to investigate allegations of improper contact between Pakistani cricketers and bookmakers in Sri Lanka.[4] A few months later in early October 2009, the Polish Sports Minister Miroslaw Drzewiecki resigned following allegations of lobbying for the gambling industry, the proposed gambling bill seeking to increase taxes on the gambling business in Poland.[5]

In early 2010, the International Cricket Council (ICC) sent its Anti-Corruption and Security Unit to the Under-19 Cricket World Cup in New Zealand. In particular, ICC spokesperson James Fitzgerald acknowledged the threat of spot-betting, noting that 'potential corruptors look for vulnerable players and officials to

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[1] "Kicking illegal betting out of football: Ian Blackshaw comments on FIFA's early warning system'—January 26, 2010 (*Source*: www.asser.nl) accessed on January 26, 2010.

[2] "Wimbledon Championships on Match-fixing alert" http://www.sports-city.org/news June 18, 2009.

[3] *Ibid*.

[4] Pakistan cleared of bookie claims"—BBC Sport, August 10, 2009.

[5] "Minister quits over casino claims"—BBC, October 5, 2009.

provide inside information or encourage them to under-perform.'[6] The spot-betting (as a form of *sport*-betting) involved smaller details like the number of wides or no-balls bowled in an over or spell or the number of players wearing caps.[7]

In the Caribbean, the most high-profile sporting integrity issues have both involved cricket, one involving billionaire sponsor Sir Allen Stanford and the other, the West Indies middle-order batsman, Marlon Samuels. The Stanford fiasco did not involve sports betting but rather an alleged Ponzi scheme, while the Samuels affair[8] involved allegations of contact with an Indian bookmaker on the eve of a One-Day International match between the West Indies and India in January 2007. Samuels was subsequently banned for two years.

When one further considers the regular occurrence of 'unusual betting patterns' in sport today, it is clear that effective and proper regulation is not only relevant but paramount. Depending on one's location, the issue may be well entrenched or relatively new. The latter reality describes the Caribbean *status quo.*

16.3 History of Gambling and Betting in the Caribbean

Historically, the Caribbean region has been shaped by myriad social, political, economic and religious influences. These have had a significant bearing not only on general societal development, but especially in personal habits and choices. Betting has generally been viewed as a vice to be avoided, since it goes against the universal values of integrity, diligence and sacrifice. The conservative view is that gambling encourages the taking of short-cuts and promotes quick rewards without the requisite investments of hard work and productive hours. This perspective has predominated the West Indian society and continues to influence the degree of participation in gambling up to the present time. These cultural mores are so germane to Caribbean societies that they have already impacted the outcome of betting-related litigation. In the Trinidad and Tobago case *Kearne Govia v. Gambling and Betting Authority and others*,[9] a key consideration in the final outcome of the case was the way that society viewed gambling. The Appeal Court noted as follows:

> The view of the objectors that gambling is contrary to their church's doctrine and thus a sin is not dissimilar from the views of many other denominational churches and indeed other faiths that comprise our cosmopolitan society. Naturally, then, the majority in our society would view the court's countenancing of a betting office immediately adjacent to a church, as a further erosion of our collapsing society … The consideration therefore of the

[6] "ICC lectures under-19 teams on evading corruption" www.cricinfo.com January 16, 2010.

[7] *Ibid.*

[8] Considered below.

[9] Kearne Govia v. Gambling and Betting Authority, Warrick and St.John's Baptist Church—Mag. App. 145 of 2005.

> Church's stance on gambling was therefore a pertinent consideration in assessing the suitability of the premises for use as a betting office.[10]

In the Caribbean, social and moral arguments play a significant role in the regulation of gambling and betting generally and often impact policy-making. The recent Betting, Gaming and Lotteries (Amendment) Act of Jamaica stipulates in Section 63 that licensed premises 'shall be closed to the public on Good Friday, Christmas Day and every Sunday.' Those dates of closure are well established in Jamaica and many parts of the Caribbean as 'holy days' on which activities like gambling could and should not occur. Moorman recounts a similar reality in North America noting that 'historically, almost all forms of gambling were illegal and also viewed as immoral…'[11] Likewise, Smith observed that the 'main opposition to sports betting in this era came from anti-gambling moralists' as he evaluated Canadian sports betting in the twentieth century.[12]

In recounting the history of gambling in Trinidad, Gray notes that 'when the first group of Chinese came to Trinidad as immigrant labourers in 1806, they not only brought their knack for small business… but a traditional numbers gambling game from the Southern Provinces of China. Their numbers gambling game was later modified to suit the traditions and experiences of the Trinidad population and renamed Whe Whe in the then dominant patois language of the island.'[13] Further, playing whe whe was a gambling offence which was caught by Ordinance 6 of 1868 under the sections that addressed all games of chance.[14] Gray also notes the irony and/or hypocrisy of a strong anti-gambling stance in the late nineteenth century by the elite of society, while horse racing, on the other hand, was not only legal, but also supported and organised by the very elite.[15]

It is indeed axiomatic that one of the sports most closely related to betting and gambling is horse racing. Trinidad and Tobago saw one of its first formal racing meets under the auspices of the Trinidad Turf Club on October 27, 1828. Cozier notes that although 'the meeting in 1828 heralded the beginning of the organised era, match races had been taking place from as early as the late eighteenth century even before the British occupation of 1797. The French plantocracy kept horses specifically for festive occasions when they were matched against each other particularly on Paradise Pastures in the south.'[16] Cozier adds that on that historic day in 1828, the second race, the Trinidad Turf Club Cup, was won by a horse

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[10] *Ibid*., at pp. 10–11.

[11] "Gambling and Professional Athletics"—Anita Moorman, The International Sports Law Journal 2009/1–2, p. 90.

[12] "Sports Betting in Canada"—Garry J. Smith—The International Sports Law Journal 2009/1–2, p. 106.

[13] "History of the Game"—Christopher Gray, Trinidad Guardian newspaper, May 26, 1990 at p. 8.

[14] *Ibid*.

[15] *Ibid*.

[16] "The History of Horse Racing in Trinidad and Tobago"—John Derek Cozier.

called Independence 'despite strong favouritism for Marigold indicated by *numerous bets* of Marigold against the field'[17] [emphasis added]. Betting on horse racing evidently had an early start in Trinidad.

A similar story is told on the island of St. Croix in the US Virgin Islands. Malec observes that 'organized horse racing has existed on St. Croix since the late 1800s.'[18] In describing the social role of sport in national rebuilding after the destruction of Hurricane Hugo there in September 1989, Malec makes the pertinent observation that one reason why 'horse racing best serves this idea of a socio-emotional function is the added element of gambling…'[19] He recounts the views of Loy, Mc Pherson and Kenyon that people gamble in order 'to escape the boredom of a routine life, to relieve societally induced tensions, to strive for social mobility by winning money, and to indicate to themselves and others that they can regulate and control their destiny. The horse races and the element of gambling allow for all these needs to be met.'[20] These views to some degree represent an unorthodox approach to gambling in the Caribbean, whose society, more often than not, holds conservative views on key social issues.

Horse racing in Barbados has a history of over 150 years, with racing at the Garrison dating 'back to the 1840s when the dashing British Cavalry raced against the local plantocracy for the bragging honours.'[21] Today, the marquee event in the horse racing calendar in Barbados is the Sandy Lane Gold Cup Festival at which all betting 'is on the tote with Trifecta and Superfecta betting combinations available.'[22] The Barbados Turf Club, founded in 1905, administers and promotes racing in Barbados.[23] In assessing the history of football in the Caribbean, Ferguson believes that 'football-in an organized form-arrived in the Caribbean in the last decade of the nineteenth century with the British.'[24] Unlike horse racing, there was no inherent relationship with gambling and this was perhaps partly due to the fact that in the early twentieth century, football was 'exclusively amateur and largely run by schoolmasters, churchmen and local philanthropists.'[25]

It is nevertheless, a bit surprising that the practice and scope of gambling in the Caribbean is not greater given its geographical proximity to the Americas, in particular Central and South America. Cuba, the Dominican Republic and Puerto Rico sometimes carry an uncertain geographical status, sometimes being considered Latin American nations and at other times, being labeled as Caribbean territories. Craig notes that 'Latin America also included in its list of traditional

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[17] *Ibid.*

[18] "The Social Roles of Sport in Caribbean Societies"—Michael A. Malec, at p. 246.

[19] *Ibid.*

[20] *Ibid.*

[21] "Sporting Barbados"—2006 Edition at p. 66.

[22] "Sporting Barbados"—2008 Edition at p. 60.

[23] "Sporting Barbados"—2009 Edition at p. 98.

[24] "World Class: An illustrated history of Caribbean football"—James Ferguson, at p. 31.

[25] *Ibid.*

sports and games a number of varieties of ball games, a strong affinity for the bow and arrow, pockets of intensive wrestling, and an affinity for gambling-oriented games.'[26] Notably, Craig juxtaposes the gambling cultures of Latin and South America (where Guyana is located, although it is considered a Caribbean nation) adding that while, historically, gambling was widely practiced by Latin Americans, by contrast, many South American tribes did not 'seem to have had any interest in gambling, nor did they practice the rudimentary play with dice or lots that is extremely common throughout the world.'[27] It was more likely that games of chance would take place, but even this was limited to the societies that were more advanced, like the Mayans and the Aztecs in Central America or the Incas in South America.[28] For this reason, Craig concludes that for large sections of South America, 'it appears that gambling was nonexistent or at least has gone undetected in terms of traditional play.'[29]

Undetected gambling seems to aptly describe the general position in the Caribbean even today. It will be discovered during this chapter that 'informal gambling' tends to characterise the practice of many inhabitants especially as it relates to sport. Should law enforcement agencies decide to increase its vigilance in policing betting and gaming in the Caribbean, it would not be surprising if many offences, albeit minor ones, are being committed across the region on a consistent basis. Perhaps the Caribbean authorities share Moorman's view that 'informal gambling or wagering is acceptable provided that the primary purpose is the playing of the game for enjoyment, not for financial gain.'[30]

16.4 The Policy Framework and Regulatory Climate in the Caribbean

> In order to ensure that the conduct of betting, gaming and lotteries is fair and free from criminal influence, the Betting, Gaming and Lotteries Commission has made several recommendations to the Government regarding measures aimed at strengthening the regulatory framework and rules governing the operations of licensees under the Betting, Gaming and Lotteries Act.[31]

Caribbean governments have approached gambling and betting in a way that reflects society's views on the practice. Budgets seldom speak on this issue and

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[26] "Sports and Games of The Ancients"—Steve Craig, at p. 115.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

[30] "Gambling and Professional Athletics"—Anita Moorman—The International Sports Law Journal 2009/1–2, 90 at p. 96.

[31] "Betting, Gaming and Lotteries (Amendment) Act, 2009—Memorandum of Objects and Reasons"—Audley Shaw, Minister of Finance and the Public Service, Jamaica.

most public discussions tend to discourage any form of gambling. Across the region, various commissions have been established to regulate gambling. In Jamaica, the Betting and Gaming Lotteries Commission has been mandated, in conjunction with other stakeholders, to develop a long-term structural plan that will see, *inter alia*, the introduction of telephone and internet betting. The backdrop of the recent policy initiatives in that country was the need to strengthen the regulatory landscape of betting and gambling. The end product was the Betting and Gaming Lotteries (Amendment) Act, 2009. The above quoted Memorandum of Objects and Reasons not only highlights the social concern of immunisation from criminal influences, but also presents the economic motivation behind the legislative amendments in Jamaica. The memorandum adds that the new gaming and wagering measures are 'expected to bolster the betting and gaming industry by enabling licensees to respond rapidly and effectively to technological and consumer-led development, which will enhance the contribution of the industry to the Jamaican economy, while protecting the interests of the public.'[32] As is often the case in the sporting industry, competing interests must be balanced, the same being true for Jamaica.

Zagaris notes that 'virtually all jurisdictions in the Caribbean permit various types of gaming' with many Caribbean gaming laws following British law. He adds that many 'require reconsideration for the purpose of modernization.'[33] These prophetic comments have been heeded in some Caribbean territories.[34] In Jamaica, the regulatory environment is a strong one consisting primarily of the Jamaica Racing Commission and the Betting Gaming and Lotteries Commission. In Trinidad and Tobago, a Racing Authority exists, which is specific to horse racing, and which was established by the Trinidad and Tobago Racing Authority Act Chapter 21:50, while the duties of the Betting Levy Board, a body corporate established under the Betting Levy Board Act No. 35 of 1989, are equally limited in scope. Under Section 9 of the Betting Levy Board Act, the Board is 'responsible for the development and improvement of every aspect of horse and dog racing, including the breeding of race horses and dogs and the provision of benefits for jockeys and stable lads.' The broad language used does not disclose how much of a regulatory function that Board was meant to assume with regard to betting practices. It appears that the focus of the Board's functions is the collection of taxes, duties and fees payable to it under the Gambling and Betting Act.[35]

As far as lotteries are concerned, the National Lotteries Control Board was established under the National Lotteries Act of 1968, which was later amended by

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[32] *Ibid.*

[33] Excerpt from "Selected Developments in Latin America and the Caribbean in Anti-Money Laundering"—Bruce Zagaris, Paper presented to the Fourth International Money Laundering Conference, April 22–23, 1999, Miami Beach Florida.

[34] Discussed at Section 5, *infra*.

[35] Section 9, Betting Levy Board Act No. 35 of 1989.

the 2006 National Lotteries (Amendment) Act. Section 9 of that Act states that notwithstanding 'any other written law respecting gambling, betting or lotteries, the Board may carry on the business of promoting, organising and conducting national lotteries…' The only noteworthy connection between sport and the lottery system in Trinidad and Tobago appears to be the stipulation in Section 23A that an instant lottery surplus must be paid into the Sport and Culture Fund established under Section 3 of the Sport and Culture Fund Act No. 31 of 1988. Although Section 4 of the Sport and Culture Fund Act mentions the undertaking of 'any other activity related to Sport or Culture' as one of the purposes of the Fund, it is safe to conclude that the regulation of sports betting was not part of Parliament's intent in 1988.

In the Bahamas, one of the regulatory bodies is the Gaming Board for the Bahamas, established under the Lotteries and Gaming Act Chapter 387, while horse racing is regulated by the Racing Commission established under the Racecourse Betting Act Chapter 386. The Racing Commission has been given a wide advisory function with regard to 'all matters connected with racing and betting on racecourses within The Bahamas.'[36] Although the Bahamas passed a Sports Act that took effect in 1964, there is no mention of sports betting in the Act. Once again, horse racing remains the focal point of betting regulation.

In Antigua and Barbuda, the Commissioner of Inland Revenue plays the major regulatory role as stipulated in the Betting and Gaming Act Chapter 47. This resembles the position that existed in Trinidad and Tobago in the early 1960s when the Chief Magistrate exercised the function of the Licensing Authority for the purposes of granting betting licences and permits. The Betting and Gaming Act in Antigua, like in Trinidad and Tobago was passed in 1963. The scope of the Act was also limited to games of chance whose definition, like most others in the Caribbean that define 'games of chance,' elucidated that such games do 'not include any athletic game or sport.'

The 1902 Gambling Prevention Act of Guyana is one of the regional statutes that does not define 'game of chance,' although it does state that gambling means 'to play at or engage in any game of chance, or pretended game of chance, for money or money's worth.' The most notable feature of the Guyanese legislation is the role played by the Demerara Turf Club. Section 21(1) of the Act states, *inter alia,* that 'it shall be lawful for the Demerara Turf Club Limited (hereinafter referred to as "the Club") to organise and conduct a lottery or sweepstake in connection with any race meeting held under the auspices of the Club or under the auspices of any racing club or association affiliated thereto or in connection with any race run in England under Jockey Club Rules or National Hunt Rules.'

The exemptions made for the Demerara Turf Club reflect the reality of sports betting in the Caribbean where, outside of horse racing and more recently dog racing, very little is said from a legislative viewpoint. Likewise, at the level of

[36] Section 4(a), The Racecourse Betting Act Chapter 386.

sports bodies, a similar dearth of policy directives exists as is evident in the conspicuous absence of sporting integrity provisions in governance documents of many national sporting organizations through the region.

16.5 The Legislative Landscape

There is a vast, but old body of legislation in the Caribbean dealing with gambling and betting. Such is the antiquity of some of these regional statutes that in more than one jurisdiction, legislative amendments are either currently being proposed or have already been enacted. In this section, the legislative framework for betting in Jamaica and Trinidad and Tobago will be featured, with comparisons being made to other Caribbean territories.

16.5.1 Jamaica

Historically, gambling in Jamaica was governed by the Betting, Gaming and Lotteries Act. The Casino Gambling Act was scheduled to be passed at the beginning of 2010, with the goal of governing casino gambling. Its enactment is not expected to have any direct bearing on sports betting in Jamaica. It is the Betting, Gaming and Lotteries (Amendment) Act, 2009 (hereinafter the '2009 Amendment Act'), however, which has changed the landscape of sports betting in Jamaica.

In conjunction with the Provisional Collection of Tax (Betting, Gaming and Lotteries) Order, 2009, the Amendment Act introduces a pool betting duty and a sports betting tax. 'Sports betting' has been defined as 'the making of a wager on the outcome of a sports event.'[37] The Act also defines 'online betting' as 'betting by electronic means including any form of betting via telephone or the Internet or such other communication system approved by the Commission,' while 'electronic betting' refers to 'betting using a telecommunications network, using either a telephone line, the Internet, a mobile phone or other means approved by the Commission.' The Commission mentioned in these definitions is the Betting, Gaming and lotteries Commission. With the introduction of clear provisions on sports betting, a corresponding sports betting tax has also been imposed at a rate of 7% of gross profit accruing to an operator.[38]

When the Jamaican Cabinet gave its approval in September 2009 for the amendment of the Betting Gaming and Lotteries Act (hereinafter 'the Betting Act') to introduce sports betting and the payment of a sports betting tax,

[37] The Provisional Collection of Tax (Betting, Gaming and Lotteries) Order, 2009-amendment to Section 2 of the Betting, Gaming and Lotteries Act.

[38] *Ibid*., amendment to Section 33.

it was envisioned that overseas sports betting would be embraced.[39] As a result, betting could now take place on popular global sports like the various European football competitions and the National Basketball Association (NBA) in the United States of America.[40] Notably, the 2009 Amendment Act has broadened the definition of a 'racing promoter' to mean 'a person who with the approval of the (a) Jamaica Racing Commission, promotes horse-racing or racing of any approved species of animal at an approved racecourse; (b) Betting, Gaming and Lotteries Commission, accepts bets on *approved sports betting activities*' [emphasis added]. The 2009 Amendment Act therefore envisages sports betting activities that have been approved. This is a clear and bold step towards legalising betting on the outcome of sports events in a way that did not previously exist.

In like manner, Section 25 of the 2009 Amendment Act regulates the setting up of a totalisator on specified premises, where the operation of the said totalisator shall only be for betting transactions on, *inter alia*, sports betting activities approved by the Commission. The legislative intent is therefore clear: betting on sports is lawful once the requisite Commission approval has been granted.

As a means of generating more revenue for the Jamaican economy, the aforementioned 7% sports betting tax was introduced by the 2009 Amendment Act. According to Section 33(3) the tax 'shall be applicable to any bet made by a bettor (a) with a bookmaker (b) with a non-promoter of pool betting under Section 31A or (c) by means of a totalisator on an approved racecourse, licensed track or other premises approved by the Commission.' As such, there is wide applicability of the sports betting tax, confirming the economic policy motivation behind the introduction of the duty. As a country that has a strong tourism sector especially in Western Jamaica in places like Montego Bay, the new face of sports betting is destined to reap rewards for that nation.

16.5.2 Trinidad and Tobago

Gambling in Trinidad and Tobago is primarily regulated by the Gambling and Betting Act of 1963[41] ('The Gambling Act'). The Act has undergone many subsequent amendments between 1973 and 1997. Although the legislative draftsmen did not include the term 'Lotteries' in the Short Title to the original Gambling Act, lotteries are also governed by this legislation.

Section 27(1) of the Gambling Act contains a general prohibition on the use of premises for betting with a penalty of TT$2500 (approximately US$600/€250) or 12 months' imprisonment. Notably, there is a presumption that someone found on

[39] "Jamaica Cabinet approves sports betting amendment"-Caribbean Net News-September 11, 2009.

[40] *Ibid.*

[41] Chapter 11:19 of the Laws of Trinidad and Tobago.

premises being used for betting transactions, was there for such a purpose. Another general prohibition exists on receiving bets, negotiating bets or conducting pool betting operations. Of particular relevance to the sports betting context is the role of the foreign pool operator who is defined in Section 26 as 'an agent or representative of a principal who, in his own right and not as agent of another, carries on pool betting business in respect of football pools, outside of Trinidad and Tobago.' The Act qualifies this provision in Section 29(5) by adding that a 'betting office licence granted to a foreign pools operator entitles that person to carry on pool betting business as a foreign pools operator only' so that such a person cannot assume that he can conduct pool betting business locally if the requisite authorisation has not been granted. Further, 'football pools' is itself defined in Section 26 as 'any pool betting that is effected on or by way of the result of football matches wherever played.'

Evidently, betting on local football in Trinidad and Tobago is sporadic, as compared to a greater incidence of betting on both European and international football especially in World Cup years. Serac noted that the ICC's Cricket World Cup, hosted in the West Indies in 2007, struggled to keep pace with the extent of betting that occurred during the FIFA World Cup in Germany the year before. In 2007 she noted: 'Local bookies are not too ecstatic either about the ICC CWC and recall better days for last year's FIFA World Cup in Germany. A local bookmaker said CWC betting in Trinidad represents ten per cent of the activity during World Cup tournament.'[42] Under the rules of the Trinidad and Tobago Professional Football League (TT Pro League), the Code of Conduct for Managers simply states that a manager 'shall conduct himself at all times in an ethical and professional manner and shall observe the highest standards of integrity and fair dealing.'[43] This broad mandate does not reveal whether betting integrity issues were envisaged and it is unlikely that they were, given the paucity of local football betting incidents.

The third schedule to the Gambling Act regulates the conduct of pool betting business by stating that a holder of a betting licence must comply with certain requirements. One such stipulation is that the pool betting 'shall take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events, the bets being entries in the competitions and the winnings in respect of the bets being the prizes or share in the prizes.' The goal of the provision is to restrict betting on sports to the context of prize promotions. This leaves little room for profit-making, which appears to be neither the intent nor the reality of sports betting in Trinidad and Tobago.

Surprisingly, one of the older pieces of legislation in Trinidad and Tobago is relevant to sports betting. The 1934 Boxing Control Act, another Act poised for

[42] "A Gambler's Gloom"—Stephanie Serac, Trinidad Guardian newspaper—April 18, 2007, at p. 35.

[43] Appendix 1, Rule N 1.1, Clause 8.

amendment, almost incidentally mentions betting in Section 24 of Part 1 of the Schedule to the Act, stating that:

> No betting shall take place during the progress of any boxing contest and any member of the Board may request the removal of any person offending in this manner and his request must be complied with by the promoter of the contest.

The Act therefore gives the power to physically remove someone found betting during the course of a boxing match. There is little evidence to indicate how often this provision has been invoked over the course of the 76-year existence of the Act.

16.5.2.1 The Controversy Surrounding the National Tote System

> Private betting shops would either have to close or join the National Tote System…[44]

These were the two options that the then Trade Minister of Trinidad and Tobago, Mervyn Assam, gave to the owners of private betting shops in 1998. The context was a move by the government to nationalise horse racing by establishing a National Racing Commission to operate the National Tote System established under the 1995 Finance Act.[45] The Trade Minister saw the move as one that would facilitate job creation through the opening of more betting shops, while private betting shop owners viewed it as a conduit for unemployment.

In addressing the House of Representatives in November 1999 during the Parliamentary debates on the Gambling and Betting (Amendment) (No. 2) Bill and the National Racing Commission (No. 2) Bill, Minister Assam observed that 'most countries of the world, in order to have a vibrant horse-racing and dog-racing industry have gone this way. They have established national tote systems. Among the countries that have gone this way…are France, Italy, Canada, Hong Kong, Singapore, Australia, Venezuela, Mexico, Argentina, Chile, Germany, United States of America, India, Japan, Malaysia, New Zealand, Puerto Rico, Panama and Brazil.'[46] The goal was to create, through the national tote system, a centralised mechanism for administering horse and dog racing in Trinidad and Tobago. Opponents of the move expressed the concern that the function of the Turf Clubs would be compromised and that the closest stakeholders, mainly in the private sector, would ultimately suffer by losing control of the sport of horse racing.

Evidently, both the National Racing Commission Bill and the Gambling and Betting Amendment Bill lapsed. However, the issues ventilated were instructive and will form a useful springboard for future policy and/or legislative amendments in relation to horse racing in Trinidad and Tobago.

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[44] "Assam sounds warning-Private betting shops fall under NTS"—Kathleen Maharaj, Trinidad Express newspapers—January 7, 1998 at p. 2.

[45] *Ibid.*

[46] Hansard-Racing Commission—November 19, 1999.

16.5.3 Belize

The Gambling Prevention Act Chapter 109 is the main legislative instrument in Belize to regulate betting and gambling. The very name of the Act tells a story about that government's policy. Additionally, Belize has passed a Gaming Control Act, which imposes a gaming tax, a Computer Wagering Licensing Act and a Lotteries Control Act. The Sports Act which reflects the law in Belize as at December 31, 2000, does not mention betting but may still have some regulatory relevance based on the broad wording of Section 25 which states as follows:

> The Minister may from time to time order all or any of the activities of the Council, sports committee or a sporting organisation to be investigated and reported on by a person or person as he may specify and upon such order being made by the Council, sports committee or sporting organisation shall afford all facilities and furnish all information as the person or persons may require, to carry out every such order.

Investigative powers are always a powerful regulatory tool, so that the Sports Act may have inadvertently given the jurisdiction to the authorities in Belize to monitor sports betting even outside of the more specific gambling laws.

16.5.3.1 Defining Gambling

In Belize, the Gambling Prevention Act defines 'gamble' as follows: 'to play at or to engage in any game of chance or pretended game of chance, for money or money's worth.' This definition mirrors that in Guyana, where a 'game of chance' is not defined. However, based on the fact that so many of the statutes in the Caribbean follow the British model and contain language similar to each other, it is reasonable to assume that in Belize, games of chance do not include athletic games or sports. Owners or occupiers of 'common gaming houses' are liable to fine and imprisonment, albeit minor penalties (fines range from $250.00 to $500.00 and imprisonment ranges from 3–6 months). One pertinent section of the Act for the purposes of sports betting is Section 11(c) which states that:

> Whoever by fraud, unlawful device or ill-practice-
> (c) in wagering on the event of any game, sport, pastime or exercise, wins from any person to himself or others any sum of money or valuable thing, shall be deemed guilty of theft of such money or thing by means of deception, and shall be punishable accordingly

The section appears to permit wagering on sports, but within the required legal limits.

16.5.4 Bermuda

The year 1975 was significant in Bermuda's betting history. In that year, Parliament enacted the Betting Act, the Betting Regulations and the Betting Duty Act. Prior to the 1975 legislation, the Lotteries Act was passed in 1944 which is consistently referred to in the Betting Act.

16.5.4.1 'Pool Betting' Defined

This Act notably defines 'pool betting' as 'betting based on the forecast of the results of a football match, cricket match, race or other event taking place abroad…' The definition specifically mentions cricket, football and racing, but lumps everything else into the category of 'other event.' Principles of statutory interpretation would suggest that 'other event' would in the first instance refer to other sports. The significant note, though, is the reference to 'taking place abroad' so that the legislative intent was to embrace offences taking place outside of Bermudan waters. Additionally, the 1944 Lotteries Act makes the activity of licensed bookmakers and licensed pool betting agents lawful.

16.6 The Case Law

Litigation has, unsurprisingly, been dominated by horse racing. Yet, it is fair to say that, generally speaking, no substantial body of law exists in the Caribbean as far as it relates to sports betting. Arguably, the highest profile gambling case in the Caribbean involved the dispute between Antigua and Barbuda and the United States over the latter's ban on internet gambling. Of similar high prominence was the Marlon Samuels disciplinary decision arising out of allegations of match fixing in cricket.

16.6.1 The Antigua Disputes

> A WTO tribunal in April 2005 decided that portions of the Wire Act, Travel Act and Illegal Gambling Business Act violated international trade rules.[47]

This was the heart of the matter. The United States passed laws which made online gambling illegal and in particular, the use of telephones or the Internet to facilitate gambling. The Antigua/US dispute received much publicity and also

[47] "Antigua gambles on trade case with US"—The Washington Times, July 5, 2006 Jeffrey Sparshott.

produced passionate reactions during the period of the conflict between 2004 and 2006 in particular. Charlie Mc Creevy, the commissioner for the European Union's internal market back in 2007, stated that 'the US is discriminating against foreign gambling companies by banning payments to betting Web sites'[48] The effect of the US laws, which prevented credit card companies from processing payments to online gaming companies, was to cause companies like Sportingbet Plc, Leisure & Gaming Plc. PartyGaming Plc. and Empire Online Ltd. to either stop operations in the US or to be sold at a nominal cost.[49] These events occurred around the same time when Sportingbet itself was considering an all-stock takeover of World Gaming Plc., an Antigua-based company that ran websites offering sports bets, poker and casino gambling.[50]

The US ban was vehemently opposed by the Antiguan government in light of recommendations made by the Dispute Settlement Body of the World Trade Organization (WTO). Ultimately, the appeals panel ruled that the provisions of the Wire Act, the Travel Act and the Illegal Gambling Business Act which prohibited the offering of online gambling services from Antigua, were in contravention of the General Agreement on Trade in Services (GATS) issued by the WTO.[51] There has since been further follow up by Antigua to ensure that the US has complied with the WTO ruling.

Litigation was also started during that period by the Financial Services Regulatory Commission (FSRC) regarding a separate dispute. At the end of 2006, the FSRC sought a restraining order from the High Court of Justice calling for BETonSPORTS (Antigua) Ltd 'to account for its assets and obligations and otherwise provide such information that will assist the FSRC in ensuring that BETonSPORTS consumers are protected to the maximum extent possible and that Antigua and Barbuda's Laws and Regulations are adhered to effect the orderly closure of BETonSPORTS' US-facing operations.'[52] The application arose following a settlement between the company and the US Government after both criminal and civil charges were laid against BETonSPORTS. The concern in Antigua was first of all a jurisdictional one and according to Kaye Mc Donald, the Director of Gaming for FSRC, 'the jurisdiction of the United States Government over BETonSPORTS is questionable, by virtue of being the holder of an Interactive Gaming and Interactive Wavering license issued by the Antiguan and Barbudan authorities.'[53] Outside of this, the primary concern was that upon

[48] "US online gambling ban is protectionist says EU official"—Caribbean Net News, January 31, 2007.

[49] *Ibid.*

[50] "Sportingbet may bid for Antigua-based gaming company"—Caribbean Net News, Louisa Nesbitt, September 8, 2006.

[51] "Gambling Law, Casino Laws in Caribbean Countries"—World Casino Directory Staff, October 17, 2009.

[52] "Antigua-Barbuda Regulator takes legal action against BETonSPORTS"—Caribbean Net News, Friday December 1, 2006.

[53] *Ibid.*

dissolution, the company's assets were properly distributed in the interest of the parties with a legitimate interest.

Antigua and Barbuda has received general commendation for its fortitude and determination to be respected as a world player in the gambling market.

16.6.2 The Marlon Samuels Ruling

Betting, Match Fixing and Corruption

Players or team officials must not, directly or indirectly, engage in the following conduct:

(a) bet, gamble or enter into any other form of financial speculation on any cricket match or on any event connected with any cricket match (for the purposes of this Rule, an Event);
(b) induce or encourage any other person to bet, gamble or enter into any other form of financial speculation on any cricket match or on any Event or to offer the facility for such bets to be placed;
(c) be a party to contriving or attempting to contrive the result of any cricket match or the occurrence of any event in exchange for any benefit or reward;
(d) for benefit or reward (whether for the player himself or herself or any other person) provide any information concerning the weather, the state of the ground, a team or its members, (including without limitation, the team's actual or likely composition, the form of individual players or tactics) the status or possible outcome of any cricket match or the possible occurrence of any event other than in connection with bona fide media interview and commitments;'[54]

The aforementioned provisions of West Indies Players Association (WIPA) Code of Conduct closely mirror those of cricket's world governing body, the ICC. Back in 2007, Jamaican and West Indies batsman Marlon Samuels was banned from all forms of cricket for two years, following allegations of inappropriate contact with an Indian bookmaker on the eve of a one day international against India. For reasons stated in its very detailed judgment, the Disciplinary Committee of the West Indies Cricket Board (WICB) reluctantly suspended Samuels.

16.6.2.1 The factual matrix

The charges against Samuels were stated in para 3 of the ruling as follows:

(a) Receipt of any money, benefit or other reward (whether financial or otherwise) which could bring Mr. Samuels or the game of cricket into disrepute; and

[54] West Indies Players Association (WIPA) Code of Conduct-Section 1-Rules for Behaviour-Offences, Rule 8.

(b) Engaging in any conduct which, in the opinion of the Executive Board, relates directly to any of the Rules of Conduct and is prejudicial to the interests of the game of cricket.

Paragraph 4 of the ruling outlined the particulars of the first charge wherein Samuels received the benefit of having his hotel accommodation in the sum of US$1,238.00 (50,486.70 Rupees) paid for by Mr. Mukesh Kochhar and/or his associates. The hotel expenses arose following the One Day International (ODI) series between India and the West Indies in January 2007. As far as the second charge was concerned, the particulars centred on the fact that Samuels provided Kochhar on the eve of the January 21st ODI with accurate information about the identity of the opening bowlers for the West Indies.[55]

The Disciplinary Committee found that the relationship between Kochhar and Samuels was central to the charges and noted that the two men first met each other in 2002, five years earlier.[56] The Committee further noted the increased attention being paid to corruption in sport and acknowledged the promulgation of the ICC Code of Conduct for Players and Team Officials.[57] It did not help Samuels' case that he was present at a presentation done by Mr. Ronald Hope, a Regional Security Manager at the ICC, in which Hope brought awareness to many cricketers about 'the dangers posed by corrupt persons and unregulated gambling and the basic responsibilities of a cricketer in the fight against corruption in the sport.'[58]

It was a salient fact that Mr. Kochhar admitted during the proceedings that he was in the habit of betting heavily on cricket. However, he denied being a cricket bookmaker, although he did place bets on the very match for which Samuels furnished him information, some accurate, some inaccurate. Kochhar added that he never discussed his cricket betting with Samuels.[59]

16.6.2.2 The Decision of the Disciplinary Committee

A majority of the Committee believed that the first charge relating to the divulging of confidential team information should be thrown out and it was accordingly dismissed. It did not appear to them that 'the Code, as it is currently worded, prohibits per se the improper divulging even of confidential team information in circumstances where the person giving out the information does not himself: bet on matches (i), or encourage others to bet on matches (ii), or gamble (iii), or encourages others to gamble (iv), or become a party to match-fixing (v), or underperform (vi), or encourage some other to underperform (vii), or trade the information for reward (viii).'

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[55] Decision of the WICB Disciplinary Committee—Para 5.

[56] *Ibid*., at paras 15–16.

[57] *Ibid*., at para 18.

[58] *Ibid*., at para 20.

[59] *Ibid*., at paras 25–26.

However, the majority believed that the second charge was proved, noting that the 'the gravamen of this charge is the receipt of any money, benefit or other reward (whether financial or otherwise) which could bring the person receiving the benefit or the game of cricket into disrepute.'[60] Although the majority accepted that Samuels was an honest cricketer, who had never betted on cricket matches and who was 'unwittingly and innocently sucked into an unhealthy vortex by an unscrupulous gambler posing as a mentor and father figure,'[61] they also concluded that proof of the charge in question did not necessarily require 'an element of dishonesty on the part of the person charged.'[62]

The Committee did express regret over the 'apparent mandatory nature' of the penalty, viewing the minimum two-year ban as 'entirely disproportionate in the circumstances.'

The Samuels decision is a rare occasion in the Caribbean context where:

(i) Betting on sports outside of horse racing was directly addressed and
(ii) The regulatory function was performed by a sports body and not a creature of statute.

16.6.2.3 The Racing cases in Trinidad and Tobago

The cross-section of cases arising out of Trinidad and Tobago hinged upon the interpretation of the prevailing gambling legislation. In *Ernesto Abraham v The Arima Race Club*[63] the Plaintiff filed a writ claiming 'a declaration that upon the true construction of the Gambling and Betting Act Chapter 11:19 the Defendant, the Arima Race Club, its servants and or agents in administering a National Tote system pursuant to Section 34a of the said Act [The Gambling and Betting Act as amended by the Finance Act No. 5 of 1995] will be acting unlawfully and in contravention of the provisions of the said Act…'[64] The Plaintiff also sought injunctive relief that would give effect to the first limb of his claim as well as damages for unlawful interference with his business.[65] Bharath J. dismissed the Plaintiff's summons and refused to grant an interlocutory injunction. He noted that 'Off Track Betting outlets are free to take bets on foreign or overseas racing and that the National Tote System is under the control and the full responsibility of the Arima Race Club' with the result that there was no 'interference or employment of unlawful means to damage the Plaintiff's business.'[66]

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[60] *Ibid*., at para 43.
[61] *Ibid*., at para 44.
[62] *Ibid*., at para 45.
[63] High Court Action 1137 of 1996.
[64] *Ibid*., at p. 3.
[65] *Ibid*.
[66] *Ibid*., at p. 7.

In *George Guy v The Authority under the Gambling and Betting Act*[67] the issue in contention was the eligibility of the Appellant George Guy to receive a renewed betting permit and licence. The Court of Appeal found that the Authority was right in refusing the applications for the grant of the permit and licence, based on the need of the applicant to be a holder of a betting at the date in question, December 31, 1966. The facts of *Amin Habib (trading as Amin's Racing Service) v. Chief Magistrate, Trinidad and Tobago Licensing Authority*[68] were similar to the *George Guy* decision. In *Amin Habib,* the Chief Magistrate, sitting as the Licensing Authority, refused the Appellant's application for a betting office licence and a permit to carry on the business of receiving or negotiating bets or conducting pool betting operations.[69] The Appellant's claims of breach of natural justice principles were dismissed as was the overall appeal since he failed to meet the statutory requirements that would enable him to receive the desired permit and licence. In *John Katwaroo v. Jesus Bocas (trading as Diamante Racing Service)*[70] the Plaintiff, Katwaroo, claimed the sum of TT$11,908.00 (approx. $US2000.00) 'being monies due and owing to him on tote bets placed with the Defendant, John Bocas, on September 26, 1967.'[71] Rees J. decided in favour of the Plaintiff based on the credibility of the witnesses that appeared before him.[72]

In more recent times, racing disputes in Trinidad and Tobago took on a different slant in that leave for judicial was sought in the Port-of-Spain High Court following the disqualification by the Trinidad and Tobago Racing Authority of 2008 Horse of the Year, *Storm Street*. The outcome of the application would be of great interest from the viewpoint of the development of regional sports law jurisprudence especially in light of the general principle from the various Jockey Club cases, including more recently *Mullins v Jockey Club*,[73] that although sports governing bodies perform a quasi-public law function, their decisions are not usually amenable to judicial review.

16.7 Conclusion

Evidently, sports betting in the Caribbean is dormant but growing. Betting is primarily confined to the sport of horse racing, although the popularity of football and cricket has seen a slight increase over the years, especially during the World Cup years. Few statutes have been enacted across the various jurisdictions recently

[67] Magisterial Appeal No.49/86.

[68] Magisterial Appeal No.69 of 1975.

[69] *Ibid*., at p. 1.

[70] High Court Action No. 2141 of 1967.

[71] *Ibid*., at p. 1.

[72] *Ibid*., at p. 7.

[73] [2006] EWHC 986.

and what predominates currently is a slew of archaic laws that are in desperate need of amendment and/or repeal. The Jamaican initiatives in the recent months may well become the springboard for subsequent amendments in other Caribbean territories especially as it relates to sports betting. Yet, any expansion in this regard is likely to be slow, deliberate and cautious.

In the meantime, informal sports betting will continue to thrive as it seems to pose no real or immediate criminal or economic danger. Any peril that exists remains social, moral and ethical, which, ultimately, becomes a matter of individual decision-making as against one of legal regulation.

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Chapter 17
Sport Betting and its Regulation in China

Huang Shixi

Contents

Gambling or betting has a long history in China, and it is common for people to bet and enjoy themselves through playing poker or mahjong. In any event, betting is closely associated with lottery, and those people who buy lotteries may have a sense of betting mentally.

Generally speaking, the betting industry is divided into three main markets: the lottery market, the betting market, and casinos (including video lottery games). Most countries have sports lottery laws and regulations, but the countries that legalize sports betting and casinos are limited. Because of these legal limitations and enormous financial attractions, illegal betting emerged in some countries, and

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has caused a lot of problems, such as match fixing or bribery. Similar problems have occurred in China. This chapter will mainly discuss the sports lottery regulations and the illegal sports betting in China.

17.1 The Development of Sports Gaming in China

China has long waged a war against illegal gambling on its territory, despite the fact that it has a significantly long history of legalized gambling; the very first forms of this type of activity emerged there some three thousand years ago, and the first state lotteries were held in the Tang Dynasty.[1] As the fascination with games of chance grows, China has to consider the possibility of liberalizing the gaming industry, or clamp down even harder on its illegal forms.

For a long time, gambling was considered a harmless social activity that brought people together for some excitement and interaction. China's first modern casinos emerged in the treaty port cities and the international settlement of Shanghai.[2] When the People's Republic of China was founded in 1949, the newly established communist regime banned all forms of gambling activity, including lotteries, because they were considered to be capitalist practices, it was immoral and a throwback to colonial days, with the result that it went underground until about twenty years ago, when the present state-run lottery system was established.

The taboo ended in 1984 when the organizers of the Beijing International Marathon held a lottery to raise funds for the event. Other official organizations followed and, three years later, founded the China welfare lottery. As the welfare lottery gathered steam, sports officials won approval in 1994 for the China sports lottery. Sports-related lotteries under the aegis of the China Sports Lottery Administrative Center (CSLAC) were introduced, including both traditional formats and sports-related lotteries, such as scratch-and-win lotteries, seven stars, listing 3/5, sports lotto, football lottery, and basketball lottery.

Although gambling is becoming a popular leisure activity in China, up to now only a few legal lottery games existed,[3] while other types of gambling still remain banned. This policy is now lending to a rise in gambling tourism[4] and the spread of illegal gaming, which involves online betting, underground casinos, and private lotteries.

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[1] Björkell 2009.

[2] Björkell 2009.

[3] China sports lottery was founded in 1994.

[4] Betting in Hong Kong on horse racing and soccer, and in Macau for casino gambling, horse and greyhound racing, is allowed as these are Special Administrative Regions (SAR) that have grown up independently under separate rule before returning to China late last century. These places attracted many mainland Chinese (including some top governmental officials) to bet in the name of tourism.

Furthermore, internet-based illegal lottery selling is on the rise in recent years, posing a threat to the operation of the lottery market. Thus, four government ministries—Finance, Public Security, Civil Affairs, Information Industry—and the General Administration of Sport, jointly launched a campaign to crack down on illegal lottery selling on the internet to fight lottery-related fraud in 2007. The bulletin listed some of the illegal activities, such as selling private lotteries under the name of state-run lotteries, providing illegal channels for sports gambling, and underground Mark Six and lottery-related fraud.[5]

At the end of 2008, a new and better kind of "lottery" emerged in the 6th China Wuhan International Horse Racing Festival, Chinas Hubei Province, which, as the Chinese media put it, is a horse lottery, but this is only a trial race. Prior to 1949, Wuhan was home to a thriving horse race lottery business, established by the British in the nineteenth century. It has long been keen to revive its position as Chinas "horse racing city." Although the central government has approved the establishment of regular horse racing in Wuhan, and was mulling over the introduction of gambling on the races in the near future, there was no concrete information about when or whether it will begin.

17.2 The Related Policy and Regulations on China Sports Lottery

Although China gave the green light to its lottery industry in 1984, and founded the sports lottery in 1994, it did not promulgate any laws and regulations about sports lotteries until the end of the twentieth century. This practice was opposite to other countries that have legalized sports lotteries. Lack of laws and regulations on lottery supervision has become a significant factor that has impeded the sound development of the lottery industry. The Chinese government has made several lottery regulations in recent years, but only one specifically governs China's lottery market.

Nonetheless, there were still some regulations or bulletins about sports lotteries adopted by the Chinese government.

17.2.1 Provisional Measures on the Management of Sports Lottery Welfare Funds (1998)

Based on the Circular of the State Council on Further Strengthening Administration of Lottery Market, and in order to strengthen the lottery public welfare management, the General Administration of Sport, the Ministry of Finance and

[5] Xinhua News 2009.

People Bank of China issued these Provisional Measures jointly. These were the only regulations which specifically targeted sports lotteries.

17.2.2 Circular of the State Council on Further Standardizing the Administration of Lotteries (2001)[6]

In order to control unauthorized and private lotteries and expand the use of lottery welfare funds, the State Council issued this circular in October 2001, which stressed the State Council's responsibility for approving and administering the lottery-related questions, and highlighted the separate and cooperative liabilities among the Ministry of Finance, the Ministry of Civil Affairs, and the General Administration of Sport.

17.2.3 Provisional Regulations on the Management of Lottery Distribution and Sales (2002)[7]

This provisional regulation was issued by the Ministry of Finance in 2002, but it is only a ministerial rule. Apart from the management of lottery distribution and sales in this regulation, it also includes safety management and lottery supervision rules. Regretfully, underground gambling and illegal lottery were still popular in some parts of China, as the regulations did not play an effective role in the fight against illegal lottery and betting.

17.2.4 Regulations on Administration of Lotteries (2009)[8]

Actually, China began drawing up a national regulation more than a decade ago, and this has been delayed year after year due to divergences among different government departments, such as the Ministry of Finance, Ministry of Civil Affairs, and General Administration of Sport. Up to 2009, the State Council of China adopted Regulations on Administration of Lotteries (here in after the "Regulations"), which makes explicit stipulations about every aspect of lotteries, such as the distribution, sales, announcement of results, and fund management.

The Regulations will enhance supervision of the fast-growing lottery industry and stamp out fraud, which has been on the rise since the country launched its first

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[6] The State Council [2001] 35.

[7] The Ministry of Finance [2002] 13.

[8] Decree of the State Council of the People's Republic of China (No.555).

lottery two decades ago. According to the Regulations, no individual, organization, or government department could sell lotteries without permission from the State Council. The China Welfare Lottery Administrative Center and the Sports Lottery Administrative Center of the China General Administration of Sport, both state-run, are the only two legitimate lottery outlets.

Lottery funds should cover lottery prizes and management funding for lottery sellers. The rest should be spent on the improvement of public welfare, according to the draft, quoting that a percentage of the revenue would be decided by State Council financial departments.[9] Individuals or government departments violating the regulation by selling lotteries unauthorized by the State Council would be fined and face criminal charges. Their illegal gains would be confiscated.[10]

The newly adopted Regulations showed that the Chinese government will exercise greater central control over China's growing lottery market. Nevertheless, the existing rules and regulations are still not enough to deal with the lottery problems.

17.3 Sports Lottery-Related Cases Analysis

Considering the lack of efficient laws and regulations about sports lottery supervision and the temptation for top prizes as well, some unexpected fraud cases occurred in the selling and distribution of sports lotteries. One of the most representative cases is the Baoma lottery case sentenced by Xi'an court.

In 2004, several people were found guilty of manipulating a scratch-and-win sports lottery in the northwestern city of Xi'an and were sentenced to varying terms in prison. During the fraud incident, a contractor of the lottery tickets cheated his way to top prizes—a BMW and 120,000 yuan—by marking lottery tickets and employing four people to falsely claim the prizes, while claiming that the real top prize winner lottery was fake. After judicial intervention, the real lottery top prize winner Liu Liang, a young migrant worker, finally received the prize that was due and accepted apologies from local sports authorities.[11] At that time, China had only a provisional regulation on the management of lottery distribution and sales which was issued in 2002. After this case, calls for publishing regulations or even a law on lottery supervision were voiced again.

From an international perspective, during October and November 2007, International Criminal Police Organization (Interpol) associated with the police forces from China, Hong Kong, Macau, Singapore, Indonesia, and Malaysia

[9] See Articles 33–37, Regulations on Administration of Lotteries (2009).

[10] Article 38, Regulations on Administration of Lotteries (2009).

[11] Wang Lewen 2004, at 5; Yin Chao, The Appeal Period Expired in Baoma Lottery Case, Yang Yongming Appealed while Jia Anqing No, available at http://news.xinhuanet.com/legal/2004-12/16/content.html, last visited January 31, 2005.

initiated Operation "SAGA" Phase 1 (Soccer Gambling) to combat rampant illegal bookmaking and offshore betting, and resulted in more than 400 arrests after raids on 272 illegal gambling dens estimated to have handled more than 680 million US dollars' worth of bets. Between May 1 and June 30, 2008, Interpol conducted a second operation "SAGA," targeting illegal soccer gambling across Asia resulting in more than 1,300 arrests and the seizure of over 16 million US dollars.[12]

Apart from sports lottery crimes, there were several other welfare lottery-related cases in China. The frequency of lottery-related crimes indicates that there might be some problems in China's lottery management system. The state monopoly on the lottery industry may be an important reason.

17.4 The Challenge of Illegal Sports Betting and the Future Possibility to Legalize Sports Betting

China began to issue sports lotteries nearly twenty years ago, and most of the sports lotteries are computerized, or based on some foreign football matches' results. Because China's football lottery should not bet on the future results of domestic matches, and as China has a long history of gambling in the world, the result was that some Chinese gamblers began to bet on Chinese football matches. Some football athletes, team managers, and even sports officials were also involved in illegal football betting or match-fixing, the only aim of which was to earn more and more money.

At the end of 2009, Chinese police officials began to investigate illegal sports betting, match-fixing and corruption in Chinese professional football matches. In addition to some football players and clubs' managers, three top officials of the China Football Association (CFA) were arrested for alleged match-fixing and bribery, they are CFA head Nan Yong, former deputy chairman Yan Yimin, and Zhang Jianqiang, former director of the association's referee committee.[13] So far, more than 20 officials, players, and club managers, have been arrested or detained on suspicion of either match-fixing or illegal gambling. Underground illegal soccer gambling in China is experiencing a massive crack down after a number of scandals surfaced involving bribery and alleged match-fixing.

As for the three CFA top officials, although CFA is nominally a private sports association, it is also a state agency in China. Almost all of the CFA top officials were appointed by the General Administration of Sport. For example, Nan Yong simultaneously served as the director of Football Administration Center of the General Administration of Sport, the vice chairman of CFA, and director of China Super League Commission before arrest. In fact, the Football Administration

[12] See Tam 2009.

[13] Xinhua 2010.

Center and the CFA are the same agency with two different "brands." This is the main characteristic of China's sport administration system, and would inevitably lead to sports-related corruption.

The Ministry of Public Security said that it would fully support the sport authority's campaign to fight corruption in soccer. Apart from continuing its investigation into serious criminal cases, the Ministry would coordinate with the sport, supervisory and judicial organs to set up an anti-gambling mechanism in a bid to create an environment for fair play in Chinese soccer.[14] Although this anti-gambling campaign involves the football officials and athletes only, and it seems to have nothing to do with the sports lottery at first sight, it will have great influence on the development of China sports lottery. After all, it cracked down on illegal sports betting and the underground lottery in China. For lottery administrators, it may be a better choice to legalize some kind of sports lottery. For one thing, it can enhance national revenue and reduce crime violation. For another, it can meet the Chinese bettor's requirements, as betting has a long history in China and has in fact become one kind of Chinese culture, where such game ways as poker or mahjong can usually be used as betting tools.

When the author was finishing this paper, another piece of good news about horse-racing lotteries attracted Chinese bettor's attention. The State Council, China's Cabinet, encouraged Hainan in early January to "explore and develop" pari-mutuel sports lotteries and instant sports lotteries on large international events, in an effort to develop the island province into a global tourist resort. Hainan has started exploring ways to introduce betting-type lotteries on major international competitions, including horse racing in Hong Kong. Furthermore, a lottery research center has been set up by the provincial government and a research group has also been established by state authorities.[15]

17.5 Conclusion

Compared with the rapid development of the sports lottery industry, if China's laws and regulations about this subject were out of date, such situation would block the lottery industry's healthy development. The lack of efficient lottery laws and regulations would further facilitate underground sports betting and illegal lotteries, and lead to criminal violations. So, the China government should make more suitable laws and regulations about sports lottery, and try to control illegal betting.

As the lottery has been a consistent revenue earner for the government and can solve some person's employment problem, in a way, China should expand its sports lottery varieties and legalize some so-called western sports betting (such as

[14] Xinhua 2010.

[15] Qi 2010.

a horse racing lottery). At the same time, China should encourage private capital to invest in the lottery industry and break up the state-run lottery monopoly. Real competition in the Chinese lottery industry may decrease the corruption and match-fixing found in China's sports arena.

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Chapter 18
Regulation of Sports Betting in the Czech Republic

Pavel Hamerník

Contents

18.1 Introduction

The lottery law no. 202/1990 of the Collection of laws as amended (herein under as "lottery law") was passed immediately after the new market economy started in the former Czechoslovakia in 1989. This was a very hectic period of time. As a result the lottery law has many weak places and has been amended occasionally, and the Czech Republic's lottery law is very unsystematic, its parts do not

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interconnect well and its terminology is not uniform at all.[1] This chapter combines a discussion of the current state of the lottery law with some focus on options that will and will not be in the regulation of sports betting because at the time of the writing of this chapter, the public debate concerning the new lottery law is under a pre-legislative process. Ernst and Young have been delegated by the Ministry of Finance to organise public discussion and submit a proposal including issues to be improved in the lottery law, comparing various views grown in this public discussion.[2] The results will be the basis for the amendments of the lottery law. Nevertheless, there is also another proposal in the Senate of the Czech Republic, which means that at least some senators do not want to wait so long until the above process is done, instead, they submitted another proposal to improve the lottery law.[3] The scale of public discussion is very rich, ending with even more extreme opinions, for example, to abolish the lottery law completely and leave only self-regulation because the state is not able to effectively regulate and control the lottery business. Basically the reasoning of this view is expressed in the manner that the Czech Republic has been the only state which lets the hazards associated with gambling to enter the streets of the big cities and small villages without any barriers thanks to the deformed and by stepped lottery law.[4] Besides this social view, other issues concern the categories, definitions of forms of betting and different requirements for entities that have betting as their business. The controversies will be apparent later in the text. However this text will focus on sports betting.

18.2 Definitions of Lotteries/Betting

According to Article 1(1) of the lottery law in force when writing this chapter, a lottery or any other similar game is to be understood as a game in which any physical person voluntarily participates after paying some deposit whose return is not to be guaranteed to the participant. Some unforeseeable, random event or an event listed by the undertaking operating the lottery/other similar game is the determining event used for winning according to the terms and conditions of undertaking running the lottery/other similar game. It does not matter if the lottery/other similar game is run by mechanical, electromechanical, electronic or other similar means. According to Article 1(2) of the lottery law the winning circumstances (the results of the drawing of lots, sports matches, horse races or other

[1] Kramář and Hušák 2006, p. 38.

[2] http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/hernizakon_tiskoveinformace.html, Ministry of finance webpage, Press releases section, Award made to Ernst and Young in March 2008.

[3] The proposal of Senators Josef Novotný, Pavel Vícha and others to amend the lottery law, the document no. 239, http://www.senat.cz/xqw/xervlet/pssenat/historie?ke_dni=01.03.2009&O=7&action=detail&value=2261.

[4] See Senator Novotný arguments in "Hušák and Novotný call for abolishing the lottery law," http://www.financninoviny.cz/zpravodajstvi/pocitace/index_view.php?id=312574, 14.5. 2008.

future events) may not be known to anyone in advance and can be influenced neither by the person betting nor by the entity undertaking running the lotteries/other similar games.

According to authors Kramář and Hušák, this definition includes two categories of the games concerning betting, one of them being the so-called standard lotteries and similar games,[5] considered as entrepreuning activity in itself.[6] The other circle concerns the games which are part of marketing support—advertising for other entrepreuning activity (consumer instead of paying the deposit must buy certain goods, services or any other product or to conclude contractual relationship with goods/services provider to participate in some form in the advertising campaign. In this case the winner can be awarded only by a non-monetary prize, the cap of certain value is set up for the award subject to threat of criminal sanctions).[7] These circles distinguish lotteries from other forms of activities, such as the creativity of the city of Karlovy Vary, which in the so-called (later developed nickname) "Czech lottery" used the lottery mechanism to select undertakings in public tender to build a Cultural and Sports Center in the city.[8]

[5] The Lottery law distinguishes specifically named categories in its Art 2, these are: (a) money lotteries or lotteries for prizes in kind, (b) tombolas, (c) numerical lotteries, (d) instant lotteries, (e) betting games that are operated by means of electronic or electromechanically controlled gaming machines or other like devices, (f) betting games, with which the prize winning is conditioned by the successful guess of the outcome or scores of sport competitions, races and the amount of the prize depends on the ratio between the number of winners and the total amount of the deposit (wager) and the prize ratio that is set in advance, (g) betting games operated with the use of a special type of tokens, (h) betting games, with which the prize winning is conditioned by the successful guess of the outcome or scores of sport competitions, races or the successful guess of the outcome of other events of public concern providing the bets on such event is not in defiance to any ethical principles. The prize is directly proportional to the prize ratio at which the bet was taken and the wager amount, (i) betting games operated in gambling parlors specifically established for this purpose (casinos) including those operated with the use of mechanical devices (such as a roulette), (j) lotteries and other like games that are run by means of the technical devices operated directly by the bettors or operated via the telephone, where neither the number of participants is determined in advance nor the amount that was wagered is known beforehand, betting games in which a win depends on guessing the order in which racehorses arrive at the goal post (the English translation of these categories was used from webpage of Sazka, www.sazka.cz). However, according to Article 50 the lottery law allows the scenario when the Ministry of Finance approves other games not specified by the law. This is under heavy criticism and specifically noted in the Senate proposal to amend the lottery law because the legal certainty is disappearing and hazard expands.

[6] Although not subject to Trade license law no. 455/1990 of Collection of laws, but subject to lottery law.

[7] Kramář and Hušák 2006, pp. 42–45.

[8] http://www.compet.cz/verejne-zakazky/aktuality-z-verejnych-zakazek/predseda-pecina-potvrdil-pokutu-za-ceskou-losovacku/, See Press releases of Czech Competition Authority of 28th February 2008.

18.3 Conception of the Lottery Law

As it was mentioned above, Ernst and Young were empowered to undertake the public discussion on the lottery law and the result was the creation of a so-called Final Report.[9] In the attachment to the Report it is possible to read what types of discussing entities were involved, including those from the public and private sectors. According to this Report, there are currently two conceptions on how to grasp the lottery law regulation (described from page 17 of the Final report). One of them prefers to exclude marketing lotteries from the lotteries regulation to leave them purely subject to advertising law and consumer protection. The reasoning among others advocating this approach is based on the fact that marketing competitions do not compete with hazard, there is no investment in a lottery sense and these competitions do not cause dependency and addiction to betting, they are not dangerous for society. From the administrative regulation point of view there will not be as big a bureaucracy in their regulation because there is no need for approval from the public authorities (only notification is necessary for competent administrative organs), thus public money will not be used for this. If there is a cap on the amount a consumer will pay for the marketing event with the prospective of winning, this should be sufficient regulation. Moreover, the marketing campaigns are subject to free movement of services and Czech undertakings would be subject to reverse discrimination.

According to the Final Report, the opposite view is putting the marketing games at the same board as hazard. This means that marketing games should be regulated by the lottery law because there is the danger of sidestepping the lottery regulation by hiding some type of hazard under marketing strategy, the marketing games use similar tools as lotteries, and they can cause addiction. There also would be discrimination on the market in relation to lottery undertakings because these fall under stricter rules of administrative registration.

18.4 Internet Betting

Similarly the above listed proposal from the Senate calls for the complete prohibition of internet betting, which is also related to the provision of services. Czech undertakings were only recently allowed to operate betting through the internet and the future will show for how long. On January 6, 2009, the Czech government approved the betting run by 5 Czech undertakings on the internet for 10 years. The reason was to put Czech betting companies on an equal footing with foreign ones because the share of Czechs trying their luck at internet sports betting was in 2007 between 15 and

[9] http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/hernizakon_tiskoveinformace.html, submitted to the Ministry of Finance on 1st September 2008 and is accessible at this internet page listed above.

20% and in 2008 it was 33%.[10] In addition, internet betting will continue from abroad anyway and reverse discrimination would occur.

18.5 Protection of Minors

The current Senate proposal wants to prohibit internet betting with the objective to protect young people. Currently the only participants in the gaming industry playing the lotteries and similar games can be persons older than 18 years, but the fear exists that this system is sidestepped by hidden representatives who pick the winnings on behalf of younger persons.[11] This is stated in the Senate explanatory report to its proposal of amendment to the lottery law. The Ernst and Young Final Report also points to this issue.[12] Kramář and Hušák point out how to regulate consumer competitions since these are focused often at target group below 18 years.[13]

18.6 Other Obligations of Operators of Lotteries and Other Similar Games

18.6.1 Make it Czech!

Among other reasons to keep Czech control over undertakings is to prevent abuse of foreign undertakings avoiding duties arising from Czech regulation that requires that a certain part of the profits must be released in favor of public beneficial projects like sport. On the other hand the Final Report of Ernst and Young accepts that the internal market rules of the EC must be respected as well. The Senate proposal also calls for the complete revision of the lottery law from the point of European law and after Euro currency is introduced into the Czech Republic. Current Article 4(11) of lottery law forbids foreign companies from providing lotteries and other similar games in the Czech Republic, including the prohibition of participation in lotteries and other similar games when payments are transferred from Czech territory. Nevertheless, Czech persons may participate in lotteries and other similar games abroad.[14] The Ministry of Finance can pass an exception to this rule (see also below on the form of undertakings which governs the undertakings in the gaming industry). According to the Final Report the opposite view

[10] Statistics provided by Pavel Moudrý of Šance company in the interview for Radiožurnál on 6th of January 2009. Moudrý adds that he does not expect any big increase of internet betting since today.

[11] Similarly, Czech Criminal Code seeks in its Article 217 to protect due morals of youth, and not to allow them to fall under hazard games.

[12] Page 26 of the Final report.

[13] Kramář and Hušák 2006, p. 63.

[14] Kramář and Hušák 2006, p. 46.

favoring betting through the internet argues that it is possible to create technical and administrative rules avoiding the possible threat that internet betting is dangerous and sidesteps the Czech regulation.

The public discussion listed in the Final Report also refers to what form undertakings running lottery and gaming activities should conform to. The winning argument seems to be that the form of corporations with shares identified by name, however, this view accepts that for less important and smaller games providers the less strict regulation is necessary, thus it would be possible for small games to be operated by limited liability companies, foundations, etc. Currently, according to Articles 1(6) and 4(1) of the lottery law only companies with their seat in the Czech republic and pure Czech ownership can perform lottery activities and other similar games, except undertaking operating Casinos, which, according to Article 2 letter i), can consist of a Czech registered undertaking with foreign capital. Generally it is necessary to point out that lotteries and other similar games have different regimes of conditions concerning the level of basic capital, depending on the type of lottery and other similar game. Also, some lotteries and other similar games can be performed by the state or the state undertaking to which such activity was delegated or above listed corporations (like the case of sport betting).[15] Consumer/marketing games do not have any specific requirements for the form listed in the lottery law, thus Kramář and Hušák use the constitutional principle according to the Czech Charter of fundamental rights and freedoms that states that what is not forbidden is allowed, meaning even undertakings with foreign capital could participate[16] (but it seems that they must be notified/registered in the Czech republic).

18.6.2 Where the Proceeds Go

Another interesting aspect of the lottery law according to Article 40 relates to the proceeds of Horse races betting. The proceeds of horse betting may be used exclusively by an entity that "usually" or "mainly" is granted a license to breed horses for racing. Besides this example, generally "part of proceeds" determined by Article 4(2) of lottery law must be distributed to general beneficial purpose,[17]

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[15] Details concerning the amount of basic capital are listed in Article 4 of lottery law available in English at www.sazka.cz. See also special case of horse racing betting at Article 40 of lottery law.

[16] Kramář and Hušák 2006, p. 48.

[17] Malast and Rajchl 2007, refer to the case-law which determines the term "Part of proceeds" (for example Czech Constitutional Court, 4th of July 2001, sp.zn. II ÚS 285/01). The amount of final counting of "Part of Proceeds" may be even sometimes higher than the final profit of the undertaking itself! Kramář and Hušák 2006, p. 65. It has been claimed that the proceeds to general beneficial activities together with administrative fees and payment of wins is higher financial burden than for regular undertaking in the business under taxation system not regulated by lottery law (Senator Novotný arguments in "Hušák and Novotný call for abolishing the lottery law," http://www.financninoviny.cz/zpravodajstvi/pocitace/index_view.php?id=312574, 14.5. 2008).

for example sport. The Law no. 115/2001 of Collection of laws "On Support of Sport", dated 28.2.2001, which normally does not say anything very useful at all in relation to sports law,still at least determines in Article 1 that position of sport in society "is the general beneficial activity."[18] The undertakings running the lotteries and other similar games can choose where the money goes and the recipients (for example sport associations) must pass the proceeds to that particular general beneficial activity. Recipients of the proceeds have the duty to notify the lottery/other similar games undertakings how they used the proceeds. The lottery/other similar games undertakings subsequently inform state authorities within a prescribed period of time. Proceeds from some betting and electronic machines can go to municipalities as well according to Article 18 of the lottery law.

18.6.3 Entitlement to Run Lotteries/Other Similar Games

According to the Final Report, lotteries and other similar games should be getting permission for operation after satisfying required conditions, thus it would be an automatic right to run the lottery/other similar game. This regime avoids corruption by providing transparency and better protection for investments. At the same time there are also voices advocating for stronger conditions for large-scale lotteries and less strict conditions for those who run marketing lotteries. Currently, which authority issues permission to run lotteries and similar games depends on the character of the activity (Ministry of finance, municipalities and regional authorities). Sports betting has to be approved by Ministry of finance (Article 21 of the lottery law). Persons at the management of the undertakings operating in this area of business must have a clear criminal history record. Another necessity is payment of so-called surety for potential creditors. How high the surety will be depends on the type of lottery/other similar game. The undertaking must also provide administrative organs terms and conditions of the games, and specifications on how the lottery/game works (Article 42 of the lottery law).

18.6.4 State Supervision

State supervision is split under the responsibility mainly of the Ministry of Finance as well as Financial authorities and local municipalities. This mechanism is regulated by Article 46 of the lottery law and the procedure itself is governed by the law no. 552/1991 of Collection of Laws on state supervision as amended (thus for example the undertaking must allow entry and access to documents).

[18] The rest of the law sets up the tasks of Ministries, other administrative organs and regional authorities on support of sport.

An administrative fee is also charged when undertakings are applying for permission and its amount is dependent on the type of activity. The top level can be unproportionally high. It is indeed a complex process to approve the activities in this industry. There are activities in other industries which require difficult processes of permission, but not with so high fee. Thus Kramář and Hušák conclude it may be kind of hidden tax.[19] For some reason betting undertakings must pay amounts up to 1% of the income from the betting games reduced by the prizes paid according to Article 29 of the law on lotteries. The Senate plans to abolish this payment in its proposal and it focuses on the registration payments and their redefined rates. Also the law on "money laundering" no. 61/2006 of the Collection of Laws serves as a tool for prevention of criminal activities running through the industry.[20] There are also conflict of interests provisions, for example undertakings running the lottery/other similar game may not accept bets for races, matches and competitions where animals, individuals or sport teams are at ownership or employment relationship to the undertaking.

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[19] Kramář and Hušák 2006, p. 89.

[20] Czech Criminal Code forbids also unauthorized business of lotteries and other similar games in the Article 118a as well as cheating at operation of lotteries and other similar games, Article 250c).

Chapter 19
Sports Betting Regulation in Denmark

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Contents

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19.1 Introduction

In June 2010 a new Gaming Act[1] ("the Act") was adopted in Denmark. The new Act marks a historical change in the regulatory regime and policy towards gaming in Denmark, because the hitherto predominantly state monopoly is replaced by a partially liberalized regime.

There are several reasons for the remarkable transition. First, it can be seen as a natural development due to the technological development, notably the Internet, which has made Denmark, a part of global communication society where consumers have access to a large number of services from providers of various nationalities, including online games like Internet Poker.

Within only a few years, foreign providers of games located in Malta, Gibraltar, the United Kingdom, etc. have gained a large share of the Danish gaming market—without having a license from the Danish authorities. Through the Internet the Danish players have become used to a wide selection of game providers. The foreign game providers often have web sites with Danish customer services and even often provide higher payback percentages and more gaming products than the Danish former monopolist, *Danske Spil A/S*.[2]

This development was worrisome from a societal point of view. If, not regulated and controlled intensively, the supply of games may be associated with negative consequences in society in the form of crime and public disorder and may bring about gaming addiction (ludomania) for vulnerable people. At the same time, the profit of Dansk Spil—which is distributed to charities—has been slowly declining.

Therefore, it was deemed necessary to be able to regulate and control the games provided to the Danes in order to channel the Danes' gaming into a controlled framework and to prevent negative social implications in society.

Another reason for the new regulation is that the Danish gaming legislation has grown to become a chaos of many different statutes and regulations (some of which were more than hundred years old) administered by different ministries. Hence, a general modernization and simplification of the gaming legislation was urgently needed.[3]

Last, but certainly not the least, a new regulation was necessary in order to prevent a case against the EU Commission. The Commission had initiated infringement proceedings against Denmark before the ECJ as it found that the Danish gaming regulation, notably the monopoly of the State owned company

[1] Act No 848 of 1 July 2010 on Gaming.

[2] The Internet has enabled the Danes to compare the products and product range of *Danske Spil A/S* with the products of online game providers in the United Kingdom, Malta, Gibraltar, etc. Therefore, a heavily increasing number of the Danish players have started playing games provided by the foreign game providers in recent years.

[3] Cf. the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen*) 2008B.1.

Danske Spil A/S, to be a violation of the fundamental rights regarding free movement of services and establishment, cf. Articles 49 and 56 TFEU.[4]

This chapter provides a brief overview of the new Danish regulatory regime. It should be noted that since the new rules regarding betting cover all kinds of betting, including sports betting, the description also covers sports betting, unless otherwise stated. Notwithstanding the ambition with the new Act to rectify the defects of the old regime, several aspects of the new Act have been criticized. The most significant of this criticism will be briefly described.

19.2 Regulation Before the 2010 Gaming Act: The Time of the State Monopoly

Before the new Act, gaming in Denmark was regulated in a number of acts, executive orders and circulars under the Ministry of Taxation, the Ministry of Justice, the Ministry of Economic and Business Affairs and the Ministry of Science, Technology and Development.

The provisions of the Criminal Code on gambling were regarded as the main act in relation to other gaming legislations. The provisions in Sections 203–204 of the Criminal Code, which are still in force after the adoption of the new Gaming Act, apply to games with stakes not regulated in private acts.[5] In pursuance of Section 203 it is a criminal offence to make a living by gambling or betting of a similar nature for which a license has not been granted or by promoting such gambling, regardless of whether such gambling takes place in a private or public place.

In pursuance of Section 204 it is a criminal offence to provide accommodation for or make arrangements for gambling in a public place when a license has not been obtained for such gambling. The provision in Section 204 is not limited to the commercial provision of games, which is the case for Section 203. Participation in gambling for which a license has not been obtained is a punishable offence.

Gambling and betting of a similar nature mean traditional gambling for not entirely insignificant economic values, the outcome of which is almost solely a matter of chance and for which a stake is payable to participate.

The most important rules about gaming outside the Criminal Code were:

The de facto main act on gaming, *the Act on Certain Games, Lotteries and Betting*[6] contains rules regarding the granting of a license to provide games, lotteries and betting in return for the payment of a duty to the State. The Act is from 1948.

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[4] *Ibid.*

[5] As most games are regulated in private acts, Sections 203–204 have only limited importance.

[6] Cf. Consolidated Act No. 273 of 17 April 2008, as amended by Act No. 521 of 12 June 2009.

In pursuance of Section 1 of the Act, the Minister of Taxation is authorized to grant a license to provide games, lotteries and betting in return for the payment of a duty to the State. However, a license cannot be granted under the Act for betting on pigeon racing and bicycle racing on tracks, provision of class lotteries and the like, the establishment of casinos, gaming machines offering cash winnings or bank premium bond accounts.

In pursuance of Section 2, such license can only be granted to one company. The license has been granted (for periods of up to five years at a time) to the State-owned company *Danske Spil A/S* who thus before the present reform held a monopoly on the provision of games, lotteries and betting in Denmark. As described further below, the monopoly still applies to lotteries and certain bettings. Accordingly, the act is still in force, however in a modernized version.

Section 10 of the Act contains rules to the effect that a penalty can be imposed in the form of a fine or imprisonment for up to six months for i.a. provision and promotion of games, lotteries or betting in Denmark without holding a license under the Act as well as for giving publicity to games, lotteries or betting not covered by a license issued under the Act.

The Act on Det Danske Klasselotteri A/S[7] laid down rules governing *Det Danske Klasselotteri A/S*. The Act is from 1992 when *Det Kgl Københavnske Klasselotteri* was renamed *Det Danske Klasselotteri A/S*. The license to *Det Kgl Københavnske Klasselotteri* has been granted in pursuance of the Prohibition of Lotteries Act (Act of 6 March 1869), according to which a license has been granted to permit *Almindeligt Dansk Vare- og Industrilotteri* and *Landbrugs-lotteriet* to provide class lotteries. The Act on *Det Danske Klasselotteri A/S* has been repealed with the new Act, but the monopoly on class lotteries provided to *Det Danske Klasselotteri*, *Landbrugslotteriet* and *Almindeligt Dansk Vare- og Industrilotteri* is upheld and now follows from the new Act.

The Raffle Circular[8] stipulates that a license may be granted for lotteries only held for the benefit of charities or other non-profit purposes. Non-profit lotteries may not be held for the benefit of political purposes. The main provisions of the circular are transferred to the new Act and are hence continued. However, the hitherto requirement that the associations mentioned in the circular must be domiciled is abolished.

The Act on Local Totalisator Betting[9] contains rules regarding licenses to provide local pool betting via a totalisator or in similar ways in connection with races and other contests. The Act is originally from 1950. In pursuance of Section 1, totalisator betting or the like in connection with betting and other contests can only take place according to a licence issued by the Minister of Taxation. In pursuance of Section 1A of the Act, a licence for local totalisator

[7] Cf. Consolidated Act No. 901 of 12 November 2003, as amended by Act No. 538 of 8 June 2006.

[8] Circular No. 147 of 1 August 1994.

[9] Cf. Consolidated Act No. 22 of 16 January 2006, as amended.

betting may be issued to an association or a company which is an organiser of dog racing on racecourse, cycle racing on tracks or pigeon racing and which is a member of the relevant sport's central organisation or association. The Gaming Act continues the current rules, and the state of the law is not intended to be changed.

The Act on Casinos[10] contained rules about the access to establishing and operating land-based casinos. The act, which is originally from 1990, has been repealed with the new Gaming Act, but the basic provisions of the act have been transferred to the new Gaming Act (Sections 14–17) or executive orders. Hence, no material change of the regulation is intended. The Act on Casinos did not cover Internet games. They are now separately regulated under the new Act. The competence to grant licenses to establish and operate casinos has with the Gaming Act been transferred from the Minister of Justice to the Danish Gaming Board. As under the Act on Casinos, detailed rules on land-based casinos will be laid down in an executive order. The present is Executive Order No. 496 of 13 June 1994 about Casinos (as amended).

The Act on Gaming Machines Offering Cash Winnings[11] contained rules about gaming machines offering cash winnings which are not covered by the Act on Casinos. The Act, which is from 2000, is repealed with the new Gaming Act, but the basic provisions are, with few amendments, transferred to the new Act, cf. Sections 19–23. Gaming machines offering cash winnings are mechanical or electronic machines that may be used for games where the player for a stake of an economic value may win a prize consisting of money or tokens. Gaming machines offering cash winnings may only be installed in restaurants that have a license to serve alcoholic beverages, in private gaming machine arcades and in gaming machine arcades with public access. In such places gaming is only permitted for money. Installation and operation of gaming machines may only take place when a license has been obtained from the Danish Gaming Board.

The Act on Public Gambling in the Form of Tournaments[12] contains rules governing the provision of public gambling in the form of tournaments outside casinos. A tournament may only be held when a license has been obtained from the Danish Gaming Board. The tournament must be a small tournament where the pool does not exceed DKK 15,000 and the payment from each of the participants must not exceed DKK 300. The participants must be physically present during the actual tournament. Consequently, Internet poker is not covered by the Act. The act is not affected by the new Gaming Act.[13]

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[10] Cf. Consolidated Act No. 861 of 10 October 1994 as amended.

[11] Cf. Consolidated Act No. 820 of 26 June 2006, as amended by Act No. 1336 of 19 December 2008.

[12] Cf. Act No. 1504 of 27 December 2009.

[13] Apart from a new provision which creates a right of appeal in case of complaints about decisions of the supervisory authority, so that the decisions may be appealed to the National Tax Tribunal.

19.3 The 2010 Gaming Act[14]

19.3.1 Purpose

The purpose of the Act is, cf. Section 1, through regulation and control:

- to maintain the consumption of gaming for money (gambling) at a moderate level;
- to protect young people and other vulnerable persons from being exploited by gaming or developing a gaming addiction (ludomania) in connection with their gaming;
- to protect players by ensuring that games are provided in a fair, responsible and transparent way and
- to ensure that public order is maintained and to prevent games from supporting crime.

As a point of departure, all games are now regulated according to the same set of rules, but the intensity of the regulation shall, according to the preparatory works, be scaled to fit the size and prevalence of the game. Hence, the degree of regulation will depend on the extent of the game, its prevalence and nature, the size of the winnings, the risk of players being cheated, etc.

The distinction between small- and large-scale gaming shall ensure that the game providers' and the Danish Gaming Board's expenses for regulation and control of the games should be fairly proportionate with the potential income from the game, the players' chances of winning, the prevalence of the game, the type of game, etc. For instance, online casino gaming should be subject to more intensive regulation than lotteries provided by local associations.

The Act also introduces a distinction between games that are land-based (physical) and games that are provided online, i.e. via the Internet, mobile telephone, etc. Online provision of games gives the game providers a technical platform to supply players with new, interactive and fast played games. These games are always available for playing (always open), involve no personal contact with game providers and represent a situation where players can lose large amounts of money in a short period of time and develop an addiction to the game which may interfere extensively with the player's life at the expense of social, work and family values and obligations.

Online provision of games therefore immediately increases the need for much more intensive consumer protection than is required for the traditional physical provision of games. On the other hand, the new technologies and sales channels represent better possibilities of introducing age limits and game speed limitations.

[14] The description of the new Act is based on the preparatory works, cf. Bill 202 for a Regulation of Gaming Act and Amendment of Bill for Regulation of Gaming Act (Parliamentary year 2009–10).

These measures can contribute to the prevention of minors' gaming, gaming addiction, crime, etc.

The regulation is therefore, as a basis, identical for all types of games which involve stakes and winnings and are provided under a license issued in pursuance of the Act. There are, however, specific rules which apply to the games that are promoted online, i.e. electronically and without the physical presence of the player and the provider/promoter in the same location.

19.3.2 Scope and Definitions

Unless otherwise stated the new Act cover all kinds of lotteries, betting (including sports betting) etc. In pursuance of Section 2 the Act applies to games provided or organized in Denmark.[15] Games organized by a group of players together are also covered.

Games provided via the Internet are regarded as being provided in Denmark if the game provider accepts stakes in the game from persons in Denmark. A game provider established in a country other than Denmark is therefore required to comply with the provisions of this Act, including the license requirement, if the game provider accepts stakes in the game provided from persons in Denmark. A game is covered regardless of whether someone makes a living by the game or whether it is provided to benefit charities.

The former legislation on the gaming area lacked definitions of important concepts such as "game," "lottery" and "betting," which were used in various former acts. The explanatory notes to those acts did not provide any explanations of the concepts either. Hence, doubts have practically always existed as to the scope of these acts and the delimitation of the various types of games.[16] As violations of the gaming regulation can be met with criminal sanctions, such uncertainties are rather unfortunate.

As part of the modernization and partial liberalization of the gaming market, where specific types of games can only be provided by a few game providers, while other types of games may be provided on a market with free competition, new and more clear definitions of the various games are laid down in the Act, cf. Section 5.

The new definitions divide the concept "game" into three categories:

Lottery:

Activities in which a participant may have the chance of winning a prize and where the probability of winning in the game is solely based on chance.

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[15] "In Denmark" does not cover the Faroe Islands and Greenland.

[16] Cf. the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen*) 2008B.1.

Combination game:

Activities in which a participant may have the chance of winning a prize and where the probability of winning in the game is based on a combination of skill and chance.

Betting:
Activities in which a participant may have the chance of winning a prize and where bets are placed on:

(a) the result of a race, a sporting event or another event or,
(b) the occurrence of a particular event.

According to the definitions of the three types of games, the definition of games does, in principle, include activities in which the participants do *not* have to pay a stake to participate in the game. According to Section 3 of the Act, however, no license is required to provide games for which the payment of a stake is not required.

Hence, activities that require a license under the Act, are activities where:

(1) the participants must pay a stake to participate in the game,
(2) the participants may have the chance of winning and,
(3) the chance of winning is solely based on chance or on a combination of skill and chance.[17]

"Chance" in a game is understood to be e.g. the drawing of lots, the throw of a dice and the dealing of playing cards. If one or more elements of chance are included in a game, the outcome of the game will as a basis depend on chance—even though the game also requires the player to have certain skills within the analysis and strategy in order to win/improve the chance of winning.

In many games experience and skill play a certain part in the outcome, in particular, in the case of games with several rounds. Games such as poker and whist are examples of games in which the chance of winning depends on a mixture of skill and chance. The player's skill at calculating the percentage probability of winning or losing and the ability to plan a successful strategy undoubtedly significantly influence the outcome of the game. Chance does, however, also influence the outcome of the game, as an inexperienced player with "a lucky hand" will be able to win against players who are very experienced in analysis and strategy. Therefore, the explanatory notes to the Act stress that the outcome of poker, whist and similar games is considered to be partially a matter of chance.[18]

As a basis the combination of skill and elements of chance will mean that the activity is designated as being based on chance. If a skills competition such as e.g. a quiz programme is combined with the drawing of lots between participants to determine the winner (or to determine which participants proceed to the next stage

[17] All three conditions must be fulfilled in order for the game to require a license.

[18] See also the Supreme Court's decision in the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen*) 2009.2392 H.

in a competition), the quiz will contain an element of chance and will therefore be covered by the Act as a combination game.

19.3.3 Liberalized Games

The former system, where it was in general prohibited for any other than *Danske Spil A/S* to offer games in Denmark, has with the new Act been replaced with a liberalized system, where anyone, including commercial actors, in principle can offer games in Denmark, provided they have obtained a license in accordance with Section 3 of the new Act. However, the liberalized system only applies to some games.

19.3.3.1 Betting

Pursuant to Section 11 betting is now liberalized, however with certain exceptions (see below). This applies to both land-based (from physical shops) and online betting. Hence, new commercial game providers can obtain a license to provide betting including sports betting in Denmark. A license may cover both ordinary (fixed-odds) betting, such as *Oddset*, "live" betting, spread betting, betting exchange and pool betting such as *Tips12* and *Tips13*, *Måljagt* and manager games.

In general, licenses are granted for five years at a time, cf. Section 11(2), but there may be circumstances that dictate a shorter license period. According to the explanatory works a license period of less than five years may be relevant if the examinations of the applicant's situation raise doubts about the applicant's solidity, ability to provide games in a financially responsible way or his ability to carry on gaming activities in an acceptable way.

It follows from Section 11(3) that a license cannot be granted for betting on horse and dog racing, pigeon racing and the outcome of lotteries or other events whose outcome is decided by chance, except for land-based betting on the outcome of electronically simulated sporting events.

The prohibition against the provision of betting on horse and dog racing is a consequence of the fact that Section 12 grants *Danske Spil A/S* a license (an exclusive right) to provide horse and dog racing. A license for (local) betting on pigeon racing may be granted in pursuance of Section 13 of the Act.

It is not permitted to provide betting on the result of lotteries or the outcome of casino games where the probability of winning in the game is solely a matter of chance, e.g. roulette or gaming machines offering cash winnings.

However, it is proposed to permit the provision of land-based betting on the result of electronically simulated sporting events. The provision is an exception to the main rule that betting on the result of a lottery or on other events that are solely a matter of chance is not permitted. This means that game providers holding a

license to provide betting in shops may obtain a license to provide betting corresponding to the game Trackside. In Trackside bets are placed on the result of a computer simulated/animated horse race.[19]

19.3.3.2 Online Casino

Section 18 stipulates that a license may be granted to provide an online casino. Everyone, also commercial game providers, can apply for a license to provide an online casino. A license will in general permit the holder to provide the same games as are common in land-based casinos, i.e. roulette, baccarat, punto banco, blackjack, poker and gaming on gaming machines offering cash winnings in an online casino, cf. Section 18(1).

Other games may be permitted, cf. Section 18(3), and according to the explanatory works it is the intention to permit combination games such as whist, Hearts, Yatsy, Ludo, Rubber-bridge and Backgammon. Also, poker providers may be permitted to provide poker games in which Danish players can play against poker players from other countries in an open network. The gaming in the poker networks must conform to Danish legislation, be controlled by the Danish Gaming Board and the game provider must pay a duty on the portion of the stakes that is related to the Danish customers.

A license may be granted for up to five years at a time, cf. Section 18(2). The basis will be that licenses are granted for five years at a time, but there may be circumstances that dictate a shorter license period.[20]

19.3.4 Games Which are Not Liberalized

19.3.4.1 Lotteries

Pursuant to Section 6 the provision of lotteries, except class lotteries and non-profit lotteries continues to be reserved for one company, *Danske Spil A/S*. Lotteries include, i.a. lotto, Scratch cards, Joker, Keno, Bingo (online), Boxen and Trackside (online).

Lotteries also include games, which according to the definition, are characterized as a lottery, but which in practice belong more naturally to the category of betting and casino games. However, it follows from Section 7 and the preparatory

[19] Trackside is a natural part of the product portfolio in physical betting shops where the players can follow "live" matches/races on TV screens on which they have placed their bets. The game is primarily provided in sports gaming shops where it is provided in parallel with betting on football matches, etc. Land-based Trackside can therefore only be provided with a betting license.

[20] Cf. the similar provision in Section 11(2) described above.

works that *Danske Spil*'s monopoly on lottery under Section 6 does not cover betting, combination games and online casino.

When a license to *Danske Spil* is issued, it is determined what lotteries the license more specifically covers. Within the license period, *Danske Spil* may apply for a license to provide more types of lotteries. If *Danske Spil* wishes to provide other types of lotteries, the company must submit an application in that regard.

19.3.4.2 Betting on Horse and Dog Racing (Dantoto)

The provision of pool betting on horse and dog racing is continuously reserved for one company, *Danske Spil A/S*, cf. Section 12.

19.3.4.3 Other Restricted Games

The new Act does not change the applicable system for a number of other games to which access is either reserved for state owned companies or otherwise restricted subject to special regulation, notably land-based casino, class lottery, non-profit lottery, local pool betting and gaming machines offering cash winnings. See Sect. 19.2.

19.3.5 License Requirements

The partial liberalization of the Danish gaming market is also expressed in Section 25(1), pursuant to which all persons and companies (legal persons) as a point of departure can obtain a license to provide games, unless otherwise stipulated in the Act. With regard to the games which are not liberalized, notably lotteries, betting on horse and dog racing and class lottery, the exception in the last sentence of Section 25(1) means that a license can only be granted to *Danske Spil A/S* or *Det Danske Klasselotteri A/S*, *Landbrugslotteriet* and *Almindeligt Dansk Vare- og Industrilotteri*, respectively. See the comments above.

Pursuant to Section 26 a license can only be granted to persons who are residents of Denmark or another EU or EEA country, and who have attained the age of 21 are not under guardianship in pursuance of Section 5 of the Guardianship Act and for whom a surrogate decision maker has not been designated in pursuance of Section 7 of the Guardianship Act, have not filed for suspension of payments, proposed a composition with creditors, petitioned for winding-up proceedings or debt rescheduling or have suspended payments, are in winding-up proceedings or debt rescheduling or have initiated compulsory composition negotiations, have not been convicted of a criminal offence that gives reason to believe that there is a

clear risk of abuse of the access to work with gaming, or do not have unpaid, outstanding debt[21] to the public sector.

With regard to convictions, importance may also be attached to offences committed outside Denmark. Furthermore, particular weight may be attached to violations of the tax and duties legislation.

A renewal of a license or approval is regarded as a new application/case. Therefore, the applicant must (again) fulfill all the conditions, including not have unpaid, outstanding debt to the public sector.

By virtue of Section 26(2) a license to provide and organize games can only be granted to persons who are not residents of Denmark or of another EU or EEA country, if the applicant has appointed an approved representative, cf. Section 30. Only companies or persons who fulfill the conditions stipulated in Section 26(1)1 can be granted a license.

Legal persons (companies etc.) must, in order to be granted a license to provide games, as a general rule to be established in Denmark or in another EU or EAA country. Legal persons not established in Denmark or in another EU or EEA country are required to appoint a representative to represent it in all matters i.a. as regards the authorities, including the Danish Gaming Board and the National Tax Tribunal, in order to obtain a license to provide games in Denmark. The person appointed as representative must, besides fulfilling the conditions in Section 26, be a resident of or established in Denmark. The representative may be a natural person or a legal person.[22]

The conditions for granting a license to a legal person largely correspond to those applicable to the granting of a license to a natural person pursuant to Section 26, cf. Section 28. The Danish Gaming Board may decide that a member of the board of directors or a member of the board of management must retire from the board if such person has been convicted of a criminal offence that gives reason to believe that there is a clear risk of abuse of the access to work with gaming or has unpaid, outstanding debt to the public sector in excess of DKK 100,000. If members of the board of directors or the board of management no longer fulfill the conditions, the person in question must retire from the board of directors or the board of management.

In addition to the specific requirements mentioned above, Section 29 contains two more general requirements. First, a license to provide games can only be granted to applicants who must be presumed to be able to provide games in a financially responsible way, who are professionally qualified to carry on gaming

[21] Debt is not deemed to be unpaid and outstanding if a payment arrangement has been made with the collection authority or if security has been provided for the entire amount of the debt. Further, if a debt has not been transferred to the authority in charge of collecting outstanding amounts, or if the claim is disputed and the authority in charge of collecting outstanding amounts has given the dispute a delaying effect, the debt must be deemed not to be unpaid and outstanding.

[22] The representative may be the same person who is the tax representative of the holder of the license in pursuance of Section 29 of the Gaming Duties Act.

activities and who must be presumed to be able to carry on such activities in a responsible way and in compliance with good practice in the trade in question.[23]

Second, a license cannot be granted if the conduct of the applicant, members of the board of management or the board of directors or others is of such a nature that it gives reason to assume that the enterprise will not be operated in an acceptable way.

The character requirement also applies to others who may have a controlling influence on the operation of the enterprise. This aims to prevent that persons who do not fulfill the character requirements are actually carrying on gaming activities through a person who formally fulfills the necessary requirements.

Other persons who may have a controlling influence could be holders of qualified shares, meaning persons directly or indirectly holding at least 10 per cent of the capital or the voting rights or a share that allows them to have a considerable influence on the management of the gaming activities, or persons who are closely related to the applicant or a member of the board of management or of the board of directors, such as a family member or a partner.

By virtue of Section 44 the Danish Gaming Board may in certain situations withdraw a license to provide games. First, the license may be withdrawn if the license holder (or his representative) has grossly or persistently violated the Act. Second, a holder of a license must not be convicted of a criminal offence that gives reason to believe that there is a clear risk of abuse of the access to work with gaming. Third, the license can be withdrawn if the conditions set forth in Section 29 are no longer fulfilled, i.e. the license holder (or persons in the management or with a controlling influence over the company) is no longer able to provide games in a responsible way.

Fourth, the license may be withdrawn if the license holder or his representative does not comply with the obligations to report and pay duties or does not pay outstanding fees according to Section 42 (cf. below).

Fifth, the license holder or his representative must not have an outstanding debt to the public sector in excess of DKK 100,000. Whether the debt concerns gaming activities in pursuance of an existing or previous license is not decisive. It is merely a condition that the debt is owed to the public sector.[24]

Sixth, the license may be withdrawn if the license holder has not applied for registration with the tax authorities within 4 weeks from having received the gaming license. This condition is a consequence of the Gaming Duties Act.

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[23] The Danish Gaming Board's examinations in this respect may include assessments of the enterprise's business plan, cash position, ownership, previous enterprises, etc.

[24] The assessment of whether or not a license should be withdrawn should include considerations as to whether the debt has arisen suddenly, e.g. as a consequence of cash flow problems, or if it has grown over a period of time and whether effective measures have been taken in this connection by the holder of the license with a view to reducing the debt to the public sector within a foreseeable time.

19.3.6 Information and Other Requirements

According to Section 33 the game provider must inform the player about all relevant matters regarding the game in connection with the provision of the game, and such information must be easily accessible to the player at the place where the game is provided for sale.

Detailed information requirements will be set forth in a coming executive order, but pursuant to the explanatory notes relevant information for the provision of games include e.g. (i) all costs associated with participation (fee, postage, freight, telecommunication, etc.); (ii) the value of all winnings (market value); (iii) where and when the winners are announced; (iv) payout percentages used; (v) start and end date for participation; (vi) the procedure used for drawing the winners; (vii) how winnings are paid to the winners; (viii) deadline by which valid winning claims must be submitted; (ix) the name of the holder of the license and the physical address where the holder of the license is established, e-mail address, postal address (if applicable) and other information about the holder of the license required to contact and communicate with the holder of the license; (x) the central business registration number (CVR No.), if the holder of the license is registered in the Central Business Register (CVR); (xi) how the player can complain to the holder of the license and (xii) the date of the license to provide games.

All game providers are required to draw up game rules for the game so that the players can read the rules for the game in question. The game rules must be uploaded to the game provider's web site in case of an online game, or be displayed in the shop where the game is sold in case of a land-based game. In shops selling games it is sufficient for the dealer to be able to print the rules upon request from the player, or be able to show the rules on a monitor.

Section 34 prohibits the sale and promotion of games to young people under the age of 18. The prohibition will apply to all game providers, except for providers of non-profit lotteries. The provision of land-based lotteries and class lotteries are exempted from the general 18-year age limit, which is replaced by a 16-year age limit.[25]

Pursuant to Section 35 the license holders are not permitted to extend credit to the player to enable the player to participate in the game. This does not prevent the providers from providing games and accepting a credit card as payment as it is not the holder of the license but a payment institution that grants the player credit in such case.

Section 36 establishes a number of requirements regarding the marketing of games. It is i.a. a requirement that the marketing shall not create an impression that the chances of winning are bigger than they actually are, shall not be aimed at young people under the age of 18 and shall not have a content that gives the

[25] The provision of land-based lotteries is not believed to have the same effects in relation to gaming addiction due to the nature of the game, including the game speed.

impression that participation in games can provide a solution to financial problems or increases the player's social acceptance.

Advertisements for games are also regulated by the general provisions set forth in the Marketing Practices Act,[26] including the general clause regarding "good marketing practices." In case of overlap the Gaming Act will apply in accordance with the *lex specialis* principle, but the cases will normally be put before the Consumer Ombudsman, who supervises compliance with the Marketing Practices Act.

According to Section 41 the Minister of Taxation lays down detailed rules regarding the games and their completion. Such rules have not yet been issued, but the explanatory notes state that rather rigorous rules will be adopted with regard to the two liberalized types of games, betting and online casino. For example, the players must be registered before they can participate in games, and the age of the players must be verified in connection with the registration. The game provider shall pay the costs in this regard.

It will also be required that providers of online games make certain information and tools available on the web site with the purpose of limiting gaming addiction. This information include, as a minimum, (i) warnings and links to material on the risks of excessive gaming, (ii) notification to the player that participation in games for money can have harmful consequences (with links to Danish counseling institutions), (iii) a possibility for players to exclude themselves temporarily from a specific game or the entire web site, (iv) a possibility for players to be able to voluntarily permanently exclude themselves (in which case the game provider must automatically request the player's permission to have a counselling institution contact the player), (v) a possibility for players to impose limitations on his gaming (transfer/deposit/loss limits) and (vi) a possibility for the game providers to develop and use new tools to prevent minors' gaming and gaming addiction.

19.3.7 Fees

Pursuant to Section 42 the game providers are obligated to pay fees to finance the costs of the Danish Gaming Board for the administration of the proposed rules, including control and supervision of the game providers. The fees must correspond to the actual costs of administering the Act.

With regard to liberalized games, i.e. betting and online casino, the applicant shall pay DKK 250,000 (2010 level) when filing an application for a license to provide betting and online casino. The fee must be paid when the application is submitted, at the latest. The fee is to cover the costs associated with the Danish Gaming Board's processing of the application. The application fee is payable for applications for licenses to provide betting as well as for licenses to provide online

[26] Cf. Consolidated Act No. 839 of 31 August 2009.

Table 19.1 Gaming income and fees

Size of gaming income	Fee
Under DKK 5,000,000	DKK 50,000
DKK 5,000,000 to DKK 10,000,000	DKK 250,000
DKK 10,000,000 to DKK 25,000,000	DKK 450,000
DKK 25,000,000 to DKK 50,000,000	DKK 650,000
DKK 50,000,000 to DKK 100,000,000	DKK 850,000
More than DKK 100,000,000	DKK 1,500,000

casino. If a game provider applies for a license to provide both betting and online casino, the fee will, however, only be DKK 350,000 (2010 level).

Besides the application fee the license holder must pay an annual license fee, cf. Section 42(3). The fee depends on the taxable gaming income for the calendar year (cf. Sections 6 and 11 in the Gaming Duties Act): Table 19.1

The intention with the differentiation of the annual fee is to contribute to allowing smaller game providers easier access to the betting and online casino games markets.[27]

Section 42(4) stipulates that if the realized annual gaming income is higher or lower than the fee paid under subSection 3 and this leads to a fee level jump, the amount paid under subSection 3 will be adjusted. The adjustment must be effected immediately after it has been found that the gaming income exceeded or was below the level originally paid for. Repayment of annual fees paid in excess may not be effected until after the end of the calendar year.[28]

If the holder of the license stops providing games, there will be no adjustment of the fee.

The fee for the following calendar year must correspond to the preceding year's actual gaming income so that it corresponds to a full calendar year. This means that if the holder of the license only provided games for six months in the preceding year, the gaming income must be multiplied by two to establish the fee level. The fee will always be adjusted if the actual gaming income changes in relation to what was applied as the basis for payment of the fee.

If the applicant's annual gaming income is less than DKK 1 million, a fee of DKK 50,000 is to be paid to cover the total costs of processing the application,

[27] The differentiated scale for payment of the annual fee means, for example, that a holder of a license with an annual gaming income of DKK 8 million will pay an annual fee of DKK 250,000, corresponding to a reduction of the fee by DKK 420,000. For a holder of license with an annual gaming income of DKK 75 million, the change means that the fee will increase to DKK 850,000, corresponding to an increase of DKK 180,000.

[28] If, for example, the holder of the license has stated the expected gaming income in the interval between DKK 5 million and DKK 10 million (DKK 9,999,999) and the gaming income reaches DKK 10 million (and is less than DKK 25 million) for the calendar year, the difference (DKK 450,000 less DKK 250,000) of DKK 200,000 will be charged immediately after this is recorded.

issuing the license and supervision, cf. Section 42(5). The maximum license period is then one year.

19.3.8 Supervision and Control

Provisions concerning supervision and control are stipulated in Sections 46–49 of the Act. Pursuant to Section 46 the Danish Gaming Board controls the current game providers (with the exception of *Landbrugslotteriet and Almindeligt Vare- og Industrilotteri*, which will continuously be controlled by the Ministry of Justice) as well as the new commercial game providers which obtain a license to provide online casino games and betting in connection with the liberalization.

According to the explanatory notes the Danish Gaming Board must in its control of the gaming market (i) focus on the players' interests, i.e. by ensuring that the players receive their rightful shares of winnings and that the games observe the payout percentage, (ii) ensure that technical equipment used to provide games has been controlled and approved for the purpose by recognised test institutions, and (iii) ensure that the State's interests are protected, e.g. by ensuring that the holders of the licenses pay the correct duties.

The control of the individual games will, according to the explanatory notes, be adapted to the various types of games, based on an assessment of materiality and risks relating to the scope of the game, its prevalence, security, nature, the size of the winnings and the risk of players being cheated, etc.[29]

Section 47 gives the Danish Gaming Board access—without a court order—to inspect the premises used by the holder of a license to provide and organize games, and permits them to inspect accounting records, other accounting material, correspondence and other documents that may be of importance to the provision of games. Consequently, it will be possible to make inspections of premises located at other places than where the games are provided, but which are used for e.g. administrative activities in connection with the organization, including office premises and residential premises.

Inspections must be in compliance with fundamental procedural principles and the rules in the Act on Due Process of Law in the Administration, including the requirement that if an individual or legal person is reasonably suspected of having committed a punishable offence, intrusive measures may only be taken as against the suspect with a view to obtaining information about the matter(s) which the suspicion concerns.

The holders of licenses and their employees must provide the Danish Gaming Board with the necessary instructions and assistance in connection with an

[29] In the types of games that have built-in elements of chance (lottery draws, dealing of cards, throwing a dice, etc.), it will be important that the mechanism that generates the randomized result works as intended. In pool betting, it will also be important to ensure that the calculation of winnings payments to the players is carried out correctly.

inspection and surrender or forward the requested material to the Danish Gaming Board.

In order to further strengthen The Danish Gaming Board's supervision and control the game providers must, in connection with an application for a license to provide games, give an account of and document how the provider will implement the protection measures of the Act in the form of programmes to prevent gaming addiction, minors' gaming, etc.

Holders of a license to provide games in the form of fixed-odds betting and online combination and casino games are according to Section 43 required, one year after starting to use the license, to prepare a report about how the holder of the license has complied with the legislative requirements, including the requirement for protection measures to prevent gaming addiction, minors' gaming, etc. The report must be prepared by an enterprise approved by the Danish Gaming Board. In addition, the license holders must every year publish an annual report including the enterprise's key figures.

19.3.9 Blocking of Payment and/or Internet transmission

Section 65 stipulates that transmission of payments of stakes and winnings to and from an illegal game provider, as well as transmission of information via a communications network to an illegal game system, is not permitted.

This provision covers, for example, an Internet service provider that makes a DNS server available to its own end-users or other providers' end-users (hereinafter referred to as "Internet service providers") by transmitting information to a specific Internet domain with an illegal game system. Such transmission will be in contravention of the provision.[30]

The provision also covers providers of payment services and electronic money institutions which transmit payments of stakes and winnings to and from a specific account held by an illegal game provider.

Recognizing that the Internet service/payment providers normally do not have knowledge about which game providers are illegal, and that they are not under any obligation to make regular checks of whether or not the information/payments they provide is legal, the Danish Gaming Board will inform the Internet service providers or the payment service providers about the Internet domains which the Danish Gaming Board believes to contain illegal game systems or to and from what accounts payments of stakes and winnings may not be made. Such information will be in the form of a recommendation.

[30] According to the explanatory notes the provision intends to cover Internet service providers that provide the Internet to a wider range of customers. It is not the intention to include enterprises providing the Internet to a limited or closed group of people, such as hotels, restaurants, educational establishments, etc.

In cases where an Internet service provider or a payment service provider has received a recommendation of that nature from the Danish Gaming Board, the Internet service provider or the payment service provider can avoid breaking the law by establishing a DNS blocking (Internet blocking) of the Internet domain in question or by blocking payments to the accounts in question.

If a recommendation to an Internet service provider or a payment service provider is not observed, the Danish Gaming Board may, according to the explanatory notes, seek to have the provision enforced by the imposition of an injunction by the enforcement court in accordance with the rules of Part 57 of the Administration of Justice Act.[31]

This provision has been notified to the Commission in pursuance of Directive 98/34/EC of the European Parliament and of the Council (the Information Procedure Directive) as amended by Directive 98/48/EC.

19.3.10 Sanctions

Section 59 stipulates that the provision, organization or promotion of participation in illegal games, i.e. games which are provided in Denmark without a license under the Act, is punishable by a fine or imprisonment for up to one year.

Games provided via the Internet are regarded as being provided in Denmark if the game provider accepts stakes in the game from persons in Denmark. A game provider established in a country other than Denmark is therefore required to comply with the provisions of the Act, including the license requirement, if the game provider accepts stakes in the game provided from persons in Denmark.

Promotion of games without a license means any type of activity whose purpose is to establish games or increase participation in illegal games, regardless of whether such games are provided electronically or otherwise. Games will, for instance, be regarded as being promoted if links are provided to web sites of game providers which do not have a license to provide games under this Act. Consequently, the provision prohibits that players in Denmark are physically or by digital means helped to play with game providers without a license.

Information offices in Denmark for game providers without a license may be deemed to promote participation if the earnings of the office come from advertising or providing information about the possibilities of gaming with the game provider. However, this does not cover the editorial mentioning of illegal games in printed or digital news media.

Contribution to violation of the provisions may be subject to a penalty in pursuance of the general rules of Section 23 of the Criminal Code. This means that

[31] Pursuant to Section 641(1) of the Administration of Justice Act, the enforcement court may issue an injunction ordering parties of private judicial relationships to omit actions that are in contravention of the rights of the judgment creditor. Section 651 stipulates that a wilful violation of a restraining injunction may be punishable by a fine or imprisonment of up to four months.

private individuals or enterprises whose servers host web sites that violate the prohibition in the provision may be deemed to contribute to the violation. In order to be able to punish the so-called hosts it will normally be necessary for the authorities to first approach the host with an order to remove the illegal web site. It is also a condition for imposing a penalty on the host that the host does not immediately comply with such order.[32]

Providing advertisements or publicity for games or game providers that do not have a license under the Act is subject to a penalty. Advertising and publicity also cover the receipt of sponsorships (financial contributions to an activity, an event, etc. with the purpose of promoting the sale of the game provider's products from illegal game providers).

It is a punishable offence to promote participation in the games of a holder of a license for commercial purposes without having obtained the approval of the holder of the license.

Finally, it is a punishable offence to make a living by games for which a license has not been granted under this Act. The provision corresponds to the rules applicable to commercial participation in unlicensed gambling in pursuance of Section 203 of the Criminal Code, cf. Sect. 19.2.

19.3.11 Coming into Force

The date of entry into force of the Act was originally fixed to 1 January 2011. However, due to a critical inquiry to the Commission from providers of games on gaming machines offering cash winnings and land-based casinos, arguing that the proposed difference in duties between physical games and online games constitute illegal state aid to the benefit of online game providers, it was decided to notify the proposed duties with a view to obtaining the Commission's confirmation that they do not constitute state aid.

The proposed rules cannot be put into force until the Commission's confirmation has been obtained. Accordingly, Section 66 authorizes the Minister of Taxation to put the Act into force.

19.3.12 The Gaming Duties Act

The new Gaming Act shall be viewed in the context of the likewise new Gaming Duties Act,[33] the purpose of which is to regulate the payment of duties on games

[32] Also persons working for illegal game providers who make a substantial effort in the company's business may be said to contribute to the violation. Such persons could be sales agents or persons gathering information about Danish sporting events for use for the game provider's betting activities.

[33] Act No. 698 of 25 June 2010.

provided, organized or held in Denmark. With the new Gaming Duties Act, the various gaming duties are unified in one act and at the same time a modernization and a simplification of the rules are carried out i.e. in relation to registration, duty periods and payment.

Games covered by the liberalized part of the gaming market (betting and games in online casinos) are subject to a duty of 20 per cent on the gross gaming revenue. *Danske Spil* has become liable to corporation tax, and winnings duty is only imposed on lotteries provided by *Danske Spil*. For the other areas, the new Gaming Duties Act primarily continues the current law.

19.4 Criticism of the New Act

Several aspects of the new act have been criticized, mainly the relationship with EU law and the new provision regarding blocking of payment and/or Internet transmission.

As described in the introduction, one of the primary purposes with the new act is to make sure that the regulation as in accordance with EU law, notably the fundamental right to free movement of services across the EU, cf. Article 56 (former 49) TFEU. Despite this effort it has been argued that the act still violates Article 56 and other fundamental EU law principles.[34]

First, it has been pointed out that the act (including the preparatory works) lacks any kind of assessment of whether the restrictions (which still apply outside the liberalized areas) on the access to provide games on the Danish territory ''reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and systematic manner," as required in the *Placanica* case.[35] In other words Denmark has failed to prove that there is proportionality and coherence between the overall purposes pursued with the act (e.g. combating gambling addiction) and the measures set forth in the act to obtain these purposes.

Second, no explanation at all is given for the exception of lottery from the partial liberalization. As lottery is a service comprising Article 56 TFEU[36] the exception regarding lottery still constitutes an infringement of EU law. The exception regarding horse racing is also deemed to be a violation of Article 56, because the reason stated for the exception (preserving the local races) is not a valid reason under EU law.

Third, the provision regarding blocking of payment and/or Internet transmission, if necessary via an injunction order, has been heavily criticized for violating fundamental EU law and human rights principles regarding freedom of expression

[34] Cf. Tax Policy Review (*Skattepolitisk Oversigt*) 2010, pp. 27–41 and 273–283.

[35] C-360/04, at 53.

[36] Cf. C-275/92, Schindler.

and proportionality. The fear is that it will lead to comprehensive blocking of access to web sites containing games which—due to a closer scrutiny—turn out to be legal, or blocking of web sites which, besides games, also contain information which is fully legal and maybe even desirable in a democratic society, e.g. political discussions and views.

Fourth, an interim provision creating a so-called "black period" has been criticized. As mentioned, the new Act will not come into force until the provision which has caused the allegations regarding illegal state aid has been notified to the Commission. However, the Ministry of Taxation *may* choose to put into force the amendments to the current main act, the Act on Certain Games, Lotteries and Betting. A specific amendment is that the provision of Internet access to an illegal game is regarded as illegal promotion of the game, cf. Section 67 of the new Gaming Act, and thus can be subject to an injunction order. This makes it possible for the Danish authorities to cut off access to foreign online game providers in the period until the new Act will come into force (thereby giving the state-owned *Danske Spil A/S* to gain market shares in the interim period). However, at the time of writing (November 2010) the amendments to the current act, including Section 67, have not been put into force.

19.5 Conclusion

The new Gaming Act represents a clear improvement compared to the former legal framework, which was very unclear, badly arranged, unenforceable against foreign-based online game providers, and presumably a violation of EU law.

The liberalization of betting and online casino will no doubt increase the market for provision of games and betting in Denmark, including sports betting. At the same time the license requirement and the Danish Gaming Board's vast competences with regard to control and supervision will probably ensure that the liberalization can be implemented without significant negative societal effects.

However, the new Act also has its drawbacks. It is a rather narrow liberalization, which for reasons that are not entirely clear do not comprise notably lotteries and betting on horse and dog racing. Further, despite the vast efforts to ensure that the new Act complies with EU law, this issue seems not to have been entirely solved. Moreover, the provision regarding blocking of Internet transmission/payment services, which may play an important role in effectively keeping foreign unlicensed providers away from the Danish market, appears questionable in light of the fundamental principles of freedom of expression and proportionality.

Chapter 20
Estonia: Regulation of Sports Betting Under the New Gambling Act

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Contents

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20.1 Introduction

One has to appreciate the history of Estonia when it comes to the subject of sports betting. Gambling of any kind was prohibited in the Soviet Union, although in all bigger cities the casino businesses were illegally organized even during the darkest days of communism. Therefore, the historical account of the legal regulation of gambling can be taken with regard to the past 14 years only, i.e., since the adoption of the first Lottery Act in 1994 (*Loteriiseadus*) and the first Gambling Act in 1995 (*Hasartmänguseadus*) by Estonian Parliament (*Riigikogu*).

Whether as a consequence of the mentality imposed by this history or due to certain other factors, the problem of gambling addiction is routinely overstated in Estonian society. Casino operators are frowned upon and it is not uncommon to hear the word 'mafia' used as an adjective to describe the gambling business, casinos in particular. The legal regulation of gambling was insufficient and inadequate up until 2009 when the new Gambling Act entered into force. Taking into consideration that the legislation was widely opened to criticism, and the social attitudes, the lack of any more comprehensive academic writing on the matter is surprising. The only substantial treatment of the subject is provided by the student Master Thesis submitted by Peedu in 2008, alas, dealing mostly with the provisions of the old Gambling Act of 1995 and the cases decided under it.[1] With a population of 1.4 million, and the short history of legislative action and enforcement in the field, Estonian courts have not had many opportunities to rule on this subject either. There are no English or any foreign language translations available for the new Gambling Act or for any of the national court decisions.

On May 1, 2004, Estonia joined the European Union. Gambling activity is an area that was not directly discussed at the accession negotiations. However, it is an economic activity within the meaning of the EC Treaty and is as such affected by the accession. This means that the gambling legislation of the Member States should be in conformity with the Community legislation, in particular the internal market and competition rules.

This article will focus on the provisions of, and requirements placed upon, the organizers of gambling under the new Gambling Act and will, *inter alia*, place the emphasis on licensing of remote gambling and the activities of several offshore companies that create the legal problems for supervisory officials in Estonia. Other types of gambling and the key changes in their legal regulation will also be discussed. Lotteries, in respect to which the state has reserved a monopoly for itself,[2]

[1] The work is available at http://dspace.utlib.ee/dspace/bitstream/10062/6835/1/peeduagris.pdf. Its author is a senior lawyer at the Estonian Tax and Customs Board, the authority in charge of licensing gambling operators.

[2] This follows from the Article 9(5) which provides that 'Lotteries, except for promotional lotteries, may be organized by a completely state-owned public limited company founded for that purpose by the Government of the Republic whose share capital is at least 1,000,000 Euros and whose shares are completely state-owned.'

are outside of the scope of this chapter but will be mentioned to the extent necessary for general understanding of their place in the organization of gambling.

20.2 The Problem of Gambling in Estonian Society

Due to several media scandals and the lack of proper lobbying in the government, the status of gambling, in particular the casino business in Estonia, is quite low in the eyes of the general public. There are two lobbying groups working at the opposite ends of the cause: *Eesti Kasiinovastased* (Estonian Anti-Casino Movement, hereinafter *Kasiinovastased*) supported by *Eesti Hasartmängusõltlaste Ühing* (Estonian Union of Gambling Addicts); and *Eesti Hasartmängude Korraldajate Liit* (Estonian Association of Gambling Operators, hereinafter EHKL).

Statistics about the number of the addicted gamblers differ substantially between the two interest groups. Whereas the biggest casino owner in Estonia says that the number amounts to 26,000 and that this is the number that includes not just casino gambling, it also includes those addicted to all other forms of gambling, *Kasiinovastased* puts that number at 50,000 compulsive *casino* gamblers. The respectable daily business newspaper *Ärileht* talks of 70,000 casino addicts. They also point out that "casinos have caused the suicide of hundreds of people in Estonia, even murders of members of their family, including children. 42% of the dependants are considering suicide. In 2007 the research carried out by *AS Turuuuring* (Market Research) showed that 76% of Estonians and 81% of residents of Tallinn are in favor of banning casinos."[3]

Whereas it is not difficult to sympathize with the cause, there is another equally valid side of the story. Gambling, much like drinking alcohol and smoking cigarettes is a personal choice. As long as properly regulated and supervised in order to prevent the illegal use of profits and money laundering, there is no compelling reason to create further pressures on the government. In a letter addressed to the Minister of Finance in March 2008 *Kasiinovastased* expressed a serious concern in relation to the repercussions that may materialize because, in its view, the new Gambling Act favors casino interest groups. In mid-April 2008 they visited EU Parliament, European Commission representatives and NATO headquarters trying to draw the attention to their concern that there is no adequate control over the casino business and gambling market in many new EU and NATO Member States. This, in their opinion, leads to money laundering and other crimes, and possibly even provides support for terrorist activities.[4] On April 29, 2008, in the center of

[3] Source: http://www.arileht.ee/uudised/434954.

[4] Source: http://maxkaur.blogspot.com/2008/04/uus-hasartmnguseadus-snnib.html.

Tallinn Estonian anti-casino protest was organized with the purpose of bringing the entire casino business in Estonia under the control of the state.[5]

It is important to mention that sports betting and the lottery have not been the direct cause for these kinds of concerns and attacks as they are considered less socially harmful.

20.3 Relevant Legislation

Prior to the adoption of the new Gambling Act ('the Act')[6] two separate laws used to regulate the field: the Lotteries Act of 1994 and the Gambling Act of 1995. They provided for imperfect mechanisms of regulation and control in particular due to their inability to cope with the changes in the organization of the gambling industry. The practical problems that were unresolved were many, most notably the lack of regulation of remote gambling. The new Gambling Act was in the form of a draft proposal and a subject of debate over 4 years. The European Commission was informed of the draft legislation in the beginning of 2008 and *Riigikogu* finally adopted the new Gambling Act on October 15, 2008.

The objectives of the new Gambling Act are to impose stricter requirements for organizing gambling games in order to improve the quality of gambling services, enact measures for protection of players, and to decrease the negative consequences of the gambling and its influence on the society.[7] Amendments where made in order to effectively cope with the changed situation in the gambling sector and to make use of novel possibilities to supervise gambling organizers.

Entry into force of the act is split into three stages. Most of the provisions are already in force as of January 1, 2009. The next set of provisions, which will become effective on January 1, 2010, is the most important in the context of online sports betting. The organizers of remote gambling are given more time to study the impact of the new legal regime. For offshore companies offering online sports betting services to their clients in Estonia the impact will be profound. These provisions and their contribution to the regulation of remote gambling will be addressed later in detail.[8] Finally, provisions regulating electronic reporting and supervision of gambling systems, as well as those that set forth the requirements for games of chance machines will enter into force on January 1, 2011.

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[5] The video of a later *Kasiinovastased* protest which took place in July 2008 in front of the building of Olympic Entertainment Group, the owner of Olympic Casino, is available at http://www.nuffi.ee/video/hlzc88eG-QM.

[6] State Gazette RTI, 06.11.2008, 47, 261. Available at https://www.riigiteataja.ee/ert/act.jsp?id=13060644.

[7] Article 1 of the Act.

[8] See the paragraphs on online sports betting *infra.*

Apart from the new Gambling Act, which repealed the 1994 Lottery Act and 1995 Gambling Act, the relevant legislation includes a new Advertising Act[9] and a Gambling Tax Act that is currently undergoing review.[10]

20.4 Definition, Categories and Sub-Categories of Gambling

20.4.1 Definition

The Act defines gambling as having all of the following characteristics: a stake made by the player is the condition for participating in a game; players may win prizes as a result of the game; the result of the game is determined completely or partially by actions based on chance; or depends on the occurrence of an event not known in advance.[11] So there are three elements that need to be present; stake, prize and chance. If one of the elements is not present then we are not dealing with gambling. Additionally, Article 2(5) excludes games of skill in which the only prize is the opportunity to play again in the same game, as well as sports competitions, lotteries whose prize has a value of up to EUR 1000, and promotional lotteries with a prize fund of up to EUR 10,000. All are excluded from the definition of gambling within the meaning of the Article 2(1) of the Act. All other lotteries must be organized by state-owned monopoly.[12]

The basic three-element definition has not changed substantially in comparison to the old Gambling Act, thus, the Supreme Court decisions on the definition of gambling are applicable in relation to the new Act as well.

20.4.1.1 Stake

The Act defines a stake as "a sum of money paid for participation in a game or a monetarily appraisable obligation taken in return for the right to participate in gambling."[13] Before the Act came into force, the same concept was defined by the Supreme Court in the case 3-1-1-7-06 (p-d 9.3–9.5).[14] Accordingly, a stake, within

[9] State Gazette RT I 2002, 28, 158. Available at https://www.riigiteataja.ee/ert/act.jsp?id=13061981.

[10] State Gazette RT I 2008, 15, 108. Available at http://www.riigiteataja.ee/ert/act.jsp?id=1040649.

[11] Article 2(1) of the Act.

[12] Eesti Loto is the state-owned public limited company that organizes lottery games in Estonia. For more on the company see www.eestiloto.ee.

[13] Article 2(2) of the Act.

[14] The decision is available at http://www.riigikohus.ee/?id=11&tekst=RK/3-1-1-7-06. It is worth mentioning that the concept of stake in this particular case was defined in relation to lotteries.

the meaning of Article 3 of the old Gambling Act, is the value of the object that the participant bets, in return for the right to participate in the game, and that he or she will lose on the basis of chance in case they do not get the said prize. The sums paid to acquire the right to participate in a draw do not amount to stake within the meaning of Article 3 of the old Gambling Act, if as a consequence of the draw the value of the personal assets placed as stakes to obtain the right to participate cannot be reduced. Only if there is a risk of reducing the value of assets of a player will there be a "stake."

Furthermore, according to the General Part of the Civil Code Act of 2002,[15] Article 66, property is "a set of monetarily appraisable rights and obligations belonging to a person unless otherwise provided by law." Article 65 of this Code provides that the value of an object is its usual value, meaning its average local selling price (market price). Furthermore, "objects are things, rights, and other benefits which can be the object of a right."[16] Therefore, betting a sum of money in return for which a participant receives the object or rights of the same value, or the exception from obligations of the same value, will not constitute the decrease in the value of asset and will not constitute a "stake."

20.4.1.2 Chance

The concept of chance under the new Gambling Act does not rely on a predominance test; instead, not only in the games in which the result is entirely dependant on chance (such as slot machines), but also in the games in which the result depends partly on chance (and partly on skill), will there be a "chance" within the meaning of the Act. In addition, the element of chance does not have to dominate over the skill to determine its outcome. This approach is reflected in the express language of the Article 3(4) that defines games of skill as games whose outcome depends predominantly on the physical skilfulness or skills and knowledge of the player. Thus, only a certain element of chance needs to be present for there to be a "chance." However, sports competitions (which by nature of sport industry always contain a certain degree of chance) are excluded from the categories of gambling.

20.4.1.3 Prize

The Act defines the prize as the right of a player to acquire money or other benefits having a monetarily appraisable value.[17] As should already be clear from the definition of gambling, Article 2(5) excludes certain types of prizes from the scope

[15] State Gazette RT I 2002, 35, 216. Available at https://www.riigiteataja.ee/ert/act.jsp?id=13111425.

[16] Article 48 of the General Part of the Civil Code Act.

[17] Article 2(3) of the Act.

of the Act. In addition, Article 41 provides that the prize for a game of skill organized on a machine for a game of skill shall be an object that is not money and whose value is a maximum of EUR 50. The prize in an online game of skill which cannot exceed EUR 50.

Once it has been ascertained that all the elements are present and that the case involves gambling within the meaning of Article 2 of the Act, the next step is to identify the category and sub-category of gambling in question.

20.4.2 Categories and Sub-Categories of Gambling

The Act encompasses types of gambling that were previously insufficiently regulated or not regulated at all. As a novel element lotteries and games based on "mental skills" are included in the Act as forms of gambling. Remote gambling is now specially regulated, and so are promotional lotteries.

According to Article 3 the categories of gambling are: (1) *games of chance*—games whose result depends on chance and which take place using a mechanical or electronic apparatus or through the agency of a game organizer; (2) *lotteries*—games whose result is determined completely by chance, where the prize fund forms up to 80% of the sales price of the lottery ticket print run and results are revealed a maximum of three times a day or results are revealed upon uncovering a field on a lottery ticket; (3) *totos*—games whose result depends on the prediction by the player of the occurrence, non-occurrence or the manner of occurrence of an event, where the event with regard to which the player enters a stake is beyond the control of the organizer of the gambling, receiving the prize depends on whether the prediction comes true, the amount of the prize depends on the size of the stake and on the winning coefficient determined before the stake was placed (betting), or on the percentage of the stake pool determined by the organizer of gambling, the number of persons making the correct prediction, and the sizes of their stakes (totalisator), and; (4) *games of skill*—games whose outcome depends predominantly on the physical skilfulness or skills and knowledge of the player, and that are organized by using a mechanical or electronic tool.

The subcategories of games of chance are: (1) games organized on gambling tables and gambling machines to determine the outcome of which an electronic, mechanical or electromechanical device made for organizing gambling or the assistance of the game organizer is used, and (2) additional games of chance—which upon compliance with the conditions provided in the rules of the game afford the player at the gambling machine or gambling table the opportunity for a prize collected from the stakes from gambling machines or gambling tables, or otherwise predetermined prize.

The subcategories of lotteries are: (1) classical lotteries—lotteries where the results depend completely on chance and where the results of the lottery are revealed after the lottery organizer ceases to allow participation in the lottery; and (2) instant lottery—lotteries whose results are randomly determined on tickets

before the lottery tickets are acquired by a player and whose result becomes known to the player upon uncovering the playing field after they acquire the lottery ticket.

Promotional lottery, which is not within a state monopoly and is not a category of gambling as long as it does not exceed EUR 10,000, and is a classical or instant lottery organized by a trader for the purposes of advancing the sales of goods or services, or for promoting goods, services or their providers.[18] Most importantly, the new Act thoroughly regulates remote gambling. Article 5 defines it as "the organisation of gambling in such a manner where the result of gambling is ascertained using electronic appliances and in which the player can take part via electronic device, including telephone, Internet and broadcasting." The court practice has confirmed that remote gambling is not an independent category or subcategory of gambling.[19] Instead, it is a manner in which organizers provide gambling services.

20.4.3 Share and Reserve Capital Requirements for Gambling Organizers

20.4.3.1 Share Capital

According to Article 9 of the Act, games of chance may be organized by a public or private limited company whose share capital is at least EUR 1 million. Lotteries, except for promotional lotteries, may be organized by a completely state-owned public limited company founded for that purpose by the Government of the Republic whose share capital is at least EUR 1 million and whose shares are completely state-owned. Games of skill may be organized by a public or private limited company whose share capital is at least EUR 25,000. Totos may be organized by a public or private limited company whose share capital amounts to at least EUR 130,000.

However, more important than the share capital requirement is the requirement as to the specific legal form of company that can organize gambling. Public or private limited companies are not the only forms of company, and therefore, it would appear *expressis verbis* that the license would be refused to any undertaking that is not complying with the condition related to legal form. If a company from another Member State would be refused the license on the basis of lacking the required legal form it could possibly create the problems of compatibility with the EU internal market rules.

[18] Definition under Article 6 of the Act. This type of lottery can go unregulated as long as its prize fund does not exceed EUR 10.000. See Article 2(5).

[19] Decision of Tallinna Halduskohus (Administrative Court) of 28 June 2007 in the case 3-06-1582.

20.4.3.2 Reserve Capital

The new Gambling Act obliges gambling organizers to create the supplementary reserve capital from annual net profit transfers or other transfers to reserve on the basis of legislation or articles of association. The minimal size of the reserve capital is set to one-third of share capital. The lawmakers have released from this obligation organizers of totos in relation to the events in which the players place the stakes on the outcome of a horse race, and who are non-profit organizations specified by the Government of the Republic, the only statutory purpose of which are equestrian and equine-related activities. Instead of requirements to create additional reserve capital, the net capital reflected in such non-profit organization's balance sheets has to constitute at least 2/5 of the value of their assets.[20]

20.4.4 Licensing Requirements

According to Article 2 of the old Gambling Act, the right to organize gambling belonged to the State, and it could then transfer this right in accordance with the conditions set forth in the old Act, including the issuance of the licenses. The new Act has deleted this article but the state licensing requirements as means of control have remained. In order to legally provide gambling services in Estonia, a person has to first obtain an activity license, and after that an operating license.[21] The decision of Administrative Court confirms that activity and operating licenses are interconnected and that without the operating license it is not possible to legally provide gambling services at a specific location.[22]

20.4.4.1 Activity License for Organizing Gambling

Applications for activity licenses are addressed to the Tax and Customs Board who decide within 4 months whether to issue or deny the license. According to Article 16 of the Act, an activity license entitles a person to apply for an operating license for organizing of the gambling. The activity license is issued for an unspecified term and is not transferable. A separate activity license is issued for games of chance, totos and games of skill. This means that if one attempts to organize different types of gambling each one will be required to be licensed separately. It should be noted that there is no requirement to obtain an activity license for the organization of lotteries.

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[20] This follows from the Articles 9(7) and 10(1) of the Act.

[21] Articles 19–32 of the Act.

[22] Decision of Halduskohus (Administrative Court) in case 3-06-1582.

20.4.4.2 Gambling Operating License

Article 22 of the Act provides that a separate operating license is issued for the period of 20 years: (1) for organizing one category of a game of chance at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; (2) for organizing toto, or at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; (3) for organizing games of skill at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; (4) for organizing a category or subcategory of gambling as online gambling; (5) for organizing a lottery, except a promotional lottery.

The operating license, except for the operating license granted for organizing lotteries and totos for non-profit associations specified in Article 9 (7),[23] shall be granted solely to the holder of an activity license.[24] An operating license for online gambling is granted for 5 years and instead of the requirement to provide an address for the venue in the application form, the online service providers have to supply the address of the server containing the software used for organizing gambling. The decision to grant or deny an operating license is made by the Tax and Customs Board, normally within 2 months.

20.4.4.3 State Fees

The new Gambling Act has amended the State Fees Act.[25] Hence, Article 219 of the State Fees Act sets the amount to be paid at EEK 750,000 for organizing a game of chance, EEK 500,000 for organizing pari-mutuel betting, and EEK 50,000 for organizing a game of skill.[26] Article 220 of the State Fees Act provides that for reviewing an application for a gambling operating license, except in the case of a lottery, a state fee of EEK 50,000 shall be paid. In addition, for reviewing an application for operating license for lottery, a state fee of EEK 10,000 shall be paid. The fees have not changed significantly except for in the case of organization of totos where it has decreased by 33%.

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[23] 'Non-profit organizations specified by the Government of the Republic the only statutory purpose of which are equestrian and equine related activities.'

[24] Article 22(2) of the Act.

[25] State Gazette RT I 2006, 58, 439. Available at https://www.riigiteataja.ee/ert/act.jsp?id=13160293.

[26] 1 EUR is equal to 15.64 EEK (Estonian krooni). Official exchange rates by Bank of Estonia.

20.4.4.4 Compatibility with Article 49 EC Treaty

While Estonian rules on licensing are applicable without distinction to domestic and foreign providers of gambling services, it remains a question as to whether the requirement to obtain an activity license for each category of gambling separately is compatible with the market access approach. Namely, it is not clear whether foreign service providers that are legally established in another Member State, and that already comply with the licensing requirements in their home state, would be the subject to an activity license only in respect to categories of gambling that they do not have a license for in their home state, or to double licensing requirements, i.e., in relation to categories already licensed at home. Looking at the practice of the Tax and Customs Board, who has investigated the case of triobet.com and inquired into the licenses issued by the Isle of Man, it would appear that the principle of mutual recognition would be respected as far as the situation where identical activity licenses are issued by the home states. However, given that the investigation took place at the time the legislation did not provide the powers to supervisory officials to block the sites of foreign remote gambling service providers, it does not follow that the investigation would cease without any results after January 1, 2010, and entry into force of the provisions of the Act related to remote gambling.[27] Furthermore, it also remains unclear whether Estonian legislation requiring separate licenses for different categories of gambling is justified and proportionate, and whether it would serve more than financial objectives. The complete lack of consideration for the control exercised by another Member States would probably be in contradiction to the basic substance of the economic freedoms in the internal market, unless justified and proportionate. This concern has also been voiced by the European Commission in the course of their review of the proposal for the new Gambling Act.

20.5 State Supervision and Reporting

Supervision over the organization of gambling is performed by police officials and Tax and Customs Board officials. An organizer of gambling must submit a report in electronic form on the organization of gambling every 3 months to the Tax and Customs Board.[28] The Act has made use of the novel possibilities to supervise the organizers via an electronic calculation and control system.[29] It is an electronic communication network connecting the gambling machines, or additional games of chance for organizing other gambling of the organizer of gambling, with electronic game equipment or game equipment used for organizing gambling in

[27] Discussed further below under paragraphs dedicated to regulation of remote gambling.

[28] Article 57(1) of the Act.

[29] The relevant provisions will enter into force on 1 January 2011 separately from the rest of the Act.

the form of remote gambling. The gambling table must be connected with an electronic calculation and control system, where settlements, or the game, are partially made by using electronic devices. The electronic calculation and control system is intended to guarantee registration and recording of information in a way that enables calculation of the organizer of gambling at any time, as well as the percents of payments made to players from the total amount of stakes for every gambling machine, gambling table connected to the system and online gambling game.[30] Where the electronic calculation and control system of the organizer of gambling and the information system of the Tax and Customs Board are connected as described above, and in the case of promotional lotteries, there is no requirement to submit a report on the organization of gambling.[31]

In order to inspect the legality of an organization of gambling, supervisory officials are entitled to perform on-the-spot inspection of the organizers of gambling at its location or place of activity.[32] Civil and criminal sanctions are prescribed for violations of these provisions of the Act.[33]

20.6 Taxation Under Gambling Tax Act

A gambling tax is paid by organizers of gambling.[34] Article 1 of the Gambling Tax Act provides that the gambling tax shall be imposed on amounts received as stakes in games of skill, totalisators or betting provided for in the Gambling Act; gambling tables and gambling machines used for organizing games of chance provided for in the Gambling Act; amounts received as stakes in games of chance that are not organized on gambling tables or gambling machines; and, amounts received from the sale of lottery tickets when lotteries provided for in the Lotteries Act are organized. The reference to the Lottery Act here is obsolete as it is no longer in force. Gambling organizers argue that the term "amounts received as stakes" should be interpreted according to the net principle, i.e., that the prize money should be subtracted from the amount of stakes received in order to arrive at the taxable base. However, the proposition has no support in law, namely, in the explanatory memorandum to the Gambling Tax Act[35] that provides for the application of a gross-profit principle, meaning taxation of the amount of stakes without any such subtractions. This approach aims to avoid a situation where the

[30] Articles 58(1) and (2) of the Act.

[31] Article 57(2) of the Act.

[32] For more on the investigative power of the supervisory officials see Articles 66 –73 of the Act.

[33] See Articles 74–101 of the Act.

[34] Article 2 of the Gambling Tax Act.

[35] 861 SE Available at http://web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=861&t=E.

entire amount received from a stake is paid out as prize money and there is no taxable amount left.

The Gambling Tax Act is currently undergoing review to align it with the new Gambling Act.

The tax period is one calendar month for lotteries and games of chance or skill. The taxable period for organizing betting or a totalisator shall be the period during which the betting or totalisator is organized, starting on the first day set out in the rules of the game for placing stakes, and ending on the last day set out in the rules of the game for awarding prizes. Tax declaration (even if it is not a taxable income) and tax settlement are due by 15th day of calendar month following tax period.

Specific rates are given in Article 6 of the Gambling Tax Act. The rate for organizing games of chance is EEK 7,000 per one gambling machine and EEK 20,000 per one gambling table. The tax rate for betting is 5%; for totalisator 5%; for a game of skill 18%; 18% for a game of chance that is not organized on a gambling table or a gambling machine; 18% for a passive lottery; 18% for an instant lottery; and, 10% for a numbers lottery. As has already been mentioned, the sports betting sites offering their services in Estonia, other than www.spordienustus.ee, avoid paying these taxes as they are not in possession of an activity license, and are based on tax havens such as the Isle of Man and Malta.

Gambling taxes are paid into the state budget. It is the only tax collected by the Estonian Government which is 100% invested into different social causes and charitable purposes. Of the amount of the gambling tax paid into the state budget: 46% is transferred to the Cultural Endowment of Estonia and 63% of this amount is allocated for cultural buildings; 3.9% is transferred to the Estonian Red Cross; 12.7% is intended for regional investment aid programe which supports projects related to children, young people, families, elderly persons and disabled persons; and 37.4% is allocated for supporting projects related to sports, science, education, children, young people, families, medicine, welfare, elderly persons and disabled persons out of which 31.8% is meant for supporting projects related to science, education, children and young people, 22% for Olympic preparation projects, 10% for supporting other sports projects, 32% for projects related to families, medicine, welfare, elderly persons and disabled persons and 4% for supporting cultural projects. The tax is administered by the Estonian Tax and Customs Board. In 2007, the amount of tax collected from gambling was EEK 403 million.[36] At this very moment over EEK 100 million in gambling taxes from casinos alone has gone to the state budget.[37]

[36] According to the Tax and Custom Board official statistics. See http://www.emta.ee/?id=14183.

[37] The Estonian Association of Gambling Operators has an instant calculator on its website http://www.ehkl.ee visited on 6 April 2009.

20.7 Advertising of Gambling Services, Premises and Organizers

The new Advertising Act came into force on November 1, 2008. In comparison to the repelled act, additional restrictions have been placed on the advertising of alcohol products and financial services, while exemptions have been added to the advertising regulation of tobacco products and gambling. Article 21 of the Advertising Act regulates the advertising of gambling, gambling premises and gambling organizers,[38] all of which are, according to its first paragraph, prohibited. However, the same provision goes on to add an exception for the commercials placed at: the premises of the gambling organizers; on board aircrafts and ships, as well as at airports and ports providing international transportation services; gambling locations in hotels; websites of gambling organizers; and, places of live sports events to which bets on the basis of totos can be made. In the case of lotteries, the exception applies for the lottery sales points and for advertising by means of broadcasting directly before or after the lottery program or during the commercial breaks of that program.

Trademarks of gambling may be exhibited outside of the abovementioned sites, inasmuch as gambling, gambling locations or winning chances, are not depicted or referred to expressly on the trademark.[39] It is prohibited in advertisements to present gambling as something that is beneficial and in the public interest, or to imply that gambling enhances social status. Gambling advertisements must not call for participating in gambling or visiting gambling locations.[40] The new Advertising Act constitutes an improvement in regulation considering that the repelled act provided only that "advertising of gambling and casinos is prohibited except in locations where gambling is held" and that "advertising of gambling shall be understandable and unambiguous and shall not contain a direct appeal to participate in gambling."[41]

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[38] Concepts which are interpreted in accordance with the Gambling Act. See Article 21(2) of the Advertising Act.

[39] Article 21(4) of the Advertising Act.

[40] Article 21(3) of the Advertising Act. Nevertheless, the commercials of illegal sports betting sites such as unibet.com, triobet.com and bwin.com are shown on the Estonian TV all the time, inviting people to participate! This is clearly in violation of the Article 21 of the Advertising Act. See paragraphs below on regulation of remote gambling.

[41] Article 19 of the repelled Advertising Act of 1997, as amended.

20.8 Regulation of Remote Gambling: Online Sports Betting

According to the classification provided by Schriever and Aronovich[42] it appears that Estonia employs a partly "protectionist prohibitive system" in relation to remote gambling.[43] This conclusion follows from Articles 16, 22, 52 and 56 of the Act, which taken together provide that an organizer of gambling needs to be in possession of both an activity and operating license; that the server containing software used for organizing online gambling must be located in Estonia and its proprietor must ensure supervision officials unhindered access to the server; that persons providing public data network transmission service or public data transmission network access service are obliged to prevent access through communications devices to online gambling without delay, upon learning of the illegality of the aforementioned gambling; and that persons intermediating payment are, upon learning of the illegality of the aforementioned gambling, prohibited from transferring payments to organizers of online gambling that do not conform to the requirements of the Act.

20.8.1 Industry

In the beginning of 2008 there were close to 700,00 Internet users in Estonia between the ages of 15–76, which means some 66% of the population in that age group.[44] The first attempt to deliver online sports betting services to the Estonian market was done by a company, Megapanus, that tried to establish a foothold in the Estonian gaming industry in 2001 but failed. The problem with Megapanus was that it offered only two or three games once or twice a week, which is not enough to develop and sustain gamblers' interest. The Estonian Olympic Committee (EOK) purchased Megapanus and from it created AS Spordiennustus. In close cooperation with Ålands Penningautomatförening that owns 20% of the AS Spordiennustus, European Game & Entertainment Technology Ltd Ab, a Finnish supplier of Internet gaming solutions, has successfully delivered an Internet sports betting solution to the subsidiary of the EOK.

The company started its activities in the beginning of April 2004 with the two week test period investing EEK 10 million for the launch of the system. Its target

[42] E. Schriever and A.M. Aronovich 'Cross-Border Gambling on the Internet: Challenging National and International Law' Publications of Swiss Institute of Comparative Law, Genf: Schulthess Juristische Medien AG, 2004, pp. 105–141.

[43] This system is employed also by countries such as Denmark, Norway, Austria, Finland and some others. Its defining characteristic is that the organization of gambling is allowed only on the basis of the license issued by the competent body of that state and the online gambling services provided from foreign countries by organizers which are not in possession of such license are considered illegal.

[44] See http://www.riso.ee/et/infoyhiskond/statistika/kronoloogiliselt_nov2007_e-seire.

group are young or middle-aged men in Estonia interested in sports and with average or above-average income. People aged 21 and over that who have a personal code and a bank account in Estonia can register at AS Spordiennustus site www.fortuuna.ee and place bets on any sport event. Although in the initial period there were talks about plans to expand to the markets of two other Baltic states, the portal still remains in only the Estonian and Russian languages. In the first 19 days of its activity, AS Spordiennustus has paid out EEK 300,000 in prize money, and registered 1203 players. Today, there are 2300 registered users in Estonia out of which 70% are active, i.e., play at least once a week. EOK transfers all the profits directly to the development of sports in Estonia, and therefore, the portal can be seen as a supplementary means of support for EOK, and in turn, for Estonian sports. The share capital of AS Spordiennustus is just over EEK 2 million. The subsidiary has cooperation agreements with 10 media channels in Estonia, Basketball and Volleyball Associations, and with Phillips.

20.8.2 Licensing Fiasco

The old Gambling Act did not allow for the organization of totos or any other gambling category on the Internet, and it did not contain any provisions related to remote gambling. However, in April 2004 this lack of legal basis did not prevent the Financial Ministry from issuing a license to operate internet-based totos to AS Spordiennusuts. Later on, when the organizer of triobet.com asked for the license, it was refused due to the lack of legal basis.[45] Recently, however, the AS Spordiennustus had its license for fortuuna.ee renewed until May 8, 2018, on the basis of Article 27 of the Act, which gives the power to local governments to consent to the opening of a gambling venue.[46]

[45] Source: http://www.ohtuleht.ee/index.aspx?id=212406. Consider also the provisions of Article 372 of the Penal Code: (1) Economic activities in a field subject to a special prohibition, or activities without an activity license, other license, registration or through an unapproved enterprise in a field where such activity license, other licence, registration or approval of enterprises is required, are punishable by a fine of up to 300 fine units or detention. (2) Same act, if: (1) it is committed by a person who has previously been punished by such act; (2) danger to the life or health of numerous people is caused thereby, or (3) it is committed within a field of activity related to health services, handling of infectious materials, aviation, railway traffic or provision of credit, insurance or financial services, is punishable by a pecuniary punishment or up to 3 years' imprisonment. (3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a fine of up to 500, 000 kroons. (4) An act specified in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment. (5) A court may, pursuant to the provisions of Section 83 of this Code, apply confiscation of a substance or object which was the direct object of the commission of an offense provided for in this section.

[46] The document available at http://tallinn.andmevara.ee/oa/page.Tavakasutaja?c=1.1.1.1&id=113617.

The only company in Estonia that provides online sports betting services and that has a license to operate is AS Spordiennustus. The remaining operators, such as owners of Unibet, Bwin, Bet24, Triobet (with shares owned by Baltic football leagues) and others, are offshore companies and they are not in possession of such licenses. They do not pay any taxes in Estonia either. On the one hand, these companies are doing nothing more than exploiting the benefits of the EU internal market. On a closer look they are exploiting far more than that. They make the prohibition to operate without a license obsolete for the companies registered abroad, but this is enabled by the technology in the sector the regulation of which is considered to be without the satisfactory solution anywhere in Europe. However, the most disturbing part concerning the arrangements in the online sports betting market is the fact that most of the companies flagrantly breach Article 21 of the Advertising Act. Even more disturbing is that the Estonian Consumer Protection Board (*Tarbijakaitseamet*), an authority in charge of supervision over the enforcement of the Advertising Act, is doing nothing to get the completely illegal commercials off the television. The aggressive advertising campaign coupled by the inactivity of the Consumer Protection Board that is aware of the breach but does nothing about it, places the only law abiding and ethical company, AS Spordiennustus, in a competitive disadvantage. Therefore, the breach of the Advertising Act has implications not just for mandatory provisions related to consumer protection, but also constitutes market distortion and significantly decreases the amount of profits to be invested into the development of local sports.

The Ministry of Finance, Tax and Customs Board, and the Office of Public Prosecutor do not hide that the situation is indeed problematic[47]:

> The Public Prosecutor's Office explained (in response to the inquiry of the Estonian Tax and Customs Board, 19.07.2006), that the Public Prosecutor's Office is of the same opinion as given to the Ministry of Finance in 2004 (considering www.bet24.com): the territorial applicability does not extend to remote gambling, and the prosecutor's office will not commence any criminal proceedings against such operators.
>
> Therefore, at present the Estonian authorities do not have any legal bases to hinder those operators (such as www.triobet.com). According to the response of the Public Prosecutor's Office (to the Tax and Customs Board, 21.06.2006 and to the Ministry of Finance, 27.09.2004) it does not matter that the web-site can be also found in the Estonian language. The language used does not prove that remote gambling is being operated in Estonia.[48]
>
> The Estonian Tax and Customs Board asked the police to commence misdemeanour proceedings against www.triobet.com. Northern Police Prefecture did commence misdemeanour proceedings against www.triobet.com on 29.08.2007, but till now the Tax and Customs Board has not received any notice considering the proceedings. But because of the statements already given by the Prosecutor's Office, it is clear that it is not possible to hinder those operators at present.

[47] The following paragraphs are excerpt from email correspondence with Agris Peedu, senior lawyer at the Estonian Tax and Customs Board. 6 April 2009.

[48] In my response to this email I have pointed out that providing services in Estonian language coupled by the aggressive advertising on top Estonian TV channels in Estonian language should be sufficient evidence that the service is targeting the clients in Estonia. This was accepted as true, but the fact of lack of clear legal basis still remained.

According to the Constitution of the Republic of Estonia the courts remain the only institution with the competence necessary to provide authoritative interpretations on such matters.[49] Article 3 of the Constitution provides that "the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." There is no doubt that this limit on the powers of the state includes limits on the exercise of powers of administrative organs in carrying out their duty to implement the Act. As a matter of the simple constitutional doctrine of separation of powers, the lawmakers decide on all important questions, and the executive branch does not have a power to intervene into matters falling under the competence of legislative branch. This basic rule extends also to the issue of licensing the operators of remote gambling services. The question of the possibility to organize remote gambling in Estonia was a subject of two court decisions, alas, without any clear answers to remove the confusion and stop the debates.[50]

It remains to be acknowledged that the questions on legality and licensing of remote gambling are very soon going to become a thing of the past. Articles 52–56 of the Act will enter into force on January 1, 2010, separately from the rest of the Act, and will provide the legal basis for supervising officials to block the sites whose servers are located in another country using the help of banks and internet service providers. New questions relating to compatibility with EU internal market law are then likely to replace the current debates on legality and licensing of remote gambling.

20.9 Requirements for Games of Chance Operators and Their Premises: Effects on the Casino Industry

A closer look at the changes brought by the provisions of the new Gambling Act reveals more stringent requirements for the organization and operation of casinos. At the same time, compliance with the new requirements favors big casinos and will force the small casino operators to close down. First, games of chance can no longer be located in residential houses. As required by Article 37(1) of the Act they would have to relocate to a separate building, or move to a premise in hotel, conference or entertainment center, or shopping centers that are not also residential buildings.[51] However, small gaming halls are often located in apartment buildings

[49] Available at http://www.president.ee/en/estonia/constitution.php.

[50] Namely, the decisions of Halduskohus (Administrative Court) in case 3-639/2002 and of Tallinn Ringkonnakohus (District Court) in case 2–3/100/2003.

[51] In addition, Article 37(2) provides that 'it is prohibited to open a venue for games of chance, pari-mutuel betting or games of skill in an immovable used by a preschool establishment, basic school, upper secondary school, vocational educational institution, hobby school, youth camp, children's welfare institution or youth work institution.'

or basements. The explanatory memorandum to the new Gambling Act says that "casinos can be compared to theatres or cinemas in nature but not to the 'milk shops' which must be as close to home as possible." Venue requirements belong to the set of provisions that will come into force on January 1, 2010.

Second, Article 9(4) requires that all games of chance operators must increase their share capital to EUR 1 million, instead of EEK 2 million (ca. EUR 128,000), which was applicable under the old Gambling Act. Organizers of gambling acting on the basis of activity licenses granted must bring their share capital in line with the new requirements prior to the entry into force of the new act, by January 1, 2015 at the latest.

Third, Article 37(8) obliges the operators of the games of chance to register the players who enter their premises at the door. They have to ask for the identification card and record *inter alia* the player's name, personal ID number and the date and time of arrival. The information thus collected is to be stored in the database for a period of 5 years. The operators will also have to install video surveillance inside and outside the premises. This requirement also plays into the hands of the big firms: the casinos currently complying with the minimum allowed size (8 slot machines) would have comparatively much higher costs to install this system of control and surveillance.

Finally, in comparison to the old Gambling Act of 1995 that imposed a requirement to have at least 8 slot machines in every casino, the new Gambling Act requires at least 40 slot machines. Taking into consideration that a slot machine costs about EEK 200,000, and that there are gambling taxes in amount of EEK 7,000 a month for each of them as opposed to the previous EEK 5,000, it seems pretty obvious that many places will not be able to comply with this requirement. Even if investment into the new slot machines and the taxes could be complied with, as a practical matter, the smaller casinos normally have no extra space for the new machines and would have to relocate to the premises prescribed under Article 37(1). The explanatory memorandum notes that the new minimum requirement could bring about the closing of 20 places. However, it was the opinion of the managing director of the EHKL that shortly after the law comes into force only half of the casinos in Estonia will remain on the market. The number of the casinos has fallen from 170 in December, 2007, to 148 in January, 2009 143 in February, 2009 and 134 in March, 2009. Due to the economic crisis and the impact it has on the number of casino clients, this decrease seems to be the trend that is unlikely to be reversed any time soon. The shares of Olympic Entertainment Group, the owner company of the biggest casino operator in Estonia, on Tallinn Stock Exchange (*Tallina Börs*) have plummeted. On June 23, 2006, the market value of the undertaking was EEK 6.61 billion, on July 10, 2007, it rose to EEK 15.2 billion, and on September 2, 2008, it sharply dropped to EEK 4.9 billion. The managing director of the EHKL might eventually get closer to the truth than the drafters of the explanatory memorandum. At the same, the Estonian casino market will become more difficult to penetrate for new entrants.

Casino firms have started to prepare for the changes ever since the proposal. Some restructuring and merger activity has taken place already even before the adoption of the Act while it was still in the form of legislative proposal.[52]

20.10 Conclusions

The new Gambling Act aims to provide an attractive and trustworthy business environment for the organization of remote online gambling from Estonia. However, the possibility of banning access to the services by internet service providers and restrictions on transferring funds to locally unlicensed remote gambling operators, as well as the requirement for remote gambling operators to have a server physically located in Estonia, put in question the attractiveness of Estonia as a small market for foreign online gambling operators. Whether such restrictions are in accordance with EU internal market law, Article 49 in particular, is another question and the one that poses a legal problem that is by no means confined to Estonia.

[52] For example, Olympic Casino bought Kristiine Casino and Monte Carlo bought Kasiino Paradiis.

Chapter 21
Betting in France

Perrine Pelletier, Thibault Verbiest and Geoffroy Lebon

Contents

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21.1 Introduction

The Gambling sector has given rise to a number of judicial procedures, legal commentaries and parliamentarian debates before the legal framework in France was fundamentally changed with the adoption of a new law regarding the liberalization of the online gambling sector.[1] This law (hereafter the New Law) entered into force on May 12, 2010, and constituted the starting point for online gambling activities in France, a few days before the start of the Soccer World Cup in South Africa. In this respect, the economic realities of this special sector have intensified the needs for such a revolution in the French legal landscape.

The purpose of the following analysis is to explain the main legal features of this highly sensible sector, which was held by the French States for centuries. This is to say that the French legal framework applicable to betting is impregnated by a strong State control, both in the offline and online sector. Regarding the latter market, the French State had to elaborate a new system adapted to the Internet realities of accessibility of competitors' offers, as well as to comply with European law.

As a result, betting in France is strictly regulated, by an ancient monopoly offline and a brand new liberalization online.

Thus, here follows a presentation of the legal framework of the gambling market before the recent liberalization, together with an overview of the key steps leading to the online liberalization. Finally, we will focus on the current legal framework applicable to online betting (horse race and sports betting).

21.2 Overview of the French Legal Framework Gambling Market Before the Recent Liberalization

In France, a restrictive gaming policy is based upon a variety of acts that are sometimes difficult to understand for a clear overview of the applicable system. The main relevant laws are as follows:

[1] Loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne.

- The Act of 21 May 1836 on lotteries
- The Act of 12 July 1983 on games of chance
- The Act of 15 June 1907 on casinos
- The Act of 2 June 1891 on horse races

For each segment of the gambling market there is a general prohibition with specific laws to grant State monopolies or State delegation, as well as additional laws and case law to ban activities, for example, interactive gambling and gambling machines outside casinos.

21.2.1 Games of Chance

The Act of July 12, 1983, on games of chance, provides for a general prohibition of games of chance and punishes the participation in an unauthorized gaming house by a €45,000 fine and 3 years of imprisonment.

Advertising for unauthorized games of chance is also punished by a fine amounting to €30,000 with the possibility for the judges to pronounce a fine of four times the amount invested in advertising expenses.

Under French case law, games of chance are traditionally understood as those games where chance prevails over skill. The legal requirements are fulfilled when the three cumulative criteria are met in a game:

- when chance prevails over skill (1),
- when a stake is paid (2), and
- when the operation is opened to the public (3).

Games where knowledge and/or skill is decisive to make the participant play, do not fall under the scope of this law. Additionally, games where players participate for free (or are reimbursed for incurred costs of participation) are also excluded from the scope of the law.

In any case, the 1983 Act applies to all games of chance other than lotteries and sports betting (casino, poker, bingo etc., …), whereas the 1836 Act applies to lotteries and sports betting as detailed hereafter.

21.2.2 Lotteries

The May 21, 1836, Act, applies to all lotteries (including sports betting) and any offered to the French public are prohibited,[2] provided that the following cumulative conditions are met:

[2] Article 1 of the French Law of 21 May 1836.

- A public offer to play;
- In exchange of a financial contribution;
- Where the gains are allocated by means of chance
- And which creates the expectation that something may be won.

This Act on lotteries punishes the organization of unauthorized lotteries with a €60,000 fine[3] and 2 years of imprisonment. Moreover, under Article 4 of the 1836 Act, the advertising of prohibited lotteries and sports betting is sanctioned by a €30,000 fine with the possibility for courts to multiply this fine by four times the amount invested in advertising expenses.[4]

It is important to underline that despite the principle of strict interpretation of the criminal law, these laws were applied by the judges to online gaming in order to prosecute and punish illegal web sites upon the qualification of "unauthorized gambling house," whereby the software and the internet address were considered as the gaming house.[5]

21.2.3 National Lottery

Only the French National Lottery, the Française des Jeux (hereafter the FDJ), is allowed to offer lotteries to the public, both offline and more recently online, in application of a subsequent Decree.[6] It is to be noted additionally that bingo halls are prohibited in France. Thus, bingo can only be marketed by FDJ offering an instant scratch game under this brand.

Following the creation of the FDJ in 1979, a new area of competences was given to the State monopoly when sports pool betting was authorized in 1985 by Decree.[7] Since 2002, fixed-odds sport betting has also been permitted within the FDJ competences.

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[3] As modified by the so-called Perben II Act of 9/03/2004.

[4] Nevertheless, the Act of 21 May 1836 foresees in a double exception. On the one hand, exceptions are foreseen for charitable lotteries or promotional lotteries. On the other hand, it should be stressed that free lotteries cannot be qualified as prohibited lotteries. In this regard, if the lottery does not have any negative financial implication for the player, e.g., cost reimbursement or without fees or stakes, the 1836 Act on lotteries cannot be applied. Promotional lotteries are also authorized provided they comply with the consumer law provisions.

[5] In this respect, the last decision before the suspension of prosecution and launching of the legal reform: CA Versailles dated 4 Mars 2009 n°07/01408.

[6] Décret n°78-1067 du 9 novembre 1978 relatif à l'organisation et à l'exploitation des jeux de loterie and Decree 5 April 2001 regarding the extension to Internet.

[7] Décret n°85-390 du 1 avril 1985 relatif à l'organisation et à l'exploitation des jeux de pronostics sportifs.

21.2.4 Horse Race Betting

The PMU also disposes of the monopoly in France through a law regulating horse race pool betting dated 1891[8] and is still in force today. This law prohibits all bets outside the monopoly of the PMU. Fixed-odds horse betting is not permitted in France.

21.2.5 Casino

Legal casino operations in France were established with a law issued in 1907[9] that permitted casinos only in specified areas (e.g., seaside resorts). As a result, delegation of public services is granted to applicants willing to offer a casino in a listed town, meeting very strict conditions as required by the said town hall, taxable at a very high level and through a special authorization granted by the Ministry of Internal Affairs. Thus, in order to deliver the required ministerial authorization, the casino has to offer the combination of cultural activities, restoration and gambling.

Prohibition of online casinos: the organization of online gambling activities, including casino games, falls under the scope of the 1883 and 1936 Acts as the judge decided to have a restrictive interpretation of the admitted exception for authorized gambling; i.e., an online offer of an authorized offline casino would not be permitted.

With the law of 5 May 1987 slot machines within casinos were legalised while they were integrally prohibited in France by the law of 12 July 1983. Prosecution against illegal slot machines (outside casino premises) is very active and give rise to numerous case law[10] to maintain public order.

As a result, a combination of laws and secondary regulation of the previous centuries has implemented a general prohibition of gambling with the exception of permission to State monopolies or State delegations. With the development of the Internet, the FDJ was given online competences in 2001, as well as PMU,[11] while the judges, failing a more appropriate law, decided to apply the traditional laws to generally ban online gambling.

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[8] Loi n°1891-06-02 du 2 juin 1891 ayant pour objet de réglementer l'autorisation et le fonctionnement des courses de chevaux.

[9] Loi du 15 juin 1907 réglementant les jeux dans les casinos and following Laws and corresponding Decrees or Governemental Orders.

[10] For instance an important ruling by the Supreme Court: Cass. crim. 15/12/2004, number 04-81319.

[11] PMU was authorized to offer betting via the following interactive channels: Minitel (since October 1989), interactive digital TV (since February 1999), Internet (since August 2001), mobile phones (since November 2005).

The most recent Court decision in this respect also underlines the crucial need for law revision in the French legal gambling landscape. The Court of Appeal decision[12] follows a decision of March 15, 2007, from the Tribunal de Grande Instance de Nanterre. For the first time in France, three persons and a company society had been prosecuted for the participation and exploitation of a web site offering online poker. The first instance Tribunal judged that the accused had committed the infraction of illegal exploitation of a casino and convicted them to a penalty of €45,000 and 1 year of prison with respite. An appeal was also filed.

The Versailles Court of Appeal considered once again that French jurisdictions were competent in this case since one element of the infraction, the offer to the French public, had been committed on French territory. Thus, the sole fact that a site is accessible via the Internet makes the judge competent.

At this occasion, the Court deemed that even if poker was a "reasoned game," the essential part of the game was the cards shuffling and distribution, which remains completely ruled by chance. As a consequence, poker was confirmed as a game of chance, despite some position pleading for qualification of it as a skill game.

Further, the Court confirmed the applicability of the traditional gambling prohibition laws to the online activities. As a result of the Appeal, 2 of the 3 prosecuted persons were declared innocent for lack of conviction, while the third one was condemned.

21.3 The Key Steps for Liberalization of Online Gambling

21.3.1 The Pressure from European Level

In the absence of community harmonization in the gambling field, Member States have a discretionary competence to organize this sector. However, as part of the European services, and as such, subject to the freedom to provide services, Member States legislation needs to respect Article 56 of the EU.

For the ECJ[13]: According to the established case law, Member States are not allowed to restrict services, i.e., cross-border gambling offers, unless they prove overriding reasons related to public interest. Member States are entitled to seek to protect public interest, as long as this is done in a manner consistent with EU law, i.e., that any measures are necessary, proportionate and non-discriminatory.

[12] Versailles Court of Appeal, 9th Chamber, 4 Mars 2009.

[13] The main decisions in this field are the following: ECJ, 24 March 1994, aff. C-275/92, Schindler; ECJ, 21 September 1999, aff. C-124/97, Läärä; ECJ, 21 October 1999, aff. C-67/98, Zenatti; CJCE, 6 November 2003, aff. C-243/01, Gambelli; CJCE, 13 November 2003, aff. C-42/02, Lindman; CJCE, 6 March 2007, aff. C-359/04, Placanica; CJCE, 8 September 2009, aff. C-42/07, Santa Casa; CJCE, 3 June 2010, aff. C-258-08, De Lotto.

Consistent case law also underlined that any restrictions that seek to protect general interest objectives, such as the protection of consumers, must be "consistent and systematic" in how they seek to limit activities.

Concretely, a Member State cannot invoke the need to restrict citizens' access to gambling services if, at the same time, it encourages them to participate in State games of chance.

More recently, the ECJ ruled that a Portuguese state-run charity's gambling monopoly is legal as it aims to combat criminal activity, (*Santa Casa* case, 2009) and recognized that the requirements are of a different level among the Member States. Therefore, it can be justified not to automatically recognise the legality of an operator even licensed in another Member State.

This decision was actually based on previous decisions and tends not to be in contradiction with anterior rulings. Instead it confirms and recognises the conditional recognition principle in gambling services, while the European Commission has been increasing the pressure on various European jurisdictions.

The European Commission (hereinafter EC) in recent years has actively challenged and questioned many existing national gambling regulations. Accordingly, the Commission sent inquiries to several member states—among them France—requiring information about the respective betting/gambling markets and has even started infringement proceedings (based on Article 226 of the EC Treaty) against certain states to verify whether national legislation is in line with Article 49 of the EC Treaty, which guarantees free movement of services in application of the ECJ criteria. Yet, the EC pointed out that national legislation must be in line with EU law, which means that measures imposed must be "necessary, proportionate, and non-discriminatory."

France represents a typical case:

- In October, 2006, France (together with Austria and Italy) received an official request for information regarding national legislation restricting the supply of certain gambling services.
- In June 2007, the EC prompted France to amend its national gambling legislation via a reasoned opinion based on the response received upon the official request for information about October 2006.

The EC used the following argumentation:

- From the EC's perspective, the French restrictions are not compatible with EU law; rather, the national measures imposed restrict the free supply of sports betting services and have not proved to be "necessary, proportionate, and non-discriminatory."
- Moreover, according to the EC, the French state monopolies cannot be seen as purely nonprofit operations based on the fact that they are subject to strict annual revenue targets and depend on commercial sales points for marketing operators' gambling services.
- Third, the EC points out that the French national legislation provides for criminal sanctions that threaten or have even been applied to CEOs of sports

betting companies (e.g., arrest of BWin's CEOs in France in late 2006) that operate based on an EU member state's license).
- In fact, according to the EC, the French legal practice led, for example, to the exclusion of a cycling team (Green Cycle Team) in the Tour de France in 2007 because this team was sponsored by the Swedish online gambling firm Unibet, which was not licensed in France.

In late 2007, France responded to the court's reasoned opinion and explained that the French government sets the respective limits on the operation of gambling activities in France for reasons of public interest; thus, from the perspective of France, it was consistent with the rulings/jurisprudence of the ECJ.

Finally, at the end of 2007 the French government began discussions about a possible liberalization of its online gambling and betting market, something that was finally proposed in March 2009.

21.3.2 Durieux Report: The First Step of the Liberalization

When the European Commission started infringement investigations regarding France's sports betting market in 2007, the French Ministry of Finance responded with a study known as the "Durieux Report," which was published in early 2008. The report's key conclusions were that France must partially liberalize its gambling market:

- due to legal developments in the European Union (EU) as a whole and
- due to the increasing popularity of Internet gambling web sites licensed in other Member States (especially Malta), or even worldwide hosted and non controlled gambling web sites.

As a result, this report made recommendations to progressively open the French online gambling and betting markets to liberalization.

21.3.3 The Bill for Liberalizing the Online Gambling Sector

The unresolved conflicts between the EU and France regarding France's gambling monopoly together with the Durieux Report's recommendations seem to have prompted the French Government to rethink things fairly quickly in 2009. In March 2009 a draft bill regarding the opening up of the remote gambling market was presented by Eric Woerth, the Minister in charge of the National Assembly, the lower Chamber. After a highly discussed session, the draft law was voted in the first lecture and transmitted to the Senate by the summer. The Higher Chamber also intensively discussed the draft law and voted on new amendments, which in turn required a second lecture by the National Assembly. The time frame for the

entire legislative process was extremely tight, as the Government in March 2009 committed itself to have the reformed legal framework operational by the start of the Soccer World Cup, in June 2010. Finally, the law was adopted in April 2010 and promulgated on May 12, 2010.

At this date, the newly created Authority (ARJEL—see below for more details) was already effective as some of its key members were already nominated within a preparatory mission of the said authority. Under intense political, economic and timely pressure, the consequent secondary legislation was adopted. It resulted that the Decrees and Governmental Orders, as well as ARJEL decisions, were taken days after days in the course of May and June 2010. The first licensed operators were delivered their licences on June 8, 2010 (the Start of the World Cup being June 11, 2010), following an accelerated procedure.

What follows is a description of the main features of the revolutionary law in the French legal gambling landscape.

The official policy of the Government is to open up the gaming market in such a way that it keeps cntrol over it. Considerations of consumer protection, the fight against addiction, and against fraud and money laundering, are core issues of the text.

In this respect, wagers, winnings and the average rate of return to the players, is limited allegedly in order to safeguard social order and to prevent addiction. In a preventive way, operators will have to insert objective messages on their web sites about the prohibition from play of minors and the risks related to gambling activities. They will also have to set up tools for self-gaming moderation.

The opening is limited to (1) online horse race betting, (2) sports betting and (3) so-called "jeux de cercle" (ring/p2p-games): games consisting of shared games which depend on skill, whereby the player, after the intervention of chance, demonstrates his/her will and decides, in relation to the strategy adopted by the other players, to use a strategy which is likely to increase his/her chance of winning (the latter being mainly meant for online poker).

Thus, lotteries, virtual slot machines, "spread betting," "betting exchanges," betting on virtual competitions and casino games in which consumers play against the bank (roulette, blackjack, etc. …), are excluded from the scope of the law since they are considered to be too dangerous in light of maintaining public and social order, i.e., they are said to be too addictive.

The New Law put in place a licensing regime under the control of the Online Games Regulations Authority, hereafter ARJEL, an independent public authority, specially created to regulate the remote gambling market.

Thus, online gambling licenses will be delivered only to online operators complying with the regulations contained in the list of requirements (see Sect. 21.4) according to the segment of their activity: a license for horse race betting; one for sports betting; and one for poker; or three licenses in case of a multiple offer.

Only applicants established in the EU or the European Economic Community (EEC) will be entitled to apply for a license. However, the draft law does not require having the servers for online operations based in France, nor in the EU.

In addition, it will also be a condition of eligibility to the French license not to have any equipment (i.e., server for instance), headquarter, or subsidiaries based in a tax heaven.

A tax heaven is defined as a non cooperative jurisdiction following the definition of Article 238-0 A of the taxation code (as revised by Article 22 of the financial law for 2009). Accordingly, a list of 18 "non cooperative jurisdictions" has been drawn up through a Ministerial order.[14]

For their French licensed offer, operators will have to operate from an Internet web site accessible through a first level domain name with a ".fr" ending. In order to define what parts of the operator's offer fall under the scope of this law, one should consider things from the players' side: all connections from a server located in France or all players registered as French residents need to be redirected towards this ".fr" extension. One can note that an operator having a ".com" and a ".fr" will have to adapt its system so that the respective offer is strictly distinct.[15]

In consideration of public order, all data related to gambling activities, all data exchanged between players and operators and data linked to the identification of gaming or betting events, will have to be available on a mirror server based in France called a front end and composed of a captor in the lower part and a vault in the upper part.

Following a highly debated Article of the New Law, betting operators will have to obtain consent from the operating rights owner of a sport event in order to offer their bets on those competitions. This provision is detailed below.

A key issue concerns tax that was decided to be calculated on the amount of the stakes: the total sums outlaid by players and punters. The winnings, invested by the latter in the form of new bets, will be equally taxed. The taxation is set according to the following scheme:

- 8.5% for sports betting;
- 15.5% for horse racing betting;
- 2% for online poker (capped to €1 per hand for cash games).

Interestingly, the draft bill stipulates that after a period of 18 months—after the official opening of the online gambling market is underway—a study will be conducted and presented to the French parliament that analyses the conditions and effects of the opening of the online gambling market. This disposition constitutes a revision clause.

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[14] Anguila, Belize; Brunei; Costa-Rica; Dominique; Grenada; Guatemala; Cook Island; Marshall Island; Liberia; Montserrat; Nauru; Niue; Panama; Philippines; Saint-Kitts-and-Nevis; Sainte-Lucie; Saint-Vincent and Grenadines Island.

[15] One can imagine a ".com" offering casino games, betting on virtual events etc., … and still willing to apply to a French license. In such a case, this operator will have to inform its French players that they will be redirected towards the ".fr" web site and differentiate the respective gaming offers.

PMU and FDJ—Companies that so far have been entitled to offer online horse racing (PMU) or sports betting (FDJ), are allowed to continue to carry out their activity provided that they fulfil the obligations specified in the bill and request a license within 3 months of the establishment of ARJEL.

It is interesting to note that during the parliamentary debates at the National Assembly, over 1300 amendments were submitted for scrutiny. Approximately 80 amendments have been adopted. In order to take some perspective regarding this dense text, the most salient amendments are discussed below.

As regards rules for advertising, the CSA (the National Regulatory Authority for the Audiovisual Sector) and the ARJEL will be required to carry out a business impact assessment regarding gambling advertising so as to enable the French legislature to amend the rules, if appropriate. Advertisement was a key issue in the political debates.

As regards international poker platforms, online gaming operators will only be allowed to offer poker to players registered with the ".fr" web site. This implies that non French players would have to register under the ".fr" web site in order to be able to play with French Players, or for French players to be legally able to play in international tournaments. This appears to be unrealistic and as a result impacts operators' business obliged to put in place a closed-loop system in France and facing the risk to be bypassed by competitors that would not have made the choice to operate legally in France, and therefore, still offer international platforms, even to French players.

As regards player protection, amendments provide for the obligation for online gaming operators to introduce a code during the subscription process in order to make sure that the newly registered person is a physical person and not, for example, a "bot." Furthermore, the following measures should be implemented by online gaming operators: mandatory mention on the entry page that gambling is prohibited for minors, appearance of a pop-up window at each connection to remind players that gambling is prohibited for minors (players' date of birth should be requested), possibility to check the register of "excluded gamblers" and a prohibition to finance or sponsor any event targeting minors.

As regards online gaming operators' databases, operators will be required to prove that a player has opened and charged his/her account after the operator has been granted a license by the ARJEL. In addition, there will be a prohibition against any automatic account transfer from a previous web site to the newly-licensed ".fr" web site of an online gaming operator (the account transfer should be requested by the player). The latter amendment is supposed to avoid distortions of competition resulting from allegedly "illegal" presence in the market prior to its liberalization.

In addition, as a result of the European Commission's reasoned opinion on the Draft Law (June 8, 2009) in accordance with Directive 98/34/CE, the Draft Law has been amended so as to require that the ARJEL take account of the conditions already fulfilled by an online gaming operator in its Home Member State, when it comes to granting licenses to offer games of chance in France. As a consequence,

the ARJEL intends to cooperate with the National Regulatory Authorities of other Member States in order to ensure an adequate level of protection for players in the context of online gambling.

As regards the ARJEL's coercion powers, the Deputy Chairman will be entitled to seize a Judge entrusted with the task of delivering interim injunctions with a view to requesting Internet Service Providers to block access to online gaming web sites considered as illegal (instead of having a direct power of injunction).

21.3.4 The Reaction of the European Commission to the Draft

Before the draft bill can enter into force, the European Commission (hereafter the EC) must approve the proposed law in accordance with the notification procedure set up in the Directive 98/34/EC of June 22, 1998. In early March 2009, the French government sent the draft law to the EC services to check its conformity with EU law.

At the beginning of June 2009, the EC replied with a detailed opinion on the draft[16] and stated that it was "welcoming the generally positive direction of the French proposal" but also criticized the following points:

- *The license system has to take into account securities and controls issued by other EU states*—Accordingly, the law was revised by the Senate and included for the ARJEL to take into consideration the application of a licensed candidate in another Member State. However, in practice, there is no obligation for the ARJEL to grant a licence even if this operator was legally licensed in another MS. This is a key illustration of the conditional recognition principle.
- *Consent of the sports event organizer right to be negotiated with the sports betting operator seen as critical*—However, this provision was maintained under the condition that France would provide the EC with an assessment regarding the potential risks of restriction to the freedom to provide services as set up in Article 49 of the EC Treaty.
- *Maximum payout rate to be justified*—The EC seemed to contest that there is "a high correlation between the rate of return for winners [payout rate] and addiction." Therefore, France would have to render a report with evidence to justify that such a limitation was
- *No fiscal representative in France needed*—Regarding the obligation to have a fiscal representative established in France the EC sees this as "disproportionate insofar as it could be replaced by a less restrictive measure, and given the requirements already imposed … whereby operators shall make certain specific data permanently available …" This is a constant ECJ ruling but the French

[16] European Commission, Notification 2009/0122/F, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998.

authorities have decided to maintain this provision due to the specificities of the gambling sector.

- *Clarification regarding location of the servers*—The EC asked the French government to clarify where the operator's server must be located and whether a duplicate server in France is necessary. As a result, only the front end server is to be located in France.

As a conclusion one notes that the EC detailed opinion does not include any comments regarding the fact that only online betting is to be liberalized (but not retail betting), nor regarding the kind of gambling activities authorized versus prohibited. It is also not explicated that horse race betting is limited to pool betting or that other kinds of betting are prohibited.

One could think that the revision clause after 18 months justied most of the potential non compliance aspects of the New Law. It is very likely indeed to consider that the said law is to be reformed step by step and one can reasonably consider that this first step opening has been a huge one and quite balanced so as to preserve the official aim of the Government: put in place a controlled liberalization of the online gambling sector.

The context of such controlled opening will be described below through a strict licensing system, the brand new regulator and a detailed secondary regulation.

21.4 Current Legal Framework for Betting

21.4.1 ARJEL: The New Regulator

21.4.1.1 Legal Form and Composition of the ARJEL

The ARJEL (*Autorité de Régulation des Jeux en Ligne*) is a new independent administrative authority essentially in charge of granting licenses to online gaming operators and enforcing compliance with requirements issued to license holders or towards non licensed operators. Chapter 10 of the New Law deals with the ARJEL.

The ARJEL does not hold the moral personality and as such has no right or interest in launching judicial actions for instance. However, the ARJEL's President has the competence to bring an action before all jurisdictions, in order to accomplish the ARJEL mission.

Pursuant to Article 35 of the Law, most of the ARJEL missions are managed by seven members who are appointed according to their economic, judicial and technical skills. Three members, including the president, are appointed by a government order, two of them by the President of the National Assembly and the last two by the President of the Senate. The members are all mandated for a 6-year period and the term of office is irrevocable and non-renewable, which is meant to guarantee their independence. This political panel (called *le collège*) is assisted in its daily tasks by an administration composed of civil servants and

state agents, all placed under the authority of a General Director. To date, the ARJEL's President is Mr. Jean-François Vilotte and its General Director Frederic Epaulard.

Article 36 lays down the rights and duties of the members and agents of the ARJEL in relation to the legal privilege and in order to prevent conflicts of interests. Article 37 of the law aims to define the terms for internal administration of the ARJEL (i.e., delegation, organization of departments, practical details concerning budget and accountancy).

21.4.1.2 ARJEL's Missions

The authority's first duty was to elaborate the terms of reference (*cahier des charges*) with the view to list the requirements for the candidates to a license. The final version of the terms of reference were approved on May 17, 2010, by a government order; on the basis of which candidates prepare their request for a French license.

This being done, ARJEL's main responsibility according to Article 3 of the Law is to supervise and control gambling on the Internet. Pursuant to that task, the ARJEL assumes the technical market regulation, controls legal online operators and fights illegal web sites. Thus, in the framework of its monitoring activity, the ARJEL is in charge of the following duties:

- instructing the files and attributing the licences;
- auditing for compliance by operators with legislative and regulatory measures and clauses of the reference terms that they are subject to;
- carrying out surveillance of online operations and participating in the fight against illegal game sites and against fraud;
- enacting rules regarding the audit of technical and financial data for each online game or bet;
- determining, where appropriate, the technical parameters of online games within the framework of rules set by the decrees.

As a traditional administrative entity, the ARJEL can be consulted by public authorities for advice, or for information transmission, for instance to the customs or taxation services.

The ARJEL is to deliver its opinions on Governmental proposals related to the gambling field. In this respect, the authority fully contributes to the writing of regulations in this matter. It also suggests to the Government legislative and executive modifications when they are needed.

According to Article 34 of the Law, when a given situation concerns the gaming field a demand of advice can be brought before the ARJEL by the French Competition Authority.

Once a year, as with all other independent administrative authorities, the ARJEL submits a public report on its activities to both the Government and the Parliament.

21.4.1.3 Investigation of Approvals Demand

The ARJEL administrative body scrutinizes the application files submitted by candidates to get French licenses, and prepares a report that is used by the "college" political body (see above) to decide upon the sufficient compliance with the objectives of gambling policy. The list of licensed operators is then published in the official Gazette.

In case of a license refusal, the ARJEL must state the reasons on which its decision is based.

The substance of the request is decisive in the decision to grant an approval. Therefore, Article 21V of the law provides that any modification to be made in the information held in the request has to be notified to the ARJEL.

The Law does not limit the number of approvals that can be granted to online operators and the ARJEL is entitled to set up and update the list of legal online operators that hold an approval.

Furthermore, the ARJEL has important powers of investigation and it is competent to carry out administrative inquiries. In this respect, its administrative members are entitled to register and play on the Internet to check the compliance of the licensed operators throughout their web site, and to monitor non licensed operators to gather evidence of their illegal activity in application of the French law.

Moreover, the ARJEL is entitled to impose administrative pecuniary sanctions through a penalty committee composed of six members; two of them being nominated from the Administrative Supreme Court, two from the Judicial Supreme Court and two from the Budget Court. The penalty committee may also withdraw or suspend an approval if an operator breaches its legal obligations. Those sanction procedures follow the general principle of a fair trial and are subject to appeal to be lodged by the Administrative Courts.

Finally, the ARJEL has competence to fight against illegal operators (see below).

21.4.2 The Licensing System

Licenses are granted for a period of 5 years and are renewable but not transferable. A specific agreement is required for each type of game operated by the licensee.

Pursuant to Article 38 of the Draft Law, online gaming operators applying for a license to the ARJEL will have to pay a fixed fee (which shall be determined by a Decree) in the following cases:

- When lodging an application for a license, the fee fixed by the Decree is €5,000 for one licence, €8,000 for two, and €10,000 for three.
- For each license issued or renewed, on January 1st of each year following the year in which the license was issued or renewed, a fixed fee of €10,000 for one licence, €20,000 for two licences and €30,000 for three is due.

- For a license renewal, application fixed fees of €1,000 and 10,000 are due. It shall be payable by the operator on the day of filing the application with the ARJEL.

The substance of the application covers three main aspects:

- The financial robustness.
- The legal compliance.
- The technical liability.

Thus, the application file contains a range of information to respond to the need for transparency regarding the above-mentioned criteria.

License applicants (individuals or companies) need to provide information and justifications regarding their identity, capital constitution, legal structure composition, etc.

As for the legal compliance, the candidate is requested to present the procedures put in place in order to justify a strict legal compliance procedure, an adequate procedure regarding the registration of players, the check of identity, the measures in place to avoid minors, anti money laundering procedures, anti addition procedures, etc. In addition, all contracts concluded for the exploitation of the gambling website are to be submitted. The exhaustivity of the pieces of justification is a criterion for the attribution of licences.

Regarding the technical aspects, a range of vulnerability tests and other certifications are required. It is to be noted that the criteria of transparency are also applicable to this field whereby the ARJEL can decide that the tests provided are not detailed enough, and therefore, could request additional information.

As a result, the application is to be as complete as possible or subject to suspension while the ARJEL requests additional information. The applications filed so far comprised thousands of pages. For the sake of an efficient instruction, the ARJEL has contracted external auditors. The New Law foresees a maximum of 4 months of instruction without taking into account eventual suspension delays. The first licences were instructed and granted within less than a month in order to allow the first legal operators to offer their sports and horse race betting before the World Cup: the list of first licensees was published on 8 June 2010!

21.4.3 The Specific Regulatory Framework for Horse Race and Sports Betting

As mentioned above, the New Law does not allow any kind of bets on any elements but rather refers to subsequent decrees which define the exact scope of legal betting. The secondary regulation lists the sports, the competitions and the phases of games legally admissible for betting.

21.4.3.1 Horse Race Betting

As regards horse racing betting, Article 11 of the New Law states that the horse races or shows that may be betting objects are set in a list established following any regulatory instructions. Pursuant to decree n° 2010-498 of May 17, 2010, a horse racing betting may only be made on horse races or shows registered on the calendar established by the Minister for Agriculture following a specific procedure set by the decree. Indeed, the calendar is the result of a dialogue between the horse racing's governing bodies, the National French Races Federation, the Regional Races Federation and the Minister for Agriculture.

According to the decree, horse races and shows that may be registered on the calendar also have to fulfil three criteria. First, the races and the shows must be real and legally organized in France or abroad. Second, the watch and the organization guarantees of the races and shows have to be considered as sufficient by the horse race governing body in charge of the concerned speciality.[17] Third, the doping control implements on the races and shows also have to be considered as sufficient by the horse racing's governing body in charge of the concerned speciality.

After the calendar is made by the Minister for Agriculture, it is transmitted to ARJEL at the latest on the first working day of the month of December of the previous year. ARJEL will then provide this calendar to online horse racing betting operators. Yet, this calendar may evolve as all online horse racing betting operators can suggest to the Minister for Agriculture to register horse races or shows organized abroad which are compliant with the three criteria mentioned above. The Minister for Agriculture reaches a decision on this request, within the time of 1 month, after the opinion of the horse racing's governing body in charge of the concerned speciality.

In addition, concerning the year of 2010, this specific procedure aiming at establishing the calendar has not been implemented owing to a liberalization which took place within a short period. Consequently, in 2010 and only for this year, the horse shows' calendar is the calendar mentioned by Article 22 of the Decree n° 97-456 of May 5, 1997 that is used for the mutual bets' operations which took place out of racecourses. This calendar has been approved by the order of May 25, 2010.

Besides the horse races and show betting objects, the calendar has to determine for each race or show the category of horse betting allowed, namely the single betting or the complex betting.[18] Moreover, the Decree of May 17, 2010 states that a horse betting may only be taken on the official result of the races, that is to say the numbers of the horses which are ranked, within the limits of the first five

[17] Pursuant to Article 2 of the Decree n° 97-456 of May 5, 1997, in each of both specialiities, namely harness racing and flat racing, one body is approved by the Minister for Agriculture as the horse races' governing body. Therefore, France Galop is the governing body of flat and steeplechase horse racing in France, whereas Société d'encouragement à l'élevage du cheval français is the governing body of harness horse racing in France.

[18] The complex betting denotes the bets for which a punter has to, on the same races, appoint five horses in order of arrival.

places, at only places that get an allocation pursuant to the Code of races or, as regards the races organized abroad, that get an equivalent distinction.

21.4.3.2 Sports Betting

With regard to sports betting, Article 12 of the New Law provides that ARJEL defines for each sport, pursuant to regulatory instructions, the sporting event categories as well as the kind of results and the corresponding phases of games on which bets can be taken. In this respect, Decree n° 2010-483 of May 12, 2010 has been adopted to guide ARJEL in this definition of the scope of the legal sports betting.

Concerning the definition of the sport event categories, the above-mentioned decree describes the procedure to follow. The categories of events are defined after the opinion of the competent sports federation which holds a delegation from the State[19] and they have to fulfil four criteria. First, the organizer of the sporting event must be a sports federation mentioned in Article L. 131-1 of the Sports Code (French Football Federation, French Tennis Federation …), an international sports federation (FIFA, ITF …), an international sports body (CIO …), a sporting event's organizer mentioned in Article L. 331-2 or L. 331-5 of the Sports Code (Amaury Sport Organisation …) or a sport event's organizer which is legally organized abroad (*Liga de Fùtbol Profesional*, the Premier League …). Second, the rules enforceable to the sport events have to include any provisions relating to the publicity of the event's results. Third, the age of the athletes taking part in the competitions is an important element for the definition of the sporting event categories. Indeed, this criterion is the corollary of the New Law's objective to protect minors.[20] Its goal is to avoid any sport events which concern minors as betting objects. For instance, in virtue of this criterion, it should not be possible to bet on the FIFA U-17 World Cup. Last but not the least, the sport events must have a fame and a stake guaranteeing a sufficient number of bettors. Therefore, in the manner of the third criterion, this last criterion is essential in the definition of the events' categories as it really enables to establish a selection among all the competitions organized in France and abroad.

Thus, these criteria are not very restrictive because they have for effect to include in the French scope of legal betting the main sporting events which are interesting, in the first place, to the online gambling operators. We can note this in the lists established by ARJEL since the liberalization of the games of chance in France. Indeed, the first list which was published by ARJEL in May 2010[21]

[19] In the absence of a competent sports federation which holds a delegation from the States, it is the Minister for Sports which is competent.

[20] Article 3 of the Law of 12 May 2010.

[21] Collège de l'ARJEL, Decision n° 2010-009 of May 28, 2010.

enabled to bet on the major sporting events of fifteen sports disciplines.[22] This list was completed by ARJEL on 25 June 2010,[23] including any sporting events from thirteen additional sports disciplines.[24] For instance, concerning football, online gaming operators can offer betting on thirteen sporting events[25] subject to observing the provisions relating to the betting right (see below). Nevertheless, except UEFA Euro, FIFA World Cup and Olympics game, the events registered in the football list are men's tournaments. Furthermore, this football list does not include some main sporting events such as FIFA Beach Soccer World Cup, Africa Cup of Nations or even Copa America which, however, might fulfil the four criteria mentioned above.

This list can evolve still further. In its decision, ARJEL indicates that this list will be completed or modified whenever it is necessary. In this regard, all online sports betting operators can request ARJEL to register one sporting event category on the list. ARJEL reaches a decision on this request within the time of 1 month, after the communication by the operator of a file introducing the characteristics of the events.

In addition,the Decree of May 12, 2010 also describes the procedure to follow to establish the results of the registered sport events on which bets may be taken. These results are defined for every sport and for every competition category by ARJEL, after the opinion of the competent sports federation holding a delegation from the State.[26] The Decree adds that the kind of results can be either the final results of the sporting events or the results of the phases of games of these events, that is to say an event taking place during the sports competition and being the expression of objective and quantifiable sports performances of the athletes taking part in it. These kinds of results are established together with the list concerning the category of sporting events.[27] Online sports betting operators can request ARJEL to register one kind of results on the list including the results on which bets may be taken. The provisions are the same as those established for the register request for a new competition category.

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[22] Athletics, Motor Sport, Rowing, Basketball, Cycling, Equestrian, Football, Golf, Handball, Judo, Motorcycle Racing, Rugby, Tennis, Table Tennis, Volleyball.

[23] Collège de l'ARJEL, Decision n° 2010-058 of June 25, 2010.

[24] Badminton, Baseball, Billiards, Boxing, Fencing, Ice Hockey, Aquatics, Traditional Basque sport, Petanque and Provençal game, Skiing, Boule Lyonnaise (Sport-Boules), Taekwondo, Sailing.

[25] French Cup (from the 32e of final), Ligue 1, Ligue 2, UEFA European U-21 Championship (qualifying rounds and final tournament), UEFA Euro (qualifying rounds and final tournament), European championships (Premier League and equivalent), League Cup, FIFA Confederations cups, FIFA World Cup (qualifying rounds and final tournament), Olympics Games, Champions Trophy, UEFA Champions League, UEFA Europa League.

[26] In the absence of a competent sports federation which holds a delegation from the States, it is the Minister for Sports which is competent.

[27] Collège de l'ARJEL, Decision n° 2010-058 of June 25, 2010.

As a result, the horse racing and sports betting regulation framework is purely defined by the law. Online gaming operators can make this framework evolve by suggesting to register any horse races or shows, any sporting events category or any other kinds of results. However, despite this right, some events or results will not be registrable in the list owing to the ARJEL's position. For example, ARJEL refuses bets on friendly matches (Football, Rugby, Tennis[28]…) or on negative gestures such as the number of corner kicks or the number of fouls.

21.4.4 The Negotiable Right to Bet with Sports Events' Organisers "The Betting Right"

The New Law has created a French specificity regarding sports betting as a new legal right was elaborated, a kind of license to be negotiated by gambling operators with sports event organizers.

21.4.4.1 Before the New Law

Since the end of the nineties, the question of games of chance and in particular online gambling has been a recurrent subject in case law. Indeed, many gambling operators have objected to the legal monopoly or exclusive rights recognized in some Member States pursuant to the provisions of EU law.[29] Moreover, online gaming operators have been sued by sports actors. These latter claimed the protection of their rights as they estimate that gambling operators were using the key elements under their property and legal protection without the corresponding due authorization (image, trademarks …).[30]

In addition, in France, another legal issue divided sports actors, especially sports organizers and online gaming operators. The Sports Code, in Article L. 333-1, states that sports organizers hold an exploitation right, which is a monopoly, on

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[28] In this regard, it is not possible to bet on both the last Davis Cup or Fed Cup matches when a team won in the first three matches.

[29] See above.

[30] About the image right of the athletes: TGI Paris, ord. réf., 8 July 2005, *Real Madrid CF, Zinedine Z., David. B., Raul G. et autres c/Hilton Group Plc, Sporting Exchange Ltd., William H., Sportingbet Plc et autres;* CA Paris, 11e ch., sect. B, 14 February 2008, *Unibet Ltd c/Real Madrid et autres*, RG n° 06/11504, GP. About the other elements: TGI Paris, ord. réf., 16 October 2006, *LFP c/Sté Interwetten*, RG n° 06/57318—TGI Paris, 28 November 2007, *CNOSF c/Expekt.com Ltd*—TGI Paris, 30 January 2008, *Sté Juventus FC SPA c/Sté Unibet Ltd et a.*—TGI Paris, 3e ch., 2e sect., 30 May 2008, *FFT c/Sté Unibet Ltd et FFT c/Sté Expekt*,—TGI Paris, 17 June 2008, *SA Paris SG c/Sté Global Entertainment Ltd et a.*; CA Paris, 14 October 2009, *FFT c/Unibet*; CA Paris, 11 December 2009, Global Entertainment Antigua Ltd (Unibet)/Juventus Football club et autre; CA Paris, 2 April 2010, Paris Saint Germain c/Société Internet Opportunity Entertainement Limited et Société Bwin International Limited.

the sports events they organize.[31] Therefore, according to sports event organizers, this monopoly also applies to the exploitation of the sports event under betting form.

At first, the judges refused to apply this exploitation to the organization of betting on the sports events because they ruled that the Article L. 333-1 essentially concerns broadcasting rights.[32] In other words, the authorization of the sports organizers was not necessary to organize sports bets.

Then, a few months prior to the first version of the draft on the online gaming submitted to the National Assembly, the judges ruled that the organization of online betting is included in the legal monopoly established in support of the sports organizers.[33] This ruling was upheld by the Court of appeal which adopted, at this occasion, an extensive vision of the perimeter of the legal monopoly.[34]

Consequently, in France, prior to the adoption of the law of 12 May 2010, the organization of sports bets damaged both the legal historic monopoly of games (PMU, FDJ) and the legal monopoly of the sports organizers because it was obvious that online gaming operators, an illegal situation on French territory, do not approach the sports actors to get their authorization.

21.4.4.2 The Legal Consecration

The ruling of the Court of Appeal mentioned above had the particularity to have been reached the following day of the adoption of the draft in first reading by the national Assembly, the 13rd of October 2009. Yet, the peculiar position of the judges as regards the exploitation monopoly in the field of the betting has not stopped the legislator from inserting a corresponding right in this draft Law. This demonstrates the wish of the legislator to recognize in favour of the sports event organizers a property right on the commercial use of all characteristic elements of sporting events.

In reality, according to the Members of Parliament, it was necessary to clarify, in the law, the respective rights of sports organizers and gaming operators in order to prevent the multiplication of litigations after the liberalization.[35]

Nevertheless, the substance of this new legal right was subject to many discussions in the Parliament, as well as many amendments, including due to the position of the European Commission in this respect.

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[31] Article L. 333–1 of the Sports Code: "The sports federation, as well as the organizers of sporting events mentioned in the Article L. 331-5, are owner of the exploitation right of the sporting events or sports competitions which they organize."

[32] TGI Paris, ord. réf., 16 October 2006, *LFP c/Sté Interwetten*, RG n° 06/57318.

[33] TGI Paris, 3^{e} ch., 2^{e} sect., 30 May 2008, FFT c/Sté Unibet Ltd et FFT c/Sté Expekt.

[34] CA Paris, 14 October 2009, FFT c/Unibet.

[35] Report n° 209 (2009-2010) of Mr. François Trucy (Senator), on behalf of Commission of finance, 19 January 2010, p. 346.

First, this so-called "betting right" had as its goal to recognize to the sport events organizers a property right as regards the commercial use of some elements which are accessory to their sport events, namely their names, their calendar, their data and their score. This right means that the elements which are essential data for the operators and also for other lines of business are exclusively reserved to sport event's organizers.

Thus the use of those elements is not free and it has to be set by contract with the concerned sports actors. This outlook of the "betting right" has been strongly criticized. On the one hand, it had actually the goal to grant sport organizers a new general right on any elements which could be considered as free and not subject to any property right in virtue of the principles of free information. Besides, the 30 March 2010 case law ruled that the legal exploitation monopoly of the sports organizers does not apply to the score of the sporting event.[36] On the other hand, the European commission in a detailed opinion with regard to the French draft Law drew the attention of the French authorities to the delicate compatibility of the "betting right" with the EU law.[37] The Commission noted that "such a requirement could impede or render less attractive the exercise of the freedom to provide services and could be regarded as constituting restrictions within the meaning of Article 49 of the EC Treaty." Nevertheless, the European Commission added that, if the aim pursued by the "betting right" was to ensure or strengthen the financing of benevolent or public-interest activities, it was not a valid and sufficient justification. On the contrary, the imperative requirements in the general interest such as consumer protection and the prevention of both fraud and incitement to squander on gaming are the sole legitimate aims for such a restriction to the freedom to provide services.

Thus, the law was slightly adapted to these recommendations. Now, the "betting right" only aims at governing the relations between the sports organizers and gaming operators licensed by ARJEL with regard to the betting offers of the latter on sporting events. This "betting right" will have to attend to fighting against fraud in order to prevent the integrity and equity of sports activities. In other words, the French authorities consider that this legal monopoly on the exploitation of sporting events under bet form does not pursue a financial goal but only the goal to force sports events organizers and gaming operators to establish the terms of an ethical, fair and responsible game.

21.4.4.3 Legal System

Pursuant to Article 63 of the Law of 12 May 2010, the exclusive exploitation right recognized to sports organizers includes the right to "license" the right to bet on

[36] TGI Paris, 30 March 2010, FFR c/Fiat France et al.

[37] European Commission, Notification 2009/0122/F, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998.

the said sport events. In other words, the French Law lays upon online gambling operators authorized by ARJEL to get beforehand the consent of sports events organizers to offer bets on the sporting events.

Article 63 establishes the general framework of this original right and leaves it to a Decree to specify the exact terms of this right. The Article of the New Law states in particular that the attribution of this right cannot be exclusive and shall not be discriminatory among the online gambling operators for the same betting category. Moreover, the draft contract between sport event organizers and gambling operators has to be transmitted before signature to ARJEL and to Competition Authority for opinion. Therefore, the "betting right" is subject to a strict control.

Besides, in case of refusal by sports event organizers, the latter has to justify its decision and give notice of such motivation to the operator and ARJEL. In addition, the law expressly underlines the legitimate aim pursued by the "betting right" as Article 63 provides that the contract has to include the obligations relating to the detection and the prevention of fraud which lies with the online gambling operators. This provision also states that payment to sports organizers should ensure expenses to fight against fraud.

For practical purposes, pursuant to the Decree n° 2010-614 of 7 June 2010, the conclusion of the contract has to be the result of a non discriminatory consultation procedure which is opened to all gambling operators who hold a license delivered by ARJEL. Precisely, each sports organizer establishes specifications for each kind of sport events.

These specifications include the calendar of the attribution's procedure and the rules governing the consultation. In particular, they have to set the cost of compensation for the attribution of the "betting right." This amount has to be set in proportion to the bets, i.e., it needs to be proportional to the stakes. These specifications also set the terms and conditions for the exploitation of this right. In particular, the specifications indicate the obligations of sports organizers and gambling operators as regards the fight against fraud and the prevention of risks of attack on sport's integrity.

However, unlike the classic consultation procedure, the discretional power of sports events organizers concerning the attribution of the "betting right" is limited according to the provisions detailed in the related Decree.

21.4.4.4 The Issues

The application of the "betting right" raises many issues whereby answers are likely to be first given by the judges and then by the legislator pursuant to revision clause in the New Law. For instance, is the "betting right" really compatible with the EU Law as it is questionable whether this is the less restrictive measure to the freedom to provide services? Other effective instruments already exist indeed to preserve the integrity of sports such as the European Sports Security Association.

Besides, when an international sport events organizer takes place in France,[38] will only the operators authorized by ARJEL be concerned with the "betting right"? Do the online gambling operators have to negotiate right to bet on all sport events? Lastly, while the New Law explicitly foresees this "betting right" as a means to prevent conflicts of interests between the operators and the sports actors (Article 32),[39] it looks questionable to establish such a right based on a proportional retribution of the stakes.

As a conclusion this French specificity will certainly raise further commentaries and even case law. For now, some EU jurisdiction are said to be interested in the development of such a system and the European Commission will be awaiting the report due by the French State to justify that this is not a barrier to the freedom to provide services.

21.4.5 Fighting Against Illegal Websites

The newly set up licensing system for legal gambling in France can only operate and meets its expectations if illegal operators are effectively penalized for not complying with the French law.

21.4.5.1 Advertisement as a Promotion of Legal Operators versus Illegal Ones

According to the New Law the promotion of gambling is strictly regulated both for legal operators due to the fight against addiction consideration and illegal operators for the fight against infringement to the Law.

All means of commercial communication in favour of a licensed gambling operator shall incorporate a warning message as defined by Decree[40] in order to prevent consumers from the risks of gambling and with reference to the system of information and assistance for players facing gambling addiction's symptoms.

Promotion of licensed gambling operators is legal provided that publicity is not targeting an underage public, as gambling is illegal under 18. Thus, advertisement should avoid any web sites or TV shows or magazines designed for minors.

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[38] In this regard, Article 63 of the law enables organizers of international sports competitions such as an international federation to empower the French national federation to conclude the contract relating to the negotiate right to bet.

[39] For instance, sports organizers have to adopt in their disciplinary Code any provisions whose aim is to ban the actors of the sporting event to bet on it. The relations between online gaming operators and sports organizers are supervised by the law.

[40] Decree n° 2010-624 on June 8th, 2010: "Jouer comporte des risques: endettement, dépendance … Appelez le 09-74-75-13-13 (appel non surtaxé)."; "Jouer comporte des risques: isolement, endettement … Appelez le 09-74-75-13-13 (appel non surtaxé)."; "Jouer comporte des risques: dépendance, isolement … Appelez le 09-74-75-13-13 (appel non surtaxé)."

According to Article 9 of the Law, commercial communication in infraction to the above principles is punished with severe penalties (€100,000 and up to four times the publicity expenses).

In addition, specific Codes of Conduct applicable to the gambling setup by the actors of the publicity sector (ARPP: self-regulatory advertisement authority) have listed some ethical principles for a responsible gambling promotion (for example, advertisement should not induce that gambling is a way to earn money etc.). These rules should be taken into consideration as they provide for a self-regulatory framework directly applicable to the present case.

Pursuant to Article 48 of the New Law, the promotion of a non licensed gambling operator is prohibited and punished by severe penalties. This is a key provision of the New Law as non-licensed gambling operators will not be allowed to enter into sponsoring agreements (e.g., with French sports teams). Web sites will not be allowed to advertise gambling/betting operators that are not licensed. In case of noncompliance, the fine payment will be €100,000 or four times the amount of advertising expenses, whichever is higher—a hefty payment for sports web sites, broadcasters and other media.

21.4.5.2 Further Means to Fight Against Illegal Online Business

The New Law foresees a number of measures to be applied to fight against non licensed operators, i.e., illegal operators. According to the above, an operator offering a game out of the scope of the law will not be granted a licence and/or offering a game even included in the scope of the law but without licence will be considered as an illegal operator. Thus the following measures could be applied:

21.4.5.3 Blocking

Illegal gambling/betting web sites—targeting French residents—could be prevented from operating in France, in particular, by blocking their financial transactions or blocking the entire web site. This is the competence of the ARJEL to invite illegal operators to stop their undue activity before they require from the judge/the Minster of Budget to order the Internet and/or financial providers to block respectively the web site and/or the financial transactions. Additionally, pursuant to Article 50 of the Draft Law, ARJEL's chairman is entitled to seize the judge in order to obtain an injunction to stop referencing illegal web sites on search engines or directories.

21.4.5.4 Imprisonment and Fines

Non-licensed gambling operators could even be subject to criminal sanctions such as prison sentences of between 3 and 7 years and additional fines of between €45,000 and 100,000.

Pursuant to Article 47 of the Draft Law, a complementary penalties system is introduced in the fight against illegal operators as follows: the deprivation of civic, civil and family rights, the confiscation of movable and immovable property, the showing or broadcasting of the judgement, the final shutdown of establishment for a period of up to 5 years, the ban of applying for a license for a period of up to 5 years, the ban of exercising a public function, a professional or social activity in the exercise of which the offence was committed, the withdrawal of the license. The principal penalties remain without further modifications.

Customs agents are entitled to research and note the infringements in relation to advertisements for an illegal web site as well as to all other illegal gambling activities.

A key issue still to be resolved through a jurisprudence to be elaborated by the newly created ARJEL regards the criteria to define what is an illegal operator subject to the French law, i.e., which criteria both for the competence and the applicability of the Law. Regarding their competence, and as mentioned above, the criminal judges have interpreted in a broad way the criterion of accessibility of an infringement on the Internet as soon as a web site was accessible from France. Regarding the constitution of the infraction, it is usually based on a distinction between an active and passive offer. If a gambling operator is actively targeting the French market, it may be liable under the French Law. However, the exact criteria are fluctuating …

In any case, it is likely that the ARJEL will invest all kinds of means to fight against illegal operators as well as it is very expectable that French licencees will lodge complaints against their illegal competitors. To date, two notifications have been sent to EU-based and licensed operators for infringement to French law … the legal gambling party in France is just starting.

21.5 Conclusion

Following completion of the contemplated reform, France should remain an attractive market for new entrants as the very first data during the Soccer World Cup were confirming.

However, several issues will have to be addressed in order to improve the attractiveness of the French online gaming market. In this respect, it is important to keep in mind the revision clause in 18 months, after this first attempt at liberalization.

First, the New Law provides that taxation shall be based on wagers rather than on gaming gross revenues; the latter being much more suitable especially for poker operators. In application of the above, imposing a 2% tax on global wagers would amount to tax around 60% of their gross revenue. It is likely that this will be considered as very little incentive for most operators to offer their services on the French online gaming market.

Second, the international platform issue is crucial, especially for poker operators since the attractiveness of cash games or tournaments depends a lot on the liquidity available. So far, the closed-loop system has been largely criticized and justifications hereto were not always heard as satisfactory. This issue is likely to be a crucial reason for the success of the new system … or its failure in case French players mainly prefer illegal web sites which in turn offer international platforms. In this respect, one could expect some intermediary measure such as a progressive internationalization of platforms through cooperation agreements with EU or equivalent regulator, as soon as such *home jurisdictions* offer equivalent level of protection for players.

Finally, the restrained scope of the law regarding the kinds of games of chance authorized raise some concern among operators willing to offer a wider range of games, especially since their offer is legal in other Member States.

As a conclusion, it is worth underlining that the New Law is a constructive step forward. But it is certainly not the ultimate step towards liberalizing the market. In any case it is also a second example, after Italy, to make the choice to regulate this sector, despite the commentaries on the most recent ECJ case law ruling applicable to Portugal or Netherlands. Is the online gambling sector a market to be considered at the EU level? … One could consider that the imperatives of the Internet overrule the cultural specificities and could justify a pragmatic approach as the French Government just demonstrated a way to do so.

Chapter 22
Reorganization of the Sports Betting Market in Germany

Martin Nolte

Contents

22.1 Introduction

Sport plays an important role in the lives of people around the world. Its welfare functions are essential to state and society.

Sport socializes, integrates and is used for identification; it therefore exhibits the social functions that are absolutely necessary for cohesion in every national community—in Germany and in China. Furthermore, sport is of massive *economic*

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significance. The European Commission estimates that it is responsible for 3.6% of global gross domestic product. Politicians take note of these facts. Governments promote sport because of its welfare functions and for external appearances.

The growing significance of sport is, however, leading to legal problems with increasing frequency and these do not stop at national borders, as sport is an international phenomenon. Legal issues within sport assume a corresponding international dimension. The Sino-German Day of Sports Law takes on these challenges and sheds light on highly topical legal sports law issues with international implications.

This also concerns sports financing because one thing is clear—sport cannot fulfill its important functions without an economic basis. Gambling is especially significant for financing sport because around 50% of the financing for communal sport in Germany is based on government subsidies from its gambling monopoly.

This gambling monopoly exists for major lotteries and sports betting. In the case of major lotteries, players can bet on numbers they have previously filled in being drawn from a limited pool of numbers and win more than one million euros for a financial stake. In the case of *sports betting*, the player has the opportunity of betting on events during sporting competitions. There are essentially no private providers in either field.

Things are different for minor lotteries and local, very limited sports betting, which lie in the hands of private providers. The same applies to betting on horses, casinos, and commercial gambling machines. These games of chance are organized either exclusively or predominantly by private businessmen. The only other field in which there are state-run providers is casinos.

Sports betting is, however, of particular importance to sport. There are three reasons for this:

First, sports betting is based on the sports organizer's individual performances. Sports betting is inconceivable without his planning, organization, and execution of the competition.

Second, sports betting affects the integrity of sporting competitions, in other words the inability to influence them. Betting is on the outcome of sporting events, which entails the risk of manipulation. Sport loses its attractiveness and thus its recognition by state and society when competitions are manipulated.

Third, the German sports betting monopoly prohibits advertising of sports betting, which applies to television, stadium advertising, and players' shirts. This has considerable negative consequences for professional sport. German football clubs**,** in particular, have financial competitive disadvantages where international competition is concerned. Spanish club Real Madrid can advertise private gambling provider bwin on its players' shirts, but German champion 1. FC Bayern Munich is banned from doing so.

Difficult, highly topical cross-cutting questions go hand in hand with this because compelled by a state treaty between the German federal states and recent decisions of the European Court of Justice the German gambling monopoly on lotteries and sports betting must be evaluated by the end of 2010.

On September 8, 2010, the European Court of Justice shared German courts' legal concerns about the German gambling monopoly. In its opinion, this is unsystematically, if not to say incoherently, geared to the aim of combating addiction. On the one hand, the government justifies its monopoly in the areas of lottery and sports betting with this aim. On the other, it is operating a policy of expansion in the field of betting on horses, casinos and commercial gambling. These are incompatible, given that the liberalized areas exhibit greater potential for addiction than sports betting.

In view of this my paper is divided into three parts:

The first part deals with the framework for sports betting in Germany, for which a decision by the German Federal Constitutional Court of 28 March 2006 is decisive. In the second part, I will describe developments in the sports betting market during the last four years. In the third part, I will address future regulation of the sports betting market, in which I will pay particular attention to constitutional and European law, after which I will sum everything up.

22.2 Framework Conditions for Sports Betting in Germany

First, I would like to look at the framework conditions for sports betting in Germany.

The state basically has a monopoly on organization. This monopoly was based solely on the lottery laws of the German federal states for a long time. These concluded a treaty on July 1, 2004, which mutually obliged all the federal states to maintain the sports betting monopoly.

This was based on the conviction that ensuring an adequate supply of sports betting is a public duty. According to the German constitution's allocation of rights and duties, fulfillment of this duty is the responsibility of the individual federal states. State lottery companies exist to fulfill this responsibility.

There are two exceptions to this principle: first, the special field of betting on horses, which has traditionally been in private hands since 1922 and for which the Federal government's Race Betting and Lottery Act is authoritative. Second, there are few private betting licenses with limited local validity. They were issued between 1989 and 1990 in the transitional period when the German Democratic Republic was reunifying with the Federal Republic of Germany and have limited local validity for the new federal states.

22.2.1 German Federal Constitutional Court's Sports Betting Judgement of 28 March 2006

The framework conditions have been heavily influenced by the German Federal Constitutional Court's sports betting judgement of March 28, 2006, in which the highest German court declared the sports betting monopoly to be unconstitutional.

In its view the betting monopoly's specific formation violates the freedom of profession guaranteed under constitutional law. The monopoly constitutes a particularly fierce attack on the freedom of profession, which can only be justified with great difficulty. Fiscal motives were not sufficient, only the aim of combating addiction could uphold the sports betting monopoly. At any rate, the monopoly would have to be consistently geared to this aim, and it is not.

Despite being unconstitutional, the legal situation continued on as it was. However, the state was obliged to reorganize the sports betting market, for which it was given until December 31, 2007. There were two forms of reorganization open to the government. On the one hand, it could continue the monopoly, in which case it would have to keep a close eye on the aim of combating addiction. On the other hand, it could also decide, without further ado, to open up the sports betting market to private providers under controlled circumstances.

22.2.2 Direct Impact of the Sports Betting Judgement

The sports betting judgement has a direct impact on the provision of betting and for the conclusion of a new state treaty.

22.2.2.1 Considerable Limitations on Betting Provision

The judgement of March 28, 2006 initially leads to considerable restrictions on betting provision.

The state lottery companies have been banned from part-time and live betting. The same applied to betting using short message service (SMS) telecommunications service and within football stadiums. Registration of new betting customers was suspended. "Old customers" were subjected to strict identification measures. Other restrictions were added to these, concerning various forms of advertising. Football club 1. FC Bayern Munich was banned from pitch-side advertising for the state monopolies and also had various addiction prevention measures stopped, which included, for example, warning notices on betting slips referring to the danger of addiction to sports betting.

At the same time pressure on illegal private sports betting providers was increased. The authorities prohibited the acceptance and broking of private bets. They declared their decrees to be immediately enforceable. They threatened substantial fines in the event of non-compliance. The courts held these measures to be lawful. They referred to the Federal Constitutional Court's judgement, according to which organization and broking of sports betting without a German license is strictly prohibited. This represented a danger to public safety. The reorganization orders were therefore lawful.

22.2.2.2 New State Treaty on Gambling as of 1 January 2008

The sports betting judgement also quickly led to conclusion of a new state treaty on gambling, between the Federal Republic of Germany's federal states, which has been in force since January 1, 2008.

This state treaty forcefully emphasized the state sports betting monopoly. The federal states cited the following to justify the monopoly: the monopoly is a suitable method of combating the risks associated with betting. This applies especially to the combating of addiction and crime. The policy of strict regulation had proved its worth; this policy must therefore be adhered to.

The admission of private companies, on the other hand, should be refused is basically supported by two reasons:

First, the admission of private betting companies would lead to an undesirable expansion of the gambling market, as had been proved by forecasts of stakeholders and the public safety authorities.

Second, the number of addicted gamblers and those at risk of addiction would rise to the same extent, which would in turn have a negative impact on accompanying and acquisitive crime.

Although the reasons for the sports betting monopoly were legitimate at the time, developments between 2006 and 2010 contradict the assumption that the sports betting monopoly has achieved its aims.

22.3 Trend in Sports Betting Between 2006 and 2010

Between 2006 and 2010 the sports betting trend has essentially been shaped by two factors.

First, state sports betting turnover has really slumped, while the black market has flourished massively in the same period.

Second, there was a flood of lawsuits against the sports betting monopoly, which prompted the most recent decisions by the European Court of Justice, which shared the concerns of German courts regarding the admissibility of the sports betting monopoly.

22.3.1 Slump in Turnover and Development of the Black Market

The decline in state betting turnover between 2006 and 2010 was massive. Cautious estimates assume a decline exceeding 60%. In the first instance this could be used to back up the sports betting monopoly's success, whose goal is to inhibit the passion for gambling, yet on closer inspection this goal has not been achieved, as the turnover of illegal and foreign providers has flourished in the same period.

This development forces one to the following conclusion: the monopoly is not fulfilling its regulatory objective. On the contrary, it has generated a sizeable black market. The total sports betting market volume in Germany is conservatively held to be around five billion euros per annum, of which less than 200 million euros can be ascribed to legal state providers. The remaining share of sports betting is turned over by illegal or foreign providers.

From a regulatory policy view, the monopoly is not only unsuitable, it is even counterproductive. The same must apply to the remaining regulatory aims of the state gaming treaty.

There is a recent comparative law study on addiction prevention carried out in 2010. It comes to the conclusion that the addiction is best combated using a licensing model. The following should also be considered when countering crime: the latest betting scandal in Germany in 2009 occurred under the current state monopoly, which continues to cause a substantial black market operating outside the prevailing law. There can thus be no talk of countering crime in this area. Effective combating of crime is different.

22.3.2 Legal Objections to the Sports Betting Monopoly

There is a correlation between the negative trends in the sports betting monopoly and the legal objections, which are based on German constitutional law and European law.

At the level of German constitutional law, it is first and foremost a question of the monopoly's compatibility with private providers' freedom to exercise a profession. The monopoly serves to inhibit the passion for gambling and to combat addiction and crime; a proclamation of which in the new state treaty is, however, insufficient to justify the state monopoly. The Federal Constitutional Court has repeatedly made clear that the action taken must also actually be suitable to promote the specified objectives. This must be the subject of considerable doubt in view of more recent developments in the sports betting market.

The Federal Constitutional Court has not previously shared this concern. In more recent decisions it has not had an opportunity to rule on the content in this matter. In view of the trends that have been highlighted, it is highly probable that at the next opportunity the court will arrive at the sports betting monopoly's unconstitutionality. It is at any rate certain that more recent developments will be taken into account.

Second, there are far reaching concerns with regard to European law. They concern the sports betting monopoly's compatibility with the private provider's freedom of establishment and freedom to render a service. Although restriction of these freedoms would be permissible for reasons of regulatory policy, especially to curb addiction, the actions in this case would have to be coherent, in other words, consistent.

This is not the case in Germany because ultimately there are licensed gambling sectors such as horse betting, casinos, and commercial gambling. In these areas the government is pursuing an expansionist policy, which contradicts the aim of combating addiction which the state is pursuing in the field of sports betting. Finally, the state is still advertising, especially where lotteries are concerned. This fact is also incompatible with the aim of combating addiction.

I therefore permit myself to make an interim summation. The gambling treaty's regulatory targets have been missed. The monopoly is having a counterproductive effect. The state is losing considerable income from the decline in state betting revenues and the simultaneous exclusion of private products. Finally, the state gambling treaty violates European law and is exposed to significant constitutional law concerns in view of the black market. It is thus a question of time as to when the Federal Constitutional Court will declare the treaty to be inadmissible.

22.4 Future Regulation of the Sports Betting Market

This is the background to future regulation of the sports betting market. In this case two different models are being discussed:

On the one hand, the continuation of the sports betting monopoly for the purpose of combating addiction, and on the other hand, regulated opening up of the sports betting market to private entities, subject to government supervision.

22.4.1 Continuation of the Sports Betting Monopoly

For regulatory policy, fiscal, economic, and legal policy reasons, continuation of the sports betting monopoly for the purposes of combating addiction appears to be wrong, as is shown by the following:

22.4.1.1 Counterproductive to Regulatory Policy

In regulatory policy terms the sports betting monopoly is counterproductive, as is shown by the trend in the past four years. During this period neither enthusiasm for gambling, nor addiction, or crime, were curtailed. On the contrary, the monopoly caused a black market. This ensues from the evaluation committee's latest interim report. Therefore, it cannot be assumed that the regulatory objectives would be achieved through continuation of the monopoly.

They would only be fulfilled if one were allowed to cautiously expand the range of services, to advertise and to access the internet. These options are, however, barred under the monopoly, as increasing attractiveness contradicts the objective of combating addiction. The monopoly's weakness in regulatory terms is therefore inherent.

22.4.1.2 Detrimental to Fiscal Policy

The sports betting monopoly is detrimental to fiscal policy because its continuation leads to state betting turnover falling further. The monopoly can only be justified by rigorous combating of addiction. Fiscal motives are prohibited. The necessary objective of combating addiction contradicts any increase in attractiveness.

Another thing: the European Court of Justice allows the sports betting monopoly to continue. In this case, Germany would have to coherently direct its entire gambling policy to the fight against addiction. This has a considerable impact on the concessionary areas of horse betting, commercial gambling, and casinos. Private licences in these areas would be massively devalued, with significant losses in value-added tax. The German horse betting market alone has an annual turnover of approximately 260 million euros. There are 8,000 arcades with more than 100,000 machines and around 40 private casinos. If a strict fight against addiction was to operate where these facilities are concerned, this would give rise to significant compensation payments on the part of the state.

22.4.1.3 Anachronistic in Terms of Economic Policy

Continuation of the monopoly is anachronistic in terms of economic policy. More and more European Union member states such as France, Italy, and Denmark, are opening up their sports betting markets to private providers. Germany's market remains closed. This is causing private companies to migrate abroad, which has significant consequences for the domestic market, as Germany loses jobs, turnover, and taxes. The problem would be home-made. Continuing the sports betting monopoly is contradictory to the objective of European treaties.

22.4.1.4 Extremely Risky in Terms of Legal Policy

Finally, continuation of the monopoly is extremely risky in terms of legal policy. The sports betting monopoly is supposed to combat addiction, curb enthusiasm for playing, and deflect crime. The last four years have shown that the monopoly has not been able to fulfill its regulatory policy objectives. The Federal Constitutional Court had, however, stated that combating addiction as an aim is theoretically sufficient to operate a monopoly. In view of the increasing black market, there is nevertheless a suggestion that the court could come to the conclusion in future that the German monopoly in fact does not fulfill its supporting regulatory objectives.

Additionally, supporters of this monopoly perpetuate its maintenance with the aim of safeguarding the lottery monopoly. Their opinion follows presumed logic—if one were to approve sports betting, with a greater potential for addiction, one would first have to approve lotteries, with a lesser potential for addiction, thus losing the lottery monopoly, which must be retained at all costs.

This argument seems illuminating, but it is not. On closer inspection this argument endangers the lottery monopoly more than it safeguards it, as continuation of the sports betting monopoly with the aim of combating addiction is already questionable on factual grounds. If the sports betting monopoly was successfully challenged, the lottery monopoly would also be overturned. The sports betting monopoly and lottery monopoly would ultimately be fatefully linked through the aim of combating addiction.

22.4.2 Regulated Opening Up of the Sports Betting Market

The alternative to the monopoly is therefore regulated opening up of the sports betting market to private providers, under government supervision. The Federal Constitutional Court already referred to this alternative in its decision of March 28, 2006. This model could be based on four cornerstones:

22.4.2.1 Preventative Regulation Through Qualified Concessions

First, preventative regulation through qualified concessions. The sports betting market would not be opened up through wild liberalization. Instead a licensing model would be sought which contributes to preventative regulation of the sports betting market. Organization of sports betting would only be permitted with a prior licence. This qualified concession would have a preventative regulatory effect, as grant of the licence could be linked to regulatory requirements such as the provider's reliability and liquidity.

22.4.2.2 Protecting the Integrity of Sporting Competition Through Collateral Provisions

Second, protection of the integrity of sporting competition must be ensured through provisions collateral to the licence. To do this, the administration must be authorized to issue collateral provisions, which could specify precise requirements on the permissible forms of gambling. Forms of gambling that are especially addictive or highly manipulative, such as betting on the next yellow card, or the next foul, would have to be precluded. This would not only achieve general regulatory objectives, but would also better protect the integrity of sporting competition. For this purpose one would have to have recourse to the sport's special expertise. Its involvement in concrete considerations on prohibiting specific products could be achieved by giving it a seat and a voice when drawing up collateral provisions.

22.4.2.3 Regulatory Control Using the Licensing Model

Third, the licensing model would achieve regulatory control. Opening up the market reduces the weight of justification that the state has for forming a monopoly. Under the monopoly the regulatory aims of combating addiction and deflecting crime have a claim to absoluteness. This largely precludes increased attractiveness of the gambling offering. The situation changes fundamentally if the sports betting market is opened up. The state's weight of justification decreases. The regulatory objectives lose their absolute weight. They can be appropriately balanced with economic and fiscal policy motives. This is associated with significant maneuvering room on the part of the state. It can open up the internet for sports betting, allow advertising, and moderately increase the range of products. This increases the attractiveness of legal sports betting in Germany. And as a result, a large part of the illegal market would transfer to the legal market, and people who are especially prone to addiction could consequently be better reached. Therefore, the licensing model is preferable in terms of regulatory policy.

22.4.2.4 Regulatory Sports Betting Tax

Fourth, a regulatory sports betting tax could be levied. It would support and strengthen market supervision and the aims pursued by admission to the market. In particular, the significance of the sports betting tax should lie in making the range of sports betting more expensive and limiting it to reduce the risk of game manipulation. This regulatory objective is permissible without hesitation. The sports betting tax would accordingly be a form of special tax exclusively geared to a regulatory purpose. The rate of the tax would have to be governed by this objective, which is why a percentage should be chosen which, as in France and Italy, moves in the band between being perceptible and competitive.

The tax revenue would ultimately have to be used for the same function, in other words for regulatory purposes, which particularly include the integrity of sporting competition, whose protection could be achieved by part of the revenues going to organizers of sporting competitions. Promoting the integrity of sporting competition by means of a financing guarantee would be nothing other than surrender of regulatory objectives to justify the sports betting tax.

22.5 Summary

Sports betting in Germany leads to numerous cross-cutting questions at the interface between regulatory, economic, and sports policy, and in which law plays a central role. The various interests must be ranked and balanced against each other so that they can all come to fruition in the best possible way.

This applies also to the interests of sport. Sports betting entails the risk of manipulation and thus prejudices the integrity of sporting competition, which is why intelligent safeguards and controls are required. Sports betting also opens up significant economic and fiscal opportunities, which should not be placed in the hands of illegal providers.

In view of the current black market and the mandatory stipulations of constitutional and European law, sports betting in Germany requires reorganization. Continuation of the sports betting monopoly for the purposes of combating addiction is extremely risky and obviously disadvantageous. It will continue the dramatic slump experienced by state-run providers and lend impetus to development of the black market. Finally, the aim of combating addiction would also place the lottery monopoly at risk. Anyone supporting continuation of the sports betting monopoly with the old justification should be clear about these circumstances.

The real alternative can only be controlled opening up of the sports betting market to private entities under government supervision. The licensing model offers significant channeling potential. It achieves the regulatory objectives, in conjunction with considerable additional revenue for the state. Sport would benefit too, as it is concerned with the integrity of its events, with solid basic financing from gambling revenues and additional advertising opportunities.

There is therefore no alternative to controlled opening up of the sports betting market.

Chapter 23
Sports Betting in Greece

Marios Papaloukas

Contents

In most societies for much of human history gambling was prohibited. Nowadays, it is considered a socially acceptable activity. In the European Union, member States are free to choose their own policy insofar as gambling is concerned although the public, as well as government bodies, tend to favour tight regulation. A restrictive regulation is justified when it aims at protecting people from the

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dangers of gambling and not when it is protecting the profits of a monopoly. However, even with the best of intentions betting regulation policies have a way of becoming distorted when governments rely too heavily on people's passion for gambling in order to pay bills.[1]

23.1 Legislation Regarding Sports Betting in Greece

23.1.1 General Aspects of Betting

The term "betting" was well known in the Greek justice system even before a specific law was issued. The Greek Civil code with Roman and Byzantine law influences was put into force on 23 February 1946. Three of its articles[2] contain provisions regulating gambling and betting debts. Both gambling and betting are included in the so-called contracts depending on luck, namely, those that fall into the category of contracts under which the performance of a contractual duty depends on an unforeseeable factor. This category of contracts also includes insurance contracts. However, while insurance contracts provide social benefits, gambling and betting contracts have anti-social aspects as they aim towards an effortless income or towards satisfying a passion. It is precisely for this reason that the civil code legislator after evaluating the dangers for society and the potential social problems that can arise as a result of peoples involvement in such games, avoids giving them full legal status but, at the same time, does not prohibit their existence. Thus the legislator indicates that profits from gambling do not create an enforceable, a valid claim in the sense that, such profits cannot be claimed in Court, but nevertheless if those profits are, in fact, paid, then the recipient cannot claim a refund, except in the event of fraud.[3]

23.1.2 The Formation of an Entity Providing Sports Betting in Greece (OPAP)

The above described was the situation until 1957, the year in which the systematic regulation regarding sports betting in Greece was introduced. A Legislative Decree issued in 1957[4] refers, amongst others, to the betting slip of football matches and

[1] Collier 2008, 21–22.

[2] See Articles 844, 845 and 846 of the Greek Civil Code.

[3] See scientific report of Law 2433/1996 dd. 8-7-1996.

[4] See Article 12, para 6 of Legislative Decree 3769/1957.

calls for the issue of a Royal Decree which will regulate the way in which it will both function and be organised. The same Decree[5] also states that anyone, except the "Greek Horse Racing Company," who in any way organises or provides a venue for sports betting-related acts, or anyone who participates in sports betting activities not organized by the "Greek Horse Racing Company," will be punished with up to 2 years' imprisonment and a fine.

This Royal Decree was in fact issued in 1958.[6] According to it a Legal Entity under the name *Organismos Progrostikon Agonon Podosferou*,[7] otherwise known as "OPAP" was established. Its aim was to operate and organise the betting slips for Greek football matches, where the player had to predict the result of a specific number of football matches included in each betting slip. The earnings were used to finance public sport and athletic activities in general. Until today, OPAP is solely responsible for organising this game.

23.1.3 The Establishment of Various Games of Chance

In 1996[8] two more betting games, under the names "Lotto" and "Proto" were introduced. In addition, the issuing of betting slips for all team or individual sports with pre-fixed or non-fixed odds was allowed.[9] It was also decided that certain events, provided they were found suitable, were to be made available for betting. Issues such as the structure and function of betting slips, and the application of earnings were to be regulated by a Presidential Decree that would be issued.

Indeed, the following year a Presidential Decree[10] was issued according to which the management rights on betting were assigned exclusively to the Greek State. These rights were further assigned to OPAP which in turn could by exercising this right itself or by assigning it to a third party take any measure necessary in order to secure the operation and function and in general the proper running of the entire betting structure.

23.1.4 Criminal Penalties

This State monopoly was even protected by a penal law that was introduced in 1996.[11] According to it, anyone offering to the public or to a wide audience betting

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[5] In Article 14.

[6] Royal Decree dd. 29 December 1958.

[7] Which can be translated into English as "Organisation for the Prognosis of Football Matches."

[8] See Article 1 of Law 2433/1996.

[9] See Article 2 of N. 2433/1996.

[10] See Presidential Decree 250/1997.

[11] See Article 2 of Law 2433/1996.

services concerning horse racing, individual games, games with pre-fixed or non-fixed odds or concerning events made available or advertised for betting or in any other way attracting third parties to participate or in any way participating in betting shall be punished by imprisonment and a fine. In addition it is stated that these penalties apply only when another law does not provide for heavier penalties.

23.1.5 The Transformation of OPAP into a Societé Anonyme

The Greek legislator up until 1996 considered OPAP a Public Company. However, by a law issued in 1996[12] public companies were allowed to be transformed into private companies with shares (*Societé Anonyme*). The same law states that public companies after transforming into a *Societé Anonyme*, will operate according to the rules of the private economy but without losing their character as companies offering a public service. OPAP became a *Societé Anonyme* in 1999, after the issuing of a Presidential Decree,[13] which also includes OPAP's Statutes.[14]

It is of great importance to read and understand the purposes and aims of this new company as expressed in its Statutes.[15] Amongst others, OPAP's purposes include safeguarding of the proper and unhindered operation of betting games, the working-out of financial, techno-economical, technical and commercial studies for games of chance on behalf of Greek or foreign public or private bodies, technical support of games of chance, especially sports betting by way of developing, installing, operating, managing and taking advantage of new high technology services. OPAP's other aims include the advertisement, promotion and commercial development of all products, as well as the reformation of its gambling agencies in general and finally, the granting of financial aid and sponsorship to sport, cultural and social bodies.

In order to achieve its goals, it is stated[16] that exclusive branches in Greece and abroad will be established and gambling agencies all over the country will be formed which will exclusively provide all OPAP's services, supply technical and general consulting services for both natural or legal persons, for other countries or international organizations in Greece or abroad and that it will undertake every commercial or non-commercial activity as well as any physical or legal action which may be, directly or indirectly, connected to the purposes of the company.

[12] See Article 1 of Law 2414/1996.

[13] See Presidential Decree 228/1999.

[14] These Statutes have been approved by the 442/9/2001 Ministerial Decision.

[15] See Article 2 of the Presidential Decree 228/1999.

[16] See Article 2 of the Presidential Decree 228/1999.

23.1.6 The Introduction of OPAP's Shares in the Stock Exchange

After the above, according to a law passed in the year 2000,[17] the Greek State was allowed to offer investors in the Greek Stock Exchange a percentage of up to 66% of OPAP S.A.'s shares. In addition to that[18] by way of a contract that would be signed between OPAP as a *Societé Anonyme* and the Greek State, OPAP would be given the exclusive rights to operate, organise and manage all existing betting games. From then on, the regulations for each game would be decided by OPAP's Board of Directors. These regulations would govern issues regarding the nature of each game, the general structure and operation, the financial terms, the rates as profits attributable to the players, the percentages of earnings per winner category, the value of a single bet, the agents' commission rates and generally everything related to the above. This contract between the Greek State and OPAP would set the terms of exercise and the potential renewal of OPAP's rights for the management of all betting games, the consideration stipulated in return for the exclusive right, the terms of payment, the specific obligations of OPAP, and in particular, the principles of transparency of the process followed and the protection of social order and the players. This contract would also set the terms for the grounds and procedure for the revocation of these rights, penalties or other consequences to the detriment of the recipient, the terms for resolving disputes and any other relevant matter. On 15 December 2000, OPAP signed this contract with the Greek State according to which OPAP acquired the exclusive right to operate, organise, manage and provide sports betting services until the year 2020.

Additionally, according to this law,[19] OPAP starting from 1 January 2001 would cease paying any subsidy, direct or indirect, to any public or private entity other than those provided for in the Greek Sports Code[20] regarding the Football Companies Union and Football Clubs.

23.2 Greek Courts and the Sports Betting Monopoly

23.2.1 The Greek Football Federation Challenges OPAP's Rights

By a Petition filed on 15 June 2007 to the Athens Single Member Court of First Instance, the Greek Football Federation (henceforth GFF) applied for the approval of certain amendments to its Statutes. One of these amendments concerned a

[17] See Article 1 of law 2843/2000.

[18] See Article 2 of law 2843/2000.

[19] See Article 27, para 4 of Law 2843/2000.

[20] See Article 102 of Law 2725/1999.

provision that would grant the right to GFF to derive revenue from its involvement in companies that provide public or private gambling games and bets, operating in Greece or abroad, on all forms of games or bets.

The Athens Single Member Court of First Instance approved the amendment of the specific article of GFF's Statutes.[21] Despite the fact that OPAP was not party to the proceedings, the Court decision affected its interests and for this reason OPAP filed third-party proceedings against the decision that approved GFF's amended Statutes.

OPAP argued that under Greek legislation, no gambling game or bet can be conducted in Greece without a corresponding legal provision providing for it. OPAP had since the year 2000 a contract with the Greek State that granted OPAP exclusive rights in sports betting services until the year 2020. According to OPAP, the prohibitions and criminalisation of the offering of all kinds of games of chance as well as betting has been introduced for the sake of protecting the Greek Public Order, in other words the interests of the society in general.

23.2.2 Foreign Betting Service Providers Challenge OPAP's Rights

The companies "Stanleybet" and "William Hill" are active in providing betting services and they are listed on the London Stock Exchange. They intended to expand their operation and establish themselves in Greece, by providing a betting network similar to the one that OPAP exclusively runs.

To that purpose, they lodged an application to the Greek authorities in order to be recognised in Greece as legitimate betting service providers and to be granted the relevant license and/or authorization to conclude the concession contract. The application also included the request to immediately stop OPAP's activity by denouncing its exclusive contract with the Greek State as being contrary to the European Community Law.

The Greek authorities did not respond to this application within the legally prescribed time limit, so based on the Greek law, these companies have submitted requests for cancellation to the Supreme Administrative Court against this implied rejection of their request.

As there is no appeal against the Supreme Administrative Court's decisions, an issue was raised towards making a request for a preliminary ruling to the European Court of Justice (henceforth ECJ). The Supreme Administrative Court's decision on whether to make a referral is expected anytime soon.

[21] According to the Athens Single Member Court of First Instance nr. 2119/2008.

23.3 The European Court of Justice and the Monopoly Status

23.3.1 The Establishment of the Gambelli Rule

The ECJ in its decision in the Schindler case,[22,23] accepted that there are three reasons that may justify, not an absolute prohibition but the restriction of gambling and its control by the State and one argument that justifies a special treatment of gambling. First, the ECJ has accepted that there are moral, religious and cultural aspects that "prohibit" making gambling a source of private profit. Second, gambling involves a high risk of crime or fraud, given the size of the amounts at stake, particularly when operated on a large scale. Third, it is the incitement to spend which may have damaging effects on the individual and on society. On the other hand gambling may contribute significantly to the financing of benevolent or public interest activities such as social work, charity work, and sport or culture.[24]

The ECJ, therefore, concluded that those particular factors justify the national authorities having a sufficient degree of latitude in determining what is required in order to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. In those circumstances, it is for them to assess, not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.[25]

In the Läärä[26] decision, the ECJ based on the reasoning in para 61 of the Schindler decision held that the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, to totally or partially prohibit, activities of that kind and, to that end, establish control mechanisms, which may be more or less strict. The mere fact that a member State has opted for a system of protection which differs from that adopted by another member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely with reference to the objectives pursued by the national authorities

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[22] See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24 March 1994, [1994] ECR I-01039.

[23] See Littler 2007, pp. 357–371.

[24] See Case Her Majesty's Customs and Excise vs. Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24 March 1994, [1994] ECR I-01039, para 60.

[25] See Case Her Majesty's Customs and Excise versus Gerhart Schindler and Jörg Schindler, C-275/92, Judgment of 24 March 1994, [1994] ECR I-01039, para 61.

[26] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21 September 1999, [1999] ECR I-06067.

of the member State concerned and the level of protection that they are intended to provide.[27]

In the Zenatti,[28,29] and Gambelli,[30,31] decisions the ECJ further elaborated on the principle of proportionality.[32] According to this principle, the restrictions on gambling imposed by a Member State should[33]:

- be justified by imperative requirements in the general interest,
- be suitable for achieving those objectives,
- not go beyond what is necessary in order to achieve this.

In order for a State provision not to exceed what is necessary to achieve the objectives intended in the general interest there should not be another, more lenient, flexible way to regulate the matter that can achieve the same public interest objectives. After that it had become even more difficult for member States imposing a State monopoly, to present convincing arguments that the best way to protect public interest is by imposing the most radical measure from the point of view of competition rules (i.e., a state monopoly) and not by using any other more flexible measure.

23.3.2 Beyond the Gambelli Rule

However, in 2004 the ECJ found a way around this argument in its reasoning in the Placanica case.[34,35,36] The Court ruled that it is possible that a policy of controlled expansion in the betting sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming—and, as such, activities which are prohibited—to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable,

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[27] See Case Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd vs. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), C-124/97, Judgment of 21 September 1999, [1999] ECR I-06067, paras 35–36.

[28] See Case Questore di Verona v Diego Zenatti, C-67/98, Judgment of 21 October 1999, [1999] ECR I-07289.

[29] See Papaloukas 2008, p. 42.

[30] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6 November 2003, [2003] ECR I-13031.

[31] See Papaloukas 2008, p. 125.

[32] Papaloukas 2009a.

[33] See Case Criminal proceedings against Piergiorgio Gambelli and Others, C-243/01, Judgment of 6 November 2003, [2003] ECR I-13031, para 65.

[34] See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6 March 2007, [2007] ECR I-01891.

[35] See Papaloukas 2008, p. 309.

[36] Papaloukas 2007, pp. 45–58.

but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.[37]

This argument was referring to the imposition of a licensing system as an efficient mechanism enabling operators active in the betting and gaming sector to be controlled and not a system of monopoly. The same argument was used by Advocate General Bot in his opinion in the Santa Casa v. Bwin Liga case.[38,39] However, contrary to the Placanica case, this case was not about the imposition of a licensing system but about the imposition of a State monopoly on betting. The Court soon after this opinion ruled that even the imposition of a State monopoly can be proportionate.

One must bear in mind however that in the Santa Casa v. Bwin Liga case the State monopoly in Portugal was imposed through a public company and not through a private company as the case is in Greece. In that sense the Santa Casa v. Bwin Liga decision does not necessarily mean that all sports betting monopolies in Europe will be preserved.

So after the reasoning in the Santa Casa v. Bwin Liga case, could it be said that when illegal betting constitutes a considerable problem in a member State not only the imposition of a State monopoly but also the imposition of a private monopoly on sports betting can be justified? Also in such cases is advertising of a private monopoly justified just as in the case of a State monopoly? Finally, how much of illegal betting constitutes a considerable problem in order to justify these extreme measures?

Even in cases where the purpose for the imposition of a monopoly was to impose a restriction in the expansion of betting, a monopoly granting a license to a single private profit-seeking company seems to go beyond what is necessary to achieve its purpose.[40]

23.4 The Greek Policy on Sports Betting

23.4.1 OPAP as a Provider of a Public Service

In the beginning of the 1990s, under the influence of international views to limit the "State" and "Public Sector" and the requirements of EU legislation, the EU

[37] See Joined cases Criminal proceedings against Massimiliano Placanica, C-338/04, C-359/04 and C-360/04, Judgment of 6 March 2007, [2007] ECR I-01891, para 55.

[38] Case Liga Portuguesa de Futebol Profissional, Baw International Ltd vs. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07, opinion of Advocate General Bot delivered on 14 October 2008, paras 85–88.

[39] Papaloukas 2009c.

[40] Papaloukas 2009b.

member States proceeded gradually to "Privatisation" of public enterprises by selling them to private investors. By this restriction of the public sector and the corresponding expansion of the private sector in combination with the lifting of the monopoly status, an effort was made to achieve free competition in the markets in order to improve the services provided to the consumer by these former public companies.

A company can be classified as providing a public service under either the organic or the functional criterion. Under the organic criterion, a company is characterised as a public service provider only when this is specifically stated by law. Under the functional criterion a company can be characterised as a public service provider when it actually provides goods or services that serve the public interest, striving to meet the basic needs of the public, without having to be specifically defined as such by law. Essentially, characterising a company as a "public service provider" does not solely depend on its legal form but mostly on the nature of the services it provides, which must also be, as defined in the Greek Constitution,[41] of vital importance to the everyday needs of society. According to the functional criterion it is not enough that a provision classifies OPAP as a public service provider, if OPAP does not actually provide such a service.

Therefore, although OPAP's Statutes state that OPAP works for the public interest under the rules of private economy and has the characteristics of a Public service provider,[42,43] from all the abovementioned we are drawn to a different conclusion. Companies such as OPAP and Duty-Free shops cannot be included in the Public Service Providers. Indeed, this view is also reflected in the Report of the Scientific Committee of the Greek Parliament on the Law 2414/1996, filed on 21 May 1996. In the case of OPAP, before considering it as a company providing a public service one has to present convincing arguments to the fact that gambling is a public service. To do so one would have to support that society is in fact benefiting from this activity and that it is a basic human need that a State should take actions to satisfy.[44,45]

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[41] See Article 23 para 2 of the Greek Constitution.

[42] In the first Article of its Statutes as they were approved by the Ministerial Decision nr. 442/9/2001 it is mentioned that it is a company providing a public service whereas in the first Article of OPAP's Statutes as included in the Presidential Decree 228/1999 it is not.

[43] See decision of the Greek Supreme Administrative Court (STE) 1776/2007.

[44] See the arguments presented in the Case Liga Portuguesa de Futebol Profissional, Baw International Ltd vs. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, C-42/07, opinion of Advocate General Bot delivered on 14 October 2008, paras 15–45 and 248–251.

[45] However, it could be claimed that betting is different from other gambling games where players must lose in order for the gambling business to make a profit and prosper. Betting is based on the result of a competition, the occurrence of an event or the existence of something and winnings are calculated on the total amount of bets placed, so contrary to other gambling games they do not allow only a small amount of players to win. Viewed in such a way and contrary to what Adv. General Bot claims in paras 28–31 of his opinion in case C-42/07 delivered on 14 October 2008, betting may appear less anti-social than other gambling games and more of a recreational activity.

23.4.2 The Legislator's Aims

As mentioned above in the ECJ's case law, each State is free to choose the policy that will relate to betting and gambling in general. The definition of a State's policy is a difficult task and it also requires an investigation of the implied aims behind the legal provisions. The researcher can use any source that indicates the intention of the legislator at the specific time a legal provision is drafted and approved. It is possible that the true purpose could be hidden behind "great" ideological statements. In order to unveil it, one should collect information coming from any source, which may include the company's Statutes, a statement of the State representative or even the minutes of one of the discussions of the law making committee.

It is useful to examine exactly what it is that the legislator is trying to achieve when legislating on OPAP and what is the mission assigned to OPAP. As previously mentioned, OPAP was established in 1958 as a legal entity to which the operation and organisation of sports betting was assigned. No article in this 1958 Decree states that OPAP aims to limit the expansion of gambling and betting or to protect the public against the risks of gambling or betting in general.

By a Law issued in 2004[46] the Committee of Gambling Control was founded which, since then, has been responsible for the State control of gambling and betting services in order to safeguard all public interests and protect the players. Obviously, the legislator in 2004 thought that since OPAP was transformed into a *Societé Anonyme* and is a Publicly Listed Company in the Greek Stock Exchange, its main goal must be to safeguard the interests of its investor-shareholders and not to protect the players. The legislator, therefore, delegated this role to this new committee.

Moreover, according to Sect. 1.1.2 in the OPAP's Annual Report for the year 2005[47] to its investors-shareholders, it is, amongst others, stated that, the aim of OPAP is to revitalise betting, to introduce new and redesigned lottery games, improve and extend the distribution network and continue the fight against illegal gambling and betting.

In addition, in order for someone to realise the aims of the legislator regarding OPAP and the mission assigned to OPAP, it is useful to study the reports accompanying the relevant laws passed in 1996[48] where the legislator explains the reasons for the introduction of new games of chance and why OPAP became a *Societé Anonyme*.

The first of these reports[49] starts by stating that in most EU countries lottery and gambling games have been long established and carried out successfully. It also mentions that it is necessary to produce a betting slip for all forms of games which

[46] See Article 16 of Law 3229/2004.

[47] See http://www.opap.gr/files/2005_ENHMER_07.pdf.

[48] Law 2433/1996 and Law 2414/1996.

[49] Report on Law 2433/1996.

may include bets of pre-fixed or non-fixed odds in order to effectively tackle illegal gambling which, amongst others, has the direct result of exporting currency abroad. It further explains that this happens mainly because the companies that are illegally involved in gambling in Greece co-operate with foreign ones by accepting bets on their behalf. Also, regarding the punishment of the offenders it is stated that the exemplary punishment of those who are in any way involved with illegal gambling, will effectively contribute to a substantial reduction of these bets and at the same time help the development of pre-fixed bets which will be carried out legally by OPAP.

In the second of these reports,[50] it becomes obvious that the first of the three legislator's aims when he introduced the Law that allowed Public companies to be converted into *Societés Anonymes*, following which OPAP was also transformed into a *Societé Anonyme,* was the functional and organisational modernisation in order to achieve higher levels of economic efficiency. The other two aims are related to the strengthening of OPAP's independence from the State and the clear definition of its relationship with the State. Further on, the report refers to business plans and objectives to be made under contracts with the State in order to improve results.

In the explanatory memorandum concerning the Law of 2000,[51] which envisaged the possibility of reducing the State's percentage share in OPAP to 34%, it is stated that the State's aim is to exercise effective control of the company as well as reassure shareholders and the public who trust the company.

23.5 Conclusion

When a State selects a policy that limits and restricts betting and gambling in order to protect the public from the dangers of gambling, the ECJ only considers whether the measures taken by the State are in accordance with the chosen policy. Measures such as limited licensing of betting service providers or the monopolistic supply of such services by a non-profit making company or even the imposition of restrictions on the advertising of these companies could be considered proportional and consistent with this policy.

The Greek legislation on gambling is based on the general rule that betting and gambling of any kind is, in principle, prohibited and will be permitted in exceptional circumstances set by law which defines the game, the provider of the game as well as the rules of operation. The operation of this game is under constant and strict government control.[52] Following this process, namely by special legal

[50] Report on Law 2414/1996.

[51] Law 2834/2000.

[52] See Study of Gambling Services in the Internal Market of the European Union, European Commission of 14 June 2006. http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf.

provisions all OPAP's games were created, run, and will be run until 2020, based on a contract with the Greek State.

Therefore, the Greek gambling and betting structure is governed by a very strict monopoly protected by a complex legal system containing penal and administrative measures. The only legal provider of betting services is a private company which, gradually over the years became a publicly listed company whose shares are listed in the Greek Stock Exchange and its shareholders reap huge profits.

Judging from all the abovementioned, combined with the fact that betting services in Greece are promoted through extensive advertising, it is becoming clear that based on the existing ECJ's case law, presenting convincing arguments before the Court that the system in Greece actually meets the requirements of the proportionality principle will not be an easy legal task.

Even if the Court is convinced that OPAP is a company providing a public service, the service that the legislator assigns to OPAP does not appear to be that of protecting people from the gambling addiction. Instead of protecting the public against social risks associated with gambling, OPAP's main aim seems to be to protect the shareholders' profits as well as to stop gamblers from resorting to illegal betting games, namely betting games not organised by OPAP and not, as it should, to protect them from the gambling addiction and other dangers arising from gambling in general, illegal as well as legal.

One should take into consideration that in a country with a strict monopoly protected by penal laws, all other gambling service providers are by definition included in the illegal sector without any further considerations. However, all unlicensed betting service providers in a specific member State should not be treated the same. Law-abiding, tax paying, candid legal entities providing gambling services in neighbouring member States cannot be considered without serious justifications as related to the criminal underworld just because a license to operate legally in one Member State is denied to them. The arguments of a State in order to protect the monopoly imposed, should take into account the fact that these providers of "illegal betting services" are and remain illegal and thus included in the criminal sector only because this State's laws do not allow them to become legal by granting them a license although in many cases they have even applied for one. In such cases it may be the restrictions themselves that nurture the so-called "criminal sector" and increase "criminality" in the gambling sector.

The aim to avoid criminal behaviour by clandestine providers as used in the proportionality test cannot be interpreted as covering all enterprises operating without license after the State has denied them the granting of this license. The protection of the public has to mean something more than that, if the purpose of the penal law is not to be construed as protecting a private monopoly from losing customers.

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Chapter 24
The Sportbetting System in Hungary

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Contents

24.1 Introduction: History

The first lottery was held in 1770. After short and longer breaks, to the beginning of modern history, Hungarian gambling was established in 1947, when the football pool (TOTO) was introduced.

The Gambling Plc. was established in 1991. It is owned by the State Privatization and Trustee Plc. (the National Trustee Plc from 2009). Currently the supervisory authority is held by the national Gambling Supervisory Authority, which is a department of the Hungarian State Tax & Financial Control Administration. The profit of the Gambling Plc. was expanded as a way-out. Amendments to the gambling act contributed to the consolidation of the market. The lottery, the sport-bet, and the sale of raffles have been transferred to the exclusive competence of the Company. However, the issue of casino-permits became stricter, and the gambling-machines that were illegal started to develop dynamically on the basis of the new taxation circumstances.

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Table 24.1 The incomes of the Gambling Plc. (million HUF)

Games	2005	2006	2007
Betting	13,655	16,481	16,131
Lottery tickets	104,769	97,431	101,306
Raffles	11,119	13,812	14,519
Rapid games	2,273	13,697	12,241

The government tried to open a free way for the privatization of big state companies treated as a "sacred cow" (e.g., Gambling Plc.). On the basis of the New Ownership Program, the citizens family's may purchase ownership under favorable conditions from the enterprise assets of the state, which extend to approximately HUF 1,500–2,000 billion (€5–6 billion) from the state assets, the registered value of which is ca. Ten thousand billion HUF (€34 billion) (of which real value may approach 50,000 billion HUF (€167 billion).

In May of 2007, on the basis of the proposal submitted to the parliament, many companies would come out from permanent state ownership and the rate of permanent state ownership would be decreased in many companies.

From where does this huge amount come from?

Sport-gambling, as we mentioned before, has deep roots in Hungarian history. Besides traditional gambling, electric (internet) gambling has also widely spread. Distinctions have been made between the different types of gambling as "Standard," "Asian handicap," "P2P gambling," and "Other gambling."

In the summer of 2008, more and more people bought lottery or football pool tickets and bet on sports event, due to ascending prizes related to the European Football Champion and the Olympic Games, and the traffic of Hungarian gambling has increased. At the same time the profit from slot machines has decreased, thanks to the world economical crisis. At the end of 2008, the spokesman for the Gambling Plc. stated that the profit of Gambling Plc. was approximately the same amount as Hungarian tourism realized. This amount would increase by thirds if the situation of the international bets in Hungary would be solved. As 90% of these bets concern to the black economy, they do not have a license from Gambling Plc. and do not pay taxes (Table 24.1[1]).

According to Act I of 2004 on Sport (hereinafter the:"Sport Act") and the current finance act, where the State gives money for sport activity, 12% of the tax on sweepstakes fortune-games (like the five, six, seven scratch lottery tickets, the so-called "joker," "keno," "luxor," "putto," "tango," and the "fortune ticket"), 50% of the tax bookmakers-system sport betting games, and 100% of the tax of footballpool games (so-called "Toto"), should be incurred to support sport. This support will be built in every year into the budget of the Ministry of Domestic Affairs (nowadays the Ministry of Self governments). The minuciose regulates the utilization of these amounts as dictated by ministry decree.

[1] (1€ 260 = HUF).

According to the Sport Act the State supports only those, who

a. do not have mature public due;
b. manage well, according to the legal rules; and
c. have to account for the earlier received support.

According to the above mentioned supporting system the following entities cannot be supported by the State:

a. sport enterprises that have a bankruptcy or liquidation in process;
b. sport associations and clubs who fall into abeyance by the court, and those who have to be abolished according to the Act II of 1989 on Right of Association; and
c. those clubs that are in bankruptcy, or liquidation in process (moreover against whom somebody have the petition to bankruptcy, or liquidation in process at the court, if the court has ordered their process legally binding).

Furthermore, the State directly finances sport by 0.25–0.3% of the state budget. This is a really high percentage in Europe, much higher than in Germany, France or the United Kingdom. Naturally, this measure of the state budget is not indifferent, but this relates to the social position of sport. At the same time the "sport-industry" makes up only 0.7–1% of the Hungarian GDP, which is an extremely low rate in Europe, as the average is 1.5–2.5%, which never stops growing. But the western states undertake only 30% of this, and the rest should be given by the local governments and by the households.

According to information from the Ministry of Finance financing aid is HUF 12.8 billion (€426 million) of the budget of the Ministry of Self Government (as the responsible ministry of sport), which is HUF 91 billion (€303 million). This amount is merely a part of that amount by which sport has been supported in Hungary.

We wonder what would happen if the incomes of the raffles, of the other lottery games, and the incomes of the betting would largely exceed the current figures and percents? The way that sport is financed definitely needs a new idea, and a new preference as the maintenance of active sport is a part of the national economy.

As we mentioned above the government tried to open up a free way for privatization. The point of view of the opposition is "It is not common to pare away the hen laying the golden egg"—The "strategical asset" means the assets that are important from the point of view of national safety, and the sale (in favorable circumstances) of which would be appropriate. The Gambling Plc. has such a big profit and this money would be enough also to compensate the defects of the national health care system. It is impossible to build a safe, free, and powerful Hungarian Republic without national assets.

24.2 Main Part

The sale (privatization) of the Gambling Plc (in Hungarian: "Szerencsejáték Zrt") has arisen many times in the past 5 years, but in this time, there was no clarification as to the problem with the state operation, and the advantages and disadvantages of privatization.

We strongly overtake our neighbors with the €60 spent yearly by a person on gambling. The question is: Is it worth it? The public may risk HUF 4–5 billion (€14.9 million) profit with the sale of the company under the present situation. This should be required in the purchase price from the buyers for a few decades in advance.

A reason for privatization may be the quality, or efficiency of the service that should be developed. However, gambling is not such a public service, the morality of which could be indignant to some people, nevertheless, it may endanger the competitive power of the economy. If we consider competition in the near future, state ownership is not the best solution, at least in Hungary, as state companies usually are in such situations.

The first reaction was prohibition: the 2005 amendment to the Gambling Act does not allow for the operation or marketing of those companies, banks are not allowed to transfer money on their accounts, and internet service providers were not allowed to negotiate with them. Naturally, companies avoid all of the mentioned rules and made an application to the European Union stating that such rules are breaching the principles of free competition and the free movement of services. A Commissioner of the EU started to deal with the case and the European Commission called on Hungary and 6 other member states to abolish the limitation.

When is it worth it?

There is no answer for the question why, when, and how. Also the SzDSz Hungarian Liberal Party and MDF (Conservative Party) favored the idea to sell a minority share of the ownership on the stock exchange. Also, the president of the exchange favored the idea, hence this made the offer fresh, although the present proposal would take out 100% of the company from state ownership. It may occur that someone picks out the asset and others collect only the valueless ownership shares. If someone will purchase the ownership parts from the minority shareholders, vast assets may be realized. Will the state under sale the shares, or sell at market price? Does the income enrich the companies, or would the income go into the state budget?

This stringency is the death of Hungarian sport. We are grateful to our Olympian champions. Hungary has been registered between the first 10–15 states always, which is marvelous. The Hungarian coaches do not work abroad, and there is sport science and sport healthcare. In addition, physical education is on a higher level in the public schools. Domestic sport centers are better now and we have an accredited doping-laboratory. The state shall finance these things in future in a more powerful way than it does now.

Where can we get more money from?

On the one hand this could be those incomes from Gambling Ltd. which would be divided between the citizens under the realization of New Ownership Program, only in the event that everything happens parallel with positive expectations, which is not common in Hungary, unfortunately. Also, it has to be mentioned that some economists and politicians think that not only state sources may increase the amounts available—which means that the business sector should undertake a bigger role in the financing. Such is the Hungarian dilemma.

What kind of models could we follow? For example: Let us see the United Kingdom's model!

24.3 Lottery Funding of the UK Sports

Sport England's Olympic Lottery Distributor Sport England is a non-departmental public body and National Lottery distributor committed to creating a world-leading community sports development system and increasing participation in sport. Sport England's annual budget (lottery and exchequer) is £250 million This commits Sport England to deliver on a series of demanding targets by 2012/13: 1 million people doing more sport. Sport England's community—or regional—funding stream is called the Community Investment Fund, or CIF. This is the National Lottery funding available through and managed by the regional offices of Sport England. Funding is awarded through an open application process. The lottery funded Major Events program coordinates and supports plans to stage major sporting events in the UK over the next 20 years. This long-term approach to planning ensures that each sport bids for events that fit in with their Performance Pathway programmes and that funding is in place to support the cost of staging the events. The Olympic Lottery Distributor is an independent body set up by Parliament and uses money raised by the National Lottery to fund the delivery of the infrastructure for the London 2012 Olympic and Paralympics Games and their legacy. It also provides funding to some of the bodies tasked with ensuring the successful delivery of the London 2012 Olympic and Paralympics Games.

£1,835 million is available and these funds will help to ensure the successful delivery of the London 2012 Olympic and Paralympics Games and the regeneration of the Lower Lea Valley. This will fund activities that ensure the timely and cost effective delivery of the London 2012 Olympic games and Paralympics games. This also directly relates to requirements incorporated in the Host City Contract, which requires that it contributes to the infrastructure and sports legacy of the Games; contribute to the legacy that demonstrates social inclusively; support wider community and regeneration benefits; contribute to the delivery of the Games which are low carbon, zero waste, conserve biodiversity, and promote environmental awareness and partnerships; support wider community and regeneration benefits; and through the Lottery funded Major Events program, coordinate and support plans to stage major sporting events in the UK over the next 20 years. This long-term approach to planning ensures that each sport bids for events fits in

with the Performance Pathway program and that funding is in place to support the cost of staging the events. Grants range from around £1,000 (€1,154) to support an individual athlete on a program, to a 4 year award of over 8 million to a key Olympic sport.

UK Sport's International Director, John Scott, at the 2008 Legacy Lives conference stated "Legacy Lives is an annual forum which focuses specifically upon best practice legacy planning and implementation for major sporting events—an essential consideration in UK Sport's planning and support of sporting events via its National Lottery backed World Class Events Programme."

UK Sport has developed a unique understanding of major events through the World Class Events Program that supports both the bidding for and staging of World Class sports events in the UK.

With approximately £20 million of National Lottery funding committed to targeting up to 120 more major events to be hosted by the UK before London 2012, including 47 at the World and European Championship level, the program plays a vital role in supporting the strategic ambitions of sports in the UK, as well as stimulating positive economic and social impact.

24.4 Summary

The present essay deals with the history of the Hungarian sport betting, with special regard to the whole situation after the change of the political system. Sport betting was a big source of revenue to compensate the budget deficit during the socialist period. It was a big breakthrough when the idea of the sport financing was reformed again.

After the peace agreement of Trianon, the first Hungarian sport act, and its implementing decree, provided that the incomes from the horse race shall be invested for the aims of sport, however, this has been forgotten by the State during the socialist period. Since 1990, bingo was one of the biggest sources of revenue which can be invested into sport.

Regarding the favorable fact that one of the co-writers is an English athlete, our essay tries to make a comparison between the Hungarian model and the betting system in the UK. We have been doing a lot of thinking about the reason of the comparison of these two, dissimilar states regarding their betting systems. We know that the constitutional system of the UK is completely different than Hungary, as Hungary is a parliamentary republic, while the UK is a kingdom, with 4 territories (England, Wales, Scotland, and North-Ireland). The scope of the British act is on the whole territory of the UK, but the mentioned territories have the right to incorporate their own law. However, Hungary has a constitution incorporated in law and a sport act, but the UK has no constitution incorporated in law and no sport act approved by the parliament.

The Gambling Act, approved in 1993, affects our subject mostly. As long as in Hungary 12% of the tax of the sweepstakes fortune-games, 50% of the tax on

bookmakers-system sport betting games, and 100% of the tax of footballpool games, should be incurred to support sport, then 20% of the gambling' incomes (not the taxes!) should be incurred to supporting the sport in UK.

According to the above mentioned question on the reason for the comparison we could answer that the public ground's differences may not cause the comparison but the difference of the approaches.

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Chapter 25
Sports Betting: Is it Really Illegal in India?

Vidushpat Singhania

Contents

25.1 Introduction

Man has always been captivated by gambling. History books have shown that man has always indulged in this past time and it has sometimes even led to his ruin. Indian history is strewn with such incidents. One of our most revered epics, the 'Mahabharata,' has highlighted the practice of gambling at the time and the evils associated with it. Betting and gambling give man a chance to earn disproportionate amounts of money in a short time without labor; this fuels the dream of avarice of men. It lures a man away from an honest day's work and has, therefore, been termed as an evil in the religious scriptures and is generally shunned upon by society. *The Times* in the 1890s had put it as '[it] eats the heart out of honest labour. It produces an impression that life is governed by chance and not by laws.'

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In India the most popular sport is cricket. If betting in cricket is taken under review specifically, it is estimated that about Rs. 720 Crores ($150 million) is bet on an average One Day International anywhere in the world.[1] The very rise in popularity of this sport can be attributed to betting on the sport, particularly during the 17th century. The formulation of the rules and regulations of many modern games can be attributed to sports betting. This is particularly true for laws of cricket. The code of 1774 specifically mentioned:

> If Notches of one player are laid against another, the bet depends on both innings, unless otherwise specified. If one Party beats the other in one innings, the notches in the first innings shall determine the bet. But if the other party goes in a second time then the bet must be determined by the numbers on the score.[2]

Therefore, a question that comes to my mind is that since the popularity of the sport can essentially be derived from betting on the sport, is it prudent to now say that betting is an evil and thus should not be a part of sport? This would take away one of the ingredients of the popularity of sport. In this chapter the discussion will be limited to the legal position in India, especially pertaining to sports betting, specifically avoiding a discussion on moral codes, social views and religious beliefs.

25.2 Position of Sports Betting in India

In India, the power to legislate has been divided between the Centre and the State. The Constitution of India, through Article 246 and the Seventh Schedule, has divided the power of the Centre and the State into three Lists. The power to Legislate on matters listed in List I vests with the Centre (Central List). While the Power to Legislate on subjects enlisted in List II vests with the State (State List). List III, known as the Concurrent List, consists of matters on which both the Centre and the State can legislate. Betting and gambling fall under the ambit of Entry 34 of the State List. Being a part of State List, it is the power of the state governments to regulate sports betting and gambling in India. This has not always been the case.

Pre-Independence before the existence of the Constitution and a clear division of power, betting and gambling were governed by a central legislation, namely the Public Gambling Act 1867, which governed aspects of gambling in certain territories of India. After independence and with the coming of the Constitution, various states enacted their own laws pertaining to betting and gambling. The importance of the Public Gambling Act 1867 still remained since certain states adopted the Public Gambling Act to apply to their territory via Article 252 of the

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[1] Lord Condon, Bounce Corruption out of Cricket leaflet (2002). Also see ICC Anti Corruption Unit. Interim Report April 2001 (The Condon Report)—www.icc-cricket.com.

[2] Mason. T, 'Sport in Britain'.

Constitution of India, which empowers the parliament to legislate for two or more states by consent and adoption of such legislation by any other state. By the Adoption of Laws Order 1950, the jurisdiction of the Public Gambling Act was limited through the words 'Uttar Pradesh, Punjab, Delhi and Madhya Pradesh.' Thus the act applied only to these states with amendments promulgated henceforth.

In the case of *Ganga v. Empress*,[3] it was held that the court must take judicial notice of the Act itself, but whether or not portions of the Act have been extended to a particular locality or whether steps have been taken with this view are sufficient in law to effect it are questions of fact or law which the Criminal Court has to decide. Subsequently, the importance of the Act has declined since the Act has been amended in Uttar Pradesh by the U.P Act. 34 of 1952, in Punjab by the Punjab Act. 9 of 1960 and in Madhya Pradesh by C.P Acts. 3 of 1954. The Delhi Gambling Act. No. IX of 1955 has repealed the Public Gambling Act for the territory of Delhi. The other states were free to enact their own state legislation to govern betting and gambling in their territories after the coming into force of the Indian Constitution.

Individual state acts have been enacted governing the aspects of gambling and betting such as the West Bengal Gambling and Prize Competitions Act, the Bombay Prevention of Gambling Act, the Madhya Bharat Gambling Acts, the Madhya Pradesh Public Gambling Act, the Madras Gaming Act, the Orissa Prevention of Gaming Act, the Punjab Public Gambling Act, the U.P. Public Gambling Act, the Rajasthan Public Gambling Ordinance, the Assam Gaming and Betting Act, the Delhi Public Gambling Act, the Kerala Gambling Act, the J&K Public Gambling Act, the Andhra Pradesh Gaming Act, the Karnataka Gambling Law, the Meghalaya Prevention of Gambling Act, the Pondicherry Gaming Act, the Tamil Nadu Gaming Act. As intricate as it may be, this chapter will attempt to discuss the scope of sports betting under the ambit of some state acts. There will also be an attempt to inculcate the recent controversies in the sports arena that have taken place in India.

If a general perspective behind the promulgation of the various state acts has to be undertaken, then a brief look at the preamble is warranted to see the reason why these acts have been enacted. The Preamble to the Public Gambling Act states that 'it is expedient to make provision for the punishment of public gambling and the keeping of common gaming-houses.' The preamble to the Kerala Gaming Act states that 'it is expedient to make better provision for the punishment of gaming and keeping up common gaming house in the State of Kerala.' The Preamble to the Assam Gaming Act states 'gambling and betting on games and sports have widely spread throughout the state causing debasement of public morality and wide spread exploitation and threat to peace and order.' A broad perusal of the preamble of various acts reveals that most state acts, except the Assam Gaming and Betting Act, were made to curb the evil of gaming in a public house, the important words

[3] *Ganga v. Empress, 1885 P.R.No. 41(Cr) at p. 87.*

being 'gaming' and 'public house.' Therefore, the objective behind these Acts can be said to be prohibiting 'gaming' in a 'public house.'

Before proceeding further to discuss the legality of sports betting in India, it is necessary to establish various aspects of sports betting and differentiate it per se with gambling. This discussion becomes even more important considering the language of Section 12 of the Public Gambling Act which states: 'Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.' The Act makes a clear distinction between 'games of mere skill' and 'games of chance.' While gambling or gaming, if they may be used interchangeably, is solely based on a game of chance, sports' betting in my opinion is based on the evaluation of the skills of participants, although there is an element of chance since the outcome is uncertain.

To make the position clear, we will evaluate the laid down definitions as to what a 'Game of Chance' is. The phrase is known to law as a settled signification.[4] A reference can be made to the case of Rex v. Fortier,[5] where an interpretation of a game of chance was given as, 'It is a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all or are thwarted by chance.' A 'game of skill' is one in which nothing is left to chance and in which superior knowledge and attention or superior strength, ability and practice, gain victory.[6] A sport or an athletic game will definitely fall within the purview of 'game of skill' since an athlete with superior strength, skill, ability, practice and form will in most cases win over an athlete or a team with lower skill. Although present, the element of chance is outweighed by the element of skill involved. A game of chance and a game of skill are distinguished on the characteristics of the dominating element that ultimately determines the result of the game.[7] It has even been held in the case of *State v. Gupton*[8] that any athletic game or sport is not a game of chance.

While considering the legality of horse racing, the Supreme Court of India in the case of *D.R. K.R. Laksmanan v. State of Tamil Nadu*,[9] held that horse racing, foot racing, boat racing, football and baseball are all games of skill. The rationale for the same lay in the fact that a person betting on a horse race applied his research and skill in order to determine the pedigree of the horse, his form, etc. A pertinent question in my opinion is that if a person applies his skill to determine a result where a horse is involved, should not a game where there is greater participation of human beings be placed on a higher mantle? A person can apply his skill in judging the strengths and weaknesses of a person in the game he is playing, his form can be determined from the statistics, and a psychologist will even be able

[4] State v. Gupton, 30 N.C.271.

[5] Rex v. Fortier, 13 Que K.B. 308.

[6] *Ibid.*

[7] Peo v. Lovin, 179 N.V.164.

[8] State v. Gupton, 30 N.C.271.

[9] *D.R. K.R. Laksmanan v. State of Tamil Nadu (1996) 2 SCC 226.*

to determine the body language of the person when he is playing and his feelings during crucial moments through his face expressions. All the above evaluations in my opinion requires the application of a persons' skill.

The court followed the principle laid down in *Rex v. Fortier* regarding the aspects of 'game of skill.' The Supreme Court has even gone to the extent that certain games of cards like Rummy are a game of skill and not a game of chance.[10] The Public Gambling Act 1867, Section 12 states, 'Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played.' Carrom and chess certainly require skill and hence in view of Section 12 of the Public Gambling Act 1867, it has no application to these games.[11] Therefore, games such as chess, carrom and billiards[12] are not considered games of chance. Similarly, in the case of *State of A.P v. K. Satyanarayana*,[13] the game of rummy was held to be a game of skill, and therefore, to be outside the ambit of the Public Gambling Act.

In my opinion, sports would clearly fall within the game of skill and thus be outside the ambit of the Public Gambling Act, 1867 or other state acts. An evaluation of the same when undertaken brings to light that Section 3(b) of the Kerala Gaming Act, 1960 provides that whoever being the owner or occupier of any house, room, tent, vehicle, vessel or place, knowingly or willfully permits the same to be opened, occupied kept or used by any other person for the purpose of gaming on any of the objects aforesaid shall be punishable with imprisonment which may extend to 1 year, or with fine which may extend to one thousand rupees or with both.

Section 2(b) of the Public Gambling Act states that gaming includes wagering or betting but does not include a lottery. The Act is silent on betting on skilled or unskilled games and sports. Section 3 of the Orissa Prevention of Gambling Act, 1955 provides that whoever takes part in gambling or gaming shall on conviction be punished with imprisonment which may extend to one hundred rupees, or with both. For the purpose of the Act, gambling or gaming does not include lottery and means a play or game for money or other stake and includes betting and wagering and other act, game and contrivance by which a person intentionally exposes money or things of value to the risk or hazard of loss by chance (s.2(b)).

Probably one of the few states expressly bringing sports betting under its ambit is s.2(a) of the Assam game and Betting Act 1970, which provides 'that bet with all its grammatical variations means any money or valuable security or thing staked by a person on behalf of himself or on behalf of any other person, by himself or through any agent or any person procured or employed acting for or on his behalf, to be lost or won on the happening or determination of an unascertained thing, event or contingency of or in relation to a game or sport and shall include

[10] State of A.P v. K. Satyanarayana (1968) 2 SCR 387; AIR 1968 SC 825.

[11] Manakadu Elainger Nala Sports v. State of Tamil Nadu 2005 (29) A.I.C 440 at. 440(Mad).

[12] Squier v. State, 66 Ind. 317.

[13] State of A.P v. K. Satyanarayana (1968) 2 SCR 387; AIR 1968 SC 825.

acceptance of a bet.' It shall further include wager, wagering contract, totalisator and pool transaction in relation to any game or sport but shall not include a lottery or betting on a horse race when such betting takes place:

(i) On the day on which the race has been fixed to run,
(ii) In an enclosure which the racing club or the stewards thereof controlling such race have with the permission of the state government set apart for the purpose, and
(iii) With a licensed book-maker for horse racing or by means of totalisator as defined in s.14 of the Assam Amusement and Betting Tax Act, 1939.

Therefore, a limited view can be taken that sports being a game of skill would not fall within the ambit of most state acts until the time when they have been expressly included within the act. If such position is deemed to be true then per se sports betting would not be illegal until the time when it is not causing a public nuisance. Even the Indian Penal Code has considered the evil of lottery and made running of a lottery house punishable under Section 294A. The code is however silent on aspects of sports betting.

Therefore, unil the time when a specific legislation bans sports betting, like the Assam Game and Betting Act, the same cannot be assumed by mere connotation. Sports betting essentially involves the practice of making a wager on the outcome of a sports event. Therefore, all sports betting contracts would tend to be wagering contracts. Wagering contracts under the Indian Contract Act 1872 are voidable contracts. On a broad evaluation of the laws in India, it can be said that the principle behind gambling and betting contracts would fall within Section 30 of the Indian Contract Act, 1872, which treats a wagering contract as void. In the case of *Gherulal Parakh v. Mahadeodas Maiya*,[14] the Supreme Court of India has held that a wagering contract is not an unlawful contract within the ambit of Section 23 of the Indian Contract Act. Pollock and Mulla in their book on Indian Contract define the phrase 'forbidden by law' in Section 23 thus;

> An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the legislature or a principle of unwritten law. But in India, where the criminal law is codified acts forbidden by law seem practically to consist of acts punishable under the Penal law or acts prohibited by special legislation, or by regulation or orders made under the authority derived from the legislature.

To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded. Sir William Anson's definition of 'wager' as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event accurately brings the concept of wager declared void by Section 30 of the Contract Act. The position of law thus is that a wagering contract is not illegal and merely void. A logical conclusion then would be that betting is not illegal per se until an act of a legislature prohibits the same.

[14] Gherulal Parakh v. Mahadeodas Maiya 1959 Supp (2) SCR 406.

The issue of gambling as a fundamental right was discussed in the *R.M.D. Chamarbaugwala case*.[15] The court held that the right to gamble was not within the freedom of right to practice a profession, business or trade guaranteed under Article 19 (1) (g). But the court clearly laid down that (i) the competitions where success depends on substantial degree of skill are not 'gambling' and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would neverthless be a game of 'mere skill.'

Once we can establish that sports betting contracts are not illegal and are not banned in certain states, since they are outside the gambit of gambling, then the question arises whether maintaining a prospective public betting in states where sports betting has not been included within the practice of gambling be illegal too? It has been highlighted that generally to constitute an offense of the penalty of owning, keeping or having charge of a gaming house, or being found in the gaming house, an essential ingredient is that gaming should be going on in such premises[16] and that it was used for the profit or gain of the accused.[17] Since sports betting would not fall within the ambit of gambling, in my opinion the only laws which these sports betting houses would be violating could be causing public nuisance under Section 294A of the IPC, and various other state police acts enacted in order to maintain public order in the state.

25.3 Online Sports Betting

A unique situation that warrants a discussion is a situation 'A,' where a person is allowed to bet from the U.K and other countries where sports' betting is legal through legislation, on games being played by India, in India, or abroad. A person resident in India cannot bet on the same through a legally established betting house in India. So, can a person in India bet on a sport through betting houses located outside the Indian territory? The answer to this would be no, although there is no particular law outlawing such betting. But a look at the provisions of the Information and Technology Act 2000, and provisions of the Foreign Exchange Management Act, would pose a hindrance to the same. A person undertaking to carry out such a transaction would essentially be violating one of the provisions of these Acts. Online gambling can generally be of two types. The first would be called gaming as it would be casino style gaming and lotteries based on chance. The second type of online gambling would be sports betting. Here, the events occur offline in real time and can be verified independently. The Information and Technology Act, Section 67 states:

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[15] AIR 1957 SC 699.

[16] Gangadas Benerjee v. Emperor, AIR 1930 Cal. 365 at p. 365.

[17] Emperor v. Walia Musaji, ILR 29 Bom. 226: 7 Bom. LR 16: 2 Cr.L.J.26.

> Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to 5 years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to 10 years and also with fine which may extend to 2 lakh rupees.

The authorities can use the provision in the context that gambling tends to appeal to the prurient interest or tends to deprave and corrupt persons. The ambit of this section is very wide and in a limited context will not govern sports betting since horse racing has expressly been recognized in many states as a game of skill and since it is already being regulated it cannot be said that betting on a game tends to deprave and corrupt persons. A view therefore is that sports betting is not expressly prohibited within the provision of any law. However, assuming that if such was prohibited in India, how would the Indian government regulate sports betting for web sites registered outside India where gambling and betting are legal? Such web sites would fall outside the jurisdiction of the Indian law. In such a case a person resident in India would be able to place a bet on web sites hosted in countries where betting is recognized by law. He could do so by placing a bet on the web site and paying for the same through his bank account, wire transfer or credit/debit card. Alternatively, he could also open an account in the country where the web site is located and pay for his bet from that account. This is curbed in India through provisions of the Foreign Exchange Management Act. The first scenario of transferring money from India on betting would squarely fall under the ambit of Foreign Exchange Management (current account transactions) Rules, 2000. Rule 3 of the rules deals with the Prohibition on drawal of foreign exchange. It states:

> Drawal of foreign exchange by any person for the following purpose is prohibited, namely:
>
> a. a transaction specified in Schedule I; or
> b. a travel to Nepal and/or Bhutan; or
> c. a transaction with a person resident in Nepal of Bhutan:
>
> Provided that the prohibition in clause (c) may be exempted by the Reserve Bank of India subject to such terms and conditions as it may consider necessary to stipulate by special or general order.

A further look at the schedule is warranted as it contains further clarifications as to what transactions are covered under it. It covers, (1) remittance out of lottery winnings, (2) remittance of income from racing/riding, etc., or any other hobby and (3) remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes, etc.

The rule makes it very clear that remittance for football pools, sweepstakes, etc., are prohibited. The provision has left it open to cover other kinds of betting falling under the same genre. Therefore, even cricket betting, hockey betting, etc., will fall under its purview and a person will not be able to pay on these web sites without contravening the provisions laid out in Rule 3.

Another situation that can be comprehended is a situation 'B,' where a person resident in India, could open a Foreign Currency Account in the country where sporting betting is legalized through legislation. The situation B would attract the provisions of The Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000. Section 3 of the 2000 regulations states:

> Restriction on holding foreign currency account by a person resident in India:
> Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident in India shall open or hold or maintain a Foreign Currency Account:
> Provided that a Foreign Currency Account held or maintained before the commencement of these Regulations by a person resident in India with special or general permission of the Reserve Bank, shall be deemed to be held or maintained under these Regulations:
> Provided further that the Reserve Bank, may on an application made to it, permit a person resident in India to open or hold or maintain a Foreign Currency Account, subject to such terms and conditions as may be considered necessary.

Therefore, a person resident in India will not be able to maintain an account in foreign currency without contravening the provisions of the regulations, or without the permission of the Reserve Bank of India.

25.4 Recent Controversies

A recent controversy that was brought to the forefront was the criticism of the SMS (Short Messaging Services) game during the recently concluded Indian Premier League. An opinion was expressed by the sports minister Mr. M.S. Gill, stating: 'This is viewed as openly encouraging gambling and betting which official bodies do not resort to, even in countries where betting is legal—all this to make money and enlarge their TV viewership base.'[18] The game involved the viewers predicting the ball by ball result for an over through SMS services between the period April 18 to May 24, 2009. If the prediction was right then the viewer was entitled to various cash prizes. Based on the discussion above, in my opinion the viewer would be exercising his skill in making a prediction based on an assessment of the player, conditions of play and form. Although the SMS game was withdrawn, it clearly brings out the intent of the sporting bodies and the viewers to engage in sports betting.

An innovative way in which the IPL team owners were found to skirt the laws of betting was through betting not involving money. In a repeat match of the IPl opener of 2008, Shahrukh Khan, owner of the Kolkata Knight Riders, and Vijay Mallya, the owner of the Royal Challenger Bangalore, were seen placing 'legal bets throughout the match with sattarules.' The consideration for the bet involved

[18] "Indian Premier League defends against 'gambling and betting' charge"; Accessed on 14 September 2009 at http://www.gamblingplanet.org/news/Indias-Premier-League-defends-against-gambling-and-betting-charge/051009.

Shahrukh Khan trading his son to be a ball cleaner for the Bangalore team, his team being Kingfishers' flight attendant for a day etc.[19]

25.5 Taxation of Sports Betting

If the government considers the above arguments it could make provisions to tax sports betting as it taxes horse racing. A state legislature is competent to make laws on taxes on betting and gambling under Entry 62 of the State List. The rate of tax on horse racing in the state of Tamil Nadu has been assessed at 20%[20] of the money earned through sports betting. Further, the income earned through such betting liable to be taxed under clause (ix) of Section 2(24) would include 'any winnings from lotteries, crossword puzzle, races, including horse race, card games and other games of any sort or from any gambling or betting of any form or nature whatsoever.' Explanation 2 to the same would cover 'card games and any other game of any sort.' Thus, the income from sports betting is liable to be taxed in all cases. The rate of taxation for the same would be governed by Section 115(BB), which would impose a rate of 30% tax.[21] An acceptance of sports betting by the government would in one way curb the illegal betting market and corruption associated with it and additionally give to the government the much needed revenue which it could utilize to better the sporting infrastructure in the country, and provide a stimulus to the youth by developing the sport at the grassroots level.

25.6 Conclusion

A parallel can be derived from betting in horse racing, which has been legalized owing to the reason that it is not a game of chance, since people who bet on horse races research on the horses and jockeys before betting. Therefore, it is a game of skill. Deriving from the same logic, in my opinion, it would be right to hold that sports betting too is wholly a game of skill, since the outcome, although uncertain, is dependant largely on the skill of the players involved in the sport. A person who studies the form of the players, their stats, conditions of play, etc., could, in my opinion, be able to predict the outcome with a fair amount of accuracy. Therefore, sports betting should not be within the ambit of gambling. As a result, the question posed, 'Is sports betting really illegal in India?' would be answered in the negative since most states do not prohibit it through their legislature.

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[19] 'IPL: Legalized Sports Betting Skyrockets; Embarrassing stunts at stake'; Accessed on 20 July 2009 at http://news.techtribe.com/thecareerpigeon/thecareerpigeonv3/sports.html.

[20] *D.R. K.R. Laksmanan v. State of Tamil Nadu (1996) 2 SCC 226.*

[21] http://www.incometaxindia.gov.in/Acts/INCOME%20TAX%20ACT/115BB.asp. Accessed on 17 September 2009.

Chapter 26
Sports Betting in Indonesia

Hinca I. P. Pandjaitan

Contents

26.1 Introduction

A sport organization needs a great number of funds. Such funds may come either from the State Budget or the community itself. Sport betting and/or sport gaming constitutes one of the ways to attract or draw out the funds aimed at organizing any sport events. Sport betting and/or any other form of sport gaming involves a great deal of people who then become addicted to such betting activity often causing communal restlessness. Some kinds of sport betting have been known in Indonesia such as illegal lottery (*lottere buntut*), Toto Lottery, Nalo Lottery, Lotto Lottery, Toto *KONI* Lottery, *Undian Harapan* (Hope Lottery), TSSB (Social Contribution Ticket With A Prize), Football Forecast (Porkas Sepakbola), KSOB (Social Coupon for Sport with a prize), Social Donor Contribution With A Prize, *Damura* (People's Fund for Sport), Magnum Lottery, and free lottery to watch soccer. All

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such sport betting has endured its high and low tide, once reached its temporary glory and then died forever. The case of SDSB sport betting is an undeniable example as it was closed down by the Government due to a great deal of rejection within the community in 1993.

The question is whether or not such *sports betting* and/or sport gaming is legalized by law. This question is relevant since amid the people, sport betting is also recognized as a kind of gambling when the people bet upon any unpredictable result of sport games, races, or competitions, either conducted individually or organized indirectly by any third party or corporate body. In other words, gambling is actually a kind of unlawful action formally stated as punishable criminal conduct. This article will describe whether or not this *sport betting*, like direct betting and/or sport gaming, is something forbidden. In other words, how is sport betting practiced in Indonesia?

This question will be discussed based on the relevant laws and regulations namely (i) Law No. 22 of 1954 on Lottery, enacted and applicable ever since July 27, 1954, (ii) Article 303 in conjunction with Article 303 para (1), Article 303 para (2), Article 303 para (3), Article 542 para (1) and Article 542 para (2) of the Code of Criminal Justice revised by Law Number 7 of 1974 on Lottery Controlling, (iii) Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling and, (iv) Law No. 3 of 2005 on National Sport System in conjunction with the Government Regulation No. 17 of 2007 on Sport Financing.

26.2 Regulations on Betting

In Indonesia, betting has been generally conducted as a habit by many people since the era of the Government of the Netherlands East Indies based on the *State Gazette of* 1923 No. 351, which has been amended several times, and was last amended by the *State Gazette of* 1948, Number 323.[1] It means that betting has always been very familiar to the Indonesian people. Nevertheless, its implementation has often caused a problem amid the community. Therefore, Law No. 22 of 1954 on Betting was made and enacted to supersede those State Gazettes.

Betting has also been regarded as one of the ways used to obtain funds (moneys). On the one hand, the betting organizer may easily obtain the amount of money required, and on the other hand, the betting participants only hope to obtain the reward or prize which is much higher in value compared to that having been expended by them in that betting.[2]

However, seen from the public interest point of view, the Government needs to take note of and supervise these betting activities. There are three main reasons why Government supervision is required. *First*, to provide a guarantee that the

[1] See considerations of Law Number 22 of 1954 on Lottery.

[2] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

betting organizer will fulfill his promises. *Second*, to guarantee that the money obtained from betting will be used for the purpose as previously specified. *Third*, to prevent a number of betting lots circulating within the community, possibly causing social depravity.[3] The policy with respect to this supervising measure requires the lottery organizer to obtain a prior written consent of the Government.

Actually, the desire to get a prize from any betting may encourage the participant to always involve himself in such activity. The inclination is clear, namely to restore his financial condition. Sometimes a betting participant loses control and gets carried away in the prolonged effort and hope to get uncertain results as expected. Of course, this condition may disturb the restful feeling of the betting participant which can spread over his family and at its extreme, harm communal orderliness. That is why, by means of Law No. 33 of 1954 on Lottery, organizing any lottery shall be subject to a prior written consent, in this case of the Minister of Social Affairs.[4]

What is meant by betting? In Law No. 22 of 1954, betting on Lottery is each opportunity provided by any legal entity and anyone having fulfilled certain requirements who may then join this lottery to get prizes in the form of money or goods provided to each participant. The winner is appointed by drawing lots or other ways to determine the profit being uncontrollable or affected by the participant itself.[5] The term lottery in this case does not prioritize the form of such lottery, but instead requires only three factors to be able to determine whether something can be regarded as a lottery or not, namely: (i) to open an opportunity to join and get a prize by fulfilling certain requirements, (ii) nominating the winners among the participants based on taking a chance, and (iii) such winner nominations do not depend much on the influence of the people having interest in such lottery organizing.[6] Therefore, each regulation containing these three factors may be regarded as a lottery, though often this type of lottery is not the same as those usually recognized by the public.[7] Thus, each activity containing one of these factors may be regulated based on this law. For example, the lottery in a horse race and/or a soccer competition is inclusive of this regulation although it is not called a lottery.[8]

Law No. 22 of 1954 on Lottery expressly provides that the participant in the lottery is allowed to influence the possibility to win the prize, but such probability may not depend solely on the competency and expertise of the participants. So, it is not a lottery if the decision in any games depends on the power and thought of the participants. For example in soccer, chess, and swimming, although there are some elements that are impossible to be decided solely by the participants, such as

[3] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

[4] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

[5] See Article 1 para (2) of the Elucidation of Law No. 22 of 1954 on Lottery.

[6] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

[7] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

[8] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

field conditions, the player's physical condition, and other conditions. In addition, it is also not a lottery for any game whose decision is solely controlled by the participants, such as in a contest where the question is the procedure necessary to obtain the prize, whether by betting or lottery, such as in a simple contest or requiring much power to bet properly, or those wherein the prize can be obtained directly or by taking lots where several people bet properly such as in more sophisticated games.[9]

Therefore, it can be seen clearly that the definition of lottery is only formulated in general in regard to the formulation with respect to when and what requirements are essential if an undertaking is regarded as a "lottery." In this "lottery" the words "to participate" must have the purpose of joining in competition to get the prize. Such competition is not regarded as an important matter if the prize provided to any participant is conducted by taking lots or by other means in determining the profit which is unaffected by the participant. If a participant desires to join the competition then he must pay a sum of money, or buy lots, or some goods, in advance.[10]

This Law does not mention the requirements to become the participants in any lottery. Paying a sum of money is not an absolute requirement. Therefore, the smuggling of provisions to participate in any lottery may be avoided. The nominating of a prize may depend on the type of lottery itself in a limited sense, or may happen unexpectedly. Therefore, this law expressly states that a lottery is a game wherein its finalization depends on the taking of lots or any result determined by drawing lots, thus there are many meanings to a lottery. As a consequence, it is quite possible to conceal the occurrence of a game. The prize in this context the occurrence of lottery may be in the form of money or valuable goods.[11]

By this general formulation on lottery. Law No. 22 of 1954 on Lottery has stipulated the requirement to obtain a prior consent of the competent authority.[12] Therefore, anyone who organizes any type of lottery, must obtain a prior written consent, unless the lottery is conducted by the government and by any association recognized as a legal entity, or by a corporate body established for at least 1 year within the environment limited to its members, for social aims with the nominal value of the lottery not higher than Rp. 3,000 (Three thousand rupiah). This kind of lottery must be reported to the Government's competent authority, in this case the Head of the Local Government.[13] Provisions with respect to this approval are also applicable for any lottery combined with other events. For example, the game of taking a chance connected to a race like sweepstake, pool, and others, or what is

[9] See Elucidation for Article 1 para (2) of Law No. 22 of 1954 on Lottery.

[10] See Elucidation for Article 1 para (2) of Law No. 22 of 1954 on Lottery.

[11] See Elucidation for Article 1 para (2) of Law No. 22 of 1954 on Lottery.

[12] See Article 1 para (1) of the Elucidation of Law No. 22 of 1954 on Lottery.

[13] See Article 1 para (2) and Article 2 of the Elucidation of Law No. 22 of 1954 on Lottery.

usually called free card, namely a lottery connected to the sale of any goods or entry ticket for an evening market and others.[14]

Besides, it is still possible to undertake an illegal lottery, namely those conducted by associations within the environment of its own members for merely social purposes. The aim is to give opportunities to associations and to avoid the disguise of law in the form of organizing illegal small lotteries, something that is frequently happening right now. There are three fundamental considerations in planning this lottery regulation: first, to show to the public that each lottery is trustworthy; second, to demonstrate that lottery organizing is limited to public natured charity lotteries; and third, besides a large amount of money circulating within the community, and the profits obtainable by the organizer and participants in the lottery, the Government may also take the benefit from the levied taxes for the State Treasury and funds allocated for social needs.[15]

If the discussion on whether any activity belongs to a lottery or not cannot be resolved, then who will decide? Law Number 22 of 1954 on Lottery firmly stated that any doubts arising from whether or not any game of chance is a lottery shall be decided by the Minister of Socials.[16]

A permit to undertake a lottery may only be given for social purposes of a public nature.[17] This provision restricts lotteries and allows them only for public and other purposes. For the purpose of social undertakings, a lottery is allowed to be held. The words "social" and "social undertakings" have a broader sense. A "social undertaking" is a business conducted in an attempt to make people live free from fear and poverty thus giving the best contributions to the community.[18]

To obtain any permits, some items must be mentioned as clearly as possible within an application letter with respect to (i) the aim and purpose of organizing the lottery; (ii) the organizing system; (iii) who is the organizer; (iv) the amount, type, and price of its prizes; (v) the price of its lottery ticket and part of it if such lottery is undertaken by using a lottery ticket; and (vi) the time limit for the lottery undertaking.[19]

The permit to undertake any lottery, for every type of lottery with a nominal value not higher than Rp. 10,000 (ten thousand rupiah), will be granted by the Head of the Provincial Government or other Head of Local Government being equal in power and authority. Copies of this Permit Certificate to hold the lottery and an Application Letter will be sent from the relevant agency to the Minister of Social Affair. A permit to hold any lottery with a nominal value higher than Rp. 10,000 (ten thousand rupiah) will be granted by the Minister of Social Affairs.[20]

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[14] See the Elucidation of Article 1 para (1) of Law No. 22 of 1954 on Lottery.

[15] See the Memoir of Elucidation of Law No. 22 of 1954 on Lottery.

[16] See the Elucidation of Article 1 para (3) of Law No. 22 of 1954 on Lottery.

[17] See Article 3 of Law No. 22 of 1954 on Lottery.

[18] See the Elucidation of Article 3 of Law No. 22 of 1954 on Lottery.

[19] See Article 4 of Law No. 22 of 1954 on Lottery.

[20] See Article 5 of Law No. 22 of 1954 on Lottery.

Permits to undertake a lottery may be granted to (i) organizations recognized as a corporate body, and (ii) non-corporate body organizations that have been established and operated for at least 1 year.[21] The officials of the competent authority are given the opportunity to act at their own discretion.[22]

All requirements that must be obeyed by the receiver of this permit are included in the Permit Certificate for Lottery for the benefit of the participants or public. If such requirements are not in observance, then the certificate is no longer applicable. Upon the request of the relevant agency, the duration for holding the lottery may be extended once. The decision letter for this Permit Certificate to hold the lottery must be attached to the Lottery Tickets, or if there is no lottery ticket, it must be announced in the daily newspaper so that it is known by the public.[23] Such provisions are inclusive of the provisions for games like sport *pool.* Sport *pool* is often played without lottery tickets, but the guesses are to be delivered in written form accompanied by a sum of money to be regarded as participating evidence. The permit for this sport *pool* and other similar games may be announced through advertisements in broadly circulating newspapers.[24]

A permit from the Minister of Social Affairs is also required in order to sell, offer, and distribute to the public lottery tickets organized in foreign countries. Within its decision letter some requirements must be mentioned for the benefit of the participants or public and to be observed by the receiver of the permit for the lottery. Should such requirements be disregarded, then the permit will be annulled or found to be invalid.[25]

Anyone who receives a prize as the winner of any lottery held under the approval of the Minister of Social Affairs, or other relevant competent authority, will be charged a lottery tax as follows. The winner of a prize with a value of Rp. 5,000 (five thousand rupiah) or lower, shall be taxed an amount equal to twenty percent of the prize value. If the prizes comprise some goods then the lottery tax shall be ten or twenty percent of the value of the goods at the time of drawing the lot. This lottery tax shall be payable to the lottery organizing agency by the winner prior to receiving his prize. The lottery organizing body shall then remit such lottery tax funds to the State Treasurer no longer than 1 month after the drawing lot.[26] This tax payment shall be related to the permit given. Therefore, the lottery winners organized by the government, or those excluded from the obligation to obtain a permit, shall be exempted from paying any lottery tax.[27]

Law No. 22 has firmly regulated all punishable conduct. The first level of punishment is confinement of up to 1 year or a fine up to Rp. 10,000 (ten thousand

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[21] See Article 6 of Law No. 22 of 1954 on Lottery.

[22] See the elucidation of Article 6 of Law No. 22 of 1954 on Lottery.

[23] See Article 7 of Law No. 22 of 1954 on Lottery.

[24] See the Elucidation of Article 7 para (3) of Law No. 22 of 1954 on Lottery.

[25] See Article 10 of Law No. 22 of 1954 on Lottery.

[26] See Article 11 of Law No. 22 of 1954 on Lottery.

[27] See the elucidation of Article 11 of Law No. 22 of 1954 on Lottery.

rupiah). This punishment can be imposed on anyone who (i) organizes any lottery without a prior permit, (ii) performs any conduct actually requiring a prior written consent of the Minister of Social Affairs without a permit, (iii) organizes any lottery without fulfilling the requirements mentioned within the decision letter of the relevant permit; (iv) sells, offers, and distributes to the public the lottery tickets of the lottery as meant in sub a above; (v) performs whatever measures aimed at supporting all conducts as meant in point (i) through point (iv) above; (vi) expends the money from the lottery deviating from the uses specified, unless permitted by the Minister of Social Affairs to perform such deviating actions.[28] The second level of punishment includes a fine of up to Rp. 3,000 (three thousand rupiah) for anyone organizing a lottery without any notification.[29] However, the two conducts are not criminal, but only an illegal action.[30] All of a plaintiff's assets and properties obtained from such illegal actions and all of those used to perform such conduct, either owned by the plaintiff or by other parties, may be seized by the government.[31]

26.3 Sports Betting in the Penal Code

In the scope of the criminal code, as regulated by the Penal Code, *sport betting* may be categorized as a kind of gambling or lottery. This can be seen from the formulation of Article 303 of the Penal Code.

In Article 303, para (3) of the Penal Code, it is formulated that "gambling is each kind of games, in which, the possibility to win generally depends only on the taking a chance or risk one's luck, and also that such possibility would be higher if the player is cleverer or more capable. The gambling also has the meanings namely all betting to the final result of any race or other games or competition, not organized by the gambler themselves, the same is for all kinds of bet."

Gambling or lottery is also meant as a betting activity to obtain a profit from the previously unpredictable final score of any game, race, or competition. This means that gambling is betting conducted intentionally, namely by risking any value or valuable items with the awareness of its risk and all at once, relying on unpredictable results from such game, race or competition. Therefore, we can formulate the existence of three elements in conduct that can be categorized as gambling. *First*, the existence of a game, race, or competition, meaning that the activity usually conducted in the form of a game, race, or competition is held solely for having fun or to spend time with the hope of receiving some form of profit. Therefore this activity has a recreational nature. However, the players are not

[28] Article 12 para (1) of Law No. 22 of 1954 on Lottery.

[29] Article 12 para (2) of Law No. 22 of 1954 on Lottery.

[30] Article 12 para (3) of Law No. 22 of 1954 on Lottery.

[31] Article 12 para (4) of Law No. 22 of 1954 on Lottery.

necessarily involved in these games, thus they can be spectators or betting persons. *Second*, the existence of some element of chance or risking one's luck, meaning that to win such games or races depends more on speculative aspects, taking chances, or risking one's luck. The winning factor obtained is caused by the habit or smartness of the players who have become used to or well trained in such games. *Third*, the existence of the betting aspect, meaning that there is a bet in the games played by the betters or any third party called a Bandar or Banker, either in the form of money, or other things that can be valued by money. In this context, of course there are opposing parties, namely the gainer and the loser. It is the main element determining whether any conduct is called gambling or not.

Therefore, *sports betting* may be categorized as gambling as meant in Article 303, Article (1) of the Penal Code. Therefore, the provisions of Article 303 para (1) have determined the punishment for the doer of the gambling activity as follows; "in jail punishment at the longest 10 years or a fine at the highest Rp. 25 million for an unauthorized person (i) intentionally organize or give opportunity to gamble as their job, or intentionally involve himself in the gambling company; (ii) intentionally organize or give the public an opportunity to gamble, or intentionally involve himself in the gambling company, with or without any conditions or method required to take such opportunity; (iii) to play gambling as his job … Anyone being guilty of crime in performing such job, then his right to perform such job may be annulled."[32]

With respect to the legal formulation of the gambling criminal act as described above, the Indonesian government, by means of Law No. 7 of 1974 on Lottery Controlling firmly stated that; "all gambling illegal acts is a crime,[33] since gambling is in conflict with the religion, ethics and *Pancasila's* moral principles and endangering the life and livelihood of the community, nation and State."[34] Therefore, some efforts to control and check gambling are required, up to its smallest environment, and eventually to close it down so there will be no more gambling in all territories of the Republic of Indonesia.[35] Based on such concerns, the provision of Article 303 described above has been amended with respect to the punishment warning to become the provision of Article 303 (bis) based on Law No. 7 on Lottery Controlling[36];

Article 303 (bis) para (1), in conjunction with Article 542 of the Penal Code, and Law No. 4 of 1974 on Lottery Controlling, says "sentenced by imprisonment at the longest 4 years or a fine at the highest Rp. 10 million; (i) anyone using an opportunity to play gambling held by violating the above provisions of Article 303 of the Penal Code, (ii) anyone taking part in a gambling undertaken in the public

[32] See Article 303 para (2) of the Penal Code.

[33] See Article 1 of Law No. 7 of 1974 on Lottery Controlling.

[34] See the consideration of letter a considering the Law No. 7 of 1974 on Gabling Control.

[35] See the consideration of letter b considering the Law No. 7 of 1974 on Gabling Control.

[36] The Law No. 7 of 1974 on Gabling Control taking affect as of 6th November 1974.

road or in its roadside or in other places accessible by public, unless such gambling or lottery undertaking is permitted by the authorized supervisor."

Article 303 (bis) para (2) says "when such breach was conducted less than 2 year ago since its permanent punishment due to one of these breaches, it can be sentenced by imprisonment at the longest 6 years or a fine at the highest Rp. 15 million."

The question is what is the activity that must be forbidden and alleviated, especially in sport betting inclusive of the conduct categorized as gambling?

Article 1 para (1) of the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling says that "the granting of permit for all kinds of lottery undertakings are forbidden, both those organized in the Casino, Gathering Place or it is held for other reasons."[37] Since March 31, 1981, any permit already granted will be annulled and no more applicable.[38] Therefore, all forms and types of gambling are forbidden without exception. However, its *locus* is limited to only three forbidden place categories, namely (i) the Casino, (ii) gathering places, and in (iii) other places for other reasons.

The types and forms of gambling held in Casinos include, among others, *Roulette*, *Blackjack*, *Baccarat*, *Creps*, *Keno*, *Tombola*, *Super Ping-pong*, *Lotto Fair*, *Satan*, *Paykyu*, *Slot Machine* (Jackpot), *Ji Si Kie*, *Big Six Wheel*, *Chuc a Luck*, throwing the arrow or hen's feathers to the any rotating target (*Paseran*), *Pachinko*, *Twenty One*, *Hwa-Hwe*, and *Kiu-kiu*.[39]

The types and forms of gambling held in gathering places among others consist of gambling like throwing the arrows or hens' feather on an immobile target, throwing the ring, throwing the coin *Kim,* fishing hook, shooting non-rotating target, throwing the ball, cock fighting, cow fighting, buffalo fighting, sheep fighting, horse race, cow race *(Karapan),* dog race, Hailai, *Mayong* or *Macak,* and *Erek-erek*.[40]

The types and forms of gambling held in places other than in a Casino and in the gathering places for other reasons, include, among others, gambling related to communal habits, such as the fighting of cock, cow, buffalo and sheep, horse, and cow races.[41] Not included in this connotation is the habit related to religious ceremonies as long as such activity does not represent gambling.[42]

The question becomes whether *sports betting* is included in the three categories formulated above? The answer is *no*. It is obvious that the General Elucidation of

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[37] See Article 1 para (1) of the Government Regulation No. 9 of 1981 in Implementation of Law No. 7 of 1974 on Lottery Controlling.

[38] See Article 1 para (2) of the Government Regulation No. 9 of 1981 on Implementation of Law No. 9 of 1974 on Lottery Controlling.

[39] See the elucidation for Article 1 para (1) letter a of the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling.

[40] See the elucidation for Article 1 para (1) letter b of the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling.

[41] See the elucidation for Article 1 para (1) letter c of the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling.

[42] See the elucidation for Article 1 para (1) letter d of the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling.

the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling, firmly stated that "… by the prohibition to grant the permit to undertake any gambling or lottery, *it does not mean as the prohibition to undertake any sport, recreation and habitual games*, as long as they does not represent the gambling." This provision is formulated clearly and recognizes that the undertaking of sport natured games is absolutely not prohibited, although there is an addition stating that as long as it does not represent gambling. Since the limitation of prohibited gambling has been clearly formulated by its form and types and three locus categories described above, then it is certainly clear that those outside the formulation, and outside the three locus categories, are not parts of the prohibition. This means that any undertaking of sport natured games, or *sports betting,* as long as not inclusive of the above three formulations, is not part of gambling.

26.4 Regulating of Sport Financing and Sports Betting

Is *sports betting* and/or sport lottery regarded as one of the sources for sport financing as regulated by Law No. 3 of 2005 on the National Sporting System? Before answering this question, it must be first answered how is sport financing conducted in Indonesia, is it solely for the account and risk of the state (state budget) or also the community? The following is the answer to the source of sport financing is answered as follows.

Sport financing must be a joint responsibility among the Central Government, the Local Government and the community.[43] Therefore, it is clear that there are three components responsible for sport financing, namely, the Central and Local Governments and the community having an equivalent position of obligations. Nevertheless, such obligation is borne only by the Central and Local Government, while the community is optional in nature. This is clearly formulated in Article 69 para (2) of Law No. 3 of 2005 on the National Sports System namely "The Central and Local Government shall be obliged to allocate the Sport Budget from the State and Local Budget." Sports financing sources are determined based on adequate and sustainable principles[44] in accordance with the planning priority in sport development.[45] The sources of sports financing may be obtained from (i) the community through various activities based on the applicable provisions; (ii) mutually benefiting cooperation; (iii) non-binding foreign aid; (iv) business profits from the sport industry; and/or (v) other legal sources based on applicable laws and regulations.[46] Sport financing management must be conducted based on the principles of justice, efficiency, transparency, and public accountability.[47]

[43] See Article 69 para (1) of Law No. 3 of 2005 on National Sports System.

[44] See Article 70 para (1) of Law No. 3 of 2005 on National Sports System.

[45] See Article 4 of the Government Regulation No. 17 of 2007 on Sport Financing.

[46] See Article 70 para (2) of Law No. 3 of 2005 on National Sports System.

[47] See Article 71 para (1) of Law No. 3 of 2005 on National Sports System.

Any sports funds allocated by the Central and Local Governments may be in the form of grants in accordance with applicable laws and regulations.[48]

Sport financing sources allocated by the Central Government come from the State Budget, while sport financing sources allocated by the Local Government originate from its Local Budget.[49] Moreover, sports financing sources from the community can be obtained from:

a. Domestic and foreign sponsorship activities;
b. grants both from the domestic and foreign countries;
c. fund mobilization;
d. compensation for status takeover and transfer of athlete;
e. fostering money from professional athletes;
f. mutually benefiting cooperation;
g. other non-binding donations; and
h. other legitimate sources based on the applicable laws and regulations.[50]

The Government's revenues obtained from sportsmanship or sport-related services in any sport undertakings, and this financing source, will represent the Non-Taxable State Revenue.[51] Local Government revenues are obtained from sport services or sport-related services in any sport undertaking and this financing source represents the local income.[52]

Besides the sources mentioned above, sport financing sources may also come from the sport industry covering among others:

a. Tickets from the undertaking of championships or competitions;
b. rents of sport facilities;
c. sale and purchase of sport products and facilities;
d. *sport labeling*;
e. advertisements;
f. sport broadcasting rights;
g. sport promotion, exhibition and festivals;
h. sport agency; and
i. sport information service and consulting.[53]

To support sport finance, the Government may establish a state owned sport company in the form of a corporate body. This sport corporate body must be established in accordance with the prevailing laws and regulations.[54]

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[48] See Article 71 para (2) of Law No. 3 of 2005 on National Sports System.
[49] See Article 5 of the Government Regulation No. 17 of 2007 on Sport Financing.
[50] See Article 6 of the Government Regulation No. 17 of 2007 on Sport Financing.
[51] See Article 7 para (1) of the Government Regulation No. 17 of 2007 on Sport Financing.
[52] See Article 7 para (2) of the Government Regulation No. 17 of 2007 on Sport Financing.
[53] See Article 6 of the Government Regulation No. 17 of 2007 on Sport Financing.
[54] See Article 8 of the Government Regulation No. 17 of 2007 on Sport Financing.

Any funds obtained from sport financing sources may be allocated only to undertake any sport events covering:

a. Educational sport, recreational sport and reputation sport;
b. sport fostering and development;
c. sports management;
d. sports week and championship;
e. athletes fostering and development;
f. enhancement of the quality and quantity of sport means and facilities;
g. development of sports science and technology;
h. empowerment of role and participation of the community in sport activities;
i. development of sports cooperation and information;
j. fostering and development of the sports industry;
k. standardization, accreditation, and certification;
l. doping prevention and supervising;
m. reward granting;
n. supervising implementation; and
o. development, supervising, and management of professional sport.[55]

The use of sports finance shall be accountable periodically and transparently by the user in accordance with the applicable laws and regulations.[56] Sport undertakings must be accountable according to the acceptable accounting standard determined in accordance with the applicable laws and regulations.[57] Such accounting must be reported and/or announced in accordance with the applicable laws and regulations.[58] The Central and Local Governments according to their respective power and authority must supervise this sport financing.[59]

By referring to the financing provisions in Law No. 3 of 2005 on the National Sports System, and Government Regulation No. 17 of 2007 on Sport Financing, as described above, there is a red line indicating that *sports betting* is enabled to be performed for the purpose of sport financing. The formulation for this financing source can be attempted from the community through the following instruments (i) various activities based on the applicable rules and regulations, (ii) mutually benefiting cooperation, and/or (iii) other legal sources based on the applicable rules and regulations, representing the entry gate for creatively developing sport betting as one facility for sport financing. Moreover, Article 6 para (1) of Government Regulation No. 17 of 2007 on Sport Financing firmly formulated and clearly opened such opportunities by saying that sport financing sources from the community can be obtained among others by fund mobilization, mutually benefiting cooperation, and other legal sources based on the applicable laws and

[55] See Article 9 of the Government Regulation No. 17 of 2007 on Sport Financing.
[56] See Article 10 of the Government Regulation No. 17 of 2007 on Sport Financing.
[57] See Article 11 of the Government Regulation No. 17 of 2007 on Sport Financing.
[58] See Article 12 of the Government Regulation No. 17 of 2007 on Sport Financing.
[59] See Article 13 of the Government Regulation No. 17 of 2007 on Sport Financing.

regulations. Its limitation is the formulation of the three categories forbidden by Law No. 7 of 1974 on Gambling Eradication in conjunction with Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Gambling Eradication and Article 303 of the Penal Code.

26.5 High and Low Tide of Sports Betting in Indonesia[60]

As described at the beginning of this article there are a number of sport betting models performed in Indonesia. After independence, namely since the enactment of Law No. 22 of 1954 on Lottery, *sports betting* in the form of *lottery* began appearing in the 1960s at that time known more famously as illegal lottery (*lottere buntut*). At that time, in Bandung, West Java, for example, there was a lottery called *Toto Raga* as an effort to mobilize funds by following the horse race, while in Jakarta, the capital city of the Republic of Indonesia, in the era of Governor *Ali Sadikin*, appeared the lottery called *Toto* and *Nalo* (*National Lottery*). However, it was obvious that the negative impact caused by this model of *sports betting* was terrific. As a result, in 1965, President *Soekarno* issued the Presidential Decree Number 113 stating that *lottere buntut* has torn down the nation's morality and was categorized as a criminal act of subversion. But, in line with the change of regime from the Old to the New Order in 1966 this lottery developed even more and searched for its new form.

In 1968 for example, creativity found a new model for *sports betting* which came from the Government of Surabaya City when it published what was called the Lotto (*Lottere Totalisator*) in an effort to seek funding for the undertaking of the National Sport Week VII, to be held in Surabaya in 1969. This creativity of the Surabaya City Government was followed by the Central Government through the Department of Social introducing and selling the *sports betting* model, namely *Nalo* (*Nationale Loterij*) in 1970. *Nalo* was sold amounting to 1,000,000 tickets by drawing lots each week. Its price was Rp. 50 per ticket. The funds obtained were used not only for sport financing, but also for helping the victims of natural disasters, giving aid to 22 orphanages respectively, receiving 100 hens and the erection of the Office of the Department of Social itself. Since that time, *sports betting* has developed by looking

[60] For the purpose of this discussion, see Tempo Magazine No. 27 of XXV 31 August 1991, National Column, p. 27. http://majalah.tempointeraktif.com/id/cetak/1988/11/26/NAS/mbm.19881126.NAS28693.id.html, http://majalah.tempointeraktif.com/id/cetak/1991/11/02/NAS/mbm.19911102.NAS15563.id.html, http://majalah.tempointeraktif.com/id/cetak/1993/10/30/NAS/mbm.19931030.NAS2278.id.html, http://majalah.tempointeraktif.com/id/arsip/2004/01/19/LU/mbm.20040119.LU87967.id.html, http://www.polarhome.com/pipermail/nasional-m/2002-August/000113.html, http://www.gatra.com/2005-05-09/artikel.php?id=84222, http://www.hidayatullah.com/index.php? optiom=com_content&article&id=847, http://dekade80.blogspot.com/2009/02/porkas-dan-mimpi-menjadi-jutawan.html, http://dearthalassax.com/?p=34, http://misc.feedfury.com/content/19459303-dari_porkas_sampai_sdsb.html, http://sinarharapan.co.id/berita/0401/15/sh05.html, http://sinarharapan.co.id/berita/0401/19/nas08.html, http://majalah.tempointeraktif.com/id/arsip/2004/01/19/LU/mbm.20040119.LU87967.id.html.

for their new forms to replace the already existing sport betting, among others, Toto KONI. Similar to the previous *sports betting* models, this *sports betting* model did not last very long. In 1974, Toto KONI was obliterated. The *sports betting* model has come and gone, one replaced the other.

New creative forms of *sports betting* emerged in 1978. The Government gave a permit to *Undian Harapan* Company, previously named the Social Rehabilitation Foundation, to introduce and sell the coupon of *Undian Harapan.* The purpose of the *Undian Harapan* model of *sports betting* is to hold back the black lottery coming from Singapore and Malaysia. Each month this lottery sold its coupon amounting to 4 million coupons, but approximately only 900,000 coupons were sold out. This lottery is sold at Rp. 200 per coupon. Each month the manager of the *Undian Harapan* gets a profit of Rp. 30 million.

It was not yet a year since *Undian Harapan* was introduced, when in 1979, another new *sports betting model* namely *Tanda Sumbangan Sosial Berhadiah* (TSSB) emerged. It was recorded as having printed approximately 4 million coupons by drawing lots twice a week. Its price was Rp. 200 per coupon. Similar to the previous sports betting models, the *Undian Harapan* and TSSB also came to an end.

After a lull for some time, a new model was again created by the Government through the Minister of Social Affairs. The new model, *Mintaredja*, was an idea to undertake the soccer *forecast* as a form of lottery without causing a gambling excess. After making a comparative study for 2 years in some countries, the Department of Social Affairs concluded that the soccer forecast in England was simple and did not cause excess gambling. Besides, the ratio obtained between the lottery organizer, the government, and the prize for the lottery participant divided proportionally is 40–40–20. But this planning has not yet been implemented, because in 1976 the Minister of Special Affairs demanded to have it reviewed by the Supreme Court, the State Intelligence Coordinating Board (*Bakin*), and the Department of Home Affairs, to find whether or not the soccer forecast got a challenge from the community. The profit distribution model has been changed to 50–30–20. This planning also failed to be performed, because President *Soeharto* thought very carefully and asked to have it tilted more intensely. It needed about 7 years to implement this football forecast lottery and in December 28, 1985, the Football Forecast Coupon, with Prizes (*Kupon Berhadiah Porkas Sepak Bola*), was formally opened, circulated, and sold. The *Porkas Sepakbola* was aimed at withdrawing the community's funds to support the fostering and development of the reputation of Indonesian sport. The *Porkas Sepakbola* was born based on Law No. 22 of 1954 on Lottery, which among other purposes is that the lottery resulting in a prize does not cause bad social impacts.

Different from Toto KONI, there is no figure betting in *Porkas Sepakbola,* but only the guessing of one of these categories of M–S–K or win, draw, or lose. Another difference is that Toto KONI circulates far into the remote area of the country, whereas *Porkas Sepakbola* circulates only at the level of regency and kids under the age of 17 are forbidden to sell, circulate, and buy it.

The Coupon of *Porkas Sepakbola* consists of 14 columns and takes lots once a week, after the 14 football clubs accomplish their matches. The schedules of these

matches are determined by PSSI taken both from domestic and foreign schedules. Each holder of the coupons is charged the price of Rp. 300 per coupon and if successful at guessing whether Win (W), Draw (D), or Lose (L), he will get his prize amounting to Rp. 100 million.

In January 11, 1986, the first drawing lot of *Porkas Sepakbola* was conducted and until the end of January of the same year, the net fund successfully collected by this *Porkas Sepakbola* undertaking reached Rp. 1 billion. In the middle of 1986, the circulation of the *Porkas Sepakbola* coupon was conducted by means of a counter system until October 1986. The collected funds of *Porkas Sepakbola* reached Rp. 11 billion from the target of Rp. 13 billion fixed until the end of the year. From this amount, the Central Indonesian National Committee of Sports gets Rp. 1.5 billion, the Local Indonesian National Committee of Sports gets Rp. 4.5 billion, the Indonesian Football Association (PSSI) gets Rp. 1.4 billion, the Office of Minister of Sports and Youth gets Rp. 250 million, the Committee of Asian Games X Seoul gets Rp. 250 million, the administration gets between Rp. 8.5 million and Rp. 9 million, and Rp. 4 million was deposited as a perpetual fund.

The *sports betting* model of *Porkas Sepakbola* also did not last. In January 1988, the Social Coupon for Sport with a prize (KSOB) organized by *Yayasan Dana Bhakti Kesejahteraan Sosial* was issued. There were two coupons sold, namely the coupon for guessing the score of the first half and second half of the match, and the coupon used to guess the letters (2–4 of 14 betted letters). The coupon prize was Rp. 600 per coupon with the highest prize of Rp. 8 million. Approximately 45–60%of the incoming funds would go back to the buyer in the form of the prize. After succeeding to absorb the communal funds of approximately Rp. 1.2 trillion, KSOB ceased and in 1988, Rp. 1.5 billion of the KSOB's funds was donated to TVRI and Rp. 120 billion used for sport financing.

Similar to the fortune of the previous *sports betting* models, the KSOB also ended its life due to a strong rejection from the community. In the middle of 1988, DPR RI through the faction of the *Persatuan Pembangunan* Political Party stated that KSOB and TSSB had caused negative impacts of sucking up the funds of the rural community and thus affecting the regional economics. As a consequence, in the middle of July 1988, the Minister of Social Affairs, Dr Haryati Soebadio, in a meeting with the Commission VIII House of Representative of the Republic of Indonesia firmly stated that KSOB and TSSB in 1988 had sucked up Rp. 962.4 billion of the community's funds. This was four times higher compared to the result of the sale in 1987. However, in line with the wishes of the community, although KSOB and TSSB could be used to attract a lot of funds for the development of sport and other social activities, in January 1, 1989, KSOB and TSSB were terminated and replaced by a new game called SDSB.

In accordance with its name, the *sports betting* model of SDSB had the purpose to give a donation in good faith. The SDSB coupon is divided into two types namely Coupon A at the price of Rp. 5,000 with the prize of Rp. 1 billion, and Coupon B pricing Rp. 1,000 with the prize amounting to Rp. 3.6 million. Both coupons are taken once a week and 30 million coupons are circulated divided into Coupon A numbering 1 million coupons and Coupon B numbering 29 million.

SDSB is operated by a permit given based on Law Number 22 of 1954 on Lottery and Decision of the Minister of the Republic of Indonesia Number: 21/BSS/XII/1988 dated November 21, 1998, on Implementation Guidance to Undertake the Collection of Philanthropist Social Donation with Prizes and the Decision of the Minister of Social Affairs of the Republic of Indonesia Number BSS 16-11/88 on Permit Granting for the Undertaking of Collection of Philanthropist Social Donation with Prizes to *the Foundation of Dana Bhakti Kesejahteraan Sosial* in Jakarta. The annual turnover of this SDSB is predicted to reach Rp. 1 trillion. Besides, as the benefit of the organizer, this SDSB's funds amounting to Rp. 237 billion is used to assist, surmounting the impact of a natural disaster, to the amount of Rp. 95 billion, used for sport fostering; Rp. 108 billion used for prosperity business, and another Rp. 3 million/month used by the Centre of Art Documentation of H.B. Jassin. In the history of the sports betting model's existence in Indonesia, SDSB gave rise to the most intensive rejection within the community through huge demonstrations. Finally, in November 25, 1993, SDSB was closed and since that time no more new *sports betting* models had appeared.

Seven years later, at the beginning of 2000, another new sport betting model came, known as "People's Social Fund For Sport (*Damura*)" the approval for its organizing was given to the *Mutiara Mandala Mahardhika Company.* Besides promising a direct prize, the organizer also gave scholarships and risk insurance as another reward. But these *Damura* coupons also failed to continue due to protests and rejection from the people. However, the *Damura* has maximally attempted to make changes from the previous sport betting model, whereby there are three important items namely: (i) *damura's* selling concept attempts to be different from that of gambling; (ii) the selling target would be from the middle to the higher group of the community, and (iii) the current portion of 6.5% for sport would be increased.

Although a repeated failure, the effort of making the sport betting model come to life is still being attempted. One of the newest sport betting models is the so-called Magnum, being successfully undertaken in Malaysia and managed by the *Metropolitan Magnum Indonesia* Company under the name of Social Fund and Sports Welfare Program. This magnum *sports betting* model cooperates with KONI, its permit was granted by the Minister of Social Affairs on December 6, 2003.[61] However, it was never fully operated, the Magnum's fate was the same as its previous sport betting models, dying before fighting, again due to rejection from

[61] The process to obtain a permit for this magnum sports betting model can be smoothly conducted. On 6 June 2003, the *Metropolitan Magnum Indonesia* Company sent a letter to the Chairman KONI, *Agum Gumelar* on "Social Prosperity and Sport Program Cooperation." On August 10 until 11, 2003, Vice-Chairman of KONI Budget Planning Division, *Mayjen Sang Nyoman Suwisma* and Head of Sport Industry and Business Commission *Andi Gani Nena Wea* performed a comparative study in Malaysia to observe the operation of Magnum 4D Berhad. On 29 August 2003, Head of KONI Budget and Planning Division *Indra Kartasasmita* sent "Evaluation on Social Prosperity and Sport Program Cooperation" to the General Chairman of KONI. On 14 October 2003 The General Chairman of KONI issued his agreement on "Social Prosperity and Sport Program Cooperation." On 27 October 2003 KONI signed the cooperation agreement with PT Metropolitan Magnum Indonesia. On 6 December 2003 Minister of Social

the people. On January 15, 2004, its permit having been given already, was annulled by the Minister of Social Affairs, *Bachtiar Chamsyah.*

How does the Magnum lottery work? The magnum *sports betting* model has many variations. Based on the proposal made on September 15, 2003, this lottery is conducted in the following way: each buyer of an entry ticket in multiplication of Rp. 2,500 will be entitled to one bet. The ticket buyer can choose the serial number printed on the ticket through an electronic system. The drawing lot of this ticket's serial number is conducted once a week or in accordance with the schedule of the match. The winning ticket's serial number will be the one with the same betting result. The tickets can be bought at the counters provided or at other places appointed by the organizer through the electronic system throughout Indonesia. The prizes provided have different values. The First Prize is 100 29 inch TV sets and DVD players at the price of Rp. 6 million/unit. The Second Prize is 100 21 inch TV sets at the price of Rp. 2,500,000 per unit. The Third Prize is 100 refrigerators at the price of Rp. 1,500,000 per unit. The Fourth Prize is 100 savings of Rp. 500,000 per savings. The Fifth Prize is for 3,000 winners who get Rp. 150 ribu in cash.

Based on the proposal dated October 20, 2003, the betting conducted as follows. The betters are spectators at the place of the match. For each entry ticket bought the buyer will be given a free betting number recorded by an online system. The amount of lottery numbers will be determined based on the number of spectators in any specified place and period. The ticket having the same number as the betting result at each drawing conducted by an online system, will be the winner. The ticket selling places in the form of counters are provided at the match places, shopping centers and at other places throughout Indonesia. The tickets are sold throughout Indonesia, however, the matches are only conducted in certain cities. Therefore, the buyer can purchase these coupons without having to watch the match himself. The prizes have various values. Prize I is 100 29 inch TV sets and DVD players at the price of Rp. 4,375,000 per unit. Prize II is 100 21 inch TV sets at the price of Rp. 1,875,000 per unit. Prize III is 200 refrigerators at the price of Rp. 1,250,000 per unit. Prize IV is 750 deposits worth Rp. 500,000. Prize V is for 2,000 winner of Rp. 125,000 in cash. Besides the main prizes, entertaining prizes are also provided namely entertaining prize I for 200 winners of three correct figures consecutively from the rear get the prize of respectively, worth Rp. 1,500,000. Entertaining prize II for 1,000 winners for two correct figures consecutively from the rear get a prize worth respectively of Rp. 200,000.

Based on the proposal dated October 29, 2003, having been approved by the Minister of Social Affairs on December 16, 2003, the bettors are those watching the match at the match places by previously buying the ticket. Each entry ticket will be attached by one free lottery number recorded by an online computerized

(Footnote 61 continued)
Affairs, *Bachtiar Chamsyah* issued a permit for free lottery undertaking with prizes to the *Metropolitan Magnum Indonesia* Company.

system. The amount of lottery numbers will be determined based on the number of spectators in any specified place and period. The winners would be those having their ticket number the same as the number resulted in by drawing lots conducted by an online computerized system. The ticket selling places in the form of counters are provided at the match places, shopping centers, and at other places throughout Indonesia. The prizes have different values. Prize I is 100 29 inch TV sets and DVD players at the price of Rp. 7,500,000 per unit. Prize II is 100 21 inch TV sets at the price of Rp. 3,000,000 per unit. Prize III is 200 refrigerators at the price of Rp. 1,500,000 per unit. Prize IV is 750 deposits worth Rp. 600,000. Prize V is for 2,000 winner of Rp. 180,000 in cash. Besides the main prizes, entertaining prizes are also provided, namely: the entertaining prize I for 200 winners of Rp. 1,500,000 in cash; the entertaining prize II for 1,000 winners of Rp. 200,000 in cash. The tickets are sold throughout Indonesia, however, the matches are only conducted in certain cities. Therefore, the buyer can purchase these coupons without having to watch the match himself. It is not necessary for the buyer to come to the place of the match since the drawing of lots are conducted in Jakarta. The capacity of the match place is limited, but the target of the drawing of the community's funds is up to millions of rupiahs per month.

What do we guess? Similar to the four number games being successfully conducted in Malaysia, this Indonesian version of a lottery uses the numbering system changed into letters. The digit is changed into the mark. The number 0 means the archery sport branch changed to the letter A. The number 1 means the badminton sport branch changed to Letter B. The number 3 means the diving sport branch changed to Letter D. The Number 4 means the Horse Riding sport branch changed to Letter E. The Number 5 means the football sport branch changed to Letter F. The Number 6 means the Golf sport changed to Letter G. The Number 7 means the Rock Climbing sport branch changed to Letter H. The Number 8 means the Ice Hokey sport branch changed to Letter I, and the number 9 means the Javelin Throw sport branch changed to Letter J.

The player must forecast the combination of four sport branches, for example, the sport branch of archery, chess, diving, and football to be converted into the letters ACDF. This combination of letters can be aimed at two betting categories, namely *home* and *away*. Then the Operator will draw lots up to three times a week. The bettors matching his one or more consecutive composition of letters will get various prizes. For the *home* forecast there are two coupon prices. The first coupon costs Rp. 2,500 per coupon, and prize I is a refrigerator, prize II is a TV set, prize III is a Mini-Compo, and there are 10 special prizes, including a Rice Cooker, and 10 entertaining prizes in the form of Hair Dryers. The second coupon costs Rp. 100,000 per coupon, with Prize I a *Toyota Kijang* car, prize II a *Suzuki Karimun* car, prize III 3 Motor Bikes, 10 special prizes of Computer sets, and 10 entertaining prizes in the form of ACs.

Meanwhile for the *away* forecast, there are two types of coupons sold. The first coupon is sold at a price of Rp. 2,500 per coupon with prize I a Bicycle, prize II a Refrigerator, and prize III a TV set. The second coupon costs Rp. 100,000 per

coupon, with prize I a *Honda Accord* car, prize II a *Toyota Kijang* car, and prize III a *Suzuki Karimun* car.

The newest *sports betting* model is a Free Lottery for the viewers of Sport Matches regulated by the Decision of the Minister of Social Affairs No. 673/HUK-UND/2003, which must be actually effective from February 1, 2004. However, this *sports betting* model also failed to be implemented. While this article was being written, no *sports betting* had come out.

26.6 Closing

In practice, in Indonesia, although there are a lot of *sports betting models,* they are always rejected by the community. They are regarded not only as causing a form of restlessness within the community, but sport betting is also considered to be a form of gambling. At this time, there is no *sports betting* in Indonesia in accordance with the prevailing laws and regulations.

The review of the existing regulations especially Law No. 22 of 1954 on Lottery, having existed and come into force on July 17, 1954, Article 303 in conjunction with paras (1), (2) and (3), Article 542 paras (1) and (2) of the Penal Code, revised by Law No. 7 of 1974 on Lottery Controlling, the Government Regulation No. 9 of 1981 on Implementation of Law No. 7 of 1974 on Lottery Controlling, and Law No. 3 of 2005 on National Sports System, in conjunction with the Government Regulation No. 17 of 2007 on Sport Financing, *sports betting* is exclusive of the forbidden gambling, and is even enabled to become one of the means to obtain funds for sport undertakings. The collected funds from sports betting models such as *Porkas Sepakbola,* TSSB, and SDSB, from 1979 to July 1991, were recorded as amounting to 10 billion and were donated for the benefit of sport amounting to Rp. 107 billion or 21%, other social bodies amounting to Rp. 174 billion or 34%, and religious bodies amounting to Rp. 6.67 billion or 2.29%.[62] The tax received by the Government from sports betting in 1986 was Rp. 2 billion, in 1997 Rp. 3 billion, in 1998 Rp. 4 billion, and in the following year it was Rp. 8 billion. In 1991, the organizer or manager of *sports betting* and/or lottery must pay its value added tax amounting to Rp. 13.4 billion, tax of the lottery prize and income tax amounting to Rp. 12 billion, making the total tax payable from *sports betting* equal to Rp. 25.4 billion.[63]

In spite of the fact that there is no *sports betting* currently in Indonesia, the Indonesian community may consistently perform *sports betting*, especially through the *online* internet media, giving easy guidance on how to play in such *sports*

[62] http://majalah.tempointeraktif.com/id/cetak/1991/11/02/NAS/mbm.19911102.NAS15563.id.html

[63] See The Circular Letter of Director general of Taxation No. SE-23/PJ.5.1/1990 on Confirmation of SDSB Agent as PKP dated 9 July 1990 and The Circular Letter of Director General of Taxation Number 8/PJ.5.1/1991 On PPN (VAT) in organizing SDSB dated 14 December 1990. http://www.ortax.org/ortax/?mod=aturan&q=&hlm=430&page=how&id=7768.

betting. For example, those introduced at the web site http://www.betting-online.biz/index.htm. This *web site* contains the *Expect Online Sports betting Guide,* written in 18 languages, including Indonesian, added by 7 simple guides on how to play betting. In the *expect.com* website there is information about how to register as a member, how to activate the betting account, the betting methods, how to take the betting results, how to read the best opportunity, and how to guard its security.

An ample time is still required for the Indonesian people to place and fully understand *sports betting* as a part of the communal activity and the dynamics of a sport undertaking itself. It means that *sports betting*, although believed to be able to finance sport undertakings, is not solely a normative problem, but more of a communal and sociologic problem. Within the social intercourse among the nations in the world, where sport is a part of the globalized culture, *sports betting* is a certainty.

Chapter 27
Chapter on Sports Betting in Ireland

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Contents

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27.1 Introduction

Historically, sports betting involved attempting to predict sports results by making a wager on the outcome of the event. Modern sports betting offers endless different types of wagers on who will score the first goal, who will be the first player to be sent off and by what distance a particular horse will win a race. It also offers different modes of betting from the traditional bookmaker's shop, to online person-to-person betting. Despite the complexities of modern sports betting, Irish legislation dealing with gaming and sports betting has remained firmly routed in the mid-twentieth century (and some might argue the nineteenth century). Change is now on the agenda and not before time.

The histories of sport and betting have long been closely intertwined. As one might expect, this is also the case in Ireland. Ireland is well known for its love of, amongst other things, horses. Betting and horses have always been related and a culture of betting on horses has grown up along with the horse racing industry in Ireland. Both horse racing and greyhound racing are the subject of specific legislation which covers betting, but to which other sports are not subject.

Concern has long existed that the potential corruption associated with betting threatened the integrity of sport and this is now the subject of strict rules from sports governing bodies. This is equally the case in Ireland. Indeed, Ireland has seen its fair share of betting scandals, although most occurred decades ago and are considered more as examples of people 'bucking the system' or 'getting one over' on the bookmakers, rather than corruption. One of the most infamous examples of this is the 'Yellow Sam' horse betting coup in 1975. In this case a professional gambler, Barney Curley, trained his horse Yellow Sam for an obscure national hunt race at Bellewstown in County Meath. The horse's odds were 20–1. The Bellewstown course was serviced by just one public telephone. Dozens of Curley's friends stood as bookmakers across the country with instructions to place bets on receiving a call. Twenty-five minutes before the race, a friend of Curley walked into the telephone booth and pretended to place a call to a dying aunt. The people in the queue behind him waiting to use the telephone sympathetically allowed him to talk for half an hour, while off-course bookmakers tried to contact their counterparts on the course as the bets on Yellow Sam increased. Yellow Sam won the race and as the coup was not illegal, bookmakers were forced to pay out nearly IR£300,000 (about €400,000) to Curley and his accomplices. Needless to say technology is now sufficiently advanced to prevent a similar coup today.

27.2 Background

Sports betting in Ireland is seen as distinct from other types of gambling such as:

- Casino-style table gaming
- Gaming machines

- Remote gaming (internet, interactive and mobile gaming)
- Bingo and
- The lottery.

This is because gambling activities are subject to different rules depending on the type of gambling conducted. However, the distinction is often far from clear-cut. This chapter will therefore consider, not just sports betting, but also the general law regarding gaming and lotteries.

27.3 Gaming and Lotteries

27.3.1 Gaming

As the topic of this chapter is sports betting and the law in Ireland, our discussion of non-sport related gaming is by no means exhaustive. However, as alluded to above, it is necessary to set the legislative context and background in which sports betting occurs.

Prior to 1956 there was little regulation of gaming in Ireland and most gaming took place through charitable lotteries. The Gaming Act 1923 dealt with the recovery of securities advanced in the course of gambling transactions. The Betting Acts 1926 and 1931 provided for the licensing and operation of bookmakers. The Totalisator Act 1929 established the tote and the Irish Hospitals Sweepstakes Acts 1930 and 1931 established the hospital sweeps.[1] Up until 1956 all gambling, gaming and lotteries which fell outside the pre-1956 Acts set out above were subject to a number of older English statutes all of which were repealed by The Gaming and Lotteries Act 1956 (as amended) (the '1956 Act').

The 1956 Act remains the main piece of legislation dealing with gaming. It controls and regulates gaming and lottery activities (other than State-sponsored lotteries) and its underlying ethos is that the demand for gambling should be strictly regulated. A 2007 report by the Swiss Institute of Comparative Law for the European Commission highlighted a number of apparently archaic legal justifications in Member States that attempt to rationalise the prohibition on gambling. In relation to Ireland it noted that gambling was prohibited to 'prevent the evil of tempting poor people to part with their limited resources in the remote expectation of gaining substantial rewards'!

The main aim of the 1956 Act is to limit lotteries to small local promotions and to regulate and control gaming activities.

The forms of gambling permitted under the 1956 Act are:

- Lotteries (excluding lotteries covered by the National Lottery Act 1986) and

[1] The hospital sweepstakes was a lottery run in conjunction with major horse races and ceased in 1986.

- A very limited form of gaming. 'Gaming' means playing a game (either of skill or chance or partly of skill or chance) for stakes hazarded by the players.[2]

All gaming, except that which is specifically provided for under the 1956 Act or that which falls outside the definition of what constitutes 'unlawful gaming' under the 1956 Act, is prohibited. Casino-type games such as roulette or blackjack are technically illegal, as 'the chances of all players including the banker are not equal' and as a portion of the stakes are retained by the promoter/banker otherwise than as winnings as the result of play.[3]

Section 4(3) of the 1956 provides that:

> Gaming shall not be unlawful if no stake is hazarded by the players with the promoter or banker other than a charge for the right to take part in the game, provided that
>
> (a) only one such charge is made in respect of the day on which the game is played, and
> (b) the charge is of the same amount for all the players, and
> (c) the promoter derives no personal profit from the promotion of the game.

Clearly, this exception does not save casino-type games from being illegal and despite this, there are a number of private members clubs offering roulette, blackjack and other casino-type games. Although technically illegal, the activities of these clubs have been tolerated. However, recent raids on private members' clubs have seen An Garda Síochána (Irish police) confiscating bets and roulette wheels.

Interestingly, in line with the rationale of not taking advantage of the poor, the offence of unlawful gaming is committed by the operator rather than the gamblers. Section 4(1) of the 1956 Act makes it an offence to promote or assist in promoting or providing facilities for unlawful gaming. Therefore, nothing in the 1956 Act restricts Irish people from gambling in internet casinos established outside of Ireland. Gaming at a traveling show, carnival or similar event, is permitted subject to certain conditions.[4] A cursory look at the provisions regarding funfairs and carnivals indicate how archaic and outdated the current Irish legislation is—Section 14 of the 1956 Act allows gaming at a licensed amusement hall or funfair, again subject to conditions, one of which is a maximum stake of sixpence per player!

A gaming licence can be obtained under Section 19 of 1956 Act and is issued by the Revenue Commissioners. Where the relevant local authority has passed a resolution under Section 13 of the 1956 Act, an applicant can apply to the District Court for a certificate authorising the issue of a licence permitting gaming at an amusement hall or funfair. The court may attach conditions to such a certificate, for example:

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[2] Section 2 of the 1956 Act.

[3] Section 4(1) (a) and (b) of the 1956 Act.

[4] Sections 6 and 7 of the 1956 Act.

- Limiting the hours during which gaming may be carried on
- Restricting the kinds of gaming and the extent to which particular kinds of gaming may be carried on and
- Restricting gaming by people under a certain age.

The certificate must be submitted to the Revenue Commissioners and they will issue the gaming licence on payment of the relevant excise duty and receipt of a tax clearance certificate. A licence can be issued for a maximum duration of 1 year.

The statutory limits on stakes and prizes of 2.5p (known as sixpence in old money) and 50p (ten shillings) respectively, have not been changed since 1956. In 1985, an amusement hall owner unsuccessfully sought to have the 1956 Act declared unconstitutional on the grounds that the values set in 1956, and which still applied, represented an attack on his constitutional right to earn a livelihood. The Supreme Court found that the State was entitled to maintain the restrictions 'when they were so clearly imposed, with due regard to the exigencies of the public good' (*Caffola v the Attorney General, O'Malley and Ireland* [*1985*] *IR 496*).

In line with the general prohibition on gaming, Section 36 of the 1956 Act provides that every contract by way of gaming and wagering (the latter of which is not defined) is void and that you cannot take proceedings to recover money which is alleged to have been won in a bet. There is no Irish case law interpreting Section 36, but the English case law on similar provisions would most likely be followed in Ireland. This would mean that gaming debts are unenforceable at law.

In the mid 1990s the EU Commission took action against Ireland, claiming that certain sections of the Gaming and Lotteries Act 1956 were incompatible with the EC Treaty. The Commission issued an opinion to which Ireland responded. Neither the opinion nor the response is publicly available, although the Office of the Information Commissioner granted a freedom of information request to the opinion and response to a petitioner.[5]

Because of technological advances associated with online betting and gaming, the current legislative framework badly needs updating. In 2000, an Interdepartmental Committee was set up to look at gambling in Ireland. A proposal to create the office of Gaming Regulator to oversee registration and gambling, charitable lotteries and commercial sales promotions was mooted but never established.

27.3.2 Reform

Reform is on the agenda again due to a recent report and the fact that the UK has enacted the Gambling Act 2005 and established a national regulator, the Gambling Commission. The Regulating Gaming in Ireland report was published by the

[5] Case 000257—Mr X and the Department of Justice, Equality and Law Reform which is available on www.oic.gov.ie.

Government's Casino Committee in July 2008 ('2008 Gaming Report') in advance of setting up an informal cross-party committee to examine gaming in Ireland. The report makes 32 recommendations that have significant public policy implications, but it does not specifically address sports betting. In line with this the Casino Committee recommends that:

> gaming and betting be treated as two completely separate types of gambling activity, which raise very distinct regulatory issues and which should be treated separately in any regulatory arrangements. The Committee considers that this is fundamental for the regulation of gaming. The Committee recommends that there should be no betting of any kind permitted on or in any licensed gaming premises. Likewise, there should be no gaming activity of any kind permitted on or in any betting or bookmakers' premises.

This position contrasts with the UK position where the Gambling Act 2005 consolidated all existing legislation and governs all forms of gambling, including betting, gaming and lotteries in (with the exception of betting on financial instruments and the UK National Lottery).

27.3.3 Lotteries

A lottery is defined in the 1956 Act as 'including all competitions for money or money's worth involving guesses or estimates of future events or of past events the results of which are not yet ascertained or not yet generally known.'[6] Lotteries are dealt with in Part IV of the 1956 Act and the five main categories that are permitted under the 1956 Act are:

1. Lotteries limited to members of a society or those working or residing on the same premises, in relation to which there is no prize limit.[7] These are private lotteries involving members of a society not established for gambling and they do not need a permit. An example would be members of a football club organising a draw, raffle or private lottery. These are not publicly advertised and tickets are not sold to the public.
2. Lotteries conducted in conjunction with a dance/concert etc. which have a maximum prize of €31.74 (£25).[8]
3. Lotteries promoted in conjunction with a circus, carnival or travelling show or at a licensed amusement arcade or funfair have stake and prize limits of less than €1.[9]

[6] Section 2 of the 1956 Act.

[7] Section 23 of the 1956 Act.

[8] Section 24 of the 1956 Act.

[9] Section 25 of the 1956 Act.

4. Occasional lotteries operated under a permit issued by a Garda (police) Superintendent have a maximum prize of €3,809 and are limited to one lottery per six-month period.[10]
5. Periodical lotteries operated under a licence issued by a District Court have a maximum prize of €20,000 per week.[11]

With the exception of the National Lottery (see below), no lotteries are allowed except for those set out above. With the exception of (1) and (3) above (which do not require a licence), no lottery may be promoted for personal profit. The promotion of foreign lotteries is prohibited and there are restrictions on advertising lotteries.[12]

An application for an occasional lottery permit under Section 27 of the 1956 Act ((4) above) must be made at a local Garda (police) station and the following conditions must be met:

- The permit holder cannot derive any personal profit from the lottery
- The total value of the prizes cannot be more than €3809 and
- The value of each prize must be stated on every ticket or coupon.

A permit will not be granted more than once every six months to any particular beneficiary.

An application for a periodical lottery licence for charitable or philanthropic purposes (which must not exceed one year) under Section 28 of the 1956 Act ((5) above) must be made to the District Court and the total prize in any one week cannot exceed €20,000. A 28-day notification must also be given to the superintendent of An Garda Síochána for the district in which the lottery is to be held.

Therefore, the question which arises for the operators of promotions is whether the promotion in question falls within the definition of lottery for the purpose of the definition of Section 2 of the 1956 Act. If it does, a licence may be required (depending on the type of lottery) and non-compliance with the licensing requirements will render the promotion illegal, and if it falls outside the definition then the promotion is also illegal.

There are a number of cases in this area. In *Bolger v Doherty*[13] the Supreme Court held that bingo fell within the definition of a lottery and therefore had to be licensed. In *Attorney General v Healy*,[14] participants who were initially selected by the organisor had to answer a specific question in order to win the prize. The High Court held that the opportunity of winning money by answering the question was something of value which was awarded through a game of chance and therefore a lottery. In *Attorney General v Best's Stores*[15] a promotional scheme in

[10] Section 27 of the 1956 Act.
[11] Section 28 of the 1956 Act.
[12] Section 21(5) and Section 22 of the 1956 Act respectively.
[13] [1970] IR 233.
[14] [1972] IR 393.
[15] [1970] IR 225.

which customers who had purchased the princely sum of £1 worth of merchandise could put their receipts into a box and be in with a chance to win a turkey. This was found to be a lottery and subject to the licensing requirements. Although the competition did fall within the definition of lottery and Section 2 of the 1956 Act, it does highlight the absurdity of the wide scope of the legislation and how outdated it is. Many of the commercial promotions which exist today were suimply not envisaged in 1956 and the legislation is badly in need of updating.

27.3.4 National Lottery

State lotteries are now well established features in most EU Member States. The introduction of the National Lottery under the National Lottery Act 1986 (the '1986 Act') provides a statutory framework for the running of a national lottery in Ireland. A Post National Lottery Company is licensed to operate the National Lottery by the Minister for Finance in accordance with the Act and has done so since 1987. The spring of 2009 will see a new tender process being entered into by the Department of Finance to find a company to operate the National Lottery from 2012 onwards.

Section 1 of the 1986 Act defines the National Lottery as 'any lottery game or combination of lottery games held by the Minister or held under a licence in accordance with the rules contained in a scheme under Section 28(1) of this Act in relation to that game or each of those games.' A 'lottery game' is defined in the Act as 'any game, competition or other procedure in which or whereby prizes (whether money prizes or otherwise) are distributed by lot or chance among persons participating in the game, competition or other procedure.'

The National Lottery is not subject to any restrictions as regards the value of its prizes other than that the total value of the prizes must not be less than 40% of the total ticket sales in any 1 year. The National Lottery is therefore excluded from the terms of the 1956 Act. The 1986 Act does, however, allow the Minister for Finance to vary the prize limits set for lotteries and removes the restrictions on the advertising of larger lotteries contained in the 1956 Act. The National Lottery sells its products through approximately 3,500 retail outlets throughout Ireland.

The National Lottery is one of the largest promoters of gambling in the State. A total of 60% of its turnover is reinvested in a range of good causes including youth projects, sports and the arts. It is an important means of fundraising for charitable purposes.

27.3.5 Competition Aspects

Following the launch of the National Lottery, many charities which had been traditionally dependent on lotteries for fundraising protested at the unfairly

competitive aspects of the National Lottery which would impact their fundraising operations. Therefore, in 1997, the Government established the Charitable Lotteries Fund which assists charities whose comparable lotteries have been adversely affected by the National Lottery. This fund is administered by the Department of Finance acting on the advice of an Interdepartmental Advisory Committee under an independent chairman, which advises on the criteria to be employed in the distribution of the funds. The Fund is resourced from the National Lottery surplus.

27.4 Betting

A bookmaker (bookie) or turf accountant is a person or firm that takes bets and pays winnings depending on sports results and, depending on the odds and the nature of the bet. Ireland is full of them.

Traditionally, bookmakers have been located at racecourses, but the late twentieth century saw a proliferation of betting shops opening and bookmakers now offer a wide range of options to their customers, not just limited to sports betting. However, with the rise of online betting the role of the local bookmaker is under threat and most bookmakers now offer telephone betting and online betting services.

Most Irish bookmakers' business revolves around offering a wider range of bets on all sporting events here and abroad, including rugby, soccer, golf, Gaelic games and of course horse racing and greyhound racing. They also offer novelty bets such as betting the outcome of political elections or who will win a literary prize or TV contest.

The licensing of bookmakers in Ireland was introduced by the Betting Act 1926 and is strictly controlled. As mentioned in the introduction to this chapter, horse racing plays a significant part in betting in Ireland and the Totalisator Act 1929 introduced the totalisator or tote to allow 'pool betting' at racecourses and greyhound tracks (see further below). These forms of betting have been regulated and their proceeds used to enhance and grow the horse and greyhound racing industries. Levies on (on-course) betting turnover are diverted to the Government coffers for the upkeep of race and greyhound tracks and to increase the prize money.

Horse Racing Ireland and the Irish Greyhound Board are responsible for the control of horse and greyhound racing respectively (see further below).

The law in relation to betting is contained in the Betting Act 1931 (the '1931 Act') which repealed the Betting Act 1926. It has been amended and supplemented by various statutory instruments, the Horse and Greyhound Racing Act 2001 and by various Finance Acts over the years.

27.4.1 Bookmaker Regulations

It should be noted that while gaming falls within the portfolio of the Department of Justice, Equality and Law Reform, betting legislation and the duty collected therefrom falls under the control of the Department of Finance.

There are approximately 1,170 bookmakers' offices in Ireland. Under Section 7 of the 1931 Act, in order to carry on business as a bookmaker, a bookmaker's licence must be obtained from the Revenue Commissioners by completing the relevant application form (set out in the Betting Act (Revenue Forms) Regulations 2007). An annual excise duty of €250 is payable. All Irish resident bookmakers must obtain a certificate of personal fitness annually from An Garda Síochána (Irish police) before applying for their licence and a tax clearance certificate.

Non-residents must obtain a certificate of personal fitness from the Minister for Justice, Equality and Law Reform. The Minister for Justice, Equality and Law Reform has absolute discretion to grant a non-resident applicant a certificate or to refuse an application on any ground without stating that ground.[16] A certificate of personal fitness to hold a betting licence under the 1931 Act may be issued to a natural person although that person is acting as an agent for a company and will hold the betting licence on its behalf (*McDonnell v Reid* [*1987*] *IR 51*).

Bookmakers' premises (which excludes on-course bookmakers who do not require a premises license to operate) are subject to an excise duty of €380, must be certified as suitable and are listed in the Revenue Commissioners' register of bookmaking offices. Section 16 of the 1931 Act allows the Minister for Justice, Equality and Law Reform to revoke any bookmaker's licence issued under the 1931 Act.

Both applications (for the licence and the premises) must be signed by two peace commissioners/solicitors. The bookmaker must also publish notices in two local newspapers of his intentions. If the Superintendent of An Garda Síochána rejects either application (or both) the applicant has the right to appeal that decision to the District Court. When the bookmaker has received both certificates (certificate of personal fitness for the licence and for a certificate of suitability of premises for the betting shop), he must apply within 21 days to the Revenue Commissioners for a bookmaker's licence and to have the premises registered.

The bookmaker's licence and registration of premises must be renewed annually on 1 December. Reinstatement of a licence after de-registration is subject to the payment of a fee of €2,000.

It may be of interest to note that it is illegal for a bookmaker to write, print, publish or knowingly circulate any advertisement, circular or coupon advocating or inviting betting on football games or to procure someone else to do so, unless the advertisements/circulars/coupons are distributed by the bookmaker in its premises which is registered under the 1931 Act.[17]

[16] Section 5 of the 1931 Act.

[17] Section 31 of the 1931 Act.

27.4.2 Betting Duty

The betting duty payable by bookmakers on most bets has been increased from 1 to 2% with effect from 1 May 2009 by virtue of Section 53 of the Finance (No. 2) Act 2008 which amends Section 67 of the Finance Act 2002 (as amended by the Finance Act 2006). It is interesting to note that Section 53 of the Finance (No. 2) Act 2008 also inserts a new provision in Section 67 of the Finance Act 2002 (as amended).

'For the avoidance of doubt, betting duty imposed by subsection (1) is chargeable on all bets placed by a person with a bookmaker at the bookmaker's registered premises, irrespective of the means by which a bet is placed.'

This means that the duty will be payable once the bet is placed at the bookmaker's registered, regardless of how it is placed. The exchange between the Minister for Finance Brian Lenihan and other TDs (members of parliament) during discussions about this provision indicate that it was inserted as an anti-avoidance measure to ensure that betting duty was imposed on all bets which are placed at a bookmaker's premises, regardless of how they are placed. It appears that some bookmakers had intended to install machines in their premises which would have allowed punters to bet online with an offshore operator and thereby avoid betting duty on the basis that the bet 'took place' offshore. The 2008 Gaming Report recommended that telephone and online betting should be taxed and on the basis of recent comments, it appears that the Minister for Finance is also of this view. He indicated a desire to broaden the tax base in respect of gaming while also expressing the fear that taxing online and telephone betting companies who provide jobs in Ireland might lead to the jobs being exported elsewhere.

In response to this anti-avoidance measure, bookmakers who have operations located in Ireland (Paddy Power and Boylesports) have indicated that it may no longer be feasible to run their telephone and internet betting operations from Ireland.

A bookmaker is prohibited from collecting this betting duty from bettors since 1 July 2006,[18] but the betting duty payable is allowed as a deduction in computing the amount of profits or losses of a bookmaking business for income tax or corporation tax purposes. This has resulted in customers not having to pay tax whether they place bets in a shop, over the phone or online.

A recent report from Davy Stockbrokers showed that an independent betting shop with a turnover of €2.6 million, operating on the basis of a profit margin of 2.5%, would have a total tax bill of €60,125 on profits of €65,000.

Part 2 Chap. 1 of the Finance Act 2002 consolidated and modernised laws on betting duty and Section 68 thereof exempts the following bets from betting duty:

[18] Before July 2006, the majority of Irish bookmakers absorbed the levy themselves and did not pass it on to customers. This was easier for larger bookmaking firms to do and some smaller firms could not compete and were forced to close.

1. Bets placed on-course during and at a horse racing meeting**.** Betting duty is not chargeable on bets that are entered into during and at a race meeting held at an authorised racecourse (within the meaning of the Irish Horseracing Industry Act 1994) and are in respect of one or more events taking place at the meeting, or at a place other than the meeting. In other words an on-course bookmaker based at the Curragh will not pay a levy on any bet placed at the course, even if the bet is placed on a race at Cheltenham. This exemption does not apply to bets entered into by any means of telecommunications.
2. Bets placed on-course during and at a greyhound meeting. Betting duty is not chargeable on bets that are entered into during a meeting at which a series of greyhound races is held, and at the place where the meeting is held, and are in respect of more than one event taking place at the meeting or at a place other than the meeting. Again, this exemption does not apply to bets entered into by any means of telecommunications.
3. Tote bets accepted in a bookmaker's licensed premises. Betting duty is not chargeable on tote bets that are accepted in registered premises for and on behalf of Horse Racing Ireland or the Irish Greyhound Board or a subsidiary (within the meaning of Section 2 of the Horse and Greyhound Racing Act 2001) of either body operating under a licence granted under the Totalisator Act 1929.

However, it is important to point out that bookmakers falling within these exemptions are subject to other levies (see 'Horse Racing Ireland' and 'Irish Greyhound Board' below).

In general, bets which are subject to betting duty and on-course bets at horse/greyhound races are exempt from value added tax (VAT). All other bets are liable to VAT at 21%.

27.4.3 Age Restrictions

All forms of gambling are subject to age restrictions. The age limit for the purchase of National Lottery tickets is 18. This also applies to betting with bookmakers, either in betting shops or on-course. Licensed gaming premises, however, are only restricted to persons of 16 years or over. The Totalisator Act 1929 does not set out any age restrictions on those betting on the tote at racecourses and greyhound tracks.

27.4.4 Horse Racing Ireland

Horse Racing Ireland was established by the Horse and Greyhound Racing Act 2001 to promote and develop horse racing in Ireland. It replaced the Irish

Horseracing Authority which was established under the Irish Horseracing Industry Act 1994, which in turn had replaced the old Racing Board. One of Horse Racing Ireland's primary functions is to control the operation of authorised bookmakers and the operation of the tote at race meetings. Bookmakers at racecourses must have a State betting licence before applying to Horse Racing Ireland for an on-course betting permit, which currently costs €555 per annum and runs from 1 March each year. The turnover charge generated at each racecourse, currently levied at 0.5% on all bets wagered on the races at that venue and 1% on all other bets wagered, must be paid by bookmakers to Horse Racing Ireland monthly. In October 2004 a mandatory Code of Practice of Bookmakers at Authorised Racecourses was introduced.

Horse Racing Ireland has three divisions:

- Racecourse Division which operates a number of racecourses
- Tote Ireland which operates the tote at all Irish racecourses including a credit betting service and a betting web site and
- Irish Thoroughbred Marketing.

27.4.5 Tote Ireland

Tote Ireland operates all Tote betting on horse racing in Ireland and offers Tote betting on UK horse racing tracks. The Tote operates in the following way: all the stakes on a race are pooled together; a deduction is made to cover costs and the Tote's contribution to racing and the remainder of the pool is divided by the number of winning bets to give the Tote dividend, namely, the return to the winners. In other words, tote customers are betting against one another, whereas in bookmaking, they bet against the bookmaker. Tote odds may fluctuate according to the pattern of betting and the amount of money staked on each horse. All profits made by Tote Ireland are used to promote Irish horse racing.

27.4.6 Irish Greyhound Board

The Irish Greyhound Board (Bord na gCon) established under the Greyhound Industry Act 1958 is a commercial semi-State body which is responsible for the development of the greyhound industry and regulates all aspects of greyhound racing including the licensing of the different tracks, the issuing of permits to officials, bookmakers, trainers and implementation of the rules of greyhound racing. A total of 17 tracks in Ireland are licensed, of which 9 are owned and controlled by BordnagCon.

The Irish Greyhound Board operates Tote facilities at all Irish greyhound tracks and applies an on-course levy on all bookmakers' betting. These levies together

with gate receipts allows the Board to supplement prize money, provide development loans and grants to greyhound tracks, to market the industry and to develop greyhound stadiums nationwide.

27.4.7 Funding of the Irish Racing Sector

The Horse and Greyhound Racing Act 2001 (the '2001 Act') provides the horse and greyhound racing sector with a level of investment related to the revenue from excise duty on off-course betting paid into the Exchequer in the preceding year, or the year 2000 increased by reference to the consumer price index, whichever is greater. These funds are paid into what is known as the Horse and Greyhound Racing Fund. Under the 2001 Act, 80 and 20% of the monies paid into the Horse and Greyhound Racing Fund are distributed to Horse Racing Ireland and Bord na gCon respectively. Funding allocated to the two bodies is not earmarked for a specific purpose and has been used over the years to increase the prize money levels, meet administration and regulatory costs alongside a major programme of capital investment. The 2008 Gaming Report recommends that, if casinos are to be licensed, Horse Racing Ireland and Bord na gCon, should be allowed to apply for such licences. One of the key challenges for the horse racing industry is maintaining the funding of Irish racing in light of potential regulatory reform and the potential opening up of the Irish gaming market.

The funding of Irish horse racing and greyhound racing through money gambled on these sports has been hugely successful for these sports and along with other measures[19] has led to Ireland being a world class operator, both in respect of the breeding of horses and the hosting (and winning) of races.

Other sports see the money which horse racing derives from gambling and want a slice of the action. The UK-based Sports Rights Owners Coalition is lobbying members of the European Parliament and the European Commission to create a 'right to bet.' In other words, event organisers want gambling operators to pay them for the right to allow betting on their matches/events. Sports governing bodies say that 'legislative initiatives should confirm that commercial exploitation through sports betting can only be undertaken with their consent and with a fair financial return to the sports movement for reinvestment in sports development initiatives.'

[19] There were also significant tax breaks in relation to the breeding of horses which are now being phased out.

27.4.8 Race Fixing/Betting Scandals

The laying of horses on betting exchanges by persons involved in the running of a horse has become a significant issue in the recent years.[20] Race-fixing or match-fixing is now recognised worldwide as a problem or a least a potential problem in a variety of sports. The internet allows wealthy betting syndicates from the far-east and elsewhere to bet on races and other sport events in Ireland and potentially seek to influence the outcome of sporting events.

Under the Horse and Greyhound Racing Act 2001, the Turf Club (which is a private rather than a public body, but which is given certain statutory functions under the 2001 Act) is given the function of providing 'Integrity Services for horseracing.' The definition of those 'integrity services' in the 2001 Act is as follows:

> those services at a racecourse provided at a race-fixture or related to the running of it which are operated by or on behalf of the Racing Regulatory Body for the purpose of enforcing discipline and ensuring that horses are run fairly and properly.[21]

Accordingly, the Turf Club (called the Racing Regulatory Body under the 2001 Act) must ensure that race fixing does not occur and that races are run properly and fairly. In 2006, the Turf Club concluded a Memorandum of Understanding with Betfair through which the Turf Club can make reasonable requests for specific betting information in the event of suspicious betting patterns on a race. Betfair also agreed to pay 10% of its gross profit on Irish horse racing directly to Horse Racing Ireland. A back-dated payment was also made covering the period 2003–2006. The 10% specifically relates to gross profit on all Irish racing trade, and not just that from Irish residents. The agreement is ostensibly voluntary, although in most other ways it will operate along the same lines as the levy payments that Betfair makes to the Horseracing Regulatory Authority in Britain.

The Football Association of Ireland (FAI) is the first governing body outside of racing to enter into a similar Memorandum of Understanding with Betfair (minus the payments). The League of Ireland is largely semi-professional, although there are some fully professional teams and players. It has been argued in some quarters that given that players in lower divisions can be earning small amounts such as €100 per week, single bets on the outcome of games in which they are involved may be tempting, although there is no suggestion that this actually occurs in practice. Previously, it was the case that only trebles and accumulators could be wagered on domestic football matches, but bets can now be placed on single matches.

In December 2008, a five-match ban was handed down by the FAI's independent disciplinary committee to St. Patrick's Athletic player, Gary Dempsey, for

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[20] Laying a horse means you are betting that it will not win the race. In other words you are acting as the bookmaker.

[21] Section 2 of the 1994 Act.

placing a €20 on Galway United to beat his team, coupled with a bet on an English team. He was injured at the time and did not take part in the game. He received the ban for breaching rule 100 of the FAI's rulebook which states that:

> Anyone who directly or indirectly bets, instructs someone to bet on their behalf, provides others with confidential information or enables another person to bet for that participants own benefit on a result, conduct or progress of a match or competition in which that person is participating or has control over the result, conduct or progress of a match or competition shall be subject to disciplinary sanctions.

The FAI Appeal Committee later reduced the ban to two matches.

In January 2010, John O'Gorman, an employee of trainer Charles Byrne, was 'warned off' for 4 months by the Turf Club for breaching a rule prohibiting the laying of an employer's horses on the betting exchanges.

More money is wagered on horse racing than most other sports and some argue that it is more susceptible to corruption. By its very nature, a horse can be made to lose a race by a jockey, but one participant in a team sport may not have a huge impact on the outcome of a game. Accordingly, in Ireland the Turf Club has imposed certain conditions on the participants in racing (jockeys, trainers, owners etc.) Such persons are licensed by the Turf Club to participate in racing and so the Turf Club has the appropriate jurisdiction to impose such conditions. There are also unlicensed persons over whom the Turf Club has no control and one of the key issues facing many sports governing bodies (particularly in racing) is how to uncover race fixing and other corrupt activities when they have no jurisdiction or control over such persons.

Negotiations between the Turf Club and the representative bodies of the licensed participants in racing are ongoing with regard to a licensing scheme which requires the participants to produce their mobile phone records and consent to the production of their records by their mobile phone operator in the event of suspicious betting patterns. At the time of going to print, no agreement had yet been reached.

It has been the experience in the UK and elsewhere, that despite signing up to such a clause, participants may nonetheless simply refuse to produce their mobile phone records and of course issues arise in the context of privacy law. Due to data protection legislation, which requires the 'data subject' to give their consent to the production of such records, mobile phone companies are often not willing to produce their customers' mobile phone records.

In some jurisdictions, an ingenious method has been devised to require the producing of mobile phone records of persons who are either not licensed by the relevant governing body or who are licensed but refuse to produce their phone records. A Norwich Pharmacal Order is an order which derives its name from the case of *Norwich Pharmacal v Commissioners of Customs and Excise* [*1974*] *AC 133 HL*. In this case it was held that a person who, although not actually involved in any wrongdoing, could be compelled to give discovery of certain information or documents so as to allow the applicant to institute proceedings against the appropriate defendants. A Norwich Pharmacal Order may allow a governing body

to successfully obtain the mobile phone records from the telecommunications company of a potential wrongdoer.

27.4.9 Online Betting and New Forms of Betting

The internet has had a huge impact on sports betting, as it has had on many other aspects of life. There is no legislative framework for licensing and controlling online betting from Ireland. Section 2 of the Betting Act 1931 prohibits an unlicensed person from acting as a bookmaker in the State. It is not however illegal under Irish law to offer bookmaking services to Irish residents from an overseas jurisdiction.[22] Therefore, many Irish firms of bookmakers have set up overseas subsidiaries to offer services from locations such as the Isle of Man. Alternatively, some firms have located their staff in Ireland, while the central management and control of the online gambling company is located in another jurisdiction. The main advantage is that they offer tax free or nominal tax betting. Online operators also offer 24/7 opening hours. The future of online betting and how it is taxed and regulated still remains very much unclear.[23]

Online punters are increasingly using betting exchanges such as Betfair and BETDAQ, which automatically match bets between different bettors and effectively cut out the bookmaker's traditional profit margin and allow punters to lay (or bet against) as well as back a player, team or horse. By only taking bets if they can find someone with an equal and opposite view, the exchange thereby ensures that for every bet placed it earns money—it charges commission to the winner.

There has been much debate over betting exchanges and some have argued that they allow a higher degree of insider trading and therefore manipulation of bettors. As bettors can 'lay' a bet and therefore act as the bookmaker, it would be possible for those with inside information about a team or horse to back that team or horse to lose. The anonymity of the internet is said to facilitate such insider trading, but the traditional bookmaker's office does not exactly request for personal details before they take a bet. Those representing betting exchanges correctly argue that

[22] Section 33 of the 1931 Act made it illegal to be with any person outside of Ireland and arguably betting exchanges were technically illegal until this section was repealed by Section 18 of the Horseracing and Greyhound Industry Act 2001.

[23] In a time where there is declining tax revenue, many have argued for increased taxation on forms of betting which are currently not taxed. Many involved in the horse racing industry are of this view and argue that it would allow the horse racing industry to be more self-sufficient. Others, particularly betting exchange operators and those involved in the gaming industry say that there should be less regulation and less taxation, otherwise the jobs will be moved elsewhere. For example, DKM Consultants have recently published a report suggesting that liberalising the current legal position in relation to gambling would create new jobs and thereby create returns for the exchequer. The report was commissioned by, among others, the Gaming and Leisure Association of Ireland. It is entitled @Economic Assessment of a Regulated Casino Gaming Sector; Ireland 2008–2020' and is available at www.glai.ie.

their service is in fact more transparent and every bettor leaves a trail, making it easier to detect insider trading. As set out above under the heading Race Fixing/ Betting Scandals, Betfair has Memoranda of Understanding with many sports governing bodies through which they disclose irregular betting patterns to the governing bodies. Indeed economic analysts have compared insider trading in betting shops with insider trading on betting exchanges and found that the level of insider trading on sports betting exchanges is lower on exchanges and is much less than portrayed in the media.[24]

From a contractual point of view, betting exchanges are either independent intermediaries who match backers and layers, or they are agents of both parties to a betting exchange transaction who in turn, are the principals to the betting contract. In the UK, betting exchanges are treated in the same manner as traditional bookmakers and are regulated under the Gambling Act 2005.[25] As highlighted above, the Irish legislation in this area is outdated and betting exchanges are outside the scope of the 1931 Act as technically, the bet takes place offshore.

However, it can be argued that there are other characteristics which make betting exchanges different from traditional bookmakers. Punters, some of whom it must be remembered, act as bookmakers on exchanges, escape both taxation and regulation. Why should a bookmaker in one context be regulated and required to pay taxes, but another may not? Indeed on-course bookmakers are themselves permitted to use betting exchanges to lay bets.

What about spread betting? Spread betting is betting where the pay-off is based on the accuracy of the bet, rather than the usual win or lose outcome. The UK Gambling Act 2005 excludes spread betting.[26] Needless to say the Irish legislation long pre-dates the invention of spread betting by London stockbrokers. The UK and Ireland are the only jurisdictions in the EU where spread betting is definitively tax free. Spread betting is riskier for bettors than other forms of gambling, as the losses can be huge. Two different regimes govern financial and sports spread betting. The Markets in Financial Instruments Directive (MiFID) came into force in November 2007 and firms which offer spread betting on financial instruments (e.g. shares or bonds) must comply with the terms of MiFID. Sports spread betting however, falls outside the scope of MiFID. Nonetheless, sports spread betting firms in the UK must be authorised by the Financial Services Authority.[27] In Ireland however, sports spread betting web sites are not subject to regulation by

[24] Michael A. Smith et al., "Market Efficiency in Person-to-Person Betting" (2003) 76 Economica 673 at pp. 682–684.

[25] Section 13 of the Gambling Act 2005.

[26] Section 10 of the Gambling Act 2005.

[27] The UK case of City Index v Leslie ([1991] All ER 180) commented that sports spread betting should be treated as ordinary wagering and should therefore, unlike financial spread betting, be unenforceable. This *obiter dictum* suggestion was never implemented and UK sports spread betting firms are thus still subject to a strict regulatory regime and regulation by the financial regulator. In Ireland such a regime does not exist.

the Financial Regulator.[28] It is outside the scope of this chapter to detail MiFID requirements regarding the regulation of financial spread betting, but suffice it to say that the key concern under MiFID is that customers understand the significant risks involved in spread betting.

As Irish legislation in this area is so outdated, betting operators often end up having to use complex structures. For example, non-gaming aspects of the operation may take place in Ireland through intra group arrangements, but the internet server is located offshore in the jurisdiction in which it is licensed. These structures have not been tested in the Irish courts.

It does not appear to be illegal to advertise online tax free betting services from outside Ireland, as online betting is unregulated. There are increasing concerns regarding the level of advertising by online gaming operators based offshore. Online operators who advertise in Ireland should consider the relevant provisions of Irish advertising laws and the Advertising Standards Authority for Ireland's Code of Standards for Advertising, Promotional and Direct Marketing which, although a voluntary code, is followed by the advertising industry in Ireland and covers internet advertising. These cover any advertisements aimed at Irish consumers or published in Ireland.

Most interested parties in Ireland agree that the current legislation does not adequately address online gambling. Most also believe that the proper regulation of online gambling here could provide significant tax revenue and jobs, yet legislative reform appears to be particularly slow.

Internationally, commentators say that there is an international laissez faire attitude to online gambling. Gambling sites that take money but fail to pay out on winnings are said to account for about 20% of all internet fraud annually and yet there is no concerted international action to counter this. This has led to calls for greater regulation in the area.

27.4.10 Fixed Odds Betting Terminals

In recent years, restrictions governing bookmakers' premises have eased. The showing of live racing is now permitted and opening hours have been extended. Fixed odds betting terminals (FOBT(s)) have been a regular feature in UK licensed betting offices since the late 1990s. A FOBT consists of a touch screen and/or button functionality terminal which displays particular events (for example, virtual horse racing and roulette). The events represented on the screen or terminals are the visual expression of the results of automated draws from a random number generator, which determines the outcome of the event. Unlike traditional gaming machines, where the results are predetermined on-site, the events on the FOBT are not predetermined and the random number generator is located off-site.

[28] Register of Investment Firms (MiFID) http://registers.financialregulator.ie/DownloadsPage.aspx.

Essentially, the operator offers bets to customers on the outcome of the events shown on the terminal at a fixed rate of return. The customer can place bets on the machine and watch the outcome of the virtual horse race or roulette on the terminal screen. FOBTs can be configured to run roulette, cards and many other games, as well as facilitating online sports betting.

FOBTs are not legal in Ireland and there is a lot of speculation as to whether they may be introduced into licensed betting offices (or indeed private members clubs/casinos) in Ireland. Bookmakers have indicated that they will not introduce FOBTs to their shops if and until FOBTs are made explicitly legal under the revised legislation. However, the 2008 Gaming Report recommends that FOBTs should not be legalised:

> The prospect of FOBTs in each bookmaker's office, even if limited in number to a maximum of four per office (as in Great Britain), has potentially severe repercussions in terms of problem gambling as can be seen from studies in numerous other jurisdictions where an uncontrolled proliferation of gaming machines was allowed.

27.4.11 EU Law and the Provision of Sports Betting Services

As Ireland is a member of the EU, any Irish legislation governing betting must also be considered from an EU perspective. Neither the Treaty of Rome (EC Treaty) nor the treaties on which the Single Market is based contain any reference to gambling or betting.

The freedom of establishment in Article 43 of the EC Treaty and the freedom to provide cross border services in Article 49, are two of the 'fundamental freedoms' which are central to the functioning of the EU Internal Market. However, in all EU member states gambling, lotteries and betting are subject to regulations aimed at safeguarding public interest objectives. While pursuing broadly similar aims national laws vary considerably and often lead to barriers to the freedom to provide services and the freedom of establishment that are arguably incompatible with Community law.

Twenty Member States currently allow online gambling, whereas seven have prohibited it. Thirteen Member States have, what one might term, a liberalised market, whereas six have state-owned monopolies. In reality, this is the reason why online gambling is such a sensitive subject at the European level.

In *Gambelli*, the European Court of Justice (ECJ) considered a question on the interpretation of Articles 43 and 49 of the EC Treaty, which had been raised in criminal proceedings brought against certain individuals accused of having unlawfully organised clandestine bets and of being the owners of centres carrying on the activity of collecting and transmitting betting data contrary to Italian law (Case C-243/01 Tribunale di Ascoli Piceno v Piergiorgio Gambelli and Others). The ECJ stated that any restrictions which seek to protect general interest objectives, such as the protection of consumers, must be 'consistent and systematic' in how they seek to limit betting activities. A Member State cannot invoke the need

to restrict its citizens' access to betting services if at the same time it encourages them to participate in state lotteries, games of chance or betting which benefit the state's finances. For example, on 27 June 2007 the European Commission took action to put an end to obstacles to the free movement of sports betting services in France, Greece and Sweden. The Commission considered that the restrictions in question are not compatible with existing EU law and that the measures taken by these member states to restrict the free movement of sports betting services have not been shown to be necessary, proportionate and non-discriminatory.

The *Gambelli* decision built on the court's previous decisions in *Schindler* (*Case C-275/92*), *Läärä* (*Case C-124/97*) and *Zenatti* (*Case C-67/98*) where it accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming.

The guidance set out in the *Gambelli* case (which was reinforced by the ECJ again recently in *Joined Cases Massimiliano Placanica* (*Case C-338/04*), *Christian Palazzese* (*Case C-359/04*) *and Angelo Sorricchio* (*Case C-360/04*)) has however led to much confusion as the national courts of various member states have interpreted the public interest grounds set out by the ECJ very differently.

Commentators have argued that the case of British Horseracing Board v William Hill[29] has shifted the balance of power to bookmakers and racecourses and away from sports governing bodies. The *sui generis* database right was limited by this case and individual racecourses are now able to make their own deals for the sale of pre-race data.

The European Parliament has recently rejected the creation of a single EU market for online gambling, leaving the role of regulating gambling with individual Member States. The European Parliament's Internal Market and Consumer Protection Committee considered a draft report on the integrity of online gambling. Although the report is not binding on EU Commission activities, it has re-ignited the debate regarding online gambling in Europe. The report put forward the view that Member States have a legitimate interest in regulating individual national gambling markets in order to protect consumers and it calls on the Commission to clarify the competency of Member States and the EU in the area of online gambling. Currently, the EU Commission has no competency in the area of gambling, which currently lies with individual Member States. However, the growth of cross border online gambling has led for calls for the EU to tackle the issue.

27.5 Conclusion

The existing legislative framework in Ireland is a patchwork of regulations dating back to 1926. It badly needs to be modernised and updated in light of technological advances and the huge growth in online betting. In particular any new legislation

[29] Case C-203/02 found at [2004] ECR I-10415.

needs to properly address the reality of online sports betting, despite the difficulties in effectively enforcing the law in the online environment. A transparent and well-regulated gambling sector would also help reduce and prevent betting scandals and could even bring additional employment to Ireland as a betting hub.

Chapter 28
Betting In Sports Events. Gambling In Italy

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28.1 Introduction

The purpose of this study is to conduct an analysis on the betting games' sector. To begin with, this article shall underline the dominant role of the Italian State in the past years and how the state is slowly losing its grip and role in relation to gambling in sports as a result of the increasing flexibilities of the Internet. We shall thereafter highlight the key economic consequences produced by betting on all the parties involved in these activities.

How can we define betting in sporting events? How can we distinguish legal betting from illegal gambling? How can we combine the needs of the State with its desire to exercise and manage the betting system with the globalisation of the market?

We shall try to give some answers to these questions through conducting a study on the Italian "grants system," and how this system has been modified over the years, from 1948 up to December 2008. The definition of "gambling" has been modified too; a strict definition of gambling can be found from the Italian Criminal Code and in a particular Act (L. n.401/1989) which is directed at preserving the State's control and monopoly over gambling laws despite rulings from the European Court of Justice to the effect that the Italian national laws are contrary to the European principles on freedom of establishment and freedom of providing services.

The second part of our study shall focus on the AAMS, its structure, its functions, the evolution of its role and its aims for the future. At the same time, we shall distinguish between sporting and non-sporting-related betting events.[1]

28.2 The Definition of Gambling as a Criminal Offence

The definition of gambling can be found in the "Study of Gambling Services in the Internal Market of the European Union" of 2006, wherein gambling has been defined as "any service, including any information society service, which involves wagering a stake with a monetary value in games of chance, including lotteries and betting transactions."[2]

This definition has more or less been adopted in the same breath in Article 721 of the Italian Criminal Code, which aims to punish gambling activities which are

[1] All the relevant information has been taken from the Italian AAMS' annuary (website http://www.aams.it/news/site.php?page=2006011215265996).

[2] The above described definition has been taken from Filpo 2007, 1016.

conducted in a public area and/or private clubs. Article 721 states that: "Gambling is playing games for a personal profit when the results are completely based on uncertain events."

Over the previous years, Italian doctrine[3] has been established and evolved for purposes of distinguishing gambling from simple betting games. The above mentioned list is based on the two criteria described under Article 721, these criteria being (i) the personal profit and (ii) the results coming from uncertain events. On this basis, gambling includes: Bingo, black jack, lottery, roulette, slot machines and video poker. Simple betting includes: betting on sports events, betting on horse races, poker, bridge and flipper. It is important to underline that the players' personal abilities to contribute in the game being played fall under the second group.[4]

28.2.1 Legal Gambling

As earlier highlighted, Article 718 of the Italian criminal code punishes gambling activities that take place in public and/or private clubs. However it is important to note that gambling can sometimes be legal, and especially in situations where there is public authorisation. Public authorisations serve various purposes; for instance, through the grant coming from the State, the possibility of injecting revenues is made higher. We shall revisit this discussion during our study on the evolution of the "grant system" in Italy.

28.3 Act No. 401/1989 and the European Reaction in the "Gambelli" and "Placanica" Cases

As earlier seen, betting on sports events does not amount to illegal gambling. However, Italian judges have on some occasions tried to subject such types of betting to the rules of Article 718. A classic example involves "Tontero," which is an unauthorised betting activity in Italy, whose authors faced criminal consequences. However, the decision of the Italian judges in the "Tonrero" case did not root out the problems related to betting and gaming. This prompted the Italian law makers to deliver a new Act addressing the issue of the illegal exercise of betting activities in sports events.[5]

Article 4 of the Act No. 401/1989 provides criminal sanctions in cases of:

- Illegal exercise of the game "lotto" and the other games controlled by the State or granter societies;

[3] See Pioletti 1970, p. 30.

[4] See Manzini 1948, X, 868.

[5] See Beltrani 1999, p. 140.

- Illegal exercises of the games controlled by CONI and/or UNIRE;
- Illegal exercises of other examples of betting in relation to human beings and/or animals.

Article 4, co. 4 bis, imposes criminal sanctions on anyone who exercises, controls and manages betting without the public and specific authorisation whether the said person is Italian or otherwise. In essence, this law places betting games under the control and direction of the Italian State.

For this specific reason, Italian legislation has been heavily criticized by the European Court of Justice, which has on occasion declared that it violates Articles 43 EC and 49 EC (the "Gambelli"[6] and "Placanica"[7] judgements). In the eyes of the European Court of Justice, the criminal penalties imposed by the Italian laws and the overall restrictions directed towards the foreign betting agencies, go against the freedom of establishment and provision of services. According to the ECJ, the Italian state may control betting activities but it cannot at the same time retain a monopoly whereby it is the only institution that provides and manages betting games.

On the same breath and direction the award No. 284/2007, delivered by the Italian Constitutional Court, states that Italian judges shall not apply the national legislation for the reasons mentioned hereinabove.[8]

28.3.1 The Piergiorgio Gambelli Case

By order dated March 30, 2001, issued by the European Court of Justice on June 22, 2001, the Tribunale di Ascoli Piceno referred an issue for the interpretation of Articles 43 and 49 EC to the Court for a preliminary ruling under Article 234 EC.

This issue was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants, who were accused of having illegally organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State. In particular, the Public Prosecutor and the investigating judge at the Tribunale di Fermo established the existence of a complex organization of Italian agencies linked through the Internet to the English bookmaker Stanley International Betting Ltd (Stanley), established in Liverpool, and to which company Gambelli and the other defendants belonged. On this basis, they were accused of having collaborated in Italy with an overseas bookmaker in the activity of

[6] ECJ, Judgment of 6 November 2003, Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, ECR 2003, I-13031; see Zagato 2005, p. 206.

[7] ECJ, Judgment of 6 March 2007, Joined cases C-338/04, C-359/04 and C-360/04, Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04), ECR 2007, I-1891.

[8] See Montagna 2007, 3653.

collecting bets which is normally reserved by law to the State, thereby infringing Law n. 401/1989.

Such an activity, in the eyes of Italian legislation, was considered as being incompatible with the monopoly on sporting bets that is managed by the CONI (Italian National Olympic Committee) and for this reason it could constitute a criminal offence under Article 4 of Law n. 401/1989.

It is important to underline that the Court has been called to interpret the compatibility of the Italian criminal legislation regarding betting games with the European law.

In the eyes of the European Court, the Italian legislation was held to constitute a restriction on the freedom of establishment, which includes restrictions on the setting up of agencies, branches or subsidiaries, prohibited by Article 43 EC. In particular, the court emphasised that "where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organization of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment."[9]

Furthermore, the Italian legislation constitutes a restriction on the freedom to provide services. Article 49 EC prohibits restriction on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than the State of the person for whom the services are intended. However, Article 49 EC "covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established."[10]

In light of these considerations, the Court stated that:

> National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively, which, to be justified, must be based on imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it and be applied without discrimination. In that connection, it is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.
>
> In particular, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. Furthermore, where a criminal penalty was imposed on any person who from his home in a Member State connects by internet to a bookmaker established in

[9] ECJ, C-243/01 para 46.

[10] See Case C-384/93 Alpine Investments, para 22.

another Member State the national court must consider whether this constitutes a disproportionate penalty.

This position had been previously confirmed in 2007 in another criminal case, the ''Placanica" judgement, where the Italian legislation was declared beyond any doubt as being incompatible with the European principles on freedom of establishment and freedom to provide services within the Community.

28.3.2 The Massimiliano Placanica Case

This issue arose as a result of the decision of Stanley Leisure plc, one of the biggest bookmakers in the UK to engage in the collection of bets through the use of Mr Placanica and Mr Sorriccio as their Data Transmission Centers (or agents) in Italy, because the Italian laws on tendering procedures prohibited companies such as Stanley Leisure plc from directly engaging in betting games in Italy as Stanley Leisure plc was part of a group that had been quoted on the Italian regulated markets.

The central issue in this case concerned whether Mr Placanica, Mr Palazzese and Mr Sorriccio had violated the Italian criminal laws,[11] in particular Article 4(4a) of law No. 401/89, by pursuing the organized activity of collecting bets without possession of a licence or police authorisation[12] as required by Italian law.

The EC was called upon to decide whether these Italian laws were contrary to Articles 43 EC and 49.

The Court made specific reference to the ruling in Gambelli and reiterated that where national legislation prohibits, on the pain of criminal penalties, the pursuit of activities in the betting and gaming sector, without a licence or police authorisation issued by the state, then such a law constitutes a restriction on the freedom of establishment and the freedom to provide services.

However, it said that where national laws impose restrictive measures on the ability to engage in the collection of bets, such restrictions must be assessed on a case-by-case basis in order to determine whether they are suitable for purposes of achieving the objective(s) invoked by the member state concerned and whether they do not go beyond what is necessary in order to achieve these objectives.[13]

The Court reiterated the need to distinguish on one hand, between the objective of reducing gambling opportunities insofar as games of chance are permitted, and on the other hand, the objective of combating crime by making the operators who were active in the gaming sector subject to control and channelling the activities of betting and gaming. See para 52.

In applying this criteria to the case beforehand, the court went on to find on para 54 of its ruling that "… in the present case, according to the case law of the 'Corte

[11] This law provided for imprisonment for a period of between 6 months and 3 years.

[12] Article 88 if the Italian Royal Decree required No 773 required applications to be filed before the Italian police for licensing and authorisation to carry out betting activities.

[13] Paragraph 49 of the decision.

suprema di cassazione' (the Italian Supreme Court) that the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue, and that no justification for the Italian legislation is to be found in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling."

The Court referred to the decision of the Tribunale di Teramo in cases C-359/04 and C-360/04, which expressly excluded companies such as the defendants whose individual shareholders could not be easily identified from the tender licensing process and reiterated on para 64 that "Articles 43 EC and 49 EC must therefore be interpreted as precluding national legislation such as that at issue in the main proceedings, which excludes—and, moreover, continues to exclude—from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets."

In relation to the need to obtain police authorisation, the court stated that member states cannot apply criminal penalties for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of Community.[14] It came to the conclusion that the defendants "had no way of being able to obtain the licences or police authorisation required under Italian legislation because, contrary to Community law, Italy makes the grant of police authorisations subject to possession of a licence and, at the time of the last tender procedure in the case which is the subject of the main proceedings, had refused to award licences to companies quoted on the regulated markets. In consequence, Italy cannot apply criminal penalties to persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation."[15]

The precedent issued by this court was to the effect that:

- Articles 43 EC and 49 EC had to be interpreted as precluding national legislation which excludes—and, moreover, continues to exclude—from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.
- Articles 43 EC and 49 EC preclude national legislation, which impose criminal penalties on persons such for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where such persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to them.

[14] Reference was made to Case 5/83 Rienks [1983] ECR 4233, paras 10 and 11.

[15] See para 70 of the decision.

28.4 History and features of the Italian "Granting System"

The expression "granting system" means the system through which the AAMS grants third parties the licence to control activities and purposes related to betting on sports event or not.

The granting system was initiated in 1948,[16] and has undergone several amendments and modifications over the years. The main important feature of the system regards AAMS and its functional purposes. AAMS can in particular sub-lease the licence to a third party, or a private society, thereby enabling this third party to exercise and control a particular type of betting. This grant feature relates to sports events and other different games, such as numbers-based games.

This system, together with the limitations and restrictions coming from the criminal legislation (Act n. 401/1989), ensured that the state monopoly on betting games was maintained until the ECJ decided to intervene. In order to observe and respect the European Community law, as well as the ECJ case law, the grant system was amended in detail in 2006.

The legal relationships between AAMS and the society or party receiving the grant then became defined in depth in Act D.L. No. 223/2006 (called the "Decreto Bersani"). Under this Act, the parties (AAMS and the private society) are specifically required to stipulate a legal model contract, wherein the rights and obligations between them are established. The new "grant system" is characterised by more betting agencies and less obligations and overall restrictions on who can organise and manage the betting games; less control and involvement from the State.[17] Finally, we can say that the new granting system is directed to observe, respect and implement the European needs and solutions[18] as put forward in the "Gambelli" and "Placanica" rulings.

28.4.1 The New Rules on the "Granting System"

The introduction of the "new granting system" in 2006 has not solved all the legal problems Italy faces with the European Court of Justices' decisions on betting. The D.L. No. 149/2008 contains rules aimed at implementing the statements and decisions from the ECJ. In particular, it maintains the same concession for the game called "Lotto"; establishes the procedural and economic rules for the selection of the new granter of betting on horse races; creates a money fund for CONI and UNIRE in order to improve the quality and health of competitors; and

[16] Before the institution of the "granting system" the Italian State managed all the betting games as a monopolist.

[17] See Corrado 2003, p. 97.

[18] In that direction Ruotolo 2007, p. 1399.

establishes contractual and economic rules for the granting of betting machines such as video poker, etc.

28.5 The Administrative Autonomy of the State—AAMS

The Administrative autonomy of the State—AAMS—manages the activities related to the regulation and control of the entire gaming market. AAMS was gradually assigned these functions of control as legislation in this sector continued to develop. At the same time, the AAMS carried on maintaining some of its more traditional responsibilities in the tobacco manufacturing sector.[19]

The participation of the Italian Government in both the gaming and tobacco manufacturing sectors played a big role in maintaining a balance between the collection of tax revenues and the safeguarding of other important activities of public interest like consumer protection and the fight against illegal gaming. Through its role in promoting business cooperation and networking, AAMS has managed to create a significant pool of wealth and employment in Italy as a whole.

The key role played by AAM in the gaming sphere involves the drafting of guidelines for purposes of ensuring the dynamic and rational development of gaming. It also ensures that all the concessions licenced by it act in accordance with the rules and regulations. AAMS continues to compare and contrast up and coming illegal gaming practises in today's world, and takes the maximum collection of revenues collected by the Government in this sector.

AAMS is in charge of collecting tax and excise duties in the tobacco industry, whose distribution, tariff and retail price it regulates. In addition to this, the AAMS carries out frequent operations to detect any tax evasions. Added to this is the responsibility to perform technical tests on the tobacco to ensure that its quality is in compliance with the Italian and EU standards and regulations.

Despite the State involving itself in this sector, public and private entities have in no way been exempted from taking part as well. The major objective that the State targets by participating in the AAMS is to ensure that the market is increasingly open and competitive and compliant with the regulations.[20] This has been achieved through joint cooperation between public and private sectors, which has made it possible to guarantee a high quality offering for consumers.

AAMS's role in the gaming sphere has continued to expand more so through its newly formed operational model of the public gaming market. Under this model, the State continues to control and manage the infrastructural network while assigning the rights to market the games to a variety of subjects who compete

[19] The relevant information and data concerning the AAMS as reported in the present articles has been taken from the AAMS website, www.aams.it (visited on 11 February 2009).

[20] See De Feo.

among themselves in delivering high-quality services, thereby ensuring a safe and fully competitive market.

In essence, Italy can only triumph in its fight against illegal gaming if it adopts the twofold action plan of compliance and repression, which the AAMS has recently put into place. Through this action plan of compliance and repression, AAMS has directed its efforts towards taking preventive action through extending and improving its offers to the market with a view to put it as close as possible in line with the hopes and expectations of consumers and the general public. At the same time AAMS has not relinquished its commitment to take swift and effective repressive measures.

It is against this background that the initiative launched in cooperation with the Italian Ministry of Communications regulates the technical procedures directed at blocking access to sites that offer gaming services without any concession or authorisation.

Besides prohibiting the development of the illegal gaming market, the adoption of clearly focused repressive measures has played a big role in curbing the undesired effects of service black-outs that are not directly linked to the provision of illegal gaming solutions. In addition, the information contained on the redirecting affected the dissemination of information related to gaming laws and the institutional role of AAMS. Public and consumer awareness of gaming and related laws has therefore increased tremendously thanks to the initiatives of the AAMS.

28.6 Cultural Background

The AAMS has played a major role in the history of Italian legislation, not to mention the gaming industry.

28.6.1 Historical Background

AAMS is a creature of the economic system of state monopolies that were created to meet the publics' need for security, order and social safeguards, while filling a regulatory role meant to guarantee the use and the enjoyment of primary needs. State monopolies were initially developed by the Greeks, who applied this system to olive oil, salt, papyrus, fishing products, mines and banks. Italy established its first monopoly in the minting of coins in the 1st century, extending it to salt, cinnabars and mining products, as well as the services of heralds, barbers, cobblers and others, in the fourth century.

State and private monopolies (in the form of tendered concessions) then took over towards the middle age, minting of coins, in addition to producing and selling salt. Kings also distributed, at their discretion, monopoly-like privileges in the

sectors of production, purchases and sales. One major private monopoly that was established in Italy in the fifteenth century was set up in Florence by the Medici family to engage in alum exportation.

Between the end of the sixteenth century and the middle of the eighteenth, monopolies prospered more or less everywhere: the State monopolised tobacco products, gun powder, chemical products and other items of mass consumption.

In 1862, the Italian State placed a monopoly on the production and distribution of salt and tobacco products in order to maximize state revenues from these economic activities. Since then the state has managed its monopoly over tobacco with the help of subsidiary bodies.

The exclusive concessions on salt and the monopoly on quinine were if great assistance to the public, as this was exercised on a non-profit basis for social medical objectives. The monopoly on tobacco, on the other hand, has always been tied to changing social customs and to please the consumer, thereby making a noteworthy contribution to the satisfaction of the State's economic needs.

28.6.2 The Projects and Activities of AAMS

AAMS has forged its activities and identified itself through the history and culture outlined above as an institution that has played a central role in guaranteeing the production and distribution of goods and services in wide demand among the general public.

AAMS initially carried out its activities directly, by being solely responsible for the production of merchandise. It plays a slightly different role today; coordinating and controlling those services typical to affluent societies, i.e. Gaming activities.

AAMS has always shown a special ability to create value for Italy in line with the times. This role was seen during both post-industrial and industrial Italy, and while it may appear less evident at present, in the so-called post-industrial Italy, in large part due to the fact that the momentous changes dealt with by this Administration are still quite recent, there can be no denying that the AAMS has already modified its identity by focusing the majority of its energies on its new role as the regulator of the gaming market, while introducing significant new developments in its traditional operations involving monopoly goods. The social benefits produced new contributions that corroborate those that were traditionally provided by the AAMS and consist primarily of:

1. Fighting against illegal gaming, through supporting efforts to suppress it and through constantly improving the supply of public gaming activities;

2. Maintaining the trust of the general public and safeguarding the legitimate interests of consumers;
3. Regulating the gaming market;
4. Providing occasions for leisure time that act as diversions are compatible with broader interests of the individual and the general public.

28.6.3 Organization

We shall now assess the structure and composition of AAMS.

28.6.3.1 The Central Offices

The current organizational structure of AAMS was introduced in 2003, primarily in the sector of public gaming regulation.

The office of the Director General carries out the activities of directing and controlling, in accordance with the guidelines set out in the "General Directives for administration and management."

The Director General's Office is also responsible for the main institutional relations, external relations and issues related to news and broadcasting organisations, thereby ensuring liaison with the Minister's press office.

28.6.3.2 The Excise Duties Department

This department deals with the distribution of manufactured tobacco products. It is responsible for, among other things, granting administrative concessions in the manufactured tobacco sector and ensuring that smoking products comply with national regulations, the regulation of tax payments and the accounting of tax revenues.

Its organizational structure consists of a Director General's Office and four General Managerial Offices: the Strategic Department, the Gaming Department, the Excise Duties Department and the Department for the Organization and Management of Resources.

28.6.3.3 The Gaming Department

It supervises the organization and management of all games, oversees the management of gaming concessions, ensures that tax revenues are correct and regular and formulates directives and regulations. It also coordinates the procedures involved in granting new concessions by establishing guidelines in relation to their assignment and managing the relative public tenders.

28.6.3.4 The Department for the Organization and Management of Resources

This office manages the human, capital, logistical and IT resources, that are necessary to enable AAMS to carry out the role and tasks assigned to it. It is responsible for developing its IT system and its on line network. It defines the guidelines and procedures for managing its real estate, staff training, labour relations and collective bargaining negotiations.

28.7 Numbers-Based Games

28.7.1 Lotto and SuperEnalotto

Lotto is a popular, traditional and customary Italian game. It has the potential of developing and meeting the requirements of the changing habits and psychological motivations of Lotto players, despite its lengthy history. A number of innovations were recently introduced to it, including, automated extraction, focused extraction, the national draw ("ruota"), and the third weekly extraction, while another brand-new feature, Instant Lotto, was added in 2006.

SuperEnalotto is another game invented in 1997. It involves foretelling the first numbers extracted in the draws of Bari, Florence, Milan, Naples, Palermo and Rome. The first number extracted in the draw of Venice serves as the "joker" number.

Fabulous winnings have firmly entrenched SuperEnalotto in Italy's collective imagination, such as the amazing record of 72 million € set in 2005. Since 2006, the fans of SuperEnalotto have been presented with a brand-new logo, a new playing sheet, and a new optional, related game: SuperStar.

SuperStar is a new optional, tie-in game coupled with SuperEnalotto. A random number between one and ninety is generated by the terminal at the moment the wager is confirmed, the number becomes the winning number if it matches the first number drawn on the national Lotto draw.

28.7.2 Lottery

National lotteries are one of the oldest and most popular forms of traditional gaming in the world. They are associated with one or more historical, artistic or cultural events or other types of local initiatives, and combine the diversion of gaming activity with the promotion of our country's artistic and cultural resources. The most important lottery in Italy is the "Lotteria Italia," which has been held since the 1960s and has been given extensive media coverage. The draw for the winners is usually held on January 6 of each year.

In recent years, in line with changing lifestyles increasingly characterised by speed and immediacy, there has been a growing desire for immediate victory, regardless of the amount at stake. This led to the creation of instant lotteries and drawings, known in Italy in the famously known name of "Gratta e vinci" ("Scratch and Win"), a title that summarizes the mechanics of the game.

In 2003, they launched a third type of lottery. Tied in with the traditional lotteries, this new form of gaming utilises telephone communications.

28.7.3 Bingo

It involves the extraction of ninety numbers, and was introduced in Italy in 2001. It resembles the traditional "tombola" game played by Italian families from time immemorial. Bingo is played in specially equipped Bingo Halls that offer hospitality and entertainment services to promote friendly encounters and socialisation, thus making it a pleasant pastime.

One unique feature of Bingo, distinct from the other games, relates to the individual behavior of the participants and the distance, in terms of both space and time, between the moment when the game is played and the moment of the winnings. Since 2005, it has been possible to play Bingo through the creation of a single "virtual bingo hall" on a national level, making for extractions that produce sizeable prizes even in the smallest "real" halls.

28.8 Games Based on Sports and Horse Racing

This activity pools betting games based on forecasting sports results are time-honoured favourites in Italian popular culture, currently distributed through a vast and widespread network of betting points connected with the Totalisator, which registers all the wagers in real time and with the utmost security.

One such game goes by the name Totocalcio, which involves forecasting the outcomes of soccer matches (currently 124). From the moment it was introduced in 1946, the game has been a fixture for all Italians, even those with less enthusiasm for soccer and less gaming ability, thus giving it a privileged place in the country's collective imagination. Innovative elements have subsequently been introduced, including the Totogol game (in which the number of goals scored in each of the games listed on the betting slip must be forecasted), plus a new game, "9," coupled with Totocalcio.

The Totip pools game (based on horse races) is one of the oldest and most traditional games, still constituting a very well known brand. The Tris bet (in which the first three finishers of a race must be forecast) is a betting outlet game, played with a betting slip and aimed primarily at public affiliates, even though its widespread use and simplicity make it suitable for all players. In 2006,

further new competitions were added under the name of ''Ippica Nazionale" ("National Horse Racing").

In the past, bets were viewed as illegal gambling as the government placed greater attention on this practise. This paved the way for laws governing these activities, starting with betting on horses. Since 2002, all bets have been placed under the control of the AAMS.

Bets are placed on competitions involving Olympic sports (basketball, soccer, bicycle racing, downhill and cross-country skiing, tennis, sailing and volleyball), as well as motor sports (car and motorcycle racing), and horse races organized as part of the official programs of Italian and foreign racetracks.

There are traditionally two types of betting: totaliser-based and fixed rate. In the case of totaliser betting, "pots" of winnings are divided among those who have correctly forecast all the events being bet on. With fixed-rate bets on the other hand, the bettor is playing against the "bank" managed by concession holders, with the outcome depending on the results of individual events or of a sequence of linked events. Winners are paid an amount equal to the wager, multiplied by the fixed rate at the moment the bet was made.

Also enhancing these offers are the new betting methods that have recently been introduced on the scene: "live" bets on sports events, meaning that wagers can be laid "during" the competition until just before its conclusion (for example, up until the last lap in a motor racing event).

28.9 Gaming Machines

They originated in Italy from the 1900s onwards. In 2002, the Italian Parliament defined the ''legal" types of machines and methods of play, also regulating the possibility of winning small sums of money. Gaming machines that do not provide winnings in money can be divided into two different categories, respectively characterised by: the ability to receive an object as a prize (crane games, draws that require skill, etc.); and pure entertainment (video games and mechanical and electromechanical devices, such as billiards, table football, pinball, etc.).

The machines, known as "Newslot," are the only AWP machines authorised by the AAMS and are characterised for skill or entertainment elements combined with chance. The ongoing development of AWP machines is taking advantage of improvements in information and communications technologies in order to heighten the attraction of the machines while, at the same time, safeguarding the gamblers and the levels of revenue of legal operators. One of the most significant security features of the new machines is that they only function when connected to the AAMS computerized network, with any tampering leading to an automatic shutdown.

28.10 The Performance of the Gaming Market

The public gaming market recorded extremely positive results in 2006, confirming the effectiveness of the initiatives that were launched in 2003. This slowly popularised the gaming portfolio and the rationalisation of a sales network. The sector has reported a turnover of over 35.2 billion €. This is an increase of about 24% on 2005, and of 127% when compared to 2003.

At the same time, tax revenues from games have reached 6.7 billion € (+9% up from the 2005 revenues and +91.7% compared with the revenues recorded in 2003). This result becomes even more impressive considering the fact that the average rate of taxation on gaming has dropped from 28% in 2002, to 19.1% in 2006, and that the risk for the Treasury has decreased significantly owing on the one hand to the diversification of revenue sources (56% of the total turnover of this sector came from the Lotto in 2002), and on the other to the shift—for what concerns revenues—to games that have by their very nature more stable trends (the gaming machines) once they have fully established themselves on the market.

28.11 Conclusion

In general, the Italian State does have some form of control over the laws on betting in sports events, and through these laws (Article 4 of the Act No. 401/1989), impose criminal sanctions on persons who engage in betting activities without licences and police authorisations. But these regulations, as we have seen, have been ruled as being contrary to the EC laws on freedom of establishment and provision of services.

Through the AAMS, Italy is slowly streamlining its laws on betting and gambling in order to involve both the public and the private community in these practises without unnecessary or complicated legal restrictions.

With the increasing popularity, internet access and creation of new games in betting, it is only a matter of time before Italy, with the help of more tranquilized legislation, maximizes its income as a State from betting collections.

One important solution and recommendation for the progressive development of betting could be the creation of a "Betting Code," whose provisions combine the national, European and international law principles and jurisprudences.

A good example of a law with such principles and combinations is the English Gambling Act, which enshrines the European principles on freedom of establishment and freedom to provide services.

The current Italian legislation is entirely different from the previous provisions and has, through the "Decreto–Bersani," improved the possibilities for private companies to take over and manage sports betting through public tenders. This could more importantly create more competition and vibrate through the entire Italian betting and general economic market.

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Chapter 29
Sports Betting and the Law in Japan

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Contents

29.1 The Current Situation Concerning the Introduction of Sports Gambling (Soccer Betting) into Japan

With sports betting in Japan, the situation at present is that "Toto" (soccer betting) is the only form of gambling being promoted. Soccer betting commenced nationwide from the start of the 2001 J-League season, and is now in its 8th consecutive year of operation. Participants (gamblers) get the chance to personally predict the results of the J-League games. With tickets priced from just 100 yen

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per bet, it is both reasonably priced and convenient. Furthermore, the media coverage of the recently introduced 1 billion yen jackpot has resulted in ticket sales successfully passing the 60 billion yen mark in the jackpot's inaugural year.

However, after witnessing the successful start in soccer betting ticket sales, revenues since 2002 have been declining year after year. In fact, sales in 2006 were just 130 billion yen, falling to a quarter of the level of that reached in the inaugural year.[1] There has been much negative opinion expressed as to whether soccer betting should continue. Since September 2006, a new way to bet on soccer game results, called "Big" was established. This is where a computer predicts all the results randomly, and if the better gets a win and carry over (this is the situation when there is no better who correctly predicted all results, the prize money is then carried over for the next round of betting), the highest prize money that can be won is 6 billion yen.

Since its launch, Big has triggered new interest in Japanese soccer betting. In 2007, Big posted 50 billion yen in sales, and then went on to make history in 2008 (December's sale total is still to be counted) by achieving a figure of 90 billion by the end of November.

The objective of this type of Japanese soccer betting is to assist in the promotion of sport. However, on the other hand, there have been criminal laws introduced to regulate this area, in particular laws intended for the public management of gambling. Basically, the objective of these laws is not to divert the existing funds devoted to the promotion of sport, but to ensure that a new system can be brought forward to guarantee that such funds are managed appropriately. To raise capital for the above mentioned system special laws were brought into authorize public gambling, as gambling in general is prohibited by Japanese criminal law. Another reason behind the introduction of Toto was to provide funding for projects that the government itself could not supply.

Below, for the purpose of presenting a more detailed understanding of the Japanese soccer betting system, is an analysis of how the criminal law regulates gambling, or more specifically, the sale of betting tickets. There is also an examination of how gambling, particularly the system for betting ticket sales, is approved by special laws.

29.2 The Law System Governing Betting and the Lottery in Japan

Gambling, that is to say, the wagering of one's assets is akin to relying on the result of extrinsic circumstances.[2] Furthermore, the actual act of gambling is, in essence, putting other peoples' assets at risk. These ideas pose a threat to the

[1] Sports Promotion Subsidies and a Consideration Sports Betting Sales http://www.naash.go.jp/sinko/data.html (3 December 2008).

[2] Kimura 2004, p. 426.

custom upon which the prosperous Japanese economy is based, namely that of working hard to maintain a good livelihood. The criminal law system in Japan recognizes these concepts and that incidental to gambling comes the risk of theft and corruption in society. Therefore, strict regulations have been laid down to prevent and defend against such criminal activity.[3]

Private gambling and lotteries in Japan are basically prohibited by Chapter 2 Section 23 of the Fundamental Japanese Criminal Law. More specifically: Article 185 covers gambling; Article 186 covers habitual gambling, the creation of gambling groups, colluding to profit from gambling and gambling locations; and Article 187 covers the sale of lottery tickets.

Articles 185, 186 and 187 are now covered below:

First, Article 185—anyone caught gambling can be sentenced to either a small fine, or a penalty of up to 500,000 yen. However, this law is not only limited to people who gamble things for pleasure, it also regulates situations where two or more people together try to profit illicitly from influencing the outcome of a betting game. This law covers all types of items which are gambled (please note however, that items such as food, drink and tobacco, which are wagered for insignificant amounts are not criminalized under the Fundamental Japanese Criminal Law).

Secondly, Article 186—Provision (1)—habitual gamblers, if caught can be imprisoned for up to 3 years. Provision (2)—people who run gambling houses, form groups to plot gambling tactics or start betting rings, if caught, can be sentenced to between 3 months and 5 years in prison. Paragraph 1 of Article 186 covers the gambling situations stipulated in Article 185, but those of a more serious nature. Paragraph 2 of Article 186 covers situations where people, although not gambling personally, open gambling houses or become so called ''bookies".

Finally, Article 187—Provision (1)—people, who sell lottery tickets illicitly, if caught, can be sentenced to a maximum of two years in prison and/or a penalty of up to 1,500,000 yen. Provision (2)—people, who act as a broker (even they do not gain commissions) from illicit lottery ticket sales, if caught, can be subject to a maximum of 12 months in jail and/or a fine of up to 1 million yen. Provision (3)—this covers situations where people who have not committed offenses under provisions (1) and (2), but who have traded lottery tickets, can be given a small financial penalty and/or a fine of up to 200,000 yen. Paragraph 1 of Article 187 aims to prevent situations where people have attempted to influence the outcome of lotteries through issuing manipulated tickets, selling tickets or even actually drawing them in a lottery. Paragraph 2 of Article 187 aims to prevent cases where, although not selling or purchasing tickets directly, people act as brokers in the illicit trading of tickets. Paragraph 3 of Article 187 covers situations where people illicitly transfer or assign lottery tickets.

As considered above, in Japan every private act of gambling or sale of lottery tickets is strictly prohibited by the criminal law. However, after the Second World

[3] *An exposition of lectures on the criminal law* 1991, pp. 479–480.

War, publicly run gambling was allowed, under the auspices of the Japanese government, and is recognized by special laws for the promotion of regional economies, industry and manufacturing.[4] The types of public run gambling authorized are as follows: Horse racing; Bike Racing (now referred to as Keirin); Motorbike Racing; Motorboat Racing; the Lottery; Loto; and Scratch Cards.

In the next few sections, there will be an analysis of the various types of public run gambling. This analysis will cover the legal regulations, criminal sanctions, management, use of proceeds, the methods of betting and the objectives behind public run gambling.

29.3 The Special Laws Which Govern Public Gambling

29.3.1 Horse Racing

The law governing horse racing in Japan is the Horse Racing Act 1948 (now referred to as the HRA) (Showa Period 23rd year, law number 158).

As stipulated in horse racing law, the institutions charged with controlling horse racing matters are the Japan Racing Association (now referred to as the JRA) and the Prefectural Governments of Japan (now referred to as the Prefectural Governments) (Article 1 of the HRA). However, the Minister of Public Management, Home Affairs, Posts and Telecommunications (now referred to as the Home Affairs Minister) and the Minister of Agriculture, Forestry and Fisheries (now referred to as the Agriculture Minister), through consultation, are responsible for administering special fiscal matters for particular economic zones, including municipalities (now referred to as the Municipalities) (Article 1 para 2 of the HRA).

The JRA has responsibility for enacting national horse racing matters The National Racing Association (now referred to as the NRA) is the body charged with administering horse racing matters on a regional level for the Prefectural Governments and the Municipalities (Article 1 para 5 of the HRA).

The horse racing regulatory authority for both the JRA and NAR is the Ministry of Agriculture, Forestry and Fisheries of Japan (now referred to as the MAFF) (Article 25 of the HRA). However, the MAFF has granted the responsibility for ensuring that horse racing meetings are properly regulated (including: the registration of horse owners (Article 13 of the HRA), horses (Article 14 of the HRA), and the licensing of trainers and jockeys, these requirements are stipulated in a MAFF Supplementary Order), on a national level to the JRA and on a regional level to the NAR (Article 22 of the HRA). Please note that the NRA was also established to ensure that regional horse racing matters are administered smoothly

[4] Saito 2007, p. 52.

and fairly, alongside promoting improvements in horse breeding and livestock maintenance (Article 23 para 10 of the HRA).[5]

Regarding the sale of horse racing tickets for the JRA, the only parties permitted to do this are the JRA, and also Prefectural Governments and private individuals (Article 5 para 1 of the HRA and Article 3 para 1 of the HRA (Supplementary Provision)) that are specifically entrusted by the JRA (Article 3 para 2 of the HRA).

For NAR horse racing tickets, these can only be sold by parties entrusted by the appropriate regional governing bodies to handle NAR matters (Article 21 of the HRA). These bodies include Prefectural Governments, Municipalities, the JRA, the NRA and private individuals (Article 22 of the HRA and Article 17 bis 3 para 1 of the HRA [Supplementary Provision]).

The amount of winnings returned to successful betters differs according to the administering horse racing institution. Out of the total proceeds gained from ticket sales, the amount the JRA returns to successful betters fluctuates between 73.8 and 82%. The amount of winnings returned by the NAR is 75% of the total ticket sales.[6] Furthermore, both the JRA and NAR are obliged by Japanese income tax law to record the amount of income tax payable from the betters' total winnings, and then to inform the relevant tax authorities, who will in turn make the necessary deductions.

Regarding the sale of horse racing tickets, an important issue is tackling illegal sales practises. The organizations directly authorized to sell JRA horse race tickets are the JRA, relevant Prefectural Governments, and Municipalities. Further to this, organizations that are entrusted with either the JRA's or the local public agencies' horse racing administrative powers, can also sell tickets. In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (Article 30 para 1 of the HRA) for any other unauthorized bodies who illegally sell counterfeit horse race tickets (Article 1 para 6 of the HRA).

In 2004, Japanese horse racing law was revised, when placing bets by telephone or over the internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign horse race tickets (Article 28 of the HRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (Article 5 of the HRA). Bets can be placed either at the race course, at specialist betting shops (Article 2 [Supplementary Provision] and Article 17 bis 3 of the HRA), by phone or over the internet.

However, the law recognizes that horse racing has a certain social responsibility to uphold, in managing its practises and preventing the illegal sale and assignment of horse racing tickets (Article 29 of the HRA). Consequently, anybody found to have acted in direct contravention of the law, or through using, or conspiring to use

[5] Iwashiro 2002, p. 42.

[6] The research group for the improvement of state run sports contests in Japan 1997, p. 11.

other illegal methods to purchase tickets, will, dependent upon the severity of the offense, be subject to a fine or/and imprisonment (Articles 30–34 (inclusive) of the HRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns of the horse racing industry are to be utilized. Saying that, in the case of the JRA, there is nothing laid out in law for specifying the manner in which these funds should be used. Nevertheless in the case of the NAR, it is defined how the particular regional administration body uses the revenue at their disposal (Article 23 para 9 of the HRA).[7] Certain policies and issues often cited for support include: promoting improvements in horse breeding and livestock maintenance; advancing social welfare; upgrading medical care; developing education and culture; promoting sport; and creating more effective natural disaster recovery services.

29.3.2 Keirin (Bike Racing)

The law governing keirin in Japan is the Bicycle Racing Act 1948 (BRA) (Showa Period 23rd year, law number 209).

As stipulated in keirin law, the institutions charged with controlling keirin matters are the Prefectural Governments and Municipalities decided by the Home Affairs Minister. Prior to making such decisions the Minister will take into account specific regional economic and population issues. Furthermore, these authorities that want to hold keirin meetings should, if they can, try to fulfill various objectives, including advancing improvements in bicycle (and other machine) technology and rationalizing related manufacturing industries. Alongside this, the authorities should also promote physical education and other projects that will benefit society and regional economies (Article 1 para 1 of the BRA).

The keirin regulatory authority is the Ministry of Economy, Trade and Industry (from now referred to as the METI) (Article 50 of the BRA). However the METI has granted the JKA (an incorporated foundation) responsibility for ensuring that keirin meetings are properly regulated.[8] The JKA's duties are to make sure the riders, referees and various types of bikes are registered, licensed and meet the specific standards required for racing (these requirements are stipulated in a METI Supplementary Order).

Regarding the sale of keirin tickets, an important issue is tackling illegal sales practises. Therefore, only parties entrusted with the keirin administration authorities' powers (Article 3 of the BRA) are approved for this purpose (Article 8 of the BRA).

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[7] Iwashiro 2002, p. 38.

[8] About the JKA (Incorporated Foundation) http://www.keirin-autorace.or.jp/about/index.html (6 December 2008).

These authorized parties comprise regional public agencies, the Japan Association of Bike Racing and private individuals.

In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (Article 56 para 1 of the BRA) for any other unauthorized bodies who illegally sell counterfeit keirin tickets (Article 1 para 5 of the BRA).

In 2007, Japanese keirin law was revised, when placing bets by telephone or over the internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign keirin tickets (Article 9 of the BRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (Article 11 of the BRA). Bets can be placed either at the race arena, at specialist betting shops (Article 5 of the BRA), by phone, or over the internet.

The amount of winnings returned to successful betters by the keirin administration authorities, out of the total proceeds gained from ticket sales, is 75%.[9] Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the betters' total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

In February 2008, the Hiratsuka Keirin Arena introduced a new kind of betting ticket called "Chariloto." An interesting point to note in relation to "Chariloto," is that the total amount of prize money, following a carry over, was 1.2 billion yen, the largest amount ever seen in Japanese public run gambling history.[10]

However, the law recognizes that keirin has a certain social responsibility to uphold, in managing its practises and preventing the illegal sale and assignment of keirin tickets (Article 10 of the BRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offense, be subject to imprisonment or a criminal fine (Articles 56–69 (inclusive) of the BRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns of the keirin industry are to be utilized. The appropriate keirin administration authority can decide on how best to use the revenue at their disposal (Article 22 BRA). Policies and issues often cited for support include: advancing technical innovation in bicycles (and other machines); rationalizing manufacturing industries; advancing social welfare; upgrading medical care; developing education and culture; and promoting physical education and other programs beneficial to society.

On top of that, it is stipulated in keirin law that after every race meeting the JKA must receive a set subsidy from the relevant keirin administration authority. A certain percentage of this subsidy is to be applied in funding projects for the

[9] The Research Group for the Improvement of State Run Sports Contests in Japan 1997, p. 11.

[10] Chariloto (Keirin Betting—Chariloto—The Official Website) http://www.chariloto.com/html/chariloto/ (6/12/2008).

advancement of the public good (Article 24 para 6 of the BRA), and should not be utilized for anything other than those purposes (Article 29 para 2 of the BRA).

29.3.3 Motorbike Racing

The law governing motorbike racing in Japan is the Motorbike Racing Act 1950 (MRA) (Showa Period 25th year, law number 208).

In motorbike racing law, the Diet is responsible for deciding, by resolution, the authorities charged with administering motorbike racing matters. These institutions: are the Prefectural Governments, Osaka City; Kyoto City; Yokohama City; Nagoya City; Kobe City; each of the wards of Tokyo Metropolis where a relevant association is established; and municipalities where a motorbike racing track is currently in existence (Article 3 para 1 of the MRA).

These authorities that want to hold motorbike meetings should, if they can, try to fulfill various objectives, including advancing improvements in motorbike (and other machine) technology, and rationalizing related manufacturing industries. Alongside this, the authorities should rationalize related manufacturing industries, while also promoting physical education and other projects that will benefit society and regional economies (Article 1 of the MRA).

The motorbike racing regulatory authority is the METI (Article 54 of the MRA). However, as with the keirin system, the METI has granted the JKA responsibility for ensuring motorbike race meetings are properly regulated (Article 11 of the MRA).[11] The JKA's duties are to make sure the riders, referees and various types of bikes are registered, licensed and meet the specific standards required for racing (these requirements are stipulated in a METI Supplementary Order).

Regarding the sale of motorbike racing tickets, an important issue is tackling illegal sales practises. Therefore, only parties entrusted with the motorbike racing administration authorities' powers (Article 12 of the MRA) are authorized for this purpose (Article 5 of the MRA). These authorized parties comprise regional public agencies, the East Japan Association of Motorbike Racing, and private individuals. In fact there are strict penalties, with up to 5 years in prison, or a maximum fine of 5,000,000 yen (Article 61 para 1 of the MRA) for any other unauthorized bodies who illegally sell counterfeit motorbike racing tickets (Article 3 para 2 of the MRA).

In 2007, Japanese motorbike racing law was revised, when placing bets by telephone or the over internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign motorbike tickets (Article 13 of the MRA). There are also five different ways in which a bet can be

[11] About the JKA (Juridicial Foundation) http://www.keirin-autorace.or.jp/about/index.html (6 December 2008).

wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (Article 15 of the MRA). Bets can be placed either at the race arena, at specialist betting shops (Article 8 of the MRA), by phone, or over the internet.

The amount of winnings returned to successful betters by the motorbike racing administration authorities, out of the total proceeds gained from ticket sales, is 75%.[12] Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the gambler's total winnings, and then inform the relevant tax authorities, who will in turn make the necessary deductions.

However, the law recognizes that motorbike racing has a certain social responsibility to uphold, in managing its practises and preventing the illegal sale and assignment of motorbike racing tickets (Article 14 of the MRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offense, be subject to imprisonment or a criminal fine (Articles 61–74 [inclusive] of the MRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns from the motorbike racing industry are utilized. It is defined in law how the appropriate motorbike administration authority must use the revenue at their disposal (Article 26 MRA). Policies and issues often cited for support include: advancing technical innovation in motorbikes (and other related machines); rationalizing related manufacturing industries; advancing social welfare; upgrading medical care; developing education and culture; and promoting physical education and other programs beneficial to society.

On top of that, as is also the case with keirin, it is stipulated in motorbike racing law that after every race meeting the JKA must receive a set subsidy from the relevant motorbike racing administration authority. A certain percentage of this subsidy is to be applied in funding projects for the advancement of the public good and should not be utilized for anything other than these purposes (Article 33 para 2 of the MRA).

29.3.4 Motorboat Racing

The law governing motorboat racing in Japan is the Motorboat Racing Act 1951 (MboatRA) (Showa Period 26th year, law number 242).

In motorboat racing law, the Diet is responsible for deciding, by resolution, the authorities charged with administering motorboat racing matters. To this end, the Home Affairs Minister should take account of the special economic and political

[12] The Research Group for the Improvement of State Run Sports Contests in Japan 1997, p. 11.

circumstances of each particular municipality or administrative division (Article 2 para 1 of the MboatRA).

The motorboat racing administration authorities should try, if they can, to fulfill various objectives: including advancing improvements in technology for boats, boat engines and related parts; and also the export of such products and expertise. Alongside this, the authorities should: promote manufacturing programs; support projects to prevent accidents at sea and also support marine industry projects; while also promoting physical education, tourist activity and other projects that will benefit society and regional economies. There should also be an effort to improve the maritime facilities around Japan's coastline, which will, in turn, have a positive effect on tourism (Article 1 of the MboatRA).

The motorboat racing regulatory authority is the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) (Article 57 of the MboatRA). The MLIT has granted the Foundation of Japan Motorboat Racing Association (now referred to as the JMRA) responsibility for ensuring motorboat race meetings are properly regulated (Article 7 of the MboatRA).[13] The JMRA's duties are to make sure the referees, drivers and various types of boats and inspectors, are registered, licensed and meet the specific standards required for racing.

Regarding the sale of motorboat racing tickets, an important issue is tackling illegal sales practises. Therefore, only parties entrusted with the motorboat racing administration authorities' powers (Article 3 of the MboatRA) are authorized for this purpose (Article 10 of the MboatRA). These authorized parties comprise regional public agencies, JMRA and private individuals. In fact there are strict penalties, with up to 5 years in prison and/or a maximum fine of 5,000,000 yen (Article 65 para 1 of the MboatRA), for any other unauthorized bodies who illegally sell counterfeit motorboat tickets (Article 2 para 5 of the MboatRA).

In 2007, Japanese motorboat racing law was revised, when placing bets by telephone or over the internet was authorized. Currently, only people aged 20 years or over, including students, can purchase or assign motorboat racing tickets (Article 12 of the MboatRA). There are also five different ways in which a bet can be wagered: single win; place and show; quinella/forecast bet; quinella/forecast bet with a place and show bet; and a bet across multiple races at the same meeting, in any of the prior mentioned four formats (Article 5 of the MboatRA). Bets can be made either at the race place, at specialist betting shops (Article 8 of the MRA), by phone or over the internet.

The amount of winnings returned to successful betters by the motorboat racing administration authorities, out of the total proceeds gained from ticket sales, is 75%.[14] Furthermore, these authorities are obliged by Japanese income tax law to record the amount of income tax payable from the gambler's total winnings, and

[13] Summary of the Foundation of the Japan Motorboat Racing Association.http://mbkyosokai.jp/company/index.html (6 December 2008).

[14] The Research Group for the Improvement of State Run Sports Contests in Japan 1997, p. 11.

then to inform the relevant tax authorities, who will in turn make the necessary deductions.

However, the law recognizes that motorbike racing has a certain social responsibility to uphold, in managing its practises and preventing the illegal sale and assignment of motorboat tickets (Article 11 of the MboatRA). Consequently, anybody found to have acted in direct contravention of the law, or through using (or conspiring) to use other illegal methods to purchase tickets, will, dependent upon the severity of the offense, be subject to imprisonment or a criminal fine (Articles 65–78 [inclusive] of the MboatRA).

Additionally, it is a matter of public interest when it comes to deciding for what purpose the betting returns from the motorboat racing industry are utilized. It is stipulated by law how the appropriate motorboat administration authority must use the revenue at their disposal (Article 31 MboatRA). Policies and issues often cited for support include: advancing technical innovation in motorboats; rationalizing related manufacturing industries; advancing social welfare; upgrading medical care; developing education and culture; and promoting physical education and other programs beneficial to society.

On top of that, it is stipulated in motorboat racing law that after every race meeting the JMRA must receive a set subsidy from the relevant motorboat racing administration authority. A certain percentage of this subsidy is to be applied in funding projects for the advancement of the tourist industry and the public good, and should not be utilized for anything other than these purposes (Article 33 para 2 of the MboatRA).[15]

29.3.5 The Japanese Lottery

The law governing the lottery and other gambling games in Japan is the ‘‘Law on Identification Card Attached to Prize Money 1948” (now referred to as LPM or Lottery Law) (Showa Period 23rd year, law number 242).

The objective of the LPM is through lottery ticket sales to provide revenue for local government finance funds. In order to achieve this target, the current purchasing power of the public should be monitored, so that lottery ticket sales respond in line with demand in the present market conditions (Article 1 of the LPM).

In the Lottery Law, the institutions charged with controlling lottery ticket sales are the Prefectural Governments, self governing cities and specific cities with particular economic or geographic (war damage) requirements (now referred to as the lottery administration authorities) (Article 4 para 1 of the LPM). The latter are selected by the Home Affairs Minister.

[15] Iwashiro 2002, p. 43.

The authorization granted to the administration authorities to oversee lottery sales is for a number of purposes. These include funding public utility improvement schemes and other projects that benefit society. Furthermore, there are cases where it is necessary to set money aside for projects decided by ministerial decree, and also for supporting regional matters which require emergency public management (Article 4 para 1 of the LPM).

The lottery regulatory authority is the Ministry of Internal Affairs and Communication (now referred to as the MIC) (Article 4 para 2 of the LPM). The MIC considers applications made by administrative regions and cities who seek approval to be able to sell lottery tickets. These applicants need to present their plans for how they will use capital raised from lottery sales to fund public projects, in order to receive the necessary MIC approval.

The relevant governors and mayors from the lottery administration authorities (approved by the Home Affairs Minister) may draw up plans for how they intend to deliver the various lottery schemes, looking particularly at establishing sales and payment facilities. In line with government decrees, the authorities must also apply to banks who they will entrust with carrying out lottery-related financial matters. These types of duties include: the clerical work of preparing the lottery tickets; selling tickets; and paying out winnings (Article 6 of the LPM).

Altogether there are three types of lotteries: the general lottery; scratch cards; and the number selection lottery (now referred to as Loto).[16]

Lottery tickets can be bought by various means—at banks entrusted by the administration authorities, at kiosks around the cities, by mail order and also over the internet.

Presently, the highest prize on the General Lottery is 300 million yen. Two hundred million yen for first prize and 50 million yen each for numbers before and after the first prize. For Loto, ever since the carry over system has been introduced, as Loto 6, the highest prize available is 400 million yen. Please note that there is no income tax liability on the prize money earned from the Lottery (Article 13 of the LMA).

In Japan, unlike with the above mentioned publicly run sports contests and the below mentioned Toto, there are no age-based purchasing restrictions for lottery tickets. Furthermore, people affiliated with the lottery, either directly (e.g. a kiosk seller) or indirectly (e.g. a family member of an employee of a lottery administration authority), can also buy tickets.

Nevertheless, the resale of lottery tickets is prohibited (Article 6 para 7 of the LMA). Anybody found in violation of this law, could be subject to up to 10 years imprisonment and/or a maximum penalty of 1 million yen (Article 18 para 1 of the LMA). Additionally, any act of selling, purchasing, receiving commissions from and/or dealing in foreign lottery tickets while in a Japanese jurisdiction is

[16] The Lottery is Now (Foundation of the Japanese Lottery Association) http://www.jla-takarakuji.or.jp/now1.html#5 (3 December 2008).

considered an offense punishable by criminal sanctions under Article 187 of the (Basic) Japanese Criminal Law.[17]

Following from what has been discussed above, special Japanese laws recognize and authorize various types of publicly run gambling. The objective of putting each of these public gambling initiatives into effect is to provide financial support for local public organizations, and also to promote specific industries. It is often said that because Japan was poverty stricken after the Second World War, it introduced publicly run gambling as a last resort to stimulate an economic recovery.

However, the introduction of the sixth form of publicly run gambling, soccer betting, is against a completely different economic background for the current generation, with Japan being the world's second strongest economy. In fact this particular initiative has separate objectives and ways for which the funding raised should be utilized. In the next section there will be analysis of the legal, economic and management issues surrounding soccer betting in Japan.

29.4 Soccer Betting as a Means of Promoting Sport

The law governing soccer betting is the "Act on Sports Promotion Voting 1998" (now referred to as SPV) (Heisei period 10th year, law number 63).

As stipulated by the SPV, the Ministry of Education, Culture, Sports, Science and Technology (now referred to as the MEXT) is the regulatory authority for soccer betting. Furthermore, the main objectives of the MEXT under the SPV, are to ensure the necessary funds are raised for sports promotion, and to confirm that any initiative it sets up is effectively administered.

Soccer is the only sport to be utilized for sport promotion betting initiatives under the SPV. To this end the Japan Professional Soccer League (now referred to as the J-League) (Article 24 para 1 of the SPV and the Ministry of Education Newsletter number 56) was set up to run various soccer competitions. These comprise the J-League, the J-League Cup and the Emperor's Cup. However, please note that other soccer competitions are excluded from the afore-mentioned initiatives, including the Japan Football League (amateur), local leagues and even foreign soccer leagues.

The sole authority charged with administering sports promotion through betting under the SPV is the National Association for the Advancement of Sports and Health (now referred to as the NAASH) (Article 3 of the SPV).

By order of MEXT, NAASH will select certain J-League games on which betting can take place. After the game, any better in possession of a winning ticket,

[17] Trouble with the Lottery (Foundation of the Japanese Lottery Association) http://www.jla-takarakuji.or.jp/trouble.html (3 December 2008).

in line with the rules stipulated by MEXT, will receive a payout of their relevant winnings (Article 2 of the SPV).

Currently there are six soccer betting games in Japan. The first type of game is the Toto series (comprising three games—Toto, Mini Toto and Toto Goal), where you can personally predict the results of matches. The Big series (comprising three games—Big, Big 1000 and Mini Big) is the second type of game, where a computer randomly predicts match results. There is no obligation on NAASH, as the soccer betting administrative authority, to deal with income tax issues (Article 16 of the SPV).

The maximum payout for Toto is 200 million yen, which is only possible when a carryover occurs. For Big, the maximum payout is 600 million yen, again, this is only possible when there is a carryover.

Soccer betting tickets can be purchased either online, at convenience stores, or from specially licensed betting shops. However, as stipulated by Article 9 para 10 of the SPV, the following parties cannot purchase or receive transfers of soccer betting tickets: people under 19; government officials working in promoting other sports; NAASH staff; J-League members of staff; and all the J-League club employees, representatives, directors, players, J-League match referees and commissioners. Criminal sanctions such as imprisonment or fines (Articles 32 and 42 of the SPV) can be imposed on any of the above mentioned parties in breach of the SPV law. Furthermore, people found using, or conspiring to use, systems other than those defined by SPV for acquiring soccer betting tickets, can also be subject to such punishment.

Once the winnings and administration expenses have been deducted from the total amount of revenue received from soccer betting ticket sales, it is divided into three parts for distribution. The first third is utilized to fund the following initiatives: promoting education, sport and culture for the Japanese youth; preserving of the environment; advancing international relations; and maintaining the national treasures of Japan (Article 22 of the NAASH).[18]

The remaining two thirds of the revenue are each used mainly to finance sport promotion projects by local authorities or sports organizations through the following projects, or to be used as funds needed for international level sports event hosted by Japan (as stated in the MEXT orders) (Article 21 paras 1 and 2 of the SPV).

The projects are as follows:

(i) to establish an institution (including facilities) as a base to promote sport in the regions;
(ii) to establish an institution as a base to improve the level of competitiveness in sport, both nationally and internationally;
(iii) projects to promote sport at sports lessons, competitions and other sport events using the institution described in (2); and
(iv) to train new and improve the quality of the current sports coaches

[18] The Purpose for which the Proceeds of Sports Promotion Betting are Used (National Agency for the Advancement of Sport and Health) http://www.naash.go.jp/toto/what.html (4 December 2008).

Additionally, the proceeds from the soccer betting initiative can be invested in the ''Sports Promotion Fund'' established by the Japanese government allocating 25 billion yen in a budgetary measure in 1990 (Article 21 para 4 of the SPV). The objective of this fund is to assist the sports organizations in hosting major events, and also to create world respected athletes and coaches.[19]

As analyzed above, from the proceeds of the soccer betting system Japan has set out to accomplish dual objectives. The first is to improve Japan's level of competitiveness in world sport. The second is to promote sport as an essential life habit throughout the nation. At the start of this chapter it was stated that the proceeds of the soccer betting initiative had been falling year upon year. For instance, in 2002 the amount raised for Japanese sport totaled 5.7 billion yen, however, in 2007 the figure raised was a mere 80 million yen in comparison. Consequently, this lack of constant funding meant that some sporting projects were inevitably canceled or cut back. On top of this, various funds for the promotion of sport had to be privately guaranteed.[20]

However, in 2008 the soccer betting game, Big, has brought some fresh inspiration to the scheme. By November the amount raised for sporting projects run by the Sport fund has been estimated to be in the region of 850 million yen. It is thought that when the final figures are calculated in 2009 the total sales proceeds from soccer betting in 2008 will have reached a historic high of over 90 billion yen.[21]

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[21] The Movement/Variation in Sports Promotion Betting Grants (14th MEXT Special Sports Betting Promotion Conference on Distributing Sports Promotion Betting Resources/Funds) http://www.mext.go.jp/b_menu/shingi/chukyo/chukyo5/gijiroku/002/08110403/001.pdf (5 December 2008).

Chapter 30
Sports Betting in Kenya

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Contents

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Sports betting has been defined as betting on the occurrence of an event. If the given event occurs the bettor wins; if not he loses the wager. It is a popular past-time all over the world and Kenya is no exception.

30.1 History of Sports Betting in Kenya

Kenya is a country with a relatively short history, having attained its independence in 1963. Betting in sports was a relatively unknown activity prior to independence, and only began to develop in the early 1980s.

The practise has steadily picked up, and today there are numerous types of games involving betting in sports, such as horse racing, football, tennis and basketball.

Betting in Kenya is controlled by the Betting Control and Licensing Board, which was established by an Act of Parliament, Chapter 131 Laws of Kenya, in 1966. Prior to the Act, the functions of the board were handled by the Kenya Police Department. The Act provides for the control and licensing of betting and gaming premises and the activities carried thereon. It also provides for the authorization of lotteries and prize competition as well as eradication of illegal gambling.

Given the positive contributions the gaming and betting industry continues to make for the economy in terms of employment and revenue generation, betting continues to become a legitimate consumer practice, and hence the need for vigorous promotion and State supervision.

30.2 The State Supervisory Mechanism

The Kenyan government plays a key role in the legal administration and controlling of betting activities in Kenyan sports. It does this through the establishment of various bodies, laws, and stipulation of penalties, crimes, and offenses related to betting.

Among such laws and bodies are the Betting, Lotteries and Gaming Act, cap 131 laws of Kenya, and the Betting Control and Licensing Board.

Through these mechanisms, the Kenyan government has managed to protect and safeguard the public and third parties from unscrupulous betting operators, while also providing certain mandatory requirements related to licensing, ticketing, submission of returns, bookmaking and totalizing. Several betting institutions have also been established.

30.2.1 The Betting Lotteries and Gaming Act Cap 131

This is the main legislation that focuses on betting practises in Kenya. This Act comprises one of the many laws Kenya adopted from its colonizer, the United Kingdom. It has since undergone several amendments to suit the current practical conditions facing the Kenyan sports betting industry.

Section 2 of the Act defines betting as ''to wager or stake any money or valuable thing by or on behalf of any person or, expressly or impliedly to undertake, promise or agree to wager or stake by or on behalf of any person, any money or valuable thing on a horse race, or other race, fight, game, sport, lottery or exercise or any other event or contingency."

The Act only recognizes betting activities that are carried out in public premises. It defines betting premises as "premises to which the public has or may have access and which are kept or used (whether on one occasion or more than one) for the purpose of."

30.2.2 The Betting Control and Licensing Board

Whereas the Act principally sets out the formalities applicable to betting, the duty to implement these formalities has been placed in the hands of a subordinate body.

The central body charged with the duty of foreseeing the administration and transparent operation of betting in Kenya is the Betting Control and Licensing Board. This board was established in 1966 and undertakes a number of functions.

30.2.2.1 Roles and Functions of the Betting Control and Licensing Board

The board's mission is to ensure that betting is conducted honestly and competitively with minimum costs but maximum contribution to society, and that it is free from criminal activities.

It is charged with the responsibility of controlling and licensing of Betting and Gaming premises, facilitation of tax collection, authorization of public lotteries and prize competitions, inspection and elimination of illegal gambling.

30.2.2.2 Core Functions

The board performs a number of duties, among them being:

a. Licensing and controlling of Betting and Gaming premises and the activities carried therein.
b. Authorization and control of prize competition and lotteries.
c. Curbing illegal betting, lotteries and gaming.
d. Providing an enabling environment for betting, lotteries and gaming.
e. Advocating for betting, lotteries and gaming as a legitimate consumer pursuit.
f. Creating awareness and public confidence in betting, lotteries and gaming.

30.2.3 Requirements and Conditions for Operating Betting Premises

The Betting, Lotteries and Gaming Act, Cap. 131, empowers the National Betting Control and Licensing Board to impose such conditions as it may deem necessary to ensure that lotteries are promoted and conducted as efficiently as possible, in the interest of the purpose for which it was being promoted, the public in general.

Pursuant to this, the Board has come up with a number of requirements that all lottery operators must adhere to. In order to operate and carry out the business of sports betting in Kenya, an individual or company must meet the following conditions:

a. He or she must acquire a betting license.
b. Operators must have tickets.
c. They must submit their returns.

30.2.3.1 Licensing Requirement

A person who wishes to run the business of sports betting in Kenya must apply for a license. The application must be submitted to the board in duplicate and be accompanied with a minimal application fee. The licenses are valid for one year and must be renewed by the end of the 30th day of June of the following year.

In accordance with Section 5(3)(1) of the Act, an applicant may be denied a license if a number of conditions have not been met, such as:

a. If he or she fails to satisfy the Board that he or she is a fit and proper person to hold the license or permit and that the premises, if any, in respect of which the application is made are suitable for the purpose,
b. If the applicant knowingly makes a false statement or declaration in an application for, or a renewal or variation of, a licence or permit,[1]
c. If the Board fails to send a copy of the application for the license to the local authority within whose area of jurisdiction where the applicant proposes to conduct his business and has given the local authority reasonable opportunity to object to, or make recommendations with respect to, the application.

Duties of a Sports Betting License Holder

Upon receiving a betting license, the holder thereof is required to perform and abide by a number of duties.

[1] Such an act invites a fine not exceeding € 500 or to imprisonment for a term not exceeding six months or to both.

To begin with, in case a licensee changes the name, address or location of a business to which the licence relates, or in case he performs any change that affects his interest as an owner, director, partner, agent, manager or servant in that business, he must, within seven days of the aforesaid change.

Licensees who close down their business must give written notice to the Board within seven days of closure and must surrender their licence to the Board.[2]

Failure to observe any of these regulations exposes the licensee to a fine not exceeding 10 €, or to imprisonment for a term not exceeding one month or to both.

30.2.3.2 Ticketing Requirement

The Act requires those who run betting premises to operate with tickets. In accordance with Section 5(1) of the Act, the Board is required to cause books of tickets to be printed and numbered serially for sale to bookmakers at a cost equal to the costs of production.

The Act requires any bookmaker who takes a bet at a place other than at an authorized race meeting to issue the person from whom he has taken the bet a ticket from one of the books of tickets. He must thereafter enter the particulars of the bet on the ticket.

Section 5(4) makes it an offense for a bookmaker to place a bet at a place other than an authorized racing meeting and to thereafter fail to issue a ticket.

30.2.3.3 Submission of Returns

All lottery operators are required to submit returns on a quarterly basis showing details of the number of tickets printed, the number of tickets sold, the cost of each ticket to the public, the amount of money collected, the amount of money devoted to good cause, the amount of money one ascribes, the names of all the winners, the names of all the beneficiaries and the amount received by each presiding and supervision of all lottery draws by Board officials.

Records must also be kept of all draw results published in the media and provision must be made guaranteeing to cover the prizes to be awarded in the lottery the board officials must also witness the awarding of prizes won in the lottery.

30.3 Illegal and Prohibited Betting Activities

As with any other activity, betting in Kenya can lead to a number of offenses. The following betting activities have been declared illegal and are subject to sanctions in Kenya.

[2] See Section 16(3) cap 131 of the Betting, Lotteries and Gaming Regulations, www.kenyalaw.org.

(i) Betting with young persons
(ii) Betting in public
(iii) Betting at unauthorized places
(iv) Operating without a license
(v) Betting in unlicensed premises
(vi) Public invitation to unlicensed premises
(vii) Reception and/or advancement of money at unlicensed premises.

30.3.1 Betting with Young Persons

Under Section 28(1) A person who:

(i) Bets with a young person; or
(ii) Employs a young person on licensed betting premises or in connection with a pool betting scheme or
(iii) Receives or negotiates a bet through a young person; or
(iv) Sends to a young person any circular, notice, advertisement, letter or other document relating to betting.

Shall be guilty of an offense and liable for a fine not exceeding 300 €, or to imprisonment for a term not exceeding three months, or to both.

''Young person" has been defined as a person who is under the age of eighteen.

30.3.2 Betting in Public

It is an offense for any person to frequent or loiter in a street or public place, on behalf either of himself or of any other person, for the purposes of bookmaking, betting, agreeing to bet, or paying, receiving or settling bets. This offense invites a fine not exceeding 500 €, or imprisonment for a term not exceeding six months, or to both.

30.3.3 Betting at Unauthorized Places

As seen earlier, under Section 5(4) of the Betting, Gaming and Lotteries Regulations, it is an offense for a bookmaker to place a bet at a place other than an authorized racing meeting and to then fail to issue a ticket. This offense carries a penalty of a fine not exceeding 50 € or to a term of imprisonment for a term not exceeding six months, or to both.[3]

[3] See Section 14.2 of cap 13. www.kenyalaw.org.

30.3.4 Operating Without a License

Section 14(1)(a) makes it clear that an owner or occupier of a betting premises, or any person having temporary use or otherwise thereof, who keeps or uses unlicensed betting premises is guilty of an offense and liable to a fine not exceeding 100 €, or to imprisonment for a term not exceeding one year, or to both.

Case law in Kenya is few and far between. However, in the criminal case No. 1962 of 2006 *Jackson Kioko, Muia Mutinda, Joseph Muthama and Mwanzia Kioko v The Republic*,[4] the four accused had been charged with gambling in a public place without a valid license. They were sentenced, on their own plea of guilty, to each pay a fine of 50 € in default of which they would all serve two months imprisonment.

30.3.5 Betting in Unlicensed Premises

A person who bets in unlicensed betting premises shall be guilty of an offense and liable to a fine not exceeding 50 € or to a term of imprisonment for a term not exceeding six months, or to both. On a similar note, a person found in unlicensed betting premises or found escaping therefrom on the occasion of their being entered, shall be presumed, until the contrary is proved, to be or to have been betting therein.

People under whose care or management an unlicensed betting premises has been left can also be guilty of an offense if they in any manner they assist or are knowingly engaged in the management of such unlicensed premises. They may be liable to a fine not exceeding 50 € or to imprisonment for a term not exceeding six months, or both.

30.3.6 Public Invitation to Unlicensed Premises

Innocent third parties should also be on the look out as the Act makes it an offense for any person to announce, publish, or cause to be announced or published, either orally or by means of any print, writing, design, sign or otherwise, that premises are opened, kept or used as unlicensed betting premises, or in any manner to invite or solicit any person to bet in unlicensed betting premises.

Any such act renders the person liable to a fine not exceeding 100 €, or to imprisonment for a term not exceeding one year, or to both.

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[4] See.http://www.kenyalaw.org/CaseSearch/case_search_fts.php?words=BETTING+%26+LICENCING+&check_submit=1&submitter=SEARCH+%BB&mode=normal.

30.3.7 Reception and/or Advancement of Money at Unlicensed Premises

Under Section 14(e) of the Act, the advancement, furnishment or reception of money by any person for the purpose of establishing or conducting the business of unlicensed betting premises is prohibited. Any such act renders the person liable to a fine not exceeding 100 €, or to imprisonment for a term not exceeding one year, or to both.

30.4 Protection of Third Parties and the Public

The Act goes further to protect private and public entities, as well as members of the public, from exploitation by unscrupulous license holders, and gives them greater security in their dealings with betting businesses. It does this through several regulations, which it has put in place:

30.4.1 Furnishment of Monetary Security

All applicants are required to furnish the Board with security by means of a deposit, or such other security as the Board may approve, of a sum not exceeding 400 €. This security is meant to cater for any immediate financial damages which a license holder could cause to third parties. It is thereafter refunded or canceled on the expiration or cancelation of the license.[5]

In determining the amount of security the Board takes into account:

(i) The known business of the applicant
(ii) The amount, if any, by which that business may reasonably be expected to increase in the ensuing year.
(iii) The Board may at any time vary the amount of any security given in pursuance of this section if it is satisfied that, having regard to the known scale of business of the licensee concerned, the variation is reasonable. (Sections 6(3) and (4) of cap 131)

It is intended that through this, the public can have greater confidence while dealing with betting operators.

[5] See Section 6 of Cap 131. www.kenyalaw.org.

30.4.2 Prominent Displaying of Licenses

All license holders are required to prominently display their licenses on conspicuous areas of their principal place of business and on any part thereof to which the public has access. In addition, a copy of such license must be similarly displayed at each of the branches of the licensee or permit-holder (Section 8).

Failure to do this, or displaying of an invalid license by the license holder in question, renders him liable to pay a fine not exceeding 30 €, or to imprisonment for a term not exceeding three months, or to both.

30.4.3 Prohibition of Re-transfer of Licenses

Section 12 of the Act prohibits the transfer to another person, of any license issued to him. A person who transfers or purports to transfer a license or permit is guilty of an offense and liable to a fine not exceeding 20 €, or to imprisonment for a term not exceeding two months, or to both.

30.5 Bookmaking and Totalising

The Act does have a place for bookmakers engaged in the business of betting. It defines a bookmaker as ''a person who, whether on his own account or as servant or agent to another person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out, or permits himself to be held out in any manner, as a person who receives or negotiates bets."

Bookmakers and totalizors in Kenya may be issued with two types of licenses; an on-the-course license,[6] or an off-the-course license,[7] or both. The totalizors' licenses may be limited to either each race day, or for a period not exceeding one year.

The licenses shall act as authority enabling them to carry on the business as bookmakers, but only at the betting premises named thereon. In addition, bookmakers may also carry out their business in the form of partnerships and must keep a full and accurate record of all betting transactions entered into.

Bookmaking without a valid license invites a fine not exceeding 100 €, or imprisonment for a term not exceeding one year, or to both.

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[6] This license authorizes a person to carry on his business as a bookmaker at any authorized race meeting.

[7] This license authorizes a person to carry on his business as a bookmaker at the betting premises named therein.

30.5.1 Documents and Records to be Kept by Bookmakers

Bookmakers and totalizors are required to file their returns within seven days following each period of fourteen days.

In addition to this, all bookmakers in the Kenyan sports industry are required to keep a full and accurate record of all betting transactions entered into showing:

(i) The total amount of bets received by him (including bets received at an authorized race meeting), and the total amount of winnings paid by him;
(ii) In the case of bets received at a place other than an authorized race meeting, the total amount of losing bets and the total amount of winning bets.

In addition to (i) and (ii) above, totalizors must keep records showing the amount of moneys devoted to any charitable purposes or other purposes and must, within twenty-one days after each race on which that totalizator was operated, submit to the Permanent Secretary a certified statement in duplicate together with a remittance for the amount of the tax due.[8]

30.5.2 Betting Institutions in Kenya

Pursuant to these laws, several betting institutions have been set up, but are yet to gain popularity. Of these institutions, the Kenya Sports Bet appears to be leading the pack in as far as betting operators are concerned.

30.5.2.1 The Kenya Sports Bet

This is a sport booking department casino located in Malindi, Kenya. It was opened in 2001 and today offers a wide choice of tax-free odds on European and Worldwide sporting events. Its activities are regulated by the Kenyan authorities and it does have a set of rules governing its betting system. The minimum amount one can place for a bet is 5 €. Clients must be over 18 years of age in order to participate.

All clients are required to open a deposit account, with the minimum deposit amount being 50 €. The Kenya Sports Bet does also maintain rules governing the filing of complaints to the company related to betting. Bets can be placed on football, motorsports, tennis, and basketball.

Other betting companies in Kenya include Florida Casino Mombasa, The Continental Resort, Bollywood Casino, Safari Park Hotel and Country Club, and many others. The minimum age for participation is 18 years.

[8] See Section 8 of the Betting, Lotteries and Gaming Regulations. www.kenyalaw.org.

30.6 Conclusion

The Kenyan government does have control over the activities of betting in sports events. Evidence of this is seen through the Act and in the criminal sanctions that can be imposed on persons who engage in betting activities without licenses.

Still, when it is all said and done, greater efforts need to be put in place to further streamline the laws. Public awareness and education on betting in sports must also be carried out, with emphasis on the possible illegalities involved in betting, the consequences thereof, and on promoting safe and healthy betting practises.

Sports possess great potential for fostering development. The public and the private community must therefore be encouraged to participate in sports activities, of which betting is one, with a view to promoting the economy.

With its increasing popularity, internet access, and the creation of new games in betting, it is only a matter of time before Kenya, with the help of more tranquilized legislation, maximizes its income from betting collections.

Chapter 31
Sports Betting: Law and Policy. The Chapter on Latvia

Sarmis Spilbergs and Reinis Pavars

Contents

31.1 Introduction

As in most jurisdictions worldwide, sports' betting in Latvia is regarded as a gambling activity. Under Latvian law betting is defined as depositing a stake on the possibility or impossibility of any event and the amount of the gain depends on the accuracy of the player's forecast, deposited stake, as well as on the index for calculation of the gain, which is fixed by the rules of game.[1] Sports' betting is where a person wagers on the results of a sports event and the amount of the possible winning is determined by the stake-winnings ratio set by the betting service provider. In the case of a totalizator, the prize is determined according to the total amount of pre-paid stakes.[2]

[1] Gambling and Lotteries Law of Republic of Latvia, adopted on 17 November 2005. Article 1.5.
[2] *Ibid*., Article 1.18.

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Since the time Latvia regained its independence from the Soviet Union in 1991, the gambling industry has witnessed a significant growth. Sports betting and bookmaking, which constitutes a certain part of the industry, have also developed significantly. In the early 1990s, due to the lack of gambling regulations, the growth of the gambling industry was spontaneous and uncoordinated. However, even without specific regulation, sports betting did not become very popular. In 1994, when the first gambling regulation was introduced,[3] sports betting as a service almost ceased to exist due to its low popularity and the newly adopted regulation, which made the service more complicated to provide. However, in the late 1990s, along with economic growth, the emergence of casinos, and the increasing popularity of slot machines, sports betting also became more popular. The growth in the industry brought light to different types of wagering and bookmaking, but sports betting became the most popular of them. Consequently betting reception centres were opened throughout the largest cities of Latvia.

Currently the rivalry from foreign online betting organizers, usually operating in more favourable regulatory environments, has lead to a situation where there is only a single enterprise licensed in Latvia to provide the traditional and interactive sports betting services. The Latvian licensing regime imposes the same capital, establishment and other requirements on the sports betting organizers that a "brick and mortar" casino operator is faced with. Companies wishing to provide only sports betting services might see this as quite harsh compared to regimes in some other jurisdictions. The Internet and the evolution of other technologies has allowed many operators to establish and get licensed elsewhere, but still enter the Latvian market via electronic communication means. Recent trends indicate that foreign operators are capable of adapting to local markets not only by offering to bet on sports events, but also on a range of different Latvian social, cultural and political events.

31.2 Regulation of and Supervision of Sports Betting in Latvia

The "Law on Lotteries and Gambling" was adopted by Saeima (the Latvian Parliament) on June 16, 1994, and during the next decade it was amended nine times before being replaced on November 17, 2005, with the current Gambling and Lotteries Law (hereinafter the Gambling Law). The regulation of betting has evolved slowly over time, including in relation to the licensing requirements, the supervision mechanism, the regulated forms of gambling (traditional, interactive) and the rules on protection of gamblers' rights and public interests.

The supervision authority over gambling organizers is the Lotteries and Gambling Supervisory Inspection (hereinafter the Inspection), however, the State

[3] Law on Lotteries and Gambling of Republic of Latvia, adopted on 16 June 1994.

Revenue Service and the State Police also exercise control, with respect to taxation, underage gambling, etc.[4] The Inspection is the competent authority in key matters of compliance with the law and regulations, licensing, control and supervision, development of legal acts and surveillance of the market.[5] The Inspection also ensures the protection of gamblers' rights and aims to reduce the eventual social risks related to gambling. From the latest annual reports of the Inspection, one of Latvia's policies in the field continues to be the limitation of the organization of gambling in the interests of the general public.[6] The Inspection constantly gathers and analyzes market data and based on its conclusions as to whether the state policy is being implemented successfully it decides whether additional legislative initiatives are necessary.

31.2.1 Licensing: General

For a company to be able to render sports betting services, general and special licenses must be obtained in accordance with the Gambling law. Licenses may only be received by capital companies (a Limited Liability Company or a Joint Stock Company) established in Latvia with no less than 51% local shareholding (EU investors are regarded as local).[7] The amount of the paid up share capital has to be at least 1 million LVL.[8]

In order to obtain the general license, certain information and documents must be filed with the Inspection. These include the annual report, the report for past quarters of the current year, information about credit liabilities, information about the sources of capital financing, a development plan for the next year activities, indication of the planned kinds of gambling activities, the expected amount and allocation of income and expenditure, the foreseeable profit and its application, information about the shareholders of the applicant, confirmation that at least one half of the members of the supervisory board and the board of directors of the company are domestic taxpayers of Latvia and have an unimpeachable reputation.[9] The Inspection is also entitled to request additional information if it finds that the filed documents do not provide a complete and clear picture of the sources of financing, plans of activity, etc.[10] The decision to issue the license is adopted

[4] *Supra* note 1, Article 81.

[5] *Ibid*., Article 82.

[6] Annual public report 2008 of the lotteries and gambling supervisory inspection, approved by the decree No 7 of June 29, p. 20, available at http://www.iaui.gov.lv/Gada_Parskati/default.htm, last accessed on 20 July 2009.

[7] *Supra* note 1, Articles 1.3 and 8.

[8] 1€ = 0.702804 LVL. Amount of 1 million LVL constitutes approximately 1.42 million euros.

[9] *Supra* note 1, Article 11.

[10] *Ibid*., Article 12.

within ninety days from the day of submission or from the day additional information was submitted to the Inspection upon its request.[11] The license is granted to the company subject to payment of the state duty of LVL 300,000[12] (three hundred thousand Latvian lats). Although the license is perpetual, it is subject to re-registration at the Inspection on an annual basis.[13]

31.2.2 Licensing: Special

In addition to the general gambling organizers' license described above, a separate special license is needed with respect to each gambling site the organizer wishes to open. Thus, the general license merely gives the company a status of "gambling organizer," but each type of gambling activity has to be licensed further. Depending on the type of intended operations, the organizer can apply either for a casino, gaming hall, bingo hall, or totalizator and betting hall license.[14] The organizer may also apply for an interactive gambling (i.e. online) license or license for games of chance over the phone if a "brick and mortar" site is not planned.[15]

31.2.2.1 Brick and Mortar Betting Halls

The documents that are required for a totalizator and betting hall license include documents regarding the building of the intended premises and description of the intended activities and development plan, but the most burdensome to obtain might turn out to be the local municipality permission.[16]

Under the Gambling Law there are certain locations where gambling cannot be organized. Among these are state and municipality institutions, churches, health care and educational institutions, pharmacies, post departments, credit institutions, public markets and others.[17] Please note that though the restrictions also vary depending on the gaming activity in question and with respect to betting halls the restrictions are the least severe. For example, unlike any other gambling activity, betting can be organized in public events locations, in shops, cultural institutions, railroad and bus stations, ports and airports (with separate entrance from

[11] *Ibid*., Article 13.

[12] *Ibid*., Article 14, and Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, Article 2, (∼€430,000).

[13] *Ibid*., Article 16.

[14] *Ibid*., Article 20.

[15] *Ibid*., Article 46.

[16] *Ibid*., Article 27.

[17] *Ibid*., Article 41.2.

outside), as well as in bars and cafeterias.[18] Yet again, even if the intended location does not fall within the predefined restricted areas, the municipality is still entitled to refuse its permission if it finds that gambling in the particular location would be "detrimental to public interests."[19] There are no objective criteria laid out under which the assessment for "detriment to public interests" should be made, thus the municipalities have rather wide discretion to implement the gambling policy they stand for. The attitude may vary from municipality to municipality, but as regards the Riga city municipality (approximately 750,000 residents out of 2.3 million total in Latvia), since the adoption of the Gambling law, which introduced the requirement of municipality permissions, it has not issued any permissions for new gambling locations. The existing gambling organizers, licensed under the previous system, are the ones who have managed to maintain their business in the same location and their leases to the premises have not expired.[20]

If the required documents have been gathered and filed with the Inspection, the Inspection adopts the decision within thirty days and issues the license to the organizer subject to payment of state duty in amount of LVL 30,000[21] (thirty thousand lats).[22] The special license is also perpetual, but subject to annual re-registration [fee LVL 30,000 (thirty thousand lats)].[23]

31.2.2.2 Interactive (Online) License

Given the ample restrictions on locations where betting halls can be operated and the uncertainty with municipality permissions, the potential sports betting organizers might have lost their interest to run a fixed location. Electronic communication means have proven to be a much more convenient way for people to wager their stakes. It also allows targeting much wider client auditory in a more cost-efficient way for the organizer. Given that the local municipality permission is not required, the licensing regime is also more favourable.

In order to obtain the interactive gambling license, which, among others, allows engaging in sports betting, information regarding rules of the games/services has to be provided, in addition to notice on a Latvian bank account for dealings with customers, description of the software and software test results,[24] location in

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[18] *Ibid.*

[19] *Ibid.*, Article 42.1.3.

[20] *Supra* note 6, Annual Public Report 2008, p. 18.

[21] Approximately 43,000 €.

[22] *Supra* note 1, Article 28 and the Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, Article 2.

[23] *Ibid.*, Article 33 and the Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, Article 2.

[24] In accordance with the rules of Cabinet of Ministers, No. 113, Rules on Independent and Internationally Recognized Laboratories to Issue Opinions on Software Used in Organization of Interactive Gambling, adopted on 07.02.2006, only two institutions are allowed to issue such

Latvia where the hardware used for sports betting will be placed, a description of the planned security measures to prevent third party interference, information on measures to be implemented for customer personal data protection, webpage to be used if the sports betting is organized via the Internet and information about the person in charge of the operations.[25]

The application is examined and a decision regarding the interactive license, if it concerns only sports betting, is taken within thirty days from the receipt of full information at the Inspection, whereas if other gambling services are rendered as well (i.e. card games, roulette, etc.), the decision is taken within sixty days.[26] Although the law does not refer to any fees or re-registration obligations for interactive licenses, the Inspection treats it the same as a regular betting hall license—i.e. 30,000 LVL are payable annually.

In addition to the Gambling law, which lays down the general requirements that the interactive gambling organizer must comply with (player registration, dealings only with Latvian banks, personal data protection, warnings regarding addictive nature, reporting, bookkeeping, etc.), there are several Cabinet of Ministers Regulations that specify these requirements in more detail.

31.3 Promotion Prohibition

Since January 1, 2006, along with entry into force of the current Gambling Law, all forms of gambling promotion (advertisements) outside the gambling locations are prohibited.[27] Consequently, there should be no public activities related to promotion of sports betting in Latvia. However, the reality is that promotion of sports betting in Latvia still exists. The organizers are constantly looking for ways to bypass the restriction. In fact, judging from the available decisions of the competent authorities, among all the possible gambling types, usually sports' betting organizers are the ones who are involved in the violations of the said restriction. The industry has also developed certain practises to deal with the restrictions and enforcement authorities are facing certain issues to strike them down effectively.

The Gambling Law only provides the general restriction on "gambling advertising." It does not elaborate on the meaning of the term "advertising." In those circumstances the general definition of advertising from the Advertising law[28] has to be applied to understand how extensive the restriction on gambling

(Footnote 24 continued)
opinions: the Gaming Laboratories International Europe BV (Netherlands) and SMI Software and Messtechnik Institute GmbH (Austria).

[25] *Supra* note 1, Article 47.

[26] *Ibid*., Article 48.

[27] *Supra* note 1, Article 41.5.

[28] Advertising law of Republic of Latvia, adopted 20 December 1999.

advertising is. Advertising is defined as any form or any mode of announcement or endeavor associated with economic or professional activity, intended to promote the popularity of or demand for goods or services.[29] Given the broad wording, the definition could apply to anything the organizer does outside its registered gambling site, as long as it can be shown that the actual purpose of the particular activity is to promote the gambling services rendered by the gambling organizer. For the detriment of the organizers, the competent authorities tend to look at the restriction in its broadest way.

Usually the sports betting organizers would place a banner in the most popular Latvian online sports portals, in the sports federation webpage or in the sports halls/arenas during sporting events. In all the publicly available violation cases[30] so far, it has always been a sports betting site registered abroad that is advertised. The compliance with the Advertising law is enforced by the Consumer Rights Protection Centre (hereinafter the CRPC).[31] The CRPC is entitled to initiate a case either on the basis of a third party application (i.e. complaint), information provided by another institution, or on its own initiative.[32] Of the five sports betting advertising cases, three were initiated by third party applications, and two of these by the only Latvian sports betting organizer. Hence, the locally licensed operator is keeping an eye on the activities of competitors. Given the involvement of foreign online operators, which brings up jurisdictional and enforcement issues, none of the cases have been initiated against the actual gambling organizer, instead they are all against the advertising channel. Four cases deal with Internet portals containing sports betting banners and one case was against the operator of the largest sports arena in Latvia. These decisions are relatively recent, i.e. in the period from May 2007 until November 2008. In all the cases CPRC established a violation, in two instances a monetary fine of LVL 2,000 was imposed, and in the remaining three an order was issued to terminate the violation.

In all cases the parties who were accused of violating the advertising prohibition used similar defense arguments. The CRCP rebutted the argumentation in the same manner. A case against the largest sports hall "Arena Riga" illustrates the common argument that advertising of the brand or trademark of the sports betting organizer itself does not amount to "gambling advertising."[33] "Arena Riga" claimed that no particular gambling activity was being advertised and a restriction on advertising the logo of the company would be too broad. They argued that the company could also be rendering non-gambling services that are not subject to advertising restrictions. The CRPC did not uphold this argument, instead it explained that the trademark "betway|^{COM}" indicates a link to a certain Internet

[29] *Ibid*., Article 1.

[30] CPRC Decisions No 2-r (11 May 2007); No 5-r (16 May 2007); No 15-r (20 July 2007); No. E03-RIG-372 (01 September 2008); and No. E03-RIG-453.

[31] *Supra* note 28, Article 13.

[32] *Ibid*., Article 14.

[33] *See* CRPC Decision No. 2-r on advertisement, 11 May 2007.

domain and such practise falls within the advertising definition. The main economic activity of the Internet site is gambling services, which are prohibited from being advertised.

Another interesting aspect in a similar case against one of the largest Internet news portals "Delfi" indicates that the same offense may lead to a double penalty.[34] The CPRC imposed a penalty of LVL 2,000, despite the fact that the Inspection had already imposed a penalty of LVL 100. As noted before, the CPRC is the competent authority with regard to enforcement of the Advertising law, whereas the Inspection is the competent authority with regard to the Gambling law. The Code of Administrative offenses allows the Inspection to impose a penalty up to LVL 1,000 for violations of the Gambling law, whereas the CPRC is entitled to impose a penalty of up to LVL 10,000 for breach of the Advertising law.[35] Although the gambling advertising restriction is stipulated in the Gambling law, the Advertising law contains a more general prohibition—to disseminate legally prohibited advertising.[36] Hence, each authority qualified the same event as a violation of the law that was in its competence to enforce. Clearly, Delfi was not satisfied with such a resolution and the CRPC has informally confirmed that not only Delfi, but also all other decisions with respect to sports betting advertising, have been appealed in the administrative courts.

None of the cases have yet been examined. While the rulings are pending, the conclusion is that the CPRC decisions have not resulted in the desired effect. Some of these websites are still carrying banners with sports betting sites and promotional activities can still be noticed during sports events. Hence, both the Internet portals and the sports betting organizers are simply buying time with the appeals, hoping that the penalties would outweigh the gains during the litigation period, or they are strongly convinced that the practise indeed does not amount to gambling advertising. The court rulings are keenly awaited to cast certainty on this issue.

Another trend, which shows at least some respect to the advertising ban by the betting organizers, is the practise of "alibi sites." To avoid the advertising prohibition, a double link advert is created. The banner on a popular Latvian portal (.lv) advertises a ".com" or ".net" site which itself does not contain any games of chance, however its main purpose is to bring the person to a site that does. The "alibi site" may contain some games of skill or similar entertainment, but not sports betting, only its advertisements. Taking into account that these are ".com" or ".net" sites, the Latvian authorities cannot control their advertising content. Furthermore, given that they are not providing sports betting services themselves, these sites cannot be restricted from advertising in Latvia. So far there have been no cases where the legality of this practise would be analyzed and the view of the

[34] *See* CPRC Decision No. E03-RIG-372, 01 September 2008.

[35] Code of Administrative offenses of Republic of Latvia, adopted 07 December 1984, Articles 166.13 and 204.5.

[36] *Supra* note 28, Article 12.4.

Inspection and the only Latvian sports betting organizer regarding this practise is also unknown.

The advertising restriction is in fact a two-fold issue. On the one hand, the government tries to protect the general public from the potential harms of gambling; on the other hand, the restriction leads to complications that make Latvia less attractive as a potential venue for international sporting events. The sports betting organizers tend to be frequent sponsors of international sporting leagues and they reasonably expect that their logo will at least be displayed during the events the league organizes. The intentional nature of these events allows for significant attention, revenues from ticket sales, increased tourism and publicity. Hence, not only the sports industry, but also municipalities and the State itself are interested in encouraging major international sports events to be hosted in Latvia. However, if the league cannot ensure that its sponsors' logo is displayed, it risks losing the sponsor and may not consider Latvia as one of the possible locations for the venue. Loosing these events also would not be in best interest of the general public.

Latvia's case shows that despite the restriction, sports betting sites are still being promoted on Internet portals and during sporting events either directly or through "alibi sites." The competent authorities, despite viewing this as violation, have not managed to make these advertisements disappear. As a result, foreign online gambling organizers gain competitive advantage over the ones that are locally licensed. The Inspection cannot ensure that consumer interests are fully protected and possible tax revenues flow out of the country. Hence, the current inability to effectively enforce the restriction, which puts the local companies in a disadvantageous position, calls at least for a debate as to whether the restriction should not be reassessed. A reasonable balance must be found. Interpreting the restriction in the most extensive way after all may not be in the best interests of the general public.

31.4 The Market

Given the comparatively "heavy" regulation of the industry and taking into account the overall population (i.e. size of the market) of Latvia, it comes as no surprise that there is only one operator of sports betting licensed in Latvia.[37] The general trend in the sports betting market is that betting is done interactively, i.e. via Internet, telephone, television, radio, or by any other type of electronic communications means. Thus, the only sports betting organizer in Latvia, in addition to the 17 fixed locations it runs, has also taken out the interactive gambling license.

Unlike in several other countries, Latvia imposes no prohibitions in relation to

[37] SIA Tele Toto, Brīvības iela 99, Rīga LV-1001, Latvia, www.optibet.lv.

online gambling. There is an explicit regulation, which shows that Latvia considers it to be a legitimate business activity. Furthermore, despite that the E-Commerce directive[38] allows restricting online gambling services originating from other EU Member States, Latvia has neither restricted its residents from gambling on foreign websites, nor has it restricted access to such sites. Consequently, not only sports betting organizers from other EU Member States, but also from third countries are able to render and target their services to the Latvian public. Given that these websites operate according to the laws of their registration countries and are not controlled by the Inspection, the Latvian consumers using these services do so at their own risk. Nevertheless, judging from the frequency of the advertisements these foreign gambling sites place in the Latvian portals, it must be concluded that consumers do not find the lack of Inspection back-up as a major factor and are using these services at least to the extent that it makes economic sense for the operators to be present on the market. In fact there has not been much public turmoil regarding any fraudulent cases by these foreign operators and, although the Inspection might have received some complaints from consumers, as of today it has not published any "black lists" or warnings regarding particular sites which should be avoided. Hence, it would be fair to say that the Latvian sports betting market consists of two parts—the locally licensed and the foreign online operators.

In these circumstances it is hard to tell the actual value and size of the market. Although the Inspection publishes statistics on the betting market, given that there is only one licensed operator in Latvia, these figures basically reflect the revenues of this company. It would be incorrect to assume that the company has a 100% market share, but on the other hand, it is also difficult to tell what the actual market share might be. There is no information as to the total market share the foreign operators have managed to obtain. Nevertheless, according to the most recent data published by the Inspection,[39] in the first quarter of 2009 (January–March), the turnover of the one betting organizer in Latvia was 2.7 million LVL. Such turnover makes it the third largest gambling company by turnover in the whole industry. In year 2008 the total turnover from games of chance was 154 million LVL, of which betting accounted for 10 million LVL. It was the fourth largest turnover by companies in the gambling sector. In fact, given the economic downturn, out of all games of chance only the betting sector has demonstrated an increase if compared to results of 2007 (8.2 million LVL). The same tendency is visible comparing the turnovers in the first quarter of 2008 (2.3 million LVL) to the first quarter of 2009 (2.7 million LVL). Given the $\sim$10 million LVL annual turnover for a single company, and the number of foreign online sites actively advertising on the market (bwin.com, betway.com, triobet.com, expekt.com, betsafe.com, etc.), the actual size must be at least double of that.

[38] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178, 17/07/2000 pp. 0001–0016, Article 1.5.c.

[39] *Supra* note 6, Annual Public Report 2008.

31.5 Taxation

Currently in Latvia the gambling tax and its payment order is regulated by the law "On Lotteries and Gambling Tax and Fee" (hereinafter the Law on Gambling Tax), adopted on June 16, 1994. The Law on Gambling Tax has had thirteen amendments, which together determine the tax and duties rates to be paid by enterprises that have received gambling licenses. The quantity of the amendments is interrelated with the growth of the gambling industry and its turnover. Initially the gambling tax was levied as a fixed rate on particular type of gambling. However with amendments adopted on September 19, 2003, the tax on the organization and operation of totalizator and betting was set as a percentage of the income from the activity.

The gambling tax, along with the excise tax for tobacco and alcohol, is usually the first to be reviewed when the government needs to raise revenue for the state budget. On the other hand, even when the economy is in a decent shape, the tax rates are still increased to implement the defined Latvia's policy—i.e. to control the growth of the industry. Considering the present economical downturn, Saeima has adopted yet another amendment to the Law on Gambling Tax, which came in force on July 1, 2009.[40] The tax rate for sports betting has been raised to 15% from the organizers income, instead of the 10% rate that was applicable before. The Law on Gambling Tax prescribes that the tax payment is made on a monthly basis as 1/12 of the total yearly tax rate. In the case if the tax amount is indicated incorrectly or the tax payment is delayed the State Revenue Service is empowered to impose strict sanctions, e.g. including disputel-ess tax recovery, legal penalties up to 250% from the payable tax amount and the annulment of gambling organizers' license.[41]

Unfortunately there are no statistics available as to the taxes collected in particular from betting activities, however, in the first quarter of 2009 the collected gambling tax from the whole gambling industry amounted to 5.2 million LVL in the state budget and additional 1.5 million LVL in the municipality budgets. In addition to the gambling tax the companies also pay corporate income tax, social contributions, VAT and other taxes which in the first quarter of 2009 amounted to 2.8 million LVL. Altogether in 2008 the industry paid 23.8 million LVL as a gambling tax in the state budget, 6.9 million in municipality budget and the other taxes amounted to 18.2 million LVL.[42] Comparing the 2008 results to 2007 results there is a slight drop and the same is true if comparing the first quarter of 2009 and the first quarter of 2008. The results of the third quarter of 2009 should indicate whether the new tax rates in force as of July 1, 2009, will increase the tax revenues or will slow down the industry even more.

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[40] Amendments to the Law "On Lotteries and Gambling Tax and Fee"; adopted 16 June 2009.

[41] Latvian Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, Articles 13 and 14.

[42] *Supra* note 6, Annual Public Report 2008.

The last taxation aspect to be mentioned is that any winnings from a gambling activity are taxable personal income (23% rate).[43] In accordance with Latvian tax law, the gambling organizers are obliged to withhold personal income tax and make respective contributions into the state budget on behalf of that person for any winnings above 500 LVL.[44] Although the average winnings from sports betting might not reach 500 LVL, if they do, the foreign online sports betting organizers are once again in an advantageous situation if compared to the local organizer, that is, they are not bound by this obligation and are able to remit the whole winning to the person without any withholdings. In such case, and also in cases where the winnings do not reach LVL 500, the Latvian resident itself is expected to declare such income and make the tax payments.

31.6 Conclusion

Despite the economic downturn, the results of the sole sports betting organizer show that the market is still reasonably active. The fact that there is only one company licensed should not lead to false assumptions that the market is unattractive for other companies. On the contrary, it could be the licensing and regulatory environment that makes sports betting organizers consider operating from abroad. The possibilities of electronic communication means allows them to shop for the most beneficial jurisdiction to establish and license themselves (if at all) and then serve the Latvian clients online. The number of such companies seems to be only increasing over the years. The trend that the whole gambling industry is moving more to the online environment has also been recognized at the EU level.

The European Parliament recently adopted a non-legislative resolution on the Integrity of Online Gambling.[45] The European Parliament has recognized many of the issues that the Member States face with online gambling and calls for closer cooperation not only between Member States, but also between EU institutions to deal with them and form a "common position." The uniqueness of the industry has also been recognized, which makes the pure internal market approach inappropriate in this area, recognizing the rights of each Member State to regulate the area according to its traditions and culture, including the right to legitimately restrict the freedom to provide the online gambling services. Hence, on the one hand the European Parliament calls for cooperation to deal with the current concerns, but on the other it is not trying to impose certain level of harmonization among Member

[43] Law on Personal Income tax of Republic of Latvia, adopted 11 May 1993, Articles 3.16 and 17.10.10.

[44] Cabinet of Ministers Regulations No 233, adopted 01 July 1997, "Procedures how personal income tax is levied on persons' income from lotteries and gambling", Article 3.2.

[45] "Integrity of online gambling", reference INI/2008/2215; *available at* http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2008/2215, *last accessed* 20 July 2009.

States. Harmonization, however, seems to be something that the industry might be willing to see. There are at least two requests for preliminary rulings to the European Court of Justice seeking a response whether Member States shall recognize each other's licensing regime.[46] These decisions will once again show where the balance of competence to regulate in the gambling sector is to be found, or whether it is the absolute competence of each Member State.

Returning to the case of Latvia, although the regulations might seem to be quite strict, at least the sports betting sector and online betting remains a relatively open market. There are neither prohibitions for online gambling, nor are the activities restricted to state monopolies. The question whether the Latvian legal environment is attractive for potential operators is a different debate. So far there has been no domestic case law regarding the interpretation of the Gambling Law in relation to sports betting. There have only been rumours of match-fixing, but no real court cases. The current greatest challenge for the Inspection and the CRCP is to achieve effective enforcement of the advertising restriction. Depending on how successful this battle will be, the results will tell whether the restriction does not need to be reassessed in general. The current market data shows that despite the economic downturn, the betting sector is still holding up and demonstrating a slight growth.

[46] Reference for a preliminary ruling from the Hoge Raad der Nederlanden, lodged on 18 June 2008—Ladbrokes Betting and Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator, (Case C-258/08),(2008/C 223/41); and "BETFAIR STARTS LEGAL ACTION AGAINST DUTCH GOVERNMENT", *available at* http://corporate.betfair.com/powerscourt-pr-betfair-and-dutch-government-6-5-09.pdf, *last accessed* on 17 July 2009.

Chapter 32
Sports Betting in Lithuania

Jaunius Gumbis and Liudas Karnickas

Contents

32.1 Historical Perspective

In 1990, when the independence of Lithuania was restored, the law legalizing gambling games in Lithuania was adopted. However, already in 1994 a total ban on all forms of gambling was introduced. It was only in 2001 that the new Law on Gambling (the "Gambling Law") came into force and reset the legal framework for gambling, including sports betting activities. The main reason to repeatedly legalize gambling, including sports betting, was the need for additional income in the state budget in the form of various fees and taxes related to gambling activities. The first sports betting companies started their activities as soon as the new Gambling Law was established. As of 2009, four companies engaged in sports betting activities are established in Lithuania.

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32.2 Applicable Legislation

No special legislation regulating sports betting has been adopted in Lithuania. However, sports betting is organized within the general framework of gambling and the particular framework of betting. The Gambling Law is the main legal act regulating gambling in Lithuania, setting forth the main requirements for gambling companies, restrictions, and prohibitions related to the organization of gambling and supervision of gambling activities. Civil relationships, i.e. the basic rights and obligations of an organizer of gambling and a gambler, are also briefly regulated by the Civil Code of 2001. The Civil Code sets forth that betting has to be organized under the established procedure in order to have any legal effect for the parties involved. Pursuant to the Civil Code, the ticket, check, or other document specified in the rules of the game, is regarded as the contract between the organizer of gambling and a gambler. The Law on Lottery and Gambling Tax of 2001 applies to taxation matters related to sports betting. The Rules on Licensing of Gambling, adopted by the Government of Lithuania establish the procedure for granting licenses to organize gambling activities. Totalisator and betting centers are established according to the Procedure on Establishment of Totalisator and Betting Centers, adopted by the State Gaming Control Commission (the "Commission"). It should also be noted that the draft of the Gambling Law (the "Draft Gambling Law") has been under preparation since 2006 and is to be adopted in the foreseeable future.

32.3 Concept of Gambling and Betting

The Gambling Law defines gambling as a game or mutual betting that is organized under the established regulation, where the participants seek to win money by voluntarily risking a stake, and where wins or losses depend on chance or the outcome of any event or sports match. Betting is regarded as one of five forms of gambling, and is understood as mutual betting on the outcome of an event based on guessing, where the amount of the win depends on the amount of the bet made and the odds fixed in advance by the betting intermediary. It should be noted that the Draft Gambling Law introduces the parties of betting with the additional possibility of agreeing on the odds on a case by case basis. The other four forms of gambling are machine gaming, bingo, table games, and totalisator. The organization of any of the aforementioned gambling games requires a separate license. All five licenses can be obtained by a single company. Lithuanian legislation does not provide any other particular definitions or features of sports betting.

32.4 Conditions for Organizing Sports Betting

In Lithuania, sports betting can be organized by any company acting in accordance with the Law on Companies, possessing a betting license granted by the Commission, and betting regulations approved by the Commission. The authorized and paid capital of the company specified in its articles of association cannot be less than LTL 1 million (approx. EUR 286,000). All shares of the company have to be registered. In order to obtain a license the company has to provide the Commission with a number of documents related to its authorized capital, financial status, shareholders, managing persons, nature of funds used to pay for the company's shares, etc. In order to grant a license the Commission has to receive reports from the State Security Department, the Financial Crime Investigation Service, the Special Investigation Service, and the Police Department. The license to organize betting is granted for an indefinite period of time. The company possessing a license to organize betting is entitled to start betting activities only after the Commission approves the company's betting regulation, which includes main betting rules, procedures for setting up and winning the cumulative fund, paying out wins submission and settlement of claims, etc. The prior permission of the Commission is necessary to establish any sports betting center. The license to organize betting is canceled under the request of the holder, in instances when the company ceases its activities due to reorganization or liquidation, when the company fails to eliminate identified infringements of rules governing licensed betting activities, etc.

32.5 Main Restrictions and Prohibitions

Companies organizing sports betting activities are not allowed to perform other commercial activities except rental of its premises for restaurants, bars, musical performances, or currency exchange. Sports betting license holders cannot be incorporators or shareholders of other companies as well. It is forbidden to organize sports betting activities in residential buildings (with certain exceptions), educational, health care, cultural, financial, post, state or municipal institutions, supermarkets (with certain exceptions), railway or bus stations, airports, and seaports. Certain requirements for premises to execute sports betting activities were introduced aiming to limit the access of underage persons and other sensitive social groups to sports betting activities. Advertising of sports betting is forbidden in Lithuania, except for the names and addresses of betting license holders and betting centers.

32.6 Main Obligations

The shareholders of the company have to notify the Commission of every transfer of the shares, and the Commission in such a case has to decide on re-registration of the company's license. Sports betting companies are responsible for ensuring that persons under 18 years of age would be precluded from betting. Sports betting companies have an obligation to register every person who makes bets or wins amounts equal to LTL 3,500 (approx. EUR 1,000). Companies organizing sports betting are also obliged to annually provide the Commission with their annual financial statement and auditors report. Financial statements of sports betting license holders are made publicly available.

32.7 Supervision and Liability

In Lithuania, the Commission is entitled to execute supervision of gambling companies, including sports betting companies. The Commission is granted the right to obtain necessary information, to examine financial activities of sports betting companies, to inspect the premises where sports betting is organized, to request explanations on the organization of sports betting activities from the companies, to impose sanctions, etc. Under the Lithuanian legislation the infringement of gambling organization procedure or betting regulations is regarded as an administrative offense and incurs a fine in the amount of LTL 5,000 (approx. EUR 1,429) to LTL 25,000 (approx. EUR 7,250).

32.8 Future Legislative Developments

According to applicable legislation the organization of any gambling activities (including sports betting or totalisator) via the internet, telephone, or other mobile devices, is prohibited. However, it is likely that in the foreseeable future this restriction will be eliminated since the main provisions to be introduced by the Draft Gambling Law relate to the possibility of operating online gambling (as well as sports betting and totalisator) activities. The proposed model for online sports betting and totalisator is highly related to the physical establishment of such operators and is only allowed for subjects meeting special licensing requirements. Moreover, strict requirements are proposed for the identification of persons betting online. The Draft Gambling Law requires that written contracts be entered into with persons willing to bet online. Only after the conclusion of such contracts, and after issuing the password, can the person become eligible to bet online. As mentioned, the Draft Gambling Law is under

preparation as of 2006 and is still in the process of constant changes and negotiations. Although provisions concerning online gambling are likely to be adopted in the near future, tight restrictions are likely to apply for organizing online sports betting and totalisator activities since Lithuanian authorities are quite conservative on gambling issues.

Chapter 33
Sports Betting in Luxembourg

Jean-Luc Schaus

Contents

33.1 Introduction

33.1.1 General Overview

As in other countries, sports betting activities and lotteries are heavily regulated and subject to license in Luxembourg. The current Luxembourg legislation provides for a regime applicable to benevolence and charity lotteries (law of February 15, 1882 on lotteries,[1] as amended), as well as rules applicable to sports betting

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[1] "Loi du 15 février 1882 sur les loteries," Mémorial A, (the official Luxembourg gazette) (hereafter, Mém.) 1882, 129, as amended by the law of April 20, 1977, Mém. 1977, 548; the law of August 1, 2001, Mém. 2001, 2440; the law of July 30, 2002, Mém. 2002, 1830.

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(law of April 20, 1977 on games of chance and sports betting,[2] as amended). The Luxembourg Criminal Code expressly makes it a criminal offense to conduct or operate a game of chance without proper administrative authorization.

33.1.2 Historic Background

Luxembourg law has traditionally been hostile to games of chance. Indeed, to this date, Articles 1965 and 1967 of the Luxembourg Civil Code, which have not changed since their introduction in 1804,[3] follow a tradition which goes back to Roman Law, wherein they explicitly state that claims arising out of a game or a bet cannot be enforced. This means that, for instance, a party that has given a loan to another party for the purpose of gambling will not obtain an enforceable judgment from a Luxembourg court for such claim.

Article 1966 of the Civil Code provides that this rule does not apply to those games "which help the exercise of weapons, races by foot, by horse or by carriage, racquet games, and other similar games." Although case law is extremely rare, this exception must be interpreted narrowly and was meant to apply to the participants (i.e. players) of such games, and not to third party sports betters. Indeed, the parliamentary commentary to the law of April 20, 1977[4] suggests that such exception originally was meant to promote "physical education, athletic games … for the purpose of promoting sturdy soldiers and useful citizens."[5]

Similarly, Articles 301–305 of the Luxembourg Criminal Code of 1879,[6] which are still in force, as well as Article 14 of the law of April 20, 1977, repeated the principle already prevailing in the Criminal Code of 1810,[7] pursuant to which it is a criminal offense to conduct, manage and operate any game of chance that is not

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[2] "Loi du 20 avril 1977 relative à l'exploitation des jeux de hasard et des paris relatifs aux épreuves sportives," Mém. 1977, 548 as amended by the law of August 11, 1998, Mém. 1998, 1456; the law of November 12, 2004, Mém. 2004, 2766.

[3] Articles 1964–1966 of the Luxembourg Civil Code are identical to Articles 1964–1966 of the French Civil Code.

[4] *Projet de loi (Law project)* N° 1433, motivation of the governement, p. 1262.

[5] The commentary to the law project in turn refers to the commentary to a Belgian law of 1902 which is the basis of the Luxembourg law of June 15, 1903 discussed later. To be compared with a French judicial decision of August 13, 1831, (Royal Court of Angers, published in Sirey, 2nd series, 1832, p. 273) which suggests that the winner of a billiard game could not claim his prize in court, because "[the exception of article 1966] was established for public interest considerations, and one doesn't see how the dexterity and practice of a billiard player can lead to a sturdy soldier or useful citizen."

[6] Introduced by the law of June 16, 1879, as amended.

[7] Article 410 of the 1810 Criminal Code.

authorized by a government authority. In principle, there is no level of tolerance, since ad hoc games organized in public spaces are illegal as well.[8] Punishment ranges from a fine of up to €25.000—and up to three months of prison, depending on the exact circumstances of the offense.

Generally, Luxembourg legislation[9] has always provided that the government or a municipal authority could, under certain conditions, authorize a lottery to promote devotion and charity, industry and arts, and any other "public use," sports betting being part of the definition of a lottery. The Law of June 18, 1903, for the first time introduced liberal rules specifically applicable to sports betting. This legislation was amended by a law of January 31, 1948,[10] and replaced by a new law of April 20, 1977. Modern legislation typically tries to distinguish between lotteries and sports betting.

33.2 Current Legislation

33.2.1 Private Lotteries

The current Luxembourg legislation does not allow the operation of a lottery without prior authorization and for specific purposes. Allowed goals are not-for profit purposes such as "acts of piety, benevolence, encouragement of industry or arts, or any other goals of public utility." A lottery is defined in Article 301 of the Luxembourg Criminal Code as any transactions offered to the public which offers a reward based on chance.

In accordance with the law of February 15, 1882, as amended, lotteries shall be authorized either by the Government, if the total value of the lottery tickets exceeds €6,250 or otherwise by the executive body of the municipality[11] in which the lottery is organized. An authorized lottery operates as an exception to the general ban of Articles 302 and 303 of the criminal code.

In practice, local sports clubs, charity, and church organizations, are typically authorized to organize one single lottery event in a given year.

Pursuant to a law of July 30, 1983,[12] an excise duty of 15% is payable on lottery proceeds. There is no taxation of prizes.

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[8] Article 557, 3° of the Criminal Code; see also, commentary to the law project which led to the law of April 20, 1977 (law project N° 1433).

[9] See Royal Decree of May 31, 1828 (Mém. 1828, n° 34); Law of February 15, 1882 on lotteries (Mém. 1882, N° 13. p. 129).

[10] Mém. 1948, N° 9, p. 179.

[11] "Collègue des bourgmestre et échevins."

[12] Mém. 1983, N° 60, p. 1345.

33.2.2 The Luxembourg National Lottery

Immediately after the end of World War II, the government established the National Lottery in order to replace the then existing lotteries,[13] which were operated by various charity outfits. In return for the monopoly to organize lotteries on the Luxembourg territory, the *Œuvre Nationale de Secours Grand-Duchesse Charlotte*[14] (hereafter, the Œuvre Nationale), must by law distribute 50% of the proceeds of the National Lottery among various other Luxembourg-based charity organizations. In accordance with Article 4 of the Grand-Ducal Decree of July 13, 1945, any other public lottery issuing lottery tickets for more than €2.500 is subject to agreement by the Œuvre Nationale (on top of the municipal/governmental authorization discussed before).

The Luxembourg administrative court of justice has held that the fact that the Œuvre Nationale holds a monopoly to organize lotteries and can veto the authorization of an independent lottery is legal from a Luxembourg law basis and compatible with EU Law, because there is no discrimination between domestic and foreign operators.[15]

33.2.3 Sports Betting

33.2.3.1 Introduction

The law of June 15, 1903,[16] which was abrogated by the law of April 20, 1977, was the first legislation to introduce more liberal rules specifically applicable to sports betting. From 1903 until a law of January 31, 1948,[17] the prohibition of lotteries did not apply to games involving physical exercise or skills or bets thereon.[18] In 1948, such games became more restricted. While not outlawed, they were made subject to an authorization by the Ministry of Justice, the details being defined in a Grand-Ducal Decree of September 20, 1948,[19] which also introduced a special tax on sports' betting games.

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[13] Grand-Ducal Decree of July 13, 1945, Mém. 1945, p. 392, as amended by the Grand-Ducal Decree of December 29, 1960, Mém. 1960, p. 1551; and the Grand-Ducal Decree of August 26, 2005, Mém. 2005, p. 2584.

[14] The Œuvre Nationale de Secours Grand-Duchesse Charlotte is a charity organization created by the Grand-Ducal Decree of December 25, 1944, (mém. 1945, p. 7).

[15] Luxembourg administrative court (First instance), July 26, 2000, N°10605.

[16] Mém. 1903, N° 43, p. 641.

[17] Mém. 1948, N° 9, p. 179.

[18] Article 7 of the 1903 law.

[19] Mém. 1948, N° 57, p. 1075.

The currently applicable legislation is the law of April 20, 1977 on games of chance and sports betting, as well as the Grand-Ducal Regulation of September 7, 1987 as amended.[20]

33.2.3.2 Government Authorization

The current legislation does not define the policy grounds on which an authorization may be refused. However, a refusal must have always been motivated by the government authority[21] and is subject to appeal in the administrative courts. Any decision by a government body or agency may always be disputed on the grounds of excess or diversion of power, violation of the law or formal requirements designated to protect private interests.[22]

In any event, an applicant must provide identification documents such as, amongst others, company bylaws, exact identification of its managers with supportive documentation, judicial records, the full text of the game rules on which the sports bets are proposed to be based. A foreign applicant must also provide the name of a general agent based in Luxembourg. Such a general agent in turn has certain legal responsibilities such as turning in the tax proceeds.

Sports bets must be accepted from the general public at points of sale that must be licensed by the Justice Ministry. Just like the applicant for a sports betting license, the manager of a point of sale is also subject to a background check.

33.2.3.3 Procedural Requirement with Regards to Sports Bets

At this point in time, the Luxembourg legislation has not been adapted to take into account the possibility of running sports betting activities over the Internet.

The current legislation provides that bets must be registered in accordance with either of two methods, these being the stamping of the participant's bulletin stating the bets by a registration machine, or by the electronic reading of such bulletins by a registration machine.

The registration machines and the bulletin templates must be approved by the government authority. The Grand-Ducal Regulation of September 7, 1987, also details the contents of the receipt which must be handed to the player. Amongst others, the receipt must state the number of the government authorization, the exact name, address, of the organizer of the event or its agent, as well as a clause

[20] Mém. 1987, p. 1739, amended by the Grand-Ducal Regulation of June 5, 1997, Mém. 1997, p. 1459; and the Grand-Ducal Regulation of August 1, 2001, Mém. 2001, p. 2449.

[21] Law of December 1, 1978 on the non-contentious administrative procedure (Mém. 1978, p. 2486).

[22] Article 2 of the law of November 7, 1996 on administrative courts (Mém. 1996, p. 2262).

stating that Luxembourg courts have jurisdiction over any litigation with regard to the sports game.

Bets can only be received until 30 min before the beginning of the underlying sports event.

33.2.3.4 Criminal Rules

The law of April 20, 1977, makes it an offense, not only to organize sports bets without proper authorization, but also to act as an agent for a third party who has not obtained a proper authorization by a Luxembourg government authority. This scenario would apply to resellers and representatives operating on the Luxembourg territory and acting for foreign sports betting organizations.

Merely tolerating or encouraging the practice of "excessive" sports betting activities within publicly accessible premises is a criminal offense as well.

33.2.3.5 Taxation of Sports Betting

Since 1948, sports betting activities have been subject to various taxes. The Grand-Ducal Regulation of September 7, 1987 provides that an initial tax must be paid by any successful applicant for an authorization to operate sports bets in Luxembourg. The exact amount of this tax is fixed by the government authority authorizing the sports bets and is capped by law at €619,73.

On top of this tax, an excise duty of 15% of the gross amounts committed by the players is due and payable to the Luxembourg tax authority. The excise duty is calculated on the amounts indicated in bets filed on Luxembourg territory and is payable by the operator of the bets or by his general agent, if applicable.

Chapter 34
Legal Aspects of Sports Betting in Macedonia

Igor Aleksandrovski

Contents

34.1 Introduction

The purpose of this article is to present the legal aspects of organizing sports betting in Macedonia taking into consideration the relevant national legislation. At first I will briefly talk about the phenomenon of sports betting in Macedonia and will discuss the sociological factors that contributed to its fast expansion. Afterward I will present an overview of the general legal frameworks of organizing games of chance with special focus on sports betting and betting on sports matches via Internet.

Today we are all aware that sports betting has become big business. According to some unofficial data just the Super Bowl generates around $10 billion USD in turnover.

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In terms of sports betting Macedonia *has been turned into a giant betting arcade*.[1]

There are many factors (economic, psychological, sociological and legal) that influence the appearance and the expansion of betting in general and sports betting in particular. In Macedonia (and it is not much deferent in any other Balkan country) the expansion of sports betting happened primarily as a result of the bad economic situation and the low margin to participate in the game (minimum bet is 50 MKD—about 0.80 EUR). The typical profile of a person who bets is a young man, with a high school degree and low income.[2]

A study conducted by the Center for research and policy in 2006 analyzes the phenomenon of sports betting in Macedonia. According to the study the possibility of gain in connection with the low economic and social status and the low-living standard of the citizens is the main reason why so many people bet (37% of the citizens place bets and of the people who bet, 71.5% do so because of economic reasons, hoping to win and gain material means).[3] The main reasons for the expansion of sports betting are those placed it the high-unemployment rate, bad economic situation in the country and the illusion of control over the result.

In Macedonia the first betting places specialized in sport events[4] started operating in the late 1990s. Ever since the betting market has been constantly growing both in terms of revenue, in the level of market penetration and in the number of betting places. Reaching 79 licensed betting places in 2005,[5] around 150 in 2007 and today we can speak of close to 200 betting places operating in the country.[6,7]

34.2 Legal Framework

In regards to the development of the legal framework that regulates the activity of Sports betting the most important years are:

- *1997* and the enactment of the Law on games of chance and entertainment games with which sports betting was institutionalized.

[1] Susan Lee, Our Inner Macedonian, available at http://www.forbes.com/2008/11/26/macedonia-betting-gambling-oped-cx_sl_1128lee.html.

[2] Center for research and policy making, Sports betting as a Social Phenomenon in Macedonia, July 2006, available at http://www.crpm.org.mk/Home.htm.

[3] A survey conducted by CRPM (Center for Research and Policy Making), available at http://www.crpm.org.mk/Home.htm.

[4] In Macedonian Sportski oblozuvalnici (Спортски обложувалници) or Kladilnica (Кладилници).

[5] Ministry of Finance.

[6] If we compare this to the total population of the country in turns out that there is a betting place on around 10,000 citizens.

[7] This numbers cannot be confirmed due to the fact that many betting places operated illegally. In 2007 during the control of the Public revenue office 136 betting places were closed because they did not have the appropriate licenses to carry out their activity.

- *2001* and the first great change of the law with the amendments in which sports betting is regulated more precisely.
- *2002* and the amendments in betting on sports matches via Internet was introduced.

In terms of expansion and implementation of the law we can speak of periods before and after 2007. Before 2007 the law on games of chance and entertainment games was more or less not respected by the organizers of sports betting. Sports betting was organized without any control or payment of any licenses or tax. There were isolated controls[8] by the public revenue office which showed limited or no results. However adequate systematic approach was lacking.

It looks like in 2007 the government decided to implement the law and to establish order in the sports betting industry. The controls in 2007 where the public revenue office closed down 136 betting places for irregularities—not having a license to organize sports betting send a clear message to the organizers that the state is determined to implement the law and it has to be respected. Afterward almost all of the organizers of sports betting acquired licenses and started respecting the legislative framework.[9]

34.2.1 Overview of the Law of Games of Chance and Entertainment Games

In Macedonia the law on games of chance and entertainment games ("official gazette of the republic of Macedonia" no. 10/97, 54/97, 13/2001, 2/2002 and 54/2007) regulates the types, conditions, organization and the manner the games of chance and entertainment games are organized in the Republic of Macedonia.

The Law makes a distinction between Games of chance and entertainment games. *Games of chance* are defined as games in which a greater number of persons participate and in which, in addition to the entertainment, the participants are given an opportunity to make profit in money, objects or rights and the final result of the game does not depend on the knowledge and the skills of the participants in the game, while *Entertainment games* are computer games, games' consoles, simulators, video automates, pinball machines, dart, billiards, organized computer entertainment games and other similar devices put into operation by inserting coins, chips or by cash and non-cash payment, in which the participant

[8] On the 25–26 of September 2001 the public revenue office controlled 46 sports betting places and closed 44 of them for irregularities, for more see http://www.a1.com.mk/vesti/default.aspx?VestID=2625.

[9] For more see http://www.ujp.gov.mk/mk/javnost/soopstenija/pogledni/15.

cannot make profit in money, objects or rights, except the right to one or more premium games on the entertainment device.[10]

According to the law the games of chance can be general and specific.

- General games of chance are:
  - Lotto
  - Football pools
  - Lottery
  - Instant lottery
  - Tombola and
  - Premium games.
- Specific games of chance are:
  - Games organized in a gaming house (casino)
  - Interactive games of chance organized in gaming house (casino)
  - Games on slot machines
  - Betting on sports matches
  - Betting on sports matches via Internet

In terms of the organization the games of chance can be permanent and temporary.

Permanent organization of games of chance (general and specific) can be carried out by a company legally organized and existing on the territory of republic of Macedonia.

Temporary organization of games of chance can be carried out by associations of citizens from the fields of physical culture and handicapped persons on the basis of a license-approval. The games of chance lottery and tombola can be organized temporarily.

The permanent organization of the games of chance can be arranged on the basis of a Decision by the Government of the Republic of Macedonia, which shall issue licenses for permanent organization of games of chance to the company. The license is issued upon proposal by the Minister of Finance. On the other hand the approval for a temporary organization of games of chance and organization of the game of chance-premium game is issued by the Minister of Finance on the basis of request by the organizer, submitted to the Ministry of Finance.

License for permanent organization of games of chance, the number of which is limited, shall be issued on the basis of public announcement. For organizing football pools, lottery and instant lottery the number of licenses shall be limited to 2 (two) given to deferent companies. For lotto and tombola the number of licenses is limited to 3 (three) given to deferent companies. The state however reserves the right to organize the same General games of chance.

[10] Article 2 and 3 of the law on games of chance and entertainment games ("official gazette of the republic of Macedonia" no. 10/97, 54/97, 13/2001, 2/2002 and 54/2007).

34.2.2 Licenses and License Fees

License for permanent organization of games of chance can be issued to a legally incorporated and existing trade company with a head office in the Republic of Macedonia that meets the following criteria:

- has founding capital of at least EURO 2,500,000 in MKD[11] equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia, except for organizing of *Betting on sports matches* where the founding capital of the company has to be EURO 200,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia and additional bank guarantee of EURO 300,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia is sought.

Furthermore the Trade Companies which are organizing Betting on sports matches and have from 25 to 50 payment places are required to acquire additional bank guarantee of EURO 50,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia and for every additional 25 payment places are required to acquire additional bank guarantee of EURO 50,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia.

- to provide technical, technological conditions and provide premises for carrying out the activity of organizing games of chance
- has engaged manager and other persons professionally skilled and who have required experience for a correct managing of the work and who have not been sentenced for punitive act connected with games of chance or entertainment games or for a criminal deed from the field of economics and
- at least 6 months prior to the publication of the announcement for obtaining a license, has settled its obligations toward the State, does not have a blocked giro account and pays the salaries on regular basis.

If the company which organizes *Betting on sports matches* wishes to engage in organizing other types of games of chance it has to fulfill certain additional criteria such as:

- to increase its founding capital up to EURO 2,500,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia
- to provide technical, technological conditions and provide premises for carrying out the activity of organizing games of chance
- has engaged manager and other persons professionally skilled and who have required experience for a correct managing of the work and who have not been sentenced for punitive act connected with games of chance or entertainment games or for a criminal deed from the field of economics and

[11] 1 EUR is equivalent to 61 MKD.

- at least 6 months prior to the publication of the announcement for obtaining a license, has settled its obligations toward the State, does not have a blocked giro account and pays the salaries on regular basis.

The period of validity if the license is from 3 (three) to 6 (six) years. The acquirer is obliged to organize the games of chance for which he acquired the license without interruptions. The period of validity of the license for temporary organization of games of chance is 9 (nine) months and it cannot be renewed in the year in which it expired.

Granting of the license shall be subject to license fee payable in installments. Fifty percent of the fee is to be paid on the day of acquiring the license and 50% in equal yearly installment payable at the latest until the 30 of January for the current year.

The starting license fee for the licenses is determent by a decision of the Government of Republic of Macedonia. The starting license fee for the licenses whose number is limited is set at:

- 250,000 EUR in MKD counter value for the organization of the game of chance Lottery
- 1,050,000 EUR in MKD counter value for the organization of the game of chance Lotto
- 385,000 EUR in MKD counter value for the organization of the game of chance Football pools
- 550,000 EUR in MKD counter value for the organization of the game of chance Instant Lottery
- 1,570,000 EUR in MKD counter value for the organization of the game of chance Lottery TV Tombola organized over broadcasting channels.

The starting license fees for the licenses whose number is not limited are set at:

- 520,000 EUR in MKD counter value for the organization of the games of chance organized in a gaming house with duration of the license of 6 (six) years
- 630,000 EUR in MKD counter value for the organization of interactive games of chance organized in a gaming house with duration of the license of 6 (six) years
- 72,800 EUR in MKD counter value for the organization of the games of chance on slot machines with duration of the license of 6 (six) years
- 100,000 EUR in MKD counter value for the organization of the game of chance Tombola with duration of the license of 3 (three) years
- 100,000 EUR in MKD counter value for the organization of the game of chance Betting on sports matches with duration of the license of 3 (three) years
- 500,000 EUR in MKD counter value for the organization of the game of chance Betting on sports matches via Internet with duration of the license of 6 (six) years.

The License fee for permission for temporary organization of games of chance is set at:

- 30,000 EUR in MKD counter value for the organization of the game of chance Lottery

- 30,000 EUR in MKD counter value for the organization of the game of chance Tombola
- 230,000 EUR in MKD counter value for the organization of the game of chance TV Tombola.

34.2.3 Duties

The organizers of games of chance are obliged to pay a special duty of 4% of the total sales/payments for the General games of chance (Lotto, football pools, lottery, instant lottery and tombola) as well as for the Specific game of chance such as Interactive games of chance, Betting on sports matches and Betting on sports matches via the Internet.[12]

On the other hand the organizers of Premium games are subject to a special duty of 18% of the total amount of the award, according to the rules of the specific game.

The company's organizers of certain types of games of chance are also required to have a deposit of as security for payment of future premium of the participants in the games of chance. This deposits are set as follows:

- For one slot machine club 500.000 MKD
- Lotto 6.500.000 MKD
- Football pools 3.500.000 MKD
- Lottery 350.000 MKD
- Instant lottery 1.000.000 MKD
- TV Tombola 10.000.000 MKD
- Tombola 1.000.000 MKD
- Betting on sports matches over the internet 200,000 EUR in MKD counter value

This deposit should be maintained during the whole period of validity of the license.

The organizer of the games of chances is obliged to submit audit reports to the Ministry of Finance within 6 months after the end of the fiscal year.[13]

Another obligation is that every organizer of games of chance should enact rules under which the game shall be organized. The rules of game of chance and the rulebook of the gaming houses should be publicly available to the participants. In order to be legally valid both the rules and the rulebook should be verified by the Minister of Finance.

[12] The duty is payable until the 15 of every month.

[13] The fiscal year is the same as the calendar year.

34.3 Betting on Sports Matches

The law places *Betting on sports matches and betting on sports matches* via *Internet* in the group of specific games of chance which are organized on permanent basis. Betting on sports matches is defined as game *of chance in which the participant can realize a gain by betting on various events of sports matches*. The manner of the betting, depending on the rules of the game and the equipment owned by the organizer, can be performed by entering certain data on a stub or in other manner.

The organization of the games of chance betting on sports matches and betting on sports matches via Internet can be arranged on the basis of a Decision by the Government of the Republic of Macedonia, which shall issue licenses for permanent organization of games of chance betting on sports matches and betting on sports matches via Internet to the organizer/applicant. The license is issued upon proposal by the Minister of Finance.

In order to acquire license for permanent organization of games of chance betting on sports matches the company has to be legally incorporated and existing trade company with a head office in the Republic of Macedonia and to meet the following criteria:

- has founding capital of at least EURO 200,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia and additional bank guarantee of EURO 300,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia is sought.

Furthermore the Trade Companies which are organizing Betting on sports matches and have from 25 to 50 payment places are required to acquire additional bank guarantee of EURO 50,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia and for every additional 25 payment places are required to acquire additional bank guarantee of EURO 50,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia.

- to provide technical, technological conditions and provide premises for carrying out the activity of organizing games of chance
- has engaged manager and other persons professionally skilled and who have required experience for a correct managing of the work and who have not been sentenced for punitive act connected with games of chance or entertainment games or for a criminal deed from the field of economics, and
- at least 6 months prior to the publication of the announcement for obtaining a license, has settled its obligations toward the State, does not have a blocked giro account and pays the salaries on regular basis.

If the company which organizes *Betting on sports matches* wishes to engage in organizing other types of games of chance it has to fulfill certain additional criteria such as:

- to increase its founding capital up to EURO 2,500,000 in MKD equivalent at a middle exchange rate of the National Bank of the Republic of Macedonia
- to provide technical, technological conditions and provide premises for carrying out the activity of organizing games of chance
- has engaged manager and other persons professionally skilled and who have required experience for a correct managing of the work and who have not been sentenced for punitive act connected with games of chance or entertainment games or for a criminal deed from the field of economics, and
- at least 6 months prior to the publication of the announcement for obtaining a license, has settled its obligations toward the State, does not have a blocked giro account and pays the salaries on regular basis.

The period of validity if the license is from 3 (three) to 6 (six) years. The acquirer is obliged to organize the games of chance for which he acquired the license without interruptions. The starting license fees for the licenses for the organization of the game of chance betting on sports matches with duration of the license of 3 (three) years is set at 100,000 EUR in MKD counter value while the starting license fees for the licenses for the organization of the game of chance betting on sports matches via internet with duration of the license of 6 (six) years is set at 500,000 EUR in MKD counter value.

Furthermore, betting on sports matches has to be organized in special premises—betting place, which cannot be smaller than 60 m^2, and the organizer is allowed to serve beverages by a stand or a bar and the organizer of games of chance in a betting place is obliged to adopt a rulebook of the betting place for the organization and the manner of operations, and to present it to the visitors in an appropriate manner. The rulebook of the gaming houses should be publicly available to the participants. In order to be legally valid both the rules and the rulebook should be verified by the Minister of Finance.

The organizers of games of chance betting on sports matches and betting on sports matches via the Internet are obliged to pay a special duty of 4% of the total sales/payments.[14]

Betting on sports matches via *Internet* shall is defined as *specific game of chance in which a profit is realized by knowing and betting on various sports matches*. The gains from which shall be prepared on the basis of previously prepared coefficients by the organizer of the game, and the amount of the coefficient will depends on the number of players.

The organizers of game of chance—Betting on sports matches via Internet can be domestic and foreign citizens and Companies. The organizers are required to have a deposit as security for payment of future premium of the participants in the games of chance in the amount of 200,000 EUR in MKD counter value. This deposit should be maintained during the whole period of validity of the license.

In order to be able to participate in the games of chance – betting on sports matches via Internet, the participant in the game has to be an adult, registered on

[14] The duty is payable until the 15 of every month.

the website of the given game who deposits a minimum amount of EUR 25 and the payment and gains shall be determined in foreign currency. It is very interesting to note that participation in the game of chance—betting on sports matches via Internet is not permitted for citizens of the Republic of Macedonia.

Foreign legal entity or physical person can organize specific games of chance in a betting place, provided that it/he/she invests in the country an amount of at least EUR 1,000,000 within a period of 1 year, and ensures employment for at least 10 persons, citizens of the Republic of Macedonia.

34.4 Conclusion

What should worry us as a society is the percentage of young men who bet. This percentage is very high, 72% of those younger than 25 and 71% of those aged between 26 and 40.[15]

Legally, persons under 18 years of age should not be allowed to enter the betting place, however this rule is simply ignored. Another rule which in my view is not logical and cannot be enforced is the rule that participation in the game of chance—betting on sports matches via Internet is not permitted for citizens of the Republic of Macedonia.

At the same time fixing of sports matches in order to make profits from sports betting is becoming a serious issue in today's sports and Macedonian football clubs are on the top of the game. Macedonian football club FK Podeba was banned for 8 years from European events by UEFA over a match-fixing scheme. The UEFA disciplinary committee ruled that Podeba deliberately lost a Champions League qualifying match in 2004 against Armenian club Pyunik. UEFA said that club president Aleksandar Zabrcanec and the team's former captain Nikolce Zdravevski were handed life bans because they fixed the outcome of the game in a betting scheme.[16] At present there are several ongoing UEFA investigations which involve the Macedonian clubs Rabotnicki, Vardar and Milano in suspected match fixing as part of a betting scheme.[17]

It is time that betting in general is taken seriously by the relevant authorities and a strategy is enacted in terms of limiting access to underage people in the betting places and narrowing down of the number of people who bet. For now it seems that everybody is happy that the organizers of betting get their profits, the state its taxes and the people well they get a taste of the "American dream."

[15] Center for research and policy making, Sports betting as a Social Phenomenon in Macedonia, July 2006, available at http://www.crpm.org.mk/Home.htm.

[16] The case is currently in front of the CAS 2009/A/1920 FK Pobeda—Prilep, Aleksandar Zabrcanec, Nikolce Zdraveski v/UEFA. The hearing was held on the 16 and 17 December 2009.

[17] For more see http://www.a1.com.mk/vesti/sport.asp?VestID=112679.

Chapter 35
Sports Betting in New Zealand: The New Zealand Racing Board

Elizabeth Toomey and Simon Schofield

Contents

35.1 Introduction

In New Zealand, the sports betting contract exists within an efficient regulatory regime. Nonetheless, in our modern competitive environment, the gambling industry faces significant challenges. In this chapter, the term "sports betting" is

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used in its widest sense. It comprises racing betting (horses, greyhounds and dogs); animal fight betting; and general sports betting (betting on sporting events).

Sports betting is conducted by the New Zealand Racing Board. The Totalisator Agency Board (the TAB) is its most recognisable arm. It liaises with the various national sporting organisations in order to provide on- and off-course betting facilities for the public. Historically, the TAB that provides off-course betting, arose as a compromise. It essentially removed the commercialisation of betting through the bookmaker by reaching a balance between an enjoyable activity and the lessening of the effects of problem gambling. While horse racing was traditionally the most substantial gambling activity, gradually lotteries, instant kiwi, gaming machines, casinos, dog racing and general sports betting have dramatically changed the gambling landscape. The TAB is no longer hidden. It is a visible commercial entity. In addition to outlets, the TAB uses the Internet, Phonebet, Touch Tone and a SKYBET channel to bet. Its visibility has made the tendency to gamble, and the associated risk of problem gambling, more recognisable; and a significant public health approach has been adopted to identify, minimise and manage these risks. Gambling activity will always comprise attempts to rig a sport result for an easy dollar but reasonably effective anti-corruption measures exist.
In modern times, the Internet and sport transactions abroad present significant challenges for the TAB. As a statutory corporation designed for taxation, it operates in a highly competitive marketplace. A telling example is the horse racing industry which currently faces record declining membership and public patronage[1]; and has been described as an "industry in crisis."[2]

35.2 The Bookmaker

35.2.1 Horse Racing and Trotting

Horse racing was adopted instinctively into New Zealand society. The first recorded horse race was held at Kororareka (Russell) in the Bay of Islands in 1835[3]; and the first recognised thoroughbred horse, Figaro, landed in Wellington in 1840.[4] Anniversary celebrations in Auckland, Wellington, Nelson, Canterbury and Otago all provided annual racing meetings. By the 1880s, statistics suggested

[1] *Stratford Racing Club v New Zealand Thoroughbred Racing* (HC, Wellington, CIV 2005-485-555, 6/12/05, Miller J), [2].

[2] *Racing Awaits its Makeover* 2009.

[3] Grant 2000, p. 11.

[4] McLintock 1966, p. 13.

that there were more racecourses and racing clubs, on a per capita basis, than anywhere else in the world.[5] A New Zealand bred horse won the Melbourne Cup in 1883.[6] Gradually, local clubs evolved; racecourses were made reserves[7]; and attempts were made to nationalise racing rules. With the advent of the annual meetings, the bookmaker emerged. A loud and persistent commentator, the bookmaker tantalised the public to bet to select the winner against fixed odds. By 1875, 300 full time bookmakers were employed in the racing meetings throughout New Zealand.[8] The bookmaker's nemesis was the introduction of the totalisator which adjusted the odds according to the bets received. Before an Act was introduced in 1881, an unregulated gambling market was rife with corruption. In one instance, George North, a bookmaker, fled with £4,500 wagered on the Wellington Racing Cup.[9]

The legal position prior to the Gaming and Lotteries Act 1881 was precarious.[10] Strictly speaking, New Zealand adopted all the laws of Britain in 1840[11]; and at common law a bet was an enforceable contract.[12] Thus, the Imperial statutes of 1664,[13] 1710[14] and 1835[15] that addressed the prevention of excessive gaming applied. The applicable 1664 Act essentially prevented the enforceability of betting contracts where persons had lost more than £100 on credit. The 1710 Act provided that if a person lost £10 or more at any one time and paid his lost money to the winner, he could recover that money if an action was brought within three months. The 1835 Act provided that where the "securities were declared void (under the preceding statutes then) an innocent holder for value of a note given for a gaming consideration could not recover upon it."[16] In 1875, it was made clear in *Dogherty v Poole*[17] that a loser of a wager could be successful under Section 2 of

[5] D Syme, "The Social Context of Horserace Gambling in New Zealand: An Historical and Contemporary Analysis," PhD thesis, Victoria University of Wellington, 264, as cited in Graham 2007, p. 9.

[6] Grant 2000, p. 22.

[7] For example, *Canterbury Provincial Council Racecourse Reserve Ordinance* Sess. XI, No.7 (1859) and *Wellington Council Ordinance* Sess. XVII No.3 (1869), Sess. IV No.7 (1857), and Sess. X No.3 (1863).

[8] Grant 2002, p. 77.

[9] Grant 2002, p. 79.

[10] Moodie 1975a, b.

[11] Section 1 English Laws Act 1858.

[12] *Good v Elliott* (1790) 100 ER 808.

[13] 16 Car. II, Chap. 7.

[14] 9 Anne, Chap. 14.

[15] 5 and 6 Will. IV, Chap. 41.

[16] *Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General* 1948, p. 13.

[17] Moodie 1975a, n 161.

the 1710 Act. A number of Provincial Ordinances[18] and Acts[19] sought to regulate betting but none was comprehensive.

The Gaming and Lotteries Act 1881 filled that gap. Concern had grown over sweepstakes, lotteries, bookmakers, and gambling by young people and in clubs. During the Bill's passage, Edward Wakefield referred to bookmakers as "a lot of men who to all appearances [have] no right to be outside the walls of a gaol…"[20] In practical terms, the legislation was based upon the Gaming Act 1845 (UK) and the Gaming Houses Act 1853 (UK). Thus betting contracts were void but not illegal. Public gambling as well as gambling houses were made illegal and totalisators had to be licensed under the control of the Colonial Secretary. Bookmaking was not illegal per se as it was considered, albeit optimistically, that the totalisator would monopolise the horse racing market. Nonetheless, the courts interpreted the legislation cautiously.

Dark v Island Bay Park Racing Company[21] was the leading decision relating to the totalisator under the 1881 legislation. Two horses, Talebearer and Little Scrub, ran a dead heat. A second race was run and Little Scrub won. The plaintiff, who had backed Talebearer, argued that he was entitled to the dividend on the totalisator from the first race. The Court held that the wagering contract was unenforceable. Richmond J stated that[22]: the depositor in the totalisator backs the horse he selects, against the field. That is the wager, and it is laid with the backers of the other horses—whether the layers of the wager are known to one another or not signifies nothing—and those who are working the machine are stakeholders.

His Honour considered that the case fell "within the enactment of [s]33, which says that all wagering agreements are null and void, which means not that they are not legal, but that they cannot be enforced in a Court of Justice."[23] The legislation was designed to "save the time and dignity of the Court, for dignity could scarcely be preserved in the investigation of absurd disputes arising out of betting transactions."[24]

The criminalisation of bookmaking, a very contentious issue in this period, was affirmed in *Porter v O'Connor*.[25] Pursuant to Section 18 of the 1881 Act, the defendants were charged with unlawfully conducting a scheme by which prizes of

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[18] For example, Sections 2(6) and (7) *Otago Provincial Council Vagrant Ordinance* Sess. XIII No. 62 (1861) and Section 4(1) *Canterbury Provincial Council Police Ordinance* Sess. X No.1 (1858).

[19] For example, Section 1 *Nelson Provincial Council Billiard Tables Act* Sess XII No.1 (1864); Section 2(17) *Auckland Provincial Council Rural Police Act* Sess. XIX No.11 (1866); and Section 5(44) *Auckland Provincial Council Auckland Municipal Police Act* Sess. XIX No.15 (1866).

[20] *New Zealand Parliamentary Debates* 1881, 38, p. 498.

[21] *Dark v Island Bay Park Racing Company* (1886) 4 NZLR 301.

[22] *Ibid*., at 302.

[23] *Ibid*.

[24] *Ibid*.

[25] *Porter v O'Connor* (1887) 5 NZLR 257.

money were competed for by a mode of chance, namely a horse race. In 1886 at Riccarton Racecourse in Christchurch, they had a book comprising the names of horses in the various races; and they invited people to wager with them, declaring that they would pay the same as the totalisator.[26] Johnston J reasoned that this practice "had all the elements of chance in it which the totalisator has"[27] for which prizes of money were gained. Most importantly, "the licence to use the totalisator could not be invoked as legalising a scheme referring to the dividends declared on it."[28] The conviction was confirmed.

However, in similar circumstances, the Court in *Barnett v Henderson*,[29] declined to follow *Porter v O'Connor* stating that the laying "with two distinct persons distinct bets at totalisator odds"[30] was not a mode of chance but rather fixed at the odds of the totalisator. The Court considered that there was "nothing illegal in New Zealand in making a bet or in giving odds."[31]

The difficulty the courts faced in criminalizing bookmaking was evident in *Hyde v O'Connor*.[32] The Court in this case determined that horse racing was a game of chance. The defendant, standing on a box, had used cards and a book to wager with the public. The Court concluded that any profit depended "upon the state of betting with reference to the number of bets laid on or against the winning horse—a state of things fluctuating from one minute to another throughout the duration of the betting."[33] Thus totalisator betting was a matter of uncertainty and chance. The words of the statute clearly pointed to the use of the totalisator as an instrument of gambling, "not to a mere agreement that some part of the contract shall be determined by the results of the use of such instruments in other hands."[34] While that conviction was quashed, a second charge—that of using a public place for the purpose of betting—was upheld[35]:

[A] fixed and ascertained spot defined in an enclosure by a moveable wooden box, at which a person orally advertises his willingness to bet, is a "place" within the meaning of the Act.

The laws relating to bookmaking were widely flouted. Even where bookmakers were prosecuted, many bookmakers had the resources to obtain expert legal help.[36] Punters were reluctant to tread the treacherous path of giving evidence in court. For example, in the absence of any substantial evidence against them, Matthew

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[26] *Ibid.*

[27] *Ibid.*, at 262 and 260.

[28] *Ibid.*, at 262.

[29] *Barnett v Henderson* (1892) 11 NZLR 317.

[30] *Ibid.*, at 318.

[31] *Ibid.*

[32] *Hyde v O'Connor* (1893) 11 NZLR 723.

[33] *Ibid.*, at 725.

[34] *Ibid.*, at 727.

[35] *Ibid.*, at 728.

[36] Grant 1994, p. 64.

Barnett and Peter Grant, well-known Christchurch bookmakers, were acquitted three times in consecutive years from 1901.[37] Moreover, juries were often sympathetic to the bookmaker's plight, acquitting even in the face of compelling evidence.[38] The racing clubs were forced to take the initiative and began excluding professional bookmakers from their courses. The validity of these exclusions was tested in *Pollock v Saunders*[39] in which it was argued that the bookmaker was entitled to remain on the race course as he had made a bet on the totalisator. The Court disagreed, observing that, as the bookmaker knew he had been forbidden from the course, he had never had a licence to be there, and thus he was never entitled to a refund of the bets that he had made on the totalisator.[40] Similarly, racing clubs began to arrest and fine bookmakers for trespass although some racing clubs were reluctant to do so in the face of public opposition. Predictably, bookmakers devised different and more inventive ways of flouting the law.

By this time, the anti-gambling league had announced its presence. Associated with "intemperance, sexual immorality, and desecration of Sundays,"[41] gambling was deemed a vice, a curse and evil. Gambling ran counter to the protestant work ethic, self-discipline and the family unit. When the Governor visited the Grand National in Riccarton in 1897, Ministers of the Baptist, Methodist, Presbyterian and Congregationalist churches denounced his actions as popularising the gambling sin. Reverend Rutherford Waddell asserted in expressive tones that gambling was "a disease, spreading its subtle prehensile tentacles out of every sphere of our existence—tentacles whose touch at first is so delicate but whose clutch is so deadly on the developing life of a nation."[42] In 1899, Ada Wells at the National Council of Women deplored "our gambling hells and dens of impurity."[43] By 1907, the Women's Christian Temperance Union presented Parliament with 36,471 signatures to abolish the totalisator. However, this effort had to be balanced against Parliament's receipt of 311 other petitions with 36,219 signatures advocating its retention.[44]

Prime Minister Ward compromised, recognising both the popularity of horse racing and the tax intake from the totalisator. The passing of the Gaming Act 1908 confined all betting to the racecourse. Gambling houses, street betting and work betting were made illegal. The doubles totalisator was prohibited as were communications to the racetrack via telephone or telegraph and even notifications inducing betting. Bookmakers had to be licensed and were confined to the racetrack. This legislation was criticised by many for not being sufficiently hard-

[37] Grant 1994, at 65.
[38] Grant 1994, at 83.
[39] *Pollock v Saunders* (1897) 15 NZLR 581.
[40] *Ibid*., at 590.
[41] Grant 1994, p. 76.
[42] Grant 1994, at 78.
[43] Grant 1994, at 79.
[44] Grant 1994, at 84.

hitting. In 1910, Chapman J declared it as "one of the gravest mistakes of the legislators;"[45] and considered it his moral duty "to complain about a law which legalises the operations [of bookmakers] who come very close to the criminal class."[46] As a result of this backlash, in July 1910, Parliament voted 69 to 4 to prohibit bookmaking from the racecourse. While the practice of bookmaking itself was not made illegal until 1920, betting was made illegal in the street, in licensed premises, in a gaming house, on a racecourse other than bets on the totalisator, or in a public place, thus making it "difficult to see where the bookmaker could legally conduct his business."[47] The public attitude was perhaps best illustrated by the observation that the "totalisator was democratic, egalitarian, organised and orderly, whereas bookmaking was the exact antithesis."[48]

Effectively, bookmakers were left with a monopoly on credit, small, double, and all off-course, betting. Bookmaking remained socially acceptable in everyday life. This is well-illustrated in *Quirke v Davidson.*[49] While a bookmaker's premises was being searched, a policeman answered the phone and was met with the reply: "£1 on Chimera, £1 Festivity, £1 on Likelihood."[50] Thirteen such messages were recorded. The information had been dismissed on the ground that the evidence as to the telephone messages was legally inadmissible; and also on the ground that an actual bet was required before action could be taken. The Court allowed the appeal holding that actual betting on the premises was not necessary to constitute an offence; and that the evidence as to the telephone messages was allowable. Subsequently, a general appeal by way of rehearing was brought focusing particularly on the question of the admissibility of the phone messages as evidence: *Davidson v Quirke*.[51] In this latter case, the Court affirmed that this evidence was admissible, observing that "a logically relevant method of proving [the offence] is to prove that on that day a large number of persons communicated with those premises by telephone for the purpose of making bets there."[52] Moreover, although such telephone communications were technically hearsay, the communications formed part of the *res gestae*.

In *Dolling v Bird*,[53] an information was dismissed when an undercover police officer made a series of bets. The Court held that betting is not in itself illegal, but the purpose and effect of the legislation is to prohibit betting carried on as a business on premises used for that purpose.[54] In this case, only two bets had been

[45] Skene 1989, p. 50.

[46] *Ibid.*

[47] Skene 1989, at 54.

[48] Skene 1989, at 67.

[49] *Quirke v Davidson* [1923] NZLR 546.

[50] *Ibid.*, at 547.

[51] *Davidson v Quirke* [1923] NZLR 552.

[52] *Ibid.*, at 555.

[53] *Dolling v Bird* [1924] NZLR 545.

[54] *Ibid.*, at 548.

made and there was no further evidence "of any general business of betting, as distinguished from a willingness to bet on isolated occasions with a specific individual."[55]

In 1946, a Royal Commission on Gaming and Racing was constituted. Calls had been made to legalise bookmaking. The Dominion Sportsmen's Association gathered 80,511 signatures in 1924 to petition for the licensing. Private members' bills in 1927, 1930 and 1931 failed to legalise bookmakers; and, in December 1933, E F Healy's Bill for licensing also failed, albeit by a mere two votes at its third reading.[56] The Commission conducted a comprehensive review. It estimated that while £20 million had gone through the totalisator, almost £24 million had been handled by illegal bookmakers.[57] The Commission recommended a regulated off-course betting system controlled either by a governmental trust or by the Racing and Trotting Conferences. Doubles totalisators, publication of tips and dividends, and telephone betting were all permitted. The scheme was described as "reactionary… rather than a proactive and innovative concept to run off-course betting."[58]

In 1949, a referendum was called. 424,219 people voted for off-course betting and there were 199,406 opposers. The resultant TAB was the first legally authorised on- and off-course betting schemes in the world. The iconic Kiwi male found solitude in "the classic troika of rugby, racing and beer."[59]

Nonetheless, the legal boundaries continued to be challenged. In *Pine v Bailey*,[60] a competition took place at a pub whereby the competitors named the winner of each of the eight races held at a specified race meeting. Three points were awarded for a winner, two points for second and one point for third. The publican passed the money pool to the highest points total. The Court of Appeal held that while, prima facie, the publican was the occupier of a common gaming house, he was in fact a mere stakeholder. This meant that he was an agent holding the stakes of several principals. He did not receive anything out of the pool. With respect, this reasoning appears contrived. Although the money was not received as "consideration for any… promise to pay," consideration should include any such marketing enticements. A similar situation arose in *Bhana v Barriball*[61] where a winner of a sweepstake was entitled to recover. Although the betting contract was void, the actions to recover the money from his agent to whom it had been paid by the loser or the stakeholder were valid as the Gaming Act 1908 did not apply. The money had been won and the agent was not entitled to put the money in his pocket.

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[55] *Ibid*., at 551.

[56] Grant 2000, p. 15.

[57] *Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General* 1948, p. 21.

[58] Grant 2000, p. 22.

[59] Phillips 1996, p. 215.

[60] *Pine v Bailey* [1960] NZLR 180.

[61] *Bhana v Barriball* [1973] 1 NZLR 616.

In 1970, a Royal Commission of Inquiry scrutinised the TAB. The local TAB had become a household name with TAB branches and agencies everywhere. The TAB became a favourite with the punter (increased stakes and better on-course facilities); racing clubs (profit distribution); and the tax department (9.35 percent of totalisator turnover).[62] The system was copied with some variations in all of Australia's major states. By the 1960s, horse racing betting provided more than 90% of New Zealanders' gambling activity.[63] However, by the 1970s, calls were being made for the redistribution of profits in the racing industry; for the introduction of new bets (trebles, quinellas and triellas); and for the closure of uneconomic clubs. The Commission favoured the introduction of a National Racing Authority. It felt that tension between racing and trotting interests, as well as between rural and metropolitan clubs, could be avoided if the new chairperson was entirely independent. It also suggested that more tax be redirected to the TAB; same day payouts be introduced; and governmental control be relaxed. The consequential Racing Act 1971 created the New Zealand Racing Authority.

Despite the TAB, convictions for bookmaking continued, and legal arguments became very technical.[64] In *Police v Ford*,[65] the police had a warrant to seize evidence of bookmaking. Incoming calls were made, and the defendant warned the callers off. Despite being warned not to, she continued to do this on two further occasions and was consequently charged with obstruction. In the Court's view, the search warrant did not authorise the obtaining of evidence by answering the telephone without the consent of the subscriber.[66] This decision prompted a later statutory amendment.

However, in *Police v Machirus*,[67] a conviction was affirmed. The police obtained a search warrant but before the police arrived, the phone was ripped from the wall and documents burned. The police reconnected the phone and received five calls. The Court of Appeal held that the hearsay rule did not apply as the calls were "not tendered to prove the truth of any assertion but simply to indicate that there had been an apparent attempt to bet."[68] The appellant also argued that reconnecting the phone was in breach of the Telephone Regulations 1976 and that the evidence was inadmissible as it had been obtained improperly. Dismissing the appeal, the Court held that, under the circumstances, there was no overriding unfairness.[69]

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[62] Grant 2000, p. 663.

[63] *Ibid*., at 61.

[64] See also *McFarlane v Sharp and Another* [1972] NZLR 64; *McFarlane v Police* [1981] 2 NZLR 681; *Machirus v Police* [1983] NZLR 764; *Matthewson v Police* [1969] NZLR 218; *Sunlay v Hunter* (HC, Hamilton, M405/83, 26/3/1984, Tompkins J).

[65] *Police v Ford* [1979] 2 NZLR 1.

[66] *Ibid*.

[67] *Police v Machirus* [1977] 1 NZLR 288.

[68] *Ibid*., at 292.

[69] *Ibid*., at 291.

To this day, bookmaking remains illegal, and convictions still occur despite the apparent omnipresence of the TAB.[70] In 2007, under the Gambling Act 2003 and Racing Act 2003, Internal Affairs inspectors caught a Gisborne woman taking bets on horse races at the Turanga Hotel. Given her financial situation, she was sentenced to 100 h community work rather than a fine; and the Court ordered the forfeiture of the $1,158 she had in her possession. The Department of Internal Affairs spokesman observed that "[b]ookmaking effectively diverts money from the community and from the racing industry, which gets much of its financial support through the TAB."[71] The hotelier was fined $3,000 plus costs for allowing his premises to be used for illegal gambling, and $300 plus costs for taking part in the gambling.

35.2.2 The Gambling Act 2003 and the Racing Act 2003

The Gambling Act 2003 and the Racing Act 2003 provide an appropriate consolidation of the law. The Gambling Act 2003 provides that every contract relating to illegal gambling is an illegal contract for the purposes of the Illegal Contracts Act 1970.[72] However, gambling contracts authorised by the Gambling Act 2003 are now enforceable.[73] In essence, this renounces the previous law of unenforceable gambling contracts.[74] Gambling is defined as paying or staking consideration on the outcome of something seeking to win money when the outcome depends wholly or partly on chance.[75] Thus, gambling incorporates the previous concepts of betting, gaming, wagering and lotteries. Bookmaking (which is prohibited)[76] is defined as running a business or making (or endeavouring to make) a living, totally or partly from taking or negotiating bets; organising pool betting; matching gamblers; laying or offering odds; and offering to bet with more than one person.[77] Private gambling is authorised where gambling takes place at a private residence primarily as a social event in which all stakes are distributed as reward to the winners with no deductions of any kind; and all participants have an equal chance of winning.[78] A sales promotion scheme is authorised where there is the promotion of a sale of goods and the outcome is determined by skill and chance.[79]

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[70] http://www.nzherald.co.nz/, "Conviction of Illegal Pub Bookmaker Recalls Bygone Era" (28/2/07).

[71] *Ibid*.

[72] Gambling Act 2003, Section 14(1).

[73] Gambling Act 2003, Section 14(2).

[74] Wellik 1999, p. 376.

[75] Gambling Act 2003, Section 4(1).

[76] Gambling Act 2003, Section 9(2).

[77] Gambling Act 2003, Section 4(1).

[78] *Ibid*; Gambling Act 2003, Section 9(1)(c).

[79] Gambling Act 2003, Sections 4(1), 18.

Other gambling is divided into categories that have various procedures relating to the necessity for licensing.[80]

The Racing Act 2003 deals specifically with betting on racing and sporting events. Its purpose is to promote the long-term viability of racing in New Zealand; to facilitate such betting; and to provide effective governance arrangements for racing.[81] The New Zealand Racing Board (NZRB) comprises seven members appointed by the Minister of Racing: one from each of the three racing codes (New Zealand Thoroughbred Racing Inc, Harness Racing New Zealand Inc and the New Zealand Greyhound Racing Association Inc); three appointed by a nomination advisory panel; and a chairperson who is chosen after consultation with the racing industry. The functions of the NZRB are stated in Section 9(1) of the Act. They are to[82]:

(a) develop policies that are conducive to the overall economic development of the racing industry, and for the economic benefit of people who, and organisations which, derive their livelihoods from racing;
(b) determine the racing calendar each year, and issue betting licences;
(c) conduct, make rules and distribute funds obtained from racing and general sports betting;
(d) administer the racing judicial system;
(e) develop or implement programmes for the purposes of reducing problem gambling and minimising the effects of that gambling;
(f) undertake research, development, and education, and use its resources (including financial, technical, physical and human resources), for the benefit of New Zealand racing;
(g) keep under review all aspects of racing and advise the Minister accordingly;
(h) perform any other functions that it is given by or under this Act or any other Act.

It is clear that the NZRB has a broad range of powers. It is required to prepare financial statements, statements of intent, a business plan and annual reports. It decides how to distribute surplus revenue after payment of successful bets and dividends, goods and services tax, totalisator duty and its operating expenses.[83] The amount distributed to the racing codes is distributed in proportion to how much they contribute to NZRB's financial turnover. Each racing code must apply the rules for its particular type of racing.[84] This allows for greater uniformity and specialisation. There are four club categories: galloping; harness racing; hunt and greyhound racing.[85] There are rules controlling or excluding the admission of

[80] Gambling Act 2003, Section 20(1).
[81] Racing Act 2003, Section 3.
[82] Racing Act 2003, Section 9.
[83] Racing Act 2003, Sections 53(2) and 57(2).
[84] Racing Act 2003, Section 29.
[85] Racing Act 2003, Section 5(1).

specified classes of persons,[86] but these only apply where it is necessary to maintain public confidence in the conduct of horse racing and the integrity of racing betting.[87] Any person breaching these rules commits an offence and is liable to summary conviction to a fine of up to $1,000.[88]

The Act defines the various types of betting. "Racing betting" includes all betting on races run at racecourses within and outside New Zealand[89]; and includes totalisator, equalisator and fixed-odds betting. "Sports betting" (referred to in this chapter as "general sports betting") is betting on sporting events within and outside New Zealand.[90] The NZRB must obtain the written agreement of the appropriate New Zealand national sporting organisation before any betting on that event is allowed.[91] The appropriate contract should include profit distribution to that national sporting organisation.[92] Unsurprisingly, betting with persons under 18 is an offence; and no person may make a bet on behalf of another under the age of 18.[93] Moreover, despite betting contracts authorised by the Act being enforceable at law when made, the TAB or any racing club has the right to refuse or accept all or part of a bet without having to give reasons.[94] Those associated with the NZRB or racing clubs commit an offence when they offer to provide credit to any person when they are aware that the credit is intended to be used to make a bet.[95]

While the NZRB is the overarching body of all sports bettings in New Zealand, there is an "awkward tiered"[96] relationship among the various participant institutional structures. The members of the three codes described above are the associated regional or district racing clubs. A racing club is defined as a club (whether incorporated or not) that is "established for the purpose of promoting, conducting, and controlling races, and that is registered with a racing code in accordance with the constitution of that code; and includes a hunt club."[97] Under Section 42 of the Act, the NZRB decides all racing dates; and pursuant to Section 45, it must issue betting licences to the racing clubs to whom the racing dates have been allocated. This will include any terms or conditions that the NZRB considers appropriate.[98]

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[86] Racing Act 2003, Section 34.
[87] Racing Act 2003, Section 34(5).
[88] Racing Act 2003, Section 35.
[89] Racing Act 2003, Section 5(1).
[90] Racing Act 2003, Section 5(1).
[91] Racing Act 2003, Section 55(1).
[92] Racing Act 2003, Section 55(2).
[93] Racing Act 2003, Section 63.
[94] Racing Act 2003, Section 65.
[95] Racing Act 2003, Section 63(2)(c).
[96] *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268, 280.
[97] Racing Act 2003, Section 5(1).
[98] Racing Act 2003, Sections 42 and 45.

The legal position of these racing clubs was considered in *New Zealand Racing Industry Board v Attorney-General*[99] under the former Racing Act 1971. The Department of Internal Affairs refused to grant six racing clubs licences for gaming machines. It was argued that the racing clubs did not fit the definition of "societies" because they were not established for non-commercial purposes. The Court disagreed. It observed that in charting the flow of money, racing clubs were not commercial as the body in control of betting was the TAB. Although the racing clubs derived the majority of their money through on-course betting, subscriptions, entrance fees, and facilities, the money was spent on "maintaining tracks, buildings and improvements… and the like."[100] Racing clubs were "not established for the purpose of making a profit… only for the purpose of holding the racing meetings. Any profit derived is ploughed back into fulfilling their objective: namely, to promote, conduct and control race meetings."[101]

The TAB, by contrast, is primarily commercial in nature. The racing clubs are seen as "little more than conduits within the industry for money expended on on-course betting."[102] Effectively, the TAB conducts the retail operations of the NZRB.[103] The TAB has three different categories of outlets. First, there are branches that are directly controlled by the TAB. Secondly, there are agencies where the TAB leases the property and contracts an agent occupier. The TAB provides the equipment and administrative support; the agent finances the power, gas, SKY TV, and cleaning. The agent can employ the staff. He or she is paid by an agreed commission and is liable for any losses. The profitability of the agency depends upon the agent's work. The agent is an independent contractor, not an employee.[104] Finally, sub-agencies are similar to agencies but are run with other businesses—typically pubs or sports or social clubs.[105]

In whom the ownership of the TAB vests is a somewhat academic question. In *Official Assignee v Totalisator Agency Board*,[106] the Court stated that while "[t]he Totalisator Agency Board is a creation of statute"[107] the particular transaction in that case was between Mrs R as an individual and the TAB as agent for the particular club conducting the race to which the transaction related. The TAB was "a mere channel of conveyance—a conduit pipe—for the transmission of the

[99] *New Zealand Racing Industry Board v Attorney-General* [2003] NZAR 85.

[100] *Ibid*., at 93.

[101] *Ibid*., at 95.

[102] *Ibid*.

[103] *Lightbourne v New Zealand Racing Board* (HC, Auckland, CIV 2008-404-7273, 10 December 2008, Allan J), [1].

[104] *Agius v Totalisator Agency Board* [2003] 1 ERNZ 601. For a full discussion on this aspect of sports law in New Zealand, see Toomey and Fife 2008, Part II, Chap. 1.

[105] *Ibid*., at 604.

[106] *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064.

[107] *Ibid*., at 1072.

money to the particular totalisator operated by the particular racing club."[108] The bet was "a bet or a plurality of bets inter se made by all those who invest."[109] The Court observed that totalisator betting should be regarded "as a multipartite agreement between numerous parties divided into groups who bet to win or lose according as the uncertain event does or does not happen."[110] Racing clubs argued that this interpretation suggested that they owned the TAB because they were analogous to a society where each member has a proportionate share. However, in reality the TAB is more analogous to an independent statutory corporation.

The racing codes—the middlemen—occupy an unenviable position. Each regulates the conduct of racing by its code.[111] While this generally involves the control of the race such as licensing and the registration of participants, more onerous duties include punishment for breaches of the rules, determination of appeals and disqualifications and suspensions where appropriate.[112] As statutory bodies, they are unable to levy without authority. They are not private contractual bodies, but entities discharging a public function[113]; and they do not have power to control the internal procedures within the racing clubs other than to determine judicially that the sport has been brought into disrepute. Judicial review of any decision made by a club can be sought.[114] In *Adlam v Stratford Racing Club*,[115] the Stratford Racing Club blackballed new members because the committee members wanted to retain control. It also transferred its principal asset, a race-course worth $3.4 million, to the Te Kapua Park Trust in order to avoid a sale of the racecourse and consequent expropriation of the proceeds. The Court, in two judgments[116] (the second of which was upheld on appeal in part),[117] held that the transfer was invalid and that the blackballing involved an irrational and improper purpose.[118]

The Judicial Control Authority governs the appointment of judicial committees of each racing code. It has a panel of suitable people from which members of a judicial committee or members of an appeals tribunal may be appointed.[119] A judicial

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[108] *Ibid*., at 1073.

[109] *Ibid*.

[110] *Ibid*.

[111] Racing Act 2003, Section 29.

[112] Racing Act 2003, Section 29.

[113] *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268, 288.

[114] *Adlam v Stratford Racing Club* [2007] NZAR 544; *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 (CA). For a related subsequent decision, see *Te Kapua Park Trust v Stratford Racing Club Inc,* 13/11/08, Andrews J, HC New Plymouth, CIV-2008-443-446.

[115] *Adlam v Stratford Racing Club* [2007] NZAR 544.

[116] *Ibid*; and, earlier, *Stratford Racing Club v New Zealand Thoroughbred Racing* (HC, Wellington, CIV 2005-485-555, 6/12/05, Miller J).

[117] *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 (CA).

[118] *Adlam v Stratford Racing Club* [2007] NZAR 544. For further discussion of these decisions, see Toomey and Fife 2008, [99], [100], [106].

[119] Racing Act 2003, Section 37.

committee comprises a chairperson, being a barrister and solicitor with at least seven years practice, and two members per code.[120] Judicial committees are appointed by the Authority (whether for matters that arise on a day of racing or otherwise) to hear, adjudicate and determine any matter brought before the committee in accordance with the racing rules of the relevant code. They also have the authority to exercise the powers, duties and functions, including the imposition of penalties or costs, conferred upon them by the rules.[121] An appeal tribunal may be appointed to hear and adjudicate on any appeal.[122]

35.2.3 Animals and Sports Betting

Animal fight betting has always been illegal. These fights usually involve inciting an animal to fight against another animal, often until death. The most popular contests comprise rat-fighting, dog-fighting and cock-fighting. These contests, a signature feature of which is the exploitation of animals' natural aggression, have been prohibited in Britain since 1365, and this prohibition was reiterated firmly in the Cruelty to Animals Act 1835 (UK).[123] Unfortunately, New Zealand has had an historical infatuation with this pursuit. For example, Hokitika's Shamrock Hotel was built specifically for the fights—it had a sunken pit of eighteen feet in diameter.[124] While efforts were made to ban the contests, keen participants simply moved into the bush and posted lookouts. It was clear there was "too much money, prestige and enjoyment at stake."[125] In 1866, the pastime was described as "the most disgusting exhibition of cruelty."[126] As late as 1931, a Sydney reporter described a fifteen round contest as involving "a mangled bleeding mess of malignity" when a bird had died before its fourteenth round.[127] Fortunately, these contests seemed to disappear soon afterwards.

Pursuant to Section 31 of the Animal Welfare Act 1999, it is an offence to knowingly own an animal "for the purposes of having that animal participate in an animal fighting venture."[128] An "animal fighting venture" is defined as "any event that involves a fight between at least 2 animals and is conducted for the purposes

[120] Racing Act 2003, Section 38.
[121] Racing Act 2003, Section 39.
[122] Racing Act 2003, Section 40.
[123] Gardiner 2006, p. 120.
[124] Grant 1994, p. 32.
[125] *Ibid*.
[126] *Ibid*.
[127] Grant 1994, p. 14.
[128] Animal Welfare Act 1999, Section 31.

of sport, wagering, or entertainment; but does not include any activity the primary purpose of which involves the use of one or more animals in hunting or killing an animal in a wild state."[129] In 2009, the media warned of a resurgence of the blood sport when an elderly ridgeback dog was used as dog fighting bait.[130] In 2004 and 2005, an inspector of the Society for the Prevention of Cruelty to Animals (the SPCA), when closing down animal fighting rings in Northland, observed not only that dog-fighters enjoyed the depravity of seeing pain and suffering, but also the "big money in the bets [as] drugs are used as currency."[131]

The sports of hunting and angling sit on the fringe of sports betting In New Zealand, these sports involve the New Zealand Fish and Game Council (Freshwater Fish and Birds), the New Zealand Big Game Fishing Council (Saltwater Fish) and the New Zealand Deerstalkers' Association (Recreational Hunting). A member pays a fee to the incorporated body, enters the appropriate competition, and if he or she is successful, receives the associated prize. This is an indirect (Class 2) form of betting under the Gambling Act 2003.[132] The prizes may have a total value not exceeding $5,000 provided the actual turnover does not exceed $25,000.[133] This form of gambling does not require a licence.[134] Most societies for hunting and angling are recreational. Legally, this form of gambling is a prize competition rather than a form of sports betting. It is akin to members of a rugby team each getting an award for winning an event. No third parties are involved.

35.2.4 Dog Racing

As with horse racing, settlers intuitively brought greyhound racing to New Zealand; and bookmaking betting became popular. The first major greyhound race took place in Christchurch in 1891.[135] However, as bookmaking became illegal, the sport became less popular despite cries for the legalisation of an on-course totalisator. The 1946 Royal Commission on Gaming and Racing rejected this pressure. Despite the legality of betting on greyhound racing in other countries (the United Kingdom, United States, and Australia), the Commission held that "gambling upon dog-races is [gambling of] a new form and in a form which it would be difficult to control."[136]

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[129] Animal Welfare Act 1999, Section 31.

[130] http://www.dompost.co.nz/, "Bloody Sport" (25/4/09), accessed 22/6/09.

[131] *Ibid*.

[132] Gambling Act 2003, Section 24.

[133] Gambling Act 2003, Section 24.

[134] Gambling Act 2003, Section 26.

[135] Grant 2000, p. 324.

[136] *Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General* 1948, p. 125.

In its view, horse racing provided "a sufficiently extensive gambling medium [and] the establishment of a further gambling medium [was] unnecessary and undesirable."[137] A decisive fact was that dog-racing had been somewhat of a latecomer[138]; and it was felt that dog-racing gambling would introduce "a new and excessively attractive form [that would] immeasurably increase… the volume of gambling" in the country.[139]

The 1970 Royal Commission of Inquiry legalised greyhound racing betting. In granting on-course equalisator gambling on greyhounds, it took into account two significant petitions, signed in 1966 and 1968. It recommended that totalisators be adopted once greyhound racing was able to provide the necessary financial arrangements and had a robust administrative structure.[140] The advantages of dog-racing over horse-racing include smaller grounds, more frequent weeknight meetings, lower entrance charges, lower bets, and the maximum of eight runners in each field.[141] Nonetheless, off-course betting facilities through the TAB were not introduced until 1981, in part due to the difficulty of estimating the sport's economic viability. An added difficulty was the early-closing of the TAB, making weeknight meetings impossible.[142] By 1991, computerisation heralded routine evening meetings[143]; and, in 2008, following the introduction of televised *Trackside*, greyhound racing was able to boast $250,000 for a win.[144]

35.2.5 General Sports Betting

Betting on sporting events was a significant part of colonial New Zealand. Despite the obvious sports, "bookmakers prowled the country taking bets on such diverse sports as pigeon- and skeet-shooting, coursing, sculling, cycling, caber tossing, ploughing, wood-chopping, cricket, billiards, 24-hour walking contests, and scow racing on the harbours"[145] The Gaming and Lotteries Act 1881 expressly prohibited public betting on sports contests, but this did not deter the avid bookmaker.[146] However, from the start of the twentieth century, betting on sporting events declined as horse-racing became more dominant. Although a controversial issue, sports-event betting remained illegal. Until 1987, even Lotto was rejected as

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137 *Ibid*.

138 *Ibid*.

139 *Ibid*.

140 *Horse Racing, Trotting and Dog Racing: Report of the Royal Commission of Inquiry* 1970, p. 254.

141 Miers 2004, p. 307.

142 Grant 2000, p. 327.

143 *Ibid*.

144 New Zealand Racing Board 2008, p. 10.

145 Grant 2000, p. 294.

146 Grant 2000, at 295.

Prime Minister Muldoon considered that its introduction would devastate the horse racing industry.[147] In 1991 the New South Wales TAB identified a market gap and advertised, quite successfully, its betting in New Zealand's metropolitan newspapers.[148] By 1994, New Zealanders were betting more than $2 million with the Australian-based betting agency Centrebet.[149]

On 3 June 1994 the TAB formally applied to the government to allow this type of sports betting. The Select Committee report recommended that no betting on sport should take place, either nationally or internationally, unless the governing body approved.[150] In late 1995, the Racing Amendment Act 1995 was passed; and, in pursuit of extra funding, rugby union, rugby league, motor sport, billiards and snooker embraced it enthusiastically. Softball, golf, tennis, soccer, athletics, Australian Rules, and lawn bowls followed. The three sports notably absent from this list were boxing (the TAB argued that corruption was rife in that sport); netball (Netball New Zealand thought it would degrade the sport); and cricket (New Zealand Cricket was cautious given the international corruption in the sport). The first sports betting occurred on a rugby match for the 1996 Bledisloe Cup.

The variety of sports and the bets placed with them are now phenomenal. Cycling, triathlons, American football and baseball signed up, as did the initially reluctant cricket, netball, and boxing. With the addition of the Super 12 (later the Super 14) rugby competition and the televised *TAB Sports Café*, the TAB has had unprecedented marketing success. Yachting New Zealand did not commit until 1999 as its principal sponsor, the New Zealand Lotteries Commission (the NZLC), argued that the TAB provided indirect competition. The new millennium brought more sports to the fore: basketball, ice hockey, speedway, shearing, and motorcycling. In 2008 with 29 committed sports, the TAB was able to boast an overall contribution of $20 million since 1996 to those sporting bodies involved.[151] In 2008, there were over 8.6 million sports bets across a variety of 35,000 different betting options.[152] The total turnover for that year was $137.9 million.[153]

35.2.6 The Internet and Sports Betting Transactions Abroad

While the international position on internet sports betting has generated a vast amount of literature, the New Zealand position is comparatively simple. The New Zealand courts will treat as unenforceable any cause of action for gambling that

147 Grant 1994, p. 248.
148 Grant 2000, p. 298.
149 Grant 2000, at 300.
150 Grant 2000, at 302.
151 New Zealand Racing Board 2008, p. 34.
152 *Ibid*.
153 *Ibid*.

arises overseas.[154] The forum for any such dispute is the overseas jurisdiction. Thus, it is not illegal for a person in New Zealand to gamble over the internet on an overseas web site.[155] Section 9(2)(b) of the Gambling Act 2003 prohibits remote interactive gambling. This includes gambling by a person at a distance by interaction through a communication device.[156] However, sales promotions conducted in New Zealand as well as internet gambling by the NZLC and the NZRB are both exceptions. It is questionable whether loans made overseas that are lawful in that jurisdiction for the purpose of gambling are recoverable in the New Zealand courts. It is unlikely that the gambling contract comes within those envisaged by the Act.[157]

The Act also prohibits a person from publishing or arranging to publish, in New Zealand, an overseas gambling advertisement.[158] It is a summary offence punishable by a maximum fine of $10,000.[159] An overseas gambling advertisement is legal where it is incidental to its purpose; is about minimising the harm of problem gambling; or is directed towards buyers of gambling equipment.[160] A further exception can be made if it is necessary to enable New Zealand to comply with its present or future international trade obligations.[161] In 2008, the NZRB estimated that 20% of the New Zealand gambling market was being spent offshore. It warned that it could lose its monopoly over gambling as a result of "the relatively borderless and unregulated" internet; and that overseas internet gambling providers posed a significant threat to both our future growth and customer retention.[162]

The international position on all forms of online gambling is problematic because of the Antigua dispute.[163] The role of General Agreement on Trade in Services (GATS) is to provide world-free trade. Antigua took the United States to the World Trade Organisation (the WTO) dispute settlement panel on the ground that the United States, when enacting its anti-gambling laws, had violated its commitment to non-discrimination between foreign and domestic traders. In *United States v Cohen*,[164] an American citizen based in Antigua was prosecuted for providing internet gambling services to customers in the United States. As internet gambling is their second major economic earner, Antigua argued it had suffered economic loss as a result of the prohibition of offshore

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154 *Moulis v Owen* (1907) 1 KB 758.

155 Gambling Act 2003, Section 4(1); definition of "remote interactive gambling"—exception (b)(iii).

156 For definition of "communication device" see Gambling Act 2003, Section 4(1).

157 Robson 2008, [43].

158 Gambling Act 2003, Section 16.

159 Gambling Act 2003, Section 16.

160 Gambling Act 2003, Section 16.

161 Gambling Act 2003, Section 16.

162 New Zealand Racing Board 2008, p. 11.

163 Murawski 2008, Yevgeniya 2008.

164 *United States v Cohen* 260 F.3d 68 (2nd Cir. 2001).

online gambling operators taking bets from the United States.[165] The United States argued that this was "necessary to protect public morals or to maintain public order" within the GATS exception in Article XIV—measures designed to "combat money-laundering, fraud, compulsive gambling, underage gambling and organized crime."[166]

The WTO Appellate Body agreed in part with the United States. However, it found that the Interstate Horseracing Act 1978 (US), a statute that allowed interstate betting on horses while disallowing offshore operators from providing the same services, was discriminatory. The obvious answer to the problem was to allow overseas internet gambling providers to bet on horses within the United States along with other United States providers. However, given the different laws of its various states, the United States chose to withdraw from its internet gambling commitments. In 2007, it was ordered to pay compensatory annual payments of $(US)21 million to Antigua, although this order is under appeal.[167] The United States is entering into negotiations for withdrawal with other WTO signatories including the United Kingdom and Australia. The true effect of this decision has not been felt directly in New Zealand, as New Zealand's position has been to tax and regulate rather than to prohibit internet gambling. Today, the NZRB and the NZLC compete with the ever-increasing world providers of internet gambling.

35.3 Location

In 1951 the early TAB branches and agencies were designed to be away from the public eye. It was common for TAB premises to be hidden away down side alleys so as not to attract "unwanted attention from moralists and from politicians and bureaucrats who did not want to see replicated the rowdy [betting shop atmosphere of] Australia."[168] Law prohibited employees from tout betting[169]; and advertising could only relate to the race itself, not the betting. The TAB could not advertise the establishment of a new agency. No other businesses were allowed on the premises; and the agencies had to provide a separate unobtrusive entrance. Prohibition extended to radios and seats. As loitering on the premises was banned, payouts on dividends were held over until the next day. While the TAB was not to encourage betting, it was to provide an appropriate alternative to bookmaking. Despite all these constraints, TAB premises flourished. They were seen as a necessary convenience.

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165 Murawski 2008, p. 455, p. 458.

166 *Ibid*., at 455 and 456.

167 Yevgeniya 2008, p. 888.

168 Grant 2000, p. 138.

169 Grant 2000, at 37.

From the 1980s, the TAB suggested that it would be more profitable to run the TAB via sub-agencies; and proposed the introduction of TAB terminals in dairies, gift shops, and even licensed premises. In 1982, Lion Breweries applied to the Licensing Control Commission for a TAB agency to be sited in the Wiri Trust Hotel.[170] It argued that Section 83(4) of the Racing Act 1971 (that required a separate entrance and physical isolation from any other activity being carried out on in the same premises) and Section 248(1) of the Sale of Liquor Act 1962 (that prohibited betting on licensed premises) both precluded the TAB from being part of the hotel premises. It was held that it would be an "artificial and unacceptable way of circumventing those provisions" by redefining premises.[171] On appeal,[172] the Court held that the word "premises" in the two Acts was defined differently. "Premises" meant the part of the building the agency was to occupy. A "separate entrance" meant a separate entrance into the agency; not a separate entrance from the street. Moreover, it was held that under the Sale of Liquor Act 1962, betting on the totalisator did not take place at the licensed premises at all. The bets were made among the individual investors themselves; and the betting contract was made on the racecourse.[173] A year later, Section 83(4) of the Racing Act 1971 was repealed in an attempt to place greater restrictions on the bookmaker.[174]

Today, community involvement in decisions concerning the creation of gambling facilities is significant.[175] Under the Racing Act 2003, territorial authorities are required to devise policies (with a triennial review) on the venues of TABs in terms of the social impact of gambling within that territory. The policy must specify whether or not TAB venues should be established and, if so, where they should be located. The territorial authority is required to consider the characteristics of the district; the location of community facilities such as schools, kindergartens, early childhood centres and churches; and the cumulative effects of additional opportunities of gambling. These procedures are designed to accord with the special consultative procedures in the Local Government Act 2002. The TAB must obtain territorial consent whenever it seeks to establish a new venue. The consent can be granted or refused with appropriate notification. In 2008, the NZRB declared that its "seven new-look TAB stores in Auckland" with "features… like designated theatre zones with soft seating and coffee lounges… flush-mounted… LCD televisions… and touch-screen information stations for sports options and internet browsing" were part of the "dynamic evolution of an iconic

[170] *Re An Application by Lion Breweries Ltd* [1983] 3 NZAR 319; and, subsequently, *Re An Appeal by Lion Breweries Ltd* [1983] 3 NZAR 364; *Licensing Control Commission v Lion Breweries Ltd* [1983] 3 NZAR 468.

[171] *Re An Application by Lion Breweries Ltd* [1983] 3 NZAR 319, 320.

[172] *Re An Appeal by Lion Breweries Ltd* [1983] 3 NZAR 364.

[173] *Ibid*., at 372.

[174] Racing Amendment Act 1983, Section 16(1).

[175] Racing Act 2003, Sections 65A and 65E.

New Zealand institution."[176] Betting by phone and by the internet has suppressed the traditional problem of suitable sites. Betting is now available anywhere.

35.4 Corruption

The potential for match fixing or corruption in sport betting will always exist. When a punter can preordain the outcome of a match, a guaranteed substantial amount of money can be made quickly if he or she places a bet. In such an event, the integrity of sport is compromised. The reputation of the particular sport is damaged; potential sportspeople do not play; spectators refuse to attend rigged matches; and sponsors of the sport cancel their support. Corruption is more likely to occur when betting is illegal; there is a low detection rate for cheating; player wages are low; prize money is scant; and there is minimal prestige for winning individual contests.[177] Nonetheless, match fixing has occurred in most sports. In 1961, 476 players from 27 United States universities were bribed by bookmakers in order to manipulate 43 games.[178] A number of warnings, bans, fines and prison sentences were issued; and college athletes were prohibited from betting on college sports events. In 1994, in the international cricket arena, Mark Waugh and Shane Warne accepted money from a bookmaker to provide insider information.[179] Another cricketer, South African Hansie Cronjé, admitted that he provided bookmakers with forecasting[180]; and in 2007, rumours that Nikolay Davydenko had match-fixed emerged when a British bookmaker reported unusual betting patterns.[181]

New Zealand has not remained immune. In 1891, Patrick Keogh, playing for the Otago Rugby Football Union, performed so appallingly that an investigation was launched to investigate whether he had a monetary investment in the outcome.[182] In his defence, he threatened to name other involved players. The union described his conduct as reprehensible. In *Caddigan v Grigg*,[183] a bookmaker deceptively transferred ownership so that a horse could participate in a race, thus skewing the odds. This conduct was considered seriously detrimental to the interests of racing. In 1996, the Marlborough Rugby Union admitted that players had bet on their team to win (by 12 points or less) a semi-final against Canterbury—an action strictly prohibited by the New Zealand Rugby Football Union

[176] New Zealand Racing Board, *Annual Report* (2008), p. 46.
[177] Forrest 2006, p. 44.
[178] Maennig 2005, p. 187.
[179] Gardiner 2006, p. 327.
[180] *Ibid*., at 328.
[181] http://www.nzherald.co.nz/, "Tennis: Backhand Play" (12/10/07), accessed 1/07/09.
[182] Grant 1994, p. 70.
[183] *Caddigan v Grigg* [1958] NZLR 708.

Rules.[184] In international cricket, following the revelations of Cronjé affair, New Zealand cricketer Martin Crowe was investigated in 2001 but allegations could not be proved.[185] In September 2009, allegations that his fours team deliberately lost a bowling match at the Asia Pacific bowls championships were strongly denied by double world champion Gary Lawson.

Today, professional players will usually have a clause in their sporting contracts stating that they will endeavour, to the best of their ability, not to bring their game into disrepute.

If a sport becomes involved in betting, the TAB mandates that anti-corruption measures be put in place. Generally, this reflects the position in the international arena. Regulation 6 of the International Rugby Board Regulations provides that:

> [n]o person may seek or accept any bribe or other benefit to fix a match… or to achieve a contrived outcome to a match… or to otherwise influence improperly the outcome of any other dimension or aspect of any match;[186]
> and
> [n]o person shall enter into any wager, bet or any form of financial speculation, directly or indirectly as to the result or any other dimension or aspect of any match.

Furthermore, anyone must inform the union of any activity, including unsolicited approaches from third parties, which he or she believes contravenes the regulation. When such notification takes place, each alleged breach must be investigated and appropriate action taken. While in most cases the disciplinary procedures of the appropriate sporting organisation will deal with the breaches of the rules, the Sports Tribunal of New Zealand may determine sports-related disputes if the Tribunal agrees to do so and all parties agree to that procedure.[187]

35.5 Problem Gambling

35.5.1 General Policy

In many ways, gambling is an innocuous activity. The opportunity for a quick monetary gain is exciting; and gambling is often part of a social occasion—going to the races is possibly the best example. Sports betting challenges the competitive psyche to test wits, skill and knowledge; and this creates an element of thrill-seeking and risk-taking. However, gambling to excess can damage relationships, careers and finances; and can lead to family violence, poor parenting, dishonesty

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[184] Grant 2000, p. 309.

[185] Gardiner 2006, p. 332.

[186] http://www.irb.com/lawregulations/index.html, International Rugby Board, "International Rugby Board Regulations Relating to the Game" (2009), Regulation 6.

[187] Sports Anti-Doping Act 2006, Section 38(b). For a full discussion of the New Zealand Sports Tribunal, see Toomey and Fife (2008), Chap. 2.

offences and suicide. Problem gambling often coexists with other psychological problems such as depression, anxiety, obsessive–compulsive disorder and abuse of alcohol and other drugs. In one study, it was discovered that one in six of those admitted to Auckland Hospital following a suicide attempt met the criteria for problem gambling.[188] The problem can remain undetected, as gambling often becomes a secretive pursuit. A problem gambler is unlikely to gloat over a win as that may lead to others' resentment. It is safer to remain quiet.

Research shows that sports betting can be addictive as it is a continuous form of gambling (there is no real delay) and there is a perceived ability to beat the odds through tips or other knowledge.[189] Sometimes, the positive social racetrack associations can be outweighed by a gambler's financial disappointment and deteriorating mental health.[190] Sports betting, like other forms of gambling, is often practised by those who can least afford it. In 2008 almost half of the 659 TAB outlets were in decile areas rated 8 or above.[191] Therefore the other half were located in the poorest twenty percent areas of the country. However, it must be noted that only about 7% of those seeking treatment for problem gambling cited sport or track betting as their primary mode of gambling.[192] Non-casino gaming machines, some of which are in TAB outlets, account for 76%; casino gaming machines 9%; casinos 6%; and lotto, instant kiwi, and other non-casino forms of gambling the remaining 2%.

35.5.2 Fraud by Agents

Agents who commit fraud to support a betting habit are a continuing problem for the TAB. When it was first established, the TAB treated this type of conduct cautiously. Rather than involving the police, it adopted a policy of instant dismissal as long as there was some form of monetary restitution. To do otherwise meant risking adverse publicity. The fraudsters practised various schemes—some successful, others not. In 1955, a so-called burglary of a Te Kuiti agency was an unsuccessful cover- up for an agent's stealing[193]; and in 1968, a Papakura agent committed suicide after an audit revealed he had stolen $1,440 from his agency to cover an extensive debt.[194]

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[188] http://www.moh.govt.nz/moh.nsf/indexmh/problemgambling-publications, Francis Group, "Informing the 2009 Problem Gambling Needs Assessment: Report for the Ministry of Health" (2009), 44.

[189] *Ibid*., at 45.

[190] *Ibid*., at 30.

[191] *Ibid*., at 59.

[192] *Ibid*., at 44.

[193] Grant 2000, p. 163.

[194] *Ibid*., at 167.

However, in 1984, the TAB sought police intervention when an agent stole $8,000 in two different betting transactions.[195] The agent was prosecuted for dishonesty. Later, in 1987 a further prosecution was made when a sub-agent misappropriated $43,968[196]; and, in 1994, an agent staged a sophisticated abduction and robbery to cover gambling debts.[197] Today, the TAB recruitment process is rigorous. Staff are trained to identify problem gamblers and any such person is given information about problem gambling services.[198]

35.5.3 Liability of the TAB

The liability of the TAB when problem gamblers become penniless has been addressed in a number of New Zealand cases. In *Official Assignee v Totalisator Agency Board,*[199] the Official Assignee claimed against the TAB for sums paid by the bankrupt gambler to the TAB and vice versa. The Court held that Sections 69 and 70 of the Gaming Act 1908 were "sufficiently comprehensive to afford a complete defence"[200] to the action—they rendered unenforceable any action to recover sums of money staked and won in betting transactions. The alternative argument was also considered valid: as the TAB had acted without notice of the bankruptcy, it was not bound to return the money. On appeal,[201] the Court held that no action could lie against the TAB as it was an agent of the racing clubs and even if each racing club was sued by the Official Assignee, it would have an effective defence under Section 70 of the Act.

Two further cases, both failing to reach litigation, throw light on the seriousness of problem gambling. In 1992, a partner in a law firm was jailed for six years for stealing a total of $3.3 million from the solicitor's trust account to bet in part at the TAB.[202] The New Zealand Law Society, forced to indemnify the clients out of the solicitors' fidelity guarantee fund, filed a statement of claim arguing unjust enrichment and dishonest assistance of a breach of trust. As only a fraction of the money lost was spent at the TAB, proceedings were eventually withdrawn. In 1996, a financial controller of an export company stole money by drawing on

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[195] *Ibid*., at 162.

[196] *Ibid*., at 164.

[197] *Ibid*., at 167.

[198] New Zealand Racing Board 2008, p. 18; http://www.tab.co.nz/help/problem-gambling/gambling-help.html, New Zealand Racing Board (2009a, b).

[199] *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064.

[200] *In re Richardson; Official Assignee v Totalizator Agency Board* [1959] NZLR 481.

[201] *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064. Although the appeal was dismissed, it should be noted that the Court was divided on the issue of whether the unenforceable gaming contract had valuable consideration within the wording of Section 82 of the then Bankruptcy Act 1908.

[202] Grant 2000, p. 352.

company funds. He was charged with 440 offences involving just less than $3 million[203]; and sentenced to a 5-year imprisonment term. The export company advised the TAB of its intention to file a statement of claim on the ground that Section 103 of the Racing Act 1971 applied to punters and not to victims of fraud. This too was subsequently withdrawn.

35.5.4 Responsible Gambling

Both the Gambling Act 2003 and the Racing Act 2003 are designed to minimise the harm caused by gambling. Harm is defined as harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and includes personal, social, or economic harm suffered by the person, their spouse, civil union partner, de facto partner, family or wider community, or in the workplace, or by society at large.[204] All sectors of the gaming industry are required to fund problem gambling services.[205] Those involved must also identify, minimise and manage the inherent risks.[206] Under associated regulations, the NZRB is required to display clearly visible signage at its venues that encourages players to gamble only at levels they can afford and contains advice about how to seek assistance for problem gambling.[207] One notice advises: "Take a tip. Set your limits and bet responsibly."[208] Problem gambling awareness training is provided to every employee who supervises racing or general sports betting. At a minimum, the employee must approach a player reasonably suspected of experiencing difficulties relating to gambling; must provide him or her with information about the potential consequences and about problem gambling services; and must remind the player that the Board may refuse to accept a bet under Section 65 of the Racing Act 2003.[209]

The NZRB has issued a Responsible Gambling Code of Practice and a Harm Prevention and Minimisation Policy. Under these policies, no automatic teller machines are allowed at NZRB venues[210]; the NZRB will periodically monitor TAB accounts for signs of problem gambling and take appropriate action if required[211]; all venues must have clearly visible working clocks[212]; and staff must

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[203] Grant 2000, p. 359.

[204] Gambling Act 2003, Section 4(1).

[205] Gambling Act 2003, Sections 317–325; Racing Act 2003, Section 65I.

[206] Gambling Act 2003, Sections 313–316.

[207] Racing (Harm Prevention and Minimisation) Regulations 2004, regulation 5.

[208] http://www.tab.co.nz/help/problem-gambling/gambling-help.html, New Zealand Racing Board (2009a).

[209] Racing (Harm Prevention and Minimisation) Regulations 2004, regulation 6.

[210] Racing (Harm Prevention and Minimisation) Regulations 2004, regulation 4.

[211] http://www.tab.co.nz/help/problem-gambling/gambling-help.html, New Zealand Racing Board (2009b), 4.3.

[212] *Ibid*., at 4.11.

discourage punters from leaving children unattended either at the venue or in the venue car park.[213] Under Section 65H of the Racing Act 2003 regulations may be made under which problem gamblers are identified; prohibited from entering racecourses or venues; removed or restricted; or required to comply with certain conditions of re-entry. These regulations must specify the grounds for classifying a person as a problem gambler; identify those authorised to conduct such a classification; set out the steps to be taken to identify problem gamblers; and specify the rights of those identified or excluded.[214] Pursuant to Section 65G of the Act, every person who enters an NZRB venue in breach of regulations will be treated as committing an offence under Section 4 of the Trespass Act 1980.[215]

As part of this process, the NZRB provides a number of initiatives to combat problem gambling. Two programmes of assistance are the "Set Your Limits" programme and the "Self-Exclusion" programme. The former involves a suspension on the TAB customer's account when a weekly spending limit or weekly loss limit has been reached. Under the latter, a customer may be denied access to NZRB venues or racecourses. Both programmes operate indefinitely but can be revoked with the agreement of the NZRB. In 2008, about 100 problem gambling incidents were investigated and, of those, 37 exclusion notices were issued with a further seven customers being placed on the "Set Your Limits" programme.[216] The NZRB must also provide the Secretary of Internal Affairs with information for research, policy analysis and development purposes.[217] Policy initiatives seek to control the growth of gambling; prevent and minimise the harm caused by it; authorise and prohibit some gambling; facilitate responsible gambling; ensure the integrity and fairness of games; limit the opportunities for crime associated with gambling; and ensure that money from gambling benefits the community.

35.6 Conclusion

The Report of the Royal Commission in 1948 found it inevitable that off-course betting should be regulated so that "'active solicitation into the habit of betting" would be eliminated; interest in the sport of racing would be enhanced; and tax would be paid.[218] This heralded the introduction of the TAB which became part of New Zealand's social laboratory. It has "metamorphosed into a national industry and become a major revenue producer."[219] Despite its success, it must always be

[213] *Ibid*., at 4.12.

[214] Racing Act 2003, Section 65H.

[215] Racing Act 2003, Section 65G; *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621.

[216] New Zealand Racing Board 2008, p. 18.

[217] Racing Act 2003, Section 65 J.

[218] *Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General* 1948, p. 33.

[219] *New Zealand Racing Industry Board v Attorney-General* [2003] NZAR 85, 94.

remembered that rampant gambling can ruin families, careers and lives. With the expansion of gambling services, the risk of problem gambling and corruption is always alive. The NZRB has strived diligently to find the correct balance and must be commended for its appropriate policy making. The betting contract has been removed from the bookmaker and now exists within an efficient regulatory regime. However, in today's climate, the competitive market for betting abroad available via the Internet threatens the monopoly that the NZRB has enjoyed. In order to compete in this new environment, the NZRB must sharpen its creative tools.

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Chapter 36
Sports Betting: Law and Policy (Northern Ireland)

Jack Anderson

Contents

36.1 Introduction

The legal regulation of all forms of gambling in the United Kingdom is now dominated by the Gambling Act (UK) 2005. This Act generally extends and applies to England and Wales, and, with some exceptions, to Scotland. It has

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however limited application in Northern Ireland, and only Section 43 (chain gift schemes), Section 331 (foreign gambling) and section 340 (foreign betting) apply in the jurisdiction. The law on gambling in Northern Ireland is largely contained in the Betting, Gaming, Lotteries and Amusements (NI) Order 1985 ("the 1985 Order"). This provision will be central for this discussion on the law of sports betting in Northern Ireland.

Overall, this chapter is divided into five parts. First, the legal and sporting context of betting and gambling in Northern Ireland is outlined. Second, a brief historical and social study of the law and practice of betting and gambling is undertaken. Third, the modern history of betting and gambling in Northern Ireland is located in the Betting and Lotteries Act (NI) 1957 ("the 1957 Act"). The implementation of that provision and its subsequent interpretation by the courts are examined. Fourth, the 1957 Act was replaced in full by the aforementioned 1985 Order. The implementation of the 1985 Order and its continuing interpretation by the courts is fundamental for this review of the sports gambling laws of Northern Ireland. The analysis of the 1985 Order will allude to a number of external influences. For instance, the 1985 Order was formulated and enacted at the height of the "Troubles" in Northern Ireland, and an interesting surrounding feature of the provision was the concern that bookmaking ventures were being used as a conduit for the racketeering and laundering of money by paramilitary organisations. Later, and in a much more mundane fashion, the law on betting and gambling in Northern Ireland had to accommodate the National Lottery Act (UK) 1993, which extends in full to the jurisdiction. Finally, the analysis of the 1985 Order remarks upon the realisation in Northern Ireland in the earlier part of this decade of the need to relax some statutory controls on betting and gaming with a view to bringing Northern Ireland law in these areas more closely in line with the corresponding law of Great Britain. Initially, this "relaxation" manifested itself in the Betting and Gaming (NI) Order 2004 ("the 2004 Order"). Nevertheless, one year later, the limited territorial effect in Northern Ireland of the Gambling Act (UK) 2005 meant that Northern Ireland law was once more at odds with the corresponding law of Great Britain. Accordingly, the fifth and final part of this section speculates on possible future developments in the law of sports betting in Northern Ireland with respect to the objectives and schemes of the Gambling Act (UK) 2005.

36.2 The General Sporting and Legal Context in Northern Ireland

36.2.1 Sports Betting

Although a small jurisdiction, with a population of around 1.5 million, Northern Ireland has a vibrant and established sporting tradition. The most obvious manifestation of this tradition is football, and, most notably, with players such as the

late George Best, who won the European Cup with Manchester United in 1968. Although interest in the English Premier League is high, the actuality of Northern Irish sport is more diverse than that and sports such as horse racing (particularly the National Hunt version) and greyhound racing (especially in the major cities of Belfast and Derry) remain popular. These three sports are the mainstays of the sports betting industry in Northern Ireland. In terms of the broader picture on the relationship between gambling and sport, reference must be made to a report entitled "The Economic Importance of Sport in Northern Ireland" published in 2007 by the Sports Council of Northern Ireland ("Sport NI") and the Department of Culture, Arts and Leisure. The report focussed on the economic importance of sport to Northern Ireland in 2004, providing additional comparisons with estimates from 1998.

The report noted that in 2004, £446 million was spent by consumers on sports-related goods and services in Northern Ireland, which accounted for 2.8% of total expenditure in the region and was higher than the national average for England (2.4%). Moreover, the Sport NI report also observed that for the period 1998–2004 there had been a 75% increase in sports-related consumer expenditure, and that this increase was at odds with general economic trends in the United Kingdom and was sustained in spite of the fact that average earnings in Northern Ireland were below the average for the United Kingdom during the period in question. Crucially, the Sport NI report noted that, although the increase in expenditure on sport during the period 1998-2004 could be explained by a 53% increase in expenditure on sports clothing and footwear and a 56% increase in subscriptions and fees to sports clubs and gyms, the critical factor was the considerable expansion of the size of gambling within the sports market—a 100% increase from £45 million in 1998 to £90 million in 2004. In summary, in 2004, one-fifth of the total consumer spending on sport was gambling related, which was second only to expenditure on sports clothing and footwear (29%) as the largest category of consumer spending on sport. According to the report, the £90 million spent on gambling was largely accounted for in three ways: gambling on football pools (£2 million); raffles and gaming (£8.4 million); and horse racing (£80 million). In an overall sense, the Sport NI report was in no doubt that this substantial increase could be explained by the abolition of gaming tax announced by the then Chancellor of the Exchequer, Gordon Brown, in his Budget speech in 2001. In this, the Sport NI report, which was prepared by the Sport Industry Research Centre at Sheffield Hallam University, stated that financial results for the period 1998–2004 showed a dramatic improvement in profits in a range of sport betting companies including Arena Leisure, Sporting bet, Paddy Power, Wembley and William Hill. In fact, in the case of William Hill, full pre-tax profits increased by 525% in 2003.[1]

Figures since 2004 have yet to be collated, though anecdotal evidence suggests that, at least until the recent global credit crunch and accompanying economic

[1] Statistics and figures taken from *Report on the Economic Importance of Sport in Northern Ireland* 2007.

recession, the betting industry in Northern Ireland was thriving. For instance, in February 2008, Ladbrokes, Britain's and the Republic of Ireland's biggest bookmaker, announced that it was to buy 54 bookmaker shops in Northern Ireland through its acquisition of Eastwood Bookmakers for £117.5 million. Aspects of this acquisition reveal facets of the Northern Ireland gambling industry, which pervade the following account of the law surrounding that industry. For example, contemporary media reports on the deal noted that Ladbrokes paid more than £2 million per shop, roughly double the price of comparable deals in England. Ladbrokes explained this in two ways. First, it stated that the underlying annual earnings per shop in Northern Ireland were about £200,000, compared with £100,000 in its shops elsewhere in Britain. Apparently, one of the reasons betting shops in Northern Ireland performed so well relative to the rest of the United Kingdom was the higher proportion of football betting, which has a higher margin than horse racing. In simple terms, Ladbrokes was of the opinion that the price paid was fair when the annual collective EBITDA (Earnings before interest, tax, depreciation and amortisation) of the shops was expected to be in the region of £11 million. Second, and of more immediate legal import, Ladbrokes explained the high price paid for the shops in question as being related to the fact that there are restrictions on the accrual of new bookmaking licences in Northern Ireland, which are awarded only after a demand-based test—a method that has been abandoned in other parts of the United Kingdom by the Gambling Act (UK) 2005. In sum, by purchasing the 54 shops in question, and adding that to its market entry purchase of 16 bookmaker shops in 2006, Ladbrokes had, in two years, acquired 23% of the NI betting shop market.[2]

36.2.2 Legal Context

Some brief clarification is needed to explain the law making and legislative process in Northern Ireland.[3] From the late fifteenth century to 1800, the island of Ireland had its own parliament (the Old Irish Parliament), however, under the terms of the Act of Union 1800 the island became an integral constitutional part of the United Kingdom of Great Britain and Ireland, with all law making powers centralised on the Westminster Parliament in London. Under the Government of Ireland Act 1920, the island of Ireland was partitioned between Northern and Southern Ireland. In Northern Ireland, a parliament was established in Belfast (Stormont), and from 1921 until 1972 legislation on most major domestic issues for Northern Ireland was made in the form of Acts of the Northern Ireland Parliament. A feature of the legislative process from 1921 to 1972 was the fact that when an Act concerning a major substantive area of the law, such as criminal law,

[2] See the report on the acquisition by Walsh 2008, p. 47 (Business Section).

[3] See generally Dickson 2005 and Anthony and Morison 2005.

went through the Westminster Parliament, the Northern Ireland Parliament regularly enacted legislation that mirrored the Westminster equivalent—for instance, the Theft Act (NI) 1969 largely reflects the provisions of the Theft Act (UK) 1968. Nevertheless, in certain areas, and reflecting the more conservative nature of Northern Ireland society as a whole, Northern Ireland law remained distinct. These areas included (and continue to include) matters relating to abortion and liquor licencing, and this social conservatism to matters of "vice" also explains the contrast between the 1957 Act and the more liberal regulatory framework in Britain that gradually began to take shape in the 1960s.

In 1972, the Stormont Parliament was suspended by the British government who imposed direct rule from Westminster. 1972 was by far the worst year (both in terms of violence and death toll) in the "Troubles" in Northern Ireland between the largely British/Protestant/Unionist majority and the mainly Irish/Catholic/nationalist minority. From 1972 to 1999 a number of initiatives were attempted in order to re-establish a devolved legislative body in Northern Ireland. There were two devolved Assemblies during the period: in 1974 (this Assembly had limited legislative powers or measures); and from 1982 to 1986 (it had no legislative powers). These initiatives apart, the period was marked in legal terms by direct rule, as a result of which the great majority of Northern Ireland's primary legislation was brought into effect by means of Orders in Council, which were laid before the Westminster Parliament under a so-called affirmative procedure. The 1985 Order is an example of that procedure. From the late 1970s, it also became the practice, under a negative resolution procedure, to ensure that certain Acts relating to Great Britain would also contain clauses stating that parallel legislation for Northern Ireland might be issued under that Act (or for any part thereof) in the form of statutory instruments. Section 63 of the National Lottery Act (UK) 1993 is an example of this procedure.

Most recently, a Northern Ireland Assembly was established by the Northern Ireland Act 1998. The Act implemented provisions of the Belfast Agreement, also known as the Good Friday Agreement of 10 April 1998, which was negotiated by representatives of both sides in the Northern Ireland conflict. The Agreement was facilitated by the British and Irish Governments and following devolution on 2 December 1999, legislative powers in most areas were transferred from Westminster to the Northern Ireland Assembly. The Assembly has been suspended on a number of occasions since 1999, during which direct rule applied once more in Northern Ireland. It was, for example, during one such suspension that the 2004 Order was enacted. On foot of the Northern Ireland Act 2006 and the Northern Ireland (St Andrews Agreement) Acts of 2006 and 2007, restoration of the Assembly took place in May 2007. It follows that at present the law making process in Northern Ireland might be summarised thusly. On the one hand, certain legislative matters remain specifically reserved to the Westminster Parliament under the devolution process, while, in a more general sense, Westminster (including the eighteen Members of Parliament representing Northern Ireland), retains the right to debate and legislate upon Northern Irish matters such as the very limited territorial extent outlined in Section 361 of the Gambling Act (UK)

2005. On the other hand however, it is now envisaged that with the restoration of the Assembly, the majority of legislation affecting Northern Ireland only is expected to be made in the form of Bills passed by the Northern Ireland Assembly. Accordingly, any updating of the existing law of sports betting and gaming in Northern Ireland is most likely to be manifested in this fashion.

36.3 A Short Legal History of Sports Betting in Northern Ireland

36.3.1 Betting Laws Committee 1947

In 1947, an expert committee appointed by the Minister of Home Affairs, published their report on the law and practice of lottery, betting and gaming in Northern Ireland.[4] The 1947 Committee considered the same terms of reference as were given to a 1932–33 Royal Commission on Lotteries and Betting.[5] Although not as neutral in its views as that Royal Commission, neither were the recommendations of the 1947 Committee as proactive as the subsequent 1949–1951 Royal Commission on Betting Lotteries and Gaming.[6] This regulatory conservatism was eventually reflected in the 1957 Act.[7] The 1947 Committee's approach to its three heads of enquiry *viz*, lotteries, betting and gaming, was admirably succinct. It carried out a short survey of both governmental action and the existing law on lotteries, betting and gaming; it assessed their current status in terms of efficacy and enforcement; and it then recommended a number of legislative initiatives. This succinctness was reflected in its initial definition of its key terms of reference:

> A lottery is a distribution of prizes by lot or chance; a bet has been defined as a promise to give money or money's worth upon the determination of an uncertain or unascertained event in a particular way; and gaming is that form of betting in which any game is played for stakes hazarded by the players.[8]

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[4] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947.

[5] *Final Report of the Royal Commission on Lotteries and Betting* 1932–1933.

[6] *Report on the Royal Commission on Betting, Lotteries and Gaming* 1949–1951.

[7] For an excellent review of the parallel and more progressive developments in Britain see Miers 2004, at chs. 3, 6, 9 and 10.

[8] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, p. 11.

36.3.2 Betting Laws Committee 1947: Historical Survey and Existing Law[9]

In the sixteenth century, King Henry VIII, who was himself a keen sportsman, became concerned that the popularity of games such as bowls, tennis, games of cards and dice was diverting the attention of the male population from archery and other military exercises, which were seen as necessary "in defence of the realm." The Unlawful Games Act 1541, which also extended to then Kingdom of Ireland, prohibited the keeping of any house of other place where such games were played, either for money or otherwise.[10] Subsequently, the Lotteries and Gaming-Tables Act (Ireland) 1707, an Act of the Old Irish Parliament, expressly declared gaming tables "where persons play at card and dice for great sums of money to the corruption of youth and the utter ruin and impoverishment of families" to be illegal in Ireland.[11] In a similar vein, the 1707 Act prohibited the setting up or publishing of the "many mischievous and unlawful games called lotteries." The 1707 provision was somewhat ineffectual and further legislation was necessary in 1712[12] and 1739.[13]

The Gaming Act of 1739, which recited all the old gaming laws covering the playing of card and dice games (such as pharaoh, hazard, passage and roulette); bowls; tennis; horse racing; and foot races, was designed to punish and eradicate excessive wagering given its association with "all manner of deceitful and fraudulent behaviour." In a nod to the fact that the previous legislation had been largely ignored in Ireland, the 1739 Act also imposed penalties on Justices of the Peace who refused or neglected to carry out their duties under the Act. In a manner specific to modern Northern Ireland, the 1739 Act expressly exempted from its remit the Corporation of Horse Breeders in County Down who were allowed to continue with their horse racing activities under the powers granted to them in Royal Charter by King James II in 1685. The Corporation originally organised race meetings in Downpatrick but moved to Down Royal (its present course; located just outside Belfast) in 1789. Downpatrick and Down Royal remain the only two racecourses in Northern Ireland.[14]

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[9] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 11–15.

[10] 33 Henry VII c9.

[11] 6 Anne c17.

[12] Gaming and Lotteries Act 1712, 11 Anne c5 & c6.

[13] Gaming Act 1739, 13 George II c8.

[14] Under Article 9(1) of the Horse Racing (NI) Order 1990 (SI 1999/1508 (NI 12)) any person who applies for the grant or renewal of a bookmaker's licence or a bookmaking office licence under Part II of the Betting, Gaming, Lotteries and Amusements (NI) Order 1985 [SI 1985/1204 (NI 11)] must pay a charge to the benefit of the Department of Agriculture and Rural Development. Collectively, these charges, known as the Horse Racing Fund, are used for the financial support and development of the Downpatrick and Down Royal racecourses. See also the Horse Racing (Charges on Bookmakers) Order (NI) 2007 (SR 2007/83).

In the latter half of the eighteenth century, the Old Irish Parliament moved, as a means of increasing revenue, to the creation of state lotteries, eventually adopting the (similar) scheme of lottery laws of the British Parliament from the 1780s onwards.[15] With the passing of the Act of Union in 1800, there was a similar convergence with respect to betting and gaming laws. By the mid-nineteenth century, it had become clear that the existing laws on gaming and betting in Britain and Ireland were being thoroughly evaded. Moreover, many of the old gaming laws in particular had ceased to be applicable in that they prohibited certain healthy, purely sporting forms of recreation. Therefore, in 1844, it was decided to appoint Select Committees of the House of Lords and House of Commons at Westminster to examine the existing gaming and betting laws.[16] The subsequent reports, as manifested in legislation, had an enduring legacy that lasted for over a century.

The most important of the 1844 recommendations, and the one that resonates to this day in Britain and Ireland, was that gaming and betting contracts should not remain enforceable in the ordinary courts; that existing penal statutes relating to excessive wagering should be repealed, and that debts so contracted should be recovered "by such means only as the Usages and Customs of Society can enforce for its own protection."[17] In short, the Gaming Act (UK) 1845 relieved courts of law from taking any cognizance of claims for money won by wagering, and also provided for the suppression of gaming houses. The 1845 Act was supplemented by the Gaming Houses Act (UK) 1854, which made it easier to establish proof of the use of a house for gaming, and increased the relevant penalties. An unforeseen effect of the 1845 provision was a move into private betting and the establishment of so-called ready money betting houses. These bookmaking establishments were proscribed by the Betting Act (UK) 1853. Overall, the primary consequence of the stated provisions was that (the exception of on-course, horse racing betting notwithstanding) bookmaking simply moved to the streets and became associated with secondary criminality. For the latter half of the nineteenth century street betting in Northern Ireland was dealt with, as elsewhere in Britain and Ireland, by means of local byelaws or indirectly through provisions such as Section 4 in the Vagrancy Act (UK) 1824, until the consolidation of the law in the Street Betting Act (UK) 1906.

By the 1940s, the law on lotteries, gaming and betting in Northern Ireland was a farrago of old, partly enforced, largely ineffectual statute and local practice.[18] With

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[15] Lottery Act 1779–1780, 17 &18 George III c5. For a review of the British state lottery laws of the period see Miers 2004, Chap. 5.

[16] *The Three Reports from the Select Committee of the House of Lords on the Laws Respecting Gaming* (House of Lords, London, 1844, HL 604) and *Report from the Select Committee of the House of Common on Gaming* (House of Commons, London, 1844, HC 297).

[17] Note the modern, regulated expression of this principle in *Calvert v William Hill* [2008] EWHC (Ch) 454.

[18] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 16–19.

respect to lotteries, the 1947 Committee recommended the consolidation of all existing laws along the lines adopted in Britain under the Betting and Lotteries Act (UK) 1934. The 1934 Act effectively banned all lotteries not specifically sanctioned by Westminster, though it did allow, to a limited and strictly regulated extent, small lotteries incidental to entertainments such as bazaars and sales of work and including private lotteries promoted for the exclusive benefit of a society or club.[19] The 1947 Committee was particularly exercised with the need to prohibit large-scale public sweepstakes, which were successfully undertaken in the Irish Republic in the form of the Irish Hospitals' Trust Sweepstake.[20] This hugely successful sweepstake system was organised in the Irish Republic to the benefit of organisations affording social and health care. The 1947 Committee felt that there was neither the need for nor the desire to permit such a facility in Northern Ireland, and that the advertising of tickets for this public sweepstake should be prohibited in Northern Ireland.[21]

With respect to gaming, the 1947 Committee noted that the law was largely contained in the Gaming Act (UK) 1845, the Gaming Houses Act (UK) 1854, as supported by Section 57 of the Summary Jurisdiction Act (NI) 1935.[22] Section 57 addressed an anomaly in the law whereby coins were not "instruments of gaming" and consequently the game of "pitch and toss," which was purported to be quite popular in parts of Belfast at the time, was not covered by the earlier acts.[23] By the 1940s, gaming was not, according to police confirmation given to the 1947 Committee, of much concern to the authorities in Northern Ireland. The 1947 Committee noted that, although events such as whist drives (a type of card game popular at the time in Britain and Ireland and played for prizes in money or in kind) and certain gaming machines found in amusement arcades at seaside resorts, were technically in breach of the existing gaming laws; in reality, whist drives were "free from essential mischief" and fun-fair games were often more to do with "skill" than "chance."[24] Overall, the 1947 Committee recommended minimal changes to the law on gaming save the further monitoring by the police of gambling at fun-fairs and the consolidation of the remaining effective provisions of the

[19] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 57–59.

[20] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, p. 21.

[21] For some background see further Coleman 2005.

[22] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, p. 19.

[23] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 34 and 70. The usual form of the gambling game of "pitch and toss" is where the player who manages to throw a coin closest to a set mark gets to toss all the coins, winning those that land with the head up.

[24] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 34–35.

1845 Act in a new legislative scheme.[25] The existing law on betting was however more complex, and in need of dedicated attention.

36.3.3 Betting Laws Committee 1947: Problems with Sports Betting

In the 1940s, the applicable law relating to betting in Northern Ireland was contained in five statutes.[26] The Betting Act (UK) 1853 stated that anyone found conducting a betting house with the purpose of providing betting services for persons found thereon, could be liable to a fine or imprisonment for six months. Although "cash betting" was generally prohibited by the 1853 Act, it was allowed in the Tattersall's Ring area of a racecourse where on-course cash betting was generally permitted.[27] Moreover, it was lawful for a person to keep an office for betting with persons who did "not resort there in person" but communicated by post, telegram or (later) phone, with the settlement of such bets usually done on a weekly basis. On pain of two months' imprisonment, the Betting Act (UK) 1874 supplemented the 1853 Act by prohibiting the advertising of betting services. The Betting and Loans (Infants) (UK) Act 1892 also applied in Northern Ireland declaring it illegal to invite infants to make a bet. The Street Betting Act 1906 (UK) held that frequenting or loitering in a street or public place for the purposes of betting was a criminal offence, attracting a maximum of six months' imprisonment. Shortly before World War I, the Football Association became concerned at the growth of organised football betting on the English football league. The idea here, which must be distinguished from football pools, was that a bookmaker through a coupon would offer for cash fixed odds to a competitor who could accurately forecast the results of certain football matches. Given the susceptibility to corruption and match-fixing, the matter was taken up again by the FA after the war and the Ready Money Football Betting Act (UK) 1920 was enacted, prohibiting such combination betting on football.

In reviewing the sports betting industry in Northern Ireland in early part of the twentieth century, the 1947 Committee noted that the mainstays of that industry were betting at horse racing tracks, at greyhound tracks and football pool betting. At the time, Northern Ireland had two race tracks (it still has), which then operated under the control of the Irish Turf Club, the private regulatory body in Ireland. Only accredited members of the Bookmakers' Protection Association (now the

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[25] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 69–71.

[26] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 17–19.

[27] The authority of the House of Lords' decision in *Powell v Kempton Park Racecourse Company* [1899] AC 143 being good law in Northern Ireland. For general background to that case see further Miers 2004, pp. 253–261.

Northern Ireland Turf Guardians Association) were admitted to racecourses. The betting that took place was carried out in cash and by credit and on the basis of odds agreed between the bookmaker and the backer when the transaction was being made, the odds varying according to the amount being waged on each horse. All the usual conventions applied: betting took place immediate "before the off"; the settlement of bets took place on the declaration of the "winner alright"; and a bookmaker who received a large sum of money on a horse could lay it off with another. Disputes arising between a backer and a bookmaker were usually dealt with by the controlling bodies, where the ultimate sanction was that the losing party could be "warned off," i.e., debarred from entering the racetrack. A similar system of betting operated at Northern Ireland's (then) four greyhound racing tracks under the private regulatory authority of the Irish Coursing Club, though there was slightly more governmental involvement through the licencing of tracks pursuant to the Dog Races (Restriction) Act (NI) 1946. The 1947 Committee noted that, although pari-mutuel or totalisator betting at licenced tracks in Britain was permitted by virtue of the provisions of the Betting and Lotteries Act (UK) 1934, similar legislation had not been enacted in Northern Ireland[28] to the extent that the existing law equated to the ban on the operation of the Tote laid down in the English High Court decision of *Shuttleworth v Leeds Greyhound Association* (*1933*).[29]

Ready cash betting on football, through fixed odds offered by a bookmaker, was illegal under the Ready Money Football Betting Act (UK) 1920. In any event, a credit-based system of football pool betting was much more popular—and lucratively so for some of the companies running it.[30] The basic idea was that coupons were distributed weekly during the English league football season whereupon a list of Saturday matches was set out. A participant would stake on their ability to forecast a home or away win or a draw, with points being awarded for each forecast. The odds paid to the competitor with the most points depended on the amount of money paid overall into the "pool" and the number of successful competitors. Although the 1947 Committee noted that the "pool" system flirted with the boundaries of the 1920 Act, and that the amounts wagered were increasing, it did not find the scheme as problematical as the fact that cash betting houses, in contravention of the Betting Act (UK) 1853, existed quite openly in Northern Ireland, especially in Belfast.[31]

By the 1940s, the application and enforcement of the Betting Act (UK) 1853 had become farcical. Right from the beginning, prosecutions under the Act were rare, and even on conviction local lay magistrates usually agreed to impose a

[28] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 25–26.

[29] [1933] 1 KB 400.

[30] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 26–28.

[31] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 28–34.

minimal fine only. Matters became so lax that the Summary Jurisdiction Act (NI) 1935 had to take any power of adjudication in respect of betting law away from lay magistrates. From 1935 onwards, there appeared to be an agreement between the police, resident magistrates and the bookmakers' representative body that existing bookmakers would be prosecuted on eighteen fixed occasions during the year, and would be fined £5 on each occasion plus costs. New entrants to the market were not offered such protection and were, it seems, prosecuted with such frequency as to put them out of business. The manner in which this "levy" was imposed, and the accompanying court procedure, did not "commend itself" to the 1947 Committee.[32] On hearing evidence from police representatives from Great Britain, the 1947 Committee noted that, although reasonable enforcement of the Betting Act (UK) 1853 and the Street Betting Act (UK) 1906 was possible; in practice, the legislation lacked public support, was outmoded, and even promoted an amount of underground, unregulated wagering. In addition, although the 1947 Committee acknowledged that the manner in which the betting laws were currently being implemented in Northern Ireland was a pragmatic, reasonable measure of control that had the advantage of eliminating street betting by placing bookmakers in offices where they could be supervised regularly by the police,[33] the 1947 Committee felt, and particularly for those prone to excessive gambling that it would be better if these matters were openly regulated and subject to a licencing regime along the lines implemented in 1931 in the Republic of Ireland.[34]

Finally, the 1947 Committee debated in detail the merits of imposing a betting tax on prospective off-the-course bookmaking establishments in Northern Ireland.[35] Taking into account contemporary statistics indicating that up to 75% of population were then indulging in betting in some form or other, and that apart from income tax liabilities of the bookmaker such regulated betting would contribute little to the public purse, they recommended a betting tax as a "corrective" that would strengthen the envisaged controls, i.e., raise revenue for the Exchequer, some of which might be directed to offset any social problems associated with betting and gambling.

36.4 The Betting and Lotteries Act (NI) 1957

The recommendations of the 1947 Committee, some of which have been alluded to above, were largely reflected in the Betting and Lotteries Act (NI) 1957. For example, the recommendations that a general ban on lotteries should be

[32] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, p. 33.

[33] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, p. 60.

[34] Section 2 of the Betting Act (Ireland) 1931.

[35] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 71–75.

implemented, save for certain small and private lotteries, was effected by Part III (Sections 24–31) of the 1957 Act.[36] Part III of the 1957 Act was similar in scheme and in substance to Part II of the Betting and Lotteries Act (UK) 1934. Similarly, the manner in which the 1934 (UK) Act permitted pari-mutuel or totalisator betting at licenced tracks in Britain was followed in Part II (Sections 21–23) of the 1957 (NI) Act, which granted such rights to approved racetracks. With respect to betting, the principal concern was with the licencing of "off-the-(race)course" cash and credit betting. There was clear acknowledgement of the 1947 Committee's argument that an open, regulatory system based on a licencing regime would best enable state authorities to control the betting industry in Northern Ireland with a particular eye on the prevention of excess gambling, and its associated social problems.[37] This comprehensive regime was enacted in Part I (Sections 1–20) of the 1957 Act. Part I of the 1957 (NI) Act thus repealed the Betting Act (UK) 1853 and legalised cash and credit off-the-course betting subject to a licencing regime.[38] From this point onwards, bookmakers in Northern Ireland had to apply for a licence. The licencing regime operated on the basis of obtaining a certificate of character from the Ministry of Finance; the payment of a fee and excise duties; and a certificate of suitability—the last criterion being supervised by the police and the courts. The opening hours; the endorsement of a bookmaker's premises; restrictions on loitering and advertising outside betting premises; restriction on juveniles and minors within; and enhanced powers of entry and police investigation were all laid down clearly in the 1957 Act.[39] In order to prevent the wholesale opening of premises for betting purposes, a set amount of licences were only made available to individuals, and usually only to those bookmakers who had existed under the previous "regular prosecution as a levy" regime. In an ironic twist therefore, on the initial implementation of the 1957 Act, a certificate of suitability could, in reality, only be obtained on the presentation of prior convictions for bookmaking! In addition, the issuing of new licensees and the transfer of existing licences was tightly regulated on an "on-demand" basis or, on the death of a holder of a licence, to the deceased's legal representatives, all subject to the approval of the licencing authorities.[40]

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[36] Similar to the scheme found in Part II of the Betting and Lotteries Act (UK) 1934.

[37] *Final Report of the Betting Laws Committee on Lottery, Betting and Gaming Laws* 1947, pp. 59–63 provide an interesting, if slightly dated, review of the social problems inherent in the debate on the legalisation of sports gambling.

[38] The existing on-course betting regime was left largely intact, as was the regime governing betting by way of football pools save section 32 of the 1957 Act, which preferred that pool betting be done directly between registered pool promoters (under the Pool Betting Act (UK) 1954) and the individual client, without the employment of agents.

[39] For a partly revised copy of the 1957 Act, see http://www.bailii.org/nie/legis/num_act/balai1957381/ (last viewed on 16 December 2008).

[40] See centrally section 7 of the 1957 Act, grounds for refusal of certificate of suitability of premises.

The 1957 Act regulated sports-related gambling in Northern Ireland for nearly 30 years. There was a modest, if interesting, amount of reported case law relating to its provisions but the dry facts of cases belie the fact that the 1957 Act operated against the background of the "Troubles" in Northern Ireland. The context and the case law pertaining to the 1957 Act are now outlined.

36.4.1 Case Law

Sections 6 and 7 of the 1957 Act, which concerned the process whereby a certificate of suitability to an applicant bookmaker could be made and refused, prompted most concern for the courts: *McGimpsey v O'Hare*[41]; *R (Nicholl) v Recorder of Belfast* (*1965*)[42]; *R (Thompson) v Additional County Court Judge for Antrim* (*1967*)[43]; *R (Boggs) v Country Court Judge of Tyrone & Ors* (*1968*)[44]; and *In Re Stevenson & Ors Application* (*1984*).[45] The typical scenario is cases of this kind was, on the awarding of a certificate of suitability by a resident magistrate, a challenge, by way of judicial review, would be made by an aggrieved party such as a local resident or by the police; or, on refusal of the certificate, a challenge would be made by the applicant-bookmaker. The objections by local residents or the police could be quite technical and pedantic in nature and *In Re Stevenson & Ors Application* (*1984*), for example, the granting of certificate of suitability to a Mr Terence Fox was quashed when it transpired that the requirements as to advertising for the application in the local area (pursuant to Section 6(3) of the 1957 Act) and the rateable value of the bookmaking premises (pursuant to Section 7(1)(j)) had not been discussed fully at the granting of the certificate. The former objection was particularly odd given that Mr Fox had advertised his notice to apply for a certificate of suitability in two of Northern Ireland's leading daily newspapers—the broadly unionist *Belfast News Letter* and the broadly nationalist-leaning *Irish News*. The prosecutor's argument that the *Irish News* sold less than 3 copies in the town in which the bookmaker was to operate was, however, seen as having some merit to the Section 6(3) objection.

Other largely technical interpretations of provisions in the 1957 Act occurred in *Spears v Barrett* (*1964*)[46] and *Shute v Hunt and Others* (*1969*)[47] where the matter of whether a private social club had the necessary Section 27 exemption to run a private lottery was at issue. In *Spears*, the lottery was seen as merely incidental to

[41] [1959] NI 98.
[42] [1965] NI 7.
[43] [1967] NI 82.
[44] [1968] NI 16.
[45] [1984] NI 373.
[46] [1964] NI 77.
[47] [1969] NI 189.

the running of the social club in question but in *Shute* a social club, formed by members drawn from the supporters of Glentoran FC, one of Northern Ireland leading football clubs, was seen as a mechanism for avoiding the 1957 Act's proscription of lotteries. More broadly, the 1957 Act prompted the interest of the House of Lords on two separate occasions. In *McCann v Attorney-General for Northern Ireland*,[48] the claimant who had carried out a bookmaking business prior to the implementation of the 1957 Act, failed however to obtain a certificate of suitability under Section 6 of the Act. The claimant argued that having regard to the restrictive wording and "carryover" requirements of Section 6 of the Act, it would, given his circumstances, be impossible for him to obtain a certificate of suitability; thus he was precluded from ever again carrying on his business in his present premises to the extent that the prohibition on non-licenced bookmarkers under Section 5 of the Act had the effect of taking property belong to him without compensation. This, the claimant argued, was, in terms of constitutional law, contrary to Section 5(1) of the Government of Ireland Act 1920, which prohibited the Northern Ireland Parliament from enacting any law that sought to take property without compensation. The Court of Appeal of Northern Ireland held that Section 6 was not confiscatory in nature but was a truly regulatory provision and that, in any event, as the House of Lords later affirmed, compensation was provided for such situations by Section 4 of the Finance (No 2) Act (NI) 1957.

In *Seay v Eastwood* (*1976*),[49] the appellant, Barney Eastwood, one of Northern Ireland's leading bookmakers, and later a boxing promoter of world champions such as Barry McGuigan, installed two "fruit" machines in one of his betting offices. The machines paid cash awards to persons using them if a certain combination of fruit symbols appeared in the window on the machines. The machines were of a nature that they produced for the appellant a fixed profit of about 27% of the stakes provided by the players. The appellant appealed against his conviction for carrying on a business other than bookmaking in a licenced premises contrary to Section 13(1)(a) of the 1957 Act. Eastwood argued that the operation of the fruit machines was part of "the business of receiving bets" thus was consistent with the definition of "bookmaking" contained in Section 20 of the 1957 Act. The House of Lords dismissed the appeal; the appellant was not receiving bets but simply taking a fixed proportion of the stakes inserted into the machines; therefore the coins inserted into the machines were not bets within the meaning of Section 20, and the appellants were rightly convicted. In short, playing a fixed odds gaming machine was gaming, not betting; thus contrary to scheme of the 1957 Act.

[48] [1961] NI 102.

[49] [1976] 1 WLR 1117; [1976] 3 All ER 153; [1976] NI 8.

36.4.2 Context

Although *Seay v Eastwood* is of some general interest to the statutory interpretation of betting, lotteries and gaming legislation,[50] it also reflects a particular point of interest with respect to the 1957 Act, i.e., its fading applicability in the face of enhanced technological means of providing gambling opportunities and services. In short, the 1957 Act meant that Northern Ireland law, though initially more advanced than the corresponding law of Great Britain, had now fallen behind.[51] Moreover, in a Northern Ireland context, by the 1970s, the "Troubles" were raging, and, understandably, the enforcement of sports betting and gaming laws was probably given a low priority, though there was an uneasy sense that, at the fringes of the established bookmaking industry, betting facilities were vulnerable to illegal activities such as racketeering and money laundering. In sum, by the mid 1980s, and for a combination of the reasons stated, it was clear that the law on gambling in Northern Ireland was in need of comprehensive reform.

Finally, an interesting way to trace sports gambling in this period, and within the troubled context of Northern Ireland, is to relate the story of Leonard Steinberg, the founder of Stanley Leisure plc, which until 2005, was one of Britain's largest bookmakers.

> Leonard Steinberg's grandparents were Jews who escaped the pogroms in Poland and Russia during the early 20th century, settling in Manchester, England, and then Northern Ireland. Steinberg grew up in Belfast, the son of Stanley Steinberg, who owned and operated an optical manufacturing business and a milk bar in addition to running an illegal betting shop as a hobby. As a teenager, Leonard Steinberg placed an occasional bet, and when he was 18 years old he first tried his hand at bookmaking. Some school friends asked him to stake their bets on the 1954 Derby, but realizing that the bets covered only nine of the 20 horses in the field, Steinberg and a friend decided that the odds favoured them taking on the risk themselves instead of placing the bets with bookies. Because only one of the horses placed and required a payout, Steinberg and his partner each walked away with more than one pound.
>
> After this modest foray into bookmaking, Steinberg decided to pursue a career as an accountant and had begun a trainee program with a Belfast firm when his father died in 1954. As the oldest child in the family, he stepped into take over his father's businesses to support his mother, two brothers, and a sister. He hired someone to operate the milk bar and attempted to keep the optical manufacturing business running as well. However, his employees absconded with £3,000, and optics proved too technical for the young man, forcing him to shut down that business. All that remained was his father's illegal betting shop. It was here that he found success. After Northern Ireland legalized betting shops in 1957, he was able to expand the business. With the ownership of two Belfast betting

[50] See, for example, *Senator Hanseatische Verwaltungsgesellschaft mbH* [1997] 1 WLR 515, [1996] 4 All ER 933.

[51] Compare the law in Northern Ireland with, for example, the Betting, Gaming and Lotteries Act (UK) 1963, the Gaming Act (UK) 1968 and the Lotteries and Amusement Act (UK) 1976. Not that the law in Great Britain at the time was without difficulties in dealing with technological advances; see generally the *Final Report of the Royal Commission on Lotteries and Betting* 1978.

> shops, Steinberg founded Stanley Leisure in 1958, naming the company after his late father.
>
> Stanley concentrated on the lower-end of the betting market and over the next decade added some ten shops across Ulster. He also began taking bets from customers in England before betting shops were legalized there. It was in England that his future lay, especially in light of the increased level of violence that afflicted Northern Ireland. 'At that time,' he told the press in a 1997 interview, 'there was no great difference between the IRA and the extremists on the Protestant side. They were all at the protection racket. We refused to pay.' Some of his shops were set ablaze and his workers threatened. By the early 1970s, Steinberg, who as an Ulster Unionist was a target of the IRA, decided to relocate his business across the Irish Sea. He started out by operating two betting shops on the Isle of Man, which were followed by four in Yorkshire. During the middle years of the decade, he acquired more than 100 betting shops spread across northwest England. They were in poor condition and hardly attractive to the big three in the industry: William Hills, Ladbrokes, and Coral. In general, Steinberg [who eventually based his business in Liverpool] did business in the places his larger rivals disdained, and he was willing to invest the time and money needed to grow them into healthy ventures.[52]

From humble beginnings in the Northern Ireland of the 1950s, Stanley Leisure went public in 1986, and in 2005 Stanley Leisure plc's 624 betting outlets were bought by rival William Hill for a staggering £504 million.

36.5 The Betting, Gaming, Lotteries and Amusements (NI) Order 1985[53]

In July 1985, the Betting, Gaming, Lotteries and Amusements (NI) Order 1985 was approved by both the House of Commons[54] and the House of Lords[55] at Westminster. In introducing the 1985 Order to the House of Commons, the then Parliamentary Under-Secretary for Northern Ireland, Chris Patten, succinctly encapsulated the purpose and thrust of the legislation:

> The purpose of the order is to bring up to date the social law in Northern Ireland on all forms of betting, gaming, lotteries and amusements with prizes. The present law is out-dated, is proving increasingly difficult to enforce and has fallen into disrepute in many respects. The order seeks to remedy that highly unsatisfactory situation by replacing all existing enactments with legislation which will reflect current attitudes to gambling and demands for gambling facilities and which can be expected, therefore, to command general public respect and to be capable of proper enforcement.[56]

The 1985 Order remains the principal legislative provision for sports betting and gambling in Northern Ireland. It is a lengthy and complex provision,

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[52] See Grant 2005.

[53] Betting, Gaming, Lotteries and Amusements (NI) Order 1985 [SI 1985/1204 (NI 11)].

[54] Parliamentary Debates (Hansard) House of Commons, 6th series, vol. 83, cols 631–648.

[55] Parliamentary Debates (Hansard) House of Lords, 5th series, vol. 466, cols 1523–1535.

[56] Parliamentary Debates (Hansard) House of Commons, 6th series, vol. 83, col 632.

consisting of 187 Articles, 21 schedules and 191 pages of legislation. Given its size and scope, it is beyond the brief of this report to outline it fully and what follows includes a summary of the main provisions (including a brief outline of the issues raised in the parliamentary debates surrounding its introduction); subsequent case law; and the relatively small number of amendments and updates made to the 1985 Order prior to the Gambling Act (UK) 2005.[57]

36.5.1 The 1985 Order: Summary

The 1985 Order consists of six parts. Part I (Articles 1 and 2) deals with the title, commencement and interpretation of the Order, thus is self-explanatory.
Part II (Articles 3–53) largely re-enacts the existing betting law of Northern Ireland contained in the 1957 Act. Many of the changes are cosmetic and consolidating though in substance this part of the order addresses an anomaly in the previous law: it permits licenced greyhound track to operate a tote—previously the law had only allowed licenced horse racecourses to use the tote system. Part III (Articles 54–130) of the 1985 Order deals comprehensively with gaming, which is not something that was dealt with to any great extent by the previous legislation. Given its scale, Part III is divided into five chapters. The first applies to gaming of a private kind, for example, in a family or between friends. Its aim is to force all gaming with the potential for abuse into the regulatory system of control established by chapters II and III, as well as prohibiting all gaming in public places. Chapter II provides a comprehensive code for the control of bingo promoted commercially in private bingo clubs licenced by the courts for that purpose. In introducing the provision, the government considered whether to provide (as was the case in Britain at the time) for the licencing of gaming clubs in which other forms of commercial gaming could take place, such as casinos. Nevertheless, the government spokesman of the day concluded that "there is no evidence of any significant demand in Northern Ireland for that type of gaming club. We have tried throughout the order not to stimulate demand for betting or gaming that does not clearly exist."[58]

Chapter III (Articles 80–125) deals with gaming by means of gaming machines. Anyone who wishes to supply or maintain a gaming machine has to obtain from a

[57] For a revised version of the 1985 Order see online at http://www.opsi.gov.uk/RevisedStatutes/Acts/nisi/1985/cnisi_19851204_en_1 (last viewed on 16 December 2008).

[58] Parliamentary Debates (Hansard) House of Commons, 6th series, vol. 83, col 633, Chris Patten, Parliamentary Under-Secretary for Northern Ireland.

court a certificate or permit authorising him to do so.[59] The original purpose of this procedure, and the other provisions of the chapter, was to prevent racketeering by paramilitary organisations. Initially under the 1985 Order gaming machines which could pay big prizes, usually known as jackpot machines, were prohibited except in registered private members' clubs or when used for fund raising at bazaars, sales of work, fetes or similar entertainments promoted for non-commercial purposes. Moreover, to have gaming machines, a club had to register with the court, either under the 1985 Order or, as continues to be the case, under the applicable registration of clubs legislation.[60] Initially, the 1985 Order, as was the case in Britain at the time, mandated that a registered club be limited to operating a maximum of two gaming machines—it is now three. The concern at the time was, on the basis of police advice, that in certain areas of Northern Ireland the proceeds from gaming machines in certain clubs were helping to finance the operations of paramilitary organisations.[61]

Chapter IV (Articles 126–127) provides for small gaming which consists of games played at entertainments promoted otherwise than for private gain. This primarily covers such charitable and non-profit making activities as bridge and whist drives, but also allows other games such as bingo to be promoted by clubs for the benefit of the membership in general. Chapter V is the last chapter of Part III of the 1985 Order dealing with gaming. It allows clubs to make modest charges for taking part in equal chance "non-banker" gaming without contravening the general prohibition on participation charges in Chapter I. Clubs are able to make charges sufficient only to cover the cost of providing the facilities for the gaming. The relevant government department (now the Department for Social Development) may by order vary the limits on the daily charge or specify different limits for different games.[62] The chapter also prohibits, subject to specified exceptions, the advertising of facilities for gaming and allows a landlord to evict a tenant or occupier of premises convicted of using the premises for illegal gaming.

At the time of its introduction, the various regulatory and enforcement functions outlined above were administered in Britain by the Gaming Board, established under Section 10 of the Gaming Act (UK) 1968. In contrast, in Northern Ireland, these regulatory functions were discharged variously by agencies, the courts, district councils and the police and government departments. In introducing the

[59] See, for example, the discussion of the provision on amusement arcade permits (articles 109–121) in *R v Secretary of State ex parte Anderson*, Unreported, Queen's Bench Division, MacDermott LJ, 14 October 1988 and *Re O'Connor's Application* [1991] NI 77. Both cases mention the then accompanying secondary regulations, which are now contained in the Gaming Machine (Prescribed Licensed Premises) Regulations (NI) 1998 (SI 1998/57) permitting the use of gaming machines in the bar areas of public houses and licensed hotels.

[60] See further the Registration of Clubs (NI) Order 1996 [SI 1996/3159 (NI 23)]; originally, the Registration of Clubs (NI) Act 1967.

[61] See further, Parliamentary Debates (Hansard) House of Lords, 5th series, vol. 466, col 1526, Lord Lyell and the contribution of Lord Fitt at cols 1529–1533.

[62] Most recently, the Gaming (Variation of Monetary Limits) Order (NI) 2003 (SR 2003/15).

provision, the government spokesman recognised that "in Great Britain the Gaming Board plays an important role in supervising gaming and has been highly successful in purging it of criminal elements. However, as large-scale commercial gaming is not to be permitted in Northern Ireland, we do not think that the establishment of a Northern Ireland [gaming] board would be justified. There are, in addition, security considerations which we cannot ignore."[63] In the House of Commons debates surrounding the introduction of the 1985 Order, the government's spokesman, Chris Patten, was asked to elaborate on his remark that there were "security considerations which we cannot ignore." Patten acknowledged that those security considerations applied to clubs that were suspected of being under the control of paramilitary organisations. Accordingly, the government was of the belief that the police would be in a better position to deal with some of those pressures than would be, for example, the inspectors of a gaming board.[64]

Part IV of the 1985 Order (Articles 131–152) deals with lotteries. Article 131 makes all lotteries unlawful, other than small lotteries at exempt entertainments, private lotteries and public lotteries promoted by a registered society for the support of charities, sports, games, cultural activities or other non-commercial purposes. The provisions for small and private lotteries largely re-enact the existing 1957 law subject to regulatory requirements that societies seeking to pursue small lotteries must register with their local authority and their agents must obtain a lottery certificate of competency. The prohibition in Article 131 is now also subject to Section 2 of the National Lottery Act (UK) 1993, which applies in full in Northern Ireland.[65] Part V of the 1985 Order (Articles 153–168) regulates amusements with prizes and prize competitions. It allows amusements with prizes other than by gaming machines at non-commercial entertainments, and subject to specified restrictions on a commercial basis of travelling showmen's fairs, in licenced bingo clubs and in premises used wholly or mainly for the provision of amusements under permit by a district council. Part V re-enacts the existing law in Northern Ireland relating to newspaper and other competitions. It prohibits the conduct, through any newspaper or in connection with any trade or business, of any prize competition which involves forecasting the result of an event or any other competition in which success does not depend to a substantial degree on the exercise of skill. Part VI covers a variety of matters. Cheating continues to be an offence under article 169, and gambling debts remain irrecoverable in law pursuant to Article 170. The police have enhanced rights of entry to all premises with facilities for engaging in betting, gaming, lotteries and amusements with prizes.[66]

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[63] *Ibid* at col 634.

[64] *Ibid* at col 635.

[65] See generally Section 63 of the National Lottery Act (UK) 1963 and Section 3 of schedule 1 of the 1993 Act for the detailed amendments to the 1985 Order.

[66] Subject to the provisions of the Police and Criminal Evidence (NI) Order 1989 [SI 1989/1341(NI 12)].

36.5.2 The 1985 Order: Case Law

The case law surrounding the 1985 Order is predominately judicial review in nature. Typically, the cases concern either an attempt by the service provider to review the refusal to grant a licence to provide a gambling service under the 1985 Order; or where the police, a local authority or other interested party seeks to quash or qualify the granting of a gambling-related licence such as an amusement permit.[67] So, for example, in *Re Owens' Application* (*1988*),[68] the Northern Ireland Court of Appeal dealt with an objection that was lodged against the renewal of a bookmaker's licence on the grounds that the bookmaker in question was not of the appropriate character, reputation and financial standing pursuant to Article 7(3) of the 1985 Order. The appellant had objected on the grounds that the bookmaker had apparently failed to honour a series of bets made by the appellant. The Court of Appeal, on a case stated from a magistrates' court, held that the failure to pay a wager was a matter which the magistrates' court could consider in deciding whether a bookmaker is a fit and proper person in terms of the licencing provisions of the 1985 Order, though the Court of Appeal did make it clear that no court should involve itself in resolving a betting dispute between a bookmaker and his client.

The remaining case law on the 1985 Order mainly concerns the scope of, and technicalities within, Article 12 (the granting of bookmaking office licences):

> 12.
>
> 1. An application for the grant of a bookmaking office licence shall be made to a county court.
> 2. The procedure for applications for the grant of bookmaking office licences is set out in Schedule 2.
> 3. On an application for the grant of a bookmaking office licence the court shall hear the objections, if any, made under Schedule 2.
> 4. A court shall, subject to paras (5) and (7), refuse an application for the grant of a bookmaking office licence unless it is satisfied—
>
>   a. that the procedure relating to the application set out in Schedule 2 has been complied with; and
>   b. that the applicant is a licensed bookmaker; and
>   c. that the applicant is not a person in respect of whom a disqualification order in respect of bookmaking office licences under Article 30 or 53 is in force; and
>   d. that the premises are not premises in respect of which a disqualification order under Article 30 is in force; and
>   e. that there is in force in respect of the premises a fire certificate; and
>   f. that the applicant owns the premises either in fee simple or for a term of years of which at least 21 are unexpired at the date of the application; and

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[67] See, for instance, *In the Matter of an Application by Dennis Burke*, Unreported, Queen's Bench Division, Carswell LJ, 9 March 1994 and *Re Ava Leisure Ltd's Application* [1999] NI 203 both of which concern the procedure surrounding the refusal to grant an amusement permit pursuant to article 119 of the 1985 Order.

[68] [1988] NI 465.

g. that the premises will not injuriously affect, or be detrimental to, the interests of persons attending a place of worship, a religious institution, a school or premises habitually used by members of a youth organisation in the vicinity of the premises; and
h. that the premises do not form part of licensed premises within the meaning of the Licensing (NI) Order 1996[69]
i. that, having regard to the demand in the locality in which the premises to which the application relates are situated for facilities afforded by licensed offices, the number of such offices for the time being available (including any premises for which a licence is provisionally granted) to meet that demand is inadequate, and
j. either—

i. that there is in force planning permission to use the premises as a bookmaking office for the period during which the licence would be in force; or
ii. that the premises may be used as such an office for that period without such permission.

5. A court may grant a bookmaking office licence notwithstanding that the procedure relating to the application set out in Schedule 2 has not been complied with if, having regard to the circumstances, it is reasonable to do so.
6. A court may refuse an application for the grant of a bookmaking office licence if it is satisfied—

a. that the premises are not suitable as a licensed office; or
b. that the applicant has been convicted of an offence under this Part or Part I of the Betting and Lotteries Act (Northern Ireland) 1957.

7. Paragraph (4)(j) shall not apply to an application for the grant of a bookmaking office licence in respect of premises which are on the site or in the vicinity of a licensed office for which the applicant holds a bookmaking office licence and which is a licensed office to which Article 26(1)(a)–(e) [the provisional or temporary location of an office] applies.
8. Where the court refuses an application for the grant of a bookmaking office licence, it shall specify in its order the reasons for its refusal.

Of general interest under Article 12 is the case of *McLean & Ors v Kirkpatrick & Ors* (*2002*).[70] The appellants lodged objections pursuant to the 1985 Order to the granting of a bookmaking office licence to the respondents. Schedule 2 of the 1985 Order requires an objector to serve upon the applicant a notice of intention, stating briefly the grounds for so doing, and to serve a copy of this notice upon the clerk of the local court in question, at least one week prior to the court licencing sitting. The appellants admitted that they had not fully complied with the requirements of schedule 2 but argued, nevertheless, that Article 12(5) of the 1985 Order, which gave the court power to grant a licence notwithstanding that the procedure for the application (also) set out in schedule 2 had not been complied with if, having regard to the circumstances, it was reasonable to do so, should be construed in such a way as to apply to objections as well as applications. At trial, the judge held that Article 12(5) on its proper construction applied only to

[69] SI 1996/3158 (NI 22).

[70] [2002] NICA 37, [2003] NI 14.

applications and not objections. The appellants appealed that finding to the Northern Ireland Court of Appeal, also forwarding the argument that it was unfair and disproportionate that they should be barred in this technical manner from presenting their objections to the point that that "bar" constituted a breach of Article 6(1) of the European Convention on Human Rights. The Court of Appeal held that the workings of Article 12(5) were clear, and referred only to applications, which were circumscribed by detailed and technical requirements, and not to objections, the requirements of which were simpler.[71] Furthermore, the Court of Appeal held that within the context of Article 6(1)ECHR, it was not unfair or disproportionate for objectors to comply with the technical and time limit requirements of schedule 2.[72]

The remaining Article 12 case law concerns the "demand" test located in Article 12(4)(g) and(j) of the 1985 Order, i.e., ascertaining whether a bookmaking licence can or cannot be reconciled with the nature of the "vicinity" for which the licence is sought [Article 12(4)(g)] and the existing supply and demand for bookmaking facilities within that "locality" [Article 12(4)(j)].[73] In *Re Hughes' Application (1997)*,[74] for example, where Kerr J carried out a succinct review of how the courts have adjudicated on the demand test,[75] the applicant was a bookmaker who carried on business in a small office in an area that contained two other bookmaking offices. In January 1996 he gave notice of his intention to apply for the grant of a bookmaker's office licence in respect of a premises located further along the street from his existing office and some 100 m closer to the office of another bookmaker, who objected to the application. In June 1996, a magistrate granted the licence having satisfied himself that the requirements of Article 12(4)(j) had been met to the point that there was a sufficient need for three offices in the locality on the basis that that number had existed there for many years and taking into account the success of the applicant's existing business. The magistrate went on to make what was in effect a conditional order that the operation of the licence be suspended until such time as the applicant surrendered the licence for the existing premises. The appellant appealed by way of case stated.

The Court of Appeal held that on its true construction Article 12(4) required the court to be satisfied at the time of granting a licence that there was an inadequate number of bookmakers' premises in a locality to meet the demand for bookmaking

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[71] *Re O'Loughlin's Applications* [1985] NI 421, applied (similar interpretation of the requirements in schedule 1 of the Licensing Act (NI) 1971).

[72] *Stubbings v UK* [1997] 3 FCR 157, applied (Limitations Act (UK) 1980, which placed a time bar on the bringing of civil claims, did not constitute a breach of article 6(1)ECHR).

[73] See, for instance, *Nolan v Elliott & Ors*, Unreported, Court of Appeal, Lord Hutton LCJ, O'Donnell, Kelly LJJ, 18 January 1990; *McCartan v Finnegan & Ors* [1994] NI 132; *In the Matter of an Application by McClean & Ors*, Unreported, Queen's Bench Division, Nicholson J, 24 November 1994; *In the Matter of an Application by McClean & Ors*, Unreported, Court of Appeal, MacDermott L J, 25 November 1994; and *Re Eastwood's Application* [1997] NI 73.

[74] [1997] NI 133.

[75] *Ibid* at pp. 138–140.

facilities. It followed that, although there was sufficient evidence in the instant case of a demand for three bookmaking offices, the magistrate should not have granted a licence conditional upon its staying or suspension until such time as the applicant surrendered an existing licence. The conditional nature of the magistrate's order and its underlying rationale—that the number of offices would be inadequate in the locality if the applicant closed his existing office—was, the Court of Appeal held, *ultra vires* the magistrate's powers and at odds with the thrust of Article 12(4) which more properly required that the magistrate should have refused the application.

36.5.3 The 1985 Order: Substantive Amendments

The 1985 Order remains the principal legislative provision for gambling and related services in Northern Ireland. Nevertheless, and in a pattern similar to the demise of the 1957 Act, the authority of the 1985 Order must be seen to be fading as it becomes (a) increasingly fragmented through secondary legislation and (b) appears at odds with the technologically advanced gambling industry of the twenty-first century. An acknowledgement that there was a need to update the 1985 Order and, concomitantly, a need to bring the Northern Ireland law on betting and gaming more closely in line with the corresponding law in Great Britain, can be seen in the enactment of the Betting and Gaming (NI) Order 2004.[76] The 2004 Order, which consists of 12 Articles and 4 schedules, amends the 1985 Order in a number of ways, of which eight are substantive. First, the 2004 Order enables on-course betting to take place on Sundays in Northern Ireland and to provide for the rights of betting workers in relation to Sunday working.[77] Sunday off-course betting remains prohibited in Northern Ireland.[78] Second, the 2004 Order transfers the granting of bookmaking office licences from courts of summary jurisdiction to county courts.[79] Third, Article 6 of the 2004 Order relaxes some of the existing restrictions on the operation of licenced bookmaking offices such as: removing the statutory limit on the maximum width of television screens; removing the prohibition on a licenced bookmaker to encourage people to bet while they are in his premises; allowing licenced bookmaking offices to be used for the paying out of

[76] Betting and Gaming (NI) Order 2004 (SI 2004/310 (NI 1)). For full access to the provision see http://www.opsi.gov.uk/si/si2004/20040310.htm (last viewed on 16 December 2008).

[77] Article 4(4), (6), (7) and schedule 1.

[78] Though change is likely: Consultation Paper: Betting and Gaming Law, Proposed Changes Including Relaxation of Sunday restrictions 2006.

[79] Article 5(1) and schedule 2. See also the Betting and Gaming (2004 Order) (Commencement No. 3) Order (NI) 2004 (SR 2004/423); the Magistrates' Courts (Betting, Gaming, Lotteries and Amusements) (Amendment No 2) Rules (NI) 2004 (SR 2004/450); the County Courts (Amendment No 2) Rules (NI) 2004 (SR 2004/463); the County Court Fees (Amendment) Order (NI) 2007 (SR 2007/378); and the Bookmaking (Forms of Licences) Regulations (NI) 2004 (SR 2004/424).

football pools winnings; and permitting the advertising of licenced bookmaking offices published in a material form, e.g., in newspapers, journals, circulars, letters or posters printed on paper.[80] Fourth, Article 7 reduces the notice and waiting periods for non-sporting clubs seeking registration under the 1985 Order for gaming machine purposes to one year. The current notice and waiting periods are one year for sporting clubs and two years for other clubs. Registration under the 1985 Order enables a club to operate up to three gaming machines on its premises.[81] Fifth, Articles 8 and 9 amend the 1985 Order to allow gaming machines in licenced bookmaking offices and relax the restrictions on gaming machines in other premises.[82] Sixth, Article 10 amends the 1985 Order to introduce an additional type of amusement permit for premises used wholly or mainly for the provision of amusements by means of gaming machines.[83] Seventh, Article 11 removes all restrictions on the advertising of bingo. Finally, apart from on-course Sunday betting, Article 4 also relaxes some restrictions on horse and dog tracks by, for example, permitting on-course bookmakers to take bets on any event and have permanent structures for bookmaking on licenced tracks.

36.6 Conclusion

To reiterate, the law on sports-related gambling and betting in Northern Ireland is contained in the 1985 Order as amended, principally, by the 2004 Order. The 2004 Order reveals clearly that the current law in Northern Ireland is in need of consolidation. More fundamentally, the 2004 Order was enacted largely to bring the Northern Ireland law on betting and gaming more closely in line with the corresponding law in Great Britain but since the passing of the Gambling Act (UK) 2005, and its effective commencement on 1 September 2007, the corresponding law in Northern Ireland has glaringly fallen even further behind the position that now exists in Great Britain. Currently, the Gambling Act (UK) 2005 is of an extremely limited application in Northern Ireland—only Section 43 (chain gift schemes), Section 331 (foreign gambling) and Section 340 (foreign betting) extend, in a minimalist fashion, to the jurisdiction. The related difficulties mean that consumers in Northern Ireland are sometimes denied access to emerging

[80] See also the requirements on permitted advertising in the Bookmaking (Licensed Offices) Regulations (NI) 2004 (SR 2004/258).

[81] Amending article 96(4)(c) and schedule 13 of the (NI) Order 1985. See also the Gaming Machine (Form of Amusement Permit) Regulations (NI) 2004 (SR 2004/353).

[82] See also the Betting and Gaming (2004 Order) (Commencement No.1) Order (NI) 2004 (SR 2004/256) and the Bookmaking (Forms of Licences) (Amendments) Regulations (NI) 2004 (SR 2004/257).

[83] See also the Betting and Gaming (2004 Order) (Commencement No.2) Order (NI) 2004 (SR 2004/352) and the Gaming Machine (Form of Amusement Permit) Regulations (NI) 2004 (SR 2004/353).

gambling services (such as the liberalisation of premises that can be used for the paying out of winnings in pool betting competitions) now available in other parts of the United Kingdom.[84] In addition, Northern Ireland lacks the dedicated regulatory authority that the Gambling Commission has brought to the betting and gaming industry in England and Wales. This will be needed as online and spread betting services become ever more sophisticated thus making sports events ever more vulnerable to corruption and match-fixing. Therefore, it is suggested that, so as the 1957 Act eventually showed its age and gave way to the 1985 Order, so the 1985 Order should now give way to fresh legislation based on the scheme and structure of the Gambling Act (UK) 2005, for the long-term benefit of the efficacy of the law on sports betting and gambling in Northern Ireland.

I have endeavoured to state the law as of 16 December 2008.

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Chapter 37
Sports Betting in Norway: Law and Policy

Ronny V. van der Meij

Contents

37.1 Introduction

Betting, including sports betting, is and has been a popular leisure for many years in Norway. Due to the inherent dangers associated with gambling, i.e., gaming addiction, money laundering and game fixing, Norway has imposed a strict limitation as to who can provide and market these services. Under the current legislation all gaming schemes related to sports events, with the exception of horse race betting, are run by the fully State-owned gaming company Norsk Tipping. Under this policy Norsk Tipping is required to distribute its surplus to research, information, prevention and treatment of gambling addiction, as well as to sports and other beneficial organisations.

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The distribution of the surplus from the Norwegian betting monopoly represents an important source of financing for Norwegian sports. Since 1948 the Norwegian sports movement has received approximately 4 billion €, which has inter alia contributed to fund about 27,000 sports facilities. As such the betting policy of the Norwegian state is highly beneficial for sports and supported by the Norwegian Olympic and Paralympic Committee and Federation of Sports (hereinafter NIF). However, as it can be imagined, private betting operators are constantly opposing the current system and have on two occasions filed law suits contesting the legality of the legislation under EEA-Law, which corresponds to EC-law regarding free movement. On both occasions the courts have found the legislation to be compatible with EEA-law.

In the following firstly will be given a brief overview of the body of law applicable to sports betting. Thereafter, the legality of the Norwegian betting monopoly under EEA-Law will be analysed.

37.2 Brief Overview of the Body of Law Applicable to Sports Betting in Norway

Under Norwegian law it is prohibited to offer gaming and lottery services without a licence granted pursuant to specific exemptions in statutory law. Violations of the prohibition are considered a criminal offence and punishable by up to one-year imprisonment cfr. the Penal Code Sections 298 and 299.[1]

The Norwegian legislation does not refer to the term betting as decisive to determine the legality of a rendered service. However, the term "lottery" is defined in Section 1 litra (a) of the Lottery Act and will in principle cover both betting and sports betting. The statutory definition of lottery reads: "any undertaking where the participants can, against payment of a stake, win prizes as a result of a random draw, guessing or other method that in whole and in part provides a random result."[2] Despite the broad definition of "lottery" in the Lottery Act, this act does not apply to sports betting as these games are specifically regulated in the Gaming Act and the Totalisator Act.[3]

The Gaming Act grants the exclusive right to provide and market all gaming schemes related to sports events to Norsk Tipping. The only sports-related betting that is not subject to the Gaming Act is horse race betting that is regulated by the Totalisator Act. Contrary to the Gaming Act, the Totalisator Act does not provide a monopoly for a certain company such as the Gaming Act, instead it requires undertakings that want to offer and market horse race betting to hold a licence.

[1] Act 20.05.1902 nr. 10 Straffeloven.

[2] Act 24.02.1995 nr. 11 Lotteriloven.

[3] Act 01.07.1927 nr. 3 Lov om veddemål med totalisator and Law 28.08.1992 Lov om pengespill.

Such a licence may only be granted to entities whose aims include supporting horse race breeding. As of today the only entity holding a licence is the Norwegian Rikstotto foundation.

37.3 The Legality of the Norwegian Betting System Under EC-Law

37.3.1 The Applicability of The Principles of EC-Law in Norway

Norway is not a member of the EU, but it is subject to most of the rights and obligations under EC-law as a member of the European Economic Area (hereinafter EEA). The EEA was established by an agreement between the Member States of the European Free Trade Association (hereinafter EFTA) and the EC.[4] The agreement allows the EFTA countries that have ratified the agreement (Iceland, Lichtenstein and Norway) to participate in the inner market without joining the EU. This implies that the fundamental principles of EC-law apply also within the territory of the EEA. To ensure compliance with the applicable provisions of EC-law the EFTA Court was established. The EFTA-Court fulfils the judicial function within the EFTA system by interpreting the agreement on the European Economic Area in disputes referred to it.[5] For the purpose of this article it is sufficient to note that the EFTA-Court's functioning in general corresponds to the European Court of Justice (hereinafter the ECJ). However, under Norwegian internal law the preliminary rulings of the EFTA-court do not have status as binding, but shall be given considerable weight cfr. Rt. 2007.1003.[6]

37.3.2 Case Law on The Legality of the Norwegian Betting System

The first law suit contesting the legality of the Norwegian betting system was submitted in 2003. The claimant alleged that the Norwegian legislation's prohibition on privately owned gaming machines represented an inadmissible restriction

[4] See the Agreement of the European Economic Area, *OJ No L 1, 3.1.1994, p. 3; and EFTA States' official gazettes.*

[5] See http://www.eftacourt.lu/.

[6] The relationship between EU-law and Norwegian law, hereunder the currency decisions of the EFTA court and the European Courts is much more complex, but a complimentary elaboration would completely burst the frames of this article. For a more detailed analysis of the legal issues see, "EØS-rett" 2. edition by Sejersted/Arnesen/Rognstad/Foyn.

on the freedom of establishment and the freedom to provide services under the EEA-Agreement. After referring the case to the EFTA-Court the final decision was rendered by the Norwegian Supreme Court in 2007. The Court found the legislation to be objectively justifiable and thereby legal. As the case did not concern sports betting a detailed analysis of the premises falls outside the scope of this article and will not be given in the following.[7]

The second case concerned sports betting and arose in the context of a law suit from the international gaming company Ladbrokes Ltd. over administrative decisions rejecting permission to operate and provide gaming and betting services in Norway.[8] The case was referred to Oslo City Court, which asked the EFTA-Court for a preliminary ruling. The key question at stake was whether a State monopoly system such as the one established under the Norwegian legislation was compatible with Articles 31 and 36 (freedom of establishment and freedom to provide services) in the EEA-Agreement. In the following we shall take a closer look at the analytical framework set out by the EFTA-Court and the subsumption by the Oslo City Court.[9]

37.3.3 The Findings of the EFTA-Court and the Subsumption by Oslo City Court

In its preliminary ruling the EFTA-Court first pointed out that all games of chance provided in return for money constitute "economic activity," hence falling under the scope of the EEA-Agreement. Thereafter it turned to the question of the applicability of Articles 31 and 36 and held that the Norwegian legislation "completely denies private operators access to the respective market," hence constituting a "restriction" on the right of establishment and the free movement of services. The court emphasised, however, that the restrictions were of a non-discriminatory nature since the legislation at issue applied without distinction to domestic and foreign operators. As the restrictions were of *a non-discriminatory nature*, hence the crucial test was if the restrictions could be *justified by reasons of overriding general interest*.

Turning to the question of whether the restrictions could be justified by reasons of overriding general interests, the EFTA-Court recalled the conditions laid down by the case law of the ECJ, namely that the restriction must be reasoned by *legitimate aims*, pursued by *suitable means* and be considered *necessary* and *proportionate*.

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[7] See preliminary ruling of the EFTA court case E-1/06 "Gaming machines," and the judgement of the Norwegian Supreme Court with reference Rt 2007.1003.

[8] See preliminary ruling of the EFTA court of 30 May 2007 (Ladbrokes) and the judgement of Oslo City Court with reference: 04-091873TVI-OTIR/04.

[9] Oslo city court is a court of first instance. The decision was not appealed.

In order to consider whether or not the Norwegian legislation could be justified, the EFTA-Court first turned to the condition that the restriction must be reasoned by legitimate aims. To this question the EFTA-Court maintained that legitimate aims would inter alia be fighting gambling addiction, maintaining public order and in principle the aim of preventing gambling from being a source of private profit insofar as it reflected a moral concern. In the dispute Ladbrokes had alleged that the mere presence of an aim to distribute some of the surplus to sports,-and other beneficial organisations, would invalidate other possible justification grounds. The EFTA-Court rejected this argument, but set out that: "benevolent or public-interest activities may not constitute *the real justification* for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory" (italics added). Based on the interpretation of the EFTA-Court, and the evidence presented in the proceedings, the purpose of the gaming act set out in Section 1 subpara 2, the preparatory works and testimonies by politicians and a representative from Norsk Tipping, the Oslo City Court held that there was no doubt that the real justification for the restrictive policy adopted was to protect Norwegian citizens from the unfortunate consequences of betting.[10] Hence the legislation was found to be motivated by legitimate aims. The next questions were whether the policy could be considered as suitable, necessary and proportionate pursuing these aims.

In this regard the EFTA-Court expressed that an exclusive rights system such as the Norwegian system "seems, at the outset, suitable for attaining the objectives which had been put forward as the aims of the legislation at issue," but that this required the gaming policy to be consistent, i.e., "operated in a way which serves to limit gaming activities in a consistent and systematic manner."

Furthermore, it underlined that the latter implies that "particularly development and marketing of addictive games are relevant" to asses the consistency of the gaming policy. However, in order to persuade people to turn to authorised games instead of games that pose crime-related problems, or highly addictive games offered via the internet or other channels which are hard to express it was acknowledged that: "controlled expansion in the gaming sector, including the offer of an extensive range of games, advertising on a certain scale might be necessary."

Ladbrokes had alleged that the marketing of Norsk Tipping as well as the development of new games implied that the Norwegian gaming policy was not consistent, hence not suitable to pursue its aims. The Oslo City Court did not agree as it found the Norwegian legislation to form part of a systematic gaming policy that ensured a high level of protection. In this connection the Court set forth that the marketing and development of new games by Norsk Tipping constituted a controlled expansion that was necessary in order to channel Norwegian citizens to authorised games. Furthermore, the Court found that the current system granting a

[10] The unfortunate consequences were pointed out as preventing gaming addiction, ensure effective control of the gaming market, general consumer protection, crime prevention and to preventing gambling from being a source of private profit based on a moral concern.

monopoly to Norsk Tipping ensured a higher level of protection than for instance a licensing system as it ensured a more effective control by public authorities. In addition the Court was of the opinion that Norsk Tipping had less economical incentive than private operators to maximize profits and aggressively market highly addictive games. As such, the same level of protection could not be achieved by less restrictive means, hence the overall conclusion was that the legislation was suitable, necessary and proportionate pursuing its legal aims.

37.4 Conclusion

Based on the analysis in pt. 3 it can be concluded that the current state of law is that the Norwegian legislation on sports betting is compatible with EC-law as long as the marketing and development of new games is conducted in a consistent way within the frame of what can be considered as canalisation. As such it is not likely that the private gaming operators will succeed in changing the system by legal means. On a political level it seems unlikely that the system will be overthrown in any foreseeable future. On this basis it might be a good advice for gamblers to place their money on another game than the recent game of one of the private gaming operators where you can win money by predicting the year of the downfall of the Norwegian betting monopoly.

Chapter 38
Sports Betting and the Law in Portugal

Pedro Cardigos

Contents

Gaming is a principle inherent in human nature
Edmund Burke (1780)

38.1 General Overview

The Portuguese Government has banned all public and private commercial entities from exploring and launching fortune games and gambling-related activities destined for the public at large. In Portugal, this industry is restricted and monopolized by the State's authorities and/or their licensed entities, such as *Santa Casa da Misericórdia* and casinos.

This position is explained by the general concern of the potential adverse and harmful effects that such activities may have on individuals and subsequently on their families, which may ultimately lead to the increase in criminality rates. Thus, due to public policy purposes this issue was also regulated under the Portuguese Criminal Code, being the unauthorized conduction of fortune games subject to a penalty of up to 2 years of imprisonment.

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Thus, gaming law in the Portuguese legal environment is composed of a transversal set of rules, ranging from administrative issues, concerning the concessions and licensing procedures of the authorised entities; contractual aspects deriving from gambling and betting activities; tax-related issues charged upon the attributed prizes and also, as referred, potential criminal sanctions applicable to infringers.

The Portuguese Civil Code specifically states, in its Article 1245, that contracts deriving from betting and fortune game activities are by principle neither legal nor valid; and if exceptionally considered legal, are not enforceable in a court (natural obligations).

Recognising the need to explore this activity so as to attract and develop the tourism industry in Portugal, the Portuguese Government approved Decree-Law nr. 422/89 of December 2 as amended by Decree-Law nr. 10/95 of January 19 and Decree-law nr. 40/2005 of February 17 (*Gaming Law*), regulating the exclusive concessions to explore fortune games in several purpose appointed areas in Portugal, under certain requirements and supervision mechanisms as to ensure the transparency and honesty in the conduction of these games.

The last time that the government thought of redefining its policy in connection with gaming was in 2005, having created a commission that issued a report on the then current situation of the fortune games industry in Portugal. The main aspects of this report will be briefly referred below.

Also, the recent ECJ ruling on the Proceedings *BWIN v. Santa Casa da Misericórdia* and the Italian approach to this economic activity have also drawn attention to the strategy and overall development of this industry in Portugal and have been the topic of recent debates.

38.2 Games: Classification

According to the *Gaming Law*, fortune games are classified as follows:

(i) Fortune games conducted in Casinos;
(ii) Bingo and Keno games;
(iii) Lotteries, betting, odd contests or other social games;
(iv) Horse and greyhound racing;
(v) Sweepstakes, raffles, drawings, promotional contests, skill-based contests and entertainment machines.

(i) The Casinos explore Fortune games and gambling-related activities by means of a State concession (Article 27). The gambling activity in Casinos does not have much expression in Portugal in comparison to "social games."

Currently, there are nine official Casinos spread out within the Portuguese territory (Espinho, Estoril, Figueira da Foz, Funchal, Lisbon, Monte Gordo, Praia da Rocha, Póvoa de Varzim and Vilamoura). The concession to explore the Casinos is subject to a public tender set up in areas considered strategic for

the tourism industry. The requirements and obligations are set for each particular tender as well as the time frame for the concession. Apart from the specific obligations pointed out in each concession, the licensees shall commit to (Article 16):

- Guarantee the normal functioning of the Casino and its dependencies according to the scope of the authorisation;
- Carry out on a daily basis, tasteful artistic and variety performances;
- Promote and organize cultural, sports and touristic events based on the official calendar approved by the Tourism Institute and fully cooperate in identical official events that aim to promote the tourism in the respective area;
- Sponsor and implement, duly authorised by the Tourism Institute, advertisements of the casino (and respective area) overseas.

For the execution of the artistic performances and cultural events, as mentioned above, the operating company shall affect a minimum of 3% of the gross proceeds registered in the previous year (Article 16, para 2).

The activities carried out in the Casinos shall be supervised by the Inspectorate-General for Games, which will ensure the compliance with all legal requirements set forth, inter alia, the access to the gambling rooms and arcades through the distribution of an appropriate card or document, minimum age requirements, compliance with the legal timetable established and the use of appropriate warnings and signs.

The non compliance with the requirements set forth will be deemed as an administrative offence that may lead to either the imposition of fines (with variable amounts according to the specific infringement) or to the concession of authorization withdrawal.

The non-authorised conduction of fortune games can also give rise to a criminal offence. Article 108 of the *Gaming Law* determines that whoever illegally explores fortune games or gambling related activities shall be punished with up to 2 years of imprisonment. This penalty may be increased up to a third if minors are found in the illegal establishments.

Moreover, the individuals who are found gambling in illegal establishments may also be sentenced with a penalty of up to 6 months of imprisonment; or if individuals are just found in such establishments (without actually being gambling) the penalties will be reduced to half.

(ii) The conduction of bingo games, such as the Casino activity, are subject to a licence granted through a public tender; according to Article 8 of the *Gaming Law*, these games may be conducted inside or outside the Casinos (in proper establishments for the effect) and are regulated under the terms established in Decree-Law nr. 314/95 of November 24, which determines, amongst other procedures, the distribution of the revenues.

If integrated in a Casino, 60% of the gross proceeds shall be destined for the prizes and the remaining shall revert to the operating company (Articles 26 and 27).

If not integrated in a Casino, 55% of the gross proceeds shall be destined for the prizes and variable percentages of the proceeds, both assignable to the operating company and as State revenue will be fixed in an administrative resolution from time to time (Articles 26 and 27).
Moreover, the tax rate charged on the Bingo prizes has increased from 15 to 35% since 1983 until 1998, determining the closure of 15 Bingo establishments throughout Portugal, as it was no longer considered a profitable and attractive activity, neither for the operating companies nor for the gamblers.
Since 1998, the applicable tax rate was fixed at 25%, however, this decrease was not sufficient to re-boost this activity in Portugal and, therefore, many argue that it should be either tax exempted or subject to the application of progressive rates.

(iii) *Santa Casa da Misericórdia* has the monopoly over the social games in Portugal, such as lotteries, bets, odd contests and alike:

National Lottery (Lotaria Nacional) Existing since 1783, it was readapted in 1987 to become more accessible to the public through the attribution of smaller prizes, as a way to fight the illegal gaming of this sort.
Totobola Sports betting competition existing since 1961.
Totoloto Odd contest that consists of the personal selection of 6 random numbers. Existing since 1985.
Loto 2 Second round of Totoloto drawn every Monday; it is played with the same selection of 6 random numbers used for Totoloto. Existing since 1997.
Joker Odd contest that consists of the attribution of a prize to a previously numbered bulletin. Created in 1994.
Lotaria Instantanêa (*raspadinha*) Instant lottery based on a scrapping card that immediately indicates the prize won, without the need of a scrutiny. Launched in 1995.
Euromilhões Launched in 2004 in France, UK, Spain, Ireland, Austria, Belgium, Switzerland, Luxembourg and Portugal. It is the European Loto with a weekly drawing of a predicted first prize of 15 million Euros.

Since June 2001, Santa Casa has also implemented an online betting platform, which is currently completely operational.

Santa Casa's long existence, spanning over more than five centuries evidences this entity's reliability. The revenues of the social games are destined to finance Santa Casa's social and philanthropic activities as well as for several other institutions and projects, such as:

- Volunteer Fire Brigade Association (*Associação de Bombeiros Voluntários*);
- Portuguese Football Federation (*Federação Portuguesa de Futebol*);
- Sports Activities Promotion;
- Sports Events Police;
- Cultural Stimulation Fund (*Fundo de Fomento Cultural*);
- INATEL
- Social Security Financial Management;

- Prevention and Rehabilitation of impaired Individuals;
- Prevention and Rehabilitation of natural disasters;
- Family and Child Support Project;
- National Commission for the Elderly;
- Portuguese Institute for Drugs and Addiction (Instituto Português da Droga e Toxicodependência)
- Needy children support programmes;
- Secondary Education students' special projects;
- Youth occupational special projects;
- Directorate-General for the Treasury.

The Statutes of Santa Casa da Mesiricórdia of Lisbon were amended and republished in 2009 by Decree-Law nr. 235/2008 of December 3rd. This institution is now superintended by the Social Security Ministry, designated to define its global management strategy. Also, the duties and responsibilities of the Game Department were redefined and clarified, having budgetary autonomy and full authority to explore the social games industry in Portugal.
However, Portugal used to apply, until 2009, one of the highest tax rates to the prizes attributed by Santa Casa da Mesiricórdia, which led the Portuguese bettors to play in the Spanish contests and lotteries as they are tax exempted.
In 2009, Santa Casa da Mesiricórdia registered a decrease of 5.3% in comparison to the previous year, on the global revenues of the fortune games.

(iv) Despite the fact that Portugal presents a long equestrian tradition, it is the only European country that does not explore horse races. As this industry requires high investments, know-how and qualified labour force, the first and second public tender conducted to grant the exclusive exploration rights were vacant. In fact, horse betting activities in the US, UK and France have positioned this industry in the top most profitable economic activities, developing sophisticated supporting technology that is now hard to equal. However, it was pointed out in the previously mentioned survey that many benefits could return from the investment in this sector, namely:

- Horse breeding increase;
- Development of equestrian sports and equestrian related activities;
- Promotion of touristic attractions and international projection of the events;
- Stimulation of agricultural and industrial segments associated with this line of activity;
- Employment increase and craftsman's activities restoration.

The first steps towards the implementation of the horse betting industry have been taken with the approval of Decree-Law nr. 268/92 of November 28, regulating the terms and conditions of on- and off-track horse betting in Portugal and also with the amendment of the applicable tax regime, exempting, therefore, the gains within the first five years as of the concession.
Nonetheless, a few concerns regarding the coexistence with the current betting schemes, the subsequent proliferation of illegal betting and the public's

effective adhesion to this sort of gambling have caused a delay in the implementation of this industry in Portugal.

5. The *Gaming Law* also regulates the conduction of similar types of fortune games in which the hope to win is dependent on luck (or skills combined with luck), which may be admissible upon an authorisation granted by the designated authority (Governo Civil) and provided that the attributed prize has an economic value (Article 159). The foregoing is also applicable to contests or promotions where the participant always wins a prize but the prizes available have different values.

As mentioned,the said prizes shall have an economic value, precluding, therefore, the possibility of delivering money prizes. Also, contests or promotions shall not originate any expenses to the participant other than the regular courier or telecommunication expenses (with no added value), or expenses higher than the cost of the product or service that the contester is intending to claim.

There is also a limitation as to the theme of these games; it shall not be similar to the traditional games of chance, namely poker, fruits, bells, roulette, dice, bingo, numbered lotteries or other lotteries, or substitute the prizes by money or playing chips.

These games can only be led by newspapers, magazines, radio stations, televisions or by companies as a way of promoting their goods or services.

Moreover, it is necessary to bear in mind the rules regarding misleading publicity established in the Advertising Code. The advertising of a contest or promotion must refer all the relevant aspects and may not induce consumers that a prize will be obtained free of any monetary compensation.

In practical terms, a detailed application must be filed by the promoter addressed to the Local Civil Authority attached with a regulation of the draw, indicating the terms, conditions and mechanics of the draw and also a bank guarantee or insurance covering the amount of the prize.

All advertising related to a promotion or contest must clearly identify the main rules and contents of the promotion and all the promotional and marketing materials (leaflets, coupons, banners etc.) shall bear the specific reference number of the authorisation granted by the Local Civil Authority.

Substitute winners or redraws are admissible in contest where the prizes are cars or trips and provided that it is specifically indicated in the contest regulation and only in cases when the original winner is either not identified or refuses the prize. In such cases, if the substitute winner also does not come forward or again refuses the prize, the prize or its correspondent value in money, shall revert to a local charity appointed by the Local Civil Authority.

It is mandatory to announce the winners in newspapers or other means accessible to all the participants. However, the promoter may always contact directly the winners.

The conduction of these contests may also require a prior notification to the National Data Protection Authority (CNPD), as it underlies the collection and processing of personal data and according to Article 27 of Law nr. 67/98 of

October 26, the representative must notify CNPD before any processing of the data.

Pursuant to Article 162 of the *Gaming Law*, Decree-Law nr. 310/2002 of December 18 established the licensing procedure of entertainment machines, granted and supervised by the local municipality's authorities. Thus, for the purposes of the law (Article 19), it is considered as an entertainment machine, (a) all those that do not provide prizes with economic value and games which rely primarily on the player's skills; (b) all those that allow the player to capture an object whose the economic value does not exceed 3 times the value spent by the player. Slot machines with games based exclusively on luck and with prizes with an economic value, are regulated in the *Gaming La*w.

Hence, each and every entertainment machine, as described above, is subject to a previous registration procedure in the local municipality and can only be made available to the public after the license issuance (Article 20). This license shall be displayed on the machine and any transfer on the ownership of the machine shall be communicated to the local authorities.

The non compliance with these procedures will be deemed an administrative offence punishable with a fine ranging from €250 to €2.500 or €2.500 and €25.000, whether the infringer is an individual or a corporate body. Ancillary sanctions may also be applied such as the machines' apprehension or the inhibition of performing any activities in the establishments of the companies that conducted the promotional contests.

38.3 Advertising

The Advertising Code, in its Article 21, prohibits advertising of fortune games when it is the main object of the advertising message, with the exceptions of the games promoted by the *Santa Casa da Misericórdia* and on certain licensed areas where Casinos may be established.

Nevertheless, commercial promotions may be advertised, such as sweepstakes, raffles, contests and publicity contests, provided that these are previously authorised by the competent Local Civil Authority, determined according to the head office of the promoter or, for foreign entities, the head office of the legal representative.

38.4 Taxation

With regard to taxation issues, the Casino and Bingo licensees are subject to a sole and special duty on games, charged according to the area where the Casino is located and according to the revenues on the different types of games. This special duty is regulated under Articles 84–94 of the *Gaming Law*.

As for the prizes, these are subject to a fixed rate of 35% due as Income Tax (IRS), as it is considered a property increment. In case foreign gamblers receive prizes in Portugal, the operating companies shall withhold 35% over the prize value and deliver it to the Tax Bureau Authorities.

Recently, Decree-Law nr. 175/2009, of August 4, has exempted the prizes attributed by the social games of *Santa Casa da Misericórdia* of Income Tax (IRS) and unified the rate applicable as duty stamp for all the bets in these games to 4.5%, that shall be included on the price of the bet.

Also, the Portuguese Tax Bureau has issued an Official Written Notice number 20 067 with mandatory guidelines concerning the prizes to be delivered in promotions and contests, which are also subject to Income Tax (IRS) at a 35% rate; in such cases, the promoter shall also withhold 35% over the gross value of the prizes and deliver it to the Tax Bureau Authorities.

As for slot machines, entertainment machines and alike, these are subject to a reduced VAT tax rate of 5%.

Finally, Law nr. 25/2008 of June 5 regarding the prevention of Money Laundering and Terrorist Financing imposes, on Article 33, a special duty of identification to the operating companies that deliver bets and contests prizes with values above €5.000.

38.5 Bwin v. Santa Casa da Misericórdia

The Portuguese Football League and Bwin were sentenced to the payment of fines, due to the sponsorship agreement by Bwin (an online gambling web site) to the Portuguese League, in the proceedings brought up by *Santa Casa da Misericórdia*. Bwin and the Portuguese Football League have challenged the fines imposed on them, invoking the principles of freedom of establishment, freedom to provide services and free movement of capital within the EU in order to cancel the said fines, as Bwin currently holds the necessary licences to develop the said activities, issued in Gibraltar.

Accordingly, the National Court made a reference for a preliminary ruling to the ECJ on the interpretation of Articles 43, 49 and 56 of the EC Treaty with respect to the Portuguese legislation conferring a monopoly of exploration of gambling on the Internet to Santa Casa da Misericordia.

As for the alleged violation of the principle of free provision of services, the ECJ considered that the Portuguese legislation in question is incompatible with the principle referred to above, in accordance with the settled case law of the ECJ (*Gambelli, Placanica*).

It should be noted that the field of online gambling is not subject to Community harmonization. According to the ECJ's assessment, Member States are entitled to consider the mere fact that an operator, such as Bwin, offers legal services in this sector through the Internet in another Member State where it is allocated and where it is in principle already subject to legal conditions and controls by the

competent authorities of that State, cannot be considered a sufficient guarantee of the national consumer protection against the risks of fraud and crime, given the likely difficulties which could be encountered in such a context for the authorities of the Member States of establishment, to assess the quality and integrity of online operators.

In addition, according to the ECJ, due to a lack of direct contact between the consumer and the operator, gambling accessible via the Internet may carry risks of different nature and greater importance in comparison with traditional markets with regard to possible fraud committed by operators against consumers.

Moreover, one cannot rule out the possibility that an operator, who is sponsoring sports events on which it takes bets and in some cases sponsoring some of the teams participating in these competitions, could directly or indirectly influence the result of the latter and thus increase its profits.

Hence, following this ratio, the ECJ considered that given the peculiar characteristics related to the online gambling activity, the restriction imposed by *Santa Casa da Misericórdia* is to be regarded as justified by the purpose of fighting against fraud and crime. Also, the ECJ attached great importance to the fact that the monopoly awarded to the *Santa Casa da Misericórdia* was governed by considerations and requirements related to public interest objectives, pursued by financing several social and charitable projects.

Therefore, the ECJ is of the opinion that Article 49 of the EC Treaty does not preclude a legislation of a Member State, such as this, prohibiting operators, such as Bwin, duly established in other Member States, where they legally provide similar services, to offer online gambling on the territory of that Member State.

38.6 Conclusion

Although *Santa Casa da Misericórdia* registered a new approach, in the recent years, investing in digital and online betting platforms and even by rebranding the fortune games through advertising campaigns and sponsoring major sports events, it was apparently not sufficient, as there was an increase in illegal sports betting web sites available throughout Portugal and Europe.

In the current scenario, many argue that it is imperative to regulate this activity in Portugal. Even because the striking developments in the Italian gaming market after the L'Aquila earthquake, which somehow determined the liberation of this activity in order to collect the necessary funds for its reconstruction, have drawn attention to the potential of this industry; the UK has already regulated this industry and Belgium, Denmark, France, Spain and Ireland are in the process of drafting their regulations.

The Portuguese Government's reluctance in abolishing *Santa Casa da Misericórdia*'s monopoly over the fortune games industry has prevented further development on the regulation of this segment.

According to the European Association for Games, the total online betting revenues were approximately 6.5 billion Euros in 2008 and are expected to reach 11 billion Euros in 2012.

Based on these figures and other countries' experiences, the recent news indicates that the Portuguese Government is now willing to reconsider its position and further regulate this activity. It seems, therefore, that more developments on the gaming field will surface in the near future.

Chapter 39
Sports Betting in Romania

Dan Visoiu

Contents

Romania became a European Union (EU) Member State on January 1, 2007. Consequently, all the relevant EU directives[1] have been or are to be transposed into the local legislation (i.e., *Directive 2006/123/EC on Services in the Internal Market* which is due to be implemented by 28 December 2009), and Romania is now subject to the European Court of Justice's jurisprudence, such as the *Placanica*, *Gambelli*, *Laara*, *Zenatti* and *Schindler* cases.[2]

Relating to sports betting in Romania, this area began to be regulated in the post-December 1989 era pursuant to *Government Decision (Hotarare) 130/1991*,

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[1] See http://register.consilium.europa.eu/pdf/en/08/st16/st16022.en08.pdf for an overview of the legal framework relating to gambling and betting in EU member states.
[2] See http://www.bettingmarket.com/eurolaw222428.htm for a thorough analysis of these European Court of Justice decisions.

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which officially modified the legal status of the national lottery to the autonomous state-owned entity (in Romanian, *regie autonoma*), Regia Autonoma "Loto-Pronosport". The national lottery, the Compania Nationala "Loteria Romana" S.A.[3] (the "National Lottery"),[4] with the National Lottery having the sole right to exploit various types of games of chance, including "pronosport."[5]

Subsequently, other types of sports betting activities which were implemented by the National Lottery, such as *Pariloto*,[6] were deemed as non-exclusive and thus were able to be offered by private sector entities/private operators.

39.1 General Legal Background

Romania is one of the few EU member states that has the same rules governing all aspects of gambling.[7] As such, so-called games of chance (in Romanian, *jocuri de noroc*) are primarily regulated by the following legislation:

- *Emergency Government Ordinance no. 69/1998*[8]
- *Government Decision no. 251/1999*[9]
- *Emergency Government Ordinance no. 159/1999*[10]
- *Law 69/2000*[11]

Specifically, Article 6 of *Government Decision no. 251/1999* stipulates that games of chance shall include sports betting (in Romanian, *pronosticuri (pariuri)*

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[3] See http://www.loto.ro. Since 1991 the National Lottery is a member of *European Lotteries*, and as of 1992 is affiliated with the *World Lottery Association*.

[4] The National Lottery was originally established in 1906; in 1995 "Loto-Pronosport" became *Regia Autonoma "Loteria Nationala"* which in 1999 became the *Compania Nationala "Loteria Romana" S.A.*

[5] According to article 6(1) of *Government Emergency Ordinance 69/1998* (as subsequently amended) and article 7(1) of *Government Emergency Ordinance 159/1999*, the National Lottery has the sole right to organize and exploit *loto*, *expres*, *pronosport*, *enveloped tickets (loz in plic)* and *instant lottery (loz instant)*.

[6] See http://www.pariloto.ro, which commenced to be offered by the National Lottery in September 2004.

[7] See http://register.consilium.europa.eu/pdf/en/08/st16/st16022.en08.pdf, p. 15 and Point 10.

[8] Modified by (1) *Law 166/1999*, (2) *Government Ordinance 36/2000*, (3) *Government Decision no. 671/2000*, and (4) *Law 391/2002*.

[9] Modified by (1) *Government Decision (Decizie) no. 224/2000* and (2) *Government Decision (Hotarare) no. 348/2002*.

[10] Modified by (1) *Law 288/2001* and (2) *Government Emergency Ordinance 202/2005*; this emergency ordinance abrogated the former *Government Decision (Hotarare) 816/1994*.

[11] Modified by (1) *Government Emergency Ordinance 240/2000*, (2) *Government Ordinance 7/2001*, (3) *Law 345/2002*, (4) *Law 414/2002*, (5) *Law 221/2003*, (6) *Law 472/2004*, (7) *Emergency Government Ordinance 119/2005*, (8) *Law 293/2005*, (9) *Emergency Government Ordinance 205/2005*, (10) *Law 124/2006* and (11) *Law 241/2007*.

sportive), with this article also setting forth a very broad definition of sports betting activities.

Generally, economic agents have the right to organize and exploit games of chance activities on the basis of an authorization/license obtained from the Romanian Ministry of Public Finance. An authorization/license is obtained through the payment of an annual fee and by fulfilling the requirements set forth in *Government Decision (Hotarare) 251/1999*, which also includes the submission of the regulations of the specific game(s) to be offered. Such authorization/license is valid for a period of 12 (twelve) months from its issuance date.

The actual commission responsible for the issuance of authorizations/licenses to organize and exploit games of chance is to be made up of five (5) persons, four (4) from the Ministry of Public Finance, and one (1) from the Ministry of Interior.[12]

It should be noted that with respect to all of the above-mentioned types of games, the National Lottery obtained the required authorizations/licenses pursuant to *Government Emergency Ordinances 69/1998* and *159/1999*, thus it was exempted from the applicable authorization/license taxes.

As a general rule, Article 70(1)(e) of *Law 69/2000* stipulates that 20% of revenue generated from sports betting activities should be transferred to the respective national sports federation. Another important tax that has to be collected and paid is the so-called social stamp duty (in Romanian, *taxa de timbru social*), which represents an additional 10% of the ticket price/relevant amount that has to be charged by the private operator and thereafter paid into the National Solidarity Fund on a monthly basis.

Finally, there is no specific Romanian legislation dealing with online sports betting or gambling activities. Nonetheless, Romania and other EU member states are subject to the March 10, 2009, resolution of the *European Parliament*, which emphasized, among others, that EU member states must comply with the gambling legislation of the fellow member states in which they provide their services and where the customer resides.[13]

39.2 Case Law (Jurisprudence) and Romanian Competition Council Decision

There have been relatively few court cases in Romania relating to sports betting. One of these cases was decided by the Bucharest Court of Appeals in 2008.[14]

In this case, which commenced in 2006, the Romania Football Federation (FRF) sued the National Lottery in order to obtain 20% of its revenues from sports

[12] See *Government Decision (Hotarare) 219/1998* and its Annex 1.

[13] See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EN&language=EN.

[14] *Decision 400/2008*.

bets (such as those placed in betting houses), or sports prognostications, for years 2003–2005, on the basis of *Law 69/2000*. The FRF eventually prevailed, with the awarded amount being approximately €5 million.[15]

The Romanian Competition Council has also investigated the exemption of the National Lottery from the payment of certain taxes (the authorization/license tax and the social stamp duty), and found that the Romanian government (through the Ministry of Finance) was granting illegal state aid to the National Lottery through such exemptions.[16] Consequently, the Competition Council ordered the National Lottery to reimburse the state aid (approximately €12 million) to the Romanian state budget, as well as to order the modification of the applicable legislation so as not to grant the National Lottery any competitive advantages or preferential treatment over its private sector competitors,[17] which provide *Pariloto* [sports betting] and *Videoloterie* games.

[15] See http://www.nineoclock.ro/index.php?page=detalii&categorie=sports&id=20080214-16870.

[16] *Decision 154/10 July 2006*, which subsequently has been confirmed by the *Bucharest Court of Appeals*; see http://www.mediafax.ro/engleza/romania-s-lottery-co-appeals-against-state-aid-reimbursing-decision.html?6966;3810148.

[17] The Romanian Competition (under Point 45 of *Decision 154/10 July 2006*) specifically mentions the National Lottery's "sports betting market" competitors to be *Stanleybet Romania*, *Astra Sport Bets*, *Meridian Bet*, *Global Sports Bets*, *Wettpunkt International* and *Calcio Par*.

Chapter 40
Lotteries, Bookmakers and Sweepstakes in Russia

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Contents

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40.1 Gaming Legislation in the Russian Federation

The regulatory norms governing the organization of gaming and betting in Russia have undergone a long evolution. Moreover, the attitude of legislators themselves to gaming has been deeply contradictory. Initially, a ban was introduced on holding any games of chance (the 1649 Council Code of the muscovite Tsar Aleksei Mikhailovich, and Decrees of the Russian Emperor Peter I of 1696 and 1717); then some games were allowed (Decree of Anna Ioannovna, dated January 23, 1733, Decree of Elizabeth Petrovna dated June 16, 1761, and the *Ustav Blagochinia* of April 8, 1782). The reasons cited for such a ban were their harmful consequences, including 'ruin, sin and calamity,' and the unjustified profiteering of one party at the expense of another.

Later, some games were allowed. These included games based on strategy and calculation, and those played not for the goal of financial gain, but exclusively as a pastime.

The next stage saw the introduction of a rule stating that 'any loan will be considered void, if it is established by judicial review that it was effected for a game or was, to the knowledge of the lender, effected for the purposes of gaming.' Moreover, based on this rule, it can be assumed that if a game involved cash and did not engender any commitment to return a loan, then it was permitted.

Subsequently, legislators denied judicial protection of claims arising from games and bets (wagers) as, from the viewpoint of the legislator, they include no mutual exchange of valuable items or services, and such claims do not lead to the achievement of common benefits, as they are aimed at satisfying only personal whim and caprice, and fail to meet the needs of the common prosperity, while also 'contradicting good morals.'

Subsequently, a pause is evident in the history of civil legislative regulation of games and bets, which lasts until the entry into force of the second part of the RF Civil Code.[1]

The only exception during the Soviet period was for lotteries, to which Russian legislators always maintained a special attitude. Despite the fact that participation in lotteries was a basis for the inception of civil rights and duties among parties, issues relating to the questions of organization and execution of lotteries in our country were regulated at the level of bylaws.

The legislation of Soviet Russia reviewed relations arising as a result of the organization of games and participation in them, exclusively from the position of public law, as demonstrated by Article 164.1 of the RSFSR Code on administrative violations, which received the name *azartnye igry* (games of chance, or translated literally: games of excitement), as well as Articles 208.1 and 226 of the RSFSR Criminal Code, which establish legal responsibility for the organization of games of chance.

[1] 26.01.1996.

In Russia, lotteries appeared during the reign of Peter I. In 1700, Moscow was suddenly covered in posters. 'The entire world is hereby informed by Yaakov Andreev, son of Galerius the watch and clock master, that in the yard of the *okolnitchiy* (courtier of the second class) Ivan Ivanovich Golovin, near the residence of Andrei Artamonov, near the Nikola with the columns, there will soon be a happy experiment established, in foreign tongues called a lottery, at 8 roubles a lot by number. And those lots or labels shall begin to be issued to all men and women willing to participate, in the above-mentioned yard, in this year 7208 on the twelfth day of November. And as soon as all shall have been given out, then the day will see the experiment test the winner's luck and it shall be announced to the world how much of the money collected is to be handed out to each of those willing participants. And for observation, for the validity of inspection, there will be reliable gentlemen, as the great sovereign does assign to us for the testing of the winner's luck; also two babes-in-arms who, having not seen all the lots and labels, in front of all the witnesses and persons who wish to be present, in view of all will make a draw, and the amount of money being written there will be announced to the winning lady or gentleman, how much they are to be given.'[2]

This foreign novelty met with popular success. The lottery took place at the time indicated, observed by trustees appointed by the tsar. In 1745 there was also a lottery held, and the prizes were a trader's goods and other items, confiscated in lieu of debts to the state. Another landmark in the development of the lottery in Russia was in 1764, when the senate 'operated' this game of chance. But after the lottery had been held, Empress Catherine commanded that 'state debts were to be recovered by means of the laws, and henceforth such lotteries are not to be held. We are not to promote these events to society at large, as they are pernicious inventions.' One can understand the tsarina. Although the Russian lottery was initially created to top-up the state offers, it turned out that the state budget also 'sponsored' some lottery participants. Catherine II had to 'donate' 45,000 roubles to settle the debt to lottery winners.[3] In 1760, in St. Petersburg, a charity lottery was held, with a winning prize of 25,000 roubles. Naturally, many were 'driven to distraction.' Clerks gleefully worked to ruin their employers, while servants did the same to their landowning masters. Meanwhile, the state received virtually nothing from any of this.

The situation was improved by the *Ustav Blagochinia* of 1782. It permitted the organization of lotteries, and determined the rules for such events. The total sum of the lottery was determined as the value of the items offered as prizes. From 1829, only the Minister for Finance could give permission for lotteries of up to 500 roubles; only the tsar could issue permission for lotteries with sums greater than this. The ideas and goals of these lotteries were, as a rule, wholly well-intentioned: to help orphans or former convicts, to overcome poor harvests and to recover from war. Sometimes, whole villages and estates were offered as prizes.

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[2] 'IGROVOI VID—SPORTU' in *Profil*, No. 2, 2006.

[3] http://www.gosloto.ru/index.php?id=92

Lotteries were banned once again during the Soviet period. However, this did not last long. The times (and economic considerations) forced the revolutionaries to turn to gaming. In 1921 the government held the first lottery, the income from which went to feed the hungry. A new stage in the development of state lotteries in the USSR took place in the 1930s. The USSR Sovnarkom (Council of People's Commissars) then issued a decree 'On the procedure for issuing permissions for the organization of lotteries.' Permission to hold such events was given to voluntary bodies. However, these bodies were sometimes 'voluntary' only in name. An example is the 'Osoviakhim,' which used the profits from lotteries to build 35 aircraft and 30 tanks.

In 1970, a 'lottery monster' appeared: Sportloto, with more than 70 regional offices and over 30,000 sales kiosks across the country. At the end of the 1980s, according to the European State Lotteries and Toto Association, this sales network in the former Soviet Union was the largest in the world, with a sales volume that was 17th in the world. The project was also commercially successful for another reason, the players did not purchase a ready (completed) ticket, but filled it out themselves, selecting 6 numbers out of 49. Or, later, 5 out of 36. The drawings took place every 10 days, in 'palaces of sport,' at stadium and at large enterprises, and were broadcasted to the whole country. The slogan 'You Win—Sport Wins' precisely reflected the goals of the lottery. The creator of Sportloto, Viktor Andreevich Ivonin, said in an interview that in 20 years of operation, the lottery had brought the state 500 billion roubles[4]—money that was used to build stadium and sports complexes across the USSR. The lottery played a significant role in financing the Moscow Olympics of 1980.

The question of games of chance became particularly topical in Russia several years ago when the federal law 'On state regulation of activities to organize and execute games of chance and on introducing amendments to certain legislative acts of the RF' dated December, 29, 2006, No. 244-FZ was passed (hereafter, the federal law on games of chance), containing some innovations that were revolutionary for the gaming industry. The revolutionary aspect of the innovations were primarily in the fact that from the moment when the corresponding laws came into force, all gaming establishments (with the exception of bookmakers and sweepstakes) could be opened only in special gaming zones, in the manner established by the federal law on games of chance.

Until July 1, 2009, all gaming establishments in Russia had to be moved to four specially created zones: Kaliningrad Oblast (*Yantarnaya*), Altaiskiy Krai (*Sibirskaya Moneta*) and Primorski Krai, and to the border of Rostov Oblast and Krasnodarsk

[4] This is more than 80% of the entire sports budget of the USSR. For a period of 20 years the country filled out cards, selecting 6 numbers out of 49 (each number was designated with a different type of sport). The winning combination was determined by a 'logotron.' Since 1974, the drawings were broadcast on television. Sportloto had a drawing of 30 million. With a ticket price of 30 kopecks, the weekly turnover of the lottery reached 9 million roubles. Even if half of the turnover went on winnings, this was a financial result that not only modern Russian, but also foreign lottery organizers can only dream of.

Krai (*Azov-City*). These regions were selected, taking into account, above all, the desires of local authorities; while the geographical location, investment opportunities, proximity to the border, presence of airports and the attractiveness for tourists were secondary considerations.

The legislator, motivated by the belief in the gaming businesses destructive influence on the citizenry, effectively drove everyone who works in this business into a form of reservation. Undoubtedly, the 'pull' of games of chance is a weakness just like that of drink and cigarettes, but alcohol is still sold in almost any shop in the country, so why do those wishing to tickle their nerves playing, for example, in a casino, need to travel to gaming reservations?

Clearly, such major restrictions could not fail to impact the prospects of the gaming business. In Moscow, where a large part of the gaming business is concentrated, according to data from statistics surveys, the number of gaming clubs has fallen from 2,720 to 537 since the beginning of 2008. Of more than two dozen casinos operating in St. Petersburg, approximately one half do not meet the new standards, and of more than 400 slot machine halls operating officially, approximately 70% have closed. The number of gaming establishments fell in Nizhniy Novgorod (approximately 20 casinos mid-year), in Rostov-on-Don (eight casinos, 238 slot machine halls), in Samara Oblast (20 casinos and more than 200 halls) and in Saratov (6 casinos and 10 slot machine halls).[5]

This pressure on the gaming business is primarily linked to the fact that previously activities in this field were subject to almost no legislation, and as a result they developed sporadically. As a rule gaming clubs of the most primitive configurations, such as clubs with slot machines, multiplied like mushrooms after the rain, at the expense of the most unprotected population groups. The mass media ever more frequently ran Articles and analyses about people who had lost entire fortunes to slot machines. The lack of transparency in the gaming business was another factor that did little to improve its reputation. The weak legislation in this field made the gaming business unattractive for the state from the viewpoint of securing tax income, and was more a source of rapid cash for less than entirely honest entrepreneurs. Therefore, the legislators eventually chose radical measures such as banning gaming establishments everywhere, except for the special gaming zones.

The reform of gaming establishments thus gave a new impulse to the development of lotteries, sweepstakes and bookmakers. The newly released popular thirst for games of chance would partially be inherited by these sectors of the 'gaming' economy. Moreover, given the virtual exemption from 'exile' to gaming zones, these varieties of games will have no alternatives to compete with in Russian towns. Considering the absence of a clear, purposeful state policy in this field, the state could be missing an opportunity to generate significant income for the development of sports.

[5] K.A. Katkov. Taxation of the gambling business. Abstract of dissertation in pursuit of academic title of candidate of economic science. Saratov, 2008, p. 10.

In this Article, we will review the legislative regulations for all forms of gaming in Russia (sweepstakes and bookmakers) that are linked to sport in one way or another, and we will also shed light on sport lotteries and the problems linked to these forms of activity.

40.2 Sweepstakes and Bookmakers

According to the definitions contained in the federal law on games of chance, a '*bookmaker* is a gaming establishment or part of a gaming establishment, in which the organizer of the games of chance arranges bets with the participants of this form of game of chance;' a '*sweepstake* is a gaming establishment or part of a gaming establishment, in which the organizer of games of chance organizes the arrangement of bets between the participants of this form of game of chance.'

As can be seen from the definitions, the difference between these two concepts is minimal. With regard to bookmakers the establishment arranges bets with the clients, while with regard to sweepstakes it only acts as the organizer, a sort of guarantor for the clients, who bet with each other. It is precisely due to this similarity that, in this law, sweepstakes and bookmakers are often mentioned in the same sentence. No differences from the viewpoint of the organization, licensing, taxation or other parameters have been established in the legislation, for sweepstakes and bookmakers.

RF legislation does not regulate the types or objects of those bets that are organized by the sweepstake, or that a bookmaker takes. The only condition is that bets must correspond with the definition given for bets in Article 4 of the federal law on games of chance: 'a game of chance, in which the outcome of an agreement about winnings, based on risk and made between two or several participants to the bet between themselves or with the organizer of this form of game of chance, depends on an event, regarding which it is not known, whether it will take place or not.'

This means that, although around the world both bookmaking and sweepstake activities are almost always linked to taking bets on the results specifically of sporting events, theoretically bets can be taken for any event whatsoever, going as far as bets on whether the end of the world will come in 2012, or whether Martians will land in Moscow.

The popularity of sporting events as the objects of bets can be explained by the fact that matches, fights, races and other sports events are being held almost every minute of the day, and this means that a large number of people can place bets with the maximum frequency. The internet and satellite television have made it possible to watch even the most exotic and little-known types of sports, and this means that there is now even the possibility of placing bets on these.

In addition, one must not forget the positive emotional coloring of a contest that brings people back to stadium again and again, and leads them to emotionally invest in the exploits of their favorite athletes. Clearly, supporting Manchester United is far more interesting and pleasant than to hope for a Martian landing,

all the more so because one can hardly expect to be able to collect one's winnings if the Martians do come.

It should be noted that in Russia, the activity of organizing bookmakers and sweepstakes is licensed by the state.

A license for performing activities for organizing and executing games of chance in bookmakers and sweepstakes is a document, issued in compliance with the federal law on games of chance, that gives the organizer of games of chance the right to perform activities organizing and executing games of chance in bookmakers and sweepstakes *outside gaming zones*. The license must include a mandatory indication in an appendix to the license of the number and location of branches or other locations for performing activities to organize and execute games of chance in bookmakers and sweepstakes.

Thus, as we see from the definition of the license for sweepstakes and bookmakers, an exception was made (the only one for all forms of games of chance) in the form of permission to perform one's activity beyond *the limits of special gaming zones*, as mentioned above. According to the National Association of Bookmakers (NAB), at the moment of writing this Article, 367 bookmaker offices were registered in Russia. In reality, approximately 96 are in operation. The annual turnover of the sweepstakes and bookmakers market is assessed at 1 billion roubles,[6] which is of course several times less than the turnover of casinos and slot machines.

40.2.1 Requirements for the Organizers of Games of Chance, Including the Organizers of Bookmakers/Sweepstakes

Let us review the requirements, which were established by the legislation for organizers of games of chance.

Article 6 of the federal law on games of chance establishes the requirements for the organizers of games of chance in the Russian Federation, including for the organizers of sweepstakes and bookmakers.

Only legal entities, registered in the established manner on the territory of the Russian Federation, may act as the organizers of games of chance.

Legal entities, the founders (or participants) of which include the Russian Federation, constituent members of the Russian Federation, or organs of local self-government, may not act as organizers of games of chance.

Organizers of games of chance must supply such information as it is necessary to verify the fulfillment of legislated requirements for state regulation of activities to organize and conduct games of chance. The composition of such information, and the procedure for furnishing it are established by the government of the Russian Federation.

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[6] K.A. Katkov. Taxation of the gambling business. Abstract of dissertation in pursuit of academic title of candidate of economic science. Saratov 2008, p. 10.

In addition, apparently in connection with the criminalization of the gaming business in Russia, the law also establishes a requirement that the organizer of games of chance is obligated to guarantee the personal security of participants in games of chance, as well as other visitors to gaming establishments, including employees of the games of chance organizer, while they are inside the gaming establishment.

One of the most debatable innovations in the law is the establishment of a limit to the value of net assets of the gaming establishment. The value of the net assets of the organizer of the games of chance throughout the whole period of performing activities to organize and execute games of chance, may not be lower than:

(1) 600 million roubles[7] for the organizers of games of chances in casinos and slot machine halls;
(2) 100 million roubles[8] for the organizers of games of chance in bookmakers and sweepstakes.

The procedure for calculating the value of the net assets of the organizers of games of chance is established by the federal agency of executive authority appointed by the government of the Russian Federation.

At the moment of writing this article, the procedure for calculating the value of net assets was subject to the Order of the RF Ministry of Finances, dated May 2, 2007, No. 29n, 'On the establishment of a procedure for calculating the value of net assets of the organizers of games of chance.' According to this order the value of the net assets of the organizer of games of chance is determined by subtracting all liabilities from the sum of the gaming organizer's assets. The required sum of assets and liabilities is stipulated by this order.

As we can see the minimal cost of net assets, the so-called 'entry threshold,' is five times lower for sweepstakes and bookmakers than for the other forms of games of chance. This is primarily due to the fact that the bookmaker business is, by definition, not as lucrative as, for example, the casino business.

The Government of the Russian Federation can establish additional requirements for the organizers of games of chance.

What is the purpose behind establishing the requirements listed above, including the requirements to form certain net assets? Clearly, this is to consolidate and aggregate the gaming business. The volume of net assets is indeed impressive. In order to open a business a legal entity must have net assets in the volume of almost 14 million Euros for a casino, and 2.3 million Euros for a sweepstake or bookmaker. Obviously, only the biggest players on the gaming market can meet these requirements. Small gaming companies will find it almost impossible to individually increase their net assets to meet the new requirements of law No. 244-FZ.[9]

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[7] 14,000,000 Euros. At the moment of writing this article, the Euro exchange rate was 1 Euro = 43 roubles. Therefore, all sums in Euros will be shown based on this rate.

[8] 2,300,000 Euros.

[9] In connection with the established restrictions on the size of net assets, a new business even appeared: companies possessing the necessary volume of net assets, in exchange for certain monthly payments, give smaller companies the opportunity to function.

There are two opposing opinions about these aspects of the federal law on games of chance. One opinion is that the legislative innovations are harmful to the development of the gaming business and lead, if not to monopolization, at least to an unhealthy aggregation in the gaming industry, which ultimately leads to regrettable consequences, primarily for the consumers.[10]

The second view, which is also supported by the authors of this article, is that somewhat strict 'rules of the game' are necessary. The time when the gaming business could develop chaotically is past. The rights of consumers of the services provided by gaming establishments must be maximally protected and guaranteed. Winnings must be paid out and the level of security for participants in games of chance must also be as high as possible. Therefore, organizations operating in the gaming field must meet strict criteria.

It is noteworthy that in connection with the restrictions introduced, as a result of which all gaming establishments must be removed to 'gaming reservations,' the gaming business has found itself, surprisingly, with one more link to sport. On March 3, 2007, the collegium of the Federal Agency for Physical Culture and Sport (Rossport, the predecessor to the RF Ministry for Sport, Tourism and Youth Policy) issued a resolution to recognize poker as a sport (the Federation for Poker Sport was founded in 2006). It is noteworthy that Russia was one of the first countries in the world to recognize poker as a sport.

Thus, casinos received support from an organization it did not expect to offer support: Rossport. According to information that has flooded all internet fora on games of chance,[11] on July 1, 2009, when all casinos have to close and move into gaming reservations, poker clubs will open in their place. The card games will continue, but now they will not be under the 'casino' sign, but will be conducted under the aegis of the Russian Federation for Poker Sport, as commercial competitions within this sporting discipline. The plan is for poker clubs to claim an average of 2–4% of each game. Therefore, most likely we will be confronted by a new form of monopoly. After all, considering that all casinos and 'one-armed bandit' slot machines will be forced to move to gaming zones, poker clubs will find themselves free of all competition.

40.2.2 Licensing the Activities of Bookmakers/Sweepstakes

A license must be obtained to perform the activities of organizing bookmaker/sweepstakes.

[10] E.I. Spektor. 'Advokat', 2007, No. 2. Problems in the implementation of the Law on state regulation of activities in the organization and execution of games of chance. Long live the underground?

[11] http://forum.rarib.ru/index.php

Licensing of bookmakers and sweepstakes is performed according to the Order of the Russian Federation, dated July 17, 2007 No. 451, On approval of the Provision on licensing the activities of organizing and executing games of chance in bookmakers and sweepstakes (hereafter referred to as: the Order).

Licensing of activities such as organizing and executing games of chance at bookmakers and sweepstakes is performed by the Federal Tax Service.

Licenses to organize and conduct games of chance in bookmakers and sweepstakes are issued for a period of 5 years. The period of validity of the license may be extended in the manner stipulated for re-processing of the document confirming the presence of a license.

According to Article 4 of the Order, the licensing requirements and conditions for performing licensed activities are:

- The bookmaker/sweepstake must be divided into a zone for servicing the participants of games of chance and a service zone in the gaming establishment.
- In an area of the gaming establishment accessible to visitors, there must be on display a copy of the text of the federal law on games of chance, the rules of the games of chance established by the games of chance organizer, and the rules for visiting the gaming establishment, and whether permission to perform activities involved in the organization and execution of games of chance in a gaming zone or a license for the performance of activities to organize and perform games of chance in bookmakers and sweepstakes has been obtained.
- The organization and execution of games of chance may be performed exclusively by employees of the games of chance organizer. Employees of the games organizer may not include people who are under eighteen years of age.
- The equipment used in the gaming establishment must meet the requirements of the legislation of the Russian Federation on technical regulation, technical instructions, standards, and other mandatory requirements, and must be the property of the games organizer. Documents confirming that gaming equipment meets the above requirements must be permanently present on the premises of the gaming establishment.
- On the premises of bookmakers and sweepstakes, located outside of gaming zones, no activities must be performed that constitute the organization and execution of games of chance using slot machines and gaming tables.
- Compliance with the requirement for net assets, of the minimum volume established by law (100,000 roubles).
- The possession by the license applicant (licensee) of buildings, installations and structures (a single, separate part of a building, structure or installation), on the basis of legal ownership or on another legal basis, which are necessary for performing the licensed activity.

- Fulfillment of the conditions established for the establishment of bookmakers/sweepstakes[12];
- The use by the licensee of a sweepstake and (or) bookmaker registry machine, registered with the tax agency in compliance with the Tax Code of the Russian Federation.
- Provision of personal security for participants in games of chance and (or) bets, other visitors to the gaming establishment and employees of the license applicant (licensee) when they are present in the gaming establishment.
- Observance by the licensee of the rules for performing transactions involving funds with the organization and execution of games of chance, approved by the Order of the government of the RF, dated July 10, 2007, No. 441, on approval of the 'Rules for conducting transactions involving money when organizing and executing games of chance.'

For the review by a licensing agency of an application for a license, the provision or re-issue of a document confirming the presence of a license, a state duty is paid in the manner and size that is established by the legislation of the Russian Federation on taxes and charges. The state duty payable upon issuance of a license is as follows: the review of an application for a license—300 roubles; for the issuance of a license—3,000 roubles; for re-issuance of a document confirming an existing license—1,000 roubles. Total = 3,300 roubles.

[12] According to Article 15 of the federal law, dated December 29, 2006, No. 244-FZ, 'On state regulation of activities in the organization and execution of games of chance and on the introduction of amendments to certain legislative acts of the Russian Federation', bookmakers and sweepstakes may be located only in buildings, structures and installations which qualify as capital construction facilities.

Bookmakers and sweepstakes may not be located in:

(1) residential buildings, facilities of which the construction is not yet complete, in temporary structures, in kiosks, under awnings or in any other similar structures;

(2) in buildings, structures, installations, in which there are children's, educational, medical or sanatorium and resort establishments;

(3) in the buildings, structures and installations of road service stations and terminals, railroad stations, river transportation stations, river ports, airports or at the stations and stops of any form of public transport (common-use transport) providing urban and suburban linkages;

(4) on the premises, in which activities are performed, that are not connected with the organization and execution of games of chance or rendering services related to games of chance;

(5) in buildings, structures or installations that are placed in state or municipal ownership, and in which federal agencies of state authority, agencies of state authority of constituent members of the Russian Federation, agencies of local self-government, state or municipal establishments or unitary enterprises are located;

(6) in buildings, structures and installations, in which there are hieratic or religious organizations.

Bookmakers and sweepstakes may also not be located in green areas, where any of the above facilities are also located. Additional requirements for bookmakers and sweepstakes may be established by the government of the Russian Federation.

It is noteworthy that the restriction, established by Article 16 of the federal law dated 29/12/2006, No. 244-FZ, stating that a gaming establishment may not be located in buildings, structures or installations of physical culture, therapeutic or sporting establishments, does not extend to sweepstakes and bookmakers.

40.2.3 Taxation of Bookmakers/Sweepstakes

In compliance with Article 149, para 3, subpara 8 of the Tax Code, there is an exemption from value-added tax on the territory of the Russian Federation for the execution of lotteries, organization of sweepstakes and other games based on risk (including with the use of slot machines), by gaming companies and individual entrepreneurs.

With respect to the activities of gaming organizations, including sweepstakes and bookmakers, the legislation establishes a special taxation procedure. *The so-called tax on the gaming business*.

The issue of taxation of organizations in the field of gaming, including bookmakers and sweepstakes, is regulated by chapter 29 of the RF Tax Code.

According to Article 365 of the Tax Code, taxpayers paying tax on the gaming business are recognized as those organizations or individual entrepreneurs who perform entrepreneurial activity in the field of the gaming business.

When organizing bookmakers and sweepstakes, the sweepstakes or bookmaker registry equipment are taken as the object subject to taxation.

A sweepstake or bookmaker registry is a specially equipped area controlled by the organizer of the gaming establishment (sweepstakes organizer), where the total sum of bets is registered and the sum of winnings to be paid out is calculated.

The sweepstake or bookmaker registry (hereafter, the taxation object) is subject to registration in the appropriate tax agency according to geographical location of the taxation object, no later than 2 days prior to the date of installation of each taxation object. Registration is performed by the tax agency on the basis of an application by the taxpayer to register the taxation object (objects) with mandatory issue of a certificate confirming registration of the taxation object (objects). The form of the above application and the form of the above certificate are approved by the Russian Federation Ministry of Finance.

The taxpayer is also bound to register with the tax authorities, in the place of registration of taxation objects, any changes in the number of taxation objects, no later than two days prior to the date of installation or removal of each taxation object.

According to Article 368 of the Russian Federation Tax Code, the taxation period is recognized as a calendar month.

The tax rate is established by the laws of constituent members of the Russian Federation for one sweepstakes registry or one bookmaker registry and ranges from 25,000[13] to 125,000[14] roubles.[15]

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[13] 581 Euros.

[14] 2,900 Euros.

[15] For example, in Moscow the highest stake per sweepstake machine or bookmakers machine is 125,000 roubles; in Irkutsk Oblast, the maximum is 50,000 roubles, and in the Republic of Tatarstan, 75,000 roubles.

In cases where the tax rate is not established by the laws of constituent members of the Russian Federation, the tax rate per sweepstake registry or bookmaker registry, by default, amounts to 25,000[16] roubles.

The sum of the tax is calculated by the taxpayer independently as the product of the tax base, established for each taxation object; and the tax rate, established for each taxation object.

In this way the organizer of the bookmaker/sweepstake must pay a fixed tax, independent of the profits of the given enterprise.

Regarding the taxation of winnings received by physical persons in bookmakers/sweepstakes, in compliance with Article 228, para 1, subpara 5 of the Tax Code, physical persons receiving winnings paid out by the organizers of sweepstakes and other games based on risk, pay a tax calculated from the sums of such winnings.

The taxpayers thus indicated must independently calculate the sum of tax, based on the winning sums obtained, using the rate established by Article 224, para 1 of the Tax Code (13%), and must submit to the tax agency according to area of registration a tax declaration for personal income tax.

40.2.4 Advertising for Games of Chance, Including Bookmakers/Sweepstakes[17]

The RF legislation has established restrictions with respect to advertising for games of chance, including bookmakers and sweepstakes. These restrictions are indicated in Article 27 of the federal law, dated March 13, 2006 No. 38-FZ, On advertising (hereafter referred to as 'the law on advertising').

Regarding street advertising, it should be taken into account that information placed on signs at the location of an organization (location where activities are conducted) and which contain an indication of the name, address where the organization is located, the type of services rendered (activity profile) or the products sold, as well as information placed on signs and containing an indication only of the type of services offered (activity profile) or products sold (such as 'Casino,' 'Restaurant,' 'Chemist,' 'Supermarket' and 'Shoes') do not fall under the legislated definition of advertising. The requirements of the Russian Federation legislation on advertising are not applicable to this information.

However, information about the name of the legal entity and the type of services rendered (for example, 'Central Bookmakers') placed outside of the location where the organization is located, may be recognized as advertising. In this case, such placement must correspond to the requirements of the law.

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[16] 581 Euros.

[17] Letter from FAS, dated 26 December 2005, No. AK/19277, On advertising of games of chance and gaming establishments.

In compliance with Article 27, para 2 of the law, advertising of games of chance is allowed only on radio and television between the hours of 7.00 and 22.00, local time.

According to the third text paragraph of Article 27, para 2 of the law, advertising of games of chance is allowed only in buildings, structures and installations in which games of chance and/or bets are performed, with the exception of railway station premises, airport premises and subway stations, where the distribution and placement of such advertising is not allowed.

This norm makes it possible to distribute advertising for games of chance exclusively on the premises of buildings, structures and installations, where activity to conduct games of chance and bets is conducted: casinos, sweepstakes, bookmakers, slot machine halls and other gaming establishments (locations). In addition, the above norm excludes the premises of train stations, airports and subway stations, from the list of locations where the distribution of advertising of games of chance are permitted, even in cases where games of chance and/or bets are conducted in such locations.

Article 27, para 2 of the law allows the distribution of advertising of games of chance only in periodical printed publications, where the covers and printer's imprint contain information stating that these publications specialize in advertising notifications and other advertising materials, and where the periodical publications are intended for the employees of game organizers and/or participants of such games, when they are located within the boundaries of gaming zones.

This provision covers only printed mass media, and does not cover the electronic mass media. The advertising character of a publication is confirmed by a certificate of registration with the mass media, containing the corresponding indication of the publication's area of specialization. Assessment of the specialization of the mass medium as one intended for employees of gaming establishments and/or persons participating in games of chance and/or bets is performed based on information about the approximate topic covered by the mass medium, contained in the certificate of registration of the mass medium.

Article 27, para 1 of the law stipulates that advertising of games of chance must not create the impression that participation in games of chance and/or bets has any significance for achieving social or personal success, or could become a means of resolving pecuniary problems.

This requirement extends to any form of transmission of the information indicated in the advertisement, both directly (the straightforward statement in the advertisement, that participation in games of chance or bets generates success or improves one's financial status), or indirectly (the composition and presentation of the advertisement, such that the content (sense) leads one to believe that participation in games of chance and bets is important for achieving social or personal success, or can help resolve pecuniary problems).[18]

[18] Letter from FAS, dated 26 December 2005, No. AK/19277, On advertising of games of chance and gaming establishments.

When analyzing the question of whether advertisements meet these requirements, a direct link has to be made between participation in games of chance and bets, and the consequences of such participation in the form of the achieved (supposed) social or personal success, or in the form of resolving the financial problems of the participant in the games of chance or bets.

Advertising of games of chance must also not discredit persons who have not participated in games of chance and/or bets.

Based on the content of this requirement, in advertising for games of chance, it is illegal to undermine the credibility of lifestyles that do not involve participation in games of chance and bets, or to create a negative attitude, or to belittle the authority of persons who refrain from participation in such games.

Advertising for games of chance must also not create the impression that a win is guaranteed, or that there is a high probability of a win.

This requirement also extends to any form of transmission of information in advertising, either directly (a direct statement in the advertisement stating that the conditions of the games of chance or bets are such that each participant in the game or bet will receive a win, or the vast majority will win), or indirectly (the compositional arrangement of the advertisement is such that it follows from the content (sense) that participation in games of chance or bets bring a guaranteed win), or that there is a high probability of a win.

Moreover, this information may not be included in advertising, even if the rules of the game or bet stipulate the payment of winnings to each participant of the game of chance or bet.

The law also stipulates that advertising of games of chance must not fail to mention special rules or restrictions to participation in games of chance and/or bets, or rules applying to the payment of winnings, if such rules or restrictions are in place.

If there are special rules or restrictions for participation in games of chance, it is mandatory that these rules and restrictions are indicated in advertisements. In addition, advertising of games of chance must contain information about the conditions for the payment of winnings to the winner, if such rules are defined by the rules for the game or bet.

The law also stipulates that advertising for games of chance must not be aimed directly at minors, use images of people or animals, or appear in any form of radio or TV program, or in printed publications for minors.

The ban on advertising games of chance, aimed directly at minors, as established in this norm, stipulates that advertising of games of chance must not be designed to be seen by minors or influence the motivation of minors to participate in games of chance.

In this same norm, a ban is stipulated on any use (visual, audio, textual) of images of people and animals in the advertising of games of chance.

An ‘image’ is understood to be a reflection in the minds of those seeing or hearing the advertisement, of objects in the material world, or their obvious, vivid representation.

The visual use of images of people and animals is the representation of live creatures (including both known and invented) in advertising, including the representation of parts of the body, silhouettes, etc. In addition, the image of a person and an animal may be formed by the attribution of human characteristics or the characteristics of animals to objects in nature (animating or bringing them to life).

In the audio or textual aspect of advertising, there should be no information about people or animals.

Moreover, it is necessary to bear in mind that the requirement not to use the images of people and animals in gaming advertisements does not extend to information about the name of the gaming establishment or games in the advertisement, including where such names also signify a person or an animal.

In addition, the law contains a ban on the use of advertising for games of chance in any form on the radio and on TV programs, or in printed publications for minors.

When assessing radio and TV programs, as well as printed periodical publications, with regard to whether they are aimed at minors, it should be taken into consideration that the proof of such targeting may be found in the certificate of registration of such a program (periodical) as a mass medium, if the sample topic of the medium is children's programing (publications).

In addition, assessment of the content radio and TV programs, as well as printed publications, may be performed with respect to the target audience, for which the given program (printed publication) is mainly intended.

Such advertising must not contain a statement that participation in bets or games based on risk is of importance for achieving social recognition, or professional sporting or personal success.

The restrictions listed above are applied with respect to advertising by a game of chance organizer, advertising for services associated with games of chance and advertising of a gaming establishment, including advertising of locations where services related to games of chance are rendered. Moreover, requirements restricting the use in advertising of images of people and animals, as well as restrictions relating to TV and radio advertisements and restrictions relating to opportunities to advertise exclusively in buildings where games are held, are not applicable to advertising of game of chance organizers, advertising of services associated with games of chance, advertising of a gaming establishments (including advertising of locations where services related to games of chance are rendered) or advertising of games of chance, distributed exclusively among people located within the boundaries of gaming zones, created in compliance with the federal law indicated in para 3, part 2 of this article of the federal law.

Also, the law establishes minimum provisions that must be included in advertising of bets and games based on risk.

Such advertising must partly contain an indication of the time of drawing prizes during the execution of bets and games based on risk, and a source of information about the organizer of bets and games based on risk, about the rules for execution, about the prize fund of such bets and games, about the number of prizes or winnings and about when, where and how prizes or winnings are to be received.

40.2.5 Proposed Reform of State Regulation of Sweepstakes and Bookmakers

Clearly, under conditions of financial and economic crisis, the sports sector needs new and significant sources of funding. The greatest financing deficit is felt by mass sports, including sports for children, youth and 'adaptive sport' (for the handicapped). The state took the fundamental decision to move casinos and slot machine halls from July 1, 2009, to four exclusive gaming zones. It also established a favorable regime for the sweepstakes and bookmakers remaining in their existing city locations without yet increasing the burden on these establishments in any way. We are of the opinion that in Russia sweepstakes and bookmakers do not bring any significant social benefit, and bear no social burden, including for the sports at the expense of which they survive. Experience from other countries shows that one of the tangible channels for funding sports is not just lotteries, but also sweepstakes and bookmakers.

In Russia, the mandatory, earmarked use of at least 10% of this income has been stipulated for social goals, including the development of physical education and sport. There exists a mechanism for taxing the organizers of games of chance and similar businesses.

According to various estimates, the volume of the market (the turnover) of sweepstakes and bookmakers in Russia is approximately 1–1.5 billion USD each year.

It has been proposed that the size of earmarked deductions by sweepstakes and bookmakers exclusively for the benefit of the development of mass sport be established at 15% of the turnover. This would be approximately 200 million USD each year.

In our opinion, it is necessary to obligate all sweepstakes and bookmakers to obtain a license only given the presence of a special order for registration with the RF Ministry for Sports and Tourism (or another organization, authorized by the same). Such an order requiring registration will create the duty to transfer to the RF Ministry for Sports and Tourism, each quarter, a percentage of the turnover of sweepstakes and bookmakers, which would be forwarded in a strictly targeted manner to exclusively benefit the development of mass sports (primarily, financing of sports for children, youth and students and the organization of sporting events for the handicapped). The RF Ministry of Sports and Tourism must, in this case, adopt the agency-level program 'Development of Mass Sport' that will be funded using the funds thus raised.

It is apparent that the new version of this law on the gaming business almost completely bans the use of the internet for taking and processing bets by sweepstakes and bookmakers. In this connection, it is proposed that, by analogy with lotteries, only a state sweepstake (bookmaker) is to be given permission to accept bets and process them in real-time. To this end, for example, OOO Orglot (the operator of the GOSLOTO state lottery) already has more than 10,000 terminals, as well as sufficient experience, personnel and software.

All allow advertising of the state sweepstakes (which can be named in the law, for example GOSTOTO or GOSPROGNOZ) at sports facilities and in TV broadcasts of competitions (thus the income from the GOSLOTO state lottery would also increase). It is necessary to facilitate the installation of special GOSTOTO terminals at all official Russian competitions, and intercept any illegal attempts, by remaining small, private sweepstakes and bookmakers, to use online booking (control effected in cooperation with the Ministry of the Interior and the Federal Tax Service).

Clearly, GOSTOTO offers the following potential gains for the state, society and sport:

1. the appearance of a new and reliable source of funding for the most expensive area of development in sports;
2. decriminalization of the sweepstakes and bookmakers markets;
3. transparency of the financial structure and more rigid control by the state;
4. a huge number of participants in games across the country;
5. promotion of sport and attracting the interest of spectators to sport;
6. reinforcement of the fight against corruption in sport (tracking 'agreed' matches, etc.);
7. increased income from Gosloto due to the use of an identical model for the distribution of tickets.

The functional schematic of GOSTOTO will be relatively simple. In part, it is necessary for the state to determine the types of sport and specific competitions to be included in the list of bets. For example:

(a) types of sport; soccer, ice hockey, basketball, volleyball, tennis;
(b) types of competition, for example in soccer: the World Cup, the European Championship, the European Soccer League, the Russian Soccer Championship and the Russian Cup.

One can see how such a reform would allow Russia to correctly adjust the state policy in the field of games of chance, and would serve as an example to other countries.

40.3 Lotteries

The lottery business in Russia is not a part of the gaming business[19] and is regulated by a special federal law, dated November 11, 2003, No. 138-FZ, On lotteries (hereafter, the law on lotteries). The adoption of this law in 2003 was seen as a significant event and a major step toward state regulation of bets and games of chance in the public domain. Despite the 80-year history of the lottery business in Russia, lotteries became subject to the law for the first time.

[19] Letter of the Ministry of Finance, dated 12 October 2006, No. 03-06-05-03/35.

Article 2 of the above law contains a *definition of a lottery*: a game that is conducted in compliance with a contract, and in which one party (the lottery organizer) draws the lottery prize from the lottery fund, and the other party (lottery participant) receives the right to a win, if recognized as the winner in compliance with the lottery rules. A contract between the lottery organizer and the participant of the lottery is concluded on a voluntary basis and is formalized by the issuance of a lottery ticket, a receipt or other document, or other means stipulated by the lottery rules.

40.3.1 Types of Lotteries

At the time of writing this article, several different types of lotteries are being operated in Russia. The types of lotteries run on the territory of the Russian Federation are determined depending on the way they performed, the means of forming the lottery prize fund, the territory in which they are performed, the organizer of the lottery and the technology used for conducting the lottery.

Depending on the type of execution, the lottery can be of the drawn, non-drawn or combined type.[20]

A drawn lottery is a lottery in which the drawing of the lottery prize fund between all the participants of the lottery is performed at the same time, after distribution of the lottery tickets. The execution of such a lottery can include separate draws, which consist of the distribution of a batch of lottery tickets, the execution of a drawing of the lottery prize fund and the payment, transfer or issuance of winnings.

A non-drawn lottery is a lottery which the winning lottery tickets are determined at the printing stage, i.e. prior to distribution to the lottery participants. When conducting a non-drawn lottery a participant of such a lottery may ascertain whether his or her lottery ticket is a winning ticket or not immediately after depositing payment for participation in the lottery and after receipt of a lottery ticket.

A combined lottery is a lottery which the winning lottery tickets are determined both immediately after payment is made for participation in the lottery and receipt of the lottery ticket, and after the lottery prize fund has been drawn.

Depending on the way in which the prize fund was formed, lotteries may also be divided into:

(1) lotteries, the right to participation in which is linked to the introduction of payment, against which the lottery prize fund is formed;
(2) lotteries, the right to participation in which is not linked to the introduction of payment and a prize fund that is formed from the funds of the lottery organizer

[20] At the current time in Russia, there are five types of large drawn lotteries. There are more than 150 types of non-drawn or 'instant' lotteries.

(an incentive lottery). The prize fund of an incentive lottery is formed from the funds of the lottery organizer.

Depending on the territory where it is conducted, lotteries are also divided into international, pan-Russian, regional and municipal lotteries.

An international lottery is a lottery that is held on the territory of two or more states, including the territory of the Russian Federation, on the basis of an international treaty of the Russian Federation. The procedure for conducting an international lottery on the territory of the Russian Federation is determined in compliance with the requirements of this federal law. The International Charity Lottery 'Children of Chernobyl,' for example, is just such a lottery.[21]

A pan-Russian lottery is a lottery which is conducted across the entire territory of the Russian Federation.

A regional lottery is a lottery that is conducted across the entire territory of one constituent member of the Russian Federation.

The organization and execution of a lottery on the territories of several constituent members of the Russian Federation is executed in the manner established by this federal law, for conducting a pan-Russian lottery.

A municipal lottery is a lottery that is conducted on the territory of one municipal entity.

Lotteries are divided into state and non-state depending on the lottery organizer.

A state lottery is a lottery, whose organizer is the Russian Federation or a constituent member of the Russian Federation. Only a federal agency with executive authority, authorized by the government of the Russian Federation, can be the organizer of a state lottery conducted across the entire territory of the Russian Federation, and on behalf of the Russian Federation. Only an authorized agency with executive authority of a constituent member of the Russian Federation can be the organizer of a state lottery conducted on the territory of a constituent member of the Russian Federation, and on behalf of a constituent member of the Russian Federation.

A municipal entity or a legal entity, formed in compliance with the laws of the Russian Federation and located in the Russian Federation, may be the organizer of a non-state lottery. Only the authorized agency of local self-government can be an organizer of a non-state lottery, conducted on the territory of one municipal entity and on behalf of a municipal entity. A federal agency with executive authority or an agency with executive authority of a constituent member of the Russian Federation may not be the organizer of a non-state lottery.

Depending on the technology used to conduct lotteries, they are divided into lotteries conducted:

(1) in real-time, if a contract on participation in the lottery is concluded between the parties by means of exchanging documents by electronic or other means, using lottery equipment that is connected by a telecommunications network,

[21] Order of the Prime Minister of the Government of Moscow, dated 16/2/1996, No. 138-RP.

and which makes it possible to reliably establish that a document was issued by a party to the contract, and by means of which the drawing of the lottery prize fund is held in real-time, as well as the registry and transfer of information about the results of such a drawing. The above-mentioned equipment must provide protection of such information from loss, theft, distortion, forgery, as well as from unauthorized actions to destroy, modify, copy or other such activities, and from unauthorized access to the telecommunications network. Moreover, it is worth noting that conducting a lottery in real-time with the use of the above lottery equipment is only done by a federal agency with executive authority, authorized by the government of the Russian Federation, across the entire territory of the Russian Federation.

(2) in a normal regime, in which the collection, transmission and processing of game information and the formation and drawing of a lottery prize fund is conducted in stages.

40.3.2 Obtaining Permission to Conduct Lotteries

According to Article 5 of the law on lotteries, a state registry of lotteries is maintained in Russia. A single state registry of lotteries is maintained by an agency with executive authority authorized by the government of the Russian Federation.[22] The single state registry of lotteries contains information about all lotteries conducted on the territory of the Russian Federation.

Permission must be obtained in order to conduct a lottery. According to Article 6 of the law on lotteries, permission to conduct a lottery is issued to the applicant by the federal or, depending on the type of lottery, and the regional tax service, for a period of no more than 5 years, on the basis of an application to issue such permission.

Review of the issue of the above-mentioned permission to an applicant is conducted by a federal or, depending on the type of lottery, and regional tax service within a period of 2 months from the date of submission of an application for the above-mentioned permission.

The application for permission to conduct a lottery can be composed in any format, but must include an indication of the time for conducting such a lottery and the type of lottery. The following documents must be attached to the application for permission to execute a specific lottery:

(1) the rules of the lottery;
(2) the provisions for the distribution of the turnover resulting from conducting the lottery (in percent);

[22] According to the Order of the Government of the Russian Federation, dated 5/7/2004, No. 338, On measures to implement the law 'On lotteries', this same body established the Federal Tax Service.

(3) a sample lottery ticket (receipt, or other document stipulated by the lottery rules) with a description of the mandatory requirements for it and, where necessary, the means of protecting the lottery ticket from forgery, as well as a description of the hidden legends, drawings or signs applied to the ticket;
(4) the rules for identifying the lottery ticket for the payment, transfer or issue of winnings;
(5) a technical and financial justification for the lottery, for the entire period in which the lottery will be conducted, indicating the sources from which the costs of organizing and executing the lottery will be financed, and including a calculation of the expected turnover resulting from conducting the lottery;
(6) a description and technical characteristics of the lottery equipment;
(7) certified and notarized copies of the founding documents of the applicant entity;
(8) the bookkeeping balance sheet of the applicant, as of the last reporting date preceding the submission of the application for permission to conduct a lottery;
(9) a note, issued by the tax agencies, confirming the presence or absence of debts for the payment of taxes and charges;
(10) the procedure for registering distributed and non-distributed lottery tickets;
(11) the procedure for returning, storing, destroying or using non-distributed lottery tickets in other draws;
(12) the procedure for withdrawing non-distributed lottery tickets;
(13) the procedure for keeping uncollected winnings, and the procedure for claiming such winnings before the end of the period of time for obtaining winnings.

It is noteworthy that all the requirements and restrictions noted above are not applicable to state lotteries (including also municipal state lotteries) and incentive lotteries. State lotteries function on the basis of legislative acts published with regard to such lotteries by the agencies with state authority.

In compliance with Article 6, para 8 of law No. 138-FZ, permission does not have to be obtained to conduct an incentive lottery that is, the right to conduct an incentive lottery is implied where a notification about the execution of an incentive lottery is sent to the tax service. Such reduced control over the execution of incentive lotteries is primarily due to the fact that no payment for participation in an incentive lottery is taken, and the prize fund is formed by the organizer.

40.3.3 Requirements for Lotteries. Control Over the Organization And Execution of Lotteries

Article 10 of the law on lotteries establishes the mandatory regulations for lotteries, which are not applied to incentive lotteries.

The following mandatory requirements apply to lotteries:

(1) the size of the lottery prize fund must amount to at least 50%, but no more than 80% of the turnover resulting from conducting the lottery;
(2) the size of the earmarked deductions from the lottery, dictated by the lottery rules, must amount to at least 10% of the turnover resulting from conducting the lottery.

Article 11 of the law establishes the goals for which the organizers of lotteries must transfer part of the turnover achieved from conducting the lottery.

Earmarked deductions from the lottery are used to finance facilities and events of social importance (including events aimed at the development of physical culture and sport, education, healthcare, civil and patriotic education, science, culture, art, including the arts and crafts of the peoples of the Russian Federation, tourism and the ecological development of the Russian Federation), as well as performing charitable activities.

The above deductions must be transferred by the lottery organizer each quarter.

The law also establishes requirements for lottery tickets. Lottery tickets must contain the following mandatory information:

(1) the number, and date of issue of permission to conduct the lottery;
(2) the name of the federal agency with executive authority, authorized by the government of the Russian Federation, the authorized agency with executive authority of the constituent member of the Russian Federation, or the authorized agency of local self-government which issued permission to participate in the lottery, the state registration number of the pan-Russian lottery or the regional lottery or the registration number of the municipal lottery;
(3) the name of the lottery;
(4) the number of the lottery ticket;
(5) the name of the organizer of the lottery and his contact telephone number;
(6) extracts from the lottery rules, which are sufficient for the lottery participant to form an adequate understanding of the lottery, of the algorithm for determining the winnings, of the size of the winnings and the procedure for obtaining the winnings;
(7) the size of the lottery prize fund (in percent of the turnover resulting from conducting the lottery). This does not apply to incentive lottery tickets;
(8) the fixed price of a lottery ticket or fixed price of a single stake (the cost of a minimal game combination). This does not apply to incentive lottery tickets;
(9) the date and location of a lottery prize fund drawing, as well as the time and sources of publication of official drawing results (for drawn and incentive lotteries);
(10) information about the location and time for receiving winnings.

The texts on lottery tickets must be in the Russian language, and at the discretion of the lottery organizers, additionally in the state languages of the republics within the Russian Federation, and at the discretion of the organizers of

international lotteries, additionally in foreign languages. This requirement does not extend to registered trademarks, gaming symbols and the markings of the lottery ticket.

The price of a lottery ticket, the size of the winnings and the value of non-financial prizes are shown in the currency of the Russian Federation.

The lottery prize fund is formed either from the income resulting from conducting the lottery, or at the expense of the organizer of an incentive lottery.

The lottery prize fund is used exclusively for the payment, transfer or issue of winnings to lottery participants who have won.

A lottery organizer may not make claims on the lottery prize fund, except with regard to obligations to lottery participants to pay out, transfer or issue winnings, as well as using lottery prize fund money other than for the payment, transfer or issue of winnings.

The lottery organizer may not lay any claim on the lottery prize fund for any other reasons.

For prizes in kind (non-financial), the monetary equivalent must be indicated, as stipulated by the lottery rules. This requirement does not extend to incentive lotteries.

The prize fund of a series lottery is formed prior to conducting the draw.

The procedure for recording and keeping the lottery prize fund must provide for the separate accounting and keeping of the prize funds of all lotteries, with the exception of incentive lotteries.

According to the requirements of Article 21 of the law on lotteries, control over the execution of lotteries is performed by the Federal Tax Service in compliance with the law on lotteries, other federal laws and other regulatory legal acts of the Russian Federation, as well as laws and other regulatory legal acts passed by constituent members of the Russian Federation in compliance with the above, or with the regulatory legal acts of agencies of local self-government.

The Federal Tax Service or its territorial divisions are obligated to perform annual checks on the compliance of lotteries with their rules and the legislation of the Russian Federation.

40.3.4 Responsibility for Violations of Legislation on Lotteries

Persons, guilty of violating the law on lotteries bear criminal, administrative and other responsibilities, in compliance with the legislation of the Russian Federation.

The Federal Tax Service, or its territorial divisions, issue an official missive to each lottery organizer if the lottery organizer violates the following conditions:

(1) provision by the lottery organizer of incomplete or inaccurate information to the indicated authorized agency;
(2) failure by the lottery organizer to fulfill a demand of the above-mentioned authorized agency to eliminate a violation by the lottery organizer before the established deadline.

The permission issued to a lottery organizer is withdrawn on the basis of a court ruling. The Federal Tax Service, or its territorial divisions, retains the right to appeal to a court with an application to withdraw permission to conduct a lottery that has been issued to a lottery organizer, if the lottery organizer has on multiple occasions grossly violated the conditions listed above, or if the following violations are identified:

(1) incorrect use of funds, received from the execution of the lottery. Incorrect use of funds is understood as the use of earmarked deductions from the lottery for purposes stipulated by Article 11 of the law in lotteries, as well as the non-payment, non-transfer, or non-provision of winnings to a lottery participant;
(2) violation by the lottery organizer of the requirements of the law on lotteries or the lottery rules;
(3) failure to satisfy the mandatory lottery standards (the winnings must amount to at least 50 and no more than 80% of the turnover).

At the same time as the submission of applications to court, the Federal Tax Service, or its territorial divisions, retains the right to suspend the validity of permission to perform a lottery prior to a court ruling coming into force.

A ruling to suspend the validity of permission to conduct a lottery and the forwarding of a claim to court requesting the withdrawal of the permission concerned are sent to the lottery organizer in written form, with a reasoned justification of such decisions no later than three days after the date on which they were received.

40.3.5 Taxation of Lotteries

The activities of lotteries, as well as the activities of bookmakers and sweepstakes, are not subject to value-added tax.

In addition, according to the provisions of the RF Tax Code, taxation is also not applied to the sale (as well as the transfer, production or rendering for one's own needs) of lottery tickets.

Regarding the taxation of winnings, received by natural persons as a result of lotteries, in compliance with Article 228, para 1, subpara 5 of the Tax Code, natural persons receiving winnings paid out by the organizers of lotteries, sweepstakes and other games based on risk (including with the use of slot machines), pay a tax that is calculated from the sums of such winnings.

The taxpayers thus indicated must independently calculate the sum of tax, based on the sum of winnings received, using the rate established by Article 224, para 1 of the Tax Code (13%), and must submit to the tax agency by area of registration a tax declaration for personal income tax.

No tax on the gaming business has been established for lotteries.

40.3.6 Lotteries and Sport

The purpose for organizing and conducting lotteries across the world is to raise funds from private citizens to develop projects of social significance, including for the development of sports projects.

The law on lotteries establishes the socially beneficial goals to which payments resulting from the execution of lotteries can be dedicated.

Earmarked deductions from the lottery are used to finance facilities and events of social importance (including events aimed at the development of physical culture and sport, education, healthcare, civil and patriotic education, science, culture, art, including the arts and crafts of the peoples of the Russian Federation, tourism, the ecological development of the Russian Federation), as well as performing charitable activities.

It should be noted that the size of earmarked deductions (no less than the established 10%) and events to which they are directed are approved by the organizer of the lottery.

The earmarked deductions from the lottery are assigned to the income of the appropriate budget of the Russian Federation, constituent RF member or municipal entity. The government of the Russian Federation and the supreme executive agency with state authority of a constituent member of the Russian Federation, in the drafts of the corresponding budget laws of various levels, stipulate appropriations to finance the above-mentioned events and facilities of social significance, in the volume indicated.[23]

At the time of writing this article, there is only one state lottery active in Russia, funds from which will be directed toward the development of sport in the Russian Federation: GOSLOTO.[24]

The provision creating GOSLOTO was approved by Order of Rossport dated May 27, 2008, No. 279, 'On approval of the Rules of the Pan-Russian state lottery in real-time, in which the right to participation is conditional upon the deposit of a fee.'

The prize fund of the Pan-Russian state lottery GOSLOTO[25] is formed from payments deposited by the lottery participants.

The lottery is intended to achieve the goal of raising funds to partially fund the development of the sports infrastructure for mass sport in the Russian Federation, implemented in compliance with the Order of the government of the Russian Federation, dated January 11, 2006, No. 7, On the federal earmarked program 'Development of physical culture and sport in the Russian Federation between 2006 and 2015.'

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[23] "Comments to the Federal Law of 11 November 2003, No. 138-FZ," On lotteries (by article) (T.G. Zhdanovich and O.A. Shevchenko).

[24] http://www.allsport.ru/index.php?id=19019

[25] www.gosloto.ru

Earmarked deductions from the lottery are used for projects of social significance in the field of construction of sports infrastructure, popularizing mass sport and high achievements in sport and the involvement of various social strata in regular physical exercise and sports activities. These projects are divided into two different areas: *Mass sport* and *High achievements in sport*.

The *Mass sport* area will and does include the implementation of projects aimed at the development of the mass sport infrastructure in educational establishments and in residential areas, including the construction of:

- 1,467 multi-purpose halls;
- 733 covered swimming pools;
- 733 stadium for educational establishments;
- 1,000 sports centers, owned by constituent members of the Russian Federation.

Within the area *High achievements in sport* projects are implemented in the field of targeted support of scientific research and development in the field of doping control and the development of the material and technical foundation for high-sporting achievements, including:

- the reconstruction of 7 Olympic training complexes;
- the reconstruction and construction on the territory of the Russian Federation of 20 sports centers, designed for training in various different sports;
- reconstruction and modernization of the sports facilities of educational establishments for training an Olympic reserve;
- equipment for an anti-doping center.

The predicted volume of funding of the federal earmarked program from funds that are derived from the execution of lotteries during the period 2006-2015 is determined to be at least 26,894[26] million roubles, including 18,260 million roubles in the period until 2013.[27]

Earmarked deductions from lotteries amount to 15% of the turnover resulting from the execution of lotteries. Earmarked deductions are transferred to the lottery operator within that time period, determined by the legislation of the Russian Federation, to the account indicated by the lottery organizer.

The lottery organizer was initially the Federal Agency for Physical Culture and Sport (Rossport), but the Decree of the RF President dated October 7, 2008, No. 1445, dissolved the Federal Agency for Physical Culture and Sport, and the functions of this agency were transferred to the Ministry for Sport, Tourism and Youth Policy of the Russian Federation, including the functions of organizing this lottery.

[26] 625,500,000 Euros.

[27] According to the head of Rossport, Vyachaslav Fetisov, one of the conditions of the tender, as a result of which the lottery operator was selected, was the obligation to transfer 120,000,000 USD within the first year of conducting the lottery. http://www.allsport.ru/index.php?id=19019.

A tender held by the lottery operator selected Limited Liability Company Orglot as the lottery organizer.

The lottery is executed exclusively on the territory of the Russian Federation. The lottery is conducted for a period of 7 (seven)years.

The lottery includes several types (forms) of drawings, based on the guessing principle, and in order to participate in each of these the lottery participant must pay the corresponding lottery stake.

The lottery prize fund amounts to 50% of the turnover resulting from executing the lottery. The number of registered lottery stakes, the turnover and the prize fund for each drawing, conducted within the framework of one or other type of lottery draw, are calculated separately.

The lottery is conducted using the following rules: '5 numbers out of 36,' '6 numbers out of 45,' '7 numbers out of 49,' '5 numbers out of 50 plus 2 numbers out of 8,' 'between 1 and 10 numbers out of 80, with 20 out of 80 being winners,' '24 numbers out of 75' and '1 number between 0000000 and 999999.'

The cost of a minimum game combination (the size of a minimum lottery stake), can be between 5 and 100 roubles, with intervals of 5 roubles, depending on the type of lottery draw.

40.4 Conclusion

In this article, we reviewed the procedures and features of organizing sweepstakes/bookmakers and lotteries in Russia. We reviewed the aspects of taxation, licensing, restrictions and other characteristics of the forms of activity indicated. The following conclusions can be drawn as a result of the analysis:

1. The organization of sweepstakes and bookmakers has certain advantages in comparison to other forms of organization in the field of the gaming business, including permission to perform activities outside of gaming zones, a smaller tax on the gaming business in comparison to slot machines and casinos and a lower net assets sum, necessary to obtain a license.
2. Second, earning money on sport, by placing bets on the outcomes of sports events and buying stakes in sweepstakes and bookmakers, has no financial link to the sports themselves: the taxes that are paid by sweepstakes/bookmakers do not contribute to the development of physical culture and sport, and do not perform any other social function.
3. At the moment of writing this article, only one federal state lottery has been organized in Russia, deductions from which are used to develop physical culture and sport: GOSLOTO. The lottery has only recently begun operation, and it is early to talk of results, but if the lottery is executed in line with the predictions in this article, it is clear that the results of the lottery can unambiguously be recognized as successful for the development of physical culture and sport.

Chapter 41
Legal Aspects of Sports Betting in Serbia

Milan Dakić

Contents

41.1 Introduction: Facts and Figures

Sports betting has become one of the leading fields of the entertainment industry in Serbia in the last decade. While visits to sport events have drastically decreased in the recent years, the number of sports betting shops (*kladionica*), and their customers have rapidly grown. According to the information provided by the Serbian Administration of Games of Chance (*Uprava za igre na sreću*), there are 28 legitimate organizers of betting, with 1,592 betting shops across Serbia.[1] For a population of approximately 6,500,000 people over 18 years old, this makes around 4,200 persons per sports betting payment post (*uplatno mesto*). The perspective of

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[1] See www.mfin.sr.gov.yu/srl/2813, last visited on 5 January 2009.

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the industry becomes clearer when the following facts are added to the picture: there are two casino operators and 78 registered slot machines operators with approximately 15,000 slot machines.[2]

This field of the entertainment industry has rather vast economical, as well as sociological, and psychological, aspects. Namely, the budget of the Republic of Serbia in 2005 and 2006 collected more than RSD[3] 8.6 billion from games of chance (the budget revenues for 2006 were projected at approximately RSD 520 billions).[4] Also, according to recent research, there are around 300,000 people in Serbia who suffer from certain forms of addiction to gambling.[5]

The idea behind this article is to present the crucial legal aspects of sports betting in Serbia. First, the readers shall be introduced to the recent legal development of games of chance legislation in Serbia. Thereafter, the current legislative framework of games of chance and sports betting shall be introduced. Finally, certain business and tax issues shall be presented in order to focus on the business aspects of sports betting in Serbia.

41.2 Recent Legal Developments of Sports Betting

The current sports betting regulation is a result of a systematic reform of the overall games of chance legal framework in Serbia, which was introduced by the Law on Games of Chance, in 2004.[6] Up until that moment, the situation may be described as rather chaotic, with partial solutions only, weak control, and the lack of a systematic approach.

Namely, the 1992 Law on Games of Chance[7] became rather outdated. As a result, before 2004, there were only 300 legal betting shops, and 5,000 legally operated slot machines.[8] Budget revenues from games of chance were more than 5 times smaller than after the legal reforms.[9]

Authorizations granted for sports betting before 2004 were rendered to a particular betting shop, which, resulted in a greater risk of nonpayment to successful participants, and, due to the dispersed system, made the control of the

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[2] See Lakic 2009.

[3] RSD stands for Serbian dinars. In February 2009, EUR 1 amounted to approximately RSD 92.

[4] See footnote 3 above.

[5] Data provided by "Herc" Research Fund, an institution which deals with prevention of pathological gambling. See www.b92.net/info/vesti/index.php?yyyy=2008&mm=11&dd=02&nav_category=12&nav_id=326652, last visited on 5 January 2009.

[6] *Zakon o igrama na sreću* (Official Gazette of the Republic of Serbia ["RS"] no. 84/2004 and 85/2005).

[7] *Zakon o igrama na sreću* (Official Gazette RS no.83/92, 39/93, 53/93, 67/93, 8/94, 45/94, 71/94, 25/99, 33/99, 12/200).

[8] See Korpi 2008.

[9] See footnote 3 above.

whole system more difficult.[10] This, in turn, led to vast possibilities for money laundering.[11]

Pre-2004 legislation did not have a specialized state authority with adequate legal mechanisms to control the system of sports betting and maintain it within the legal boundaries. Thus, with a lot of small players in the field—many of which were illegal, and without proper mechanisms for checks and balances, the system was crying for reforms.

41.3 Current Legal Framework of Games of Chance in Serbia

In 2004, the National Assembly of Serbia enacted the Law on Games of Chance, which was the first step in restoring order in the system of games of chance in Serbia. The legislature described its motives for this piece of legislation as follows: (i) limiting the possibilities of gambling; (ii) enhancement of supervision over the organizers of games of chance; (ii) enlargement of the market players for the purpose of easier control; (iii) efficient collection of public charges; and (iv) affirmation of socially least negative games of chance by the foundation of the State Lottery of Serbia (*Državna lutrija Srbije*).[12]

The Law on Games of Chance defines games of chance as games in which the participants, against consideration, direct or indirect (by telephone impulses, etc.), are provided with the opportunity to win a prize in money, assets, services or rights, whereby the final outcome of the game does not depend entirely on the knowledge or skills of the participant, instead it also depends on chance or some uncertain event.[13] The goals of games of chance are (i) amusement, (ii) gaining prizes in money, assets, services or rights, and (iii) creating funds that represent revenues for the budget of the republic of Serbia.[14] Organizing games of chance is defined as an activity of general state interest, which is endowed to the state.[15] The state may transfer its right to

[10] Extract from interview of Assistant Minister of Finance, accessible at www.mfin.gov.rs/print-news-src/736, last visited on 5 January 2009.

[11] See footnote 3 above.

[12] Extract from presentation of the new Law on Games of Chance, prepared by the Ministry of Finance, accessible at www.mfin.sr.gov.yu/srl/120, last visited on 8 November 2009. See also the official explanation of the motives for enacting the Law on Games of Chance, prepared by the Government of the Republic of Serbia, accessible at www.arhiva.srbija.sr.gov.yu/vesti/2002-10/10/330050.html, last visited on 5 January 2005.

[13] Article 2 of the Law on Games of Chance.

[14] Article 5 of the Law on Games of Chance.

[15] Article 6 of the Law on Games of Chance.

organize the games to other entities, but it does not guarantee any of the prizes that the participant wins.[16]

The Law on Games of Chance differentiates between the following types of games of chance:

(i) classic games of chance (*klasične igre na sreću*) (lottery, sports prognosis, lotto, keno, tombola, fonto);
(ii) special games of chance (*posebne igre na sreću*); and
(iii) prizing games with goods and services (*nagradne igre u robi i uslugama*).[17]

Special games of chance are defined as games in which the participants play against each other or against the organizer, and expect the prize dependant on the amount of consideration and the rules of the game. Special games of chance include:

(i) games organized in casinos;
(ii) games on machines; and
(iii) betting on sports and other events.[18]

In line with the powers granted by the Law on Games of Chance, the Government of the Republic of Serbia and the Ministry of Finance enacted the following by-laws relevant for sports betting:

(i) Ordinance on Determining the Crimes for which, along with the Application or Request for License or Authorization for Organizing Certain Games of Chance, a Certificate on Non-Conviction of Certain Persons is Required[19];
(ii) Regulation on Types of Games of Chance (Catalogue of Games of Chance)[20];
(iii) Regulation on Specific Conditions, i.e. Content of Rules of Games of Chance[21];
(iv) Regulation on Method of Determining whether the Conditions for Obtaining the Authorization for Organizing Games of Chance—Betting are Fulfilled[22];

[16] Articles 6 and 7 of the Law on Games of Chance.

[17] Article 13 of the Law on Games of Chance.

[18] Article 15 of the Law on Games of Chance.

[19] *Uredba o određivanju krivičnih dela za koja se uz prijavu, odnosno zahtev za dobijanje dozvole, odnosno odobrenja za priređivanje određenih igara na sreću podnosi potvrda o neosuđivanosti određenih lica* (Official Gazette RS no. 128/04).

[20] *Pravilnik o vrstama igara na sreću (Katalog igara na sreću)* (Official Gazette RS no. 129/04, 8/06).

[21] *Pravilnik o bližim uslovima, odnosno sadržini pravila igara na sreću* (Official Gazette RS no. 129/04).

[22] *Pravilnik o načinu utvrđivanja ispunjenosti uslova za dobijanje odobrenja za priređivanje igara na sreću—klađenje* (Official Gazette RS no. 129/04, 9/05, 83/05 and 8/06).

(v) Regulation on Form and Content of Special Label for Game of Chance Post or Betting Shop, i.e. Payment Post of a Betting Shop[23];
(vi) Regulation on Determining the Software and Hardware Conditions for Organizing Special Games of Chance for Betting Shops[24];
(vii) Regulation on Method of Keeping Records on Turnover in Betting Shops[25]; and
(viii) Regulation on Method of Keeping a Data Base of Winners with the Organizers of Games of Chance.[26]

Each game of chance has to have the rules of game, pursuant to the relevant regulation. In this respect, the Serbian Ministry of Finance enacted the Regulation on Specific Conditions, i.e. Content of Rules of Games of Chance, which sets out the details of rules of games, which have to be respected.

Each organizer of games of chance is obliged to keep a database of winners, pursuant to the Regulation on Method of Keeping a Data Base of Winners with the Organizers of Games of Chance.

The Law on Games of Chance explicitly prohibits:

(i) participation in games of chance organized abroad for which the considerations are paid in Serbia;
(ii) collection of considerations in Serbia for games of chance organized abroad;
(iii) sale, assignment, issuing, advertizing, and any other presentation of foreign tickets for games of chance in Serbia;
(iv) organizing games of chance in free zones;
(v) participation of juveniles in special games of chance;
(vi) organizing and participating in pyramidal games (chains of fortune, etc.); and
(vii) organizing prizing contests with monetary prizes.[27]

Failure to comply with the above stated provisions may result in pecuniary fines ranging up to RSD 1,000,000 (approximately EUR 11,000).[28]

The Law on Games of Chance establishes the Administration of Games of Chance, as a specialized governmental section that in authorized, *inter alia*, to:

(i) issue and revoke the authorizations on organizing games of chance;

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[23] *Pravilnik o obliku i sadržini posebne oznake za igračnicu ili kladionicu, odnosno uplatno mesto kladionice* (Official Gazette RS no. 129/04).

[24] *Pravilnik o određivanju informatičkih uslova za priređivanje posebnih igara na sreću za kladionice* (Official Gazette RS no. 129/04).

[25] *Pravilnik o načinu vođenja obaveznih evidencija o ostvarenom prometu u kladionicama* (Official Gazette RS no. 129/04).

[26] *Pravilnik o načinu vođenja baze podataka o licima koja su ostvarila dobitak kod priređivača igara na sreću* (Official Gazette RS no. 14/07).

[27] Article 10 of the Law on Games of Chance.

[28] Article 98 of the Law on Games of Chance.

(ii) sets the technical, hardware and software requirements for organizers of games of chance;
(iii) authorizes the change of location of betting shops;
(iv) issues special labels for betting shops; and
(v) prepares the drafts of the by-laws relevant for games of chance.[29]

41.4 Specifics of Sports Betting in Serbia

Sports betting is recognized as a game of chance by virtue of Article 4 para 3 of the Catalogue of Games of Chance. Article 71 of the Law on Games of Chance defines the betting as game of chance in which the participant, pursuant to the rules of the game bets on:

(i) results of single or group of sports competitions;
(ii) certain events within a sports competition (number of scored goals, which team shall score first, which player shall be the best scorer, etc.);
(iii) success of participants in entertainment contests;
(iv) success of participants in elections;
(v) results of horse races, dog races, or other animal races; and
(vi) other events.

In order to obtain an authorization for organizing sports betting, the following documentation is required:

(i) data on name and seat of legal person, i.e. organizer of betting;
(ii) decision on registration with the competent registry, which includes the data on capital status;
(iii) foundation act;
(iv) balance sheet and profit and loss account for the previous year;
(v) evidence on title to facilities (ownership, right of use), whereby there has to be at least 30 payment posts;
(vi) evidence on exact location of payment post, including the statement on distance from schools;
(vii) certificate on non-conviction, pursuant to Ordinance on Determining the Crimes for which, along with the Application or Request for License or Authorization for Organizing Certain Games of Chance, a Certificate on Non-Conviction of Certain Persons is Required;
(viii) certificate on performed control and fulfillment of software and hardware conditions, pursuant to Regulation on Determining the Software and Hardware Conditions for Organizing Special Games of Chance for Betting Shops;
(ix) description of games of chance—betting; and
(x) rules of game for each particular game.[30]

[29] Article 13 of the Law on Games of Chance.
[30] Article 75 of the Law on Games of Chance.

The Administration of Games of Chance shall render its decision on authorization within 15 days upon receipt of the respective application. The authorization is granted for a period of 3 years, and may be prolonged provided that the above stated conditions are met.[31]

An organizer of sports betting is obliged to notify the Administration of Games of Chance on any opening or closing of payment posted within 48 h of its opening/closing.[32] Each payment post has to possess a computer or equivalent appliance for registering of the payments. The organizer of sports betting has to keep an up-to-date database on payments of all payment posts, updated daily.[33]

Each betting shop has to be labeled with a sign that contains data on the (i) organizer, (ii) location, (iii) period of validity, (iv) serial number, and (vi) other elements prescribed by the Regulation on Form and Content of Special Label for Game of Chance Post or Betting Shop, i.e. Payment Post of a Betting Shop.[34]

Employees in a betting shop are prohibited from participating in betting organized by that betting shop.[35]

Supervision over the organizers of sports betting is performed by the Ministry of Finance. The organizers are obliged to enable the direct or indirect supervision, including the inspection of premises, insight into actions that are directly or indirectly related to the organization of sports betting, business records, statements, databases, software, and other documents or data. Officials from the Ministry of Finance are entitled to participate in daily calculation of payments within a betting shop. The official of the Ministry of Finance is entitled to order that detected irregularities be remedied. In the case of non-compliance with the order, the official of the Ministry of Finance is entitled to temporarily shut down the betting shop.[36]

Pursuant to Article 4 of the Law on Prevention of Money Laundering,[37] organizers of sports betting are obliged to perform actions and measures for detection and prevention of money laundering. Such actions include the collection of data on participants and the transaction if the payment of consideration or the prize exceeds EUR 1,000, or whenever there exists a doubt that a transaction involves money laundering.[38] Organizers of sports betting are obliged to report to the Administration for Prevention of Money Laundering any transaction or series of transactions that exceed EUR 15,000, or whenever there exists a doubt that a

[31] Articles 75 and 76 of the Law on Games of Chance.

[32] Article 79 of the Law on Games of Chance.

[33] Article 82 of the Law on Games of Chance.

[34] Article 87 of the Law on Games of Chance.

[35] Article 78 of the Law on Games of Chance.

[36] Article 94 of the Law on Games of Chance.

[37] *Zakon o sprečavanju pranja novca* (Official Gazette RS no. 107/2005, 117/2005 and 62/2006).

[38] Article 5 of the Law on Prevention of Money Laundering.

transaction involves money laundering.[39] All data collected in the course of implementation of money laundering prevention measures are considered as official secrets.[40] For the purpose of implementing the measures and actions pursuant to the Law on Prevention of Money Laundering, the organizers of sports betting are obliged to nominate one employee who shall be in charge of performing such actions and measures, and who will be properly trained in that respect.[41] Supervision over the implementation of the Law on Prevention of Money Laundering is performed by the National Bank of Serbia, Ministry of Internal Affairs, Ministry of Finance, Securities and Exchange Commission, Bar, and various inspections.[42] Failure to comply with the provisions of the Law on Prevention of Money Laundering may lead to charges of commercial offense, which may result in pecuniary fines of up to RSD 3,000,000 (approximately EUR 33,000),[43] as well as prohibitions from pursuing business activities for up to 10 years.[44] Acts of money laundering may also result in criminal charges that may lead to imprisonment of up to 5–10 years if the amount of money exceeds RSD 1.5 millions (approximately EUR 16,000). Laundered money shall be confiscated. In addition, if a person is involved in money laundering, and knows or had to know that the money originated from a crime, such person shall be sentenced to up to 3 years in prison.[45] Pursuant to the provisions of Law on Criminal Liability of Legal Entities,[46] even the legal entity may be liable for money laundering and other crimes if the responsible person within the legal entity commits a crime in order to gain benefits for the legal entity.

It is worthwhile to mention that organizing sports betting without proper authorization represents a crime that shall be punished with pecuniary fines or up to 2 years of imprisonment. Also, any deception by the organizer of sports betting, or of a participant in sports betting, shall be punished with up to 5 years imprisonment.[47]

In addition, violation of the provisions of the Law on Games of Chance may lead to charges of offense, whereby the Administration of Games of Chance may sentence the perpetrators with pecuniary fines up to (i) RSD 1,000,000 (approximately EUR 11,000) for the legal entity, and (ii) RSD 50,000 (approximately EUR 550).[48]

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[39] Article 8 of the Law on Prevention of Money Laundering.

[40] Article 30 of the Law on Prevention of Money Laundering.

[41] Article 11 of the Law on Prevention of Money Laundering.

[42] Article 35 of the Law on Prevention of Money Laundering.

[43] Article 37 of the Law on Prevention of Money Laundering.

[44] Article 34 of the Law on Commercial Offences [*Zakon o privrednim prestupima*] (Official Gazette RS no. 4/77, 36/77, 14/85, 74/87, 57/89, 3/90, 27/92, 24/94, 28/96, 64/2001, 101/2005).

[45] Article 231 of the Criminal Code [*Krivični zakonik*] (Official Gazette RS no. 85/2005, 88/2005, 107/2005).

[46] *Zakon o odgovornosti pravnih lica za krivična dela* (Official Gazette RS no. 97/08).

[47] Article 352 of the Criminal Code.

[48] Article 98 of the Law on Games of Chance.

In addition to pecuniary fines, the Administration of Games of Chance may order the confiscation of items that served for, or were intended for committing the respective violations, or that were the result of such violation. Also, the Administration of Games of Chance may prohibit the legal entity from pursuing business activities and may prohibit the responsible person within the legal entity for up to 1 year.[49]

41.5 Certain Business and Tax Aspects of Sports Betting in Serbia

The Law on Games of Chance has introduced several requirements that organizers of sports betting have to satisfy.

Namely, sports betting on the territory of the Republic of Serbia may be organized only by legal entities with a registered seat in the Republic of Serbia, registered with the Agency for Commercial Registers of the Republic of Serbia for business of gambling and betting, provided that they procure the relevant authorization from the Administration for Games of Chance.[50] In addition, betting on horse races may be organized only by legal entities who own a hippodrome (or by legal entities who satisfy all other requirements and conclude contracts with owners of hippodrome), and only for races that take place on the respective hippodrome.[51]

It should be noted that pursuant to Article 5 of the Serbian Companies' Act, a company may perform all legally permitted activities, and if an activity requires a license, authorization, approval, or the like, the company may perform such activity only upon obtaining such license, authorization, approval, or the like.[52] Furthermore, pursuant to Article 6 of the law on Registration of Companies, a company is obliged to report only the code (pursuant to Act on Classification of Activities and Register of Units of Differentiation)[53] and description of the dominant business activity, whereas it may pursue other activities in line with Article 5 of the Companies' Act.[54] The Act on Classification of Activities and Register of Units of Differentiation recognizes gambling and betting under business activity code no. 92710.

The authorization for organization of sports betting may be granted only to legal entities who have at least EUR 150,000 capital as of the date of issuing the authorization.[55] This capital requirement significantly exceeds the standard capital

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[49] *Ibidem*.

[50] Article 72 of the Law on Games of Chance.

[51] *Ibidem*.

[52] *Zakon o privrednim društvima* (Official Gazette RS no. 125/04).

[53] *Zakon o klasifikaciji delatnosti i registru jedinica razvrstavanja* (Official Gazette RS no. 31/96, 34/96, 12/98, 59/98, 74/99).

[54] *Zakon o registraciji privrednih društava (*Official Gazette RS no. 55/04 and 61/05).

[55] Article 73 of the Law on Games of Chance.

requirements for Serbian companies. Namely, pursuant to provisions of Companies' Act, minimum share capital of a limited liability company amounts to EUR 500, whereas the minimum share capital for joint stock companies amounts to EUR 10,000, and for public stock companies EUR 25,000.[56] The Law on Games of Chance mandates that the capital requirement is maintained throughout the period of validity of authorization for organization of sports betting.[57]

Interestingly enough, all of the current organizers of sports betting in Serbia have been incorporated as limited liability companies.[58] This fact may be explained by the simplicity of the incorporation procedure and less legal requirements for limited liability companies provided by the respective provisions of the Serbian Companies' Law.

The Law on Games of Chance introduces one additional requirement pertaining to the location of payment posts: betting shops and payment posts have to be located 150 or more meters distant from schools.

For the purpose of insuring the payment of prizes to the participants and settling the public charges, the organizers of sports betting are obliged throughout the period of validity of the authorization, to maintain a security deposit of EUR 3,000 per payment post in a Serbian bank, or the corresponding bank guarantee. The organizers are also obliged to procure a risk-deposit of at least EUR 150 per payment post, pursuant to authorization of the Administration of Games of Chance.[59]

The organizer of sports betting is obliged to pay a fee for obtaining the authorization in the amount of EUR 100 per payment post. The fee is also due in case of opening new payment posts.[60] In addition, the organizer is obliged to pay a fee for organizing betting in the amount of 5% of all paid compensations, whereby the fee may not be less than EUR 500 per month per payment post.

The public revenues collected from the organization of games of chance—including the revenues collected from sports betting—have one particular feature: 40% of revenues ("special purpose revenues") are used for financing the Serbian Red Cross (20% of special purpose revenues), NGOs which protect and enhance the rights of persons with special needs and institutions of social safety (20% of special purpose revenues), social and humanitarian organizations (20% of special purpose revenues), sports (20% of special purpose revenues), and local self-government (20% of special purpose revenues).[61]

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[56] Articles 112 and 233 of the Companies' Act.

[57] Article 73 of the Law on Games of Chance.

[58] Data provided by Administration for Games of Chance. See Lakic 2009.

[59] Article 74 of the Law on Games of Chance.

[60] Article 80 of the Law on Games of Chance.

[61] Articles 5 and 18 of the Law on Games of Chance.

Organizers of sports betting are subject to a profit tax at proportional rate of 10%.[62] On the other hand, the participants in sports betting are subject to income tax at the rate of 20% in case they obtain a prize that exceeds RSD 17,638 (approximately EUR 200).[63] The income tax of the participant is subject to withholding, i.e. the organizer of sports betting is obliged to withhold the tax due and pay it to the competent authorities.[64]

Control of the payment of fees, taxes and other public charges by the organizers of sports betting is performed by the tax administration,[65] pursuant to the provisions of the Law on Tax Procedure and Tax Administration.[66]

41.6 Concluding Remarks

Even an ordinary person, save a researcher in sociology, may verify that sports betting has taken a serious role in everyday life in Serbia. Payment posts of betting shops are packed with people, especially during weekends. Moneys spent in betting shops are reaching amounts that cannot be underestimated. As result, the legal regime of sports betting has gained a significant role within Serbian society.

There is no doubt that the legal framework of sports betting in Serbia has been improved after the 2004 reforms. The number of illegal betting shops has been drastically decreased. The budget revenues have been increased by over 5.5 times.[67] The system of control has been established and put into operation. The organizers of sports betting and their clients are benefiting from an organized system and higher degree of legal certainty.

However, the system is not perfect and there is still need for improvement. The illegal market and money laundering are still present.[68] The tax burden is rather heavy and the tax requirements are complicated.[69] Juvenile betting has still not

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[62] Article 39 of the Law on Profit Tax [*Zakon o porezu na dobit preduzeća*] (Official Gazette RS no. 25/2001, 80/2002, 43/2003, 84/2004).

[63] Article 83 of the Law on Personal Income Tax [*Zakon o porezu na prihod građana*] (Official Gazette RS no. 24/2001, 80/2002, 135/2004, 62/2006, 65/2006, 10/2007, 7/2008, 7/2009).

[64] Articles 99 and 101 of the Law on Personal Income Tax.

[65] Article 95 of the Law on Games of Chance.

[66] *Zakon o poreskom postupku i poreskoj administraciji* (Official Gazette RS no. 80/2002, 84/2002, 23/2003, 70/2003, 55/2004, 61/2005, 85/2005, 62/2006, 61/2007).

[67] See footnote 3 above.

[68] Aćimović 2008.

[69] Aćimović 2008.

been eliminated.[70] Furthermore, certain requirements of the Law on Games of Chance have become rather formalistic and thus have lost their original goal. Such is the case with the prohibition to locate betting shops and payment posts within 150 meter radius from schools.[71] This requirement is satisfied by mere declaration of the organizer to this effect, without any verification by the authorities. Also, the EUR 150,000 capital requirement does not prevent the founder or organizer of betting to subscribe personal work or services as contributions into capital (which may be estimated by the very founder).[72]

Therefore, while the Administration of Games of Chance is yet to develop a consistent and efficient practice in supervision of sports betting, the Serbian legislature needs to introduce further improvements to the sports betting legal surroundings. In this way this amusement producing and omnipresent realm of the Serbian entertainment industry shall entrench itself as a transparent, lucrative, and adequately regulated business opportunity, which promotes and protects both the interests of participants and of the organizers, as well as the respective public interests in the domain of games of chance management.

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[70] According to data provided by "Herc" Research Fund, an institution which deals with prevention of pathological gambling, every fifth high school student visits betting shops on daily basis. See www.b92.net/info/vesti/index.php?yyyy=2008&mm=07&dd=02&nav_category=12&nav_id=306678, last visited on 5 January 2009.

[71] Article 4 of the Regulation on Method of Determining whether the Conditions for Obtaining the Authorization for Organizing Games of Chance—Betting are Fulfilled.

[72] Article 14 of the Companies' Act.

Chapter 42
Sports Betting in Singapore

Lau Kok Keng

Contents

From football to Formula 1, betting on sporting events is increasingly commonplace. Lau KokKeng, Head of iTec and Sports, Rajah and Tann LLP, provides an insight into the history, legislative framework and pertinent issues in the dynamic area of sports betting.

Sports betting involves making predictions of the outcomes of sporting events through wagering. Sporting events on which bets are commonly offered include football, motor racing, horse-racing, basketball, baseball, golf, rugby and boxing. Outcomes arising from these events on which bets may be offered may range from the final score and winner of the match or championship, to details such as first player to score and number of fouls committed during the game.

The legality of sports betting, and the extent of permitted sports betting activity, varies from country to country. Even in countries which have legalised sports betting, there nonetheless exists a huge parallel underground betting environment.

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In addition, the online sports bookmakers and betting exchangers who are licenced in offshore jurisdictions also provide additional avenues for sports betting in competition with state operators.

Proponents of legalised sports betting argue that having a flutter on a sporting activity is not only relatively harmless, but may also increase interest and fan support in the sport. In addition, the revenues from legalised sports betting may even be channelled back into funding the development of the sport. On the other hand, opponents of sports betting are concerned that it may compromise the integrity of participants in the sport (i.e., players, coaches and officiators), even if match-fixing is equally prevalent (if not more) in countries which have refused to legalise sports betting.

42.1 History and Evolution

Gambling has existed in Singapore since the early colonial days. For instance, in the 1820s, the colonial police was said to have been funded using gambling revenue. However, illegal gambling was rife and dominated the gambling industry.

The Betting Act (Cap 21) was enacted in 1960 to suppress illegal common betting-houses, betting in public places and bookmaking, while the Common Gaming Houses Act (Cap 49) was passed in 1961 to suppress illegal common gaming houses, public gaming and public lotteries. In 1968, the post-independence Government established the state operator Singapore Pools[1] to counter illegal betting and to channel proceeds of sales to benefit the community.

Up to 1999, legalised gambling in Singapore was limited to the Singapore Sweep lottery, 4D and Toto games operated by Singapore Pools, horse-racing conducted by the Singapore Turf Club and certain types of gaming in private clubs (e.g. jackpot machines). All other forms of gambling were illegal.

In 1999, to support and maintain the viability of Singapore's first local professional football league—the S-League—following Singapore's withdrawal from the Malaysia Cup tournament, Singapore Pools introduced legalised football betting on S-League games. Proceeds from betting on S-League matches are channelled back into the league to fund the development of its football clubs.

In 2002, sports betting was extended beyond local S-League games. In recognition of the popularity of betting on foreign football matches, Singapore Pools began to offer legalised betting on matches played in the World Cup 2002. Sports betting was subsequently further extended to allow for legalised betting on the English Premier League, other international matches, and to other European and Asian football leagues as well.

The opening up of sports bets was mirrored by other developments in gambling. In April 2005, in a Ministerial Statement made in Parliament, the Singapore

[1] Singapore Pools is currently the only legal lottery and sports betting operator in Singapore.

Government announced its decision to lift its ban on casinos in the city state, and to allow for two casinos to be established as part of the "Integrated Resorts" in Singapore. These Integrated Resorts, the first of which is due for completion in early 2010, will be the first ever legalised casinos in Singapore, and will be significant milestones in the gambling landscape in Singapore. To pave the way for the operation of the two Integrated Resorts, the Casino Control Act was passed in 2006.

In September 2008, Singapore hosted a Formula One race for the first time. In line with this historic event, legalised sports betting was further extended to allow Singapore Pools to offer betting on the Formula One races beginning with the Australian Grand Prix held in Melbourne in March 2008.

Though not as prevalent and entrenched as mass appeal lottery games such as 4D and Toto, sports betting has today gained widespread acceptance in Singapore. A survey conducted by the Ministry of Community, Youth and Sports in 2008 revealed that about 9% of the respondents in Singapore engaged in sports betting on a regular basis, and that the average amount spent by each of them on this form of betting is about $160 a month.[2] Legalised sports betting in Singapore is currently administered by the Singapore Totalisator Board.

42.2 Sports Betting Operators

As of 1 April 2004, the Singapore Totalisator Board (or Tote Board) acquired Singapore Pools from Temasek Holdings. Following this, the Tote Board holds the legal right to operate (a) horse-racing and totalisator operations through its agent and proprietary club, the Singapore Turf Club; and (b) 4D, Toto, Singapore Sweep, football betting and motor racing through its agent and wholly owned subsidiary, Singapore Pools. The Tote Board oversees the operations of Singapore Pools and the Singapore Turf Club. Surplus earnings are channelled by the Tote Board towards worthy causes that serve the needs of the community.

Under the Singapore Totalisator Board Act (Cap 305A), the functions of the Tote Board include, among others: (a) to operate totalisators in accordance with any approved scheme; and (b) to operate and conduct (by means of a totalisator or otherwise) such lottery or other betting or gaming activities as may be prescribed, in accordance with any scheme which the Minister may, subject to such conditions as he may impose, authorise. Accordingly, the Tote Board is empowered to provide assistance and advice relating to racing, betting and gaming in Singapore and to distribute moneys forming part of the fund of the Tote Board which is not required in the exercise of its functions for public, social or charitable purposes and for the promotion of culture, art and sport generally in Singapore.

[2] Report on Survey of Participation In Gambling Activities Among Singapore Residents, 2008 at http://www.mcys.gov.sg/MCDSFiles/Resource/Materials/GamblingSurveyReport2008.pdf.

42.3 Legislative Framework

Sports betting is prohibited in Singapore under the Betting Act (Cap 21), unless an exemption is granted by the Minister.

42.3.1 The Betting Act

The Betting Act is described as "[a]n act to suppress common betting-houses, betting in public places and bookmaking". First enacted in 1960, it prohibits betting or wagering on any event or contingency relating to any horse-race or other sporting event.

Section 3(1) of the Betting Act provides that any person who is involved in certain ways (as defined in the Betting Act) in a "common betting-house" or "betting information centre" shall be guilty of an offence. The terms "common betting-house" and "betting information centre" are given very broad definition under the Betting Act, and they are intended to capture a wide range of activities relating to horse-race and sports betting in Singapore. However, the Betting Act does not contain any express provisions dealing with online sports betting, the legality of which is briefly discussed later in this article.

42.3.2 Exemptions from the Betting Act

Prior to the Tote Board's acquisition of Singapore Pools from Temasek Holdings in 2004, Singapore Pools was granted the right to operate, *inter alia*, football betting in Singapore by way of statutory exemptions from the provisions of the Betting Act. Each type of football betting activity had to be separately exempted, as each new sports betting product had to be approved by the Minister before Singapore Pools was allowed to offer it to the public. The Singapore Turf Club on the other hand was granted the right to operate, inter alia, betting on horse-racing via the corresponding exemptions.

With the acquisition of Singapore Pools by the Tote Board, the Tote Board took over the rights to operate sports betting (including betting on horse-racing) in Singapore. Singapore Pools became an agent of the Tote Board in conducting sports betting operations, and new statutory exemptions under the Betting Act were gazetted to reflect this change. Under the Betting (Singapore Totalisator Board—Exemption) Notification 2004, the Tote Board and its officers were exempted from the provisions of the Betting Act in respect of the promotion, organisation, administration or operation of betting on football matches, while Singapore Pools, its officers and authorised agents were similarly exempted where the betting is promoted, organised, administered or operated for or on behalf of the Tote Board.

Additional exemptions were gazetted subsequently to allow Singapore Pools to offer legalised betting on Formula 1 racing.

42.4 Online Sports Betting

Singapore Pools does not offer any online sports betting currently. However, there is a proliferation of private bookmakers such as Ladbrokes, William Hill, Sportingbet and Bwin with a presence on the internet who offer sports bets to a worldwide customer base. Although licenced offshore, these operators remain unlicenced in Singapore, as no exemptions have been granted for them to offer bets to Singapore residents. Nonetheless, this has not stopped residents here from accessing their websites to place bets on sports events with these operators. Indeed, as these private operators do not have any requirements to contribute to good causes, unlike state operators, they are able to offer better odds to the punter, and are viewed as providing more value for the betting dollar. Internet betting is also more convenient as compared with having to join the queues at physical betting outlets, although phone betting offered by Singapore Pools has gone some way to overcome any such inconvenience.

Despite the growing popularity of online betting in Singapore, the Betting Act does not appear to have any provisions which expressly prohibit online sports betting in Singapore. The stance taken by the Government appears to be that the playing and operation of online gambling websites is illegal in Singapore.[3] However, the provisions of the Betting Act may not necessarily support this position. There is some uncertainty as to whether an internet betting site hosted outside of Singapore would fall within the definition of a "common betting-house" or a "betting information center", given that the definitions of the respective terms strongly suggest the involvement of physical premises and not virtual ones. Neither is it likely that a user's home from which access to the betting website is gained can be said to be either a "common betting-house" or a "betting information center". The mere act of accessing an internet betting website to place wagers from one's own home would appear insufficient, by itself, to make one's home either a common betting-house or a betting information centre since under ordinary circumstances, a home is not primarily used for betting.

However, if a user places bets for various other persons as an agent, or frequently and habitually places bets or wagers, a court might find that the user's home is a place kept or used for habitual betting, which may then fall within the offence provision. In addition, the definition of "bookmaker" in the Betting Act is arguably broad enough to include entities operating internet betting websites. As such, placing bets with an internet sports bookmaker from one's own home may potentially amount to an offence under Section 5(1), which states that any person who bets or wagers with a

[3] See for example: "Internet betting on S-league games illegal", The Straits Times, published on 31 May 2004.

bookmaker in any place or by any means (a phrase potentially wide enough to include betting or wagering over the internet), shall be guilty of an offence. This is provided the act of betting is considered to have occurred in Singapore. One argument that can be made is that in the case of betting websites hosted outside of Singapore, betting does not occur in Singapore, but rather is concluded at the place where the transactional server is hosted. The validity of such an argument, however, remains untried, untested and unaddressed by any legislation as yet.

42.5 Online Payment Services

Even if online betting does not fall within any offence provisions of the Betting Act, there are other restrictions which may impact upon the operations of internet betting websites which are accessible to residents in Singapore. One such restriction would involve payment for bets and winnings.

The most significant developments relating to online payment restrictions affecting the gambling industry have occurred in the United States, a jurisdiction which boasts stringent gambling laws. In 2006, the US Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA), which makes it illegal for its financial institutions to transfer money to offshore gambling websites or to online payment service providers used by such websites. As a result of the UIGEA, many non-US-based betting websites blocked access to US residents, and shifted their attention to Asian jurisdictions.

Notwithstanding that the UIGEA is US legislation, it has consistently been applied against non-US residents since its enactment, prompting questions over its extra-territorial effect. For example, in August 2009, Canadian resident Douglas Rennick was indicted in the US on charges of bank fraud, money laundering and illegal gambling. Rennick was accused of having opened bank accounts in the US under various corporate names for purposes of using the accounts to receive funds from offshore internet gambling operators. In another case in January 2007, the co-founders of NETeller (considered by many online gamblers to be the best option for transferring, withdrawing and depositing funds and which is widely supported by major online casinos), John Lefebvre and Stephen Eric Lawrence, were arrested in the US and charged with the intent to promote illegal gambling by transferring billions of dollars for US Internet gamblers. Both of them were Canadian citizens.

In Singapore, there is as yet no legislation equivalent to the UIGEA. However, many banks have a policy of disallowing the use of their credit cards for online gambling. These include United Overseas Bank, Citibank, HSBC, Amex, Maybank and OCBC Banks. Indeed, only DBS and Standard Chartered Bank do not block customer wagers.

42.6 Advertising

Subtle forms of advertising for offshore internet sports bookmakers and betting exchanges have gained momentum in Singapore over the years—for example, Betfair and Ladbrokes have, in the past, taken to distributing complimentary products such as beer mats and mugs, and displaying memorabilia such as team-autographed jerseys "kindly donated" by them, in pubs and bars. Both Betfair and Ladbrokes have also had representatives based in the country in the recent past, albeit performing marketing functions for the region without targeting Singapore residents. The current level of tolerance for offshore bookmakers' marketing and publicity attempts here was highlighted when Betfair hosted the Asian Poker Tour 2006 in Singapore, not least because the event was supported by the Singapore Tourist Board, but also noticeably because it was held here during the same time that the World Lottery Association's 2006 Convention was hosted by the state lottery Singapore Pools.

The advertising prohibitions in the Betting Act may be difficult to extend to online gambling for the reason that no gambling takes place in physical premises. Moreover, gambling advertisements online are not clearly prohibited by the Media Development Authority or the Broadcasting Act. In contrast, the state operator (the Singapore Totalisator Board) which upholds Responsible Gambling policies is heavily restricted by internal policies and governmental restrictions from seeking to expand its customer base by way of advertising and product diversification.

42.7 Conclusion

Legalised sporting betting forms an important source of revenue for the sports industry in Singapore. Indeed, the S-League is largely funded by the SCORE! betting business. Revenue derived from legalised sports betting can, in turn, be distributed and channelled to sports development, raising sporting standards and increasing the level of public awareness of and interest in the beneficiary sports. Legalised sports betting revenue can also be used to fund community projects such as the building of arts/entertainment centres and stadia, especially where private funding and enterprise is wanting.

While the anti-gambling movement may see sports betting as being no different from other forms of gambling and as equally detrimental to the moral fibre of society, the regulation of sports betting does go a long way in minimising any negative social impact it may have on its participants, while at the same time, serve to benefit the community in ways that would justify its continued endorsement by the Government.

Chapter 43
Slovak Republic

Jozef Čorba

Contents

43.1 Introduction

An article about sport betting, I guess, may be started with the idea that betting is an entertaining, thrilling, and addictive way of spending free time, and for someone, it may even be a money earning activity.[1]

Sport betting in the Slovak Republic comes out of similar traditions as those in the Czech Republic. Until 1993, the Slovak Republic passed the same legislative and political developments as the Czech Republic within one state. During the period after World War II until 1989, the legislative development of Czechoslovakia was

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[1] Csach 2008a.

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influenced by a directive economy governing system characterized by strong state intervention into the economy and suppression of private property as well as entrepreneurship. This system was based on directive management of national undertakings, strict planning, and centrally determined prices.[2]

The regulation of betting and gambling, including sport betting, was already given in the Civil Code of 1950, as well as in later Civil Code No. 40/1964 Coll., which is still applicable in the Czech Republic as well as in the Slovak Republic. Of course some corrections have been made as a result of social-political changes in 1989, as well as other amendments which have been passed separately, after Czechoslovakia split up, in each of the succession states. In regard to civil law, the regulation of betting and gambling was not so extensive. The legislature not only approved betting as a legal activity, but also provided that winnings from betting and gambling, as well as debts from loans knowingly provided into betting and gambling were not enforceable, so they were natural obligations. This did not apply in the case of winning undertakings managed by the state or officially permitted. In general, this legal state corresponded to the legal state provided by the Civil Code presently applicable in the Slovak Republic.

The public-law regulations contained more detailed regulation in the regulations of administrative law. Originally, such regulation was the Ministry of Finance Decree No. 167/1959 O. p., issuing regulations for providing and organizing lotteries and other similar games, which applied to all of Czechoslovakia. After federalization of socialistic Czechoslovakia, both federal republics prepared their own legislation for betting and gambling and the Slovak National Council adopted the Act No. 63/1973 Coll. on public collections and lotteries and other similar games. In accordance with this act, only socialistic organizations specially established for that purpose could be granted a permit for betting games where the results of sport events were forecasted, unless the organizer was directly the state itself (Ministry of Finance or State Organization authorized by the Ministry of Finance). Such organization in Czechoslovakia was Sazka, an undertaking for organizing sport betting. There was no other entity that was granted a permit to provide betting games in Czechoslovakia.

Sazka also provided a betting game where gamblers could forecast results of some particular sport events. The sport events were chosen in advance so that gamblers had no choice to predict other sport events and had to place a bet on all prescribed events. The amount of winnings for each participant depended on the number of correctly predicted results of the given package of sport events, the ratio between the number of winners and total amount of stakes (bets), and the proportion of winnings determined in advance.

The state monopol for providing betting games in Czechoslovakia terminated in 1989 when market principles were introduced into this field. Based on the Slovak National Council Act No. 194/1990 Coll. on lotteries and other similar games, private entities, within their entrepreneurial activities could provide the betting

[2] Husár 2007, Section 51.

games. So the plurality of providers having the form of business companies was created.

The last significant amendment to legal regulations concerning sport betting, already within the independent Slovak Republic, came in 2005 when the Act No. 17102005 Coll. on gambling was adopted. This legislative amendment should be aimed at, in particular, simplification of the administrative process for granting the permits to provide gambling and in improving predictability of this process as regards particular applicants for license. As the Slovak Republic has been a regular member of the European Union since May 1, 2004, the Act should fully respect the provisions of Article 16 of the Treaty establishing European Community (hereinafter referred to as TEC) regarding freedom of providing services, case law of the European Court of Justice of the European Communities (hereinafter referred to as ECJ), and Community goals, such as consumer protection, crime prevention, or public morality protection.

Presently the field of gambling has been solidly developed in the Slovak Republic. In this entrepreneurial field there is a sufficient competitive environment and there are 19,000 employees. In 2002, the annual stakes into lotteries and other similar games represented a 4.1% share in the total annual expenses of inhabitants in consumption.[3]

It is not only private entities who operate in the field of providing gambling in the Slovak market. Governmental Joint-Stock Company TIPOS, národnálotériováspoločnosť, a. s. (National Lottery Company), the only shareholder of which is the Slovak Republic represented by the Ministry of Finance of the Slovak Republic, operates here as well. TIPOS is obliged not only to provide gambling constituting the state lottery (numerical lotteries, special Bingo and gambling provided through internet), but also may provide other types of gambling and compete with private operators.

Beside TIPOS, Športka, a. s. was established after Czechoslovakia division as well which became the successor of common Czechoslovak State Lottery Company—Sazka. Sazka, after division of common state, divided into two succession companies (one Czech and the other Slovak), while the Slovak successor was Športka, a. s., which acquired a part of Sazka's business assets. These business assets also contained the intangible property including the know-how in providing particular gambling originally provided by Sazka.

Presently, the Slovak Republic is thrilled by the big court dispute wherein the Highest Court of the Slovak Republic,[4] as the court of appeal, upheld a judgement of the Regional Court of Bratislava. In this case, TIPOS was, beside other, imposed an obligation to pay a big sum of money as a compensation of loss, release of unjustified enrichment, and provision of appropriate satisfaction in money. The legal basis for the action was that TIPOS, in providing gambling

[3] General provisions of reasoning report to the Act No. 171/2005 Coll. on gambling.

[4] Highest Court of the Slovak Republic Judgement, Case No. 3 Obo 141/2007 of 7th August 2008.

including state lotteries, unlawfully used know-how and trademarks that belonged to Športka, a.s. as a result of legal succession after Sazka. According to the court's opinion, the above know-how in this case consisted of special knowledge and experience enabling organizing and providing numeral lotteries and betting games, such know-how comprises the system of the numeral lotteries and so it constitutes a basic and necessary condition for providing them. The state budget of the Slovak Republic will suffer the most by this judgement because the only shareholder of Tipos is the ministry.

43.2 Legal Regulation of Sport Betting in the Slovak Republic

Gambling is not fully prohibited in the Slovak Republic. Gambling may only be provided within the relevant state authority's permit, under more strict conditions than those that are required for other entrepreneurial activities, and under special supervision. So in this field, the intervention of public authority into private relations is higher. The reasons for public-law interventions into private relations are values such as public health, environment protection, safeguarding of state defense and security, or protection of participants in contractual relationships who are not sufficiently able to protect their own rights.[5] Public authority's intervention into gambling is justified, in particular, by the need of gamblers for protection, crime prevention, public morality protection, restriction of demand for gambling, and financing public interest activities.[6]

Sport betting is regulated by the above Act No. 171/2005 Coll. on gambling as amended. In this Act gambling is defined as, games where gambler may win some money, things, or rights after paying a stake, if he meets conditions specified in advance by gambling plan. A result of gambling depends on, exclusively or mainly, a random or beforehand unknown result of some circumstance or event. The result of a circumstance or an event determining the result of gambling must not be known to anyone in advance, must not be influencable by anyone, and must not be contrary to the rules of a game. The fact that the result of a game may not be influenced by anyone does not, of course, apply absolutely. For instance, in gambling where the result depends on the result of sport event, the result of such event is influenced by sportsmen who partipate in such sport event and depends on their performance. Such gambling is in particular betting games, one of the types of gambling within the meaning of the Act.

The uncertainty and randomness of the result of a sport event must be different from the uncertainty and randomness of a prize of a playing person. According to the Highest Court of the Slovak Republic Judgement,[7] the element of uncertainty

[5] Husár 2008, p. 107.

[6] Kramář 2006, p. 102.

and randomness remains even if rules of certain betting games allow the betting person to reduce the risk of his loss (loss of stake into the play) to the extent that such risk may be totally excluded. Operators of gambling are responsible for setting the gaming plan of particular games so that the sum of accepted stakes exceeds the sum of paid prizes. If the rules of odds betting game allow the exclusion of the risk by placing more betslips, combination of forecasted sport events or combination of the amount of stake per each betslip, while the uncertainty of the result of forecasted sport events still remains, then such betslips (representing the agreement of a bet) may not be invalid.

In the case ruled on by the Highest Court of the Slovak Republic, plaintiff, a betting company, accepted bets for forecasting sport events—promotion of football teams from WC Stage I to WC Stage II, in 1994. Odds, determining the winning rate depending on the amount of stake, were given for the possibility of promotion of particular teams so that, under certain circumstances, a betting person was guaranteed winning a prize. Defendants mathematically counted all the possible results and placed 54 betslips in one week at the same time, where they combined betting events—promotion of particular football teams from WC Stage I to WC Stage II—while placing different stakes. Some of the betslips were winning and the defendants claimed a prize of 385,714 Sk. Plaintiff attempted to rule such betslips or particular agreements of betting to be invalid, but as the rules of the betting game allowed a reduction of the risk of loss by placing more betslips containing different combinations of possible results of forecasted events, the court confirmed the validity of the betslips (agreements). After all, winning odds, as well as the rules of forecasted events, were given by the plaintiff itself, so it shall be responsible for them.

The Act specificies three types of betting games:

(a) *Totalizator*—the amount of the prize depends on the ratio between the amount of winners and total amount of stakes, and on a beforehand determined proportion of prizes;
(b) *odds betting*—the amount of the prize depends on the winning rate and the amount of stake, while the winning rate means the odds under which the bet was accepted;
(c) *racing bets*—winning depends on correct forecasting of order in performance tests of horses of steeplechase breeds and the amount of the prize depends on the ratio between the amount of winners and total amount of stakes, and on a beforehand determined proportion of prizes, and on a winning rate and the amount of stake. Somehow this is the combination of totalizator and odds betting.

[7] Highest Court of the Slovak Republic Judgement, Case No. 2 Cd 87/96 of 21st October 1996, publicised under No. 112/1998.

The only entity that was awarded a license for providing betting games by the Ministry of Finance of the Slovak Republic (hereinafter referred to as the "Ministry") may provide the betting games.

43.3 License and European Community Law

Licenses for providing betting games may only be granted to a Joint-stock Company or Limited Liability Company having their registered office in the territory of the Slovak Republic. So, the license may not be granted to any natural person or to any foreign legal person. In regard to a domestic legal person, only persons with no shareholder having its registered office or his residence outside the Member States, or OECD member states may apply for the license. In my opinion, such provisions may be considered as contrary to the provisions of the TEC on freedom to provide services. ECJ in its judgements in cases *Schindler*,[8] *Läära*,[9] *Zenatti*[10] and *Gambelli*[11] ruled that Member States may adopt certain restrictions related to providing gambling, and may even fully prohibit such activity, but such measures may not discriminate.

Agreeing with the ECJ opinion that restrictive measures must be applied without any difference, they must apply to all operators of different Member States in the same manner and under the same conditions,[12] and we conclude that the Slovak Act on gambling does not respect the above ECJ case-law. The restriction of the possibility to apply for a license for providing gambling only to capital companies having their registered office in the territory of the Slovak Republic seems to be discriminating and violating the freedom to provide services and freedom of establishment. If some Member State regulates the entrepreneurship in the field of gambling for the reasons above and provide for more strict conditions for entrepreneurship in this field than in other fields, the requirement of a registered office in a particular Member State is not appropriate to achieve goals that more strict regulation should follow.

The practice in the Slovak Republic is that if any entity, having the license for providing gambling in other Member State, would like to form its subsidiary in Slovakia (in accordance with Slovak regulations "form an undertaking of a foreign person in Slovakia") and register it into a Slovak companies register, with the scope of activity of providing gambling, such entity must be awarded a license for

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[8] ECJ Judgement in the case of *Her Majesty's Customs and Excise vs. Gerhardt Schindler and Jörg Schindler* Case No. C—275/92.

[9] ECJ Judgement in the case of *Markku Juhani Läära, Costwold Microsystems Ltd., Oy Transatlantic Software Ltd. and Kihlakunnansyttäjä, Suomen Valtio* Case No. C—124/97.

[10] ECJ Judgement in the case of *Questore di Verona vs. Diego Zenatti*, Case No. C—67/98.

[11] ECJ Judgement in the case of *Tribunale di Ascoli Piceno vs. Piergiorgio Gambelli* Case No. C—243/01.

[12] ECJ Judgement in the case of *Gambelli,* para 70.

that activity by the Ministry of Finance of the Slovak Republic. Foreign entities may not be granted such a license. It may be granted only to a company having its registered office in the territory of the Slovak Republic. Slovak law comes out of the theory of registered office, while in accordance with Section 2(3) of the Commercial Code, the registered office of a legal person is the address registered in the companies register or trade register or any other register provided by law. The wording of the Act results in a situation where a person not having its registered office in the territory of the Slovak Republic may not apply for a license for providing gambling in the Slovak Republic even if other requirements—capital, personnel, moral or publication—are met. A foreign entity willing to provide gambling in the territory of the Slovak Republic must (in accordance with Slovak law) form a joint-stock company or limited liability company having their registered office in the territory of the Slovak Republic, through which it will perform such activity, or it may move its registered office to the territory of the Slovak Republic.

43.4 Other Conditions for Awarding a License

Ministry shall grant the license for providing gambling to any entity that submits a complete application for granting a license and meets all the conditions for granting the license required by law. This means that upon fulfillment of conditions required by law each applicant is entitled to be awarded a license.

Conditions that must be met by the applicant for a license for providing gambling can be divided into the following groups:

1. *Legal criteria*. Applicants for a license for providing gambling must have a legal form of a limited liability company or joint-stock company. If the applicant is a joint-stock company, all shares must be issued as registered uncertified shares. Shareholders of the applicant must not be subject to bankruptcy, or rejected motion for bankruptcy because of insufficient property. The applicant must not be connected, whether in property or in person, with sport organizations or clubs in the territory of the Slovak Republic whose results will be subject to betting.
2. *Financial criteria*. Registered capital of the applicant must be at least 10,000,000 Sk (331,939.19 €).[13] The applicant, different from other companies, must have paid up its registered capital exclusively by monetary contributions,

[13] This Article was made when the currency in the Slovak Republic was Slovak Crown (Sk). In particular legal regulations for gambling the amounts were stated in the Slovak Crowns. Since 1st January 2009 euro has become the valid currency in the Slovak Republic. If the amounts in legal regulations were stated in Slovak Crowns, in brackets we state the equivalent amount in euro according to the conversion rate 1 euro = 30,1260 Sk in accordance with the Act No. 659/2007 Coll. on euro currency introduction in the Slovak Republic and on amendment of some acts.

and the registered capital must be fully paid up on the date of submitting the application for license at the latest (this date may precede submitting the application to register the company into the companies register).[14] The applicant must, on the special bank account, deposit a financial guarantee in the amount of 750,000 € pledged in favor of the Ministry. The applicant must be able to show the origin of the registered capital as well as a financial guarantee. Financial guarantees must be paid from the applicant's own resources and must not be decreased under the specified amount during validity of the license.

3. *Personal criteria*. Statutory bodies or members of the statutory bodies of the applicant must be irreproachable.[15] The applicant must show that it has a sufficient number of employees to provide gambling and that such employees are qualified to pursue the activities of providing gambling.
4. *Material and other criteria*. The applicant must also show that it has material-technical means to provide gambling, must submit a proposal of its business-financial plan, as well as terms and conditions of betting games to be assessed. Each town or municipality where an applicant's betting offices are to be placed must give an approval for placing the betting office. In the case of providing racing bets the Ministry of Land of the Slovak Republic must give an approval as well.

The applicant for a license for providing gambling is obliged to pay an administrative fee for granting the license in the amount of 10,000 Sk (331.94 €), but in case of an application for a license for providing odds betting (this is the case for most sport betting games), the fee that must be paid is 100,000 Sk (3,319.39 €).

If the applicant meets all the conditions for granting the license, the Ministry will grant the license within 15 working days from submission of the complete application at the latest. In the license, the Ministry will also state the commencement date for providing gambling. The license for providing gambling also represents the authorization for entrepreneurship in this field and an entity having such a license may apply for registration of the licensed activity as the scope of activity into the companies register.

The license is granted for five years and may not be transferred to another person, nor as a part of the undertaking in transfer of undertaking or its part. The license does not pass to the successor in the case of a merger or division of the gambling provider.

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[14] According to Slovak law, Companies are created upon registration in the companies register. Formed companies are able to, before registration in the companies register, perform legal acts directed to their creation.

[15] An irreproachable person is a person who was not effectively sentenced for an economic offense, an offense against the property, an offense against public order, and for some of other intentional offenses. Foreign persons not having residence in the Slovak Republic prove their irreproachability by a relevant document issued in the state of which they are nationals and in the state where they lived consecutively at least three months within the last three years.

Providers of sport odds betting are obliged to pay a levy in the amount of 4.5% of game funds into the state budget and a levy in the amount of 0.5% of game funds into the municipality budget, it is not clear the budget of which municipality is concerned. Game funds in odds betting mean the sum of stakes. The Act does not specify if the levy receiver is the municipality where the provider has its registered office, or the municipality where the provider has its betting office. If betting offices would be placed in more municipalities, a question would arise if such municipalities should share in the 0.5% levy. The reasoning report for the Act on gambling does not explain this situation.

Revenues from the above levies secure the performance of generally profitable services such as, in particular, health care provision, social care and help provision and humanitarian care, creation, development, protection and reproduction of cultural values, promotion of art and cultural activities, education, development of sports, creation and protection of environment and public health. In accordance with former Slovak National Council Act No. 194/1990 Coll. on lotteries and other similar games as amended, at least 50% of revenues from such levies should be used for physical training and sport purposes. This provision is not in the applicable Act, although the government intended to insert the provision into the new legal regulation.[16]

Providers of betting games must not make agreements with domestic legal persons, domestic natural persons, and foreign persons, to have exclusive rights to forecast certain competitions, races, or matches.

Prizes in lotteries and other similar games duly provided under valid licenses are exempted from income tax.

43.5 Supervision Over the Providing Betting Games

Performance of supervision over fulfilling conditions for providing gambling (including betting games) is vested to the authorities whose primary task it is to administer taxes and levies in the Slovak Republic. As a result, there are no special authorities created to perform supervision in this field.

The essential supervision is performed by the tax agencies. They perform supervision over complying with the Act on gambling, other generally binding regulations, and conditions specified in the license for providing gambling. If they find that a provider does not comply with some of its obligations directly arising from the license or regulations, tax agencies shall decide in the first instance on imposing a sanction. Tax agencies also administer the levies paid from the game funds into the state budget.

[16] See legislative intent in proposal of the Act on sport of 15th March 2007 on www.rokovania.sk.

Tax agencies are subordinated to the Tax Directory of the Slovak Republic, which maintains the central register of gambling providers and, in the second instance, decides on sanctions imposed by tax agencies.

The highest supervisory body in this field is the Ministry of Finance of the Slovak Republic, which assesses the applications for granting the licenses for providing gambling and decides on granting the licenses and subsequently supervises compliance with the Act on gambling, and other generally binding regulations on the part of Tax Directorate of the Slovak Republic and particular tax agencies. The Ministry also methodically gives directions to these supervisory bodies in performing their activities.

Authorities performing supervision may impose to supervised entities (not only providers, but also some of their employees or entities providing gambling without licenses) various types of sanctions which may be imposed cumulatively unless their nature excludes this as a possibility. The sanctions are as follows:

(a) *measure to remove and repair found insufficiencies*—as the less strict sanction
(b) *producing special statements, notices and reports*,
(c) *imposing a duty to terminate non-permitted activity*,
(d) *suspension* of providing gambling—this sanction is, in particular, imposed when violating the conditions specified in the license,
(e) *fine* up to the amount of 3,000,000 Sk (99,581.75 €); the upper limit of the fine is, in particular, imposed on an entity providing gambling without the license depending on the extent of the non-permitted activity,
(f) *penal interest*, if the provider is delayed in paying the above levies, while the amount of such penal interest is 0.1% of the owing sum per one day of delay,
(g) suggestion for forfeiture of individual license addressed to the Ministry or municipality; the suggestion itself is not a sanction, but subsequent *license forfeiture* based on the Ministry decision,
(h) imposing a duty *to release financial benefit to state budget*, in case of a benefit achieved by the provider, his family member, or a controlled entity, as a result of not complying with the gambling regulations.

43.6 Civil Law Aspects

In providing gambling, civil law relations arise between the provider and gambler—so the person who based the decision to gamble on some stake takes part in gambling.

If the provider holds the license for providing relevant gambling, a civil law relation arises between him and the gambler (in betting games may be called a betting man), where the provider is entitled to accept some stake, and is then obliged to pay a prize to the betting man provided by the Game Plan if the circumstance specified in the Game Plan occurs. In sport betting games such circumstance is the correct forecasting of sport event results by a betting man.

A betting man is entitled to, after fulfilling the conditions provided by the Game Plan, a prize enforceable by a civil action. Claims from credits provided knowingly into such bets or games that are expressively provided by the Act No. 171/2005 Coll. on gambling are enforceable by a civil action as well.

An agreement made between the betting man and the provider is, in accordance with Section 52 (1) of the Civil Code, a consumer agreement. Agreements or Game Plans containing the rules of the game having the similar nature as, the General Commercial (Sale) Terms & Conditions, may not contain unacceptable conditions.

If any entity provides, without a license, a game considered by the Act as gambling, the civil law relation between the provider and betting man arises as well. If the betting man is entitled to a prize from such game, the claim is enforceable by a civil action. Claims from such games that are not gambling under the Act No. 171/2005 Coll., regardless of whether or not such games are provided by the licensed provider, are unenforceable. The same applies for classification of such agreement as a consumer agreement, while in accordance with Section 52 (3) of the Slovak Commercial Code, the supplier, within the meaning of consumer agreement, is construed as the person acting within the scope of its business activity or other entrepreneurial activity, irregardless of whether or not such activity was permitted and registered in the company's register.[17]

43.7 Sport Regulation

Under the sport regulation or sport rules we understand, together with other authors, the rules issued by international as well as national bodies of voluntary and training sport organizations.[18] Sport regulation within the biggest sport unites operating in the Slovak Republic mostly does not deal expressively with sport betting. There are no explicit prohibitions for sportspersons to bet on sport event results. All Disciplinary Orders issued by particular Sport Unites consider it as a disciplinary offense, acting contrary to the moral rules or fair-play. It may be concluded that if particular sportspersons would place bets on sport event results, in particular if they would participate in such event, they would commit a disciplinary offense, not only under national sport rules but also under international sport rules, and a disciplinary sanction could apply against them.

43.8 Conclusion

Gambling, where winning depends on forecasting sport event results, may be provided in the Slovak Republic. There is a plurality of entities providing such services, while there are private law entities providing such games within the

[17] Same Csach 2008b, p. 25.

[18] Králík 2001, p. 9, similarly Prusák 1984.

scope of activity. The legal regulation of providing betting games is relatively new in the Slovak Republic, and is more favorable to applicants for a license for providing gambling than the previous regulations. Despite that I afford to say that it is not perfect because contrary to TEC and ECJ case law, it contains provisions that discriminatorily restrain foreign entrepreneurs from providing gambling in the Slovak Republic.

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Chapter 44
Operation, Problems and the Impact of Chance Games on the Development of Sport in Slovenia

Tone Jagodic

Contents

In Slovenia, chance games represent an important source of funding needed to support a substantial part of Slovenian society and sport as a part of society. During the years after the recognition of Slovenia (1991), a special system was adopted so as to secure the proceeds of the National Lottery for the state's budget earmarked to support organizations of the disabled, humanitarian and sports organizations.

The funding is regulated so that the organizers of the games have to pay a concession, a part of which belongs to the beneficiaries. The distribution of funds is the responsibility of two public foundations that the state founded for that very

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purpose: the Foundation for financing the organization for the disabled and humanitarian organizations (hereinafter, the FIHO), and the Foundation for financing of Sports Organisations (hereinafter, the FŠO). The particularity of these foundations is the structure of the monitoring bodies composed by the representatives of the beneficiaries of these funds, i.e., the representatives of the public sector. This seems to be an interesting solution that proved to be quite successful in practice and that may be the reason for practical and rational distribution of funds to particular segments of society. In the field of sport, efficient operation of the FŠO made a substantial contribution for the excellent results obtained by the Slovenian athletes.

44.1 Legal Framework

In Slovenia, the system of organizing gaming is regulated by the 1995 Gaming Act, and on the basis of this Act, several regulations were issued. Pursuant to the regulations of the Act, the running of classical games can be organized permanently by a joint-stock company, where the share of an individual shareholder may not exceed 20% of the basic capital, and which is seated in the Republic of Slovenia with its headquarters in Slovenia, that has no ownership investment turned over to a third party, has at least a two member Board of Directors and a Supervisory Board (with one member appointed by the Government of the Republic of Slovenia), fulfils the prescribed technical conditions and the conditions related to premises and adequate stuffing, whose portfolio guarantees payment of prizes as well as the organization of games representing its main activity (with over 80% of its revenues generated from the activity of organizing games), and acquires the concession for permanent organization of every particular classical change game allocated by the Government of the Republic of Slovenia and that pays a concession fee for every allocated concession.

Given that the organization of chance games is the exclusive right of the state, the organization of the games is subject to obtaining a license or a concession. The Government has the responsibility for the decision as to whom to allocate the concession and takes into account the criteria defined by the Gaming Act. The chance games may only be carried out by gaming devices complying with the technical requirements for gaming devices and in conformity with the assessment procedure. There are two types of games: classical games and special chance games.

Classical chance games are: numerical lotteries, lotto, sports pools, sports bets, lotteries with momentarily known prizes and other similar games. They can be organized by two joint-stock companies at the most, seated in the Republic of Slovenia. For a particular classical game, only one concession can be allocated by the Government of the Republic of Slovenia. The organizer has to pay a concession fee. Keeping of regular accounts and payment of concession fees are supervised by the state tax office. The value of the players' payments obtained from the selling of lottery tickets that are reduced by the paid winnings and which are recorded monthly, serves as a base for the keeping of regular accounts and

payment of a concession fee. From that base amount, the organizer is bound to settle up accounts and pay the concession fee in the percentage defined by the Government's decision about the allocation of a concession within five working days following the end of each month for the previous month. For the financing of the operation of the organizations for the disabled and humanitarian organizations, 80% of the funds that are obtained from the payment of concession fees for permanent organization of numerical lotteries, from lotteries with momentarily known prizes and from lotto are used, whereas 20% are used for the operation of sports organizations. For the operation of sports organizations, 80% of the funds from the concession fees for permanent organization of sports bets, other sports bets and quiz lottery are used, and 20% of these funds are used for financing of the operation of the organizations for the disabled and humanitarian organizations.

Special chance games are the games played by the players against a casino or against other players on gaming-tables with dice, bowls, cards, on gaming boards or gaming slots, as well as bets and other similar games. Concession is allocated for ten years at the most and can be extended. Concessions are non-transferable to other persons. For each awarded concession, a concessionaire has to pay a concession fee, of which 2.2% belongs to both foundations. From the remaining part, 50% represents the revenue of the budget of the Republic of Slovenia and is earmarked for the development and promotion of tourism, whereas 50% is earmarked for local communities within a particular tourist territory and is used for the regulation of populace-friendly environment and for tourist infrastructure.

Casino games: A casino concessionaire's shareholders can be the state, local communities, legal entities whose 100% owner or sole founder is the state, and commercial companies organized as joint-stock companies and complying with the conditions defined by the Gaming Act. Before awarding a concession, the Government has to get the approval of the local populace in the territory where the games will be organized. There is no restriction on the number of slots in a casino. The biggest casino in Slovenia is the one in Nova Gorica, which ranks among the biggest casinos in Europe and has around 1,200 slot machines.

Gaming halls (arcades): The majority of the Gaming Act regulations also govern gaming halls. A gaming hall should have a minimum of 50 and a maximum of 200 slot machines. Organization of live games is prohibited. A concessionaire for a gaming hall settles up accounts and pays a concession fee levied at a rate of 20% of the tax base.

In the territory of the Republic of Slovenia, permanent classical games can only be organized by two organizers at the most, whereas the Government of the Republic of Slovenia can award 15 concessions for casinos and 45 concessions for gaming halls for special chance games at the most. On 31 December 2002, the Government of the Republic of Slovenia awarded 13 concessions for special chance games, 36 concessions for gaming halls and two concessions for classical chance games. Concessions for organizing classical chance games were awarded to two joint-stock companies, the Loterija Slovenija (The Slovenian Lottery) and the Športna loterija (The Sports Lottery).

The Ministry of Finance authorized the Office for Gaming Supervision to supervise the organization of particular classical chance games and to approve organizers' internal regulations applicable to the process of the organization of chance games. In addition, certain stages of the process are supervised also by authorized outsourced experts, such as, for example, The Slovenian Institute for Quality and Metrics, for information systems.

The value of the received payments from participation costs for a particular type of game, reduced by the prizes for a particular game and the revenue from the games the players play against each other, serves as the base of the concession fee statement of account. For each type of special chance game, the base for the concession fee statement of account is established monthly and separately. Access and tips are not included in the base for the concession fee statement of account. The concession fee for gaming slots is settled up and paid according to a progressive scale, i.e., for the so called 'live games' it represents 5%. Additionally, a concessionaire of special chance games also pays an 18% tax of the base of the concession fee statement of account.

A concessionaire has to have its own supervisory information system for a gaming device (hereinafter, on-line supervision), which is connected to the information system of its relevant Supervisory body to whom it guarantees a direct on-line supervision. The Supervisory body also exerts control in a casino itself where it can compare the on the spot data capture with the data acquired by the on-line supervision. Special chance games may only be organized in casinos and in gaming halls that allow access to persons only 18 years of age or older. Managers of casinos, croupiers, games leaders, people performing internal control and chief and assistant cashiers have to obtain a license for working in gaming industry.

Pursuant to the Gaming Act, *organization of chance games on-line or* via *other telecommunication technologies* is permitted only to those companies that acquire a concession for classical chance games or a concession for the organization of special chance games in casinos. In this way, the legislator barred the concessionaires for gaming halls.

Such a regulation limits the number of the subjects who could be involved in this type of activity. The advantage of this regulation lies also in the fact that we are dealing with the companies that have or will be having land-based experiences in the field of gaming activities and adequate staffing and are organizationally thoroughly qualified. Players have greater confidence in such companies, besides, the on-line offers provide for a wider range of services to concessionaires for casinos. We are dealing with a concept "concession for casino + Internet" that is safeguarding players against fraud and criminal activity. Namely, in the case of eventual irregularities, a concessionaire can lose a concession for a casino where investments are considerably higher than those for on-line gaming. Besides, it should be mentioned that the companies that will get the permission for on-line gaming, will have to be included in the on-line network within which on-line chance games are organized and within which there is the on-line system of the supervisory body to which they are bound to authorize the access for data capture

for on-line supervision. On 31 December 2007, the responsible Ministry has not awarded any concession for the organization of on-line gaming.

Of course, such a regulation does not make it impossible for new companies to acquire a concession or license for on-line gaming. Considering relatively high levies, there has been no great demand for the concession since the "black market" or illegal on-line organizing of chance game is much more profitable. It is also quite significant that two concessions for casinos are still free.

44.2 Other Legislation

On 1 November 2008, a new Penal Code came in force that criminalizes, among other novelties, in Article 212, non-authorized organization of chance games, either on-line or via other telecommunication technologies, banning it as fraught. Such criminal conduct, i.e., "organisation of profiteering and prohibited chance games" refers to anyone who, in order to acquire illegal pecuniary advantage, for himself or any other party, organizes, participates in or helps organizing or carrying out profiteering for which definite amounts are being paid to organizers or other participants who had been included in the game or activity and are expecting to earn particular winnings money from those participants that are expected to be included into such a game or activity after them. The threatened punishment is up to three years of prison. In the same way, penalty is inflicted upon anyone who, in order to acquire, for himself or for any other party, illegal pecuniary advantage, illegally organizes, participates in, or helps organizing classical or special chance games, on-line or other telecommunication gaming, for which no concession or license has been granted by the relevant body. If anyone has acquired through any of the aforementioned activity, for himself or for any other party, substantial pecuniary advantage, or has caused great pecuniary disadvantage, the offender is sentenced to prison from one to eight years that is the first constitutive penal regulation of the gaming system infringement so far that has been based on the experiences with illegal organizing of chance games, especially the on-line ones.

Besides special regulations governing the area of chance games, there are other legislative provisions that apply to the organizer of the games and which otherwise apply to joint-stock companies and other commercial entities in our country (Companies Act, Corporate Income Tax Act, Value Added Tax Act, Personal Income Tax Act, Consumer Protection Act…).

44.3 Revenues from Chance Games

According to the data on gross revenues from classical and special chance games it is evident that revenues are increasing. During the last five years, along with the revenues, concession contributions have increased accordingly by 65%.

	2003	2004	2005	2006	2007
Total gross revenue (€Million)	282.2	336.8	385.5	416.7	433.1
Index	106	119	114	108	104
Total contributions (€Million)	90.5	110.6	129.9	141.6	148.0
Index	110	122	117	109	104
Concession fees (€Million)	51.0	60.9	70.7	76.7	80.9
Tax on gaming (€Million)	39.5	49.7	59.2	64.9	67.1

The biggest share is contributed by casinos, followed by slot machines and both lotteries. From the table of gross revenue from all chance games below (in EUR million) it is evident that total revenue from casinos amounts to more than half the amount although the share has been decreasing in the recent years.

Year	Both lotteries	Gaming halls	Casinos	Total
2006	54.9	105.3	256.6	416.8
2007	60.5	128.3	243.8	432.6

From the table showing the awarding of contributions in 2007 (in EUR million), it is evident that the predominant share of these funds goes to the state and local communities whereas the smallest part is earmarked for the FŠO (EUR 8.6 million) responsible for the financing of sports organizations.

Type of contribution	Budget	Local communities	FIHO/FŠO	2007 Jan–Dec
Concession fee	27.5	27.5	17.3/8.6	80.9
Tax on chance games	67.1	–	–/–	67.1
Total	94.6	27.5	17.3/8.6	148.0

44.4 Distribution of the Funds from the Concessions for Chance Games and Financing of Sport from this Source

In Slovenia, a special system has been introduced for the distribution of the funds raised from the concessions for chance games. The intention of the legislator was to have the funds distributed by the institutions composed by the representatives of the beneficiaries of the funds, and for this purpose, pursuant to the Gaming Act; both foundations (FIHO and FŠO) were founded. The Gaming Act also defines the ratio of the distribution of the funds between the organizations for the disabled, humanitarian organizations and sports organizations.

Therefore, the FŠO is an organization that has been distributing the funds from acquired concessions for chance games to Slovenian sport since 1988. The Council of the Foundation is composed of 17 members, officials of sports organizations and sports experts, who decide upon all significant matters of the Foundation. The funds are earmarked for the needs of top sports (40%), sport for all (7%), construction of sports infrastructure (40%), development and research (8%), whereas a smaller part goes for publishing in sport and other programs. Every year, the Foundation for financing sports organizations co-finances on average almost 600 various programs to over 250 sports organizations on average, thus covering about 30% of the costs of these programs.

Compared to the funds that are earmarked for sport by the state from the state budget, the funds of the Foundation represent a substantial share. Thus, for example, in 2005, the funds of the state budget (including the funds from the EU funds) amounted to EUR 13.7 Million (in 2006 even EUR 14.5 Million), whereas the FŠO funding amounted to EUR 6.6 Million (in 2005) or EUR 8.6 Million (in 2006), which means that the share from the chance games is getting more and more important and is still increasing. The needs of sports organizations for the FŠO funding are getting bigger and bigger every year, since in 2005 and in 2006, in spite of the economic growth and increase of expenditures from public finances for sport in the past, there was clear evidence of the decrease of the revenues of sports clubs and federations compared to the GDP. In 2006, sports clubs, in relation to the GDP, created 18.5% less revenues compared to those in 1999. Consequently, the demand for the FŠO funding fivefold surpasses public official calls for applications for the funds.

44.5 The Entrant of Foreign Organizers into the Slovenian Market: Illegal Organization of Chance Games

In the case of Slovenia, where gaming is strictly under consistent regulatory auspices, (for example, the number of the organizers of chance games, the number of the games and the number of the type of games that may be organized in the country are all limited) and the organization of gaming is supervised (for example, supervision of the organization of chance games, tax control, safeguarding the customers) gaming can be considered as a regulated, safe activity. However, that is only true for those organizers who have got a concession for the organization of games within the country and who consistently respect the legislation in force. Both lotteries with concessions have been organizing games for many years responsibly and have been ensuring the funds for the earmarked purposes defined by legislation.

In 2006, however, there was a wide penetration of foreign organizers of chance games targeting the Slovenian market without permission, i.e., without a concession for chance games, and who are offering their services to Slovenian players

on-line in the Slovenian language and are advertising their offers aggressively (in various Slovenian media, hotel industry, other places of mass gathering). Private companies registered in the so-called "tax haven" countries, (for example Gibraltar) are aggressively offering gaming in the Slovenian language which undoubtedly means illegal entrant into the Slovenian market. The huge scope of the services offered by foreign organizers of chance games is not limited to sport bets but also includes:

- Betting products of all sorts
- Playing classical games and
- Playing special chance games.

The situation was also generously supported by Slovenian advertising space (for example the Bwin.com advertising appears on TV media, printed media, on the Slovenian websites, their advertisement appears in cinemas, in pubs, etc.). It is disputable whether we can still talk about responsible organization of chance games in the case of the gaming whose purpose is above all satisfying the needs of the population for gaming and obtaining the highest possible earnings (which is characteristic of the organizers registered in the so-called "tax haven" countries).

44.5.1 The Implications of the Entrant of Foreign Organizers into the Market

The organizers who register in the countries, known as "tax havens," are paying a low percentage of levies there and can consequently reserve a high share for winnings payments (for example, Bwin.com's share for winnings payments amounts to 92% of the received payments). The information was the result of the European state lotteries and Toto association investigation, according to which, state lotteries or lotteries with state concessions respectively, earmark from their revenues 45% for winnings payments and 34% for the projects concerned with specific public interest, whereas private lottery companies earmark from their revenues 91% for winnings payments and only 3% for the projects concerned with specific public interest. As a rule, private companies sponsor only important clubs (particularly football clubs), where only the financial effect of such sponsoring is taken into account whereas they do not sponsor sport for all activities. There is also no data revealing that they would participate part of their funds for the financing of, for example, organizations for the disabled or humanitarian organizations, for culture or some other projects concerned with specific public interest, for which lottery funds are usually earmarked by the EU countries.

It is the extremely high-winnings payments funds that are problematic. According to some researches (among which, for example, the one made by the Norwegian Health Institute), high-winnings payments entail the risk of gaming addiction of the players. Winning payments of over 90% of received payments

from sports betting and other classical chance games already place these games on the same level as slot machines! There are many who found out that allowing excess gaming in the country only generates social problems caused by gaming addiction. However, the majority of customers act responsively and fix their monthly gaming stake, setting only a part of their monthly revenues apart for gaming that offers them not only fun but also a chance to win. It is only human that you participate in such a game that offers you better chances to win or in a game where the winnings payment is higher. Thus, there is a great danger that by allowing excess gaming, some part of the resources which currently our players of chance games set for these games (also for example, LOTTO), would rather be spent on the bets offered by foreign private providers.

According to both lotteries, the state has not reacted as it should have. It was found out that a lack of sound governance of the organization of games causes nothing but troubles since foreign organizers do not contribute any compensation to the country in which they collect players' spending from excess gaming, in whatever of the taxes listed below:

- Levy on chance games,
- Tax on the revenues of legal entities (there is also a deficit caused by lower earnings of the Slovenian organizers since no tax is imposed on the agents' commission for the payments to foreign providers),
- Personal income tax (players do not get just the winnings payments but also other prizes for which, according to the Slovenian law, personal income tax is imposed; for example bonuses for access, for participation),
- Tax on winnings money from chance games (pursuant to our regulations, a person liable to tax who wins a prize is levied on winning payments from gaming),
- Concessions.

The local Slovenian organizers comply with all these obligations and effect accounting and payments within due dates regularly. This means that providers of classical chance games are discriminated against. The current situation is also the consequence of inefficient government control and inaccurate legislation (inadequately synchronized within the EU either) and modest on-line offers of classical chance games in the Slovenian language which represent, on the one hand unfair competition, and, on the other hand direct undermining of the legally regulated system of organizing chance games, and therefore, also of safeguarding permanent and stable resources of the funds earmarked for financing the operation of organizations for the disabled and humanitarian and sports organizations in Slovenia.

Opening the gaming market to those providers of gaming who do not comply with legislative conditions and whom it is impossible to fully supervise threatens to cause the following serious troubles:

- Concession and other taxes would to a great extent be re-diverted into funds for winnings money, which, from the point of view of the players, might seem at the

first glance even beneficiary if the high-winning amounts did not entail the risk of gaming addiction.
- Since it would be impossible to supervise the organizers there would be a great danger of abuse, fraud, corruption, money laundering, etc.
- The funds for financing projects concerned with specific public interest would be greatly diminished (In the case of Slovenia that means raising funds for both foundations).
- Surely, the response of the general public toward the state would be very negative as it happened in the case of profiteering if the existent organizers who are paying concession fees would go bankrupt.

Since 2006, when BWin companies started their aggressive on-line advertising and offering chance games without permission or concession, both foundations have been collecting reduced concession fees. Regardless of the Ministry of Finance hedging foreign gaming exposure, the aforementioned provider continues to illegally organize BWin sports betting, advertises and collects bets in the Slovenian language; the number of the users of on-line sports betting and advertising of chance games increases, whereas the Sport Lottery has to follow its illegal and unfair competitor with higher quotas (and consequently collects less concession fees) if it wishes to keep its players.

In spite of lack of opportunity, the FŠO still records nominal growth of concession fees. This is mostly on account of extremely fast growth of this market segment and, due to the fast growth of the turnover of the Sports Lottery, and, consequently also concession fees for sport. So far, the state has not discovered an effective regulative mechanism against illegal organization of on-line sports betting. The FŠO and the FIHO have instigated infringement proceedings against Bet and Win at the Court of Ljubljana at the end of 2006 and at the same time proposed prohibition of organizing and collecting sports betting as well as advertising of chance games. The proceedings are still under procedure and have not been completed so far (by the end of 2008).

44.5.2 Proposals for Averting Further Illegal Gaming Organized by Foreign Providers

Both concessionaires, the Lottery of Slovenia and the Sports Lottery, submitted specific proposals for regulatory measures to the state, which could severely curtail the Slovenian market for private providers of chance games who are currently operating in Slovenia and are violating national legislation. For a sound starting point for any further activities, however, a decision of the governmental bodies of the highest level is vital to steadfastly support government controlled growth of the organization of chance games and to oppose opening up to liberalization. It should be stressed that the state's prohibition of gaming liberalization simply reflects the need to duly safeguard its citizens and their social security.

Based on the above, in the opinion of the concessionaires, the state should:

1. In order to secure responsible organizing of games, make a new analysis of the gaming coverage on the Slovenian market and re-examine the current Gaming Act as well as, given the analysis results, clearly define the purpose and the reason for stricter government regulatory environment of the organization of chance games (safeguarding of customers, protection against fraud misusing the raising of money for the projects concerned with specific public interest);
2. Enhance, on all levels of the European Union, regulation of gaming only on the national level while it is also recommended to have synchronized guidelines within the EU related to responsible organizing of chance games that would be respected by its member countries.

44.6 Gaming Trends Prospects

Widespread Internet and mobile technology usage is expected to introduce great changes in the area of classical chance games. According to the survey by the Research on the Internet usage—RIS 2006 of September 2006, we can establish that in Slovenia:

- 880,000 Slovenian citizens use Internet monthly and 90,00 citizens use Internet via mobile phones exclusively;
- There is constant Internet user growth although the growth is steadying;
- In 2006, there is substantial usage of on-line wagering representing 7% of monthly Internet users in Slovenia, i.e., totally 67,900 users of on-line wagering.

The internet makes it possible for an individual not only to be a player but also a provider of chance games. Besides the established on-line gaming operators (Bwin, Betathome, Bportingbet and others), the internet also offers the organization of bets among individuals, i.e., natural persons (http://www.betfair.com).

According to various sources from abroad (predominantly UK surveys) the forecasts for on-line gaming are very promising since the consumption of on-line gaming until 2010 is expected to increase drastically. The UK research company Screen Digest forecasts that UK consumer spending on on-line gambling will increase from GBP660 million in 2005 to GBP1.6 billion in 2010. At the same time the number of active UK clients will grow from 1.1 m in 2005 to 2.1 m in 2010. According to the forecasts, even greater expansion will be caused by mobile technology. According to another UK research company, Juniper Research, the estimated growth of mobile global market of chance games is from a little less than USD 2 billion in 2006 up to USD 23 billion in 2011.

The strategic goal set by the FŠO is to achieve, in partnership with both lotteries with a concession, the state, the FIHO and the users of the funds of the Foundation, its fivefold revenue increase from the concession fees from chance games within

the next ten years. This signifies that until 2017 concession contributions for sport from chance games would increase to EUR 42 million.

According to the latest research, by the Institute for Gaming Research of the Faculty of Economy in Ljubljana, and presented in August 2007, "Analysis and directives related to the reliable size and scope of the offer of classical and special chance games in Slovenia," on-line gaming is estimated to have the fastest growth of chance games products. According to the Swiss Institute for International Law (2006), internet gaming in EU is estimated to currently represent from 3 to 5% of the entire EU market of chance games. According to the providers of these services a 40% average annual growth in the period from 2004 to 2009 is expected. It forecasts an accelerated growth and greater impact of on-line gaming in the forthcoming years.

By reaching the strategic goal set by the FŠO sports organizations will be able to greatly increase the independent financial funding from chance games which they govern themselves. Apart from efficient partnerships, sound legislative regulatory measures and the fast growth of on-line gaming would surely enhance the achievement of the goal. In Slovenia, the Lottery of Slovenia and the Sports Lottery could increase their turnover by greater usage of online and mobile technology and consequently, contribute to the growth of the contributions from concessions. However, should the state fail to effectively ban the illegal market of chance games that began to spread with the Internet, then it is questionable if further development of the activities (such as sport) that significant segments of society are interested in, and that the states supports (at least politically and declaratory), would indeed be possible.

Chapter 45
Gambling and Sport in South Africa

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Contents

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45.1 Gambling Regulation

45.1.1 Introduction

The underlying premise of the limited gambling legalization and strict regulation policy in South Africa is that only licensed gambling is legal. Organized gambling on unlicensed activities are unlawful and may lead to criminal prosecution. Illegal forms of gambling include wagering on dog racing[1]; gambling without a license; and online gambling, subject to a few licensed exceptions.[2] Gambling is only lawful if it is legalized by statute and licensed and regulated by the relevant gambling board.

The Constitution of the Republic of South Africa, 1996, divides the legalized forms of gambling into two Sections[3]:

- Lotteries and sport pools that are regulated nationally in terms of the Lotteries Act[4] by the National Lotteries Board
- Gambling, casinos and wagering (including the wagering on horse racing and sporting events) that are regulated concurrently at both the national and provincial level.

At national level the National Gambling Board is the relevant regulatory body acting in terms of the National Gambling Act.[5] At the provincial level, each of the nine provinces has its own provincial gambling board acting in terms of the relevant provincial statute.[6] In all instances the legalization is

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[1] *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad* 2003 (2) SA 269 (O). The National Gambling Board has conducted research into the possible legalization of dog races and the wagering thereon, but no final policy decision has been made in this regard. See in general Snyman-Van Deventer *etanor* "Research on the implications for possible legalization of greyhound racing in South Africa" (5 June 2009) and Carnelley 2010.

[2] Although the National Gambling Act 7 of 2004 makes provision for the possible legalization and regulation of online gambling, it seems as if it will be limited to casino type gambling [Draft Interactive Gambling Regulations (GN 211 in GG 31956 dated 27 February 2009) reg 3(3)]. The Lotteries Board has not given any indication of a possible change to the Lotteries Act 57 of 1997 for the extension of sports pools to cyber space. In fact, the Act provides that in a prosecution arising from anything done (or not done) in the Republic in connection with a sports pool, it is not a defense merely to prove that the management, conduct or business of or concerning the sports pool in question is or was wholly or in part carried on at a place outside the Republic (Section 59).

[3] Section 104(1)(b)(i) as read with schedule 4 part A.

[4] 57 of 1997.

[5] 7 of 2004.

[6] Eastern Cape Gambling and Betting Act 5 of 1997; Free State Gambling and Racing Act 6 of 1996 (soon to be replaced by the Free State Gambling and Liquor Act 6 of 2010); Gauteng Gambling Act 4 of 1995; KwaZulu-Natal Gambling Act 10 of 1996 (possibly soon to be replaced by the KwaZulu-Natal Gaming and Betting Bill, 2010); Mpumalanga Gaming Act 5 of 1995; Northern Cape Gambling and Racing Act 5 of 1996; Northern Province Casino and Gaming Act 4 of 1996; North West Gambling Act 2 of 2001 and the Western Cape Casino and Racing Law 4 of 1996.

limited, comprehensively regulated and licensed through a competitive licensing process, strict probity of potential licensees, protection of minors and problem gamblers and strict enforcement.

As both Sections could potentially involve sporting events, a brief overview of each is given.

45.1.2 Sport Pools

A "sports pool" is defined to mean any scheme, under which any person is invited or undertakes to forecast the result of any series or combination of sporting events in competition with other participants and a prize is to be awarded to the competitor who forecasts the result correctly or whose forecast is more nearly correct than the forecasts of other competitors, or a number of prizes are to be awarded on the basis aforesaid. For the purposes of this definition the forecast of a result includes not only the forecast of the person, animal, thing or team that will be victorious or otherwise, but also any forecast relating to the system of scoring employed in the sporting event in question, or to the person who will be responsible for the score.[7]

Only the licensee of the National Lottery may be awarded an additional license to conduct a national sports pool.[8] No other sports pool could be licensed in terms of the Lotteries Act[9] or any other Act. The current licensee of the National Lottery, Gidani (Pty) Ltd, has been awarded a license to conduct a sports pool. The license specifies the sports pools and the conduct which is authorized[10] and is overseen by the National Lotteries Board.

The sports pool, SportStake, involves the correct prediction of the outcomes of several football matches. The aim is for players to predict the outcomes of 12 predetermined matches drawn from South African, English and other identified professional football fixtures.[11] The appocated Prize Fund for the game is 50% of the total net sales. The SportStake ticket sales for the year ending March 2009 totaled R203 million.[12]

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[7] However, this definition does not including any scheme or competition in respect of horse racing which is authorized by the board, or which is conducted in the same format and manner and under the same circumstances as a scheme or competition in respect of horse racing that existed prior to 18 June 1997. A 'sporting event' in turn is defined to mean any football, rugby, cricket, golf or tennis match, any boxing, wrestling, shooting or swimming contest, any foot, cycle, motor, boat or horse race and any other lawful sporting contest, competition, tournament or game usually attended by the public (Lotteries Act Section 1).

[8] Section 55(1) of the Lotteries Act 57 of 1997. The appointment is made by the Minister of Trade and Industry after consultation with the National Lotteries Board.

[9] 57 of 1997.

[10] Section 55(1) of the Lotteries Act 57 of 1997.

[11] The result predictions may be on a home win, a draw or an away win. Provision is made for a multiple wager and a jackpot.

[12] Approximately €25 million. See the National Lotteries Board 2009, 4.

Apart from the general offenses, the Lotteries Act specifically creates offenses for any person who with the intent to defraud, falsely makes, alters, forges, utters, passes or counterfeits a sports pool ticket; or who influences or attempts to influence the winning of a prize through the use of coercion, fraud or deception, or through tampering with sports pool equipment, systems, software, data, tickets or materials.[13]

As an aside it should be noted that sports development benefits from the National Lottery. A percentage of the funds[14] generated by the National Lottery is allocated by the distributing agency from the National Lottery Distribution Fund to sport and recreation.[15] The aim is that the distributing agency distributes the sum fairly and equitably among all applicants[16] who meet the prescribed requirements.[17] In March 2009, R746.3 million[18] was available for distribution to the 139 approved sport and recreation beneficiaries of which 42% had been allocated.[19]

45.1.3 Wagering on Horse Racing and Sporting Events

Wagering on the sport of kings, horse racing, has been legal in South Africa for more than 100 years. Wagering on sporting events is less popular, although legally possible.[20] The current regulation is mainly through the provincial statutes, although the National Gambling Act sets out certain national standards

[13] Section 58(1)(b)–(c) of the Lotteries Act 57 of 1997.

[14] The percentage allocated to the development of sport and recreation is 22% of the Fund (GN 1469 published in *Government Gazette* 27118 dated 15 December 2004). From 2 March 2000 to 14 February 2005, almost R8 million (approx €1 million) was paid for the development of sport and recreation (National Lotteries Board 2005). On 1 March 2009, R746.3 million (approx €80 million) was available for distribution to the 139 approved sport and recreation beneficiaries of which 42% had been allocated. For a list of beneficiaries, see the National Lotteries Board 2009, 84.

[15] Section 26(3)(c) of the Lotteries Act 57 of 1997 as read with the regulations in GN 1469 published in *Government Gazette* 27118 dated 15 December 2004.

[16] Section 29(5) of the Lotteries Act 57 of 1997 as read with Form 05/1 (GN 843 published in *Government Gazette* 27624 dated 27 May 2005) and reg 4 of the Regulations relating to the Allocation of Money in the National Lottery Trust Fund (GN 1070 R 6908 in *Government Gazette* 21696 dated 27 October 2000).

[17] Section 29(1) of the Lotteries Act 57 of 1997. The distributing agency must consider applications and may pay grants to appropriate recipients subject to any applicable ministerial conditions (Section 29(2) as read with Section 33 and reg 10 (GN 182 R 7013, *Government Gazette* 22092 dated 22 October 2001).

[18] Approximately €80 million.

[19] National Lotteries Board 2009, 4. For a list of beneficiaries, see the National Lotteries Board 2009, 4.

[20] In Gauteng, the tax raised in 2009 from the totalizator for wagering on horse racing was more than 10 times that of wagering on other sporting events.

that must be adhered to.[21] The aim of these uniform standards is to safeguard people participating in gambling and their communities against the adverse effect of gambling. To achieve this aim, the gambling activities are effectively regulated, licensed, controlled and policed; members of the public who participate in any licensed gambling activity are protected[22]; society and the economy are protected against over-stimulation of the latent demand for gambling; and the licensing of gambling activities is transparent, fair and equitable.[23]

The actual regulation is done on a provincial level. Where applicable, the provincial gambling statute makes provision for the licensing of horse racing itself through a race course license[24] and a horse race meeting license.[25] In addition, the gambling on these races and other sporting events are licensed through either a totalizator license and/or a bookmakers license.

A "totalizator" is an apparatus for registering the number or amount of bets on any event or combination of events. The system of betting used is where the aggregate amount staked on such event(s), after deduction of costs, is divided among those persons who have made winning bets.[26] A person may not conduct the business of a totalizator without a totalizator license subject to such conditions and rules as the board may impose and a totalizator must conduct business on the conditions set out in the license.[27]

A bookmakers license is required for any person who engages in the business of directly laying bets, other than totalizator-type bets, with members of the public or other bookmakers on the premises specified subject to such conditions as the board may impose.[28]

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[21] Section 44 of the National Gambling Act 7 of 2004 as read with Parts D and E of the Act.

[22] Legal gambling contracts are enforceable in the courts of law.

[23] National Gambling Act preamble.

[24] Section 58 of the North West Gambling Act 2 of 2001. See also Section 56 of the Eastern Cape Gambling and Betting Act 5 of 1997; Section 91 of the the Gauteng Gambling Act 4 of 1995; chaps. 13 to 18 of the KwaZulu-Natal Gaming and Betting Bill, 2010.

[25] Section 59 of the North West Gambling Act 2 of 2001. See also Section 55 of the Eastern Cape Gambling and Betting Act 5 of 1997; Section 76 of the Free State Gambling and Liquor Act 6 of 2010; Section 90 of the Gauteng Gambling Act 4 of 1995; Section 51 of the Northern Cape Gambling and Racing Act 5 of 1996; Section 31A of the Northern Province Casino and Gaming Act 4 of 1996; Section 66 of the Western Cape Casino and Racing Law 4 of 1996.

[26] Section 1 of the North West Gambling Act 2 of 2001. The other provincial statutes have similar definitions.

[27] Section 56 of the North West Gambling Act 2 of 2001. See also Sections 51 to 52 of the Eastern Cape Gambling and Betting Act 5 of 1997; Section 77 of the Free State Gambling and Liquor Act 6 of 2010; Sections 52 to 53 of the Gauteng Gambling Act 4 of 1995; Sections 52 to 53 of the Northern Cape Gambling and Racing Act 5 of 1996; Section 34B of the Northern Province Casino and Gaming Act 4 of 1996; Sections 53 to 54 of the Western Cape Casino and Racing Law 4 of 1996.

[28] See Section 57 of the North West Gambling Act 2 of 2001; Sections 53 to 54 of the Eastern Cape Gambling and Betting Act 5 of 1997; Section 78 of the Free State Gambling and Liquor Act 6 of 2010; Sections 54 to 60 of the Gauteng Gambling Act 4 of 1995; Sections 54 to 54C of the Northern Cape Gambling and Racing Act 5 of 1996; Section 34C of the Northern Province

45.1.4 Conclusion

Gambling on sporting events in South Africa is not uncommon. Apart from the national sports pool, the possibility exists that a person can wager on sporting events through licensed totalizators or bookmakers. However, any unlicensed gambling remains illegal and theoretically a criminal offense. Where the gambling opportunities are legal, gamblers are protected as the operators are strictly regulated through the relevant legislative provisions by the various gambling regulatory boards. However, although the legal principles are clear, the enforcement of the law remains problematic especially in light of the many illegal and unlicensed online operators who seem to operate within the country with impunity. With the many problems relating to criminal jurisdiction and state sovereignty these operators are likely to remain.

45.2 Match-Fixing and Corruption

45.2.1 Introduction

Although the problem of match-fixing and corruption in sport is an international phenomenon,[29] it is also a matter which has become all too familiar in South African sport. It received public prominence in South Africa when the former captain of the South African national cricket team, Hansie Cronjé, admitted his involvement with certain unsavory bookmakers in India, as well as attempts to manipulate the outcome of certain cricket matches.[30] However, contrary to popular belief, this was not the first instance in which the integrity of a South African sports event was compromised. Horse racing had since long suffered under the scourge of fixed races.[31] And Cronjé's exploits would not be the last. It was followed more recently by the arrest of almost all the premier league football referees and some team officials and the revelation that match-fixing seemed to be rife in South African football. In 2004, the Organized Crime Unit of the South African Police Service launched "Operation Dribble," which led to the arrest of 20

(Footnote 28 continued)
Casino and Gaming Act 4 of 1996; Sections 55 to 55A of the Western Cape Casino and Racing Law 4 of 1996.

[29] Cloete 2005, 11 *et seq*. To cite only a few examples, see Nafziger 2004, 30 *et seq*; Kleinman 2002; Margolis 2001; *On the Game* 1995 and *On the Defense: The Trial of Three Football Players and a Malaysian Businessman* 1997 concerning football, *Ringleaders* 1996 concerning sumo wrestling, Cochrane 2002 concerning horse racing, Newfield 2001.

[30] *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 T. See also the King Commission *Interim Report* dated 11 August 2000; Nafziger 2004, 33.

[31] See for instance *Turner v Jockey Club of South Africa* 1974 3 SA 633 A.

football referees and two club managers on suspicion of match-fixing in Professional Soccer League matches.[32]

Because of the public outcry which followed Hansie Cronjé's fall from grace, there was a feeling among South African lawyers and lawmakers, rightly or wrongly, that existing measures against corruption were not sufficient to deal with the unique problems encountered in sport.[33] And since Parliament was in any event reviewing the Corruption Act,[34] it was decided to include the so-called "Hansie-clause" into the new Prevention and Combatting of Corrupt Activities Act[35] (PreCCA).[36] This Act came into operation on 27 April 2004.

45.2.2 Defining Corruption

Corruption, by definition, involves the improper prospect or passing of some monetary or other benefit, not ordinarily due, to direct the recipient's conduct in a certain way as directed by the person offering or passing the benefit. As a result, most provisions in PreCCA explain that corruption may consist of a situation where:

- a person accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, to act in a particular way or to refrain from acting; or
- a person gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, to act in a particular way or to refrain from acting.

For ease of reference, we will refer to these activities collectively as "inducing" a person to act or refrain from acting.

45.2.3 Corruption in Sporting Events

PreCCA now expressly provides for the offense of corrupt activities relating to sporting events.[37] Section 1 of PreCCA defines "sporting event" as any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which

[32] Ndaba et al. 2004. See also Cornelius 2007.
[33] Nevin 2001.
[34] 94 of 1992.
[35] 12 of 2004.
[36] Cloete 2005, 11.
[37] Section 15.

stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted. This definition is clearly wide enough to include all organized sport, including sports such as horse racing, show jumping, polocrosse, pigeon racing[38] and even dog contests. Greyhound racing and some other sports involving animals, such as rodeos and blood sports, such as dog fighting, cock fighting and bull fighting, have been banned in South Africa.[39] Game hunting is still a major industry in South Africa, but even if it can be considered to be a sport, it is not governed by a constitution, rules or code of conduct of a sporting body, nor is it ordinarily attended by the public and will, therefore, not fall within the definition.[40]

In terms of Section 15 of PreCCA, the offense of corrupt activities relating to sporting events can be committed in various ways. In the first instance, it is committed where a person is induced to perform any act which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event.[41] This provision is clearly aimed at match-fixing. It acknowledges the fact that match-fixing takes place not only when the final result is rigged. Punters often bet on the occurrence of particular events which may seem innocuous in the greater scheme of a match, such as when the first free kick will be awarded, or how many yellow cards will be awarded in a particular match, etc. Nevin[42] explains that

> [w]ays of gambling on cricket are many and varied. Bets are placed on the outcome of the toss, the end from which the fielding captain will elect to bowl, a set number of wides or no-balls in a designated over, players being placed in unfamiliar fielding positions, individual batsmen scoring fewer runs than their opposite numbers who batted first, batsmen being out at a specific point in their innings, the total number of runs at which a batting captain will declare, the timing of a declaration, or the total runs scored in an innings. A bet can be laid on the outcome of virtually any aspect of the game. And that's what makes it so easy for players to fix a result, especially in the one-day matches.

The offense in Section 15 is further committed if a person carries into effect any scheme which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event.[43] At first glance, this provision also seems to deal with match-fixing in the sense discussed above. However, on closer analysis, the scope of this provision is actually extremely wide and could include conduct which one would not ordinarily have counted under the general heading of "match-fixing."

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[38] Pigeon racing has some of the richest prize money in South African sport.

[39] See for instance *United Greyhound Racing and Breeders Society v Vrystaat Dobbel en Wedren Raad en andere* 2003 (2) SA 269 (O).

[40] Cloete 2005, 11.

[41] Section 15 (i) (aa) PCCAA.

[42] September 2001 *African Business* 29.

[43] Section 15 (c) PCCAA.

The offense created in terms of Section 15 (c) consists of two distinct elements. Significantly, though, Section 15 (c) does not contain the requirement of inducement which constitutes a vital element of almost all of the offenses created in terms of PreCCA. As a result, it is irrelevant whether or not any monetary or other benefit changed hands in the process.

The first element in Section 15 (c) is that there must be a "scheme." The *Oxford Dictionary* defines "scheme" as

> 1. a systematic plan or arrangement for attaining some particular object or putting a particular idea into effect … a particular ordered system or arrangement … 2. a secret or underhand plan; a plot.

Similarly, the *Webster's Unabridged Dictionary of the English Language*, defines "scheme" as

> 1. a plan, design, or program of action to be followed; project. 2. an underhand plot; intrigue …

Both these definitions seem to suggest that there are two requirements that have to be met before one could label certain conduct as a "scheme"—there must be some premeditated plan and there must a plot or conspiracy which should essentially involve more than one person. This latter aspect also fits in with the general scope of PreCCA, since corruption, by definition, is not a crime which can be committed by one person acting individually.

The second element in Section 15 (c) is that the particular scheme should threaten or undermine the integrity of a sporting event. According to Preston and Szymanski,[44] the integrity of a sporting event is undermined through cheating, which, they submit, can take three forms: sabotage, doping and match-fixing. While this analysis poses some intriguing possibilities, a vital question in this regard is whether it is necessary to prove that the integrity of a particular sporting event was threatened or undermined, or whether it would suffice to prove that a sport or sports in general were under threat. The solution lies in Section 6 (b) of the Interpretation Act,[45] which provides that in any legislation, words indicating the singular, also includes the plural and vice versa. Therefore, it should be sufficient to prove that sporting events were under threat without reference to any specific individual event.

When contemplating Preston and Szymanski's[46] analysis, the notion of sabotage invariably conjures up the tearful images of figure skater Nancy Kerrigan when, in an attempt to exclude her from participation in the 1992 Winter Olympics, her knee was shattered by an assailant who claimed to act on the instructions of someone in the camp of rival skater Tonya Harding.[47] Conduct of this nature certainly constitutes a plot or scheme which threatens or undermines the integrity

[44] *Cheating in Contests* 2003.

[45] 33 of 1957.

[46] *Supra* n. 44.

[47] Duffy and Thigpen 1994.

of a sporting event. If similar events should occur in South Africa or involve South Africans directly or indirectly, it would in all likelihood justify prosecution under Section 15 (c) of PreCCA. On the other hand, random violence, such as attacks on match officials,[48] may threaten or undermine the integrity of a sports event, but usually lacks the premeditated conspiracy to categorize it as a "scheme." While such random acts of violence could constitute other crimes in appropriate circumstances,[49] they will probably not be an offense in terms of PreCCA. Of course, sabotage can take innumerable forms[50] and it will be impossible to create an exhaustive list of possible actions that can be labeled as sabotage.

Preston and Szymanski's[51] analysis poses another interesting question: Can doping constitute an offense under Section 15 (c)? Again, the use of banned substances by an individual athlete will lack the element of conspiracy, even if it is premeditated, so that it will not constitute a contravention of this provision. However, where medical or coaching staff administer banned substances to athletes, this could indeed constitute a scheme which threatens or undermines the integrity of a sporting event. Similarly, operations such as the development, manufacture and distribution of anabolic steroids as in the recent Balco scandal,[52] will most likely be classified as schemes that threaten or undermine the integrity of sporting events if similar events should occur in South Africa or involve South Africans directly or indirectly.

Thirdly, the offense of corruption in sporting events is also committed if a person is induced to frustrate the reporting of a corrupt act contemplated in Section 15, to the managing director, chief executive officer or to any other person holding a similar post in the sporting body or regulatory authority concerned or at his or her nearest police station.

45.2.4 Corruption in Gambling

Section 16 of PreCCA provides for offenses in respect of corrupt activities relating to gambling or games of chance. Any person who induces someone or who is induced to engage in any conduct which constitutes a threat to or undermines the

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[48] Such as the incident reported in *The Sowetan* on 3 May 2007, where football coach Thabo Ndlela appeared in the Witbank Magistrates' Court charged with assaulting referee Sipho Mahlangu during a league game in March.

[49] Such as the murder charges levelled against two rugby players, Ben Zimri and Wayne Matthee, from the Delicious Rugby Club in Ceres in the Western Cape following the death of Rawsonville rugby player Riaan Loots after a fight during a match between his team and Delicious in Ceres in June 2006. See also *R v Hillebrand* 1959 (3) SA 22 (T) 23D–F.

[50] Such as giving key players yellow or red cards, to name just one example—see Preston and Szymanski 2003.

[51] *Supra* n. 44.

[52] Sancetta 2004.

integrity of any gambling game or game of chance, including in any way influencing the outcome of a gambling game, commits an offense in terms of Section 16 (a) and (b). Section 16 (c) provides that a person who carries into effect any scheme which constitutes a threat to or undermines the integrity of any gambling game or game of chance, including in any way influencing the outcome of a gambling game, commits an offense.

45.2.5 Other Offenses

While Sections 15 and 16 of PreCCA provide expressly for the offense of corrupt activities relating to sporting activities and gambling, these are by no means the only provision in PreCCA which can be invoked to combat the problem of corruption in sports and gambling. PreCCA has also established a number of other offenses that may be relevant in the context of sport. In fact, it is likely that any indictment under Section 15 or 16, may include alternative charges under one or more of the other provisions contained in PreCCA.

45.2.5.1 Corruption in General

Section 3 (i) (aa) of PreCCA provides that the general offense of corruption consists of inducing someone to act in a manner that amounts to the illegal, dishonest, unauthorized, incomplete or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation. The general offense of corruption also consists of inducing someone to act in a manner that amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules[53] that is designed to achieve an unjustified result[54] or that amounts to any other unauthorized or improper inducement to do or not to do anything.[55] Since most relationships in the world of sports are based on contract,[56] any instances of match-fixing, whether it consists of a player under-performing or a match official making false rulings, can also constitute an offense under Section 3 of PreCCA.

Section 3 (i) (bb) of PreCCA further defines the general offense of corruption to include the illegal, dishonest, unauthorized, incomplete or biased misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional,

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[53] Section 3 (ii).

[54] Section 3 (iii).

[55] Section 3 (iv).

[56] *Natal Rugby Union v Gould* 1998 4 All SA 258 A. See also Beloff, Kerr and Demetriou (n 8) 9, 22 *et seq*, Weistart and Lowell 1979, 196. See also Cornelius 2002 and *Liability of Referees (Match Officials) at Sports Events* 2004.

statutory, contractual or any other legal obligation. If one considers that a substantial element in the Hansie Cronjé case merely involved the passing of information to bookmakers and punters, as well as the fact that other cricketers world-wide have been implicated in similar dealings with gamblers,[57] this provision would be an appropriate measure to prosecute those involved.

45.2.5.2 Corruption of Agents

The offense in respect to corrupt activities relating to agents is, in terms of Section 6 of PreCCA, committed where someone induces an agent or an agent induces someone to act in a manner that:

- amounts to the illegal, dishonest, unauthorized, incomplete or biassed exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- amounts to the misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules;
- is designed to achieve an unjustified result, or that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corrupt activities relating to agents.

45.2.5.3 Disciplinary Proceedings

Section 8 of PreCCA deals with corruption of judicial officers. Section 1 defines "judicial officer" to include any arbitrator, mediator or umpire, who in terms of any law presides at arbitration or mediation proceedings for the settlement by arbitration or mediation of a dispute which has been referred to arbitration or mediation. It also includes any other person who presides at any trial, hearing, commission, committee or any other proceedings and who has the authority to decide causes or issues between parties and render decisions in a judicial capacity. This definition is clearly broad enough to include the chairperson and members of any disciplinary tribunal found in sport today.

Section 8 essentially defines the offense of corruption in respect of judicial officers in the same terms as Section 6 defines the offense in respect of agents. However, Section 8 (2) explains further that "to act" in this Section includes performing or not adequately performing a judicial function, making decisions

[57] Nafziger 2004, 33; Nevin 2001.

affecting life, freedoms, rights, duties, obligations and property of persons, delaying, hindering or preventing the performance of a judicial function, aiding, assisting or favoring any particular person in conducting judicial proceedings or judicial functions, showing any favor or disfavor to any person in the performance of a judicial function or exerting any improper influence over the decision-making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.

Any person who induces another person to:

- testify in a particular way or fashion or in an untruthful manner;
- withhold testimony or a record, document, police docket or other object;
- give or withhold information relating to any aspect in a trial, hearing or other proceedings;
- alter, destroy, mutilate or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object;
- evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object;
- be absent from such trial, hearing or proceedings;

before any court, judicial officer, committee, commission or officer authorized by law to hear evidence or take testimony is guilty of the offense of corrupt activities relating to witnesses and evidential material during certain proceedings under Section 11 of PreCCA. Likewise, it is an offense under Section 18 of PreCCA for any person to intimidate or use physical force, or improperly persuade or coerce another person with the intent to interfere with testimony or evidence as set out above.

45.2.5.4 Employment

In terms of Section 10 of PreCCA, any person who is party to an employment relationship and who is induced or induces another person to perform any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offense of receiving or offering an unauthorized gratification.

45.2.5.5 Contracts

Section 12 of PreCCA provides that any person who is induced or who induces another person to improperly influence, in any way the promotion, execution or procurement of any contract with a public body, private organization, corporate body or any other organization or institution or the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract is guilty of the offense of corrupt activities relating to contracts.

45.2.6 Duty to Report

In terms of Section 34 (1), any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense under PreCCA, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. Any person who fails to comply with this duty, is guilty of an offense.

For the purposes of Section 34 (1), a person holds a position of authority if he or she is the manager, secretary or a director of a company or a member of a close corporation, a chief executive officer or an equivalent officer of any organization, or the person responsible for the overall management and control of the business of an employer. This also includes any person who has been appointed in an acting or temporary capacity.

45.2.7 Extraterritorial Jurisdiction

Section 35 of PreCCA provides for extraterritorial jurisdiction. Even if the act alleged to constitute an offense under PreCCA occurred outside South Africa, a South African court shall, regardless of whether or not the act constitutes an offense at the place of its commission, have jurisdiction in respect of that offense if the person to be charged:

- is a South African citizen;
- is ordinarily resident in South Africa;
- was arrested in the territory of the South Africa, or in its territorial waters or on board a ship or aircraft registered or required to be registered in South Africa at the time the offense was committed;
- is a company, incorporated or registered as such under any law, in South Africa;
- any body of persons, corporate or unincorporated, in South Africa.

This provision closes a loophole in South African law which existed at the time of the Hansie Cronje scandal. Because the attempts by Cronjé to manipulate the outcome of cricket matches occurred in India,[58] no South African court would have had jurisdiction to try the matter. If a similar incident should occur in future, however, South African courts will now be competent to adjudicate the matter under South African law as if the offense has been committed in South Africa.

Section 35 does not stop there, however a South African court will also have jurisdiction in respect of an offense committed outside South Africa if the:

[58] *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 T. See also the King Commission *Interim Report* dated 11 August 2000; Nafziger 2004, 33.

- act affects or is intended to affect a public body, a business or any other person in the Republic;
- person is found to be in South Africa; and
- person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

The result is that, in the future, where incidents similar to the Salt lake City scandal[59] should occur, the parties who indulge in corrupt activities could also face charges under PreCCA if they should find themselves in South Africa, since the decision to award the Olympic Games to a particular host city undoubtedly affects persons (or athletes) and businesses (sports organizations) in South Africa, even if no South African city submitted a competing bid. Similarly, future operations such as the development, manufacture and distribution of anabolic steroids as in the Balco scandal,[60] could also form the basis for prosecution under PreCCA if the perpetrators should find themselves in South Africa. In fact, due to the global nature of sport and the significance of world rankings in most sports, one could argue that almost any form of corrption in any sport could affect individual sports men and women or sports organizations in South Africa in one way or another, so that South African courts could have jurisdiction to try such matters under PreCCA if the perpetrators should find themselves in South Africa.

45.2.8 Penalties

In terms of Section 26 of PreCCA, any person who is convicted of an offense under PreCCA, is liable:

- in the case of a sentence to be imposed by a High Court, to whatever fine the court deems appropriate or to imprisonment up to a period of imprisonment for life;
- in the case of a sentence to be imposed by a regional court, to a fine not exceeding R360,000[61] or to imprisonment for a period not exceeding 18 years;[62]
- in the case of a sentence to be imposed by a magistrate's court, to a fine not exceeding R100,000[63] or to imprisonment for a period not exceeding five years.[64]

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[59] Nafziger 2004, 31.

[60] Sancetta 2004.

[61] Approximately €40,000.

[62] In terms of Section 1 (1) (a) of the Adjustment of Fines Act 101 of 1991, read with GN R1411 of 30 October 1998 and Section 92 (1) (b) of the Magistrates' Courts Act 32 of 1944.

[63] Approximately €12,000.

[64] In terms of Section 1 (1) (a) of the Adjustment of Fines Act 101 of 1991, read with GN R1411 of 30 October 1998 and Section 92 (1) (b) of the Magistrates' Courts Act 32 of 1944.

In addition to any fine a court may impose in terms of Section 26, the court may also impose a fine equal to five times the value of the gratification involved in the offence.

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Chapter 46
Legal Regulation of Sports Betting in Spain and its History

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Contents

46.1 Introduction

Anyone who knows about the messy and confusing regulation in force in Spain regarding sports betting could think that this is not the best moment for drawing up an introductory article regarding the legal regime for sports betting in Spain. And this is logical considering the fact that we are currently in a period of transition in which an out-of-date, messy and dysfunctional legal regime is still in force, although we can reasonably expect the introduction of a new set of regulations that

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we hope will face the real legal problems that arise these days with regard to sports betting.[1]

However, from a European perspective, perhaps it is a good moment to face it, especially if we take into account the fact that this regulatory provisional status also applies to the European framework as a consequence of the recent and continuous pre-legislative work within the European Community (not yet moulded into a specific Directive or into a European Regulation regarding this aspect of European Law), in part due to the important and conclusive case law of the Court of Justice of the European Communities (hereinafter ECJ) in this area (in particular, the Decisions regarding the cases of *Gambelli*[2] and *Placanica*[3]). This Case Law results from a long series of decisions regarding the regulation of gambling, in which the ECJ adopted its current doctrine with a view of achieving better harmonisation of national law with European regulations.

It is true that the European High Court has restricted the application of the initial doctrine which, for example in the case of sports betting, we can find in case C-67/98 (*Questore di Verona/Diego Zenatti*). In the decision that resolved this matter, the ECJ declared that the provisions of the EU Treaty regarding the free provision of services did not conflict with national legislation (Italian in this case) allowing certain bodies to reserve the right to collect bets on sporting events, when this legislation is properly justified by social policy objectives designed to limit the negative effects of these activities, and as long as the restrictions imposed are not disproportionate with regard to these objectives.

However, this doctrine was modified soon afterwards by the ECJ in the aforementioned *Gambelli* Decision. According to *Gambelli*, the moral, religious or cultural characteristics of states, as well as the negative consequences for individuals and society that, from a moral and financial point of view, could result from gambling and betting, may justify the retention by national authorities of the power to restrict these types of activities,[4] but in all cases *these restrictions must be fully justified and must be proportionate.*

Therefore, regarding the frequent monopolistic regulation of gambling by European states (which, it should not be forgotten, is due to both historic and social policy causes), the ECJ has declared that, as in other areas of Law, the

[1] It should be taken into account that despite the obvious relevance to this subject this work's scope does not include an analysis of the implications of sports betting with regard to (i) problems related to sport-related fraud, (ii) regulations regarding money laundering, (iii) Data Protection regulations, (iv) regulations for the protection of consumers and users, (v) regulations regarding intellectual property, image rights and competition law, etc. Please note that this work is focussed exclusively on the analysis of administrative regulation of sports betting in Spain.

[2] Decision of the ECJ on 6th November 2003, resolving case C-243/01.

[3] Decision of the ECJ on 6th March 2007, resolving cases C-388/04 and C-360/04.

[4] As stated by the ECJ in Section 60 of the Schindler decision, the ECJ stressed that these moral, cultural or religious considerations, together with the fact that these activities move large amounts of money that could be linked to crime and fraud, justify the national authorities having the power to determine the requirements that must be fulfiled by this activity.

gambling rights of each State (and consequently, rights related to sports betting) must respect the principles of free circulation of people and services that the EC Treaty proclaims in its Articles 43 and 49 and that any restriction of these principles must be fully justified.

This is why perhaps, *lege ferenda*, it is the best time to analyse the legal regime for sports betting in Spain in order to look at where we have come from, where we are and where we are going.

46.2 History of Sports Betting in Spain

Apart from games of chance, the history of sports betting in Spain is linked to the appearance of a game known as *La Quiniela* (The Pools), which has been played in this country since the second decade of the 20th Century, and which can be defined (currently) as a mutual bet in which the betters make predictions about the results of 15 football games that appear in competitions authorised by the Royal Spanish Football Federation or other national or international institutions (normally 10 teams from the 1st Division and 5 from the 2nd Division), these 15 predictions form a single bet (combinations of bets can also be made).

Although *La Quiniela* started officially on September 22, 1946 (soon after, as described later, the *Patronato de Apuestas Mutuas Deportivas Benéficas*—Charitable Sports Pari-Mutuel Betting Board—was created), the truth is that Spaniards had been playing *La Quiniela* since long before then. According to an article written by the journalist Tomás González-Martín entitled *La Quiniela is 60 years old, but it was born at the age of 15*, which was published in the newspaper ABC on September 28, 2006, people have been playing *La Quiniela* since 1929 and there is documentary evidence dating from the League championship in 1931–1932.[5]

According to the records kept on this first day of *La Quiniela* in 1946, a total of 38,530 tickets were purchased generating an income of 77,060 pesetas, of which 34,677 pesetas were used for prizes (45% of the income, as shall be explained later) distributed among the holders of 62 winning tickets.

Those who have studied the history of *La Quiniela* agree that the game was invented by Manuel González Lavín in 1929, who had the idea following the launch of the Spanish Football League. In fact, the first place in which his invention was exploited or marketed was *Bar la Callealtera, Casa Sota* that he managed, at number 22 in Calle Alta in the city of Santander.

La Quiniela was so successful that it crossed borders, expanding to cover not only the rest of Spain but also America, through the sailors who left the port of Santander for the American continent. The game also now had a printed set of

[5] According to the data provided in this article, the first ticket kept dates from November 22, 1931.

rules that determined the distribution of prize money and even envisaged incidents such as what happened in the event of suspension of a League game.

Initially, 95% of the income was used for prizes and the Tax Department only taxed the remaining 5%, which was used for the administration of *La Quiniela*. Later, this percentage was increased to 10%, as it can be seen on a ticket from 1931 that still exists today and that has the seal of the Spanish Tax Department showing the application of this rate of tax. This shows, undoubtedly, the normality with which the game was played then, even before the existence of specific regulations regarding sports betting, obviously apart from the general regulations applicable to gambling, which the Civil Code regulates in Articles 1,789 to 1,801. Similarly, it is clear that the State immediately saw sports betting as an easy way to gain a large amount of income for state coffers.

Success always has a lot of parents while failure is an orphan and so, soon, lots of parties wanted part of the loot. The first was the Town Council of the city of Santander, which in 1932 managed to gain 3% of the revenue, thereby reducing the prize money to 82%. Soon afterwards, it was agreed to give another 2% to charity. This led, almost by surprise, to the creation of an efficient and highly advanced private gambling organisation, which was a pioneer in Spain and Europe but that, like so many other things, was interrupted by the outbreak of the Spanish Civil War on 17th July 1936.

Following the war,[6] in the League's 1939–1940 season the management of *La Quiniela* (which was renamed *Bolsa del Fútbol*) was handed over to the religious order San Juan de Dios and it was decided that 50% of the revenue would be used for prize money, 5% for administration, and the remaining 45% would go to the religious order in order for it to carry out its own purposes. Finally, and after certain scandals that took place during these years, the State decided to take over its management (thereby appropriating the invention), for which it promulgated the Decree-Law dated 12th April 1946, creating the *Patronato de Apuestas Deportivas Benéficas* (hereinafter, the *Patronato*). It was at this time that what was initially a strictly private business became property of the State, which monopolised its management and exploitation and forbade private organisations from carrying out this type of activity, under penalty of being accused of committing a smuggling offence. It is curious that what was initially designed as a private business ended up becoming a state monopoly that, notwithstanding certain changes, has survived right up to the present day.

As explained in the preamble of the aforementioned Decree-Law, "The extraordinary level of interest that currently exists in sport (and football in particular), along with the enormous popularity of this game with regard to football, has given rise to the appearance of numerous bets in which the State is not involved at all in terms of regulation or financial exploitation, as all of these bets

[6] With regard to any intellectual property rights that the creator of La Quiniela might have had, it is sufficient to say that Manuel González Lavín ended his days at a concentration camp in Sant Cyprien (France).

are made and exploited by private citizens or entities." Therefore, it can be seen that the aim of this rule was not so much to regulate, but rather to give the State a monopoly over sports betting, even though the money was given to charity.

This is the intention of the legislature, for whom "State intervention would provide an appropriate guarantee to betters and would give the considerable financial product of these bets to public charity. These are the circumstances that advise the creation of an independent state Body to centralise the placing of these bets, which shall be established exclusively in order to provide considerable new revenue to charity."

And this is how the state monopoly of sports betting in Spain began which, as can be seen, *was initially limited to the world of football*. In this sense, the first Article of the aforementioned Decree-Law stated that "With the guarantee and intervention of the State, the Patronato de Apuestas Mutuas Deportivas Benéficas shall be established in Spain, *which initially shall only cover football*, without prejudice to the fact that in the future, if it is considered appropriate, it may also be applied to other sports."

This regulation of paramount importance, as it defined the legal framework for betting during the years of the dictatorial regime of General Franco (a state monopoly), and which, as explained below, was later on inherited by democratic Spain through the creation of the *Organización Nacional de Loterías y Apuestas del Estado* (National State Lottery and Betting Organisation).

As a consequence of this monopolistic purpose, the Decree-Law prohibits other sports betting in its Article 7, stating that "As the entire net product of these bets is meant for charity, any bets related to football that are established or may be established in the future are forbidden whenever, when making the bets, it is necessary to risk any amount of money." And this is accompanied by a warning[7] that "Anyone that breaches this provision shall be punished in accordance with the current Smuggling and Fraud Law."

This regulation established the distribution of the income from sports betting as follows:

(a) 45% would be used for prize money payable to betters;
(b) another 45% would be used for charity and social projects;
(c) the remaining 10% would be reserved to cover the expenses of the service provided by the *Patronato*.

Regarding the form in which the activity should be carried out, the regulation stated that "The issuance of tickets and the payment of the corresponding prizes shall be carried out by Lottery Offices, Subordinate Offices of Tabacalera S.L. and Tobacconists, which shall receive a commission or 'issue premium' for these services."

The importance of this regulation is based on the fact that, as we shall study further below, it established the following premises in the Spanish legal and

[7] As discussed later, this is maintained in current regulations.

political system, which the legislation regulating gambling and betting has respected (with the corresponding variations) up to the present day:

1. Gambling and betting is a state monopoly (which is now shared with the Autonomous Communities). There is no doubt in this regard. So much so that the subsequent Decree dated March 23, 1956, approving the Lottery Directive, declared in Article 1 that "The National Lottery is an ordinary resource of the income budget and a *State monopoly*, which guarantees the payment of prizes." Therefore, there can be no doubt as to whether or not gambling and betting in Spain has been a state monopoly.
2. Anyone who carries out these activities without the authorisation of the public authorities is considered to have committed a *smuggling offense*.
3. Part of the income from games of chance and sports betting must be used for public interest purposes (for charity in 1949 and today for the promotion of sport and other social purposes).
4. The distribution of tickets and the payment of prizes are carried out exclusively through Lottery Offices and Tobacconists. Because of this, Spaniards have historically made their bets at Lottery Offices and Tobacconists.

The *Patronato* continued to operate as an independent body reporting to the Tax Department until the restoration of democracy in Spain, and its activity has always focussed on sports betting. In this sense, for example, its most recent regulations (in particular, the Resolution of the *Patronato's* Board of Directors, approving the regulations governing betting competitions from 1st September 1979 onwards), state that the purpose of this body is not only to organise betting competitions (defined as competitions that "are organised based on the results of a game or various games of football that appear in competitions authorised by the Royal Spanish Football Federation or that have an international nature"), but rather to subject these to an administrative Law regime in order to better guarantee "the important public interests affected by these competitions." That is to say, in 1979 betting continued to be based on football and it continued to be an authentic state monopoly.

As stated previously, within the entry into force of the Spanish Constitution on December 29, 1978, the rigid state monopoly on gambling gave way to a new (but not necessarily any less rigid) legal regime in which the monopoly was shared between the State (when the bets or games are on a state-wide level) and the different Autonomous Communities recognised in the Constitution.[8] This was when the government, in order to unify the state bodies that managed gambling and sports betting, in 1984 and by means of the 1985 General State Budget Law (Law 50/1984, dated 30th December), created the *Organización Nacional de Loterías y Apuestas del Estado*—National State Lottery and Betting Organisation—(hereinafter ONLAE), which included and unified the institutions that had managed state-wide gambling up until this time, i.e. the *Patronato de Apuestas*

[8] Based on the powers that, respectively, the Spanish Constitution granted to each of them.

Mutuas Deportivas Benéficas and the *Servicio Nacional de Lotería*[9] (National Lottery Service) created after the Patronato.

This organisation brought together the state's jurisdiction in terms of gambling and betting, while respecting the jurisdiction corresponding to each of the Autonomous Communities recognised by the Constitution. The ONLAE was thereby given "responsibility for the organisation and management of lotteries, betting and gambling that *are within the State's jurisdiction*, assuming the jurisdiction currently granted to the Servicio Nacional de Loterías regarding the holding and authorisation of draws, lotteries, raffles, random combinations, gambling and betting that *covers all of the national territory* and that is currently the jurisdiction of the Patronato de Apuestas Mutuas Deportivas Benéficas with regard to the exclusive organisation and distribution of *football pools and any other betting competitions that take place based on the results of sporting events*."

The structure, composition and functions of the ONLAE were initially established by means of Royal Decree 904/1985, dated June 11 that was subsequently amended by Royal Decree 1651/1995, dated October 13, which shall not be explained here for obvious reasons. However it is worthwhile to briefly describe the current regime of ONLAE (currently named LAE, *Loterías y Apuestas del Estado*), which is defined by Royal Decree 2069/1999, dated December 30, approving the Articles of Association of the public owned company *Loterías y Apuestas del Estado* (LAE), and modified by Royal Decree 1029/2007.

The objective of this new regulation is to modernise ONLAE, modifying its structure and adapting it to its current functions in order to achieve efficient management that is able to achieve the goals set. Essentially, the main novelties in this new regulation were:

1. ONLAE was converted into a public owned company called Loterías y Apuestas del Estado (LAE), assigned to the Ministry of Finance and Taxation[10];
2. LAE would be governed by Private Law, apart from matters relating to the regulation of games within the state's jurisdiction and with regard to the authorisation regime granted by the state, which would be governed by administrative law;
3. Regarding the subject in hand, one of the functions entrusted to LAE (Article 41.b of its articles of association) was the "management, exploitation and marketing of charitable sports pari-mutuel betting, in any of its forms, as well as *any other betting competitions that are held based on the results of sporting events*;"

[9] In its Article 87.5, the Law resolves to create "The Organización Nacional de Loterías y Apuestas del Estado, reporting to the Ministry of Finance and Taxation, which shall be made up of the former Patronato de Apuestas Mutuas Deportivas Benéficas and the current Servicio Nacional de Loterías, reporting to the Ministry of Finance and Taxation."

[10] As shall be analysed later, it is worth noting the close link that has always existed between the jurisdictions related to the Tax Department and this game, which corresponds to its status as a state monopoly.

4. Furthermore, one of the most important functions attributed to LAE was the *granting of authorisations for the organisation of betting* (and other games) that exceeded the limits of an Autonomous Community (such as sports betting related to the Spanish League Championship). In this sense, Article 5 of its articles of association states that "The public owned company Loterías y Apuestas del Estado is *exclusively responsible for the authorisation* of the organisation and holding of draws, lotteries, raffles, random combinations and, in general any bet whose area of development or application exceeds the territorial limits of a specific Autonomous Community and sports betting, regardless of their territorial scope, as well as payment of the corresponding fees." This is one of the controversial powers of LAE as it makes it, apart from a provider of these services, both a judge and party of the sports betting sector.

The truth is that, according to the most recent data published by LAE, the eighty-year-old *La Quiniela* is still in very good health, as in the business year 2008 sales of *La Quiniela* amounted to 557 million Euros, with an average of approximately two and a half million bets made per week.

46.3 Sport and Sports Betting

As it has already been explained (remember that the income obtained from the activities of the *Patronato* was almost entirely given to charity), as in many other neighbouring countries, the State has always intended to use part (if not all) of the income it receives from gambling (and, in particular, regarding the matter in hand, from sports betting), for social purposes and public work (although it is fair to say that this percentage is increasingly small) and, namely, the promotion of Sport, which is an obligation that the Constitution imposes on the public authorities in its Article 43, which proclaims that "The public authorities shall promote health education, physical education and sport."[11]

In that sense, even the ECJ, in the aforementioned *Schindler*[12] case, stated that "it is worth highlighting that lotteries can make a significant contribution to the financing of philanthropic or general interest activities such as social work, charity work, sport or culture." Precisely because of this, it is justifiable (as long as it is not discriminatory) for national authorities to not only restrict this activity but also to determine the allocation of the profits made.

An example of the foregoing is the historic concession that the *Organización Nacional de Ciegos Españoles*—National Organisation for the Blind—(hereinafter

[11] Which, on the other hand, in Article 148.1.19 envisages that Autonomous Communities can assume jurisdiction in this area (The Autonomous Communities can assume jurisdiction related to the "promotion of sport and proper use of leisure facilities" as stated literally in this regulation).

[12] Decision of the Court of Justice passed on March 24, 1994, Schindler (C-275/92, Rec. p. I-1039).

ONCE),[13] has with regard to the "prociegos" coupon. As explained by case law at court,[14] "the justification for the concession that has historically been maintained regarding the exploitation of the prociegos coupon as a source of financial resources for the entity resides in the need to provide it with sufficient financial resources for it to fulfil the relevant public interests that it has assumed since its creation and continues to assume; these funds are allocated by the State through the authorisation of this draw rather than by assigning an amount charged to the State budget and it therefore constitutes a source of income for the ONCE that is essential for the performance of the activities that it carries out in the public interest."

In this sense, regarding sports betting and sport, when the National Professional Football League (hereinafter LFP) was created in 1983 during a period of serious financial crisis at Spanish football clubs,[15] the government (through the National Sports Council), intending to heal the football clubs' accounts, signed an agreement with the LFP that determined the debt of Spanish football clubs and established the way in which it should be financed: namely, with 2.5% of the revenue for *La Quiniela*. Therefore, the form envisaged to solve the financial problems of Spanish football was partially based on the revenue obtained from sports betting through *La Quiniela* (The Pools).

Unfortunately, this first attempt at solving the financial problems of Spanish football was unsuccessful, and therefore, at the end of the 80s, the government took further measures to deal with the problem by promulgating Law 10/1990, dated October 15, *regarding Sport* (hereinafter, the Sport Law). It should be taken into account that when this Law was published, the football clubs' accounts had accumulated a debt of 35,000 million pesetas.

For this purpose the Sport Law envisaged the implementation of the so-called Second Corrective Plan,[16] which would take place in two specific areas. On the one hand, in order to eliminate the debt accumulated by football clubs, it was agreed that these debts (part of which were due to the expenses resulting from the renovation of stadiums for the World Cup held in Spain in 1982) would be made the responsibility of the LFP. Furthermore, in order to guarantee the sport's

[13] The ONCE is a non-profit corporation whose aim is to improve the quality of life of blind people and people with visual disabilities in Spain. It is a type of social welfare institution. Some of its charitable activities are carried out through its Foundation, which is funded with 3% of the gross sales revenue from the gambling products that the Organisation exploits with the State's administrative authorisation. The gambling products are the ONCE's financial powerhouse and directly or indirectly support almost 110,000 people.

[14] Decision number 1162/2002, dated October 24, of the Madrid High Court of Justice (Administrative Disputes Chamber, Section 9).

[15] Which, due to the World Cup held in Spain in 1982, was obliged to invest millions in their stadiums leading to a debt, by the middle of the 1980s, of more than 20,000 million pesetas.

[16] In its Additional Provision 15, the Sport Law stated that "In order to rectify the financial situation of the professional football clubs, the National Sports Council shall formulate a Corrective Plan that shall include an agreement to be signed between this body and the National Professional Football League."

economic success and recapitalise the football clubs, all of the football clubs were forced to become limited sporting companies (sociedades anónimas deportivas, SAD).[17]

While on one hand the LFP took responsibility for the payment of this debt, on the other hand it centralised the charging of television transmission rights and the percentage received from *La Quiniela*,[18] which would be used for the payment of the debts that it had taken over from its affiliated clubs. Furthermore, during the business years 1991 and 1992, 7% of ONLAE's total annual revenue was used to fund the "Barcelona 92" Olympic Games.[19]

And this is how things worked in Spain until finally, in 1997, the LFP cancelled the Corrective Plan that was still in force by funding the debt remaining as a result of this Plan with its own financing resources (specifically, by means of a loan of 20,000 million pesetas granted by a Savings Bank), gaining in return a better assignation of the distribution of money from *La Quiniela* (which was increased to 10%,[20] which is maintained today), while guaranteeing the fulfilment of the objectives of the previous Corrective Plan.

And this is the current legal regime regarding the distribution of the profits from sports betting, which is regulated by Royal Decree 419/1991, dated March 27. This Decree regulate the distribution of the revenue and prize money from sports betting controlled by the State and other games managed by the ONLAE (in the version resulting from the modification made by the subsequent Royal Decree 258/1998, dated 20th February). According to Article 1 of this Royal Decree:

> The total weekly revenue obtained by the National State Lottery and Betting Organisation from Charitable Sports Betting shall be distributed as follows:
>
> a. Fifty five percent for prizes.
> b. 10.98% for Provincial Councils, through the respective Autonomous Communities or for these, if they only contain one province.
> c. Ten percent for the National Professional Football League.
> d. one percent for the National Sports Council, to be used for non-professional football.

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[17] With the only exception of the four football clubs that had a positive net balance at the time of approval of the Sport Law (Real Madrid FC, FC Barcelona, Athletic Club de Bilbao and Club Atlético Osasuna).

[18] In accordance with the Transitory Provision 3 of the Sport Law, "During the period of validity of the agreement and until the total extinction of the debt, the professional League shall receive and manage the following financial rights:

a. Those that, for any purpose, are generated by the television broadcasting of the competitions organised by the League (by itself or in conjunction with other club associations).
b. Those corresponding to the general sponsorship of these competitions.
c. The 1% of the total income from sports betting controlled by the State recognised by current legislation as being assigned to the professional League."

[19] In accordance with the Transitory Provision of Royal Decree 419/1991, dated March 27.

[20] This being ruled afterwards by virtue of Royal Decree 258/1998, dated February 23, partially modifying Royal Decree 419/1991, dated March 27, regulating the distribution of the revenue and prize money from sports betting controlled by the State and other games managed by the ONLAE and adding additional regulations.

e. Whatever is left over after each business year, having deducted the Administration expenses and the Commissions payable to Receivers, shall be given to the Public Treasury.

Therefore, as can be seen above, the revenue from sports betting is still used today to finance the promotion and stability of sport in Spain.

46.4 Present Situation: Appearance of New Forms of Exploitation

Nobody today doubts the importance of the game (in all of its forms) to the Spanish economy. Together with traditional games such as *La Quiniela* and the Lottery, new times have brought with them several variants that have enabled those that exploit this business (up to this day and officially, the State through the LAE and the ONCE, along with various private companies, that have been granted administrative authorisation by the Autonomous Communities, in the different leisure locations concerned such as casinos, bingo halls, gambling rooms, etc.), to exponentially increase their profits and results.

In this sense, a look at the latest data published by the Interior Ministry shows the financial importance of the sector. In its last *Annual Report on Gambling in Spain*[21] (2007), the Ministry stated that the total amount played in 2007 equalled 30,989.59 million Euros, which indicates the importance of the gambling sector to the Spanish economy. Furthermore, the report stated that the average amount played per inhabitant amounted to 685.61 Euro, which is no small figure.

However, despite the success of games of chance, the fact is that Spanish legislation has left out certain formats or types of games (particularly with regard to online sports betting), causing a situation of legal uncertainty that leaves the various operators and users in a sort of legal limbo that they can only get out of in two ways: either by giving up the exploitation of these formats (because, it could be said that these are actually illegal types of games because they do not have the corresponding administrative authorisation); or by waiting for the State and the Autonomous Communities to define a new legal framework in which these new activities can be carried out. Of course, there is also the option of operating illegally from another location.

By way of example, in its Report, the Ministry divides the existing (and, of course, legal) games into three main groups, depending on the way they are organised:

1. Games organised by private companies that have administrative authorisation, which are carried out at establishments that are appropriate for this purpose such as casinos, bingo halls and gambling rooms (*slot machines*);

[21] Accessible at http://www.mir.es/SGACAVT/juego/memorias_de_juego/informeAnualJuego2007.pdf.

2. Games managed by the State, entrusted to the public owned company Loterías y Apuestas del Estado (LAE) including Lotteries, Primitivas (Primary Lotteries) and *La Quiniela* (in its various current versions); and
3. Games managed under special administrative authorisation by ONCE, including the various games involving the popular "cupón" (coupon).

As it can be seen, apart from certain online versions of the games exploited by the LAE (which shall be referred to later), the Report does not contemplate the games and sports betting that have been developed over the last few years through web platforms, i.e. what is now known worldwide as Online Gambling or Online Betting, depending on the type of game.

Put simply, this is because the *current legislation* (notwithstanding what it will be explained later) *does not contemplate the exploitation of games of chance or sports betting that is carried out online, and therefore these cannot be authorised*. And it is, because it is not possible "to grant authorisation for a type of gambling or betting in the absence of the technical regulations necessary for its conduction and practice,"[22] an essential requirement that, with the current regulations, prevents the granting of this type of authorisations.

At the same time, gambling activities that do not have the corresponding administrative authorisation are considered illicit and are punished according to Spanish Law as a smuggling offence. This results in private operators who want to carry out these types of activities in Spain having to choose between doing it by clandestine means from tax paradises such as Antigua and Barbuda, Turks and Caicos, Gibraltar, or from nearby countries in which this activity is legal, such as the United Kingdom and Malta; or giving up the idea of carrying out this activity in Spain (which obviously does not happen very often).

As shall be analysed in the corresponding section, before beginning their activities some of the sports betting establishments that currently operate in Spain requested administrative authorisation to carry out their activities, although it always refused for the reasons that we will study later.

Obviously, like any other activity that is carried on outside the law, this situation does not benefit anyone, as it not only generates insecurity (relative because in fact the activity without authorisation is simply illegal), and lack of the appropriate legal guarantees, but it also means (from a financial point of view) that the Tax Department loses the taxes corresponding to this economic activity.

However, as always, reality moves faster than law, and therefore, despite the obstacles presented by Spanish legislation, the business of sports betting over the Internet already moves millions of Euros in Spain. According to the latest data published by the Telecommunications Market Commission (an independent public body that regulates the Spanish electronics and communications markets and reports to the Ministry of Science and Technology) in its *Annual Report on*

[22] Decision number 1368/2000, dated November 2, of the Galician High Court of Justice (Administrative Disputes Chamber, Section 2), regarding the appeal made by Eurobets International Sports Betting S.A.

Electronic Commerce in Spain though form of payment entities in 2008,[23] in the fourth quarter of this year it can be seen that:

1. The total turnover in 2008 amounted to 5,183,816,091 Euros;
2. Games of chance and betting represent 7.1% of this total turnover, occupying the 4th position[24] by sector, after air transport (1st), direct marketing (2nd) and travel agencies and tour operators (3rd);
3. Regarding the total number of financial transactions, games of chance and betting took 2nd place, with 8.3% of the total;
4. It is also significant that, if we analyse the data regarding the distribution of the turnover of electronic commerce involving money sent abroad from Spain, *games of chance and betting are in 1st place*, with 12.3% of the total. This is also the case for the number of transactions involving money sent abroad from Spain, of which gambling and betting also occupy first place, with 13.3% of the total;
5. On the other hand, analysing data in the opposite direction with regard to the turnover sent *from abroad to Spain, games of chance and betting are in last place*, together with health services, representing just 0.2% of the total;

In short, almost all of the turnover from games of chance (gambling) and online betting in Spain is sent abroad from Spain, with Spaniards using web pages located outside of Spain.

46.5 Legislative Framework: Jurisdiction of the State and Autonomous Communities

46.5.1 State Legislation

46.5.1.1 Initial Regulation: The Transposition of Directive 2003/31/CE, of the European Parliament and Council, Dated 8th June, into Spanish Law

Spain incorporated European Directive 2000/31/CE, *regarding certain legal aspects of information society services,* in particular electronic commerce in the domestic market (hereinafter, the Directive on electronic commerce), by means of

[23] Accessible at http://www.cmt.es/cmt_ptl_ext/SelectOption.do?nav=publi_info_comercio_elect.

[24] Furthermore, according to data provided by the sector (specifically, the Spanish Association of Internet Betters, AEDAPI), during the year 2007 a total of 650 million Euros were played in Spain and in business year 2008, the Internet betting business obtained results of over 200 million Euros in Spain. Furthermore, there was a noticeable increase in the importance of sports betting, which in 2009 (according to these estimates) will increase almost 30%.

Law 34/2002, dated July 11, *regarding Information Society Services and Electronic Commerce* (hereinafter, LSSI).

Strangely, although Article 1.5.d) of the Directive on electronic commerce excluded from its scope of application "games of chance that involve bets of monetary value including lotteries and betting," the Spanish legislators decided to include these services within the scope of application of the Spanish law. In this sense, in Article 5.2 of the LSSI ("Services excluded from the scope of application of the Law"), it is stated that "The provisions of this Law, with the exception of the provisions of Article 7.1, shall apply to information society services related to games of chance that involve bets of a financial value, without prejudice to the provisions of specific State or Autonomous Community legislation."

However, although the LSSI is based on the principle of the free provision of services without the need for prior authorisation, a full analysis of the Law reveals that it does in fact permit the restriction of this type of service through several of the regulation's articles. For example, although Article 7 of the LSSI declares that "the provision of information society services by a provider established in a member State of the European Union or the European Economic Area shall be carried out under the regime of free provision of services, and no restrictions may be established due to reasons deriving from the coordinated regulatory framework," this general principle, with regard to sports betting, is contradicted as these services may be interrupted when they go against or may go against the following principles (among others):

- The safeguarding of public order;
- The protection of individuals that are considered consumers; and
- The protection of young people.

These are all principles that are closely related to gambling and betting, which can be used to prevent the provision of online services related to gambling. But the most important part is the final part of Article 5.2 ("without prejudice to the provisions of specific legislation"), as this is what prevents the provision of online sports betting services in Spain on a national level, as the corresponding service providers do not have the administrative authorisation required to do so. This leads us to think that the inclusion of betting in the scope of this Law, but with all of the options for restrictions described, was only done (at least temporarily) so that the LAE could, as described later, carry out its activities over the Internet.

46.5.1.2 Authorisation of the LAE for the Online Exploitation of Games of Chance and Betting

Given the unstoppable growth of the business of online sports betting, in 2005 the Spanish government adapted the regulations for Loterías y Apuestas del Estado (which, as we have seen, manages and exploits gambling within the State's jurisdiction) to the Internet, so that this organisation could exploit its business by means of this medium. For this purpose, it issued order EHA/2566/2005, dated

20th July, *of the Ministry of Finance and Taxation, authorising Loterías y Apuestas del Estado to market and exploit its products via the Internet or other interactive systems*.

As stated by the regulation in its preamble, "the rise of information technology, particularly the Internet, has resulted in the appearance of a series of environments whose main characteristic is the provision of goods and services remotely" and therefore Loterías y Apuestas del Estado "must not ignore the evolution of technologies and the needs and demands of the public, but rather, as most countries in the European Union have done, it must adapt the marketing of its products to these new criteria."

By doing so, the Ministry intended to fulfil two objectives: on the one hand, authorise the exploitation via the Internet of government-controlled gambling and betting on a national level; and, on the other hand, eliminate or reduce the number of illegal games or bets that take place via the Internet ("the existence of this new form of participation, based on the aforementioned requirements in terms of guarantees and security, shall result in the reduction and even the *disappearance of a high number of illegal games or bets that take place via the Internet*" is the literal text of this rule). That is to say, the ministerial order is declaring that the only legal bets that can be made in Spain on a national level are those that are made through the LAE or by any other organisation that it authorises.

It is worth highlighting that the Order *expressly prohibits the LAE from marketing these betting services on a cross-border basis*, which must be guaranteed by means of technological devices that prevent bets from being made from abroad. In this sense, point 3 of its Article 3 states that "In order to avoid cross-border betting, the operation for validation by Internet or other interactive means must establish the system necessary to ensure that participation is only possible within national territory."

However, although the different forms of gambling and betting were marketed over the Internet, the rights and obligations deriving from participation "are those established in the corresponding regulations," which means that there were no changes to the legal regime for each type of gambling and betting.

Subsequently, the LAE developed this ministerial order (approving the conditions for the marketing of the service, mainly in order to avoid the participation of minors and to restrict participation to Spanish territory) by means of a resolution passed on August 23 of the same year. Recently, this resolution was derogated by virtue of the latest step taken by LAE regarding this matter, through its Resolution passed on June 18, 2008, regulating the validation over the Internet of the different types of betting competitions.

This recent resolution regulates the procedural requirements that online betting and gambling must fulfil in order to comply with Spanish legislation (it may, in the future, serve as a model for future general regulations). In this sense, the main regulatory provisions state that:

- This type of bets must be made via the web page of LAE (www.loteriasyapuestas.es) and may be by any of the types envisaged and classified

on this web page: La Quiniela (football pools), El quinigol (football betting), Lototurf (horse racing), Quintuple Plus (horse racing), La primitiva (primary lottery) and other lottery games (Euromillón and El Gordo);
- In order to participate, players must be registered in LAE's web page. This rule states that this record of players must comply with legislation applicable to the personal data protection (Organic Law 15/1999, dated 13th December, regarding Personal Data Protection);
- In order to guarantee that bets are made by adults and in order to avoid international bets, the regulations state that money for betting can only be placed by means of a credit or debit card linked to a Spanish bank account, and that this bank account must correspond to a natural Spanish person who has his main residence in Spanish territory;
- Participants shall manage their money through an "e-wallet" (the so-called "loto-bolsa"), which shall be used not only to place bets but also for the payment of the winnings. This e-wallet should have a maximum balance of €200;
- The maximum bet should be €200;
- If, as a consequence of the payment of prize money, the e-wallet's balance exceeds €200, the system shall automatically make a deposit in the bank account designated by the participant; and,
- Prizes of less than €600 are paid directly to the e-wallet (unless the existing balance plus the prizes won exceed €200), in which case this amount shall be deposited into the designated bank account. If the prizes obtained exceed €600, the participant must make a collection request by means of the procedure established for this purpose.

According to LAE,[25] in 2008 sports bets placed via the Computerised Betting system grew by 31.32%.

46.5.1.3 Subsequent Repressive Measures Against Online Betting: The Law for the Repression of Smuggling

Following the order EHA/2566/2005 described above, which authorised the LAE to operate online, and given the increase in online sports betting and (we assume) given the amount of tax fraud that foreign betting establishments operating in Spain were committing (prohibited activities, of course, do not pay taxes), in order to try to prevent this situation (and perhaps inspired by the repressive actions of the governments of the United States, France, etc.), firstly in the General State Budget Law for the year 2006 (Law 30/2005) and, more decidedly, by means of Law 42/2006, dated 28th December, regarding the General State Budget for the year 2007 (hereinafter, Budget Law), the government repeated the pre-existing prohibition of sports betting over the Internet. The Law specifically mentioned those organised "by foreign entities" and added that this prohibition also applies to entities that

[25] Accessible at http://www.onlae.es/contenidos/1116/file/np20090303laquinielaen_2008.pdf.

give publicity to these entities. This measure also reaffirmed LAE's monopoly on online gambling in Spain.

In particular, the Budget Law carries out this repression of online betting by means of its Final Provision 14, including these activities (whenever they are carried out without authorisation) within the scope of Organic Law 12/1995, dated 12th December, regarding *The Repression of Smuggling*. This Final Provision states that

> One. For the purposes of the provisions of Articles 1.7 and 2.1.d of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, *it is considered forbidden to distribute, trade, hold or produce* tickets, coupons, stamps, cards, receipts, machines or any other item, (including technical or computer equipment) that is *used for the practice of games of chance, draws, lotteries, betting and football pools*.
> It is forbidden, *without authorisation of the competent administrative body*, to hold raffles, tombolas, random combinations and, in general any competitions in which participation is not free and prizes are given by means of any random formula in which chance is a form of selection.
> The *conduction of the activities* envisaged in the preceding Section b.1 *without the corresponding administrative authorisation* or in conditions that differ from those authorised, shall be subject to the *penalty system established for smuggling infractions* in Volume II of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, regardless of the total amount of goods, merchandise, bills or the medium used to carry out the activity. These infractions shall be processed in accordance with the procedure established in Royal Decree 1649/1998, dated 24th July, which develops Volume II of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, and in any case the legal authority to impose penalties shall correspond to the Director of the Department of Customs and Excise of the National Tax Administration Agency.
> The Ministry of Finance and Taxation is authorised to define and regulate the activities referred to in the first point of letter b of this section.
> Two. With effects from 1st January 2007 and with an unlimited period of validity, a modification is made to the additional provision 19 of Law 46/1985, dated 27th December, regarding the General State Budget for 1986, which shall read as follows:
> One. In accordance with Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, *it is prohibited* in the whole national territory to sell, import, distribute and produce tickets, coupons, stamps *or any other item used for lotteries, betting and other games organised or issued by foreign persons or Entities*.
> Two. …

This criminalisation of the activity (and its advertising, which the Law prohibits in Section 2.2),[26] includes sports betting as one of the items prohibited by the Law of Repression of Smuggling. Basically, a crime is considered to have been committed by anyone who "Carries out operations involving the importation, exportation, production, trading, possession, distribution or rehabilitation of restricted or prohibited items, *without fulfilling the requirements established by Law*" (Article 2.1.d) of this regulation).

Or, as expressly stated in the new regulation, anyone that carries out this type of activity (in our case, online sports betting) "*without the corresponding*

[26] Which is not transcribed herein, as it does not fall within the object of this article.

administrative authorisation, or in conditions that differ from those authorised" shall be subject to the "*penalty system established for smuggling infractions*."

As this activity requires authorisation and, apart from the exceptions that we will examine later in the Autonomous Communities of Madrid and Euskadi (Basque Country), this activity is not properly regulated and it is impossible to fulfil these legal requirements or be authorised to operate, operators cannot avoid committing a smuggling offence.

On the other hand, despite the fact that the Spanish press has published that the Tax Authorities, in conjunction with the anti-corruption prosecutor, have already opened an investigation to study a possible case of tax fraud by betting establishments (which could, according to this information, amount to 500 million Euros), the fact is that so far there is no evidence that penalties for smuggling offences have been applied to any of the foreign companies that offer sports betting in Spain over the Internet, or anyone who advertises them (we are aware, for example, that even some of the most important football clubs in the League Championship advertise these betting establishments), which perhaps demonstrates the possible voluntary ingenuity of the Spanish legislature when regulating this activity.

46.5.1.4 The "Mandate" to the Government Contained in the Law on Measures to Promote the Information Society

In these circumstances, taking advantage of a legislative reform to promote the so-called Information Society, the legislature stated that the government should formulate a Law to regulate gambling and betting activities in Spain, particularly those carried out over the Internet. Realistically, this is not exactly a mandate but rather a *desideratum* or a reminder by the legislator to the government to regulate and update the regulations regarding gambling and betting (because so far no Law has been promulgated regarding this matter and no project has been drawn up for this purpose).

In this sense, by means of the Additional Provision 20 (entitled "Regulation of gambling") of Law 56/2007, dated 28th December, regarding *Measures for Promoting the Information Society*, it is stated that

> The Government should present a Project of Law to regulate gambling and betting activities, in particular those carried out by means of interactive systems based on electronic communications, which should be based on the following principles:
>
> 1. It should ensure the compatibility of the new regulations with the legislation applicable to other areas linked to the provision of this type of services, and, in particular, the regulations for the protection of minors, young people, groups of users that are particularly sensitive as well as consumers in general, apart from the area of personal data protection and services of the Information Society.
> 2. It should establish regulations regarding the exploitation of gambling activities by interactive systems in accordance with the principles of general European Union law.
> 3. It should create a system for the control of gambling and betting services via interactive systems that guarantees market conditions that are fully safe and fair for the operators of these systems and that provide an adequate level of protection to users. In particular,

it should regulate the activities of those operators that already have authorisation for the provision of the aforementioned services granted by the authorities of any of the member States of the European Union.

4. It should establish a system for the taxing of gambling and betting services via interactive systems based on the origin of the operations subject to taxation. The regulation must also envisage a system for the distribution of taxes collected as a consequence of the exploitation of gambling and betting services by electronic means in Spain between the State Government and the Autonomous Communities, taking into account the special tax system in Special Autonomous Regions.
5. The activity of gambling and betting though interactive systems based on electronic communications *may only be carried out by operators authorised to do so by the competent Public Authority, by means of the granting of an authorisation* following fulfilment of the conditions and requirements established. Anyone that does not have this authorisation may not carry out any activity related to interactive gambling and betting. In particular, the necessary measures should be taken to prevent the conduction of advertising by any means and to prohibit the use of any method of payment existing in Spain. Furthermore, the penalties envisaged in legislation regarding the repression of smuggling should be applied to any gambling and betting activities carried out via interactive systems without the corresponding authorisation.
6. Jurisdiction for the regulation of gambling and betting activities carried out via interactive systems shall correspond to the General State Government when it covers the whole of the national territory or more than one Autonomous Community.
   That is to say, the wish stated by the legislature is that the future Law regulating gambling and betting activities:

(a) Tends to protect the rights of minors, young people and particularly sensitive groups such as consumers and users;
(b) Incorporates the standards and principles of European Union Law regarding this matter;
(c) Regulates the activity in Spain of operators that have authorization from a State in the European Union;
(d) Establishes a system of tax collection and distribution and sharing of these taxes between the State and the Autonomous Communities; and,
(e) Respects the premise that only those authorized by the competent authority may operate, and that anyone that operates without authorization shall be punished in accordance with the regulations regarding the repression of smuggling (in accordance with the terms stated previously).

Finally (as stated in other previous regulations), this Provision defines the area of jurisdiction that corresponds to the State and the Autonomous Communities, i.e., when an operator wishes to cover the territory of more than one Autonomous Community or the whole of the national territory, the jurisdiction to authorise this activity shall rest with the General State Government.

46.5.2 Autonomous Community Regulations

As stated previously, Article 149.1 of the Spanish Constitution (which specifies the exclusive powers of the State) does not grant the State exclusive jurisdiction over gambling. This being the case, how is it possible to justify that in Spain gambling

is controlled by a State monopoly? As recognised by the Spanish Constitutional Court in its Decision dated July 23, 1998:

> despite the lack of express mention of Gambling in Articles 148.1 and 149.1 of the Spanish Constitution in the Statutes of Autonomy, the constitutional system of powers has attributed this area to the Autonomous Communities … Therefore, in accordance with Article 149.3 of the Spanish Constitution[27] and given that in Article 149.1 the State does not expressly reserve this matter, it may be stated that 'the Autonomous Government of Catalonia, in accordance with Article 9.32 EAC, has exclusive jurisdiction over casinos, gambling and betting, except Charitable Sports Pari-Mutuel Betting (STC 52/1988, point 4 of the legal grounds) and this includes jurisdiction over the organisation and authorisation of gambling in the territory of the Autonomous Community' (SSTC 163/1994, point 3 of the legal grounds and 164/1994, point 4 of the legal grounds), in this territory but not, obviously, that of any game in the whole of the national territory given that Article 25.1 of the Statute of Autonomy limits the area in which it may exercise its powers to the territory of the Autonomous Community. Furthermore, neither the silence of Article 149.1 of the Spanish Constitution regarding gambling nor the fact that the Statutes of Autonomy, including that of Catalonia, state that they have exclusive jurisdiction over gambling and betting can be interpreted as a total revocation of the State's powers in this area, as certain activities that other provisions of Article 149.1 of the Spanish Constitution attributes to the former[28] are closely linked to gambling in general, not just that reserved in Article 149.1.14 of the Constitution regarding the management and exploitation of the National Lottery Monopoly in the whole of the national territory, …
>
> In order to determine, therefore, the jurisdiction regarding this matter, it is useful to remember that … 'the tax monopoly … over the Lottery extends to all other games of chance that may be related to it and it assumes jurisdiction to authorise them." And as "an ordinary resource of the income budget and State Monopoly' … it falls within its jurisdiction by virtue of its control of the General Tax Authorities … which includes the state monopoly as a historically defined institution, and therefore the State Government is responsible for the management and exploitation of the Lottery in the whole of the national territory. This determines, in turn, by virtue of the aforementioned monopoly system regarding this game of chance, the prohibition of lotteries, draws, raffles, betting and other similar games without the authorisation of the State Government …
>
> This is why we stated that, in accordance with Article 149.1.14 of the Spanish Constitution, the State is responsible 'due to its consideration as a source of state Tax Authority, for the management of the National Lottery Monopoly and the power to organise lotteries with a national scope,' as well as 'as far as they imply a derogation of the monopoly established in favour of the State, to grant concessions or administrative authorisations for the holding of draws, lotteries, raffles, betting and random combinations only when their scope covers the whole of the State's territory' (SSTC 163/1994, point 8 of the legal grounds); and 216/1994, point 2 of the legal grounds).

The foregoing means that this jurisdiction regarding gambling is shared with each of the Spanish Autonomous Communities that, except Ceuta and Melilla,

[27] "Areas not expressly attributed to the State by this Constitution may correspond to the Autonomous Communities, by virtue of their respective Statutes. Jurisdiction over areas that have not been assumed in the Statutes of Autonomy shall correspond to the State, whose regulations shall prevail, in the event of discrepancies, over those of the Autonomous Communities regarding any matters over which they do not have exclusive jurisdiction. State law shall be, in any event, complementary to the Law of the Autonomous Communities."

[28] This refers to the Tax Authorities.

have exclusively assumed, in their Statutes of Autonomy, jurisdiction for gambling[29] in their territory. Furthermore, the relationship between State regulations and Autonomous Community regulations in this case, is based on the principle of regulatory jurisdiction rather than regulatory hierarchy. This means that the regulations of the State do not prevail over those of the Autonomous Communities and each are only valid within their area of application.

Therefore, *the State has jurisdiction regarding gambling and betting when these exceed the territorial scope of an Autonomous Community or when these have a national scope*, and the Autonomous Communities have exclusive jurisdiction regarding gambling and betting when its scope is limited to their territory (excluding charitable sports pari-mutuel betting, as they do not have jurisdiction on it).

Up to this date, of the 17 Autonomous Communities that make up Spain, only two of them (the Autonomous Community of Madrid and the Autonomous Community of the Basque Country) have expressly regulated the activity of the so-called "betting establishments." This regulation is that contained in Decree 106/2006, dated November 30, *approving the Regulation of Betting in the Community of Madrid* and Decree 95/2005, dated April 19, *approving the Regulation of Betting in the Autonomous Community of Euskadi*, respectively.

By way of summary:

46.5.2.1 The Regulations of the Community of Madrid

1. Regulate, within the territory of the Autonomous Community, "bets on sporting events, competitions or other previously determined events;"
2. Grant the corresponding autonomous body the power to "authorise the organisation and marketing of betting, as well as betting establishments and areas;"
3. Ban the participation of minors, the participations of those for whom a prohibition from accessing games has been applied for, as well as the participation of professional sportsmen and women and trainers (to avoid sport-related fraud), managers and staff of betting establishments, directors of the entities participating in the event that is the object of the bets, referees and judges involved in the competition, etc.;
4. Require that companies that wish to obtain authorisation to organise and market betting must fulfil the requirements of the Decree (among others, have Spanish

[29] For example, Article 9.32 of the Statute of Autonomy of Catalonia approved in 1979 established its exclusive jurisdiction with regard to "Casinos, gambling and betting, excluding Charitable Sports Pari-Mutuel Betting." In turn, the new Statute of Autonomy of Catalonia approved in 2006 states, in its Article 141.1, that "The Autonomous Government of Catalonia has exclusive jurisdiction regarding gambling, betting and casinos, if the activity is carried out exclusively in Catalonia, including," among others powers, "the creation and authorisation of gambling and betting, as well as its regulation."

nationality or that of any of the Member States of the EU, have a tax address in the Community of Madrid, provide a deposit of 12 million Euro, etc.; and,
5. With regard to the remote provision of these services, it is stated that providers of this service must have a secure computer system for the organisation and marketing of bets that is capable of ensuring that the terms of this Decree are respected. i.e. among other things, they must guarantee that bets are not placed outside the territory of the Community of Madrid.[30]

46.5.2.2 Regulations of the Autonomous Community of Euskadi

1. Aim to regulate, within the territory of the Autonomous Community, bets on the events included in the catalogue attached to the regulations;
2. Include prohibitions on betting that are similar to those described in the preceding Section (a);
3. Prohibit bets that are made without authorisation or based on events that are not included in the catalogue attached to the regulations;
4. State that the adjudication of authorisations shall be carried out by public tender;
5. State that the awardees of the tender must have a share capital of at least 1 million Euros, be from a country that is a member of the EU, have their registered address in the Autonomous Community of the Basque Country, etc. Furthermore, the awardees must provide a guarantee of 500,000 Euros; and,
6. The authorisations shall be granted for a period of 10 years.

It can be seen that both Decrees regulate the activity of betting in a very similar way. Perhaps the most noticeable difference is the fact that the Community of Madrid's regulations are based on the principle of free competition, while the Basque Country's regulations are based on administrative concession with a limited number of licences (during the first public tender, held on May 2, 2007, only three licences were granted).

According to the AEDAPI, so far in Madrid the first companies to open betting establishments have been Victoria (owned by Codere and William Hill), Sportium (Cirsa and Ladbrokes), Intralot Iberia and W1nners (an Alliance between Bwin and Betbull). For its part, in the Basque Country, the companies that have obtained a licence have been Victoria (Codere, William Hill and Gabascar), Reta (made up of Basque gambling operators) and Kiroljokoa (also made up of Basque operators, linked to the Basque Ball game).

It seems fair to say that these disorganised Autonomous Community regulations will never be enough to regulate the betting sector in Spain and, in any event, they will limit the growth of the sector preventing it from equally competing with foreign markets. Now that we live in a "Global Village," as famously expressed

[30] One of main criticisms of these regulations is that it is technically very difficult, if not impossible, to fulfill this requirement.

by McLuhan, it is absurd to consider regulations that divide the sector by Autonomous Communities, in which a single operator cannot operate in the whole of the country unless it obtains authorisations from each of the 17 Autonomous Communities. The truth is that this does not look like a very logical or efficient solution.

46.6 Examples of Case Law

In contrast to the situation in other countries, it could be said that in Spain there have not been any large legal disputes regarding sports betting. Perhaps this is due to the regulatory situation described and the reduced flexibility of the Spanish system. However, pursuant to the content of this work, it might be useful to highlight the following cases (some are related to gambling in general rather than sports betting), which confirm the regulatory situation described above:

46.6.1 Regarding Requests for Authorisation to Exploit Sports Betting Made by Some Private Operators in Spain

46.6.1.1 Judicial Review Number 1183/1997, Filed by the Company EUROBETS INTERNATIONAL SPORTS BETTING S.A. Against the Refusal of Authorisation for the Exercise of its Activity

Eurobets International Sports Betting S.A. (hereinafter, the company), filed a judicial review against the Resolution dated May 9, 1997, of the Sub-secretariat of the Ministry of Finance and Taxation, rejecting its previous appeal against ONLAE's Resolution dated January 3, 1997, which denied authorisation "for the exercise of the activity of national and international betting brokerage on sporting competitions."

The basis for the case is that in 1996 the company filed three requests for authorisation to open three betting brokers dealing with all types of sporting competitions "through any of the existing forms of communication," including data transmission, with a nationwide scope (two of the requests related to the Autonomous Communities of Madrid and Aragón, but with nationwide scope). These three requests were rejected by the ONLAE. This decision was subsequently ratified by the Ministry of Finance and Taxation, as stated above.

The judicial review was resolved by the Madrid High Court of Justice (Section 8 of the Administrative Disputes Chamber) in Decision number 266/2000, dated March 16 of this year. In its resolution, the Court rejected the company's appeal, stating that

- As a brokerage with nationwide scope was requested, "the public body with jurisdiction to decide whether to authorise the request is the ONLAE" and not the Interior Ministry or the Autonomous Communities of Aragon and Madrid.

- The resolutions that reject the request for authorisation to exploit the business of sports betting do not infringe the right of free enterprise proclaimed in Article 38 of the Spanish Constitution, as "the Administration has ruled against the wishes of the applicant because this is permitted by the national legislation applicable to this area, which is the exclusive jurisdiction of the State."

46.6.1.2 Judicial Review Number 579/1997, Filed by the Company EURO-BETS INTERNATIONAL SPORTS BETTING, S.A. Against the Refusal of Authorisation for the Exercise of its Activity

In this case, the company filed a judicial review against the resolution of the Ministry of Finance and Taxation of the Balearic Government, dated April 7, 1997, which also rejected the request for an authorization "to establish a national betting broker dealing with all types of sporting competitions through any of the existing forms of communication (fax, computer, telephone, post, etc.) either directly or through the different centres that offer the Data Transmission service throughout national territory." These bets were intended to be made between private individuals regarding the results of all types of sporting events, both within the country and in the rest of the world.

The judicial review was ruled by the Balearic Islands High Court of Justice (Administrative Disputes Chamber, Sole Section) by virtue of its Decision number 365/2000, dated May 15 of such year. In its resolution, the Court rejected the company's appeal, stating that

- The request formulated by the company trespasses the territorial limitation to the jurisdiction of the Autonomous Community of the Balearic Islands (and any other Autonomous Community, as it requests authorisation with nationwide scope).
- Furthermore, the Royal Decree that regulates the transfer of jurisdiction to the Autonomous Community of the Balearic Islands expressly declares that the following shall continue to fall within the jurisdiction of the State Government: (i) Charitable Sports Pari-Mutuel Betting, national lotteries and gambling on a state-wide level and (ii) the authorisation and inscription of companies operating on a state-wide level; and therefore the Autonomous Community does not have jurisdiction in this area.
- The jurisdiction to resolve this request is held by the ONLAE.
- The resolution appealed against does not contravene the right of free enterprise because "the business activity of exploitation of gambling is subject to a legal framework involving limitations and a level of government intervention envisaged by law and therefore the prior requirement for licenses and authorisations does not eliminate or alter the principle of free enterprise, but rather adapts it to the particular characteristics of this activity." Furthermore, the Court "considers that there is no need to obtain the verdict of the Luxembourg Court of Justice."

46.6.1.3 Judicial Review Number 4593/1997, Filed by the Company EUROBETS INTERNATIONAL SPORTS BETTING, S.A. Following Refusal of Authorisation for the Exercise of its Activity

On this occasion the company filed a judicial review against the Resolution by the General Bureau for Home Affairs of the Department of Justice of the Government of Galicia, dated January 8, 1997, refusing its request for administrative authorisation (presented on November 22, 1996) to carry out the activity of national and international brokerage, in the terms stated in the preceding Sections A.1 and A.2.

The judicial review was ruled by the Galician High Court of Justice (Administrative Disputes Chamber, Section 2), by virtue of its Decision number 1368/2000, pronounced on November 2 of this year. In its resolution, the Court rejected the company's appeal, stating that

- In order to grant the corresponding administrative authorisation, Autonomous Community Law 14/1985, regulating gambling and betting in Galicia, demands that the type of bet or game is included in the Autonomous Community's catalogue of games (which is approved by Decree). This catalogue of games shall specify, for each game or bet, the names, types, items necessary, rules, conditions and prohibitions and the corresponding technical regulations.
- Therefore, taking into account the terms of the request formulated by the company, "it is not possible to grant authorisation for a type of gambling or betting in the absence of the technical regulations necessary for its conduction and practice," as is the case here.

46.6.2 Regarding the Application of the Aforementioned Organic Law 12/1995, Dated 12th December, Regarding The Repression of Smuggling

46.6.2.1 Decision Number 81/1999, Dated 29th September, of the Provincial Court of Cuenca (Sole Section)

The Resolution accepted the appeal filed by the ONCE against the Resolution of the Court of First Instance, which rejected a claim made by this organisation against the association called *Organización Impulsora de discapacitados* (OID), which carried out the production and sale of tickets to participate in a daily draw, giving prizes to holders of tickets that coincided with the results of the ONCE's draw.

The Provincial Court declared that there was sufficient evidence to believe that the events reported were illegal and therefore ordered continuation of criminal proceedings. This was based on the following:

- Article (2d) of the Law for the repression of smuggling applies penalties to anyone who operates with forbidden items (including unauthorised gambling);

- The Constitutional Court has declared on several occasions "that the modalities of lotteries with a nationwide scope, due to their status as a state monopoly, are an ordinary resource of the state budget which therefore makes them part of the General Tax Department and the exclusive jurisdiction of the Central Government;"
- The State is responsible for the management and exploitation within the whole of the national territory of the National Lottery Monopoly, which includes any other games of chance related to it; and,
- This state monopoly is managed by ONLAE.

Therefore, without making a definitive judgement regarding the matter (due to the procedural phase during which the aforementioned resolution was issued), the Court considered that there was enough evidence to believe that the activity of the OID was not authorised and, this being the case, the tickets that OID marketed were a restricted item (that the Smuggling Repression Law defines as "articles, products or substances whose production, purchase, distribution or any other activity is allocated by Law to the State"), and so it were forbidden.

46.6.2.2 Decision Number 403/2005, Dated 24th June, Issued by the Provincial Court of Granada (Section 1)

This decision resolved an appeal filed by the Public Prosecutor and the accused parties against a decision issued by Granada Criminal Court number 5, by virtue of which certain representatives of the Andalusian Association for Disabled People (Federación Andaluza de Minusválidos, FAMA) were sentenced "as the authors of a smuggling offence relating to restricted items" and, together with other pronouncements, ordered to pay "a fine of 2,620,296,000 million pesetas (15,748, 296.13 Euros) each."

Basically, the events judged (and proven) consisted in that, between the months of March 1992 and September 1993, the aforementioned association FAMA sold coupons of the so-called "cupón del minusválido"[31] (disabled person's coupon), which consisted in handing over cash prizes to the holder of the winning ticket in combination with the draw of the ONCE's coupon.

By virtue of its Decision, the Court confirmed the Decision of the Court of First Instance, declaring (among other pronouncements) that

- "The conduct attributed to the accused is the marketing of tickets for lottery draws without any authorisation and with full knowledge of the illegal nature of this activity."
- "These tickets are restricted items in accordance with the Organic Law regarding the Repression of Smuggling."

[31] Clearly intending to make people confuse it with the ONCE's coupon called "pro-ciegos."

- "The issue and sale of lottery tickets, draws and all activities related to them are a state monopoly and, therefore, their marketing without legal authorisation constitutes the criminal offence examined."
- "The Lottery business is a state monopoly and the regulation that, consequentially, prohibits the activities carried out by the accused does not contravene the Treaty of Rome dated 25/03/1957 or the EU Treaty of 1992."
- In the Decision of the ECJ dated 24/03/1994 (the Schindler case) it is declared that "the establishment of prohibitions or restrictions to the free provision of this service is compatible with the aforementioned Article 59 of the Treaty."
- "The exclusivity of the game in the hands of the Tax Department determines the prohibition of the sale of foreign lottery tickets."

For all these reasons the Court confirmed the previous decision issued by the Court of First Instance.

46.7 Conclusions

'Many voices have been raised in favor of a state-wide legislative solution that regulates the gambling sector in its entirety, enabling those who are interested in exploiting this type of activity to compete equally (which means, among other things, ending LAE's monopoly), and to carry out their activity in the whole of the State. Ultimately, from the government's point of view, we understand that the real problem is not so much the terms by which betting activities should be regulated on a national level, but rather the form in which the taxes resulting from this activity would be distributed between each of the Autonomous Communities and the State.

Up to this date, none of these initiatives has resulted in a Law regulating the sector. In fact, despite the fact that in 1999 the Gambling Sector Conference[32] was created, whose functions include serving as a channel for co-operation and communication between the public authorities with jurisdiction over gambling and proposing the adoption of certain common criteria for action, the fact is that since its creation ten years ago, the Gambling Sector Conference has only met once, on the day of its creation. This exemplifies the regulatory situation that exists today in Spain regarding sports betting.

However, this situation looks like it is about to change given that apart from the government mandate contained in the aforementioned Additional Provision 20 of Law 56/2007, various bodies with political power within the State have started to promote initiatives to achieve this regulation. In fact, on December 23, 2008, the PP Parliamentary Group in Congress presented a Non-Legislative Motion[33]

[32] Created on May 5, 1999, according to the Resolution dated June 24, 1999, of the Technical General Secretariat of the Interior Ministry.

[33] http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=puw9&DOCS=1-1&DOCORDER=LIFO&QUERY=%28CDD200902020139.CODI.%29#(Página11).

regarding interactive gambling for debate during the Session. According to this Non-Legislative Motion:

1. Additional Provision 20 of Law 56/2007, dated 28th December, regarding Measures for Promoting the Information Society, mandated the government to prepare and present to Parliament a Project of Law regulating gambling and betting activities, in particular those carried out by means of interactive systems based on electronic communications.
2. The basic principles of this Project of Law were agreed by all of the parliamentary groups, which voted unanimously in favour of the transactional amendment to this Law.
3. Given the time that has passed since the approval of this Law (now almost a year) without the Government having fulfilled this mandate and the fact that it is not just useful, but rather *absolutely urgent to have a new regulatory framework regarding gambling and betting activities carried out by means of interactive systems, it is necessary to insist that new legislation should be proposed establishing the basic principles for regulating a situation that exists without any type of administrative control, without any tax being paid on the earnings made and, even more seriously, without guarantees regarding the protection of users in general and those that most require protection in particular, such as minors*.
   Because of this, the PP Parliamentary Group in Congress presents the following Non-Legislative Motion for debate during the Session:
   The Congress of Deputies urges the Government, within a period of three months, to submit to the General Courts a Project of Law regarding interactive gambling, based on the provisions of Additional Provision 20 of Law 56/2007, dated 28th December, regarding Measures for Promoting the Information Society.

This is why it does not appear unreasonable to think that, within a reasonable period of time, the government shall begin the corresponding procedures for the promulgation of a Law that, in accordance with the reiterated Additional Provision 20 of Law 56/2007, regulates and establishes the regulatory framework for the conduction, on a national scale, of sports betting, either in its traditional form (at premises prepared for this purpose), or using new technologies via online betting establishments. We will see if time proves us right. *Alea iacta est.*

Chapter 47
Sports Betting in Sweden

Michael Plogell and Erik Ullberg

Contents

47.1 Introduction

47.1.1 Historical Background

Historical facts about gambling in Sweden are somewhat scarce. However, there are traces of certain regulation leading back to the seventeenth century.[1] Prohibitions regarding lotteries arranged for commercial purposes, as well as promotion

Michael Plogell and Erik Ullberg, Partner and Senior Associate respectively, Wistrand Law Firm. This article will primarily deal with gambling activities relating to sports in Sweden. Outside its scope falls, *inter alia*, casino operations under the Swedish Casino Act (SFS 1999:355), as well as other forms of lottery not deemed relevant for commercial sports gambling.

[1] Schwalbe 1985, pp. 15 et seq.

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of foreign lotteries, were laid down by so-called "letters of the Swedish monarch" during the eighteenth century and on.[2] The general opinion was that lotteries should only benefit the state treasury. Nevertheless, it was possible to obtain permission to organize a lottery provided it was held for charity.[3]

A regulation of lotteries was adopted in 1844, which amongst others prohibited the arrangement of lotteries for the general public as well as the selling of lottery tickets on behalf of foreign lotteries.[4] The first complete and general regulation in the field appeared in 1939.[5] This regulation is considered to be the cornerstone in the present Swedish legislation.

From the foregoing, it may be concluded that there is a long Swedish history of restricting gambling activities to non-profit objectives and subject to state control. As will be seen in the following this conviction has remained in modern Swedish gambling regulation.

47.1.2 The Swedish Gambling Market and Policy

The objective of Swedish gambling policy is "to meet key public imperatives, such as combating criminality, countering the harmful effects social and economical effects of gambling addictions, and protecting consumers."[6]

Accordingly, the Swedish gambling market is regulated. In principal, the only actors allowed on the market are non-profit non-governmental organizations, and the state of Sweden. Thus, commercial actors are more or less barred from entering the market with only a few exceptions: a certain level of entertainment gambling, i.e., gaming with low-value bets and low-value prizes.

The state owned company *Svenska Spel AB* (Svenska Spel) and *AB Trav och Galopp* (ATG), which is owned by the horse racing industry, more or less enjoys a *de facto* monopoly over the Swedish gambling market. Svenska Spel has the sole right to arrange sports betting (with a few exceptions for local events) and ATG has the sole right to arrange horse racing betting.

The operations of Svenska Spel include betting at sporting events, the operation of gaming machines and the organization of lotteries. The operations of ATG are betting at horse races. The public benefit organizations organize lotteries and bingo. In 2002, actors in the Swedish market were granted the right to use new technology, such as the Internet, for distributing lotteries.[7]

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[2] *Ibid.*

[3] *Ibid.*

[4] Regulation 1844:12.

[5] Regulation 1939:207.

[6] See, e.g., SOU 2006:11, p. 26.

[7] http://www.lotteriinsp.se/sv/Gaming-Board-for-Sweden——1/Gambling-market/

Nonetheless, it should be mentioned that a large number of gaming companies are promoting participation in gaming arranged outside Sweden through the Internet, e.g., by means of their own web sites or newspapers, directed to the Swedish market. Consequently, to some extension competition exists.

The profit from lotteries and gambling must, in principle, be used for the public benefit. Surplus profits from lotteries and gambling will finance undertakings of public utility.

The turnover for the Swedish gambling market amounted in 2008 to approximately SEK 40.9 billion, of which 81% can be attributed to Svenska Spel and ATG.[8] In 2007 the state's profits from gambling activities amounted to SEK 5.2 billion. Therefore, gambling is a very profitable business for the Swedish state.

Also, every year large sums are spent on advertising of, *inter alia*, Svenska Spel's operations. Partly due to this fact competitors of Svenska Spel, such as Unibet, Ladbrokes and Betsson, openly question the legality of the Swedish policy.[9]

47.1.3 Authorities

The Gaming Board[10] has the overall responsibility for granting permits and supervising the Swedish gambling market.

The Gaming Board is charged with issuing permits for:

- lotteries that are distributed by means of electromagnetic waves,
- lotteries that are to be arranged in more than one county,
- gaming machines, and
- games of roulette, dice and card arranged pursuant to the Swedish Lotteries Act (LA).[11]

The Gaming Board is also charged with central monitoring of compliance with the Lotteries Act and the Casinos Act, and more detailed supervision of lotteries arranged under a permit from the Board or the government.

Furthermore, the Swedish Consumer Ombudsmen[12] has the general responsibility to supervise marketing activities and to protect consumers' interests, *inter alia*, under the Swedish Marketing Practices Act (MPA).

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[8] See Report 2008 of the Gaming Board for Sweden (Gaming Board), http://www.lotteriinsp.se/PageFiles/6621/Utvecklingen%20p%c3%a5%20spelmarknaden%202008%20.pdf.

[9] See Sects. 47.2.2.3 and 47.6.

[10] *Lotteriinspektionen*, www.lotteriinsp.se.

[11] SFS 1994:1000, as amended.

[12] *Konsumentombudsmannen*, www.konsumentverket.se.

47.2 Legislation

47.2.1 Overview

The Swedish gambling market is mainly regulated by two acts:

- the LA; and
- the Swedish Casino Act.[13]

Additionally, the MPA, which has a general application on all types of marketing activities, may apply to gambling issues. According to the MPA marketing must, as a general rule, not be incorrect, unfair or misleading. However the specific legislation of the LA supersedes the MPA within its scope.

47.2.2 The LA

47.2.2.1 Scope of the LA

The LA is a prohibitory act regulating lotteries.[14] It applies to lotteries arranged for the general public.[15]

Section 3 para 1 of the LA provides a broad definition of *lottery*:

> … an activity where one or several participants, with or without as stake, can obtain prizes of a higher value than that each one of the other participants may obtain.
> Lotteries shall include
>
> 1. drawing of lots, guessing, betting and similar procedures,
> 2. amusement at fairs and amusement parks,
> 3. bingo games, gaming machines, roulette games, dice games, card games, chain-letter games or similar activities.

When assessing whether an activity constitutes a lottery the general nature of the activity shall be taken into account and not only the greater or lesser degree chance present in the individual case.

Prizes (winnings) shall in this act also refer to continuation of the game.

Consequently, all games and gambling where a winner is appointed primarily by chance will fall within the scope of the LA. The element of chance is, however, not the sole criterion, but one must also consider the general nature of the activity.

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[13] Which will not be dealt with further here, please see footnote 1.

[14] The LA also applies to, *inter alia*, lotteries in the form of bingo, gaming machines, roulette games, dice games and card games that are not arranged for the general public, if the game is arranged for the purpose of gain (Section 1 of the LA).

[15] Section 1 para 1 of the LA.

In this context it could be mentioned that a Swedish court has found that Texas Hold'em poker did not constitute a game of chance. The court established in that case that a prominent Texas Hold'em player must have certain mathematical and strategic skills and evidently skill was not an insignificant factor when the outcome of a game is determined.[16]

As stated above the LA applies to lotteries arranged for the general public. The *travaux préparatoires* of the LA states that a lottery is not considered arranged for the general public if the lottery in question is aimed at both small and closed groups of people who share a provable mutual relationship.[17] Additionally, it is argued that the more the people participating in the lottery, the higher the requirement for mutual relationship and closeness.[18]

Furthermore, a lottery is "deemed to be arranged for the general public when lotteries shall be deemed to be arranged for the general public also where membership is required of a certain organization if its principal objective is to arrange lotteries, or where the lottery would otherwise as regards its extent or the conditions for participation be equivalent to a lottery arranged for the general public."[19]

In order for the LA to apply a lottery must be arranged within Sweden.[20] Normally, a lottery is considered to be "arranged" when it is marketed to the general public.[21] The arranging of a lottery should be deemed to take place where the activities are organized, managed and where the power over the activities is exercised.[22] If a lottery is arranged abroad, but opportunity to participate exists in Sweden, then it may be argued the lottery has not been arranged within Sweden.[23] On the other hand, under such circumstances one must also consider the prohibitions to promote lotteries arranged from abroad.[24]

47.2.2.2 Permission to Arrange a Lottery

The LA is based on the general principle that all organizing of lotteries require a permit and that all permits are supervised by the state of Sweden (Section 9 of the LA).[25] A license may only be granted if it can be presumed that the activity will be executed in a suitable manner, from the general public's point of view.

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[16] Judgment of the Court of Appeal for Western Sweden of 14 May 2009 in case No. B 2845-08, as far as we know the case has been appeal pending before the Supreme Court.

[17] SOU 1992:130, p. 114.

[18] Schwalbe 1985, p. 54.

[19] Section 1 para 2 of the LA.

[20] See, e.g., SOU 2006:11, p. 270.

[21] Government's bill (Prop) 1981/1982:170, p. 128.

[22] Cf., Judgment of Svea Court of Appeals of 17 September 1997 in case No. B 2482-97.

[23] See, e.g., SOU 2006:11, p. 206.

[24] Please see further sect. 47.2.2.3.

[25] In some situations a permit is not needed, but this is only under specific circumstances and it is very restricted (Section 19–21 of the LA).

Permits may in principle only be granted to non-profit organizations which (i) has as its main purpose to promote an undertaking of public utility; (ii) that carries out its operations so as to achieve such purpose; (iii) that does not refuse anyone membership in the organization unless there is a particular reason to do so; and (iv) that needs the income from lotteries to support its activities.

Permits are granted on the local, regional or state level, depending on the geographical scope of the lottery in question. At the local level it is generally the relevant Municipal Committee[26] that grants licenses, at the regional level it is usually the County Administrative Board[27] and at the national level it is the Gaming Board or the government that grants permits. As already mentioned above the Gaming Board has the central supervisory responsibility regarding the adherence to the LA and decisions based on the LA.

In addition to permits to certain non-profit organizations, as set out above, the Government may grant special lottery permits in other cases.[28] Svenska Spel and ATG operates under such permits.

The LA stipulates an age limit of 18 years for the participation in gambling on horse races, gambling machines, roulette, games of dice or card games.[29] It is for the organizer of the activity to ensure that no one under the age limit is allowed to participate. Moreover, it is not allowed for an organizer of a lottery to grant a credit for wagers in the lottery.[30]

Arrangement of a lottery without a permit is a criminal offence subject to a fine, or even imprisonment for a maximum of six months in severe cases.[31]

47.2.2.3 Promotion of Unlawful Lotteries

Generally, the LA prohibits promotion of participation of lotteries organized *without a licence* or lotteries *organized from abroad* within Swedish territory in commercial operations, or otherwise for the purpose of profit.[32] For the same purposes it is also not allowed to, without having the organizer's consent, sell lottery tickets or distribute profits in an allowed lottery.[33]

According to the *travaux préparatoires* of the LA, examples of promotion to participate in a lottery includes the offer, sales or supply of lottery tickets or certificates of participation in a lottery as well as the levitation, mediation of stakes or winnings.[34] Moreover, the distribution of notices relating to the lottery in

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[26] *Kommunstyrelsen*.

[27] *Länsstyrelsen*.

[28] Section 45 of the LA.

[29] Section 35 of the LA.

[30] Section 37 of the LA.

[31] Section 54 of the LA.

[32] Section 38 of the LA.

[33] *Ibid*.

[34] Government's bill (Prop) 1998/1999:29, pp. 8 et seq.

question, e.g., invitation or register of winners, may constitute a promotion under the LA.

It is not entirely clear how far the territorial scope of the LA reaches. As far as lotteries organized from abroad are concerned the LA will probably not apply simply because Swedish subjects may enter a lottery on a web site or similar, but some additional circumstance will have to be present in order to trigger Swedish jurisdiction. In this context a banner on a Swedish web site linking to gambling activities provided by a foreign gambling company has been found to be a promotion of a foreign lottery.[35]

TV commercials promoting gambling services in TV channels broadcast from abroad under a foreign licence is not uncommon. And as far as we know such promotions have not been challenged under the LA. However, the Swedish TV channel TV4 has been ordered by the Gaming Board to cease advertisements of sponsor messages of a foreign gambling company, which was broadcast in connection to a sports event.[36]

Moreover, in a recent and quite provocative matter as subsidiary of Betsson AB (publ) (Betsson), which organises lotteries from abroad under a Maltese licence, established a premises in central Stockholm. By providing computers connected to the Internet within the premises the company has made it possible for gamblers to place various bets on the company's bettings. The Gaming Board declared this to be a breach of the LA and ordered Betsson to cease its activities subject to a conditional fine. The decision was appealed by Betsson, which relied on EC law, but has been upheld by the administrative courts so far.[37]

If a lottery is promoted in breach of the LA, then the Gaming Board may issue orders and prohibitions subject to conditional fine.

Additionally, promotion of a lottery arranged from abroad may constitute a criminal offence subject to a fine or, in severe cases, a maximum of two years' imprisonment. Generally, Swedish authorities have enforced the prohibition only against the parties that communicate the promotion (newspapers, web sites etc.), but not against the parties providing the lotteries. There are several examples in Sweden where the person responsible for publication of a newspaper has been indicted, and found guilty for such an offence.[38]

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[35] Judgment of the Göta Court of Appeal of 20 September 2005 in case No. B 1884-04.

[36] Case pending before the Supreme Administrative Court case No. 7800-07.

[37] Judgment of the Stockholm Administrative Court of Appeal of 7 December 2009 in case No. 8900-08, now pending before the Supreme Administrative Court.

[38] Please see further Sect. 47.3.

47.3 EU Law Perspective

Already in the preparatory works of the LA the Council of Legislation[39] (which consists of judges of the Supreme Court) stated that there was a considerable risk that the Swedish legislation would be considered contrary to EU law.[40]

During the previous years the Swedish gambling legislation has been challenged based on EU law on numerous occasions. Although the courts have declared some doubts that Swedish legislation is in breach of EU law, notably Article 49 EG, the courts have initially concluded that Swedish legislation on gambling comply with EU law.[41]

Unibet (London) Ltd and Unibet (international) Ltd (jointly Unibet) have initiated a declaratory action against the Swedish state seeking to have established that the ban on promotions of foreign lotteries is in breach of EU law and that the state is liable to pay damages therefore. The court, however, found in favour of the state, considering that the restrictions on promotions served its purposes and was proportionate.[42] Previous to that judgment the Supreme Court had, after hearing the ECJ,[43] dismissed Unibet's interim declaratory action.[44]

Recently, probably as a result of the various judgments of the Court of Justice of the European Union (ECJ) on the topic, this position appears to have been even more open for questioning of Swedish courts. In a joint case before the Svea Court of Appeal two chief editors of two major tabloids (*Aftonbladet* and *Expressen*) have been charged for promoting a lottery arranged from abroad and found guilty in the lower instance, despite arguments that the current provisions in the LA was contrary to EU law.[45] The two chief editors argue that it is discriminating that promotion of a lottery arranged from abroad is subject to criminal sanction, whereas only civil sanctions may be imposed against promotions of an unlawful lottery arranged within Sweden.[46] Hence, the LA allegedly breaches Articles 12 and 49 EC.[47] The Svea Court of Appeal would initially not grant them the right to appeal their verdicts. However, the Supreme Court, eventually granted them such

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[39] *Lagrådet*.

[40] Government's bill (prop) 1998/1999:29, pp. 17 et seq.

[41] See, e.g., RÅ 2004 ref. 95, RÅ 2007 not. 72.

[42] Judgment of the District Court of Eskilstuna of 2 March 2010 in joint cases No. T 2417-03 and T 2418-03.

[43] Case C-432-05.

[44] Decisions of 4 October 2007 of the Supreme Court in cases No. Ö4474-04 and Ö 752-05.

[45] Cases No. B 5914-05 and B 7243-05.

[46] It may be contested whether this constitutes an entirely correct description of Swedish law, as it may be possible to invoke criminal liability in relation to unlawfully arranged lotteries within Sweden based on provisions outside the LA. The Swedish government has put forward this argument before the ECJ, which has stated that whether this is true as well as if is ultimately for the national court to decide.

[47] Now found in Articles 18 and 56 of the Treaty of the functioning of the European Union, which entered into force on 1 December 2009.

relief due to the uncertainty of the legality of Section 38 and 54 of the LA in light of Article 49 EC.[48] The Svea Court of Appeal then decided to refer to the ECJ for a preliminary ruling.[49] The EJC delivered its judgment in the case on 8 July 2010 stating the following:

1. Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.
2. Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.

From the ECJ's judgment one may conclude that whilst the Swedish criminal sanctions against promotion of unlawful lotteries are not contrary to Article 49 EC *per se*, it could breach EU law to treat lotteries differently depending on the country where they are arranged. Namely, lotteries arranged from abroad should not be viewed stricter. From this outcome it may be concluded that if the arguments of the two chief editors regarding a stricter view on lotteries arranged from abroad are accepted, then they should have a fair chance to be acquitted from criminal charges. It is now for the Svea Court of Appeal to try the case on its merits.

47.4 The Future Swedish Gambling Market

In 2004 the government appointed a committee that would consider the Swedish legislation on gambling, *inter alia*, in light of EU law. It delivered a Government Report in 2006.[50] The conclusion was that it is open to dispute whether the LA was compatible with EU law due to uncertainty both over the basic aims of the legislation—where in the committee's view too much weight had been attached to economic considerations—as well as over its practical applications. For instance, Svenska Spel was granted a permit to arrange Internet poker in 2005, which according to the committee may have taken Sweden beyond what is considered compatible with EU law.

In spite of the concerns the said committee chose not to propose any major changes. Nevertheless, it suggested an alternative model with a licensing system for, *inter alia*, private entities. The system would be available to a fairly limited

[48] Decisions of the Supreme Court of 5 February 2008 in cases No. Ö 1561-06 and Ö 2908-06.

[49] Joint cases C-447/08 and C-448/08.

[50] SOU 2006:1.

numbers of licensees. Anyone who met the requirements would be able to apply for a license.

Moreover, a few years ago, the European Commission also raised concerns over the Swedish gambling legislation and has in a "reasoned opinion" stated that Swedish legislation is contrary to Article 49 EC.[51] As far as the authors are concerned the European Commission intended to bring the issue before the European Court of Justice, but after having received information that the Swedish government was reviewing the current legislation, the European Commission decided to abstain from further actions until the outcome of that review become public.

Probably partly because of the European Commission's questioning of the Swedish legislation's conformity with EU law, the Swedish government appointed another committee addressing, *inter alia*, such concerns.[52] The Committee found that the foundations of the current gaming regulations, i.e., both their objectives and purposes, complied with EU law. Therefore, according to the Committee, EU law does in principle not require the Swedish gambling market to be opened to new operators. In light of its assignment the Committee identified two alternatives for future regulations[53]:

1. maintaining and tightening the current gaming regulations.
2. opening up one form of gaming to new operators.

As far as opening up the market for new operators the Committee considered that betting (odds and pools) could be considered for licensing in a partially new permit system, with the exception of betting on horse racing, and that it should be possible to provide this form of gambling through betting agents and via the Internet. Gambling activities considered to be the most problematic (e.g., automatic gambling machines, Internet casino and interactive games, such as Internet poker) should still be controlled by the State. In order to give new operators an incentive to apply for a license in Sweden, and not chose licences in a more favourable jurisdiction, the Committee also stated the ban on promotion in Section 38 of the LA should be made more effective.

As far as known no legislative work has been initiated based on the mentioned Government Reports.

The legal position during the previous years appears to have moved somewhat further towards an opening of the monopolised Swedish gambling market. Nonetheless, the recent ECJ ruling in the case referred to it by the Svea Court of Appeal basically declared that the Swedish ban on promotions of lotteries arranged from abroad may be consistent with EU law. Hence it is at least not victory for those who wish to abolish the Swedish monopoly. Given, however, that the ECJ raised some doubts of the discriminatory nature of Swedish legislation it will most

[51] See, e.g., IP/07/909.

[52] SOU 2008:124, delivered in December 2008.

[53] See, e.g., SOU 2008:124, p. 42.

likely be subject to scrutiny. Commentators of the said case have drawn very different conclusions of the judgment, but it will be the Svea Court of Appeal's interpretation thereof, that will give a (first) indication whether it will have any material impact on Swedish legislation. Therefore, it remains to be seen what will happen to the regulation of the Swedish gambling market in the near future.

Reference

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Chapter 48
Regulation of Sports Lotteries and Betting in Switzerland

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48.1 Introduction

The regulation of lotteries, in particular, sports lotteries, and betting in Switzerland may be viewed as a classic example of how gambling, one of the strongest individualistic human passions, could be used to serve the public good. Despite a recent slight decrease in the receipts from lotteries and betting, these revenues still remain a primary source of the financing of sport in the country. Out of 2.73 billion Swiss francs spent in 2007 in Switzerland by its residents on lotteries and sports betting in general (on average, 360 Swiss francs per resident), *Swisslos* and *Loterie Romande,* two principal lotteries and sports betting operators in the country, have transferred 523 million Swiss francs to Cantonal funds of lotteries and sport as well as to sportive associations, whereas the analogous figures for a record 2006 year were 2.8 billion Swiss francs (on average, 374 Swiss francs per resident) and 586 million Swiss francs respectively.[1] In relative figures, this means that currently the proceeds of lotteries accounts for approximately 80% of the budget of the Swiss Olympics,[2] for more than half of the sports budget of the Swiss Cantons as well as for 15% of the budget of Swiss Sport Assistance.[3]

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[1] *See*, Office fédéral de justice: Moins d'argent dépensé pour les loteries et les paris, Communiqués, OFJ, 06.08.2008, text in French is available at: http://www.ejpd.admin.ch (last visited October 31, 2009).

[2] Swiss Olympics is an umbrella association of Swiss sport federations, which represents both Olympic and non-Olympic disciplines. It was created on January 1, 1997 as a result of a merger between Swiss Sport Association (ASS) and the Swiss Olympic Committee (COS) with the simultaneous integration of the National Committee for the Elite Sport (CNSE). *See*, Swiss Olympic—l'Association faîtière du sport suisse, text in French is available at: http://www.swissolympic.ch/fr/desktopdefault.aspx/tabid-3242/4236_read-25026/ (last visited October 31, 2009).

[3] *See*, Loterie Romande: Les loteries et le sport: un partenariat vital, text in French is available at: http://www1.loterie.ch/data/info/380/193_LoRo_factsheetSport_12.06.pdf (last visited October 31, 2009). Swiss Sport Assistance (*l'Aide sportive Suisse*) is a non-profit public benefit organisation. Since January 1, 2004 it focuses on the support of the young athletes who participate in high-level sport. In order to achieve this goal, it raises funds from the population and the economy. *See*, L'Aide sportive: qui sommes-nous?, text in French is available at: http://www.aidesportive.ch/fr/l_aide_sportive/qui_sommes_nous__/index.cfm (last visited October 31, 2009).

Therefore, the purpose of this chapter is to present the system of regulation of sport lotteries and betting in Switzerland and to explain how it achieves such remarkable results. There is no specific legislation on sports lotteries and betting in the country, and they are governed by legislation applicable to all types of lotteries, including sports lotteries, as well as betting. Consequently, this chapter, first offers a brief historic overview of the creation of the general regulatory framework for lotteries and commercial betting in the country. After providing a snapshot of the current state of the market of sports lotteries and betting in Switzerland and its major participants, the chapter continues with the consecutive presentations of the existing system of state licensing and supervision of lotteries and betting, starting in each case with the discussion of the meanings of "lottery" and "betting," their characteristic features and distinctions from similar institutions, illustrated by decisions of the Swiss Supreme Court (*Tribunal fédéral*), the highest Court authority in the country. The chapter concludes with the outline of the proposed reforms to the existing regulatory framework providing, in particular, a brief overview of the draft Federal Lotteries and Betting Law of 2002,[4] and of the current state of this reform.

48.2 Constitutional Foundations and History of Lotteries and Betting Regulations in Switzerland

48.2.1 Constitutional Foundations of the Existing System of Regulation

The existing system of regulations of lotteries and commercial betting in Switzerland reflects the confederative structure of the country and the distribution of the legislative competence in the area of gambling and lotteries between the Swiss Confederation and the 26 Swiss Cantons. Under the Swiss Federal Constitution of 1999, Swiss Cantons are sovereign to the extent that their sovereignty is not limited by this Constitution and exercise all rights that are not delegated to the Confederation.[5] In accordance with the Federal Constitution, the legislation on gambling and lotteries belongs to the domain of the Confederation.[6] As a result, the lotteries and betting in general, including sports lotteries and sports betting, are

[4] Draft Federal Lotteries and Betting Law of 2002 (*Loi sur les loteries, Lot*), text in French is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/gesetzgebung/lotteriegesetz.Par.0005.File.tmp/entw-lg-f.pdf; English translation is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw_Lotterien_und_Wetten-e.pdf (last visited October 31, 2009).

[5] Federal Constitution of Swiss Confederation, dated April 18, 1999, Article 3 (*Constitution fédérale de la Confédération suisse du 18 avril 1999*), text in French is available at: http://www.admin.ch/ch/f/rs/1/101.fr.pdf (last visited October 31, 2009).

[6] Federal Constitution, Article 106(1).

regulated in Switzerland primarily on the Federal level, namely, by the Federal Lotteries and Commercial Betting Law of 1923,[7] and the Ordinance of 1924 to this Federal Law,[8] whereas the individual Cantons have adopted their respective laws,[9] regulations[10] or decrees of the cantonal government,[11] implementing the provisions of the Federal legislation. In addition to that, all 26 Cantons have ratified the Inter-Cantonal Convention on the supervision, licensing and distribution of profits from the lotteries and betting operated at the inter-Cantonal level or in the whole

[7] Federal Lotteries and Commercial Betting Law, dated June 8, 1923. (*Loi fédérale sur les loteries et les paris professionnels (LLP), du 8 juin 1923*), RO 39 361; RS 935 51, text in French is available at: http://www.admin.ch/ch/f/rs/9/935.51.fr.pdf (last visited October 31, 2009).

[8] Ordinance to the Federal Lotteries and Commercial Betting Law, dated May 27, 1924 (*Ordonnance relative à la loi fédérale sur les loteries et les paris professionnels (OLLP), du 27 mai 1924*), RO 40 249; RS 935.511, text in French is available at: http://www.admin.ch/ch/f/rs/9/935.511.fr.pdf (last visited October 31, 2009).

[9] For example, Canton of Bern: Law on the lotteries, dated May 4, 1993 (*Loi sur les loteries, du 4 mai 1993*), text in French available at: http://www.sta.be.ch/belex/f/9/935_52.html (last visited October 31, 2009); Canton of Fribourg: Law on lotteries, dated December 14, 2000 (*Loi sur les loteries, du 14 décembre 2000*), text in French is available at: http://appl.fr.ch/v_ofl_bdlf_courant/fra/9581.pdf (last visited October 31, 2009); Canton of Valais: Law on the implementation of the Federal Lotteries and Commercial Betting Law, dated November 11, 1926 *(Loi concernant l'exécution de la loi fédérale sur les loteries et les paris professionnels, du 11 novembre 1926*), text in French is available at: http://www.vs.ch/Public/public_lois/fr/pdf/935.5.pdf (last visited October 31, 2009); Canton of Vaud: Law concerning putting into effect in the Canton of the Federal Law of June 8, 1923 on the Lotteries and Commercial Betting, dated November 17, 1924 (*Loi relative à la mise en vigueur, dans le canton, de la loi fédérale du 8 juin 1923 sur les loteries et paris professionnels (LVLLP), du 17 novembre 1924*), text in French is available at: http://www.rsv.vd.ch (last visited October 31, 2009).

[10] For example, Canton of Bern: Ordinance concerning the lotteries (OL), dated October 20, 2004 (*Ordonnance sur les loteries (OL), du 20 octobre 2004*), text in French is available at: http://www.sta.be.ch/belex/f/9/935_520.html (last visited October 31, 2009); Canton of Fribourg: Regulations on the implemenation of the Law on lotteries, dated May 1, 2001 (*Règlement d'exécution de la loi sur les loteries, du 1 mai 2001*), text in French is available at: http://appl.fr.ch/v_ofl_bdlf_courant/fra/95811.pdf (last visited October 31, 2009); Canton of Geneva: Regulations on the implementation of the Federal Lotteries and Commercial Betting Law, as well as on the collection of the tax for the poor (*Règlement d'exécution de la loi fédérale sur les loteries et les paris professionnels, ainsi que sur la perception du droit des pauvres (RaLLP), du 9 mai 1952*), text in French is available at: http://www.ge.ch/legislation/rsg/f/s/rsg_I3_15P03.html (last visited October 31, 2009); Canton of Valais: Regulations on the implementation of the law concerning the implementation of the Federal Lotteries and Commercial Betting Law, dated May 13, 1937 (*Règlement d'exécution de la loi concernant l'exécution de la loi fédérale sur les loteries et paris professionnels, du 13 mai 1937*), text in French is available at: http://www.vs.ch/Public/public_lois/fr/pdf/935.500.pdf (last visited October 31, 2009); Canton of Vaud: Regulations concerning lotteries, tombolas and lotos, dated June 21, 1995 (*Règlement sur les loteries, tombolas et lotos (RLoto), du 21 juin 1995*), text in French is available at: http://www.rsv.vd.ch (last visited October 31, 2009).

[11] For example, Canton of Valais: Decree concerning the organisation and the exploitation of the lotteries, dated October 1, 1937 (*Arrêté concernant l'organisation et l'exploitation des loteries, du 1er octobre 1937*), text in French is available at: http://www.vs.ch/Public/public_lois/fr/pdf/935.501.pdf (last visited October 31, 2009).

territory of Switzerland, which entered into effect on July 1, 2006 (CILP).[12] Furthermore, the French-speaking Cantons have also ratified the 9th Convention concerning *Loterie Romande* of 2005,[13] whereas the German-speaking and Italian-speaking Cantons—the Inter-Cantonal Convention on the organisation of lotteries (IKV) of 1937.[14]

48.2.2 Historical Origins of the Existing System of Regulation

Viewed from a historical perspective, the origins of the existing system of regulation of lotteries and betting in Switzerland could be traced to the first half of the nineteenth century. By that time the lotteries were exclusively governed by the Cantons, and all Swiss Cantons had already adopted some statutory provisions aimed at preventing the flow of lotteries, in particular, foreign lotteries, and combating the abuses associated with their conduct.[15] Nevertheless, the need was already felt that Federal regulation in this area was required.

Although the Cantonal legislation may have been effective in preventing abuses in individual cases, it was unable to prevent economic and moral evils caused by lotteries, in their different forms, throughout the population and the country at large.[16] While the territorial effect of these *Cantonal* provisions was, by definition, confined to the territory of the respective Canton, the enterprises organising lotteries usually conducted their operations beyond the Cantonal borders. Thus, the lottery permitted in a single Canton could have produced its effects throughout the whole country. Furthermore, for the same reasons, the Cantonal legislation proved

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[12] *See*, Inter-Cantonal Convention on the Supervision, Licencing and Distribution of Profits from the lotteries and betting operated at the inter-Cantonal level or in the whole territory of Switzerland, dated January 7, 2005 (*Convention intercantonale sur la surveillance, l'autorisation et la répartition du bénéfice de loteries et paris exploités sur le plan intercantonal ou sur l'ensemble de la Suisse (CILP), du 7 janvier 2005*), text in French is available at: http://www.geneve.ch/legislation/rsg/f/s/rsg_I3_14.html (last visited October 31, 2009).

[13] The 9th Convention concerning *Loterie Romande*, dated November 18, 2005 *(9e convention relative à la Loterie Romande (C-LoRo), du 18 novembre 2005),* text in French is available at: http://www.geneve.ch/legislation/rsg/f/s/rsg_I3_15.html).

[14] Inter-Cantonal Convention on the organisation of the lotteries, dated May 26, 1937 (IKV) (*Convention intercantonale du 26 mai 1937 sur l'organisation des loteries (IKV)*), text in French is available at http://www.be.ch/gr/VosData/Gwd/Tagblatt%202002/11%20Novembersession/Beilagen/20021205_171451/Annexe%2029%20Arr%EAte%20GC%20Convent%20intercant%20org%20loteries%20Prop.pdf (last visited October 31, 2009).

[15] *See*, Message du Conseil fédéral à l'Assemblée fédérale concernant le projet de loi fédérale sur les loteries et les entreprises analogues, du 13 août 1918, Feuille Fédérale, 1918, volume IV, pp. 343–344.

[16] *See*, Rapport de la Commission du Conseil des Etats concernant la révision de la constitution fédérale, du 30 septembre 1865, Feuille Fédérale, 1865, volume III, No. 46, pp. 643, 660.

to be inefficient in stopping the growing flow of foreign lotteries, in particular, German ones into Switzerland.[17] As a result, the protection offered by the Cantonal legislation in many instances was insufficient. Thus, the need was felt that only a Federal legislator could, in a satisfactory manner, rectify the existing situation with lotteries, by means of adopting provisions which would supplement the protection already offered by Cantonal legislation.[18]

One of the first efforts aimed at the introduction into Switzerland of the regulation of lotteries on the Federal level was the resolution adopted by the Swiss Society of Public Benefit (*Société suisse d'utilité publique*) in its annual meeting held in 1862.[19] This resolution, in particular, requested the introduction of the statutory prohibition of gambling, including lotteries.[20] In 1863, the government of the Canton of Argovie took certain steps aimed at the conclusion of an inter-Cantonal treaty (*concordat*) for the prohibition of gambling, including lotteries. The Swiss Federal Government (*Conseil fédéral*) subsequently submitted this draft treaty to the examination of the commission composed of the delegates representing Cantons. This commission held several meetings in 1863–1864 under the presidency of the head of the Federal police and justice department.[21]

Although certain difficulties emerged during the commission's deliberations, the agreement was reached along the main lines of the draft. In particular, the Cantons of Uri and Schwyz, which at that time had state lotteries, expressed their willingness not to renew the concessions related to these lotteries. While the state lotteries in these two Cantons were created for the purpose of raising funds necessary for the assistance to the poor, they were subsequently taken over by private people. While these persons apparently benefited from the largest share of the lotteries' profits (around 640,000 Swiss francs), the share of the Cantons was reduced only to an annual fee of between 7,000 and 10,000 Swiss francs.[22]

The work on the draft treaty was interrupted in 1865 by the introduction of the project of the partial revision of the Federal constitution of 1848. Following the proposal of Dr. Blumer, Federal Judge and member of the Council of States (*Conseil des Etats*), an upper Chamber of the Swiss Federal Parliament (*Assemblée fédérale*), Article 59b was introduced into the project. This Article provided for the competence of the Confederation to adopt legislative provisions against the professional operation of lotteries and gambling in the whole territory of Switzerland. Taking into account that the draft inter-Cantonal treaty did not appear capable of achieving this goal, the need for centralisation of the legislation in this area was further emphasised by the report of the Commission of the Council of States, dated

[17] *See* Mouquin 1980, p. 30.

[18] *See*, Message du Conseil fédéral, du 13 août 1918, p. 344.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

September 30, 1865.[23] Nevertheless, the proposed article was rejected by the popular vote, held on January 14, 1866, which also resulted in the termination of the activities of the commission working on the draft inter-Cantonal treaty.

Despite the rejection of this proposal, the Federal Government had not lost sight of the issue. Correspondingly, the next project of complete revision of the Federal constitution also included Article 31 relating to gambling houses and lotteries, which provided, in particular, the competence of the Confederation to take necessary measures concerning lotteries. Although the new project was also rejected by the popular vote, held on May 12, 1872, this Article was included without modifications as Article 35(3) of the Federal Constitution, finally adopted on May 29, 1874.[24]

Following the introduction into the Federal constitution of the competence of the Confederation in the area of lotteries, the Federal Parliament started taking measures against foreign lotteries offered in Switzerland, initially focusing its efforts on the regulation of their distribution through Swiss postal channels. Thus, the Federal Law on the postal monopoly of 1894 included a special article providing that the post did not have an obligation to transport open shipments containing lotteries (offers of tickets, drawing lists etc.), which were not authorised in Switzerland by the competent authority.[25] Furthermore, the Federal Law on the Swiss post of 1910 has expended the application of these measures to those sealed shipments where it was possible to conclude that they contained the announcements of lotteries.[26] Nevertheless, since these measures could only reduce the postal distribution of the announcements, their overall effect was limited. On the other hand, the insufficiency of the Cantonal legislation in the area of lotteries had become more and more apparent, in particular, because of the constant development of the lotteries and their derivatives, notably loans with drawings (*emprunts à primes*).[27]

Reflecting the growing public sentiment of the necessity for a more extensive Federal regulation in the area of lotteries, Mr. Müri and Mr. Mæchler, two members of the National Council (*Conseil national*), a lower Chamber of the Swiss Federal Parliament, introduced, on September 27, 1911, a postulate addressed to the Swiss Federal Government. Under their postulate, the Federal Government was invited to produce a report dealing with the question of whether public interest required the adoption, in the near future, of a Federal law against the abuses associated with lotteries, giving effect to Article 35(3) of the Federal Constitution, with the principal aims of: (i) complete prohibition of lotteries in the

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[23] *See*, Rapport de la Commission du Conseil des Etats, du 30 septembre 1865, pp. 659–660.

[24] *See*, Message du Conseil fédéral, du 13 août 1918, p. 345.

[25] Federal Law on the postal monopoly, dated April 5, 1894, Article 12 (*Loi fédérale sur la régale des postes, du 5 avril 1894*), Feuille Fédérale, 1894, vol. II, No. 20, pp. 511–525.

[26] Federal Law on the Swiss post, dated April 15, 1910, Article 15 (*Loi fédérale sur les postes suisses, du 5 avril 1910*), Feuille Fédérale, 1910, vol. II, No. 15, pp. 199–242.

[27] *See*, Message du Conseil fédéral, du 13 août 1918, p. 346.

strict sense of the word; (ii) provision of a legal basis for mixed lotteries, notably, to raffles; and (iii) placement of lotteries of general interest under the supervision of the Confederation.[28]

On September 28, 1911, the Federal Government accepted the postulate, and the Federal Department of Justice and Police subsequently appointed Dr. Blumenstein, law professor at the University of Bern, to prepare the draft law with the explanation for motives. Following the completion of the draft in December of 1912, in the beginning of 1913 its printed version was submitted to all Cantonal governments, Federal departments of finances and posts as well as to various other interested parties. Having received the comments, the Federal Department of Justice and Police submitted the draft for the consideration of the consultative commission, which, in addition to Dr. Blumenstein, included the Prosecutor-General, a former president of the Directorate of the Swiss National Bank, as well as Parliamentary members, governmental officials, Federal Judges and practicing lawyers.

Several years of the commission's work culminated on August 13, 1918, when the Federal Government submitted to the Federal Parliament the draft Federal law on the lotteries and analogous institutions.[29] Following the consideration of the draft at the Parliament, the Federal Lotteries and Commercial Betting Law was finally adopted on June 8, 1923. It entered into effect on July 1, 1924 together with the Ordinance to the Federal Lotteries and Commercial Betting Law, which was adopted on May 27, 1924.

48.2.3 The Federal Lotteries and Commercial Betting Law and the Ordinance to this Law: General Overview

Following its recent amendments,[30] the Federal Lotteries and Commercial Betting Law currently consists of 33 Articles subdivided into five Chapters. Part One (*Interdiction*) of Chapter A (*Lotteries*) contains the definition of "lottery"[31] and establishes the general prohibition on the lotteries.[32] It also interdicts to organise and to conduct lotteries prohibited by this law, indicating that the "conduct lotteries" includes acts aimed at attaining the goals of the lottery such as the

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[28] *Ibid*., pp. 347–348.

[29] *Ibid*., p. 343.

[30] Law of June 17, 2005 on the Federal Administrative Tribunal (*Loi du 17 juin 2005 sur le Tribunal administratif fédéral (LTAF)*), RO 2008 3437 3452, text in French is available at: http://www.admin.ch/ch/f/rs/c173_32.html (last visited October 31, 2009); Federal Law on the formal updating of the Federal law, dated March 20, 2008 (*Loi fédérale relative à la mise à jour formelle du droit fédéral, du 20 mars 2008*) RO 2008 3437, 3452, text in French is available at http://www.admin.ch/ch/f/as/2008/3437.pdf (last visited October 31, 2009).

[31] LLP, Article 1(2).

[32] LLP, Article 1(1).

dissemination of information and announcements, promotion, issuance of tickets, their distribution, placement and sale of tickets, coupons and drawing lists, drawing, delivery of gains and the use of proceeds.[33] On the other hand, Part One names the types of lotteries which are not subject to this prohibition, namely the lotteries organised on the occasion of a recreational gathering, when the lots do not consist of cash and the issuance and drawing of tickets, as well as the delivery of prizes, have direct connections to this recreational gathering (the so-called *tombolas*).[34] This Part also names those types of lotteries which are exempted from this prohibition—the lotteries serving public interest goals or a charitable purpose and loans with prizes, to the extent that their organisation and operation are permitted.[35]

Part Two (*Exceptions to the interdiction*) of Chapter A allows the Cantonal authorities to authorise in their territory the lotteries having a public interest goal or a charitable purpose[36] and outlines the conditions for granting such licenses.[37] Part B of the law (*Commercial betting*) establishes a general prohibition on the organisation of commercial betting, related to horse races, regattas, football games and similar competitions and for running of an enterprise of this type,[38] providing, also a non-exhaustive list of prohibited activities.[39] This list of prohibited commercial betting activities includes: (i) placing information and announcements of the enterprises conducting commercial betting activities, regardless of whether they are made in an oral or in written form, by means of posters, newspaper articles, newspaper advertisements, sending letters or booklets by any other means; (ii) offering premises on the basis of lease or any other legal title in view of the operation of these enterprises; and (iii) acting as an employee of these enterprises or in an analogous capacity.[40]

At the same time, the law allows the Cantonal legislation to authorise totalisor betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton.[41] These provisions have been included into the law with the aim of making impossible the exercise, in Switzerland, of bookmaker's activities while allowing the Cantons to authorise the negotiation and conclusion of totalisor bets. Since the participants should be able to evaluate, by themselves, the chances of winning these totalisor bets are not, by their nature, a pure lottery.[42]

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[33] LLP, Article 4.

[34] LLP, Article 2.

[35] LLP, Article 3.

[36] LLP, Article 5.

[37] LLP, Article 6–13.

[38] LLP, Article 33(1).

[39] LLP, Article 33(2).

[40] LLP, Article 33(2).

[41] LLP, Article 34.

[42] *See*, Message du Conseil fédéral, du 13 août 1918, p. 362.

Part C of the law (*Measures concerning postal traffic*) imposes restrictions on the transmission by post of lotteries,[43] magazines and newspapers essentially serving to distribute the announcements of lotteries,[44] as well as on the transmission of communications originating from the betting enterprises.[45] Part D (*Penal provisions and procedure*) prescribes various penalties for the violation of the law[46] and provides for the competence of the Cantons to prosecute and adjudicate the violations of this law.[47] Finally, Part E of the law (*Transitory and final provisions*) provides for the possibility of the Federal Government to adopt provisions and take other measures necessary for the implementation of this law, and for its authority, by means of adopting regulations, to make the enterprise analogous to lotteries also subject to the provisions of the law.

The Ordinance to Federal Lotteries and Commercial Betting Law provides for the competence of the Police Office of the Federal Department of Justice and Police to handle the matters entrusted to the Federal administration by virtue of the Law and the Ordinance,[48] define the information which shall be provided by the Cantons to the Police Office, on an annual basis, with respect to the lotteries having a public interest goal or a charitable purpose where the total amount of tickets exceeds fifty thousand Swiss francs[49] as well as describe the operations which shall be assimilated to lotteries within the meaning of the Federal Law.[50]

48.3 Current State of the Market of Lotteries and Betting in Switzerland and its Major Participants

48.3.1 Lotteries

Since January 1, 2003, all large inter-Cantonal or national lotteries in Switzerland (with target amounts of over 100,000 Swiss francs) have been operated on a monopoly basis by two lottery companies—*Interkantonale Landeslotterie*, offering lotteries under the "SwissLos" brand in the German-speaking and Italian-speaking part of Switzerland (SwissLos),[51] and *Loterie Romande*, offering lotteries in the

[43] LLP, Article 35.
[44] LLP, Article 36.
[45] LLP, Article 37.
[46] LLP, Article 38–45.
[47] LLP, Article 47.
[48] OLLP, Article 1.
[49] OLLP, Article 5.
[50] OLLP, Article 43.
[51] *See* http://www.swisslos.ch (last visited October 31, 2009).

French-speaking part of Switzerland.[52] As of that date, there major operators, namely *Interkantonale Landeslotterie*, the *Sport-Toto-Gesellshaft* and *SEVA* merged to form the new *Interkantonale Landeslotterie*.[53] The origins of this monopoly could be traced to the economic crisis of the 30-s of the twentieth century, when the Cantons relied upon their competence to authorise lotteries having a public interest goal or a charitable purpose provided for in the Federal Lotteries and Commercial Betting Law and, consequently, exclusively entrusted certain companies with the task of organising lotteries.[54]

The players mainly have access to the products of major lottery operators at their official sales points such as newsstands, kiosks, post offices, bars and restaurants, tobacconists etc. In addition to the major number lottery which is drawn on Wednesdays and Saturdays and the Euro Millions lottery, countless types of scratch cards and tear-off envelopes are also available.[55]

In line with the requirements of the Federal Lotteries and Commercial Betting Law that the Cantons may only authorise lotteries serving public interest goals or charitable purposes,[56] the money received from the lotteries goes to the Cantons. Depending on their own regulations and the amount involved, the competent financial body of each Canton (Cantonal Parliament, governing council, specially designated agency or distribution commission) will then distribute it in the form of grants to organisations running projects related to culture, nature and heritage conservation, education, social welfare, health, business promotion, tourism or sport.[57]

On the other hand, small lotteries (with a target amount of less than one hundred thousand Swiss francs) have a limited geographical reach (local, regional or in some cases Cantonal). They are generally held by small-scale organisers in connection with a wide variety of projects and events as a means of partly financing them or raising their appeal.[58] Unlike the proceeds received from the big

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[52] *See* http://www1.loterie.ch (last visited October 31, 2009).

[53] *See* Federal Department of Justice and Police: Lotteries, text in English is available at: http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html (last visited October 31, 2009).

[54] *See* Rouiller 2004, p. 429, 436.

[55] *See*, Federal Department of Justice and Police: Lotteries, text in English is available at: http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html (last visited October 31, 2009).

[56] LLP, Article 5.

[57] *See*, the Federal Department of Justice and Police: Use of proceeds, text in English is available at: http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_verwendung_der.html (last visited October 31, 2009).

[58] *See*, Federal Department of Justice and Police: Lotteries, text in English is available at: http://www.ejpd.admin.ch/ejpd/en/home/themen/gesellschaft/ref_lotterien_und_wetten/ref_lotterien.html (last visited October 31, 2009).

lotteries, the proceeds from the small lotteries are not transferred to the Cantons, but are directly used by organisations or associations to finance the public utility or charitable projects.[59]

48.3.2 Betting

Similar to the organisation and operation of inter-Cantonal and national lotteries, sports betting on the inter-Cantonal and national level in Switzerland is currently operated by the same two companies—*SwissLos* and *Loterie Romande*. They organize sport totalisor betting (Toto-R and Toto-X) as well as the bookmaking game *Sporttip* throughout the country.[60] In addition to that, in the French-speaking part of Switzerland the *Loterie Romande* offers *Pari mutual urbain romand* (PMUR) betting on horse races in Switzerland and abroad.[61] Unlike lotteries, where the proceeds are explicitly reserved for public benefit or charitable purposes, the Federal Lotteries and Commercial Betting Law does not prescribe similar requirements with respect to the sports betting. Nevertheless, the proceeds from the sports betting are still allocated to the cantons as well as to the Swiss Olympic pursuant to the statutes of the operators or contractual arrangements.[62] In their turn, the Cantons distribute the money received from commercial betting operators for sport-related purposes in accordance with their respective Cantonal legislation.[63]

48.4 Regulation of Lotteries, Including Sports Lotteries

48.4.1 The Meaning of "Lottery" and its Characteristic Features

The "lottery" is defined in the Federal Lotteries and Commercial Betting Law as any operation which offers, in exchange for the payment or at the time of the

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[59] Département federal de justice et police: Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 9 (Section 1.2.5.1), text in French is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/gesetzgebung/lotteriegesetz.Par.0002.File.tmp/ber-lg-f.pdf (last visited October 31, 2009).

[60] *See*, Federal Department of Justice and Police: Betting, text in English is available at: http://www.bj.admin.ch/bj/en/home/themen/gesellschaft/lotterien_und_wetten/wetten.html (last visited October 31, 2009).

[61] *See*, http://www.pmur.ch/fr/pages_courses/index.php (last visited October 31, 2009).

[62] *See* Rouiller 2008, p. 12.

[63] See, *e.g.,* Canton of Valais: Decree concerning the distribution and utilisation of proceeds from Sport-Toto, dated June 10, 1998 (*Arrêté concernant la répartition et l'utilisation du fonds du Sport-Toto, du 10 juin 1998*), text in French is available at: http://www.vs.ch/Public/public_lois/fr/pdf/935.700.pdf (last visited October 31, 2009).

conclusion of a contract, a chance to receive a material advantage consisting in lot, where the acquisition, the amount or the nature of this lot, in accordance with the plan, depend upon a chance resulting from drawing of certificates or numbers or from a similar procedure.[64] In addition to that, the Ordinance to the Federal Lotteries and Commercial Betting Law assimilates to lotteries:

- all operations using the so-called 'snowball' method (avalanche, Hydra, Gella, Multiplex). The operations falling under this definition are those operations which make the delivery of goods, distribution of prizes or receipt of other benefits by a certain person dependant upon that person's success in involving other people in the same operation.[65]
- competitions of all types which admit to the participation only those persons who made a payment or concluded a contract and which makes the receiving of a prize or its amount dependent, to a significant degree, upon chance or circumstances unknown to the participants[66];
- installation and exploitation of vending machines or gaming machines which distribute neither money nor objects substituting money, where the acquisition, the nature or the value of the prize promised in exchange for a payment or at the conclusion of a contract depend, to a significant degree, upon chance.[67]

The decisions of the Swiss Supreme Court concerning lotteries traditionally distinguish four characteristic features of lotteries, namely:

- placement of a stake or conclusion of contract;
- chance of receiving material advantage, that is to say, gain;
- intervention of a chance which determines, on the one hand, whether the gain is acquired and, on the other hand, what is its amount or nature; and
- existence of planning.[68]

The *stake* is understood by the Swiss Supreme Court as a monetary value which the player transfers in exchange for receiving the right to participate in the drawing in the hope of obtaining the gain. Even an amount of several centimes would

[64] LLP, Article 1(2).

[65] OLLP, Article 43(1).

[66] OLLP, Article 43(2).

[67] OLLP, Article 43(3).

[68] See, *e.g.,* Decision in the case of *Padorex S.A. c. Conseil exécutif du canton de Berne*, dated June 12, 1959, ATF 85 I 68; Decision in the case of *Minet c. Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25; Decision in the case of *Ministère public du canton de Neuchâtel c. Jaeger*, dated November 7, 1977, ATF 103 IV 213; Decision in the case of *D. c. Préfecture du distrcit de Zurich*, dated September 10, 1997, ATF 123 IV 175; Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213; Decision No. 6S.23/2006 in the case of *X. und Y. gegen Staatsanwaltscchaft des Kantons Aargau*, dated March 31, 2006, ATF 132 IV 76; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

constitute a stake, which, after all, could be hidden behind another performance having material value.[69] On the other hand, when the participation in the drawing is not connected with any stake or with the conclusion of a contract, such drawing is neither a lottery nor an operation analogous to lotteries. It is further required that the gratuitous nature of drawing and the equality of chances of the participants appear in a clear and indisputable manner. From this perspective, the crossword competition published in a newspaper where the solutions shall be communicated to its organisers either by phone for an extra charge (0.86 Swiss francs per minute) or by postal card with identical chances of winning shall not be considered as operation analogous to lotteries.[70]

The *material advantages* are not limited to monetary advantages, such as sums of money or tangible goods. They also include non-monetary benefits and free trips.[71]

The *intervention of chance* plays different roles in lotteries and in operations analogous to lotteries. While in the first case the allocation of gains shall exclusively depend upon such chance, in a second case it would be sufficient that the allocation of gains depends upon chance or circumstances unknown to the participants to a "significant degree," and not "exclusively."[72] From this perspective, the contest where the participants have to reply to the questions requiring certain knowledge and effort on their part, but the number of prizes is lower than the potential number of correct answers and, therefore, the correct reply does not, by itself, guarantee the winning of the prize, could still be qualified as "competition analogous to lottery."[73] By the same token, even when, by chance, the number of correct answers does not exceed the number of winners, determined in advance,

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[69] See, *e.g.,* Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213, 215; Decision No. 2A.11/2006 in the case of *X. AG gegen Bundesamt für Kommunikation* sowie *Eidgenössische Rekurskommission für Infrastruktur und Umwelt*; dated April 13, 2006, ATF 132 II 240, 242; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

[70] Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213.

[71] Decision in the case of *D. c. Préfecture du distrcit de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

[72] See Decision in the case of *Minet c. Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25, 32; Decision in the case of *D. c. Préfecture du distrcit de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178; Decision in the case of *Ministère public du canton de Zurich c. Peter Rothenbühler et Ringier SA*, dated August 12, 1999, ATF 125 IV 213, 215; Decision No. 6S.23/2006 in the case of *X. und Y. gegen Staatsanwaltscchaft des Kantons Aargau*, dated March 31, 2006, ATF 132 IV 76, 80; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

[73] Decision in the case of *D. c. Préfecture du distrcit de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

since the value of offered prizes was different, the allocation of the most valuable prizes would still depend upon chance.[74]

Finally, according to the Swiss Supreme Court, the condition of the existence of *planning* is satisfied when there is a plan which, in advance, exactly determines the prizes distributed by the organiser so that it could exclude its own risk.[75] This was, for example, the case when the organiser clearly defined the limits on the amounts of money and goods offered, by establishing 21 prizes, namely: (i) the first prize—trip by air to London, spending the night there at a first class hotel plus two entry tickets to the premiere of the "GoldenEye" movie; (ii) second to sixth prizes—free use of a BMW car during a week-end; (iii) seventh to sixteenth prizes—compact-discs; and (iv) seventeenth to twenty-first prizes—certain multiple-use tools.[76] On the contrary, when the organiser of a lottery promises a prize to every participant, without the possibility of determining in advance their number, it assumes the risk of being obliged to pay significant amounts of money without the possibility of estimating these amounts in advance.[77]

48.4.2 The Distinction Between Lotteries and Similar Institutions

48.4.2.1 Lotteries and Games of Chance

Under Swiss law lotteries may be viewed as a form of games of chance (*jeux de hasard*). This follows from the definition of "games of chance" in the Federal Games of Chance and Casinos Law of 1998,[78] according to which the "games of

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[74] *Ibid.*

[75] See Decision in the case of *Padorex S.A. c. Conseil exécutif du canton de Berne*, dated June 12, 1959, ATF 85 I 68; Decision in the case of *Minet c. Préfecture du district de Zurich*, dated March 8, 1973, ATF 99 IV 25; Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC et Crédit Suisse SA c. Service de l'économie, du logement et du tourisme, Police cantonale du commerce ainsi que Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

[76] Decision in the case of *Bruggmann c. Ministère public du canton d'Argovie*, dated March 30, 1936, ATF 61 I 46; Decision in the case of *D. c. Préfecture du distrcit de Zurich*, dated September 10, 1997, ATF 123 IV 175, 178.

[77] Decision of the Swiss Supreme Court No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 75-76 (citing Imhoff-Scheier 1985, pp. 25, 39).

[78] Federal Games of Chance and Casinos Law, dated December 18, 1998 (*Loi fédérale sur les jeux de hasard et les maisons de jeu (Loi sur les maisons de jeu, LMJ), du 18 décembre 1998*), text in French is available at: http://www.admin.ch/ch/f/rs/9/935.52.fr.pdf (last visited October 31, 2009). The Law is supplemented by the Ordinance concerning games of chance and casinos, dated September 24, 2004 (*Ordonnance sur les jeux de hasard et les maisons de jeu (Ordonnance sur les maisons de jeu, OLMJ), du 24 septembre 2004*), French text is available at: http://www.admin.ch/ch/f/rs/9/935.521.fr.pdf (last visited October 31, 2009).

chance" are those games which offer, through placing a stake, the possibility of gaining money or obtaining other material advantages, where this possibility depends solely or essentially upon chance.[79] Since the lotteries also offer the possibility of winning material advantages, which depends upon a chance,[80] they would also fit under this definition.[81]

Despite the "chance" nature of lotteries, the Swiss federal legislator took a differentiated approach with respect to the regulation of games of chance in general and the regulation of lotteries in particular. This approach started with Article 35 of the Federal Constitution of 1874, which drew a distinction between the regulation of casinos (*maisons de jeu*) and that of lotteries.[82] Following the same approach, instead of submitting all games of chance to a single law, the Federal Legislator instead opted in favour of adopting two separate laws—the Federal Lotteries and Commercial Betting Law of 1923 and the Federal Casinos Law of 1929.[83] This differentiated approach has been maintained with the adoption of the Federal Games of Chance and Casinos Law of 1998. Consequently, this law specifically excludes from its application the lotteries and commercial bets, governed by the Federal Lotteries and Commercial Betting Law,[84] considered as a special law (*lex specialis*) with respect to the general law of 1998.[85]

Since under the Federal Games of Chance and Casinos Law the games of chance shall be subject to a number of restrictive requirements, notably, the requirement of their conduct in specially designated places (casinos)[86] as well as the requirement to obtain a licence for the establishment and operation of a casino,[87] drawing a clear distinction between games of chance in general and lotteries, their particular form becomes very important, especially in practice. Such distinction has been traditionally drawn by the Swiss courts on the basis of the criteria of planning, meaning that the lotteries can be distinguished amongst other

[79] LMJ, Article 3(1).

[80] LLP, Article 1(2).

[81] The draft Federal Lotteries and Betting Law defines lotteries as those games of chance which have the following four characteristic features: (i) are not held in casinos; (ii) take place during a pre-determined period of time; (iii) there are multiple players; and (iv) at least a portion of the prize fund is distributed in such a way than one player's success can or does reduce the other player's winnings or chances of winning. *See*, draft Federal Law on the lotteries and betting, Article 3(1).

[82] *See* Aubert & Mahon 2003, pp. 813–814.

[83] Federal Casions Law, dated October 5, 1929 (*Loi fédérale sur les maisons de jeu, du 5 octobre 1929*).

[84] LMJ, Article 1(1).

[85] *See*, Message relatif à la loi fédérale sur les jeux de hasard et les maisons de jeu (Loi sur les maisons de jeu, LMJ), du 26 février 1997, Feuille Fédérale, 1997, volume III, No. 20, pp. 137, 151.

[86] LMJ, Article 4(1).

[87] LMJ, Article 10.

games of chance by the existence of the plan of drawing.[88] Nevertheless, the validity of distinction between games of chance in general and lotteries, in particular, is currently tested in light of recent technical developments, in particular, the appearance of automatic touch-screen lottery machines.

Since 1999, these lottery machines, called "Tactilo" in the French-speaking part of Switzerland, have been offered by *Loterie Romande*. The machines, connected to the computer of *Loterie Romande,* the lottery organiser in Lausanne, are equipped with a slot for inserting coins, totalisor of credits, printing device allowing printing winning tickets and a touch screen, where the player may view the tickets of various lotteries and virtually scratch them.[89] Consequently, although the prizes are allocated in accordance with the plan of drawing, from the point of view of players, as well as from the point of view of their operation, these automatic machines are not very different to slot machines, subject to the requirements of the Federal Games of Chance and Casinos Law of 1998, notably the prohibition of their operation outside the casinos.

The question as to whether these *Tactilo* lottery machines fall under the scope of the Federal Games of Chance and Casinos Law of 1998 or the Federal Lotteries and Commercial Betting Law of 1923 has been controversial in Switzerland for a long time.[90] Most recently, by its decision of December 21, 2006, the Federal Casinos Commission prohibited the operation of the Tactilo-type machines outside of the casinos which have obtained a licence.[91] The Cantons, together with *Loterie Romande*, *Swisslos*, several foundations and associations benefiting from the financial support of *Loterie Romande*, as well as bodies entrusted with the distribution of proceeds from the lotteries, subsequently challenged this decision to the Federal Administrative Court. On September 14, 2007, this Court declared the appeal of the foundations, associations and distributing bodies as non-receivable.[92] As concerns the Appeal of the Cantons, *Loterie Romande* and *Swisslos*, as of

[88] Decision in the case of *Bruggmann c. Ministère public du canton d'Argovie*, dated March 30, 1936, ATF 61 I 46.

[89] The French translation of the words "touch screen" is *écran tactile*. This is where the name "Tactilo" comes from.

[90] *See*, Commission fédérale des maisons de jeu: Appareils automatiques de jeu de loterie, text in French is available at: http://www.esbk.admin.ch/esbk/fr/home/themen/lotteriespielautomaten.html (last visited October 31, 2009).

[91] *See*, Commission fédérale des maisons de jeu: La Commission des maisons de jeu interdit les appareils de type "Tactilo" (Communiqués, CFMJ, 09.01.2007), text in French is available at: http://www.esbk.admin.ch/esbk/fr/home/dokumentation/medienmitteilungen/2007/2007-01-09.html (last visited October 31, 2009).

[92] Decision No. B-1077/2007 of the Federal Administrative Court, dated September 14, 2007, text in French is available at: http://relevancy.bger.ch/php/taf/http/checkpdf.php?filename=2007/b_01077_2007_2007_09_14_t.pdf&lang=fr&type=azabvger (last visited October 31, 2009).

October 31, 2009, this case was still pending before the Swiss Federal Administrative Court.[93]

48.4.2.2 Lotteries and Derivative Financial Instruments

Under Swiss law, derivative financial instruments, or derivatives, are financial contracts whose price derives from: (a) underlying property assets such as shares, bonds, commodities or precious metals; or (b) reference rates such as currencies, interest rates and indices.[94] Since the value of the derivatives depends upon the movements of the market prices to their underlying assets, the derivatives are similar to the lotteries in the sense that the gain from them also depends upon the intervention of forces beyond the control of their purchasers. Taking into account that derivatives in Switzerland are governed by a set of laws and regulations, distinct from those governing the lotteries, notably, the Stock Exchange Law and the Ordinance concerning stock exchanges and securities trading,[95] the existing similarity between lotteries and derivative financial instruments makes it necessary to draw a clear distinction between them.

This distinction, in a sports context, has been addressed by the Swiss Supreme Court in 2007 in a case involving *Nomura Bank International PLC* and *Credit Suisse SA*.[96] This case focused upon the legal status of the derivative instrument entitled "a one year 13.5% CHF Equity Yield Note in Swiss francs with 'Coupon Bonus' in connection with the Football World Cup" issued by *Nomura Bank* on the occasion of the 2006 Football World Cup in Germany and distributed in Switzerland by *Credit Suisse*. The instrument consisted of two parts—the Note with a nominal value of one thousand Swiss francs and the Coupon Bonus. Upon the Note's maturity, the investors should have received a 13.5% interest on its nominal amount plus the principal payment the amount of which depended upon the fluctuations of shares of five companies sponsoring the World Cup (Deutsche Telekom, McDonald's Corp., Philips Electronics NV, Procter and Gamble and Toshiba Corp.).[97]

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[93] *See*, Commission fédérale des maisons de jeu: Appareils automatiques de jeu de loterie, text in French is available at: http://www.esbk.admin.ch/esbk/fr/home/themen/lotteriespielautomaten.html (last visited October 31, 2009).

[94] Ordinance concerning stock exchanges and securities trading, dated December 12, 1996, Article 5 (*Ordonnance sur les bourses et le commerce des valeurs mobilières (OBVM), du 2 décembre 1996*), text in French is available at: http://www.admin.ch/ch/f/rs/9/954.11.fr.pdf (last visited October 31 2009).

[95] Federal Law on stock exchanges and securities trading, dated March 24, 1995 (*Loi fédérale sur les bourses et le commerce des valeurs mobilières (LBVM), du 24 mars 1995*), text in French is available at: http://www.admin.ch/ch/f/rs/9/954.1.fr.pdf (last visited October 31 2009).

[96] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC* et *Crédit Suisse SA* c. *Service de l'économie, du logement et du tourisme, Police cantonale du commerce* ainsi que *Tribunal administratif du canton de Vaud*, dated February 19, 2007, ATF 133 II 68, 75.

[97] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 69.

The "Coupon Bonus," an integral part of the instrument, provided for the payment of additional interest, depending upon the performance of the Swiss national football team in the World Cup. This, in case the Swiss team reached the quarterfinal, the investor would have received an additional 1% interest (14.5% in total), the semi-final—an additional 3% (16.5% in total) and the final—additional 7% (20.5% in total). Should the Swiss football team become the World Champions, the investor would have received an additional 15% interest (28.55% in total). The description of the instrument published by Credit Suisse also emphasised that this instrument was not considered as an investment into a mutual fund and was not subject to the legislation on the investment funds or to the supervision of the Swiss Federal Banking Commission.[98]

The case started when the Department of Economy, Housing and Tourism, together with the Administrative Court of the Canton of Vaud classified this instrument as betting, prohibited by the Federal Law on Commercial Betting and Lotteries. *Nomura Bank* and *Credit Suisse* then lodged an Appeal to the Swiss Supreme Court, asking the Court to annul the decision of the Cantonal Administrative Court and to confirm that the Note was not subject to the requirements of this Federal Law and the Ordinance to the Law.[99]

The Swiss Supreme Court rejected the Appeal. The Court came to the conclusion that the Note possessed the characteristics of the game of chance and, consequently, was subject to the requirements of the Federal Games of Chance and Casinos Law, unless it could be qualified as the lottery or as commercial betting, permitted under the Federal Law on Lotteries and Commercial Betting. As concerns the possible classification of the Note as "lottery," the Court decided that the proposed instrument did not fall under the definition of lotteries and operations analogous to lotteries.[100]

First, until the end of the subscription period, the banks did not know how many investors would purchase their products and in what quantities. Furthermore, until the end of this period the banks could not have known what would be the results of the Swiss national team at the 2006 Football World Cup. In the Court's view, the results of these types of competitions are the events where the probability cannot be calculated in abstract. Although the statistical data of the past performance of the participating teams could give certain indications, it is impossible to provide an incontestable evaluation of the probability of the victory of the competitors. Under these circumstances, the Supreme Court established that by promising to any

[98] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 70. The supervisory functions of the Federal Banking Commission have been subsequently taken over by the Federal Supervisory Authority over the financial markets (*l'Autorité fédérale de surveillance des marches financiers* or FINMA). *See*, Law on the federal authority of supervision over the financial markets, dated June 22, 2007 (*Loi sur l'Autorité fédérale de surveillance des marches financiers, du 22 juin 2007 (LFINMA)*), text in French is available at: http://www.admin.ch/ch/f/rs/9/956.1.fr.pdf (last visited October 31 2009).

[99] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 70.

[100] *Ibid.,* p. 76.

investor the prize in the form of "Coupon Bonus" and by submitting themselves, to a significant degree, to the chance or at least to the circumstances unknown to them and to the investors, the banks assumed the risk to pay the prizes, the exact amounts of which were not known to them at the moment of subscription. Thus, the Court came to the conclusion that the banks did not have the pre-existing plan of the distribution of gains in the sense of the Federal Law on Lotteries and Commercial Betting and the Ordinance to this Law and, consequently, that the proposed instruments were not "lotteries" or "operations analogous to lotteries."[101]

48.4.3 State Licensing of Lotteries

48.4.3.1 Competent Authorities

Under the Federal Law on Lotteries and Commercial Betting, the legislation of each Canton shall designate a single body in charge of granting licenses to organise and to conduct lotteries in the territory of this Canton.[102] For example, in the Canton of Fribourg, such licenses are granted by the Service of Commerce Police,[103] in the Canton of Geneva—by the Service of Commerce of the Department of Economy and Health,[104] whereas in the Canton of Vaud—by the Cantonal Commerce Police of the Service of Economy, Housing and Tourism of the Department of the Economy.[105]

When the lottery is organised on an inter-Cantonal level or on the whole territory of Switzerland, it needs a prior approval (*homologation*) from the Lottery

[101] *Ibid*.

[102] LLP, Article 15(1).

[103] The application form for the licence of the lottery in the Canton of Frbourg could be found on the web site of the Service of Commerce Police (*Service de la police du commerce* or SPoCo) at: http://admin.fr.ch/fr/data/pdf/spoco/demandeloteriefr.pdf (last visited October 31, 2009).

[104] RaLLP, Article 2(1). The application form for the licence of the lottery in the Canton of Geneva could be found on the web site of the Service of Commerce of the Department of Economy and Health (*Service du commerce du Département de l'économie et de la santé*) at: http://etat.geneve.ch/des/site/economie/service-du-commerce/master-list.jsp?componentId=kmelia889 (last visited October 31, 2009).

[105] LVLLP, Article 3(1). The application form for the licence of the lottery in the Canton of Vaud could be found on the web site of Cantonal Commerce Police of the Service of Economy, Housing and Tourism of the Department of the Economy (*Police cantonale de commerce du service de l'economie, du logemenet et du tourisme du Département de l'economie*) http://www.vd.ch/fileadmin/user_upload/organisation/dec/selt/pcc/fichiers_pdf/loteries_080430_formulaire.pdf (last visited October 31. 2009).

and Betting Commission (*Comission des loteries et paris* or *Comlot*), created pursuant to the Inter-Cantonal Convention.[106] Once this prior approval is granted, the Cantonal authorities shall render the decision concerning the operation of the lottery within 30 days from the day of the notification of the approval and shall communicate their decision to the Commission.[107] The license granted by the Cantons shall not contain any additional charge or condition related to the game which derogate from the preliminary approval. Only those charges or conditions which strengthen the preventive measures decided upon by the Commission may be allowed.[108]

48.4.3.2 Persons Eligible to Obtain the License to Conduct a Lottery

General Requirements

According to the Federal Law on Lotteries and Commercial Betting, the license to run lotteries can be granted only to the public law corporations and institutions as well as to the associations of persons and private law foundations which have their seat in Switzerland and which present all guarantees with respect to the correct running of the lottery.[109] The Law also prohibits the transfer of the license by its holder to a third party.[110]

As was pointed out by the Swiss Supreme Court in 2000 in the case of *Hockey Club La Chaux-de-Fonds SA*, the Federal Law on Lotteries and Commercial Betting enumerates the categories of the possible holders of the license to conduct lotteries in a restrictive manner. Furthermore, as concerns private law entities, only legal entities pursuing purely public benefit goals or charitable purposes may be eligible for such licenses, with the exclusion of commercial entities. Consequently, according to the Supreme Court, it would be openly contrary to the goals pursued by this law to grant the license to run a lottery to a joint-stock company, which intends to finance, through the conducting of this lottery, its main activities, such as the operation of a professional hockey team in the national hockey league.[111] Thus, in view of this decision of the Swiss Supreme Court, under the current law, sports clubs in Switzerland, organised in the form of a commercial entity, would not be eligible to run their own lotteries even though they may intend to use its proceeds for the improvement of their sporting results.

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[106] CILP, Article 14. According to Article 5 of the CILP, this Commission is composed of five members, two of which come from the French-speaking part of Switzerland, two—from the German-speaking part of Switzerland, and one—from the Italian-speaking part of Switzerland.

[107] CILP, Article 15.

[108] *Ibid*.

[109] LLP, Article 6(1).

[110] LLP, Article 6(2).

[111] Decision No. 2P.280/2000 in the case of *Hockey Club La Chaux-de-Fonds SA*, dated June 18, 2001, text in French is available at: http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm (last visited October 31, 2009).

Inter-Cantonal and National Lotteries Monopoly

Inter-Cantonal lotteries and national lotteries in Switzerland currently may be organised by only two Swiss lottery companies—*Loterie Romande*, which operates in the French-speaking part of Switzerland, and *Swisslos*, which operates in the German and Italian-speaking parts. In the French-speaking part of Switzerland this monopoly is currently based on the 9th Convention related to the *Loterie Romande*,[112] whereas in the German and Italian-speaking parts of Switzerland—on the Inter-Cantonal Convention on the Organisation of Lotteries of (IKV) of 1937.[113] While there have been several attempts in recent years to challenge this monopoly in the Swiss Supreme Court, on the grounds that it violates the freedom of commerce and industry provided for by the Federal constitution,[114] in particular, by the Association for the Environment and Development, so far, the challenges have not been successful.[115]

Conditions for Obtaining the License

Under the Federal Law on Lotteries and Commercial Betting, the licenses to organise and conduct lotteries may be granted only when their organiser offers, to the purchasers of tickets sufficient guarantees from the point of view of the security and protection of their rights, and when the total amount of the prizes is appropriately proportionate to the value of the tickets to be issued.[116] The license may be subjected to certain security conditions. In particular, it is possible to require that certain designated persons domiciled in Switzerland take responsibility for the correct operation of the lottery and that the prizes are deposited with the public administrative body.[117]

Under the law, the operation of the lottery shall be completed within the maximum period of 2 years and, when the drawing is conducted in several series,

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[112] C-LoRo, Article 1.

[113] IKV, Article 3.

[114] Federal Constitution, Article 32.

[115] Decisions No. 1A. 183/1998 and 1P.488/1998 in the case of *Association Environment et Développement c. Département de la justice, de la police et des affaires militaires du canton de Vaud*, dated March 30, 1999, Revue de droit administratif et de droit fiscal, 2000, part I, p. 132-140; Decision No. 2A.59/2001 in the case of *Interkantonale Landeslotterie c. Association Lotterie Umwelt & Entwicklung ainsi que Zurich, canton, Conseil d'Etat et Tribunal administratif*, dated June 14, 1001, ATF 127 II 264, Journal des Tribunaux, 2004 I 167-172; Decision No. 2A.32/2003 in the case of *Interkantonale Landeslotterie, Regierungstrat des Kantons Zürich gegen Trägerverein Lotterie Umwelt & Entwicklung, Verwaltungsgericht des Kantons, Zürich*, dated August 4, 2003, text in German is available at http://www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm (last visited October 31, 2009).

[116] LLP, Article 7(1).

[117] LLP, Article 7(2).

within the maximum period of 3 years. When the competent body of the Canton issues the license, it shall prescribe for each lottery the period of its operation within these limits.[118] When there are valid reasons, upon the organiser's request the competent body may also extend the period of the lottery's operation for one additional year.[119]

The Federal Law on Lotteries and Commercial Betting also provides for the authority of the Cantons to regulate the operations of the lotteries in greater detail,[120] as well as to subject the lotteries with public benefit goals or with charitable purpose to more stringent requirements, as well as to completely prohibit them.[121] Thus, for example, in the Canton of Geneva, the application for a license to conduct a lottery can be refused in the following cases: (a) the previous activities and the morality of the applicants do not offer sufficient guarantees; (b) the conditions prescribed by the Cantonal regulations or by the Federal Law are not complied with or the general organisation does not present sufficient moral and financial guarantees; (c) there is a risk that a very large number of lotteries or requests for public charity bothers or presents excessive demands for contributions of the population; (d) the conditions of the previous license have not been respected; and (e) the applicant already received the license during several consecutive years; when the applicant regularly benefits from the subventions of public authorities or allocation from the proceeds of other lotteries or analogous operations, or when he regularly addresses the public by means of collection at home, sales on the streets, or by means of sending postal cheques or letters.[122]

48.4.4 The State Supervision of Lotteries

The supervision over the organisation and the conduct of the lotteries at the intercantonal or the national level is exercised by Comlot.[123] In particular, Comlot exercises the supervision over the observance of the legal requirements and conditions related to licenses. When the conditions of the license are no longer complied with, Comlot may withdraw this license.[124]

On the other hand, the supervision over the organisation and the conduct of the lotteries within the Canton is exercised by the Cantonal authorities. For example, in the Canton of Geneva, the Service of Commerce of the Department of Economy and Health may withdraw the license when, after its issuance, the Service receives

[118] LLP, Article 8(1).
[119] LLP, Article 8(2).
[120] LLP, Article 15(2).
[121] LLP, Article 16.
[122] RaLLP, Article 6.
[123] CILP, Article 20.
[124] CILP, Article 20.

information that there are facts related to its organisers which would have prevented the issuance of this license if these facts were known to the Service, or if the legal requirements concerning lotteries or the legal conditions prescribed by the Service have not been complied with by the organizers.[125] By the same token, in the Canton of Vaud, the license may be withdrawn by the Department of the Economy in the case of repeated violations of the Federal or Cantonal requirements concerning lotteries.[126]

48.5 Regulation of Sports Betting

48.5.1 The Meaning of "Betting" and its Characteristic Features

The Federal Law on Lotteries and Commercial Betting does not contain a definition of "betting." Consequently, in order to establish the meaning of this term it is necessary to analyse the decisions of the Swiss Supreme Court on the subject of betting. According to the Court, the betting is characterised by the following three elements:

- placement of a stake or conclusion of contract;
- chance of receiving material advantage, that is to say, gain;
- intervention of a chance which determines, on the one hand, whether the gain is acquired and, on the other hand, what is its amount or nature (in particular, the accuracy of the forecast made with respect to the outcome of a competition or an event).[127]

Furthermore, the Swiss Supreme Court draws a distinction between two types of betting: (i) totalisor betting (*pari au totalisateur*) and (ii) betting with bookmakers (*paris à la cote*). Totalisor betting involves the pooling of stakes placed by the bettors. This type of betting is present where the winner receives the pool of stakes or where the pool is divided amongst winners in accordance with the predetermined variable odds.[128]

On the other hand, in the betting with bookmakers its participants define the rates of return in relative values, which are multiples or fractions of the stake. The organiser, generally, determines the rates of return and accepts the bets (usually in the book, which explains where the expression "bookmaker" comes from), assuming the role of "opposite bettor" against other participants and guaranteeing the gains.[129] Although the prohibition of this particular type of betting in

[125] RALLP, Article 7.

[126] LVLLP, Article 9(1).

[127] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 77.

[128] *Ibid*., p. 78.

[129] *Ibid*.

Switzerland was one of the aims of the adoption of the Federal Lotteries and Commercial Betting Law,[130] and this law allows the Cantons to authorize, on their territory only, *totalisor* betting,[131] in recent years several Cantons have authorised the conduct of the betting with bookmakers.[132]

48.5.2 The Meaning of "Commercial Betting"

While prohibiting only commercial betting, the law does not define the meaning of "commercial." According to the Swiss Supreme Court, betting shall be considered as commercial when it is exercised as an economic activity in return for a regular revenue. The Court views as "commercial" betting which possesses certain organisation, allows for its repetition and generates revenue for its operator. This revenue does not necessarily have to result in net profits or in the increase of the organiser's assets; the mere proceeds or receipts would be sufficient in this regard.[133] Consequently, the Swiss Supreme Court qualified as "commercial" the totalisor betting organised by an association from the Canton of Ticino on the outcome of the greyhound races with the aim of receiving regular revenue, since this betting had to be repeated in the future, even occasionally.[134]

On the contrary, betting activities limited in terms of their duration and range of participants, where their operator generates no revenue for himself but simply administers the betted amounts, prior to their redistribution in full, should not be considered as commercial betting. Thus, for example, betting organised amongst office staff or among friends or relatives during the football European Cup on the outcome of the matches may be entirely compatible with the requirements of the Federal Lotteries and Commercial Betting Law.[135]

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[130] *See*, Message du Conseil fédéral, du 13 août 1918, p. 362.

[131] LLP, Article 34.

[132] *See*, Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21.

[133] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 78.

[134] Decision of the Swiss Supreme Court in the case of *Associazione ticinese per le corse dei levrieri c. Consiglio di Stato del Cantone Ticino*, dated April 3, 1981, ATF 107 Ib 391.

[135] *See*, Lotteries and Betting Commission (*Comlot*): Betting, text in English is available at: http://www.comlot.ch/e/topics-information/bets (last visited October 31, 2009).

48.5.3 The Distinction Between Betting and Similar Institutions

48.5.3.1 Betting and Lotteries

Betting is similar to lotteries in the sense that its three characteristic features, namely: (i) the placement of a stake or the conclusion of a contract, (ii) the chance of winning, and (iii) the intervention of chance for the determination of the gain and its amount, are also present in lotteries. Unlike lotteries, however, betting is not conducted according to a pre-determined plan of the distribution of gains.[136] Therefore, betting does not have the fourth characteristic feature of lotteries—the existence of planning.

Another difference between lotteries and betting is that they have different mechanisms for the determination of their results, leading to the different roles of the participants' personal knowledge and abilities. On the one hand, in lotteries the results are determined by means of drawing. Since drawing depends entirely upon a chance, lotteries leave no place for such knowledge and abilities. On the other hand, in betting the results are determined by reference to the outcome of competitions and other similar events. Thus, by placing a bet, the bettor is making a certain prognosis as to its outcome. While the element of chance in betting is also present, the abilities of the bettor and his/her personal knowledge of the similar events or the respective strength of the teams participating in this competition facilitates, to a certain degree, making a correct prognosis and, correspondingly, increases his/her chance of winning.[137]

48.5.3.2 Betting and Games of Chance

Similar to lotteries, betting also offers the possibility of winning material advantages, which depends upon a chance. Thus, under Swiss law, betting shall also be viewed as a form of "game of chance," because it fits under this definition in the Federal Games of Chance and Casinos Law of 1998.[138] On the other hand, the distinction between the games of chance, in general, and betting in particular, may be drawn on the basis of different roles of the participants' personal knowledge and abilities in the determining of the respective results. Unlike other games of chance, the outcome of which normally depends upon pure chance, betting allows participants to influence its results by means of relying upon their abilities and knowledge of the respective events.[139]

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[136] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 77.

[137] Cf., Rouiller 2004, pp. 429, 440.

[138] LMJ, Article 3(1).

[139] The draft Federal Lotteries and Betting Law defines betting as those games of chance which have the following three characteristic features: (i) are not operated in casinos; (ii) there are multiple players; and (iii) winning depends on correctly forecasting the outcome of an event or contingency. *See*, draft Federal Law on the lotteries and betting, Article 3(2).

48.5.3.3 Betting and Derivative Financial Instruments

Betting is similar to derivative financial instruments in the sense that the bettors also bear certain risks of financial loss. In view of the decision of the Swiss Supreme Court in the case of *Nomura Bank International Plc.*, it is the nature of this risk which allows drawing a distinction between the derivatives and betting. In the first case, this risk depends upon the performance of the underlying assets and, therefore, has an economic force behind it. In the second case, this risk primarily depends upon the outcome of a certain competition or an event and, therefore, by its nature, it is no longer economic risk but predominantly gaming risk.[140]

48.5.4 The State Licensing of Commercial Betting

48.5.4.1 Competent Authorities

Although the Federal Lotteries and Commercial Betting Law allows the Cantons to authorise totalisor betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton,[141] certain Cantons did not take advantage of this possibility and simply prohibited all commercial totalisor betting on their territory. Such direct prohibition has been included, for example, in the legislation of the Canton of Geneva,[142] the Canton of Vaud[143] and the Canton of Valais.[144] On the other hand, in those cases, when commercial totalisor betting is permitted by the Cantonal legislation, for example, in the Canton of Fribourg,[145] the license is granted by the Cantonal authorities of the respective Canton (in the Canton of Fribourg—the Service of the Trade Police).[146]

Similar to the lotteries, when the commercial betting is organised on an inter-Cantonal level or on the whole territory of Switzerland, it needs prior approval (*homologation*) by Comlot.[147] Once this prior approval is granted, the Cantonal authorities shall render the decision concerning the operation of the commercial betting within 30 days from the day of the notification of the approval and shall communicate their decision to Comlot.[148] As in the case of the lotteries, the license

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[140] Decision No. 2A.529/2006 in the case of *Nomura Bank International PLC,* p. 80.

[141] LLP, Article 34.

[142] RaLLP, Article 22.

[143] LVLLP, Article 13.

[144] Law on the implementation of the Federal Lotteries and Commercial Betting Law, Article 14.

[145] Law on the lotteries, Article 7(1).

[146] Law on the lotteries, Article 4.

[147] CILP, Article 14.

[148] CILP, Article 15.

to conduct commercial betting granted by the Cantons shall not contain any additional charge or condition related to the game which derogate from the preliminary approval. Only those charges or conditions which strengthen the preventive measures decided upon by Comlot may be allowed.[149]

48.5.4.2 Persons Eligible to Obtain the License to Organise Commercial Betting

General Requirements

The Federal Lotteries and Commercial Betting Law does not specifically prescribe any requirements with respect to the eligibility to obtain a license for organising commercial betting. Correspondingly, in those Cantons where commercial betting is permitted, such requirements are established by the Cantonal legislation. For example, in the Canton of Fribourg, similarly to the eligibility requirements to organise lotteries, the license to organise commercial betting can be granted only to the public law corporations and institutions as well as to the associations of persons and private law foundations which have their seat in Switzerland and which present all guarantees with respect to the correct operation of the betting.[150]

Inter-Cantonal and National Commercial Betting Monopoly

Similar to the monopolistic position of *Loterie Romande* and *Swisslos* with respect to the organisation of inter-Cantonal or national lotteries, commercial betting on the inter-Cantonal and national levels in Switzerland also could be organised only by these two operators. Although the Swiss Supreme Court so far has not specifically addressed the issue of validity of commercial betting monopoly, former President of this Court expressed the view that the Court decisions concerning the lottery monopoly could be equally applicable to the commercial betting monopoly on the inter-Cantonal and national levels.[151] Therefore, it seems unlikely that any eventual efforts to challenge the existing commercial betting monopoly of *Loterie Romande* and *Swisslos,* on the grounds that it violates the constitutional freedom of commerce and industry would be successful.

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149 *Ibid*.

150 Law on the lotteries, Article 7.

151 *See* Rouiller 2004, p. 456.

48.5.4.3 Conditions for Obtaining the License

In those Cantons, where commercial betting is permitted, the conditions for obtaining a license are prescribed by the Cantonal legislation. In the Canton of Fribourg, for example, the organiser of commercial betting has to establish regulations governing participation in the betting as well as approved terminals and programmes corresponding to the type of envisaged activities.[152] The amount of gains shall depend upon the amount of placed bets, provided that, in any case, at least 70% of the bets shall be distributed to the winners.[153] In addition to that, the license in the Canton of Fribourg is subject to a 6% tax calculated on the basis of the total amount of bets.[154]

48.5.5 The State Supervision of Commercial Betting

Similar to the supervision over the inter-Cantonal and national lotteries, the supervision over the organisation and the conduct of the commercial betting at the inter-cantonal or the national level is exercised by Comlot.[155] In particular, Comlot exercises the supervision over the observance of the legal requirements and conditions related to the licenses. When the conditions of the license are no longer complied with, the Comlot may withdraw this license.[156]

On the other hand, the supervision over the organisation and the conduct of commercial betting, within the Canton, is exercised by the Cantonal authorities. In the Canton of Fribourg, for example, the supervision over the observance of the requirements of the law on lotteries, including those related to commercial betting, is exercised by the Service of Trade Police.[157] This Service may withdraw the license to conduct commercial betting when the holder of the license does not respect the obligations imposed by the law on lotteries or by the regulations to this law[158]; when any of the conditions for the issuance of this license are no longer complied with[159]; or when the holder of the license does not pay the required amount of tax.[160]

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[152] Law on the lotteries, Article 13.
[153] *Ibid*., Article 14.
[154] *Ibid*.
[155] CILP, Article 20.
[156] *Ibid*.
[157] Law on the lotteries, Article 4(2).
[158] Law on the lotteries, Article 16(a).
[159] Law on the lotteries, Article 16(b).
[160] Law on the lotteries, Article 16(c).

48.6 Regulation of Lotteries and Sports Betting Conducted Via the Internet

In the absence of any special law or regulations, the conduct of lotteries and sports betting in Switzerland, via the Internet, shall be subject to the same requirements of the Federal Law on Lotteries and Commercial Betting and the Ordinance to this Law as those applicable to conventional lotteries and commercial betting, notably, the general prohibition on lotteries,[161] the interdiction to organise and conduct lotteries, including the interdiction of their announcement,[162] the general prohibition on the commercial betting,[163] the need to obtain Cantonal licenses for lotteries having a public interest goal or a charitable purpose,[164] as well as the need to obtain Cantonal licenses for totalisor betting involving horse races, regattas, football games and similar competitions taking place in the territory of the respective Canton, when it is permitted by the Cantonal legislation.[165] By "announcement" Comlot also understands the placement of links which point to websites run by illegal, i.e., unauthorised Swiss or foreign operators.[166]

Since the license to conduct lottery and commercial betting at the inter-Cantonal or national level in Switzerland currently is granted only to *Loterie Romande* and *Swisslos*, all other internet-based lottery or commercial betting services in the country are illegal. Consequently, any person, other than these two lottery operators, who offers lottery or commercial betting activities in Switzerland and/or advertises these activities via the internet may be reported by the Comlot to the criminal prosecution authorities. On the other hand, it is not an offence to make use of the lottery or commercial betting activities offered on the internet as a player.[167]

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[161] LLP, Article 1(1).

[162] LLP, Article 4.

[163] LLP, Article 33.

[164] LLP, Article 5.

[165] LLP, Article 34.

[166] *See*, Lotteries and Betting Commission (*Comlot*): Internet, text in English is available at: http://www.comlot.ch/e/topics-information/internet (last visited October 31, 2009).

[167] *See*, Lotteries and Betting Commission (*Comlot*): Internet, text in English is available at: http://www.comlot.ch/e/topics-information/internet (last visited October 31, 2009).

48.7 Sanctions for Violations of the Legislation Concerning Lotteries and Commercial Betting

48.7.1 Penal Sanctions Under the Federal Lotteries and Commercial Betting Law

Federal Law on Lotteries and Commercial Betting prescribes the following penal sanctions for violations of its provisions concerning the organisation and conduct of the lotteries and commercial betting:

- for organising and running the lotteries prohibited by virtue of this law—imprisonment or an arrest for a three-month period or a fine in the amount of up to ten thousand Swiss francs, or both[168];
- for commercial peddling (*colportage*) of authorised lotteries' tickets—a fine in the maximum amount of one thousand Swiss francs[169];
- for violation of the provisions of laws, ordinances or decisions concerning the organisation and conduct of the lotteries—a fine in the amount of up to one thousand Swiss francs[170];
- for placing, negotiating or offering possibilities for placing of prohibited bets on a professional basis or for running of an enterprise of this type—imprisonment or arrest for a period of up to three months or to a fine in the amount of up to ten thousand Swiss francs, provided that these two sanctions may be combined.[171]

In addition to these penalties, the Judge may also order the confiscation of the lotteries' tickets, prizes, coupons, lists of drawings and the amounts received as payments to the extent that these amounts are still available, as well as booklets and any other advertising materials assisting with the prohibited operations.[172] In case the person previously convicted of the violation to the law commits a new violation of this law within three years from the date of entry into force of the previous judgment, the Judge may increase the amount of penalty up to its double amount or, in cases provided for in Articles 40 and 41 of the law, combine imprisonment with the monetary fine.[173] Finally, when the above violations are committed by a legal entity or partnership in the process of carrying out its

[168] LLP, Article 38(1). On the other hand, according to Article 38(2) of the LPP, placing a stake in the lottery is not punishable. Therefore, persons buying tickets of the lotteries which have not been authorised or participating in the lottery through the internet could not be held responsible under the LPP.

[169] LLP, Article 40.

[170] LLP, Article 41(1).

[171] LLP, Article 42.

[172] LLP, Article 43.

[173] LLP, Article 44.

commercial activities, the bodies of this legal entity, which committed the violation, or the partners who committed the violation, shall be liable.[174]

48.7.2 Sanctions Under Cantonal Legislation

In addition to sanctions prescribed by the Federal Lotteries and Commercial Betting Law, Cantonal laws may also prescribe sanctions for violations of the legislation concerning lotteries and commercial betting. For example, in the Canton of Fribourg, to the extent that the violation is not already punishable by virtue of the Federal Lotteries and Commercial Betting Law, the person who exercises the activities governed by the Cantonal law on lotteries without the required license or violates the obligations imposed by Articles 8–10, 13 and 14 of this law, may be subject to a fine of up to ten thousand Swiss francs or up to ten thousand Swiss francs in case of repeated violation within two years from the first violation.[175] Similarly, in the Canton of Vaud, to the extent that the violation is not already punishable by virtue of the Federal Lotteries and Commercial Betting Law, any violation of the LVLLP, its implementation decrees, as well as the conditions imposed and the measures of execution taken by the competent authority, may be subject to a fine of up to five hundred Swiss francs and, in case or repeated violation, of up to one thousand Swiss francs.[176]

48.8 Proposed Reform of Lotteries and Betting Regulations in Switzerland

48.8.1 The Necessity for Reform

The process of the reform of lotteries and betting regulation in Switzerland started on April 4, 2001, when the Swiss Government decided to fully revise the Federal Lotteries and Commercial Betting Law.[177] Following this decision on May 31, 2001, the Federal Department of Justice and Police set up a commission of experts entrusted with the duty of revising the Law.[178] The proposed revision had, in particular, the following objectives:

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[174] LPP, Article 45.

[175] Law on the lotteries, Article 17.

[176] LVLLP, Article 18(1).

[177] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, at 4 (Section 1.1).

[178] *See*, Département fédéral de justice et police: Le DFJP nomme la commission d'experts pour la révision de la loi sur les loteries (Communiqués, DFJP, 31.05.2001), text in French is available at: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2001/2001-05-31.html (last visited October 31, 2009).

- taking into account the evolution of values in the area of games of chance, technical developments as well as the opening and the internationalisation of the gaming market;
- ensuring the protection of players against the possible dangers and harmful influence associated with the games of chance, taking into account the public interest;
- taking into account the financial needs of public formations without making unilateral transfers in one or another direction.[179]

The need for the revision of the law was further strengthened by a number of its deficiencies, the most important of which include:

- the absence of any separate regulation with respect to the major lottery operators which currently occupy monopoly position in inter-Cantonal and national lotteries markets[180];
- the absence of provisions against money laundering activities, whereas it could not be excluded that the lotteries market with its annual turnover of 1.4 billion Swiss francs offers possibilities for money laundering[181];
- the absence of a clear distinction between the games of chance in general and the lotteries, their particular form, which became evident in the course of the *Tactilo* case[182];
- the loss of the dissuasive effect of the penalties, prescribed by the law, in particular, monetary fines, to such extent that some foreign lottery operators even considered them as an ordinary operational cost.[183]

In addition, the growing demand and the technological developments have encouraged the authorisation of the games, to which compatibility with the existing law could raise certain doubts. For example, the Swiss number lottery with its fixed prizes for correctly guessing three or four winning numbers has renounced using the strict plan of gains distribution. Consequently, if during one of the drawings of the Swiss number lottery an unusually high number of players obtained three or four winning numbers, its organiser might be obliged, by reason of the announced fixed prizes, to distribute more money than it received as stakes. This situation would be contrary to the condition of planning, which requires the exact determination of the organiser's potential exposure.[184]

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[179] Département fédéral de justice et police: Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, at 20 (Section 1.1).

[180] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 20 (Section 1.3.2.1).

[181] *Ibid*., p. 22 (Section 1.3.2.4).

[182] *Ibid*., p. 22 (Section 1.3.2.5).

[183] *Ibid*., p. 22 (Section 1.3.2.8).

[184] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21 (Section 1.3.2.2).

Furthermore, sport betting already offered at the national level as well as PMUR betting offered in the French-speaking Cantons and the French-speaking part of the Canton of Bern with respect to the competitions or events taking place outside Switzerland, did not comply for a long time with the requirements of the law, which allows only for the authorisation of totalisor betting involving competitions or events taking place in the territory of the respective Canton.[185] Moreover, since several Cantons already authorised commercial betting based on the principle of "bookmaking," the prohibition of this type of commercial betting was also no longer observed.[186] Consequently, the law, adopted almost 80 years ago, no longer reflected the existing realities of the lotteries and commercial betting market.

48.8.2 Draft Federal Lotteries and Betting Law: An Overview

The work of the commission of experts culminated in October of 2002, when the draft Federal Lotteries and Betting Law[187] and the accompanying report[188] were presented to the Federal Department of Justice and Police. The draft law included a number of principles on which the existing system of regulation was based, such as the requirement of using net proceeds of lotteries for the public benefit or charitable causes, expanded to explicitly include also the proceeds from commercial betting,[189] the need to obtain authorisation for organisation and operation of lotteries and commercial betting,[190] and the competence of the Cantons in the area of their regulation.[191] In the Commission's view, only the limited access of operators to the market by means of licensing would allow limiting the competition and to ensure sufficient proceeds in favour of public benefit goals or charitable purposes.[192]

On the other hand, the draft law introduced into the existing system of regulation in Switzerland a number of major innovations, including the different

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[185] LLP, Article 34.

[186] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 21 (Section 1.3.2.2).

[187] Draft Federal Lotteries and Betting Law of 2002 (*Loi sur les loteries, Lot*), text in French is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/gesetzgebung/lotteriegesetz.Par.0005.File.tmp/entw-lg-f.pdf; English translation is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/lotterie.Par.0024.File.tmp/entw_Lotterien_und_Wetten-e.pdf (last visited October 31, 2009).

[188] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002.

[189] Draft Federal Lotteries and Betting Law, Article 7(1).

[190] *Ibid*., Article 6.

[191] *Ibid*., Article 5.

[192] Rapport explicatif relative au projet de la loi fédérale sur les loteries et paris, du 25 octobre 2002, p. 25 (Section 1.4.1.2).

requirements for major operators[193] and small operators,[194] the authorisation for major operators to organise commercial betting with bookmakers,[195] the possibility of access to lotteries and betting authorised under the law by means of a public electronic communication network such as the internet, television or the telephone network only for people physically present in Switzerland,[196] as well as the significant increase to the amount of monetary fines, including imprisonment for a period of up to five years or a fine in the amount of up to two million Swiss francs for serious offences.[197]

48.8.3 Current Status of the Reform

Following the submission by the Commission of Experts of the draft law on lotteries and betting and the accompanying Report, the Swiss Government authorised the Federal Department of Justice and Police to circulate this Report amongst interested parties, for consultation.[198] During this process of consultation, the polarised opinions have been expressed and the two totally opposing directions of future reform have been suggested. On the one hand, the Conference of the Cantonal administrators in charge of the lotteries, the Cantons as well as two major lottery operators (*Intercantonale Landeslotterie* and *Loterie Romande*) opted in favour of preserving the existing situation (Cantonal monopoly) and against limited liberalisation for the major operators. They also demanded the non-imposition of strict limits on the organisation of games (the payout ratio not exceeding 75%), the reduction of the Federal tax and the non-submission of lotteries and betting operators to the requirements of the legislation against money laundering.[199] On the other hand, certain umbrella associations (Swiss Association of Entrepreneurs (*Union patronale Suisse*), Economiesuisse, Swiss Association of Trade Unions

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[193] Draft Federal Lotteries and Betting Law, Article 9-13.

[194] *Ibid*., Article 14–15.

[195] *Ibid*., Article 17.

[196] *Ibid*., Article 8.

[197] *Ibid*., Article 50(2).

[198] *See*, Département fédéral de justice et police: Moderniser la législation sur les loteries. Consultation relative au projet de loi élaboré par une commission d'experts (Communiqués, DFJP, 09.12.2002), text in French is available at: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2002/2002-12-09.html (last visited October 31, 2009).

[199] *See*, Département fédéral de justice et police: L'orientation générale de la révision de la loi sur les loteries est contestée (Communiqués, DFJP, 20.08.2003), text in French is available at: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-200.html (last visited October 31. 2009); *see also*, Département fédéral de justice et police: Synthèse des résultats de la procédure de consultation relative au projet de loi fédérale sur les loteries et les paris (Juin 20003), text in French is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/gesetzgebung/lotteriegesetz.Par.0008.File.tmp/ve-ber-f.pdf (last visited October 31, 2009).

(*Union syndicale suisse*)), mutual assistance and environmental protection organisations, as well as the representatives of casinos and the slot machines industry expressed their support for the liberalisation of the market, criticising the draft for consolidating the existing monopoly in the area of lotteries and, thus, exclusively benefiting the Cantons and their two lottery operators.[200]

Following the conclusion of the discussion, the Government accepted the proposal of the Conference of the Cantonal administrators in charge of the lotteries to allow the Cantons themselves to rectify the existing deficiencies in the area of lotteries, on a voluntary basis, by means of concluding an inter-Cantonal convention. Consequently, the Government has temporarily suspended the revision of the Federal Lotteries and Commercial Betting Law, entrusting the Federal Department of Justice and Police with determining whether the objectives set by the Conference would be attained and whether the measures would be sufficient.[201]

On January 7, 2005, the Specialized Conference on the lotteries market and the lotteries law adopted the Inter-Cantonal Convention on the Supervision, Licensing and Distribution of Profits from the lotteries and betting operated at the inter-Cantonal level or in the whole territory of Switzerland, which entered into effect on July 1, 2006.[202] This Convention harmonised the licensing and supervision of the lotteries and commercial betting market in Switzerland, providing, in particular, for the creation of Comlot, entrusted with the duty of homologation of the new games and supervision over the lotteries and commercial betting operated in the inter-Cantonal or national levels.[203] The Convention also provided for the creation of the Appeals Commission as the highest inter-Cantonal judicial authority entrusted with the resolution of disputes under the Convention.[204]

Acting in accordance with the mandate of the Government, in May 2008 the Federal Department of Justice and Police presented the Report on the situation in

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[200] *See*, Département fédéral de justice et police: L'orientation générale de la revision de la loi sur les lotteries est contestée (Communiqués, DFJP, 20.08.2003), text in French is availableat: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2003/2003-08-200.html (last visited October 31. 2009).

[201] *See*, Département fédéral de justice et police: La révision de la loi sur les loteries est provisoirement suspendue (Communiqués, DFJP, 19.05.2004), text in French is available at: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2004/2004-05-19.html (last visited October 31, 2009).

[202] *See*, Inter-Cantonal Convention on the supervision, licencing and distribution of profits from the lotteries and betting operated at the inter-cantonal level or in the whole territory of Switzerland, dated January 7, 2005 (*Convention intercantonale sur la surveillance, l'autorisation et la répartition du bénéfice de loteries et paris exploités sur le plan intercantonal ou sur l'ensemble de la Suisse (CILP), du 7 janvier 2005*).

[203] CILP, Article 7.

[204] CILP, Article 10.

the area of lotteries and betting.[205] In the Department's view, it was necessary to leave sufficient time to the Cantons to implement the measures which have been decided upon by them, as well as to solidly establish their new structures. Thus, the profound evaluation of the situation in the area of lotteries and betting should not take place until the information about the effects of measures taken by the Cantons would become available.[206] The Government took note of the Report and agreed with this recommendation. Consequently, the evaluation of the measures adopted by the Cantons have been postponed until 2011, and the Federal Department of Justice and Police has been entrusted with the task to follow the developments until then, whereas the revision of the Federal Lotteries and Commercial Betting Law has also been suspended until that time.[207]

48.9 Conclusion

The system of regulation of sports lotteries and betting in Switzerland produces a very positive impression. The general prohibition on the organisation of lotteries and commercial betting together with the system of state licensing of lotteries having a public interest goal or a charitable purpose, as well as the existing monopoly on the conduct of lotteries and commercial betting in the Inter-Cantonal and national level allow, on the one hand, limiting the negative effects of these games, and, on the other hand, using the proceeds from these games for good causes, including the support of sport in the country. Moreover, although the revision of the Federal Lotteries and Commercial Betting Law has been temporarily suspended, it still may be expected that the allocation of the proceeds from lotteries and commercial betting to the public benefit would be preserved in any revised system of regulation.

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[205] Département fédéral de justice et police: Report du Département fédéral de justice et police sur la situation en matière de loteries et paris, du 15 mai 2008, text in French is available at: http://www.ejpd.admin.ch/etc./medialib/data/gesellschaft/gesetzgebung/lotteriegesetz.Par.0011.File.tmp/ber-ejpd-lotterie-f.pdf (last visited October 31, 2009).

[206] Report du Département fédéral de justice et police sur la situation en matière de loteries et paris, at 8 (Section 4).

[207] *See*, Département fédéral de justice et police: Loteries et paris: les mesures prises par les cantons seront évaluées ultérieurement (Communiqués, DFJP, 30.05.2008), text in French is available at: http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2008/2008-05-30.html (last visited October 31, 2009).

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Chapter 49
Les Paris Sportifs en Droit Turc (en Particulier dans le Domaine du Football Professionnel)

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P. M. Anderson et al. (eds.), *Sports Betting: Law and Policy*,
ASSER International Sports Law Series, DOI: 10.1007/978-90-6704-799-9_49,

49.1 Introduction

[1] Fin 2009, lors d'un congrès organisé dans le domaine du droit du sport, l'auteur de ces lignes avait présenté une contribution ayant pour titre *Considérations sur la législation turque en matière de paris sportifs dans le football professionnel*, contribution qui renfermait le même contenu que celui des chapitres qui suivent la présente introduction.

Dans les chapitres consacrés aux appréciations apportées par l'auteur sur la situation actuelle en Turquie et celles ayant trait à la conformité de la législation turque au droit communautaire ainsi que dans le chapitre des conclusions, il a été question de l'évolution attendue ces prochaines années dans le pays ainsi que des enjeux encourus dans le domaine qui nous intéresse.

[2] Dans nos conclusions, nous avions regroupé ces évolutions et enjeux en cinq points:

- Améliorations législatives afin de posséder dans le pays une législation cohérente, moderne et conforme au droit communautaire.
- Meilleures écoutes des clubs de football professionnel dans la prise de décision pour la distribution des revenus provenant des paris sportifs.
- Progression des offres et des recettes dans le domaine des paris sportifs.
- Utilisation accrue de l'internet par les parieurs.
- Ouverture de la voie des privatisations en matière des jeux de hasard.

[3] Depuis lors, jusqu'à la rédaction de ces lignes introductives *en juillet 2010,* il est force de constater que les choses n'ont bougé que partiellement (et sporadiquement). Les changements peuvent être présentés dans les points qui suivent et ne signifient pas vraiment la réalisation d'une grande évolution, les enjeux indiqués ci-dessus en cinq points nécessitant probablement plus de temps:

[3.1] D'abord, pendant cette courte période, il n'y a pas eu de privatisations, ni d'améliorations législatives attendues.

Voici un passage d'un article publié le 5 mai 2010 par Ltd Gambling Compliance dans son site web[1,2]:

> La Turquie a déclaré qu'elle relancera un processus d'appel d'offres pour sa loterie nationale d'ici la fin de l'année, mais cela pourrait prendre plus de temps aux soumissionnaires pour retourner à la table de négociation après avoir été brûlé par l'échec du processus l'an dernier.

[3.2] Ensuite, la Turquie a choisi pendant cette période, comme nous l'avions prévu, la lutte contre le truquage des matchs et l'utilisation des sites illégaux comme sa priorité.

C'est ainsi qu'un projet de loi a été déposé au printemps 2010 devant le parlement turc, complétant les dispositions de la Loi no. 5149 "qui vise à combattre la

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[1] Rédaction par Joe Thompson: http://www.gamblingcompliance.com.

[2] Ci-après: toujours traduit de l'anglais: Article de Gambling Compliance Ltd.

violence et les désordres lors des activités sportives." Ce projet, par l'adjonction de nouvelles dispositions, permet de punir pénalement le truquage des résultats sportifs engendrés essentiellement par les tiers ainsi que le versement des primes incitatives accordées aux clubs et aux joueurs en vue d'influencer les résultats.

Le but essentiel du projet est donc celui de punir les personnes qui tendent à obtenir un avantage illégitime en faisant fixer par avance l'issue d'une rencontre sportive (match fixing). La violation classique visant à modifier la position d'une équipe dans le classement ne constitue donc pas l'objet des adjonctions.

Il convient en effet de rappeler que, la fin de l'année 2009 et le début de l'année 2010 étaient très riches d'événements impliquant à la fois les clubs et les personnes privées d'origine turque dans les affaires de truquage des matchs de football, les affaires qui ont largement défrayé la chronique tout en nécessitant l'intervention de la FIFA et de l'UEFA.

Voici quelques extraits de presse étrangère ou turque, parus pendant cette période:

> UEFA suit de près les résultats de huit matches de championnat de football de séries inférieures en Turquie, soupçonnant les matchs truqués par des parieurs qui cherchent à gagner l'argent en plaçant des paris irréguliers sur les jeux.[3]
>
> *Football—Sept matchs européens en cause—Paris sportifs: le ver qui ronge le foot:*
>
> L'affaire en cours ne constituerait que la 'pointe de l'iceberg' en matière de matches manipulés et de fraude sur Internet. Plongée dans la fange du ballon, ils étaient tous réunis, mercredi, au siège de l'UEFA à Nyon. Extra bleu ciel sur les rives du Léman, tendance orageuse dans les hautes sphères. L'instance faîtière du football européen a 'invité' les représentants des neuf fédérations (Suisse, Turquie, Bosnie, Allemagne, Belgique, Croatie, Hongrie, Slovénie et Autriche) directement concernées par l'affaire des 200 matches truqués. Primo, dans un but d'information sur l'enquête en cours; secundo, pour éviter la tempête, le chaos total. 'Quand on connaît le score d'un match à l'avance, ça enlève pas mal de sel. Si on laisse les choses aller comme ça, ce sera la mort du foot,' va même jusqu'à redouter Nicolas Giannakopoulos, président de l'Observatoire du crime organisé à Genève.[4]
>
> Le gouvernement turc lutte contre les paris illégaux. L'enquête a abouti à l'arrestation de pas moins de 77 personnes lors de raids dans tout le pays dans la deuxième semaine de Février.[5]
>
> Dans le sillage de la récente football scandale des matches truqués, la Turquie a adopté une position plus ferme au sujet des paris illégaux et des matches truqués. Bien que la privatisation de la Loterie Nationale ait été mise à l'écart, les revenus de loterie ont connu une augmentation constante.[6]

[3.3] Faisant suite aux conclusions de ce dernier article, nous pourrons, en effet, confirmer la poursuite de la progression attendue dans les chiffres pendant la période sous revue aussi bien du point de vue des revenus réalisés que du nombre de parieurs actifs dans le domaine des paris sportifs et des jeux de hasard en Turquie.

L'utilisation accrue de l'internet par les parieurs s'est donc vérifiée.

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[3] Article de Gambling Compliance Ltd du 11 novembre 2009, par Graham Wood.

[4] Le journal suisse *Le temps* et le journal turc Milliyet du 26.11.2009.

[5] Article de Gambling Compliance Ltd. du 25 février 2010, par Graham Wood.

[6] Regulatory Report Turkey—Gambling Compliance Ltd du 11 novembre 2009, par Pat Rodrigue.

La progression s'inscrit dans le rythme constant qui existe depuis 2007.

Avec l'interdiction des jeux en ligne étrangers en 2007, le jeu en ligne autorisé par l'Etat, bilyoner.com avait par exemple en 2009 1 mio. d'abonnés. Il a présenté une augmentation de 25% de son chiffre d'affaires.

L'autre jeu en ligne autorisé, nesine.com avait aussi connu une progression cumulant en 2009 les 400 000 d'abonnés et commençait à offrir non seulement les paris sur les rencontres de football, mais aussi les paris sur les courses de chevaux.

[3.4] Un autre événement attendu, qui était celui des modifications législatives et réglementaires souhaitées par la Fédération Turque de Football (TFF) afin de satisfaire aux attentes des clubs de football professionnel, est également en train de se réaliser actuellement dans le cadre du système du jeu "IDDAA" qui est le système le plus répandu dans le domaine des paris sportifs.

[3.5] En revanche, il n'existe pas encore une évolution au sein de la législation turque en matière des jeux de hasard et des paris sportifs visant sa conformité au droit communautaire et pour améliorer la situation actuelle dans le but d'offrir à la Turquie une législation cohérente.

Il convient de renvoyer le lecteur aux chapitres 2 et 4 où nous avons examiné l'évolution historique et la situation légale, existant en 2009 dans le domaine des paris sportifs:

[3.5.1] Nous avons vu en effet que l'état de la législation turque en matière de paris sportifs présente actuellement un aspect lacunaire et est en plus complexe et disparate. Il n'existe par ailleurs, à notre connaissance, aucune jurisprudence prononcée dans le cadre de la législation turque en matière de paris sportifs au sujet de l'encadrement de la compétence de l'Etat.

[3.5.2] Nous sommes d'avis que la législation turque se situe actuellement entre le monopole d'Etat (Loterie nationale) et le système d'octroi des licences sous contrôle d'Etat et certaines conditions (Sport-Toto, IDDAA, Courses des chevaux), tous présentant le caractère d'opérateur unique.

[3.5.3] Certes, le droit communautaire tolère actuellement le système de l'opérateur unique, mais, comme nous l'avons dit, la législation turque n'est, cependant, pas entièrement conforme au droit communautaire si nous la comparons aux exigences retenues par le juge communautaire à cet égard.

Si la Turquie devait adhérer à l'Union européenne, au niveau de la proportionnalité et de l'égalité de traitement notamment, ses dispositions légales ainsi que sa pratique actuelle devraient être rendues conformes à la liberté d'établissement et à la libre prestation des services garanties par les articles 43 et 49 CE.

Avant l'adhésion, la Turquie devrait adapter sa législation au droit communautaire au fur et à mesure de l'ouverture de chacun des chapitres pendant la période de négociation entre elle et l'UE. Elle ne pourrait donc pas faire valoir le bénéfice d'une période transitoire telle qu'elle est reconnue, semble-t-il, par le juge communautaire à l'Allemagne, déjà pays membre de l'UE.[7]

[7] Cf. Affaire Winner Wetten GmbH./C-409/06 – Conclusions de l'Avocat général du 26 janvier 2010.

[3.6] Avant de terminer notre introduction, il serait également utile de signaler, afin de faciliter l'orientation de la législation turque vers la direction du droit européen, que les deux cas néerlandais[8] qui étaient pendants en 2009 devant le juge communautaire, ont été clôturés dans le sens indiqué par l'Avocat général dans ses conclusions.

En date du 3 juin 2010, le juge communautaire a, en effet, admis et confirmé d'abord la prémisse selon laquelle l'octroi, par un État membre, du droit exclusif d'exploiter un jeu d'argent à un seul opérateur peut être compatible avec le droit communautaire:

> L'article 49 CE doit être interprété en ce sens qu'il ne s'oppose pas à une réglementation d'un État membre qui soumet l'organisation et la promotion des jeux de hasard à un régime d'exclusivité en faveur d'un seul opérateur et qui interdit à tout autre opérateur, y compris à un opérateur établi dans un autre État membre, de proposer, par Internet, sur le territoire du premier État membre, des services relevant dudit régime.

Le juge communautaire a précisé par la suite que:

> L'article 49 CE doit être interprété en ce sens que le principe d'égalité de traitement et l'obligation de transparence qui en découle sont applicables aux procédures d'octroi et de renouvellement d'agrément au profit d'un opérateur unique dans le domaine des jeux de hasard, pour autant qu'il ne s'agit pas d'un opérateur public dont la gestion est soumise à la surveillance directe de l'État ou d'un opérateur privé sur les activités duquel les pouvoirs publics sont en mesure d'exercer un contrôle étroit.

Les considérations figurant ci-dessus auront sûrement un effet sur la législation turque existant en matière de paris sportifs dans son développement futur.

49.1.1 Remerciments

Ceci dit, avant de passer aux chapitres qui suivent la présente introduction, qu'il nous soit permis ici de remercier vivement les juristes de la Fédération Turque de Football (TFF) de leur aimable soutien qui nous a été fourni lors de la rédaction des chapitres en question.

49.2 Evolution Historique et la Situation Légale Actuelle

[4] Ce chapitre, consacré à la genèse et à l'évolution de la législation nationale turque en matière de paris sportifs, est divisé en deux parties. La première examine brièvement les raisons et les étapes de l'intervention de l'Etat dans le domaine du sport. La seconde analyse la situation légale actuelle (état fin 2009).

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[8] *Arrêt C-203/08: The Sporting Exchange Ltd, agissant sous le nom Betfair; Arrêt C-258/08: Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd.*

Est examiné essentiellement le secteur turc du football professionnel. Cela ne signifie pas que l'Etat n'a pas de compétences dans les autres secteurs d'activité du sport. L'importance économique et sociale du football professionnel nous a poussé cependant à examiner en particulier ce secteur, la majorité des dispositions évoquées dans ce chapitre étant également valables pour les autres branches du sport. Le cadre qui nous est imparti ne permettait pas par ailleurs d'aborder en détail toutes les branches de l'activité sportive en Turquie.

49.2.1 Evolution Historique

[5] L'évolution historique de la branche s'articule sur trois axes principaux:

49.2.1.1 La Loterie Nationale

[6] Le premier jeu de hasard qui a vu le jour dans le pays était La loterie Nationale (Milli piyango). Ce jeu a été lancé par l'Etat déjà en 1939 par une loi cadre portant le numéro 3670.

Plus tard, le 04.04.1988, un organisme étatique distinct a été créé sous le nom de la Direction Générale de La Loterie Nationale (Milli Piyango İdaresi Genel Müdürlüğü) en vue de son organisation et sa gestion.

La Direction Générale de La Loterie Nationale est rattachée au Ministère des finances. Il s'agit d'un monopole d'Etat.

[7] Son revenu est essentiellement distribué après la déduction des impôts, des frais et de la part de l'Etat, aux oeuvres d'entraide et d'éducation ainsi qu'à la promotion des affaires nationales.[9]

49.2.1.2 L'organisme National des Courses de Chevaux (At Yarışları)

[8] Le deuxième jeu de hasard qui a été mis à la disposition du public turc par l'Etat est celui qui concerne les courses hippiques.

Il s'agit en vérité du premier pari sportif organisé dans le pays. Créé par une loi cadre portant le numéro 6132 du 10 juillet 1953, la gestion et l'organisation de ce jeu sont confiées, par l'octroi d'une licence à un organisme semi étatique de statut spécial (Türkiye Jokey klübü/TJK) qui est à son tour soumis et ce, pour des raisons historiques, à la surveillance du Ministère de l'agriculture.[10]

[9] Ces deux institutions (Milli Piyango et TJK) sont les pionnières dans le domaine des jeux de hasard en Turquie. Leurs revenus et leur organisation

[9] http://www.millipiyango.gov.tr/kamu.html

[10] http://www.tjk.org/ Content/Tarihce_tr.aspx

progressent depuis des décennies grâce aux dizaines de milliers de points de vente (répartis dans le pays) qui dégagent un chiffre d'affaires annuel important.

[10] Toutefois, l'engouement créé par les jeux d'équipes, notamment par le football, a poussé l'Etat turc à instituer un troisième organisme spécialement destiné à opérer dans le domaine des paris sportifs en matière footbalistique.

49.2.1.3 La Direction Nationale du Sport Toto + IDDAA

[11] C'est ainsi qu'en 29 avril 1959[11] la Direction Nationale du Sport Toto a vu le jour sur un modèle du jeu provenant de l'Allemagne, dit système KOBLENZ.

Cette institution porte depuis la promulgation de la Loi no. 5583 du 28.02.2007 le nom de Présidence de l'Organisation du Sport Toto (= Spor Toto Teşkilat Başkanlığı).

Cette institution étatique, également distincte, est rattachée au Ministère du sport par le biais de la Direction générale du Sport et de la Jeunesse (GSGM).

Calqué sur le modèle existant dans les pays européens, le système du jeu de Sport Toto avait au début pour objet les rencontres de football des séries supérieures. Le système était simple et basé sur trois probabilités: victoire, match nul, défaite.[12]

[12] Vu l'évolution fulgurante dans le domaine du football, mais aussi compte tenu des nouveautés apparues dans les autres pays sur les combinaisons de jeu, ceci a permis à la Direction Générale du Sport Toto d'instaurer un système de pari sportif plus élaboré portant le label de IDDAA.[13]

Ce label découle du terme turc "iddia" qui signifie dans le langage populaire "faire un pari."

[13] Possédant déjà à sa création des combinaisons de jeu beaucoup plus élaborées par rapport au Sport Toto classique, IDDAA proposait par exemple en 2008 des combinaisons sur plus d'une centaine de matchs de ligues de football, joués en Turquie et à l'étranger toute série confondue.[14]

[14] IDDAA a rapidement supplanté au Sport Toto classique devenant ainsi le pari sportif numéro 1 des parieurs turcs et étrangers.

Compte tenu des sommes dégagées par IDDAA et sous la pression des milieux politiques et économiques, l'Etat a confié, après une mise au concours, et sous sa surveillance et par le biais de la Direction Générale du Sport Toto, la gestion et l'organisation des paris sportifs dans le cadre du système de IDDAA, à une société privée portant le nom "Inteltek" en lui octroyant une licence.

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[11] Cf. la Loi no. 7258.

[12] http://www.sportoto.gov.tr/icerik.php?id=13#.

[13] http://www.iddaa.com/index.htm

[14] Cf. ISA—GUIDE 29.03.2008.

Il convient de rappeler que IDDAA a commencé à fonctionner déjà en avril 2004 toujours sous la gestion de la société "Inteltek."

Cette société qui présente aussi dans son capital une participation étrangère (grecque: INTRALOT technologie) jouit d'une exclusivité jusqu'à la prochaine mise au concours par l'Etat qui est prévue en 2010 ou en 2011.

49.2.1.4 Jeux en Ligne (Online)

[15] Au cours de l'année 2005, le cadre juridique en ce qui concerne les loteries, les jeux de loto et les paris sportifs a été adapté afin de répondre aux développements techniques, permettant d'offrir des jeux sur support électronique, notamment par internet.

Ces mesures visent, en substance, d'une part, à autoriser la Direction Générale du Sport Toto à distribuer ses produits sur support électronique et, d'autre part, à étendre le droit exclusif d'exploitation de cette dernière aux jeux offerts sur support électronique, notamment par Internet, en interdisant donc l'utilisation de ces moyens à tout autre opérateur.

[16] Le premier jeu électronique turc légalement autorisé pouvant offrir aux parieurs une plate-forme online a vu le jour dans le pays au cours de l'année 2005 sous le nom de "bilyoner.com."

Elle est essentiellement utilisée par les parieurs du système de jeu IDDAA.

Cette plate-forme est détenue par les organismes réglementés en Turquie, à savoir TJK, Sport Toto et Milli Piyango. Elle a été créée, à cet effet, par ces trois organismes, une société du droit privé portant le nom de Bilyoner İnteraktif Hizmetler A.Ş ayant son siège à Istanbul.[15]

[17] Une autre plate-forme électronique permettant de jouer le jeu IDDAA a été créée en 2006 par la Direction générale du Sport Toto. Son nom est "nesine.com." Elle est essentiellement axée sur les jeux organisés par différents jeux proposés par la Direction générale du Sport Toto.[16]

49.2.2 Situation Légale Actuelle

[18] En droit turc, la législation actuelle régissant les paris sportifs et la distribution du revenu en provenance de ceux-ci est assez complexe et présente à notre sens un aspect lacunaire. Nous allons le voir ci-dessous plus en détail.

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[15] www.bilyoner.com

[16] http://www.devletana.com/sans_oyunlari.htm

49.2.2.1 Actes principaux

Mais on peut d'ores et déjà souligner que toute l'activité est réglementée:

[19] par *quatre lois principales*:

- La Loi no. 7258 régissant l'organisation des paris et les jeux de hasard en Football et dans les autres branches du sport.
- La Loi no. 5738 régissant la gestion des paris mutuels et de ceux de probabilité fixe organisés en matière sportive par des personnes juridiques privées.
- La Loi no. 5602 portant sur la distribution du revenu provenant des paris et jeux de hasard ainsi que sur l'imposition de ce revenu.
- La Loi no. 5149 visant à combattre la violence et les désordres lors des activités sportives.

[20] Et par *trois règlements principaux* édictés par La Direction nationale du Sport Toto:

- Le règlement d'application régissant les paris mutuels et ceux de probabilité fixe organisés en matière sportive.
- Le règlement d'application no. 11775 régissant la distribution du revenu provenant des activités gérées par la Direction du Sport Toto.
- Le règlement no. 12928 de la Direction du Sport Toto déterminant les droits attribués aux clubs pour avoir prêté leurs noms.

[21] Ainsi que par une *réglementation spéciale concernant İDDAA* (= système de jeux en matière sportive basé sur la probabilité fixe).

[**22**] Il existe également d'autres textes légaux régissant indirectement la matière en général, comme par exemple:

- La Loi no. 3289 portant sur l'organisation ainsi que sur les droits et obligations de la Direction Générale du Sport et de la Jeunesse (GSGM).
- La Loi no. 5894 portant sur la fondation ainsi que sur les droits et obligations de la Fédération Turque de Football (TFF).

49.2.2.2 Modifications Législatives Majeures Intervenues Depuis 2007

[23] L'année 2007 constitue en Turquie une date charnière dans l'évolution de la situation légale en la matière. En effet, l'augmentation très sensible du produit en provenance du système de jeux IDDAA a aiguisé l'appétit des instances gouvernementales cherchant des revenus supplémentaires pour l'Etat.

A partir de l'année 2007, l'Etat est intervenu massivement dans ce domaine exploitant la surveillance étatique existant pour tirer les avantages d'un marché totalement fermé. Une autre raison qui a poussé l'Etat à intervenir était la nécessité de légiférer en vue de mettre de l'ordre dans ce domaine où il régnait un certain désordre (matchs truqués, sites illégaux).

Chronique de différentes étapes

Pour comprendre et tracer l'évolution de la législation turque qui régit actuellement l'organisation des paris sportifs ainsi que la distribution du revenu en provenance de ceux-ci, il convient de se référer dès lors en particulier aux modifications législatives suivantes qui ont été introduites par l'Etat depuis 2007:

[24] L'augmentation du taux d'imposition de 3% à 5% de l'impôt frappant le produit global brut qui provient des jeux de hasard dans le sport, en particulier dans le football professionnel (sauf les courses de chevaux).[17]

Par la même loi, le taux applicable aux jeux de hasard dans les courses de chevaux a été fixé à 7%. Quant au taux concernant la Loterie Nationale (hors sport), il a été élevé à 10%.

Il convient de signaler que les parts à distribuer aux clubs de football sur le produit global provenant des jeux de hasard étaient calculées, à l'origine, sur le solde net qui restait après la soustraction de l'impôt ŞOV du produit global brut (= l'assiette du produit net à distribuer).

Par la suite, l'Etat a encore diminué ladite assiette en stipulant que non seulement l'impôt ŞOV, mais aussi la TVA devait être déduite du produit global afin de déterminer le produit net à distribuer aux clubs.[18]

Cette modification défavorisant économiquement les clubs de football a été fortement critiquée par la Fédération Turque de Football (TFF) ainsi que par la Fondation créée par les clubs de football (Klüpler Birliği Vakfı). Afin de défendre les intérêts des clubs de football professionnel, elles ont rapidement réagi et demandé, en même temps, l'introduction de plusieurs nouvelles modifications légales et réglementaires.

[25] L'élargissement du champ d'application du jeu İDDAA aux autres branches du sport autre que le football, par exemple basket-ball, volley-ball, hand-ball, tennis, water-polo.[19]

Ces modifications législatives n'ont pas non plus trouvé un accueil favorable auprès des clubs de football qui ont demandé la restriction de la place réservée aux autres branches de sport dans les coupons du jeu IDDAA.

[26] En considérant que l'attractivité et la part du marché de football créaient l'essentiel du revenu du système de jeu İDDAA, les clubs de football professionnel ne voyaient pas en effet d'un bon oeil la participation des autres branches au produit de ce pari sportif.

Pour cette raison, ils ont réclamé l'encrage dans la loi d'un taux minimal de la part à attribuer aux clubs de football professionnel pour ne plus subir

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[17] La Loi no. 5602 du 14.03.2007 = ŞOV/Şans Oyunları Vergisi = Impôt frappant les jeux de hasard.

[18] Modification du 14.03.2009 du règlement no. 12928 de la Direction du Sport Toto portant sur les droits attribués aux clubs.

[19] Modifications du 28.02.2007 de la Loi no. 5738 et le règlement d'application du 28.02.2009 régissant les paris mutuels et ceux de probabilité fixe organisés en matière sportive.

ultérieurement une modification par les biais des décisions internes de la Direction du Sport Toto. Le taux proposé était de 15% calculé sur le revenu net des jeux İDDAA.

[27] L'interdiction des paris sportifs illégaux (en particulier les jeux effectués par voie d'internet) en prévoyant des sanctions pénales à l'endroit des personnes physiques ou morales qui organisent et soutiennent de tels jeux.[20]

Le but de cette interdiction était d'empêcher les opérateurs qui n'ont pas obtenu une autorisation (licence) auprès de la Direction du Sport Toto ou des deux autres organismes leur permettant d'organiser les paris sportifs en démarchant sur place ou à distance les parieurs qui se trouvent sur le territoire turc.[21]

L'interdiction visait essentiellement les jeux effectués par voie d'internet depuis l'étranger en ligne.

[27.1] C'est ainsi qu'en plus de la sanction de l'interdiction d'opérer sur le territoire turc, les peines d'emprisonnement allant de 2 à 5 ans et les amendes-jour lourdes ont été prévues à l'encontre des contrevenants.[22]

En application de ces dispositions, il y a même eu des arrestations et la procédure judiciaire entamée en mai 2008 lors du passage en Turquie des agents de l'opérateur Sportingbet qui organisait, sans licence, par voie d'internet depuis l'étranger, les paris sportifs à l'attention des habitants de la Turquie, notamment en football.

Ces arrestations ont largement défrayé au cours des années 2008/2009 la chronique aussi bien en Turquie qu'à l'étranger.[23]

[27.2] Par ailleurs, sur la base de ces dispositions, plusieurs sites internet de paris sportifs ont été interdits en Turquie et se sont vus bloquer l'accès à leur site depuis le territoire turc.

En effet, selon les estimations publiées en 2007 déjà, il existerait dans le pays 400'000 parieurs utilisant les sites étrangers (considérés illégaux) dont les mises totalisant une part de marché de USD 1 mia., hors contrôle étatique. Cette part de marché serait gérée par un système de vente souterrain constitué de 40 points de vente principaux et de 250 points de vente secondaires. Le lieu de prédilection serait les départements turcs se trouvant au sud-est du pays habités essentiellement par une population kurde.

[27.3] C'est ainsi que l'avenir de l'offre de Lottomatica de joint-venture établie dans le but d'organiser la loterie a été mise en doute après que sa société partenaire turque ait vu ses avoirs gelés par les autorités fiscales du pays.[24]

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[20] La Loi no. 7258 régissant l'organisation des paris et les jeux de hasard en Football et dans les autres branches du sport, modifiée par la Loi no. 5583 du 22.02.2007.

[21] Article 5 la Loi no. 5583 du 22.02.2007.

[22] Cf. *Turquie contre les règles de poker en ligne et jeu d'argent en ligne* in: www.pokerpages.com du 10 janvier 2007.

[23] Cf. Article de Gambling Compliance Ltd du 27.1.2009.

[24] Cf. Article de Gambling Compliance Ltd du 23 mars 2009.

[27.4] Un autre article publié par Gambling Compliance Ltd déjà en 2007[25] disait ceci "Il n'est pas surprenant que bookmaker en ligne autrichienne, Bwin Interactive Entertainment, a récemment annoncé son retrait du marché turc des paris et des jeux, avec effet immédiat. Selon le communiqué de presse publié par les bookmakers, la Turquie a constitué de 6 pour cent des affaires de l'entreprise, mais à la fin du mois dernier, la situation juridique du pays s'est détériorée de façon significative et a conduit à l'adoption de nouvelles lois anti-jeux qu'un expert a qualifiées des plus autoritaires dans le monde occidental."

[27.5] Le même journal publiait deux mois plus tard que "le bookmaker en ligne autrichienne, Bwin Interactive Entertainment," a été forcé de retirer ses produits de jeu en ligne de la Turquie en raison de l'incertitude réglementaire et des difficultés opérationnelles qui régnaient dans le pays.[26]

[28] L'abolition par un décret gouvernemental datée du 06.08.2008, du règlement d'application régissant les paris mutuels organisés en matière footbalistique.

Cela a eu pour conséquence que la Fédération Turque de Football (TFF) n'avait plus la possibilité d'avoir un siège permanent au sein du Conseil de gestion de l'organisme du Sport Toto.

Il existe donc actuellement un vide juridique quant à connaître la composition et le fonctionnement du Conseil de gestion de l'organisme du Sport Toto ainsi que le rôle à jouer par le plus grand acteur des jeux dans le domaine du football, à savoir les clubs professionnels.

[29] L'abaissement de 10% à 5% de la part attribuée à la Direction Générale du Sport et de la Jeunesse (GSGM) dans le produit global net obtenu grâce à l'organisation des jeux de Sport Toto.[27]

[29.1] Pour mémoire, nous signalons qu'en Turquie la Direction Générale du Sport et de la Jeunesse (GSGM) est un organisme d'Etat, rattaché au Ministère du sport, et chargé de coordonner, de développer et de superviser toute activité sportive en Turquie. Elle bénéficie non seulement du soutien financier de l'Etat, mais également des revenus en provenance du Sport Toto.

Ses fonctionnaires sont désignés par l'Etat et soumis à la surveillance de ce dernier.

[29.2] En Turquie, l'organisation, le financement ainsi que le fonctionnement des activités sportives dans le domaine du football et dans toutes les grandes branches du sport ont cependant été, ces dernières années, confiés aux associations sportives des branches respectives en recouvrant ainsi une certaine autonomie vis-à-vis de l'Etat.[28]

Le rôle et l'influence de la Direction Générale du Sport et de la Jeunesse

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[25] Cf. Article du 6 mars 2007.

[26] Cf. Article de GamblingCompliance Ltd du 15 mai 2007.

[27] Article 9, lettre ç du Règlement no. 11775 régissant la distribution du produit provenant des activités gérées par la Direction du Sport Toto.

[28] Cf. l'Arrêt du 2 juillet 2009 de la Cour constitutionnelle turque.

(GSGM) continuent néanmoins d'être importants surtout dans les domaines où l'Etat se réserve le monopole du principe général d'interdiction, tels que les paris.[29]

En dernier lieu, il convient de citer un article publié à l'étranger afin d'illustrer l'attitude rigide de l'Etat, voire les rumeurs de copinage lors de l'attribution des autorisations ou lorsqu'il s'agit de la privatisation "Le projet de privatisation de la loterie nationale de la Turquie a été abandonné du fait que les deux offres restantes ne correspondaient pas aux critères minimaux d'évaluation par les autorités turques pour la conclusion d'un contrat de loterie de dix ans."[30]

Travaux de Privatisation

[30] En effet, en vertu de la Loi no. 4971 du 01.08.2003, les travaux de privatisation avaient été engagés sur le plan légal. Toutefois, aucune réalisation en direction d'une privatisation n'a pu voir jour jusqu'au 01.04.2007, date d?entrée en vigueur de la Loi no. 5602 portant sur le principe de privatisation. Un règlement indiquant le détail d'une telle privatisation a été également promulgué le 15.10.2008.

Signalons pour terminer que le dernier appel d'offre visant à privatiser les jeux de hasard par le biais de l'attribution d'une licence a été organisé le 07.05.2009. Mais aucune offre n'a été retenue par l'organe étatique qui décide des privations sous prétexte que le prix visé par l'appel d'offre en question n'a pas été atteint par aucune des offres présentées.[31]

49.3 Situation Economique Actuelle dans le Cadre de IDDAA

49.3.1 IDDAA

[31] Après avoir étudié l'évolution historique et la situation légale actuelle en matière des paris sportifs en Turquie, nous allons jeter dans ce chapitre un coup d'œil à la situation économique qui existe actuellement au sein du système de jeu IDDAA qui, nous l'avons vu, est le pari sportif le plus important générant le plus grand revenu dans le pays.

Par la même occasion, nous allons comparer la répartition du revenu entre différents bénéficiaires dans cette branche en prenant les chiffres en trois périodes

[29] www.tumspor.com; article du 18 mars 2010.

[30] Cf. Turquie offre des loteries bidons/Article de Gambling Compliance Ltd du 8 mai 2009, par James Kilsby.

[31] Cf http://www.millipiyango.gov.tr/ozellestirme.html.

représentatives, à savoir la situation actuelle, la période 2007–2009 et celle antérieure à 2007.

Une comparaison entre la réglementation actuelle et la réglementation antérieure à 2007 du point de vue des parts revenant aux clubs de football professionnel dans le revenu de IDDAA est aussi indiquée dans un tableau (= la péjoration des parts des clubs).

Comme il a été brièvement question plus haut, ladite péjoration a engendré des réactions et de nouvelles attentes de la part des clubs de football professionnel. Ce que nous allons voir en dernier lieu.

[32] Cela dit, sans aller plus loin, il convient de rappeler ici les performances des ventes de IDDAA et celles des autres jeux organisés par trois acteurs qui sont autorisés par l'Etat[32] sur l'ensemble du marché des jeux de hasard et des paris sportifs en Turquie:

- Selon les chiffres en notre possession (résultats 2008) au moment de la rédaction du présent article, le marché turc des jeux de hasard et des paris sportifs présentait un gâteau total de TL 6,5 mia. de chiffres d'affaires (env. USD 4,5 mia.).
- Les 35% de ce montant étaient générés par le seul jeu de IDDAA (USD 1,6 mia.). Ce système de jeu a atteint ce chiffre progressivement en passant de USD 988 mio. en 2005 à USD 1.6 mia. 3 ans après.
- Les points de vente proposant les jeux organisés par ces trois organismes atteignaient pour la même période le nombre de 10'000 unités réparties sur l'ensemble du pays dont la moitié était réservée au jeu IDDAA.

[33] Les jeux légaux turcs de paris en ligne, la plate-forme électronique "bilyoner.com" avec l'autre plate-forme électronique permettant de jouer le jeu IDDAA, "nesine.com," totalisaient, en 2008, les 13% du marché (cf. ISA—GUIDE 29.03.2008).

49.3.1.1 La Répartition du Produit IDDAA sur la Base d'un Revenu de 1 Milliard Livres Turques

Tableau 49.1
Tableau 49.2

49.3.2 Attentes des Clubs de Football Professionnel

(Exprimées conjointement par la Fédération Turque de Football (TFF) et par la Fondation de l'Union des clubs turcs de football professionnel)

[32] Courses de chevaux, Sport Toto et Milli Piyango.

Tableau 49.1 Comparaison selon la situation actuelle, la période 2007–2009 et celle antérieure à 2007

PRODUIT GLOBAL	**1.000.000.000,00**	
TVA	**152.542.370,00**	**18%**
ŞOV (l'impôt sur les jeux)	**42.372.880,00**	**(%5) Après déduction de la TVA**
Produit après TVA	**847.457.630,00**	
Produit après TVA + ŞOV	**805.084.740,00**	
1-PARTS DES CLUBS (Situation actuelle)	**80.508.470,00**	
2- PARTS DES CLUBS (2007-2009)	**84.745.763,00**	
3- PARTS DES CLUBS (Avant 2007	**97.000.000,00**	

Chiffres en livres turques (TL)
1 livre turque = 0.7 USD

Tableau 49.2 Comparaison de la réglementation actuelle à la réglementation antérieure à 2007

	Répartition du produit selon la réglementation actuelle **1.000.000.000.- TL**	Répartition du produit selon la réglementation antérieure à 2007 **1.000.000.000.- TL**
PART DE l'ETAT	**328.734.100,00 TL**	**184.657.460,00 TL**
PART DES CLUBS	**80.508.470,00 TL**	**97.000.000,00 TL**
COMMISSIONS AGENT GENERAL	**11.864.400,00 TL**	**162.967.020,00 TL**
COMMISSIONS DES AGENTS	**80.508.470,00 TL**	**73.983.050,00 TL**
GAINS DISTRIBUES	**499.999.630 TL**	**481.392.470,00 TL**

[34] En schématisant un peu, il est possible de résumer ci-après l'atmosphère et l'attentisme qui prévalent actuellement au sein de la branche de football professionnel en Turquie. Cette situation est traduite dans les faits sous forme de demandes adressées au gouvernement, formulées conjointement par la Fédération Turque de Football (TFF) et par la Fondation de l'Union des clubs turcs de football professionnel.

[35] En effet, par le biais du rapport de la TFF du 16 avril 2009, adressé au gouvernement, ces deux institutions ont demandé la réalisation des points suivants:

[35.1] Garantir la transparence et l'exactitude dans les chiffres relatifs aux années 2006–2007–2008 et 2009 en ce qui concerne le produit global provenant du jeu IDDAA ainsi que dans sa répartition.

[35.2] Etablir des règles plus objectives de façon à permettre de développer la part du marché du jeu IDDAA.

[35.3] Harmoniser la terminologie dans différents textes législatifs servant à déterminer l'assiette du revenu du jeu IDDAA à distribuer aux clubs.[33]

[35.4] Assurer, par une réglementation législative, la part des clubs de football professionnel comme étant au minimum de 15%, calculée sur le chiffre d'affaires brut—TVA. Mais non pas de 15% sur le chiffre d'affaires brut—TVA—ŞOV.

[35.5] Restreindre la place réservée aux autres branches de sport dans les coupons du jeu IDDAA étant donné le fait que le spectacle et le revenu sont principalement créés par le football. Ceci afin d'éviter une péjoration de la situation des clubs de football.

Comme nous l'avons vu, les clubs de football professionnel ne voyaient pas d'un bon oeil la participation des autres branches du sport au produit de ce pari sportif essentiellement joué par les parieurs sur le football.

La TFF, en arguant dans son rapport du 16 avril 2009 que l'attractivité du football créait l'essentiel du revenu du système de jeu IDDAA, a exigé que dans le jeu IDDAA, la place réservée aux autres branches du sport que celles du football soit d'une dimension réduite.

[35.6] Attribuer deux sièges permanents à la Fédération Turque de Football (TFF) ainsi qu'un siège permanent à la Fondation de l'Union des clubs turcs de football professionnel[34] au sein du Conseil de gestion de l'organisme du Sport Toto afin de solidifier la position de la TFF pour lui permettre de remplir l'obligation légale qui lui incombe de développer le football turc.

L'abolition par un décret gouvernemental datée du 06.08.2008, du règlement d'application régissant les paris mutuels organisés en matière footbalistique a eu en effet pour conséquence que la Fédération turque de football (TFF) n'ait plus la possibilité d'avoir un siège permanent au sein du Conseil de gestion de l'organisme du Sport Toto.

C'est la raison pour laquelle, lesdits clubs ont réclamé l'attribution, par voie légale, d'au moins 3 sièges sur 5 qui existent au sein du Conseil de gestion de l'organisme du Sport Toto, à leurs représentants cités ci-dessus.

Selon eux, cette modification devrait intervenir, en insérant une disposition rédigée dans ce sens, dans la Loi no. 7258 qui régit l'organisation des paris et les jeux de hasard en Football et dans les autres branches du sport.

Il convient de rappeler justement à cet égard que c'est le Conseil de gestion de l'organisme du Sport Toto qui détermine les pourcentages de toutes les parts à distribuer sur le revenu du Sport Toto.

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[33] Ex: *produit/produit net/produit après déduction de la TVA/produit après déduction des TVA et ŞOV, etc.*

[34] Klüpler Birliği Vakfı.

49.4 Appréciations

[36] Il est temps maintenant d'apporter une appréciation critique sur l'état actuel de la législation turque en matière de paris sportifs.

Cet aspect nous emmènera en même temps à considérer si et dans quelle mesure la législation nationale turque pourra-t-elle résister dans son état actuel au droit communautaire en cas d'une éventuelle adhésion de la Turquie à l'Union européenne (UE)?

Mais avant cela, il importe de fournir quelques appréciations d'ordre économique et social.

49.4.1 Sur le Plan Economique et Social

[37] Une première constatation qui s'impose dans ce domaine est celle de la pleine expansion du nombre des parieurs ainsi que du revenu engendré par l'exploitation de paris sportifs, notamment dans le cadre du système de jeu IDDAA.

En dépit de cette évolution, on peut aisément affirmer qu'en Turquie le niveau du revenu global provenant de l'exploitation des paris sportifs est encore insuffisant eu égard à la grandeur du marché existant.

L'insuffisance de l'offre contribue sûrement à cet état de choses.

Le marché footbalistique turc occupe en effet la sixième place si l'on prend en considération le championnat professionnel de la première division (Türkcell SüperLig) avec ses 18 équipes et 496 joueurs (état 2009) totalisant une valeur de marché de USD 1 mia. et ce, juste après les marchés footbalistique des pays comme l'Espagne, l'Angleterre, l'Allemagne, la France et l'Italie. De plus, la Turquie compte plus de 75 mio. d'habitants en grande partie constitués par des personnes jeunes fortement intéressées aux jeux de hasard.

Compte tenu de ces faits, le marché turc des paris sportifs demeure proportionnellement en très net recul par rapport à ceux des autres pays pratiquant le même genre d'activité.

En effet, aussi bien l'étendue de l'offre que le niveau du revenu peuvent encore être largement augmentés compte tenu de la taille du marché footbalistique turc. En effet, selon les avis publiés en 2009 dans le site officiel de IDDAA, cet organisme exigeait de la Direction du Sport Toto, organe de surveillance, de décider d'augmenter le nombre des combinaisons à jouer en ligne afin de pouvoir lutter contre la concurrence des sites étrangers de paris, mieux lotis du point de vue des offres.[35]

[38] Une autre constatation concerne les couches de population qui pratiquent les paris sportifs. Si l'on fait abstraction des courses de chevaux qui sont essentiellement destinées à une couche aisée, les parieurs dans le domaine du football se

[35] Cf. www.iddaa.com.tr.

recrutent fortement dans les classes pauvres ou moyennes du pays. Ce phénomène se vérifie même dans des régions peu développées du pays (Sud-Est).

Un journaliste français écrivait en effet à cet égard que "IDDAA est une institution en Turquie, c'est le nom du loto foot local et bien plus encore. Il recueille chaque jour des millions de paris. Encore plus populaire que le loto normal, IDDAA permet de jouer avec presque tous les championnats du monde, les championnats d'Andorre et de Singapour sont présents ! Les turcs aiment parier avec les petites ligues étrangères, même de deuxième ou troisième division car les cotes sont plus importantes. J'ai été plusieurs fois surpris lorsque je disais que je venais de Grenoble et que l'on me répondait qu'il y avait une équipe en deuxième division française."

[39] L'appât du gain provoque dans la société turque non seulement une sorte de gourmandise de l'Etat qui profite de sa situation monopolistique, mais engendre également les violations telles que le truquage des résultats sportifs et l'utilisation des sites en ligne illégaux.

49.4.2 Sur l'Etat de la Législation

Ceci étant dit, l'état de la législation turque en matière de paris sportifs présente actuellement un aspect lacunaire.

49.4.2.1 Lacunes

Plusieurs points pourraient être évoqués:

[40] Compte tenu du fait que le Code pénal turc, ainsi que la Loi no. 5149 visant à combattre la violence et les désordres lors des activités sportives ne contiennent aucune disposition au sujet de nouvelles violations pénales spécifiques aux paris sportifs, tels que le truquage des résultats sportifs par les tiers et les primes incitatives fournies aux clubs et aux joueurs en vue d'influencer les résultats (match fixing), la législation devrait être complétée à cet égard.

[41] Les pouvoirs administratifs pour ouvrir, instruire et poursuivre des procédures de contravention pour exploitation illicite des jeux de hasard attribués à la Direction du Sport Toto et à la GSGM ne sont pas très clairement définis, voire lacunaires.

[42] Par les restrictions qu'elle impose, la législation turque ne définit pas avec précision le niveau de la protection recherché de l'ordre public, alors que de telles restrictions devant satisfaire aux conditions qui découlent du principe de la proportionnalité, rendent obligatoire cette précision.

[43] Pour être conforme au droit européen, notamment au sujet de la liberté d'établissement et de la libre prestation des services concernant les opérateurs actifs dans l'organisation des paris sportifs, des améliorations législatives

devraient être apportées. Il manque aussi des précisions au sujet des mesures à prendre dans ce cadre pour réfréner la dépendance au jeu.

[44] Dans le cadre de cette appréciation, on n'arrive pas à voir clairement dans quelle mesure les activités de jeux illégales pourraient constituer un problème si une expansion des activités autorisées et réglementées étaient de nature à remédier à un tel problème.

[45] Au sens des dispositions légales turques, il n'est pas très aisé de constater quelle est l'interdiction d'installer en Turquie les jeux électriques, électromécaniques et électroniques, y compris tous les jeux pour ordinateurs, dans tous les lieux publics ou privés.

[46] Il n'est pas non plus indiqué clairement la relation entre lesdites interdictions et le problème qu'elles cherchent à résoudre, car ces premières concentrent leur analyse uniquement sur les conséquences négatives de l'usage incontrôlé des appareils de jeux de hasard. Dans ce contexte, il convient de signaler qu'il est possible de mettre en œuvre d'autres formes de contrôle, telle que l'introduction de systèmes spéciaux de protection dans les appareils de jeux techniques ou récréatifs afin qu'il soit impossible de les convertir en jeux de hasard ou encore de disposer d'un système d'alerte.[36]

49.4.2.2 Autres Aspects

[47] La législation turque est également complexe et disparate. En effet, le même objet (par exemple l'assiette nette des revenus) est traité par plusieurs lois ou règlements et ce, de manière parfois contradictoire. Le lecteur, même averti, se perd assez facilement dans le labyrinthe des dispositions légales, plusieurs d'entre elles traitant le même sujet sans toutefois être coordonnées entre elles.

[48] La législation turque est par ailleurs ressentie, comme nous l'avons vu, par les clubs comme étant inéquitable à leur égard.[37]

[49] Enfin, la législation turque n'a pas une systématique permettant de définir légalement les loteries et les paris sportifs. Quant à sa classification dans l'échelle située entre le monopole et la liberté totale d'organiser et exploiter les jeux, les dispositions légales n'en disent rien explicitement laissant le soin aux tribunaux et aux juristes de le déterminer.

[50] Qu'il nous soit permis ici de fournir notre version à ces deux sujets à la lumière de la doctrine.[38]

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[36] Cf. système proposé par Early Warning GmbH.

[37] Cf. la réponse 29.04.2009 de la Direction du Sport-Toto aux clubs dans le site officiel de IDDAA.

[38] Cf. Rouiller 2004, pp. 429 et ss.; Betting on Sports Events par Papaloukas Marios, Attorney at Law, Assistant Professor of Sports Law, 2009, Grèce —www.sportlaw.gr.

49.4.2.3 Définitions et Résumé

Définitions:

[51] Sont des *loteries* toutes les opérations qui offrent, en échange d'un versement ou lors de la conclusion d'un contrat, la chance de réaliser un avantage matériel consistant en un lot, dont l'acquisition, l'importance ou la nature est subordonnée *d'après un plan*, au hasard d'un tirage de titres ou de numéros ou de quelques procédés analogues.

Les *paris* sont en revanche des jeux de hasard qui ne sont pas exploités dans des maisons de jeux, *auxquels prennent part plusieurs joueurs et dans lesquels le résultat dépend du pronostic émis sur l'issue d'une manifestation ou d'un événement.*

Du monopole à la liberté totale?

[52] En Turquie, les jeux de hasard et les paris sportifs sont soumis à un principe général d'interdiction, l'État s'étant réservé la possibilité d'autoriser, selon le régime qu'il estime le plus approprié, l'exploitation directe d'un ou de plusieurs jeux par un organisme de l'État, ou par un organisme qui dépend directement de celui-ci, ou de concéder l'exploitation de tels jeux à des entités privées à but lucratif ou non, par appels d'offres effectués en application du code de procédure administrative.

[52] Au sujet de la classification d'une législation dans l'échelle située entre le monopole et la liberté totale d'organiser et d'exploiter les jeux, il est permis de dire que théoriquement il existe quatre éventualités:

- le monopole d'Etat (exploitation directe),
- l'octroi des licences sous contrôle d'Etat et certaines conditions,
- l'octroi des licences avec une procédure formelle permettant d'organiser, d'exploiter librement les jeux, de récolter l'argent pour son propre compte et de mettre à la disposition des gagnants la valeur des prix (privatisation),
- la liberté totale d'organiser les jeux.

[53] A notre sens, la législation turque se situe actuellement entre le monopole d'Etat (Loterie nationale) et le système d'octroi des licences sous contrôle d'Etat et certaines conditions.[39] Au sujet du système de jeu IDDAA notamment, il y a eu en Turquie ces dernières années plusieurs tentatives de passer du 2ème stade au 3ème qui est celui de l'octroi des licences avec une procédure formelle permettant d'organiser et d'exploiter librement les jeux. Toutefois, comme nous allons le voir, ces tentatives ont jusqu'à maintenant été avortées par l'Etat, mais aussi en raison de la réaction des parties d'opposition prétendant que le gouvernement agissait de manière partiale en faveur d'une seule société privée.

[39] Sport-Toto, IDDAA, Courses des chevaux.

49.4.3 Sur l'Etat de la Jurisprudence

[54] A notre connaissance, il n'existe aucune jurisprudence récente, prononcée au cours de la période moderne de l'Etat turque, dans le cadre de la législation en matière de paris sportifs au sujet de l'encadrement de la compétence de l'Etat, si l'on fait exception des arrestations opérées sur le plan pénal en violation des dispositions générales du code pénal.

En effet, les cas d'application des articles 48 et 167 de la Constitution de la république turque, adoptée en 1982, qui consacrent le principe de la liberté de contracter et du libre commerce et qui proclament la sauvegarde de la concurrence comme une des tâches essentielles de l'Etat dans une économie de marché, pourraient être l'origine d'une telle jurisprudence.

De plus, la Loi no. 4054 du 07.12.1994 (La Loi sur les cartels) qui contient des instruments pour lutter contre les conséquences nuisibles des cartels et les autres restrictions de la concurrence et qui interdit à toute entreprise d'occuper une position dominante dans le marché, pourrait également trouver l'application en la matière.

Mais il n'en est rien. Ces dispositions n'ont pas donné lieu à une jurisprudence dans le domaine qui nous intéresse.

En revanche, la portée de l'encadrement de la compétence des États membres en matière de jeux d'argent a déjà donné lieu à une jurisprudence relativement abondante et elle continue de susciter de nombreuses interrogations au sein de l'UE.[40]

Ceci nous emmène maintenant à étudier brièvement dans quelle mesure la législation nationale turque serait-elle conforme dans son état actuel au droit communautaire si la Turquie adhérait à l'Union européenne (UE)?

49.4.4 Législation Turque en Matière de Paris Sportifs Pourrait-Elle Résister au Droit Communautaire?

[55] Les considérations qui suivent ont pour objet de permettre d'apprécier la conformité de la législation turque en cette matière avec les règles du traité CE relatives à la libre prestation des services. Il s'agit essentiellement des règles légales visant à faire interdire aux sociétés étrangères de proposer sur leur site Internet aux personnes résidant en Turquie des jeux d'argent pour lesquels elles ne disposent pas de licence.

[56] A ce sujet, il convient de signaler que la jurisprudence de la Cour de Justice de la Communauté Européenne (CJCE) a, depuis un certain temps déjà,

[40] Cf. en particulier: Temple Lang 2003; Betting on Sports Events par Papaloukas Marios, Attorney at Law, Assistant Professor of Sports Law, 2009, Grèce—www.sportlaw.gr; Papadopoulos 2008.

évolué, pour devenir, au début, peu accommodante aux Etats qui ont instauré une législation restrictive.

Dans un premier temps, pour des raisons d'intérêt général (protection de l'ordre public et social), la CJCE a admis que les législations nationales puissent comporter certaines restrictions à la libre prestation de services en matière de prise de paris sportifs, compte-tenu de la nature particulière de l'activité. Ainsi, les Etats membres ont pu se voir reconnaître une certaine latitude pour instaurer des mesures restrictives, sous réserve qu'elles soient en rapport avec l'objectif poursuivi, et qu'elles demeurent proportionnées et qu'elles ne soient pas discriminatoires.[41]

Toutefois avec l'arrêt Gambelli rendu en 2003,[42] et surtout l'arrêt Placanica de 2007,[43] le juge communautaire a mis en cause les restrictions instaurées par les Etats membres en la matière.

Ce durcissement est apparu avec le développement des paris via internet, et l'installation de mandataires agissant pour le compte de sociétés établies dans un autre Etat, qui se sont heurtés aux dispositions restrictives nationales comme ce fût également le cas, nous l'avons vu, en Turquie.

[57] Néanmoins depuis un arrêt récent rendu par la CJCE le 8 septembre 2009,[44] le juge communautaire semble maintenant opérer un certain revirement en accordant à nouveau aux Etats la latitude de légiférer en la matière dans les limites du droit communautaire.

En l'espèce, il s'agissait des restrictions imposées par une législation nationale (le Portugal) à l'offre des jeux de hasard en ligne fournie par un opérateur privé (Société Bwin International Ltd.) qui est établi dans un autre État membre.

Dans cet arrêt, la Cour n'exige pas une ouverture totale du marché des jeux et paris sportifs. Elle accepte un compromis en déclarant en effet que

> … l'article 49 CE ne s'oppose pas à une réglementation d'un État membre qui interdit à des opérateurs, établis dans d'autres États membres, où ils fournissent légalement des services analogues, de proposer des jeux de hasard par l'Internet sur le territoire dudit État membre.

Il découlent de la lecture de cet arrêt que les limites du droit communautaire qui sont imposées aux Etats dans leur latitude de légiférer en la matière sont, toujours et encore, avant tout les principes de la proportionnalité et de la non discrimination. Citons certains passages de l'arrêt:

> Toutefois, les restrictions qu'ils imposent doivent satisfaire aux conditions qui ressortent de la jurisprudence de la Cour en ce qui concerne leur *proportionnalité* …
>
> Par conséquent, il convient d'examiner en l'espèce notamment si la restriction de l'offre des jeux de hasard par l'Internet imposée par la législation nationale en cause au principal est propre à garantir la réalisation d'un ou de plusieurs objectifs invoqués par l'État membre concerné et si elle ne va pas au-delà de ce qui est nécessaire pour l'atteindre. En

[41] Cf. Emiliou 1996.

[42] C-243/01, 6 novembre 2003.

[43] C-338/04, C-359/04 et C-360/04, 6 mars 2007.

[44] Arrêt Bwin, C-42/07.

> tout état de cause, ces restrictions doivent être appliquées de manière *non discriminatoire*.[45]
>
> … la restriction en cause peut, eu égard aux particularités liées à l'offre de jeux de hasard par l'Internet, être considérée comme justifiée par l'objectif de lutte contre la fraude et la criminalité.[46]

[58] Ceci dit, à la lecture de tous ces arrêts, anciens ou nouveaux, il est loisible d'affirmer que le droit européen s'accommoderait avec un système d'opérateur unique dans l'objectif de combattre contre la fraude et la criminalité en respectant les limites du droit communautaire. Il existe néanmoins une hésitation quant à savoir si cet opérateur unique pourrait-il demeurer dans un système de monopole d'Etat (arrêt Bwin) ou dans un système d'octroi des licences (arrêt Placanica), dans les deux cas en respectant bien entendu toujours les limites du droit communautaire?

La directive européenne relative aux services du 12 décembre 2006 n'est pas étrangère à cette évolution. En effet, ladite directive a exclu explicitement de son champ d'application "les activités de jeux d'argent impliquant des mises ayant une valeur monétaire dans les jeux de hasard, y compris les loteries, les casinos et les transactions portant sur les paris."

[59] Ceci dit, il existe actuellement deux cas (néerlandais) devant la CJCE ayant trait, dans le domaine des jeux de hasard, à la fois à la question de l'acceptabilité de l'opérateur unique et à celle qui est posée ci-dessus, à savoir si l'octroi d'un agrément au profit de l'opérateur unique devrait être accordé à un opérateur public ou si un opérateur privé pourrait-il aussi bénéficier de tel agrément.[47]

Il convient de citer ici en résumé les conclusions de l'Avocat général établies dans le cadre de ces deux cas similaires et réunis pour les circonstances:

l'Avocat général admet et confirme d'abord la prémisse selon laquelle l'octroi, par un État membre, du droit exclusif d'exploiter un jeu d'argent à un seul opérateur peut être compatible avec le droit communautaire.

La suite des conclusions de l'Avocat général pourrait être résumée ainsi (extraits tirés des deux affaires néerlandais citées ci-dessus):

> Une réglementation d'un État membre restreignant la fourniture de jeux d'argent qui vise à réfréner l'assuétude au jeu et de lutter contre la fraude, et qui atteint effectivement ces deux objectifs, elle doit être considérée comme poursuivant lesdits objectifs de manière cohérente et systématique, même si le ou les titulaires du droit exclusif de fournir des jeux sont autorisés à rendre leur offre attrayante en introduisant de nouveaux jeux et en recourant à la publicité.
>
> Le juge national, après avoir constaté que sa législation est conforme à l'article 49 CE, n'est pas tenu de vérifier, dans chaque cas concret d'application, qu'une mesure destinée à assurer le respect de cette législation, telle qu'une injonction à un opérateur économique

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[45] Considérants nos. 59 et 60 de l'arrêt.

[46] Considérant no. 72 de l'arrêt.

[47] Affaire: The Sporting Exchange Ltd, agissant sous le nom Betfair—C-203/08; Affaire: Ladbrokes Betting & Gaming Ltd, Ladbrokes International Ltd. C-258/08.

de rendre inaccessible aux personnes résidant sur le territoire national son site Internet proposant des jeux d'argent, est apte à atteindre les objectifs poursuivis par ladite législation et est proportionnée, dès lors que cette mesure d'exécution se limite strictement à assurer le respect de cette législation.

La réponse à cette interrogation ne saurait être différente selon que la mesure en cause est demandée par l'autorité publique ou bien par une personne privée, dans le cadre d'un litige entre personnes privées.

L'article 49 CE doit être interprété en ce sens qu'il ne s'oppose pas à une réglementation d'un État membre qui soumet l'organisation et la promotion des jeux de hasard à un régime d'exclusivité en faveur d'un seul opérateur et qui interdit à tout autre opérateur, y compris à un opérateur établi dans un autre État membre, de proposer, par Internet, sur le territoire du premier État membre, des services relevant dudit régime.

L'article 49 CE doit être interprété en ce sens que le principe d'égalité de traitement et l'obligation de transparence qui en découle sont applicables aux procédures d'octroi et de renouvellement d'agrément au profit d'un opérateur unique dans le domaine des jeux de hasard, pour autant qu'il ne s'agit pas d'un opérateur public dont la gestion est soumise à la surveillance directe de l'État ou d'un opérateur privé sur les activités duquel les pouvoirs publics sont en mesure d'exercer un contrôle étroit.

[60] Après avoir parcouru ces conclusions, il nous apparaît que la jurisprudence de la CJCE devient de plus en plus claire répondant à plusieurs questions posées jusqu'alors.

Le domaine est cependant complexe. D'autres problèmes et les questions peuvent surgir, comme par exemple: si et dans quelle mesure pourraient-elles continuer à s'appliquer pendant une période transitoire, les réglementations nationales relatives à un monopole d'État sur les paris sportifs qui comportent des restrictions illicites à la liberté d'établissement et à la libre prestation des services garanties par les articles 43 et 49 CE sans pour autant pouvoir contribuer à limiter les activités de paris d'une manière cohérente et systématique conformément à la jurisprudence de la Cour?

[61] Quant à la question de savoir si la législation turque en son état actuel pourrait résister ou non au droit communautaire, il importe de répondre de la manière suivante:

A notre sens, la législation actuelle de la Turquie en matière de paris sportifs n'est pas entièrement conforme au droit communautaire si l'on examine cette question à la lumière de chacune des exigences posées par la jurisprudence de la Cour de Justice de la Communauté Européenne.

La Turquie n'étant pas encore membre de l'UE, elle devrait avant l'adhésion et ce, pendant la période de négociation, adapter sa législation au droit communautaire. Cela aurait lieu au fur et à mesure de l'ouverture de chacun des chapitres pendant la période de négociation entre elle et l'UE. La Turquie ne pourrait donc pas faire valoir le bénéfice d'une période transitoire.

L'aspect de la réglementation par l'Etat et celui de l'opérateur unique existant dans ce domaine ne poseront pas trop de problèmes.

Au niveau de la proportionnalité et l'égalité de traitement en revanche, les dispositions légales ainsi que la pratique actuelle devraient cependant être rendues conformes à la liberté d'établissement et à la libre prestation des services garanties

par les articles 43 et 49 CE en ce qu'elles "contribuent à limiter les activités de paris d'une manière cohérente et systématique."

Par ailleurs, le fait de considérer les paris sportifs comme une source de revenu lucrative pour l'Etat devrait être modifié, l'accent étant mis sur "le but de réfréner la dépendance aux jeux de hasard ainsi qu'à lutter contre la fraude tout en essayant de rendre attrayante les offres sur le marché en introduisant de nouveaux jeux et en recourant à la publicité."

Le pouvoir intégrateur du droit communautaire devrait ainsi trouver à cette occasion une nouvelle preuve de son efficacité.

49.5 Conclusions (Evolution et Enjeux)

[62] Nous arrivons par ce biais à nos conclusions générales.

Dans cette rubrique, nous allons résumer l'évolution attendue ainsi que les enjeux encourus en Turquie ces prochaines années dans le domaine des jeux de hasard et les paris sportifs.

Il est loisible de regrouper ces conclusions sous cinq points:

49.5.1 Améliorations Législatives Sont Attendues

[63] Dans un pays où la majorité des gens, même s'ils montrent le contraire par leurs actes, pensent que la religion interdit les jeux en raison de leur immoralité, l'Etat qui est dirigé par les islamistes ne peut pas se montrer très clément à l'égard des jeux et casinos. En tout cas dans les apparences, il ne souhaitera pas non plus partager le gâteau avec les "étrangers."

Toutefois, en raison des conditions extérieures et intérieures qui lui sont données, l'Etat turc devrait naviguer entre d'une part le besoin de combat contre le truquage des matchs et des sites de paris illégaux et d'autre part celui de l'ouverture et l'agrandissement du marché.

Il devrait aussi habilement négocier les virages dangereux qui mènent vers une législation cohérente, dénuée de lacunes et disparités, sans pour autant perdre le bénéfice juteux provenant de l'organisation des jeux et des paris. Ne l'oublions pas, il devrait agir aussi sans mécontenter le lobby footbalistique influent.

[64] Quelle serait la priorité du gouvernement actuel dans ce catalogue des mesures législatives à prendre dans les meilleurs délais?

Dans tous les cas, la lutte contre le truquage des matchs et la cyber- criminalité aura la priorité par rapport à l'instauration des libertés d'établissement et de libre prestation des services dans ce domaine.

Le fait de renoncer à l'appât de gain et l'idée de remplir les caisses ne subiront pas de changements radicaux. Toutefois, en tout cas en deuxième étape, les mesures et améliorations législatives seront adoptées afin de rendre la législation en

matière de prise de paris sportifs plus cohérente et d'éliminer les lacunes et disparités dans ce domaine.

49.5.2 Meilleures Ecoutes des Clubs

[65] Nous l'avons vu qu'il existe des attentes assez pressantes de la part des clubs turcs de football professionnel en matière de prise de paris sportifs, exprimées conjointement par la Fédération Turque de Football et par la Fondation de l'Union des clubs turcs de football professionnel. Il s'agit notamment de l'augmentation et du renforcement des parts des clubs de football professionnel ainsi que l'attribution des sièges permanents au sein du Conseil de gestion de l'organisme du Sport Toto.

A notre sens, ces appels seront entendus. Rapidement, à savoir dans l'immédiat, mais aussi à l'avenir, leurs attentes seront satisfaites compte tenu du lobby économique et politique des clubs turcs de football professionnel.

49.5.3 Progression des Offres et des Recettes

[66] Une autre évolution rapidement attendue concerne sans autre l'amélioration des offres proposées par le système de jeu IDDAA en augmentation des combinaisons et de l'étendue des événements sportifs couverts.

Cela permettrait d'atteindre rapidement le seuil de USD 10 mia. par an dans la réalisation d'un chiffre d'affaires des trois branches exploitées.

En effet, avec le coup de pousse donné, dans leur site web, par les clubs turcs de football professionnel au système de jeu IDDAA, ainsi que par la conjonction d'autres mesures, telles que mesures pénales contre les jeux illégaux, meilleure publicité, etc. les recettes vont augmenter non seulement dans le cadre du système de jeu IDDAA, mais aussi au sein du Sport-Toto et des courses de chevaux, sans tenir compte de l'effet de l'augmentation rapide de la population et du peuplement des villes.

49.5.4 Utilisation Accrue de l'Internet

[67] Une autre évolution est sans doute la poursuite déjà entamée de l'utilisation accrue de l'internet par les joueurs de paris sportifs. Même si le nombre des institutions offrant la possibilité de jouer en ligne demeure limité, la part du marché de 13% revenant aux jeux en ligne sera largement dépassée atteignant facilement les 20% dans un chiffre d'affaires qui sera lui-même en forte progression.

La pénétration de l'informatique dans les endroits les plus reculés du pays et l'engouement chez le jeunes pour les jeux par internet amplifieront par ailleurs cette évolution.

49.5.5 Ouverture de la Voie des Privatisations

[68] En 2003 déjà, en vertu de la Loi no. 4971, la possibilité, par le biais de l'octroi des licences de 10 ans, d'une privatisation des jeux de hasard avait été encré dans la législation turque. Les règles d'application de cette privatisation ont vu le jour le 15.10.2008. Toutefois, faute de mises suffisamment élevées, l'Etat n'a jusqu'à maintenant pas adjugé à une entreprise privée la gestion et l'organisation des jeux et le droit de récolter les fonds auprès des joueurs pour son propre compte.

[69] Il est très probable qu'au cours des années à venir la privatisation de la Loterie nationale, ainsi que du Sport-toto et partant le système de jeu IDDAA puissent entrer dans les faits par le biais de l'octroi des licences permettant d'organiser, d'exploiter librement les jeux.

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Chapter 50
Juridical Regulation of the Betting in Ukraine

Daniel Getmantsev

Contents

50.1 General Regulation

Betting in Ukraine is a licensed activity. It corresponds with the term "bookmaking." According to the legislation of Ukraine, "bookmaking" is an activity specified in conducting a wager and a totalisator with the use of telecommunication networks, directed to the formation of the list of events, which are to take part in the future, receiving bets on these events, bets reserving, overseeing the results of the events, determining and delivering prizes (winnings).

A "totalisator," is a game of chance in which players stake on events with a result preliminarily unknown and for a commission fee. The initiator receives and reserves bets, and also distributes and delivers the prize (winnings) amount in accordance with the rules of the game of chance, immediately after the event is completed, and where it takes place.

A "wager" is a game of chance in which the participants bet through the cash desks of a bookmaker's office on preliminary unknown result of an event, which is to

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take place in the future, and receive prize (winnings) depending on the final result. Its amount is calculated proceeding from the bet placed and the factor determined before the game start.

"Players," are only physical persons who take part in a game of chance of their own will.

The market of betting in Ukraine is not limited. Any person who meets the legislative requirements can obtain a license.

The activity of a betting organization is subject to a double licensing. Another license is obtained for the organization of gaming establishments. The license is given by local state administrations for a period of 3 years and despite the low cost for obtaining this license (less than 50 €), it is an essential key factor for local governmental institutions to limit the quality of gaming establishments that operate at the particular territory.

The fee of the license to conduct organization and operate gambling, including betting, is 150,000 € for 5 years.

The legislation determines the requirements betting operators must meet. The officials of the licensee must meet such requirements:

- director or his deputy—a university degree or college diploma, experience in the field of gambling not less than 1 year;
- accountant or a person, who is responsible for book-keeping and accounting—a book-keeping education or a university degree or college diploma in economics, experience at the position of accountant not less than 3 years.

The operator of betting undertakes:

- to operate only those types of activity out of those listed in Sect. 3.2 of these Licensing terms, which are marked in a license;
- to conduct gambling organization only in particularly determined places, except moving small architectural forms or buildings;
- to adhere to the rules of a game of chance confirmed by the operator;
- to prohibit participation in the game of chance of persons under the age of 18;
- to form the prize fund that is the total amount of prizes (winnings) that are to be given to players in case of winning a game of chance according to the rules;
- to adhere to the requirements of the Legislation of Ukraine in the sphere of prevention and counteraction to legalization (washing) of profits received in a criminal way, i.e., through terrorism financing.

In Ukraine it is prohibited to organize and conduct games of chance:

- if the rules of a game of chance do not eliminate the possibility of physical threat to life and health of people;
- if the rules of a game of chance do not eliminate the possibility of death or injuring living creatures;
- if alcohol, tobacco and other goods, trade of which requires the proper licence, or which possession requires special permission, are offered as a prize;

- in health and educational establishments, buildings of state authority institutions, as well as of institutions of local government, cult buildings;
- outside the borders of establishments or buildings.

At bookmaking realization bets are taken in cash desks of the licensee or via telecommunication networks.

The initiator of betting

(a) is obliged to inform the gambler of the list of all events on which bets are being placed at the moment and of competition results of a previous day;
(b) can form a network of separated departments (branch offices, totalisator cash desks and bookmaker cash desks, other subsidiaries);
(c) can receive bets in a totalisator and a wager on preliminary prediction of sport, cultural or other socially essential event that does not influence the sovereignty of the state, constitutional rights of citizens and moral basis of society, does not offend honor, dignity and business reputation of citizens;
(d) can receive bets only on preliminary prediction of the events, whose results are confirmed by public facts and cannot have any influence on the part of gamblers.

If the decision to drop the realization of bookmaking is made, the initiator must publish the information in a nationwide printed mass media and inform the Ministry of Finance of Ukraine within a week. Simultaneously the bookmaker's office must stop receiving new bets and grant its responsibilities to gamblers in full amount.

Games of chance are to be conducted in accordance with the rules confirmed by the initiator. They must contain:

1. The name of a game.
2. The prohibition of the participation of persons under the age of 18.
3. The size of minimum and maximum bets.
4. The order of possible actions of gambler while conducting a game of chance.
5. The list of forbidden gambler's actions.
6. The order of determining winners and paying out the prize (winnings).
7. The information about a Jackpot or the possibility to get a bonus game.
8. The actions of gambler and official of the license in case of unforeseen situations (break of gaming machine, non-payment of prize (winnings) and so on).

50.2 Taxation

Betting has no specification in taxation like any other type of gaming business.

According to the Law of Ukraine "About taxation of profits of physical persons" the general rule for winners of games of chance is that a taxation agent of a taxpayer under adding of profit such as prizes, lottery winnings (except state

lotteries), other game of chance drawings, or winnings in his favor, is a person, who provides this adding.

When profits received as winnings in a totalisator are added, the expenditures incurred in connection with receiving of such profits, from the moment of receiving the bet until the drawing is completed, must be included.

Profits, mentioned in this paragraph, are finally taxed at paying out by them.

A taxpayer who gets a profit as winnings in games of chance is obliged to enter the sum of winnings to his annual income amount in a tax declaration.

For conducting control over taxation, any physical person—resident or not—must show his passport at the entrance of a gaming establishment while responsible officer of this gaming establishment must enter the information about passport number, first name and surname of its owner, and his or her citizenship. When a gambler is a citizen of Ukraine the information about his permanent address must be put in.

Transactions of receiving bets in games of chance as well as of paying winnings are not the object of VAT taxation.

Bookmaker's offices pay 25% of income tax in general order.

Each bookmaker's office pays about 1,000 € per year for patent on each cash desk for receiving bets.

50.3 Legislation in the Sphere of Contraction of Legalization of Profits Received in a Criminal Way

Effective tools of contraction for the profits, received in criminal way through gaming establishments, work in Ukraine.

The betting initiator must appoint an official responsible for internal financial monitoring. This official conducts an independent activity and report only to the manager of the subject.

The game initiator sets the rules for conducting internal financial monitoring. He must ensure eliciting of financial transactions, which are subject to financial monitoring.

If the amount of winnings (prize) in gaming establishment equals or exceeds 11,000 €, it must be monitored financially. Transactions of this type are registered by game initiators compulsorily.

Game initiators must file information about financial transactions to a special state body not later than after three working days from the moment of its registration.

In addition, the Parliament of Ukraine is currently considering several draft laws on more strict regulation of betting in Ukraine, however, their adoption is disputable.

Chapter 51
Sports Betting: United Kingdom

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Contents

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51.1 Brief History of Betting on Sports

51.1.1 History of Regulation

Great Britain[1] has a long tradition of gambling generally, and betting on sports in particular. The first Gaming Act was passed by Parliament in 1710, 300 years ago, so the activity has always been regulated. The betting activity initially revolved around horseraces, cricket matches, prizefights and other pursuits such as hare coursing and cock fighting. The first definition of "cheating" was included within the Gaming Act of 1835. One advantage of legitimating this betting activity is that the UK Government has been able to tax it. One disadvantage of taxing it has meant that online gambling operators have needed no further encouragement in order to choose a tax-neutral jurisdiction for their establishments.

In the same way that gambling has long since evolved from its origins within the aristocracy, the legislation has been extended from "gaming" (playing games of chance and/or still, e.g., in casinos) to include "betting" (see Sect. 51.3.2) and "lotteries" (games exclusively of chance). The most recent legislation—Gambling Act 2005—consolidated all earlier regulation into one Act of Parliament.

51.1.2 The Role of Bookmakers

Before recent advances facilitated gambling by use of interactive technology and through betting exchanges, the market for betting on sports was exclusively controlled by "bookmakers." The name is derived from the practise of creating a market on a racecourse by accepting wagers which were duly noted in a ledger or book. The market would be created by the bookmaker making an actuarial estimation and offering the "odds" of a participant winning. Subsequently more ingenious combinations of wagers and outcomes were devised. Bookmakers also later accepted bets over the telephone and opened call centres for this credit betting. The moral high ground was preserved by the legislators who decreed that such wagers should not be enforceable at law.

51.1.3 Establishment of the Tote

The Racecourse Betting Control Board (RBCB) was established by the Racecourse Betting Act 1928. The function of the RBCB was to operate pool-betting on-course as an alternative to fixed odds betting with bookmakers. Its object was to distribute profits for "purposes conducive to the improvement of breeds of horses

[1] This note details the legislation applicable to England, Scotland and Wales. Most of the legislation does not apply to Northern Ireland, for good reason. For example, horseracing is administered in Northern Ireland under rules made in Dublin, not in London.

or the sport of horseracing." Off-course and credit bets were accepted by a company called Tote Investors Ltd from 1930 and these monies were also channelled into the on-course pools.

51.1.4 Betting Off-course

The landscape was altered significantly by the Betting Levy Act 1961. For the first time, bookmakers were permitted to open betting shops and operate off-course. There are now over 9,000 shops (usually referred to as "licensed betting offices" or LBOs) in the UK and Ireland. Surprisingly, the turnover in these LBOs has not been since eroded by the inception of on-line or "remote" betting, although there are indications that betting exchanges are impacting turnover. Under this Act, bookmakers were obliged to pay a levy ("the Levy") on their off-course horseracing turnover to the Horseracing Betting Levy Board ("the Levy Board") which in turn assumed many of the funding responsibilities of the RBCB.

Under this Act, the RBCB was reconstituted as the Horserace Totalisator Board ("the Tote") and it subsequently acquired Tote Investors Ltd. Although the Tote was now permitted to open shops off-course, it was restricted to offering only horseracing pool bets. This restriction on the Tote was lifted in 1972 and thereafter it was permitted to operate as a bookmaker accepting bets on all sports.

51.1.5 Establishment of the Levy Board

The Levy Board was created by the Betting Levy Act 1961. Its object was to redistribute funds generated from the Levy in order to improve horse breeds and to facilitate horseracing. The level at which the Levy is fixed is determined by the UK Government, failing agreement between the horseracing and betting industries. Revenues from the Levy rose as successive Governments liberalised the restrictions on LBOs. In 1986, live TV pictures were introduced into betting shops. In 1993, LBOs were permitted to remain open in the evenings. Recently revenues have dropped dramatically as betting activity on sports other than horseracing has increased.

51.2 Current Position

51.2.1 The Levy Board

The role of the Levy Board is to assess and collect financial contributions from bookmakers and the Tote by means of the Levy. It distributes funds received, principally as prize money for horseraces and also to subsidize the cost of integrity

services. Integrity services include drug testing and research, filming of races and photo finish services.

The UK Government announced its intention to abolish the Levy mechanism and the Levy Board in March 2000. However, an acceptable alternative for the funding of horseracing could not be found and in December 2006, the Government announced that the current structure would be retained until a suitable alternative could be identified.

51.2.2 The Tote

Legislation enabling the UK Government to sell the Tote was passed in October 2004. The legislation also prescribed that the Tote's exclusive licence to operate pool betting on horseracing would be restricted to 7 years from inception of the newly privatised operation.[2] Upon expiry, other operators would be free to offer pool betting in Great Britain on horseracing in competition with the Tote.
In October 2008, however, the UK Government announced that the sale of the Tote would not be pursued for the time being due to market conditions. As a result, the Tote has retained its exclusivity in relation to pool betting on horseracing for the time being. The Tote remains on the list of publicly-owned assets which the UK Government would like to liquidate.

51.3 Gambling Act 2005

51.3.1 Betting

The body of law which regulates betting on sports in Great Britain[3] is contained within the Gambling Act 2005 ("the Act"). It is highly technical and comprehensive legislation, so the respective sections of the Act are referenced in this note. The Act makes provision for the licensing of "gambling," which is defined as including "betting" (Section 3(b)). Betting is defined in part as "making or accepting a bet on … the outcome of a race, competition or other event or process …" under Section 9 of the Act. The person making or placing the bet is known as the "backer." The person accepting the bet is known as the "layer." For the first time, a contract involving a bet will be legally enforceable (Sections 334/335), unless it is void for some other reason.[4] The Gambling Commission reserves the right to freeze any obligation to pay out on bets while it decides whether or not a bet is void.

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[2] The licence had never previously been limited in time.

[3] The Act does not apply to Northern Ireland, except for the offence of advertising "foreign betting" (see below).

[4] Gambling debts were previously unenforceable at law.

51.3.2 Types of Betting

There are essentially four different types of betting activity. "Fixed odds" betting involves the backer placing a bet, usually with a bookmaker who will offer odds on the bet being successful. These odds may vary according to the volume of bets placed in the lead-up to the event. The final odds offered at commencement of the event are known as the "starting prices." "Pool betting" is betting where the winnings are determined by reference to the aggregate of stakes paid which are then divided among the winners (Section 12(1)). There are specific licensing provisions which relate to pool betting on horseracing and dog racing.[5] There are also specific provisions which relate to licences to operate "football pools," where the results of football matches are forecast (see below). "Spread betting" involves making a contract for differences or for the purpose of making a profit/avoiding a loss by reference to fluctuations in a predicted score line. It is specifically excluded by Section 10(1) from this licensing regime.[6] "Betting exchanges" are not a distinct type of betting as such, but are a platform through which a backer can place and a layer can accept a bet, i.e., two individuals wager on an outcome with each other. A betting exchange will require an operating licence as a "betting intermediary" (Section 13).[7]

In addition, prize competitions which involve a payment to enter are classed as betting, except where elements of prediction and wagering are not present (Section 11). This definition would include a "fantasy football" league, for example. "Payment to enter" includes a financial equivalent, e.g., by use of a premium rate, but not a standard rate, telephone line (Schedule 1).

51.3.3 Remote and Non-Remote Operating Licences

The licensing regime for betting is orchestrated by the regulator, the Gambling Commission. Anyone providing facilities for betting commits a criminal offence unless holding an operating licence authorising the activity, always providing the activity is carried on in accordance with the terms and conditions of such licence (Section 33).

The Act also catches providing facilities for betting "remotely" (i.e., on-line or otherwise than face to face), but only if at least one piece of equipment used in the

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[5] For example, only someone holding a premises licence may accept pool bets "on-course" at a horserace course or dog track (Section 179). Nor may someone holding a premises licence elsewhere accept pool bets on dog racing, except by arrangement with the occupier of the track in question (Section 180).

[6] Spread betting is regulated by the Financial Services Authority (FSA) under the Financial Services and Markets Act 2000.

[7] One opportunity which betting exchanges may offer is "in-running" betting (placing a bet after commencement of a race); this is not offered by bookmakers.

provision of facilities is situated in Great Britain (Section 36(3)). It is irrelevant, for this purpose, where in the world the facilities are intended for use. Equipment includes "electronic or other equipment used … to store information relating to … participation," or "to present … a virtual game … or race" or to determine or store information relating to a result.

There are three different types of operating licence for betting: general, pool betting and betting intermediary. The operating licence may cover one or more of those 3 categories. However, the licence may cover either non-remote (i.e., premises-based) or remote facilities, but not both. While one person may hold a licence for both, they need to be granted separately and may not be combined.

An operating licence is also subject to "change of control" provisions (Section 103). In that sense, the operating licence is personal to the holder and may not be transferred.

51.3.4 Personal Licences

Every operating licence must specify not less than one management officer who holds a "personal" licence (Section 80). In this way the operating licence is dependent upon the satisfactory credentials and performance of at least one individual. Both operating and personal licences are administered by the Gambling Commission.

51.3.5 Premises Licences

A specific criminal offence is committed (Section 37) by someone who uses or permits premises (including vehicles and vessels) to be used for betting (whether by making or accepting bets, acting as a betting intermediary or providing other facilities for the making or accepting of bets). The local government authority is responsible for the licensing of premises. An applicant for a premises licence must already possess the appropriate operating licence. Unlike operating licences, a premises licence is transferable (with permission from the licensing authority) to another holder of an operating licence. Provided that a premises licence is in force, however, someone accepting bets "on-course" (Section 37(4)), or accepting entries into football pools (Section 93(3)), does not fall foul of this provision. Betting may be conducted on a "track" up to 8 times per year without a premises licence, provided notice is given of such "occasional use" (Section 39(1)). Track covers a horserace course, dog track or other venue at which a race or match is held.[8]

[8] This occasional use notice would typically be used to legitimate betting at a point-to-point race meeting.

51.3.6 Betting Software

Another offence is committed by someone who manufactures, supplies, installs or adapts betting software without a licence, although network operators and internet service providers are specifically excluded (Section 41(3)).

51.3.7 Cheating

The Act also creates the specific offence of "cheating," by someone who cheats at betting or enables or assists another person so to cheat (Section 42). Cheating may consist of actual or attempted deception or interference in connection with the betting process or with a real or virtual game, race or other event or process (Section 42(3)). No account is taken of whether the offender improves his chances of winning anything or wins anything (Section 42(2)).[9] There are also obligations imposed on licence holders to comply with requests for information from the Gambling Commission (Section 122).

51.3.8 Under-Age Betting

Another offence is committed by a person who invites causes or permits an under-18 to bet (under-16 in the case of the football pools).

51.3.9 Private Betting

No offence is committed by someone who makes or accepts a bet, or offers to do so, if not acting in the course of a business (Section 296(3)). Someone who makes a living from betting may in theory require a licence, but 2 friends who wager among themselves on the outcome of a match are clearly not doing so in contravention of the law. "Domestic betting" (between people living in the same premises) and "workers' betting" (between employees of the same employer) are both "private betting" and excluded from the licensing requirements (Section 296).

[9] The Parry report (see Sect. 51.4.2) recommended that the definition of cheating should be revisited.

51.3.10 Advertising

Advertising of betting is closely controlled by regulation. It is an offence to advertise unlawful betting (Section 330) or foreign betting. "Foreign" betting means (Section 331(2)) non-remote betting taking place in a territory outside the European Economic Area (EEA) or remote betting which is not subject to the betting laws of another EEA state (notionally including Gibraltar).[10] Remote advertising of betting must be targeted at people in Great Britain in order for the regulations to apply.

51.4 Integrity

51.4.1 Report of Enquiry into the Effects of Betting on Sport

Where problems have occurred in the context of betting on sports, it is invariably because a bet has been placed on one of the participants to lose a match or race ("laying to lose"). Frequently, in such situations it is a player who lays his team to lose, thus profiting from a poor performance. For example, footballers of Accrington Stanley FC laid their team to lose against Bury FC in 2008. An England international cricketer Ed Giddins laid his domestic team to lose a county match in 2002 and was banned for 5 years. two rugby league players bet against their team in 2004 knowing that St. Helens would field a weakened side against Bradford Bulls. The problem is not a recent one. The most notorious case occurred when 3 footballers were banned for life and imprisoned following convictions in 1964 for laying their team Sheffield Wednesday FC to lose a match against Ipswich Town FC. The opportunity unlawfully to lay a team to lose is one which the advent of the betting exchanges has exacerbated. This in turn offers scope for corruption. Although, as the examples above demonstrate, the problem occurs in team sports, it is potentially even more acute in the case of individual sports such as tennis or snooker.

Concerns of this type were aired in 2004 during the run-up to the implementation of the Gambling Act 2005. The Parliamentary Betting & Gaming Group ("the Group") heard evidence from both bookmakers and the national governing bodies (NGBs) of various sports.[11] Their report was published in February 2005. Many of its recommendations were implemented. Some have not yet been. Perhaps the most important concerns that which facilitates communication between the betting industry and sport. The Group recommended that all major

[10] This highlights the territorial limitations of the Act. In many cases, bets from backers based on countries where betting is illegal are accepted by British-based bookmakers. However, the Act does not apply if such bookmaking operations are based off-shore.

[11] The write appeared at one hearing on behalf of the England and Wales Cricket Board.

betting operators (including LBOs, remote operators and betting exchanges) should conclude memoranda of understanding (MoUs) with the NGBs of the sports on which their business is based.

Most of such MoUs, although frequently not of legal effect, envisage mutual co-operation with the aim of improving the integrity of betting on that sport. At its simplest, the MoU allows the betting operator to report to the NGB the outcome of any investigation into irregular betting patterns and to notify it whenever anyone, who may be prohibited from so doing by the rules of that sport, attempts to place a bet.

The Group's report also highlights the difficulties faced by NGBs in convicting the guilty and punishing them appropriately without the benefit of any statutory powers.[12] The risk management procedures adopted by the bookmakers lack transparency.

They also recommended that a common approach with the FSA should be adopted in relation to the use of "inside information." The problem with inside information is naturally one of definition. One man's bread and butter is to another man the water of life.

51.4.2 Sports Betting Integrity Panel

The most recent development, at the instance of the UK Government, was the establishment of a Sports Betting Integrity Panel ("the Panel") in summer 2009. The Panel's terms of reference included:

(a) to assess the current and potential risk of corruption in British sport, including how suspicious betting patterns are identified and assessed (both in markets within and outside the UK);
(b) whether effective rules were in place and enforced to aid management of the risk of corruption[13];
(c) support to help participants and officials understand the risks and how to protect themselves;
(d) co-ordination of management of cases at national/international levels between NGBs, the Gambling Commission and the police;
(e) adequacy of powers/resources available to these organisations;
(f) suitability of the terms and conditions under which bets are currently offered and information shared between the various parties.

[12] All NGBs are created by private, not public, law. While this means that their actions cannot be judicially reviewed, but it hampers their investigations.

[13] In October 2009 two bookmakers bowed to pressure from the football authorities and agreed to suspend betting on youth football matches.

The over-arching objective of the Panel was to design and implement an integrated strategy to uphold integrity in sports and associated betting. It specifically did not consider issues of funding. In accepting the Panel's report in February 2010[14] and fully endorsing its proposals, the UK Government predictably expressed their view that any funding necessary to implement the proposals "should be provided by sport and the betting industry as those who stand to benefit most from the new arrangements."

In framing its recommendations, the Panel focussed on 3 areas:

- adoption of rules and disciplinary procedures
- education programmes for participants
- creation of an integrity unit, capable of gathering and analysing intelligence.

The principal recommendations were:

(i) a review of the definition of "cheating" in the Gambling Act;
(ii) a review of the adequacy of the powers available to the Gambling Commission;
(iii) introduction of a new Code of conduct on integrity in sports in relation to sports betting ("the Code") which includes minimum standards for individual sports to cover in their rulebooks;
(iv) each NGB to demonstrate compliance with the principles of the Code within 12 months;
(v) each NGB to possess effective mechanisms to ensure compliance, to investigate potential rule breaches and to impose sanctions;
(vi) each NGB to establish an education/communication programme on sports betting integrity for all their competitors and participants, involving player associations and also leagues and clubs;
(vii) each NGB to put in place mechanisms for capturing and relaying betting intelligence;
(viii) betting industry to progress convergence of reporting standards under licence condition 15.1 (requirement to notify suspicious betting patterns to the Gambling Commission) and to ensure that contravention of sports rules on betting constitutes a breach of the betting operator's own terms and conditions;
(ix) establishment of a specialist Sports Betting Intelligence Unit ("the Unit") within the Gambling Commission, with the specific capability to monitor the betting activity of particular individuals.

51.4.3 Data Protection

While the Unit is already being established, others of the recommendations will require funding in order to be implemented. It remains to be seen how much funding will be required and whether sport, in particular, will be able to contribute its proportion.

[14] Report of the Sports Betting Integrity Panel: February 2010.

A potential problem which inhibits the use of electronic data generated during online betting activities is that posed by the Data Protection Act 1998. Any transfer of such data may constitute the processing of personal data, raising question marks about its lawfulness. While there are specific provisions in the Gambling Act (Section 350) which permits state officials to share information and (Section 30) which permits NGBs to supply information to the Gambling Commission, these do not override the restrictions in the 1998 Act. This lacuna was identified in evidence submitted to the Group in 2004, but it was not addressed before the Gambling Act was enacted.

51.5 A Right to Bet?

Emboldened by legislative innovation in New Zealand, the state of Victoria, Australia and most recently France,[15] in the UK a campaign has been waged for the creation of a requirement on bookmakers to obtain a licence from event owners in order to accept bets on their events. The proponents of this "right to bet"—the Sports Rights Owners Coalition (SROC)—accept that legislation would be required in order to introduce the right. They do not believe that bookmakers will voluntarily agree to such arrangements.

SROC argues that it is necessary to introduce this right so that the revenues generated in return for the grant of the right to bookmakers may be invested in improving the protection of the integrity of events. It maintains the need for such a right is justified by the specificity of sport and by the public's expectation that the event result should be of unimpeachable integrity.

The proposal is that the legislation would create a civil right, enforceable against both UK-based bookmakers and those accepting bets from UK backers although based elsewhere.

Despite its efforts, SROC recognises that opposition from bookmakers will be fierce.

[15] Rather than a right to bet, the French innovation was the creation of the event organiser's right.

Chapter 52
The Regulation of Gambling Under U.S. Federal and State Law

Paul M. Anderson

Contents

52.1 Introduction

Gambling, and in particular sports gambling, is big business. In 1996, due to the rise in legalized gambling at the state and local level, the growth of Internet gambling, and questions regarding the social and economic impacts of gambling, the United States Congress enacted the National Gambling Impact Study Commission Act.[1] This legislation established the National Gambling Impact Study Commission. The Commission's role was to conduct a comprehensive legal and

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[1] Pub. L. 104-169, 110 Stat. 1482, 1996.

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factual study of the social and economic impacts of gambling in the United States. In its 1999 report, the Commission estimated that Americans illegally wager between $80 and 380 billion annually on sporting events.[2] Although this is the last national study of sports betting within the United States, this number has surely increased in the past decade.

Betting or gambling in sports is typically perceived as a threat to the integrity of sport itself as money spent on gambling may influence the outcome of the contest outside of the normal field of play. In the United States, virtually all forms of sports gambling are illegal because they have long been associated with organized crime or other criminal influences. With the expansion of sports gambling to the Internet, concern about the corrupting influence of gambling has also increased. Several of the chapters in this book address specific situations involving gambling within the amateur and professional sports context within the United States. This chapter will focus on the extensive legislative regulation of gambling within the United States. The main focus will be on a chronological review of the many federal laws that have been created in an attempt to regulate gambling, often with a specific focus on curbing sports gambling. In addition, the chapter will include a short analysis of the regulation of gambling at the state level.

52.2 Federal Regulations

The starting point for an understanding of the regulation of sports betting in the United States is an analysis of the many federal laws that have been put in place to enforce this regulation. This Section will provide a brief overview of the following laws:

- The Wire Communications Act of 1961 ("The Wire Act")
- The Transportation in Aid of Racketeering Enterprises Act of 1961 ("The Travel Act")
- The Illegal Gambling Business Act of 1970
- The Racketeer Influenced and Corrupt Organizations Act of 1970
- The Professional and Amateur Sports Protection Act of 1992

In addition to the basic federal regulatory structure put forth through these laws, there are other federal statutes that regulate gambling activities and impact sports. However, these laws will only be discussed within an ending subsection as they do not impact the sports landscape extensively. In addition, regulation of gambling on the Internet, and the recent federal Unlawful Internet Gambling Enforcement Act of 2006, will not be discussed within this chapter as it will be covered in-depth in the chapter devoted to *The U.S. System for Regulating Internet Gambling*.

[2] Nat'l Gambling Impact Study Comm'n, 1999, pp. 2–14.

At the outset, it is important to recognize that virtually all federal laws that regulate gambling within the United States are based on Congress' authority under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, which provides that Congress has the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." As a result, these laws regulate activities that take place as part of interstate commerce, or the regulation of commercial activity between different states. In this way, states are left to create their own independent regulations of many activities within the individual state itself, but the federal government has enacted many federal laws that regulate commerce among the states overall.

52.2.1 The Wire Act

The first federal regulation of gambling was passed in 1961. The Wire Act essentially prohibits people from using a "telephone facility" to receive bets or send gambling information while engaged in interstate commerce.[3] Many legal commentators believe that the law was passed because there were concerns that people outside of Nevada (the state that has historically allowed legalized forms of gambling) were making illegal sports bets over the phone. As the United States Court of Appeals for the Fifth Circuit explained, the purpose of the Wire Act

> is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce.[4]

The first part of the Act criminalizes certain types of gambling behavior as it provides that

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[5]

Under this Section, it is illegal in the United States to transmit bets or wagers, use information assisting betting or wagering on a sports event or contest, or to engage in any communication that entitles the recipient to receive money or credit

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[3] 18 U.S.C. Section 1084, 2010.

[4] *Martin v. United States*, 1968, 895 n. 6.

[5] 18. U.S.C. Section 1084(a), 2010.

resulting from betting or wagering. In order to be found liable, the individual must engage in this conduct using a "wire communication facility," which is defined as

> any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.[6]

This definition encompasses virtually all forms of communication, from telephones and cell phones, to email and text messages.

The second Section of the Act contains a safe harbor provision providing that

> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.[7]

This Section includes an exemption from liability for news reporting of information from sporting events, and an exemption when the information used or the bet placed is transmitted from a state or country where gambling is legal to another jurisdiction where gambling is also legal.

In the United States, most federal regulations are best understood by analyzing how the courts have interpreted them. The following case explains how the Wire Act specifically applies to sports betting.

Barbara McLeod was involved in a football parlay card business that operated out of Indianapolis, Indiana.[8] Although the business operated out of Indianapolis, McLeod was working in Las Vegas and called in the lines of games over the phone. This information was crucial to running a successful football parlay card business because bookmakers attempt to print the most accurate point spreads on their cards. The information was available through other sources in Indiana, but it was not as up-to-date and accurate as the information in Las Vegas. Therefore, McLeod was stationed in Las Vegas and called in the lines to Indianapolis on a regular basis.

While McLeod was making the phone calls from a public telephone in Las Vegas, a government official stood about four feet from her and heard her give out the football line information. Phone records were then checked and it was determined McLeod made phone calls to various phone numbers in Indiana. McLeod was arrested for violating the Wire Act. Before the court, she made several challenges to the charges against her.

McLeod claimed that the evidence obtained against her when the agent listened to her phone calls was a violation of her constitutional rights to be free from unreasonable searches because the government agent did not obtain the proper

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[6] 18 U.S.C. Section 1081, 2010.

[7] 18 U.S.C. Section 1084(b), 2010.

[8] *United States v. McLeod*, 1974.

authorization to intercept her communication. In response, the court found that the government agent did not need a listening device to hear her conversation and those constitutional protections did not extend to conversations on public telephones as they are "conversations knowingly exposed to the public."[9]

In addition, she claimed that the evidence against her was not sufficient to show that she made the disputed calls because the agent did not provide evidence of phone records. However, the court found that there was enough evidence to substantiate the charges against her. McLeod was seen copying the football line in a Las Vegas sports book, and after copying the information, she made a phone call to the operator, pulled out a line sheet, and read the information on the line sheet into the phone. Within an hour of making that phone call, McLeod's codefendant was arrested with a football line sheet with the same information that McLeod had been heard reading over the phone. Although phone records did not provide the evidence that phone calls were made across state lines (as required by the statute's interstate commerce language), the court ruled that reasonable inferences could be made about the phone calls actually being made from Las Vegas to Indiana.[10]

In the end McLeod was found to have violated the Wire Act by transmitting sports betting information across state lines. Most cases under this Act are similarly easy for the government to prosecute. As long as the individual involved engaged in some form of prohibited betting activity as defined in the Act, and as long as that activity took place in interstate commerce, the individual will typically be found to have violated the federal law. Overall, any form of sports betting within the United States can be found to violate this federal law, and therefore, result in criminal prosecution, as long as the activity does not take place in the states that will be discussed at the end of this chapter as they legalize sports betting.

52.2.2 Travel Act

In conjunction with the Wire Act, in 1961 the United States Congress also passed the Travel Act. Most cases contesting gambling activities actually charge the plaintiff under both acts and so it is important to move to an analysis of this second federal law. In general terms, the Travel Act prohibits the use of mail or other methods, including the Internet, to send illegal gambling materials, such as winnings from an illegal betting operation, or using a credit card over the telephone or Internet to make an illegal bet.[11] The Travel Act specifically provides that

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to-

[9] P. 1188.

[10] *United States v. McLeod*, p. 1188.

[11] 18 U.S.C. Section 1952, 2010.

> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs or attempts to perform-
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.[12]

For purposes of the Travel Act, an "unlawful activity" includes illegal gambling, which can include sports betting.

In the *McLeod* case discussed earlier, McLeod was also convicted of violating the Travel Act, because she traveled across state lines to help "facilitate" the gambling operation. McLeod argued that the information was not essential to run the gambling business because line information was available in Indiana as well. However, the court ruled that "the use of any facility in interstate commerce need not be essential to the gambling operation; 'it need only facilitate' the carrying on of illegal gambling."[13] As the court explained, as used in the statute, "facilitate," means to "make easy or less hard."[14] Therefore, the court determined that the information McLeod received helped contribute to the success of the operation because it allowed the operator to distribute their cards before other sources would have been available.

Although traveling across state lines in connection with running an illegal gambling business violates the Travel Act, it is not the only way to violate the Act. Individuals can also be found guilty of violating the Act if they use a phone or the Internet to communicate across state lines in connection with running an illegal gambling business.

Another case involving sports betting in violation of the Travel Act was *United States v. Wilkinson* (1979). Thomas Wilkinson and Broadus Stewart operated a sports bookmaking business in Jackson, Mississippi. On November 20, 1976, a search warrant was executed to search Wilkinson and Stewart's place of business. Government agents found gambling and phone records from people who wanted to place bets or wanted betting line information. In addition, during the trial one of the defendants' customers said that he called the defendants' business from Baton Rouge, Louisiana. He also said that when he told the defendants he was not calling from Mississippi, they told him to say he was calling from Mississippi if they asked.

The court affirmed the jury's decision that the defendants had violated the Travel Act finding that they were involved in interstate commerce because they had at least one customer calling from a state outside of Mississippi.[15]

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[12] 18 U.S.C. Section 1952.

[13] *McLeod*, 1974, p. 1189.

[14] *Id.*

[15] *Wilkinson*, 1979, p. 796.

In the end, the combination of the Wire and Travel Act's make all forms of sports betting across state lines illegal in the United States. However, the federal government has gone further in attempting to regulate sports and other forms of gambling.

52.2.3 Illegal Gambling Business Act

In 1970, in a shift from attempting to regulate only individuals who engage in gambling activities, Congress passed the Illegal Gambling Business Act, a law prohibiting people from running an illegal gambling business. The law specifically provides that "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both."[16] In order to find that a business is an "illegal gambling business" that violates this Act, the government must establish that there is a gambling operation that violates a state or local law where it is conducted; involves five or more persons that conduct, finance, manage, supervise, direct, or own all or part of the business; and remains in substantially continuous operation for more than thirty days or has a gross revenue of $2,000 in any given day.

Courts have been very liberal when determining who can be counted toward the five individuals required. In *Sanabria v. United States* (1978), the court determined that anyone involved in the business to any degree, except those merely betting, will count toward the five individuals. Further, the court in *United States v. Heacock* (1994) ruled that the five people may include everyone "from layoff bettors and line services to waitresses who serve drinks."[17]

In another case, Robert Mick and his girlfriend, Harriet Brodzinski, ran a bookmaking business out of a trailer in Alliance, Ohio, for over ten years. The business provided their sole income from the late 1980s until 1997. The trailer was set up with three telephone lines, one of which was used for a fax machine. During a two-month period in 1997, the FBI ran surveillance, which found there were over 3,400 calls on the fax machine and over 6,400 calls on the other two lines. About 98% of the fax machine calls were outgoing and about 90% of the telephone calls were incoming. In addition, Mick had a friend in Kentucky who maintains a telephone line in her house to help with the betting operations. This allowed bettors in Kentucky to make a local call, which was then forwarded to one of Mick's lines in Ohio. Mick and Brodzinski, along with Mick's two sons, answered the phone calls, which were mainly people calling to place bets on various sporting events. Mick also provided a local bar owner with parlay slips, which the bar owner then sold to his customers and took a cut. Mick also took bets from a group

[16] 18 U.S.C. Section 1955, 2010.

[17] P. 252.

of people at a local car wash, and eventually provided the owner of the car wash with a fax machine so they could place bets in that manner.

After government officials talked to several informants who claimed that Mick was involved in a bookmaking business, a search warrant was issued for Mick's home, trailer, and safety deposit box. Bank records, gambling records, utility bills, and over $125,000 in cash were found. Following the search, Mick was charged with violating the Illegal Gambling Business Act, among other federal laws, for running an illegal gambling business.[18] Although Mick admitted his bookmaking activities were illegal, he claimed that he could not be convicted of running an illegal gambling business because there were not five or more people involved in the business at all times during a thirty-day period. He admitted that he, his girlfriend, and at least one of his sons were regularly involved in the business, but he argued that nobody else's actions should be counted against him. The court included bookmakers who regularly placed bets, the friend who set up a phone line in Kentucky, and the bar owner who distributed parlay sheets on Mick's behalf, which put the amount of people regularly involved in the business well above the necessary five to classify as an illegal gambling business for purposes of the Act.[19]

Even though the Illegal Gambling Business Act focuses on interstate commerce, at times, sports betting activities can be so extreme that they are found to violate the Act even if they only take place within the confines of one state. In *United States v. Zizzo* (1997), several Chicago, Illinois, based mobsters were convicted of violating the Illegal Gambling Business Act in relation to their sports gambling operations within the Chicago area. Although the gambling operations were not conducted outside of Illinois, the court reasoned that because the gambling operation had a substantial affect on organized crime, which affected interstate commerce, the Act did apply to this otherwise local gambling business.[20]

In the end, the Illegal Gambling Business Act expanded the reach of federal regulations of sports betting in an attempt to curb larger gambling businesses and activities. As the *Zizzo* case points out, much of this focus is also on curbing organized crime. The next federal law continues this focus as it more explicitly focuses on the regulation of gambling activities and organized crime.

52.2.4 Racketeer Influenced and Corrupt Organizations Act

Also in 1970, as part of the overall federal laws aimed at controlling organized crime (and also including the Illegal Gambling Business Act), Congress also passed the Racketeer Influenced and Corrupt Organizations Act (RICO).[21] RICO

[18] *United States v. Mick*, 2001.

[19] P. 569.

[20] *Zizzo*, p. 1351.

[21] 18 U.S.C. Section 1962, 2010.

was intended to combat organized crime by attacking the sources of its revenue, such as gambling and bookmakers. The law imposes both criminal and civil sanctions on those who engage in certain prohibited activities. As defined in the Act, prohibited activities are extensively defined in the Act as follows:

> Prohibited activities
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[22]

In general, this section provides a threefold effort to combat racketeering (which can include sports betting). First, the Act makes it unlawful to invest funds derived from a pattern of racketeering activity or collected from an unlawful debt. Next, the Act forbids an entity from acquiring or maintaining an interest in an enterprise that affects commerce through a pattern of racketeering activity or through collection of an unlawful debt. And finally, as a catch-all, the Act forbids any person from being employed by or associated with these types of activities.

The *Zizzo* (1997) case discussed earlier, also involved allegations of violations of the RICO Act. In *Zizzo*, a group of notorious Chicago gangsters were involved in a sports bookmaking business in Chicago during the 1980s and early 1990s. The group often moved their operations from place to place in order to keep government agents off their trail. The mobsters took bets from people on various professional sporting events and horse races. The business was so lucrative that one of its bookies would take in $75,000–125,000 in wagers on an average weekend. All bets were allowed to be taken on credit, but in an effort to make sure that all bets were collected, the bookies were held personally responsible for any of their

[22] 18 U.S.C. Section 1962.

customers' past-due accounts. It was also well known that many of the bookies threatened to harm or kill customers who owed money. As a result of all of this evidence the defendants were convicted of violating the RICO Act, in connection with running an illegal gambling business.[23]

52.2.5 Professional and Amateur Sports Protection Act

The next major piece of federal legislation to impact sports betting came in 1992 with the enactment of the Professional and Amateur Sports Protection Act. This Act prohibits a person or government entity from operating or authorizing any betting or wagering scheme based on "competitive games in which amateur or professional athletes participate."[24] Four states (Nevada, Oregon, Montana, and Delaware) previously had state statutes allowing sports wagering prior to this Act being passed; therefore, they were not affected by the Act. This allowed Nevada to continue to offer legalized sports wagering, allowed Oregon and Delaware to continue their sports lotteries, and eventually allowed Montana to create a sports lottery.

The provisions of the Act are relatively short and simple as they provide that It shall be unlawful for-

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
(2) a person to sponsor, operate, advertise, 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 (through the use of geographical references or otherwise), 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.[25]

Of particular interest to those within the sports industry, the Act applies to both amateur and professional sports organizations. Specifically, the Act defines "amateur sports organizations," as "(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or (B) a league or association of persons or governmental entities described in subparagraph (A)."[26] "Professional sports organizations" are then defined as "(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or (B) a league or association of persons or

[23] *Zizzo*, 1997, p. 1346.
[24] 28 U.S.C. Section 3701, et. seq., 2010.
[25] 28 U.S.C. Section 3702, 2010.
[26] 28 U.S.C. Section 3701(1), 2010.

governmental entities described in subparagraph (A)."[27] As a result, amateur sports organizations such as the National Collegiate Athletic Association and the Wisconsin Interscholastic Athletic Association, along with professional organizations including the National Basketball Association and the National Football League, are all subject to the provisions of the Act.

Although it has been in place since 1992, to date there is only one reported case involving the Act. In 2007, a citizen of New Jersey, James Flagler, challenged the constitutionality of the Act before the United States District Court for District of New Jersey ruled the statute constitutional.[28] Flagler alleged that the United States Constitution did not specifically mention gambling, and therefore, any laws related to gambling should be reserved for the states. His claims were dismissed for lack of standing because Flagler was not able to show that the right to gamble on professional and amateur sports was a legally protectable interest, nor was he able to show that he suffered any harm. Further, invalidating the statute most likely would not redress his issue because Congress allowed states one year to enact legislation that would allow New Jersey residents to gamble on sporting events, but New Jersey failed to do so.[29]

52.2.6 Other Federal Laws

The federal laws discussed so far provide an extensive structure that has the potential to significantly regulate all forms of gambling in the United States.

- The *Wire Act* prohibits the use of most forms of communication devices to conduct gambling activities,
- The *Travel Act* regulates the mail and other forms of commerce that could be used to conduct gambling activities,
- The *Illegal Gambling Business Act* regulates businesses that might be set up to engage in gambling activities,
- The *Racketeer Influenced and Corrupt Organizations Act* criminalizes gambling and other racketeering activities,
- The *Professional and Amateur Sports Protection Act* prohibits the operation of gambling schemes based on amateur and professional sports.

In addition, to these comprehensive laws, a few other federal laws add to the general framework of gambling regulations within the United States, although they do not focus extensively on the types of conduct already addressed. These laws include:

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[27] 28 U.S.C. Section 3701(2).

[28] *Flagler v. U.S.*, 2007.

[29] P. *7.

- While not directly related to the regulation of gambling, the *Bribery in Sporting Contests Act*,[30] makes it a crime to bribe or attempt to bribe an individual in a scheme to influence the outcome of a sporting event. The actual scheme involved must take place in interstate commerce.[31] And the event involved can involve athletes at any level of sports participation as the act defines a "sporting contest" as "any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence."[32] Violations of this law can lead to fines and imprisonment. As many sports gambling schemes involve allegations that participants were bribed in order to affect the outcome of a game to meet or change bets made, this Act can have a wide impact and adds to the federal governments efforts to combat gambling.
- The *Money Laundering Control Act*,[33] criminalizes money laundering activities. People taking part in sports betting or gambling schemes often try to disguise where the money involved originated. This is known as money laundering. The statute criminalizes certain forms of laundering, including (1) financial transactions where the individual involved knows that the proceeds involved are from some form of unlawful activity, (2) the intentional transportation, transmission, or transfer (or attempts to do the same) of funds known to be the proceeds of an unlawful activity, and (3) intentionally conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of or used to conduct of facilitate a specified unlawful activity.[34] This conduct can lead to extensive fines and incarceration of up to 20 years.
- The *Illegal Money Transmitters Act*,[35] makes it a crime to conduct, control, manage, supervise, direct, or own all or part of a business, knowing the business is an illegal money transmitting business. This type of business is one that involves the transmission of money and affects interstate commerce in any manner and fails to comply with either state law or the registration requirements for such a business. Specific to gambling, under the Act, "money transmitting," includes transferring funds on behalf of the public by any and all means, and therefore, could cover those who transfer money as part of a sports betting scheme.
- The *Interstate Transportation of Wagering Paraphernalia Act*,[36] prohibits an individual from knowingly carrying or sending in *interstate or foreign commerce any record, paraphernali*a, ticket, certificate, bills, slip, token, paper,

[30] 18 U.S.C. Section 224, 2010.
[31] 18 U.S.C. Section 224(c)(1).
[32] 18 U.S.C. Section 224(c)(2).
[33] 18 U.S.C. Section 1956, 2010.
[34] 18 U.S.C. Section 1956(a).
[35] 18 U.S.C. Section 1960, 2010.
[36] 18 U.S.C. Section 1953, 2010.

writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game.[37]

- The statute focuses on the actual paraphernalia used within betting transactions and specifically includes materials used within wagering pools for sporting events.
- The *Federal Anti-Lottery Act*,[38] bans the transmission of lottery-related materials and paraphernalia within interstate commerce. In 1994 the general prohibitions found in the statute were modified to allow for states to create their own lotteries. Many of these state level lotteries have been used to fund the construction of sports facilities.
- The *Bank Records and Foreign Transactions Act*,[39] also known as the *Bank Secrecy Act*, requires "financial institutions" and casinos to report all currency transactions greater than $10,000 in effort to fight money laundering. Nevada casinos are exempt from these reporting requirements.
- The *Gambling Devices Transportation Act*,[40] makes it unlawful to knowingly transport a gambling device to a state where that device is prohibited by state law.
- The *Gambling Ship Act*,[41] prohibits offshore gaming except on certain voyages beyond the territorial waters of the United States.

In addition to these federal laws that add to the regulation of gambling within the United States, these federal laws actually support limited types of gambling operations.

The *Interstate Horseracing Act*,[42] supports the legality of state specific gambling and wagering connected with horse racing in order to further the horse racing and legal off-track betting industries in the United States. As gambling involved with horse races may otherwise be considered illegal under the other federal laws already discussed in this chapter, this Act immunizes such activity from liability under those other laws.

The *Indian Gaming Regulatory Act*,[43] allows for Indian tribes to control their own gaming activities. The Act allows Indian tribes to conduct gaming activities that could otherwise be found to be illegal forms of gambling, from bingo and electronic games, to slot machines and other similar high-stakes games of chance. According to the National Indian Gaming Association, 225 tribes across 28 states participate in gaming which has grown into a $25.7 billion industry for the tribes (National Indian Gaming Association 2010).

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[37] 18 U.S.C. Section 1953(a).

[38] 18 U.S.C. Section 1301, et. seq., 2010.

[39] Pub. L. No. 91-508, Titles I, II, 84 Stat. 114, 1970.

[40] 15 U.S.C. Section 1171, et. seq., 2010.

[41] 18 U.S.C. Section 1081, et. seq., 2010.

[42] 15 U.S.C. Section 3001, et. seq., 2010.

[43] 25 U.S.C. Section 2701, et. seq., 2010.

In the end, this complicated regulatory scheme leaves only one general conclusion: sports betting or gambling is illegal in virtually all forms within the United States. The only legalized forms of sports betting (besides horse racing and Indian gaming) can be found at the state level.

52.3 State Law

Each American state has created its own scheme to regulate gambling. An in-depth analysis of each state's gambling laws can be found on the *Gambling Law US* website found at http://www.gambling-law-us.com/.[44] Specifically, the website provides links to each state's particular laws[45] and a summary chart of these different laws by state.[46] For purposes of this chapter, it is only necessary to understand that the majority of states have outlawed all forms of gambling, and these all encompassing bans include sports betting.

For example, in Wisconsin, a person can be criminally liable for gambling if they make a bet, enter into a gambling place with the intent to make a bet, participate in a lottery, or play a gambling machine, or conduct, intent to conduct, or possess the facilities necessary to conduct a lottery.[47] In addition, participants in contests (including sports contests) are liable for illegal gambling, as the statute provides that "any participant in, or any owner, employer, coach or trainer of a participant in, any contest of skill, speed, strength or endurance of persons, machines or animals at which admission is charged, who makes a bet upon any opponent in such contest is guilty …"[48] Similarly, bribery of participants "with intent to influence any participant to refrain from exerting full skill, speed, strength or endurance" is also illegal.[49] Most states gambling laws mirror this example. However, a few states allow for limited forms of legal sports gambling.

Title 41 of the Nevada Revised Statutes is devoted to Gaming, Horse Racing, and Sporting Events. Specifically, in Nevada a sports pool is "the business of accepting wagers on sporting events by any system or method of wagering."[50] In order to operate a legal sports pool (or book), an individual or organization must also obtain a proper license.[51] Currently Nevada has some 142 legal sports books where bettors from around the country and world can engage in sports gambling.[52]

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[44] Humphrey 2003–8.

[45] http://www.gambling-law-us.com/State-Laws/

[46] http://www.gambling-law-us.com/State-Law-Summary/

[47] Wis. Stat. Section 945.02, 2009.

[48] Wis. Stat. Section 945.07, 2009.

[49] Wis. Stat. Section 945.08, 2009.

[50] Nev. Rev. Stat. Ann. Section 463.0193, 2010.

[51] Nev. Rev. Stat. Ann. Section 463.160, 2010.

[52] Rogers 2005, p. 51.

In Montana, sports pools and sports tab games are authorized by statute.[53] The actual sports pool is called *Montana Sports Action* and can be found online at http://www.montanasportsaction.com/index.xsp. It is also legal to participate in a fantasy sports league in Montana,[54] but it is still illegal to bet or wager on the outcome of a sports event.[55]

It is important to note the recent number of state legislatures that have looked to decrease and further regulate gambling at a state level to help with budget shortfalls. In Alabama, a bill was introduced to allow state-regulated casinos to offer the same games as Native American casinos.[56] A New Jersey legislator introduced a bill that would make most gambling, including sports gambling, legal on the Internet at the state level.[57] With this in mind states such as Missouri, Rhode Island and Delaware have urged the United States Congress to lift its ban on sports gambling.

In fact, in 2009, Delaware passed a Sports Lottery Act, authorizing sports betting and gaming at existing and future facilities in Delaware.[58] The state was immediately sued by Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League, all claiming that this new form of betting on their sport, would be in violation of the Professional and Amateur Sports Protection Act.[59] The court agreed striking down the Delaware Law insofar as it attempted to develop new forms of sanctioned sports betting in Delaware, in violation of the federal law.[60]

Overall, even though there are limited exceptions, most Americans states do not allow their citizens to gamble on sporting events.

52.4 Conclusion

In the end, although the federal regulatory scheme is extensive and complicated, the reality is that gambling on sporting events in any manner in the United States is illegal. The only way for a person to legitimately gamble on sporting events is in the state of Nevada, in limited ways in Montana and Oregon, and possibly on horse races or in Indian casinos. Otherwise, all forms of sports betting are illegal due to the many federal laws discussed in this chapter.

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[53] Mont. Code Anno., Section 23-5-502, 2007.

[54] Mont. Code Anno., Section 23-5-802, 2007.

[55] Mont. Code Anno., Section 23-5-806, 2007.

[56] HB 154, 2010.

[57] S.Res. 19, 2010.

[58] 29 Del. C. Section 4801.

[59] *OFC Comm. Baseball,* et al. *v. Markell & Lemons* 2009.

[60] *OFC Comm Baseball,* 2009, 304.

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United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979)
United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997)
Wire Communications Act of 1961, 18 U.S.C. §1084 (2010)

Chapter 53
The US System for Regulating Internet Gambling

Paul M. Anderson

Contents

53.1 Introduction

Coinciding with the explosive growth of the Internet, there has been exponential growth in Internet gambling, especially sports gambling. As with many new industries, the United States Congress is currently trying to find a way to properly monitor gambling on the Internet, as new technology has allowed for illegal gambling activities to proliferate in a medium that is much more difficult to regulate. This chapter will focus on the regulation of Internet gambling within the United States.

The problem of Internet gambling can perhaps best be understood by the statement of Thomas E. McClusky Vice President, Government Affairs Family

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P. M. Anderson et al. (eds.), *Sports Betting: Law and Policy*,
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Research Council, testifying before the House of Representatives concerning online gambling:

> When you add the anonymity of the Internet, the troubles caused by gambling increase exponentially. The theft of credit card numbers from customers is a very real concern and it is much easier for gambling web sites to manipulate games than it is in the physical world of highly regulated casinos. Additionally, gambling on the Internet provides remote access, encrypted data and, most importantly, anonymity. Because of this, a money launderer need only deposit funds into an offshore account, use that money to gamble, lose a small amount of that money, and then cash out the remaining funds.
>
> It is the uniqueness of the Internet when it comes to gambling that inspired Dr. Howard Shaffer, the director of Harvard Medical School's Division on Addiction Studies, to call Internet gambling the 'crack cocaine of the Internet' due to the ease with which online gamblers can play from home. Online players can gamble 24 h a day from home with no real sense of the losses they are incurring. Additionally, while many Internet gambling sites require gamblers to certify that they are of legal age, most make little or no attempt to verify the accuracy of the information. The intense use of the Internet by those under the age of 21 has led to concerns that they may be particularly susceptible to Internet gambling.
>
> Problem gamblers between the ages of 18 and 25 lose an average of $30,000 each year and rack up $20,000 to $25,000 in credit card debt, according to the California Council on Problem Gambling. In a health advisory issued by the American Psychiatric Association in 2001, ten percent to 15% of young people reported having experienced one or more significant problems related to gambling.[1]

Numerous studies have attempted to gauge the extent of gambling on the Internet, both by the increase in gambling websites available, and via industry revenues. Some estimates show that Internet gambling is now a $12–13 billion a year industry, with about half of that coming from gamblers in the United States.[2] In addition, in 2007 it was estimated that nearly 2,300 different websites provide gamblers with ample opportunities to place bets online.

Although these numbers are hard to verify as they are ever changing and virtually immeasurable within the online environment, the United States Congress has determined that Internet gambling is a problem that needs to be dealt with. Considering the fact that the United States has regulated gambling in all of its forms since at least 1961, this is not surprising. This chapter will focus on the regulation of gambling on the Internet within the United States at both the federal and state level.

53.2 Federal Regulation of Internet Gambling

Although gambling is illegal in the United States, except for specific exceptions in certain states, businesses have tried to avoid this issue by setting up Internet gambling operations overseas. Many of these businesses have been extremely

[1] McClusky, T.E. (2007), November 14. Online gambling. *CQ Congressional Testimony*.

[2] H.R. 2046, 2007.

successful as gambling on the Internet has become an extremely lucrative business. However, in an attempt to combat Internet gambling in the United States, the government has used traditional gambling statutes to try to shut down these operations. This section will introduce the various federal laws that currently regulate gambling and various bills that have been recently introduced in the legislature. First, the Wire Communications Act of 1961 ("The Wire Act")[3] and the Transportation in Aid of Racketeering Enterprises Act of 1961 ("The Travel Act")[4] will be discussed as both have been used to regulate Internet gambling. Next, the Unlawful Internet Gambling Enforcement Act of 2006[5] will be discussed. It is currently the only Internet-specific gambling statute in the United States. Finally, recent legislation that could affect Internet gambling will be discussed.

53.2.1 Regulations that are Not Specific to the Internet

In 1961, the government passed a variety of antiracketeering statutes. Because racketeering activities often included gambling, many of these statutes focused on regulating gambling as well. Although Internet gambling was not an issue in 1961, the Wire Act and Travel Act have been used to regulate Internet gambling because the Wire Act deals with wire communications facilities, which includes the Internet, and the Travel Act deals with facilities in general.

53.2.1.1 The Wire Act

One of the most useful statutes used in trying to combat illegal Internet gambling operations is the Wire Act. The Wire Act prevents a person engaging in interstate or foreign commerce from using a wire communication facility to assist in placing a bet on a sporting event. The first part of the Act criminalizes certain types of gambling behavior as it provides that

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[6]

[3] 18 U.S.C. Section 1084, 2010.

[4] 18 U.S.C. Section 1952, 2010.

[5] 31 U.S.C. Section 5361, et. seq. 2010.

[6] 18. U.S.C. Section 1084(a), 2010.

Both the telephone and the Internet are considered wire communications facilities; and therefore, the government has used the Wire Act to prosecute individuals running Internet gambling operations overseas.

53.2.1.2 The Travel Act

Another important federal statute used to combat gambling is the Travel Act. Similar to the Wire Act, the Travel Act may also be used to prosecute people in the business of Internet gambling. This Act prevents anyone from using any facility in interstate or foreign commerce to distribute the proceeds of any unlawful activity, including gambling. The Travel Act specifically provides that

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to-
>
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform-
>
> (A) an act described in para (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in para (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.[7]

For purposes of the Travel Act, an "unlawful activity" includes illegal gambling, which can include sports betting. The courts have determined that the use of the mail, telephone or telegraph, newspapers, credit cards and tickertapes is sufficient to establish that a defendant "used a facility of interstate commerce" to further an unlawful activity in violation of the Travel Act. Obviously, as Internet gambling transactions involve the use of a credit card, these transactions can also come under the regulation of the Act.

53.2.1.3 Case Law Involving the Wire and Travel Acts

Because most cases contesting illegal gambling activities are brought under both the Wire and Travel Acts, the following cases will be used to illustrate how these laws have been applied to Internet gambling.

United States v. Cohen (2001) illustrates how the government has used the Wire Act to prosecute those involved in Internet gambling operations. Jay Cohen ran one of the most lucrative online sports bookmaking sites in the late 1990 s before he was convicted of violating the Wire Act. In 1996, Cohen, along with several business partners, started a business called World Sports Entertainment (WSE).

[7] 18 U.S.C. Section 1952.

WSE accepted bets on American sporting events through both the Internet and over the phone. WSE successfully targeted American customers through several media such as radio, television and newspaper. Clearly these attempts at targeting were successful as WSE was able to attract 1,600 American customers within the first year. Prior to allowing customers to place bets, WSE required them to open an account with WSE and wire at least $300 to a bank in Antigua to open that account. After opening the account, customers contacted WSE via the Internet or phone to place bets.

The FBI began investigating Cohen and WSE during late 1997 and early 1998. FBI agents contacted WSE by both phone and Internet to place bets after they had opened accounts. In March 1998, Cohen was arrested and charged with conspiracy to violate and actually violating the Wire Act. After a jury trial found him guilty of violating the Wire Act, he was sentenced to twenty-one months in prison.[8]

During the late 1990s as Internet gambling became more popular, states began to notice that their residents were engaging in this behavior and wanted to prevent this from occurring. In 1998, the state of New York sued World Interactive Gaming Corporation (WIGC) and Golden Chips Casino, Inc. (GCC) to enjoin them from operating within New York or offering New York residents the opportunity to gamble over the Internet while located in New York.[9]

In Vacco, the main issue the court needed to determine was whether a state could enjoin a foreign corporation that was "legally licensed to operate a casino offshore from offering gambling to Internet users in New York."[10] WIGC operated its offices in New York and was incorporated in Delaware. WIGC owned GCC, which was an Antiguan subsidiary corporation licensed to operate a land-based casino in Antigua. GCC then purchased computer servers and developed software that allowed users to gamble over the Internet from computers located all over the world. GCC promoted its Internet casino over the Internet and through a gambling magazine that was targeted to people in the United States.

In order to gamble with WIGC, customers were required to register for an account. When registering for an account, a customer was required to submit a permanent address in a state that allowed land-based gambling. Anyone who entered a state that did not allow land-based gambling was prohibited from creating an account. However, users could get around the system by going back to the registration page and entering an address in a state such as Nevada, which allows land-based gambling. The plaintiffs claimed that because it was so easy to circumvent the system, the defendants did not make a good faith effort at preventing New York residents from engaging in online gambling. The defendants claimed that the transactions occurred off shore and that there were no state or federal laws that regulated Internet gambling and applied to their conduct.[11]

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[8] *United States v. Cohen*, 2001, p. 70.

[9] *Vacco v. World Interactive Gaming Corp.*, 1999.

[10] *Id*, p. 846.

[11] *Id*, p. 848.

The court disagreed with the defendants' argument and found that its activity not only violated New York state statutes, but also the Wire and Travel Acts.[12] As the court explained, the Wire Act prohibits people from using a "telephone facility" to receive bets or send gambling information while engaged in interstate or foreign commerce.[13] The Internet is accessed through a telephone wire, which implicated the Wire Act in this case. The Travel Act then prevents anyone from using any facility to promote or manage any illegal activity or distribute the proceeds of any illegal activity.[14] The defendants here used a facility in Antigua and New York to both promote and manage the illegal activity of gambling as well as distributing the proceeds from the illegal gambling operation. Therefore, their conduct violated both federal laws.

As these cases demonstrate, state and federal authorities have been able to sue individuals who engage in Internet gambling claiming that their behavior is illegal gambling under both the Wire and Travel Acts. In 2006, the federal government went further enacting specific legislation meant to deal with Internet gambling.

53.2.2 Federal Regulation of Internet Gambling

Although the United States Congress has repeatedly expressed concern over the negative impact that gambling can have on American society, it is clear that this impact could be much worse if Internet gambling is not strictly regulated. Internet gambling can exacerbate some of the problems associated with gambling, especially underage gambling and gambling addictions. Because of the anonymity that the Internet provides, it is often difficult for owners of Internet gambling sites to determine whether players are of legal gambling age. In addition, as the Internet has grown in popularity, it has become more and more accessible and therefore, it is easier and easier to engage in Internet gambling activities. Therefore, the United States Congress has determined that it has a strong interest in regulating Internet gambling in order to ensure that all users are of legal age, to prevent illegal gambling, and to prevent excessive gambling that may lead to addictive behavior.[15] Congress' first step in regulating Internet gambling was taken when it enacted the Unlawful Internet Gambling Enforcement Act of 2006.

[12] *Id*, p. 851.
[13] *Id,* p. 852.
[14] *Id*, p. 846.
[15] GAO, 2002, 2–11.

53.2.2.1 Unlawful Internet Gambling Enforcement Act of 2006

In general, the Unlawful Internet Gambling Enforcement Act (UIGEA) prohibits the transfer of funds from a financial institution, such as a bank or credit card company, to an Internet gambling website.[16] However, the provisions of the law are extensive.

According to Congress, the UIGEA was enacted for several reasons. Initially, Congress recognized the difficulty in regulating Internet gamblers because this form of gambling is funded through the "personal use of payment system instruments, credit cards, and wire transfers."[17] In addition, in 1999 the National Gambling Impact Study Commission recommended that Congress pass some legislation that would "prohibit wire transfers to Internet gambling sites or the banks which represent such sites."[18] Moreover, Congress recognized that "Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry" and that "[n]ew mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet."[19]

Of particular importance to Internet gamblers, the Act defines a bet or wager as

> (A) the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;
> (B) the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);
> (C) any scheme of a type described in [The Professional and Amateur Sports Protection Act of 1992);
> (D) any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering.[20]

The term "unlawful internet gambling" then means to

> place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.[21]

As an exercise of the congressional power under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, the Unlawful Internet

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[16] 31 U.S.C. Section 5361, et. seq. 2010.
[17] 31 U.S.C. Section 5361(1), 2010.
[18] 31 U.S.C. Section 5361(2).
[19] 31 U.S.C. Section 5361 (3–4).
[20] 31. U.S.C. Section 5362(1), 2010.
[21] 31. U.S.C. Section 5362(10)(A), 2010.

Gambling Enforcement Act regulates only activities that take place as part of interstate commerce, or commercial activity between different states. In this way, states are left to create their own independent regulations.

The law does not make it illegal for a person to participate in Internet gambling. Instead, in order to regulate Internet gambling activities, the law focuses on financial institutions and Internet service providers and prohibits the acceptance of funds from bettors by operators of most online gambling websites as it provides

> No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—
>
> (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
> (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
> (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
> (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.[22]

The Act then calls for financial institutions to adopt procedures and policies designed to block the flow of prohibited funding to the operators of the affected online gambling websites,[23] and gives federal and state attorneys general the power to seek civil remedies to help enforce the other provisions of the Act.[24] In addition, anyone who violates the Act can be subject to criminal penalties including fines and imprisonment up to 5 years.[25]

Interestingly, the law exempts participation in fantasy sports online. Such activity, defined as

> (ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in [the Professional and Amateur Sports Protection Act of 1992] and that meets the following conditions:
>
> I. All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
> II. All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

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[22] 31 U.S.C. Section 5363, 2010.

[23] 31 U.S.C. Section 5364, 2010.

[24] 31 U.S.C. Section 5365, 2010.

[25] 31 U.S.C. Section 5366, 2010.

III. No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.[26]

is specifically excluded from the Act's definition of a covered bet or wager.

The provisions of the Act are then enforced by certain provisions of the Code of Federal Regulations. These Code provisions focus on setting forth ways to monitor financial institutions and other organizations who come under the Act.[27] As part of the Code related to banks and banking, the provisions set forth regulations for financial institutions and ways to monitor the payment systems prohibited by the Act.

Overall the impact of this Act is still to be seen. Immediately after its passage, many Internet gambling sites stopped taking bets from United States gamblers using American financial institutions. However, the application of the law to gambling and gamblers is less clear as there has been little litigation involving the Act. The Act was scheduled to go in effect on December 1, 2009; however, financial institutions, thoroughbred racing organizations, and gambling interests pressured the Treasury Department and Federal Reserve to grant a six-month delay to allow legislators an opportunity to draft new legislation to clarify the existing Act.

53.2.2.2 Case Law Involving the Unlawful Internet Gambling Enforcement Act

Although there have not been many cases brought under this new law, a few cases have tested the waters to determine how the law will be enforced.

In 2008, Interactive Media Entertainment and Gaming (Interactive Media), a non-profit group that collects and disseminates information on Internet gambling, claimed that the Unlawful Internet Gambling Enforcement Act was unconstitutional and moved to enjoin the Act from being enforced.[28] Interactive Media claimed that the Act violated the First Amendment by burdening its freedom to express itself about Internet gambling in certain ways. The New Jersey District Court held that the Act does not burden any group's expressive association freedoms because it does not prevent the group from expressing its views on Internet gambling.[29] In fact, nothing in the Act prevents the plaintiffs from continuing to promote Internet gambling. As the court explained, "the plaintiff and its members remain free to promote Internet gambling; nothing in the challenged statute implicates the plaintiff's expressive activities in this regard."[30]

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[26] 31 U.S.C. Section 5362(I)(E)(ix), 2010.

[27] 12 C.F.R. 233, 2010.

[28] *Interactive Media Entm't & Gaming Ass'n v. Gonzales*, 2008.

[29] *Id*, p. *22.

[30] *Id*, p. *22.

Interactive Media also claimed that the Act also violated its rights to be free from regulations impacting commercial speech because it criminalizes the transfer of funds. The court did not agree as it found that the Act criminalizes only the acceptance of money in connection with illegal Internet gambling, and the acceptance of money is not speech.[31]

Interactive Media also claimed that the Act is both "overbroad [and] void for vagueness."[32] The overbroad claim failed because the overbreadth doctrine is relevant only to constitutionally protected conduct and the financial transactions included in the Act are not protected speech; and therefore, are not considered protected conduct. The Act does not deal with constitutionally protected conduct, and therefore, the Act is not covered by the overbreadth doctrine and cannot be considered overbroad. Similarly, the Act is not void on vagueness grounds. Although the Act may cause operators of an Internet gambling business to incur additional costs because they have to ensure that the wagers made are not illegal, it is not vague. As the court explained, the Act clearly outlines what conduct is considered illegal and what actions businesses need to take to ensure they are not violating the Act.[33]

Finally, Interactive Media claimed the Act violated the Tenth Amendment by taking away the rights of the states to regulate gambling. The court dismissed the Tenth Amendment claim for lack of standing because private individuals lack standing to bring Tenth Amendment claims.[34] However, because the statute regulates interstate commerce, even if Interactive Media did have standing, it would be considered a proper exercise of Congress's interstate commerce powers.

Another recent case focused on whether online fantasy sports leagues do not violate the Unlawful Internet Gambling Act.[35] In *Humphrey*, the plaintiff tried to sue to recover under a Qui Tam statute, claiming that the people involved in fantasy sports leagues were making bets. Qui Tam statutes are derived from an old English statute that allows gamblers to recover their losses. The Qui Tam statute permits gamblers to recover the losses incurred while playing "cards, dice, billiards…or by betting on [a] sport or pastime."[36] The defendant ran a fantasy sports league where participants paid a fee to join the league and use services that came along with it, such as real-time data. The entrance fee also included services to manage the fantasy league, such as the ability to draft players as well as trade. At the end of the fantasy league season, winners were awarded prizes that had been announced in advance and did not have any correlation to the amount of people who registered.

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[31] *Id*, p. *27.

[32] *Id*, p. *27.

[33] *Id*, p. *28.

[34] *Id*, p. *35.

[35] *Humphrey v. Viacom*, 2007.

[36] *Id*, 2007, pp. *7.

The court rejected the plaintiff's claim and went on to explain that when there is a specific entry fee, prizes are announced in advance, and these prizes have no correlation to the entry fees, the entry fee to the fantasy league will not be considered a bet.[37] The court also pointed to the Unlawful Internet Gambling Act, which specifically excludes these types of fantasy sports leagues from its definition of bets or wagers.

So far these are the only United States court decisions that have discussed the application of the Unlawful Internet Gambling Act. Presumably as the provisions of the Act are given fuller affect more litigation will follow in the future.

53.2.3 Recent Internet Gambling Initiatives

Although Congress passed the Unlawful Internet Gambling Enforcement Act in 2006, the House of Representatives has introduced several additional bills related to Internet gambling since that time. These bills have focused on further analysis of the problem of Internet gambling, finding ways to tax the proceeds of Internet gambling activities, licensing operators of Internet gambling websites, and

- *The Internet Gambling Regulation, Consumer Protection, and Enforcement Act*,[38] grants the Secretary of the Treasury regulatory and enforcement jurisdiction over the Internet Gambling Licensing Program established by this Act, prescribes administrative and licensing requirements for Internet betting and prohibits any person from operating an Internet gambling facility that knowingly accepts bets or wagers from persons located in the United States without a license issued by the Secretary. The Bill was referred to various house committees in December of 2009.
- The *Internet Gambling Regulation and Tax Enforcement of* 2009,[39] would amend the Internal Revenue Code to impose an Internet gambling license fee on online operators, require them to file returns identifying themselves and the individuals placing wagers with them, withhold a tax on annual Internet gambling winnings of more than $5,000, impose a 30% tax on the Internet gambling winnings of non-resident aliens, and impose an excise tax on wagers on any individual who places a wager with an unlicensed Internet gambling operator. The Bill was referred to the House Committee on Ways and Means in May of 2009.
- The *Internet Poker and Game of Skill Regulation, Consumer Protection, and Enforcement Act of* 2009,[40] prescribes federal administrative and licensing requirements governing Internet game-of-skill facilities. Vests the Secretary

[37] *Id*, pp. *18-20.

[38] H.R. 2267, 2009.

[39] H.R.2268, 2009.

[40] H.R. 1597, 2009.

of the Treasury with regulatory and enforcement jurisdiction over such facilities. Prohibits any person from operating an Internet game-of-skill facility that knowingly accepts bets or wagers from persons located in the United States without a license issued by the Secretary. The Bill was referred to the Committee on Finance in August of 2009.

Although to date none of these bills has passed, they demonstrate the continuing focus that federal legislators have on the problem of Internet gambling.

53.2.4 Summary of Federal Legislation

Overall, through the Wire, Travel and Unlawful Internet Gambling Enforcement Acts, the United States Congress has set up a scheme that makes it very difficult for any private individual to participate in gambling on the Internet, including sports gambling. Even though the actual practice of online gambling is perhaps not illegal (at least under the Unlawful Internet Gambling Enforcement Act), the regulations imposed on gambling in general, and the regulations imposed on financial institutions and Internet service providers, make it difficult to see how a United States citizen can engage in any legal form of online gambling. And the latest federal law in 2006 has not ended the discussion as Congress has continued to review and debate further federal regulations in the intervening years.

Of course, as with all legislative regulation of gambling within the United States the analysis must now shift to an analysis of these regulations by individual states.

53.3 State-Specific Regulation of Internet Gambling

Prior to the passing of the Unlawful Internet Gambling Enforcement Act, several states passed laws specific to Internet gambling. Currently, Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Washington and Wisconsin have passed laws related specifically to Internet gambling. These states have used a variety of measures to prohibit Internet gambling.

For instance, Louisiana, Oregon and South Dakota have all enacted specific statutory provisions that deal with "Internet gambling" or "Gambling by computer." For example, in its general statute that criminalizes gambling, Louisiana defines prohibited "Gambling by computer" as

> the intentional conducting, or directly assisting in the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet, World Wide Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server.[41]

[41] La. Rev. Stat. Ann. Section 14:90.3, 2010.

Similar statutes can be found in Oregon and South Dakota.[42] In fact, Chapter 22–25A of the South Dakota statutes focuses exclusively on "Internet gambling" and provides that no one in the state can engage in or establish a website that conducts Internet gambling activities.[43]

Other states have created specific provisions that legalize some forms of licensed gambling activities. The Montana legislature has found that

> The legislature finds that for the purpose of ensuring the proper gambling environment in this state it is necessary and desirable to adopt a public policy regarding public gambling activities in Montana. The legislature therefore declares it is necessary to:
>
> (a) create and maintain a uniform regulatory climate that assures players, owners, tourists, citizens, and others that the gambling industry in this state is fair and is not influenced by corrupt persons, organizations, or practices;
> (b) protect legal public gambling activities from unscrupulous players and vendors and detrimental influences;
> (c) protect the public from unscrupulous proprietors and operators of gambling establishments, games, and devices;
> (d) protect the state and local governments from those who would conduct illegal gambling activities that deprive those governments of their tax revenues;
> (e) protect the health, safety, and welfare of all citizens of this state, including those who do not gamble, by regulating gambling activities; and
> (f) promote programs necessary to provide assistance to those who are adversely affected by legalized gambling, including compulsive gamblers and their families.[44]

Within its definition of regulated gambling it then defines Internet gambling as

> 'Internet gambling,' by whatever name known, includes but is not limited to the conduct of any legal or illegal gambling enterprise through the use of communications technology that allows a person using money, paper checks, electronic checks, electronic transfers of money, credit cards, debit cards, or any other instrumentality to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes, or other similar information.[45]

Interestingly, the state of Nevada, one of the few states where gambling is legal within the United States, has made Internet gambling illegal. However, it has left itself room to allow Internet gambling in the future.[46] This statute states that the Nevada Gaming Commission will not allow the licensing of an Internet gambling operation until the Commission has determined that Internet gambling operations can be operated in compliance with applicable laws and they are secure and reliable. However, if the Commission comes to that conclusion it is possible for Internet gambling to be legal in the state of Nevada in the future.

Overall, the regulation of Internet gambling at the state level is a relatively new phenomenon with states now including specific definitions of this type of gambling

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[42] Or. Rev. Stat. §167.109, 2007; S.D. Codified Laws Section 22-25A, et seq., 2010.

[43] S.D. Codified Laws Section 22–25A- 7-8, 2010.

[44] Mont. Code Ann., Section 23-5-110, 2007.

[45] Mont. Code Ann., Section 23-5-112, 2007.

[46] Nev. Rev. Stat. Section 463.750, 2007.

activity within their legislation. Unlike federal legislation, most of the state laws specifically target and criminalize the actual activity of Internet gambling. Therefore, because few states allow for any form of legalized gambling, coupling these laws with the federal laws already discussed, leads to an overall scheme that prohibits virtually any form of Internet gambling within the United States.

53.4 Conclusion

The participation of American citizens in Internet gambling continues to grow. While Congress and the states have put forth extensive regulations attempting to regulate this activity, the nature of the Internet leads to problems with enforcement. As a result while most states have outlawed Internet gambling by individuals, Congress has instead focused on financial institutions and service providers. As with any new legislation focused on the Internet, the impact of this legislation at both the federal and state level is still too difficult to assess. Instead, gambling activities on the Internet continue to proliferate. And with much illegal gambling focused on sports, the problem of sports gambling on the Internet will continue into the foreseeable future.

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Chapter 54
US Collegiate Athletics

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As collegiate athletics has become a major part of the American sports scene, concerns over internal and external gambling influences have led to private rules and public laws that attempt to regulate such activity. College sport, similar to its professional counterpart, must constantly work to control egregious actions by those involved in sports gambling that could influence the outcome of the game. Anti-gambling rules and governmental laws are designed to curb various types of cheating, especially those linked to sports gambling in collegiate athletics.

The National Collegiate Athletic Association (NCAA) governs most of the intercollegiate sports in the United States and has responded to numerous gambling scandals over the years by enacting rules (i.e., bylaws) designed to punish violators which fall under its jurisdiction. Additionally, there have been numerous state and federal laws that have been enacted to curtail gamblers influencing the outcome of collegiate sports events. If the NCAA did not address and aggressively pursue individuals or groups who surreptitiously yet effectively influence who wins or who loses a sporting event, the public-at-large would lose faith in the college sports product. Fans, alumni, and others, would not know whether the game at-hand is played on an even field, or whether it is played in favor of one team over the other. This would simply ruin the integrity of college sports.

This chapter explores the intercollegiate sports gambling landscape. Section one introduces the popularity of gambling in the United States and specifically addresses the rise in sports gambling and the role college sports play in this new phenomena. Sections two and three focus on the NCAA; more specifically, its governance structure, regulatory culture, anti-sports gambling regulations, and the enforcement of those regulations. Section four provides a summary of notable college sports gambling cases and the NCAA sanctions that resulted. Finally, Sections five and six discuss other policies and regulations that have attempted to curtail gambling on collegiate sports, including federal and state legislation.

54.1 Collegiate Sports Gambling

Gambling in general, including sports gambling, is a popular form of recreation in the United States and an increasingly popular pastime for youth and college-age adults. Revenue from all forms of gambling in the United States topped $90 billion in 2006.[1] Because of the tremendous revenue that gambling generates, governments at all levels within the United States have relaxed laws that once outlawed such wagering. For example, in the decade between 1985 and 1995, 48 of 50 states revised laws that prohibited gambling to allow limited legalized gaming, including regulated casino-style games and state-run lotteries.[2] As of 2007, Hawaii and Utah were the only states that prohibited any form of gambling within their borders.[3]

Although gambling on sports (professional or amateur) remains illegal in all states but Nevada and Oregon, an estimated $80 to $380 billion is illegally bet on sporting events in the United States each year.[4] Gambling on collegiate or amateur sports is permitted only in Nevada, where it is estimated that $2.5 billion is annually wagered on college sports, $197 million of which is attributed to bets surrounding the NCAA's Division I men's basketball tournament.[5] In addition, illegal gambling on the NCAA tournament through informal office or neighborhood betting pools is estimated at $6 billion.[6] Further evidence as to the pervasiveness of collegiate sports gambling is the "Latest Line" (i.e., the latest point spread on college basketball and football contests), which is published in daily newspapers throughout the United States and on the Internet.[7] Despite its popularity, the NCAA's position on sports gambling is quite clear: anyone involved in intercollegiate athletics is prohibited from participating in virtually all forms of sports gambling regardless of its legality.[8]

54.2 The NCAA

The Indianapolis, Indiana-based NCAA is a tax-exempt, voluntary amateur athletic association composed of 1,162 members. Its membership includes four-year collegiate institutions and athletic conferences located throughout the United States.[9] There are approximately 380,000 student-athletes who participate in the

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[1] American Gaming Association 2008.
[2] Dunstan 1997; Eadington 1996, pp. 3–8.
[3] Prah 2007.
[4] Kindt and Asmar 2002; Weinberg 2003.
[5] Armour 2008, p. B3; Weinberg 2003.
[6] McCarthy 2007a, p. C1.
[7] Grady and Clement 2005.
[8] NCAA 2004a, p. 5.
[9] NCAA n.d.b.

NCAA's three divisions of competition (Divisions I, II, III).[10] The NCAA administers 23 sports, 88 championships (41 men's, 44 women's, 3 mixed) and approximately 49,000 student-athletes compete in these championships each year.[11] The NCAA has a multi-tiered, federated governance structure with more than 125 committees, both association-wide and division-specific.[12] Association-wide committees are composed of representatives from member schools and conferences in each of the NCAA's three divisions.[13] Committees are responsible for addressing a variety of issues ranging from eligibility requirements, drug-testing policies and procedures, recruiting rules and other competitive health and safety rules including a firm stance against sports gambling (also referred to as sports wagering or gaming).[14]

Each NCAA Division also has its own governance structure with its own committees that have adopted regulatory rules known as "Bylaws," which are codified in the respective Division's annual publication known as the NCAA Manual. NCAA Division I includes the most prominent schools and conferences. Division I is separated into three subdivisions based on football sponsorship. The Football Bowl Subdivision, formerly known as Division I-A, includes approximately 119 Division I schools that sponsor the most publicized football programs and offer the largest number of athletic scholarships.[15] The remaining Division I schools either sponsor lesser funded football programs that compete in the Football Championship Subdivision (formerly known as Division I-AA) or do not sponsor football as an intercollegiate sport. Divisions II and III fund intercollegiate athletics programs at an even lesser amount than Division I members.[16]

Although sponsorship of a football program is optional, all Division I schools sponsor a men's basketball program.[17] The NCAA's annual "March Madness" basketball tournament is one of the most celebrated and well-organized athletics events in the United States. ''March Madness" has evolved into an American passion that engulfs students of all ages, student-athletes, alumni, retirees, and general rank-and-file employees throughout the United States. Office parlay cards and other gambling sheets grab significant attention of millions of persons, and no other NCAA event draws as much interest, as bets placed on the outcome of the tournament bracket appear in almost every major newspaper in the United States.[18]

The lucrative and speculative nature of sports competition and the need to maintain its voluntary, non-profit amateur status, require the NCAA to take a harsh

[10] NCAA n.d.k.

[11] *Id.*

[12] NCAA n.d.b.

[13] NCAA n.d.a.

[14] Sawyer et al. 2008.

[15] NCAA n.d.k.

[16] NCAA n.d.l.

[17] NCAA n.d.c. Bylaw 20.9-(e).

[18] *NCAA's gambling madness* 2007 , p. 8.

stance toward influences that could unfairly taint the outcomes of its events or the integrity of its sports programs.[19] Specifically, incidents of gambling, game-fixing (i.e., "point shaving") ,and sports bribery led the NCAA to adopt regulations prohibiting any form of sports wagering connected to its events or the athletes and administrators who fall under its jurisdiction.[20] The following section traces the creation of these regulations and present-day application.

54.3 NCAA Sports Gambling Regulations

The NCAA first discussed the perils of sports gambling at its 1939 convention when it created its unethical conduct legislation, now known as Bylaw 10 of the Division I Manual.[21] Express NCAA legislation on this issue was not adopted until 1983 with subsequent modifications added in 1997, 2000, and 2006. The 1983 legislation codified a long-standing rule interpretation that gambling on intercollegiate athletic events by student-athletes, coaches, and athletics administrators, constituted unethical conduct.[22] In 1996, the NCAA expanded its prohibition on sports gambling to include wagers made on professional sports.[23] Then, in 2006, language was added to address the concern over Internet gambling and to clarify the scope of individuals considered to be included in the athletics department staff.[24]

54.3.1 NCAA Manual Provisions

Below are the relevant portions of Bylaw 10 as published in the 2007–2008 Division I NCAA Manual. Identical legislation exists in NCAA Divisions II and III. These provisions can be found in the latest version of the NCAA Manual which can be accessed online on the NCAA's web site, at http://www.ncaa.org/ within the "Legislation and Governance" area under "Rules and Bylaws."

Provisions from NCAA Bylaw, Article 10: Ethical Conduct

10.02 Definitions And Applications.

10.02.1 Sports Wagering. Sports wagering includes placing, accepting, or soliciting a wager (on a staff member's or student-athlete's own behalf or on the behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest. Examples of sports wagering include,

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[19] *Ban on Amateur Sports Gambling: Hearing before the Committee on Commerce, Science and Tansportation* 2001, p. 1.

[20] Byers 1995.

[21] NCAA 1939.

[22] NCAA 1983, Proposal No. 134.

[23] NCAA 1996, Proposal No. 15.

[24] NCAA n.d.e., Proposal No. 2006-17-A.

but are not limited to, the use of a bookmaker or parlay card; Internet sports wagering; auctions in which bids are placed on teams, individuals or contests; and pools or fantasy leagues in which an entry fee is required and there is an opportunity to win a prize.

10.02.2 Wager. A wager is any agreement in which an individual or entity agrees to give up an item of value (e.g., cash, shirt, dinner) in exchange for the possibility of gaining another item of value.

10.3 Sports Wagering Activities

The following individuals shall not knowingly participate in sports wagering activities or provide information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur, or professional athletics competition:

(a) Staff members of an institution's athletics department;
(b) Nonathletics department staff members who have responsibilities within or over the athletics department (e.g., chancellor or president, faculty athletics representative, individual to whom athletics reports);
(c) Staff members of a conference office; and
(d) Student-athletes.

10.3.1 Scope of Application. The prohibition against sports wagering applies to any institutional practice or any competition (intercollegiate, amateur, or professional) in a sport in which the Association conducts championship competition, in bowl subdivision football and in emerging sports for women.

10.3.1.1 Exception. The provisions of Bylaw 10.3 are not applicable to traditional wagers between institutions (e.g., traditional rivalry) or in conjunction with particular contests (e.g., bowl games). Items wagered must be representative of the involved institutions or the states in which they are located.

10.3.2 Sanctions. The following sanctions for violations of Bylaw 10.3 shall apply:

(a) A student-athlete who engages in activities designed to influence the outcome of an intercollegiate contest or in an effort to affect win–loss margins ('point shaving') or who participates in any sports wagering activity involving the student-athlete's institution shall permanently lose all remaining regular-season and postseason eligibility in all sports.
(b) A student-athlete who participates in any sports wagering activity through the Internet, a bookmaker or a parlay card shall be ineligible for all regular-season and postseason competition for a minimum of a period of one year from the date of the institution's determination that a violation occurred and shall be charged with the loss of a minimum of one season of eligibility. If the student-athlete is determined to have been involved in a later violation of any portion of Bylaw 10.3, the student-athlete shall permanently lose all remaining regular-season and postseason eligibility in all sports.

10.4 Disciplinary Action

Prospective or enrolled student-athletes found in violation of the provisions of this regulation shall be ineligible for further intercollegiate competition, subject to appeal to the Committee on Student-Athlete Reinstatement for restoration of eligibility.[25] Institutional staff members found in violation of the provisions of this

[25] See Bylaw 10.3.2 for sanctions of student-athletes involved in violations of 10.3.

> regulation shall be subject to disciplinary or corrective action as set forth in Bylaw 19.5.2.2 of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual's previous employment at another member institution.

Applied collectively, these relatively recent NCAA bylaws prohibit college and university staff members affiliated with athletic departments from wagering on professional and amateur sports gambling. In sum, the current NCAA rules render it impermissible to: (a) provide information to individuals who are involved in organized gambling activities; (b) solicit a bet on any intercollegiate team or to accept a bet on any team representing the school; (c) accept or solicit a bet on an intercollegiate competition through any method utilized by organized gambling.[26]

Bylaw 10.02 and its subparts define "wagering" and the NCAA has interpreted the provision to prohibit activities such as bets among friends who wager a non-material item (e.g., dinner, clothing), and the re-sale of ticket options to college or professional sports contents.[27] However, the provision does not apply to wagers on sports not sponsored by the NCAA such as horse racing, nor does it universally apply to fantasy leagues or bracket pools.[28] In the case of fantasy leagues or bracket pools, a 10.02.1violation only occurs in instances in which both an entry fee is required and a prize is awarded.[29]

Bylaw 10.3 re-enforces the wagering prohibition and also makes it an NCAA rules violation to aid any individual involved in such sports wagering by providing them with information or performing actions that further their gambling efforts. This portion of the bylaw was adopted to address incidences such as point-shaving. Bylaws 10.3.1 and 10.02.1 and other provisions regulating gambling conduct also apply to membership conference staff, coaches and, of course, student-athletes. Interestingly, they also apply to the chancellor or president of an NCAA institution and faculty members associated with the athletics department.[30]

Prior to 1999, the penalties for violating provisions such as 10.3.1 were applied haphazardly and did not appear to be deterring student-athletes from gambling on college or professional sports. Accordingly, the NCAA tightened the penalties for sports gambling by adopting Bylaw 10.4, which adds specific penalties for student-athletes found in violation of the rules.[31] Most notable is that a student-athlete will lose NCAA eligibility permanently if they are involved in a point-shaving scheme of any sort. Those who are found to have bet or accepted bets generally on intercollegiate or professional athletics by utilizing organized gambling methods are ineligible for intercollegiate competition for a minimum of one year and lose one season of competition. Bylaw 10.4 reiterates the penalties against student-

[26] NCAA n.d.c., Bylaw 10.3.

[27] NCAA n.d.f.

[28] NCAA n.d.d., Proposal No. 2006-17-B.

[29] NCAA n.d.i.

[30] NCAA n.d.c, Bylaw 10.02.1.

[31] NCAA n.d.d.

athletes for unethical conduct (including gambling) and clarifies that campus administrators found in violation of the gambling regulations are subject to the penalties listed in Bylaw 19.5.2.2, which include public censure, institutional probation, and even termination of employment.[32]

The NCAA bylaws discussed above have little meaning without a mechanism through which they can be enforced. This mechanism was established in 1952, with the creation of the NCAA's enforcement program.[33] The following section explains the current NCAA enforcement process and its role in the Association's handling of allegations of sports gambling on member campuses.

54.3.2 NCAA Enforcement Process

The initial rationale behind the enforcement program was to create cooperative undertaking involving member institutions and conferences working together through the NCAA for an improved administration of intercollegiate athletics.[34] The NCAA Enforcement staff seeks and processes information related to "major" and "secondary" violations of NCAA legislation.[35]

According to NCAA Bylaw 19.02.2.1, secondary violations are actions that are "isolated or inadvertent in nature" and at best provide "only a minimal recruiting, competitive or other advantage and does include any significant recruiting inducement or extra benefit."[36] Individuals or institutions found to have committed a secondary violation will receive only minor penalties as determined bya committee composed of individuals from the membership and assisted by NCAA staff.[37]

An example of a secondary sports gambling violation is the 2005 case involving five men's track and field student-athletes at Tulane University.[38] According to NCAA reports, the student-athletes agreed to participate in a professional football pool during the 2004–2005 academic year in violation of Article 10.[39] The pool was run by a non-student-athlete. Tulane officials discovered the violation after a track and field coach saw one of the betting sheets. The institution's investigation revealed that although each of the five student-athletes had prepared a betting sheet, no money had exchanged hands and the student-athletes were unaware that the NCAA's anti-sports gambling rules included both professional and college

[32] NCAA n.d.c.
[33] NCAA n.d.h.
[34] *Id.*
[35] Rogers and Ryan 2007.
[36] NCAA n.d.c.
[37] NCAA n.d.h.
[38] NCAA n.d.j.
[39] NCAA n.d.j.

sports. Because of the one-time occurrence, limited nature of the gambling, and apparent lack of knowledge of the NCAA anti-gambling rules, NCAA staff determined that the violations were secondary. As a result, rather than be deemed permanently ineligible, the student-athletes were eventually reinstated for competition after performing community service.[40] Had the investigation revealed that large amounts of money had been exchanged, or that there were significant numbers of student-athletes participating in the pool, the NCAA would have likely deemed the violations "major."[41]

As defined in NCAA Bylaw 19.02.2.2, major violations are generally defined as all other violations, but specifically include "violations that provide an extensive recruiting or competitive advantage."[42] Investigations of alleged major violations commence upon the NCAA's receipt of credible information that a rule infraction has taken place. Sources of information vary from formal letters to anonymous phone calls.[43] Once the veracity of the source is confirmed, the NCAA forwards a notice of inquiry to the institution alerting the school that it is under investigation. If it has not already done so, the institution begins its own investigation into the allegations. Information from all investigations is evaluated by the NCAA enforcement staff and if the staff believes a major violation has occurred it will issue a notice of allegations to the institution. The notice of allegations notifies all involved parties of the violations of NCAA legislation that the enforcement staff believes occurred. The institution and others named in the document may respond to the enforcement staff's allegations. Once all parties have responded, a hearing date is set before the Committee on Infractions.[44]

A notable example of a major violation in the NCAA sports gambling context is the infractions case involving University of Washington (UW) football coach Rick Neuheisel. In April 2002, a confidential source contacted the NCAA enforcement staff and reported that Neuheisel, a former college quarterback at the University of California at Los Angeles (UCLA), bet close to $15,000 in a "March Madness" basketball gambling pool (Merron, 2006). The NCAA enforcement staff investigated the allegations by interviewing the confidential source, Neuheisel, and other athletics department staff at UW. A notice of inquiry was issued and the institution and conference also conducted investigations. Based on the findings of those initial investigations, Neuheisel was suspended and officially relieved of his duties as head coach. In February 2004, the NCAA sent a notice of allegations to Neuheisel. Upon receipt of the notice of allegation UW terminated Neuheisel's lucrative contract citing that his violation of NCAA Bylaw 10.3 gave it cause to do so.

[40] NCAA n.d.j.
[41] NCAA n.d.h.
[42] NCAA n.d.c.
[43] Rogers and Ryan 2007.
[44] NCAA n.d.h.

The case was sent to the Committee on Infractions for adjudication.[45] The following section discusses the authority and procedures of the NCAA Committee.

54.3.3 NCAA Committee on Infractions

As noted above, after a notice of allegations is issued to an NCAA member institution, the matter is forwarded to the NCAA Committee on Infractions (COI) for adjudication which may include the finding of penalties against the institution and the student-athletes or staff members involved.[46] NCAA Division I Bylaw 19.1.1 details the structure and duties of the NCAA Division I COI.[47] The COI is composed of ten individuals from member institutions appointed by the Division I Management Council. Two to three COI members must come from the public and have some legal experience. The COI reviews cases both on the written record and through a formal hearing process, which includes hearing testimony from the parties involved. After the hearing, the COI deliberates and then issues factual findings and if necessary imposes penalties against any of the entities or individuals it finds were involved in the infractions.[48]

In coach Rick Neuheisel's case, the COI ultimately agreed with UW and held that he violated the existing NCAA gambling regulations by participating in the gambling pool.[49] In its issued opinion, however, the COI stated that although the former head coach did violate NCAA gambling rules through his participation in a gambling pool, it did not find that he had knowingly violated NCAA gambling legislation.[50] The COI made this finding based on information indicating that an athletics department staff member had sent Neuheisel an e-mail with erroneous information regarding the permissibility of participating in college basketball pools. The COI believed Neuheisel's testimony that he was misled and that his participation in the pool was, in fact, permissible under NCAA rules based upon the erroneous e-mail. Neuheisel filed a lawsuit against UW for wrongful termination of his employment agreement and argued that his termination was unwarranted.[51] In the end, Neuheisel settled his claim for $4.5 million.[52]

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[45] NCAA n.d.g.

[46] Connell et al. 2005.

[47] NCAA n.d.d.

[48] Rogers and Ryan 2007.

[49] Suggs 2005, p. A37.

[50] NCAA n.d.g.

[51] Suggs 2005, p A37.

[52] Suggs 2005, p A37; NCAA n.d.g.

54.4 Notable NCAA Gambling Incidents

The Tulane University and Rick Neuheisel cases above are just two of a litany of examples of student-athletes and coaches gambling on sport. The following list represents some of the other more notable gambling incidents that occurred at colleges and universities around the United States and were the impetus for the NCAA's present day policies related to sports gambling. In considering these incidents it is important to note that the NCAA did not adopt specific regulations prohibiting sports gambling or involvement in sports gambling until 1983. Prior to that date gambling on college sports was treated as a violation of the Association's general Unethical Conduct provision.[53]

54.4.1 Brooklyn College (1945)

Although rumors of gambling on college sports date back to an 1876 regatta, the first known case occurred in 1945 when two Brooklyn College basketball student-athletes admitted that they accepted over $1,000 to intentionally throw a game against the University of Akron.[54] The two student-athletes were never arrested but eventually their testimony implicated three other teammates and led to the convictions of two men who had solicited their participation in the scheme. The game between Brooklyn and Akron was never played.[55] Shortly before the criminal trial concluded, the New York State Legislature adopted a legislation that made participating in a scheme to limit a team's margin of victory (point-shaving) a crime and expanded the application of illegal sports gambling to include amateur basketball.[56]

54.4.2 New York City Sports Wagering (1951)

Heralded as one of the biggest betting scandals in college basketball history, the City College of New York (City) and others in the area including Manhattan College, Long Island University, and Bradley University (Peoria, Illinois) were implicated in a point-fixing ring involving six other schools, more than 30 players, and members of organized crime It began when a former Manhattan College player attempted to bribe a then current player to exceed the point margin with

[53] NCAA 1983.
[54] Crowley 2006; Thelin 1994.
[55] Udovicic 1998.
[56] Goldstein 2003a.

St. Francis College of Brooklyn.[57] The player reported the incident to his coach who then went to the President of Manhattan College with the details. A sting was set up and the former Manhattan College player and another were arrested for gambling activity that included both the 1949–50 and 1950–1951 seasons.[58]

The problem grew more pervasive a few weeks later when three City College of New York (CCNY) student-athletes were arrested for taking bribes and fixing the point spread in a game against Temple University (Philadelphia). A few days later basketball players from Long Island University (LIU) were also arrested for taking similar actions. In July of that year, the scandal moved out of the New York City region with the arrest of five players from Bradley University who admitted to taking bribes to "hold down the scores against St. Joseph's University and Oregon State University."[59] It was not until October of that year, however, that the national scope of the gambling problem was revealed with the implication of point fixing at the University of Kentucky, which at that time was one of the nation's most prominent and successful basketball programs. As for the New York City schools, CCNY, LIU and Manhattan College all had their basketball programs disbanded. Both were re-established but never returned to the successes of the 1940s era.[60]

54.4.3 University of Kentucky (1952)

In 1951, the University of Kentucky (UK) won the NCAA basketball championship. One year later, the same district attorney who prosecuted the New York City gambling incidents uncovered a point-shaving scheme that had been in operation since the late 1940s.[61] The UK scheme involved three members of the men's basketball team who were paid cash by a former UK football student-athlete and some of his associates to exceed the point spread in various contests. The scheme evolved with new UK players taking the place of those who had graduated and gone on to careers in professional basketball. The NCAA reacted by canceling the school's 1952–1953 season, the first time the rather novice athletic association took such an extreme action.[62]

[57] Goldstein 2003b.
[58] Rosen 1999.
[59] Goldstein 2003b.
[60] Rosen 1999.
[61] Kentucky basketball n.d.
[62] Merron 2006.

54.4.4 The 1961 Scandals

Another far reaching point-fixing scandal was exposed in 1961, once again by the New York City District Attorney's office. This one would eventually implicate 476 basketball student-athletes at 27 schools between the years 1957 and 1961. Orchestrated mostly by organized crime members in New York City with the help of college players who had grown up in the area, this scheme included bribes and attempted bribes to both college basketball and football players. Although it led to convictions of some organized crime members, it caused St. Joseph University (Pennsylvania) to relinquish its third place finish at the previous NCAA tournament, and it negatively impacted the professional careers of over a dozen prominent college players.[63]

54.4.5 Boston College (1978)

More than a decade passed before another gambling scandal erupted in college athletics. This time it was at Boston College, an NCAA institution that had escaped involvement in previous sports gambling incidents (Goldstein 2003d). During the 1978–1979 season, a Boston College basketball student-athlete was approached by a New York City crime family to fix nine games through point shaving.[64] The student-athlete, who solicited help from two other Boston College basketball student-athlete teammates, assisted the perpetrators in earning between $75,000 and $480,000.[65] Each of the student-athletes reportedly earned $10,000 for their involvement.[66] The scheme was eventually discovered and the Boston College student-athlete who orchestrated the point-fixing received a ten-year prison sentence for his involvement, but investigators did pursue charges against the other student-athletes.[67] The NCAA did not impose sanctions on Boston College or its men's basketball program.[68]

54.4.6 Tulane University (1985)

In 1985, four Tulane basketball student-athletes were arrested and indicted on five criminal counts involving point shaving.[69] According to the indictment, at least

[63] Goldstein 2003c.
[64] McCarthy 2007b, p C1.
[65] Goldstein 2003a, p. C1.
[66] McCarthy 2007b, p. C1.
[67] Grady & Clement 2005.
[68] NCAA n.d.g.
[69] *Id.*

one of the student-athletes accepted up to $8,550 for manipulating point spreads and a total of five players were implicated in the scheme.[70] Charges were later dropped against the one student-athlete whose case made it to trial, but Tulane was subject to an NCAA investigation that included allegations of violations of Bylaw 10.3. Tulane eventually chose to take its own corrective action by terminating its men's basketball program for four years rather than risk even harsher institutional penalties from the COI.[71]

54.4.7 Universities of Florida and Arkansas (1989)

Two Southeastern Conference schools had to address student-athlete gambling in 1989. In those separate cases, four University of Florida football student-athletes and several University of Arkansas student-athletes were caught betting on football games and were suspended from participation in intercollegiate athletics.[72] Neither case resulted in criminal charges or major NCAA sanctions; however, the NCAA determined that the student-athletes had violated Bylaw 10.3 and each was rendered ineligible to compete for the remainder of the 1989–90 academic year.[73]

54.4.8 Maine (1992)

In 1992, the University of Maine suspended 19 athletes from the football and basketball teams for operating a professional and college sports gambling ring that reportedly involved bets from $25.00 to 1,150.00.[74] Thirteen members of the schools baseball team were also involved in sports gambling activities. Around the same time, another Maine college was implicated in a sports gambling scandal. Division II Bryant College suspended five basketball players who had built up $54,000 in gambling debts, and a former player and student were arrested and charged with bookmaking.[75] The NCAA deemed all the infractions as "secondary" violations of Bylaw 10.3 and the student-athletes were eventually reinstated for competition.[76]

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[70] Goldstein 2003d.

[71] NCAA n.d.g.

[72] Zimbalist 1999.

[73] NCAA n.d.e.

[74] *Id.*

[75] Rhoden 1992, p. A1.

[76] NCAA n.d.e.

54.4.9 Northwestern University (1994–1998)

In 1995, three Northwestern basketball players were accused of accepting money from a former University of Notre Dame football player to affect the outcome of the game involving Penn State University, the University of Wisconsin, and the University of Michigan.[77] The former Notre Dame student-athlete and two of the three Northwestern players were indicted and convicted. The heaviest jail sentence of two months in prison was handed to a former player from Notre Dame who had been involved in other incidences of illegal gambling.[78] Two of the Northwestern student-athletes were sentenced to one month in federal prison and both were suspended from the team.[79] It was the second suspension for one of those players who, along with a Northwestern football student-athlete, had admitted to gambling on college football games the previous fall. The NCAA did not impose any major sanctions on the school, but it deemed the student-athletes ineligible to compete for violating Bylaw 10.3.[80]

Another gambling incident involving this Chicago-area university involved two Northwestern football student-athletes who pleaded guilty to a federal perjury charge stemming from the fixing of football games.[81] One student-athlete admitted that he had fumbled intentionally in a game against the University of Iowa to win a bet of $400 and had won $500 on an Ohio State game in which he had played. The student-athlete admitted to betting on a total of five games and was subsequently penalized per NCAA rules.[82]

54.4.10 University of Maryland (1995)

Five football players and one basketball player were suspended after the six bet on college sports.[83] One of the five was the starting quarterback on the school's football team who allegedly bragged to others that he had won $8,000 on the 1993 NCAA basketball tournament. The NCAA determined that all five had violated Bylaw 10.3 and NCAA rules required that four of the football players be withheld from one regularly scheduled game. The fifth football student-athlete was given an eight-game suspension.[84] The lone basketball student-athlete had to forfeit playing

[77] Berkow 1998, p. C1.
[78] Barlett & Steele 2000, pp. 52–62.
[79] NCAA 2004b.
[80] NCAA n.d.e.
[81] NCAA n.d.h.
[82] Slavin 2002.
[83] NCAA n.d.j.
[84] Maisel 1995, p. 46.

in the first 20 games of the 1995–1996 season, but no formal NCAA investigation of the Maryland athletics program resulted.[85]

54.4.11 Boston College (1996)

Three Boston College football players bet against their team, and ten others were allegedly involved in betting on both professional and college football and baseball contests (*Organized crime* 1997). The team's head football coach reported the gambling activity to the appropriate university officials after he heard that some of his players may have bet against their own team when it played against Syracuse University.[86] In all, 13 players were suspended and 6 were permanently removed from the team. The NCAA determined that 7 of the student-athletes violated Bylaw 10.3, but no other NCAA sanctions resulted from the incident.[87]

54.4.12 Arizona State University (1997)

This gambling incident was revealed when bookmakers in Nevada discovered an odd betting pattern and alerted the Federal Bureau of Investigation (FBI).[88] FBI surveillance discovered that more than $1 million dollars in bets were being wagered on Arizona State University (ASU) games.[89] An investigation revealed that the starting point-guard at ASU, which was in debt to a student bookie for other gambling debts, enlisted a teammate to help in a point-shaving plan.[90] The complete federal investigation of Arizona State's 1993–1994 basketball season led to the two student-athletes admitting that they took money for their role in the scheme and both pleaded guilty to charges of conspiracy to commit sports bribery. One of the student-athletes was sentenced to two months in jail, levied an $8,000 fine, three years of probation, and six months of home detention. The student bookie and the second student-athlete were also convicted but received lesser sentences.[91]

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[85] NCAA n.d.d.
[86] Merron 2006.
[87] NCAA n.d.e.
[88] NCAA n.d.f.
[89] McCallum and Hersch 1997, pp. 21–22.
[90] NCAA 2004b.
[91] *Id.*

54.4.13 University of Florida (2001)

An investigation by the Florida State Attorney General's office revealed that a star University of Florida basketball student-athlete was linked to gambling on college sports. Several witnesses, including UF basketball players, told state investigators that the former "Mr. Basketball" (the honor bestowed to the best high school player) for the state of Florida had openly discussed his sports gambling.[92] The student-athlete was declared ineligible, admitted that he violated NCAA rules and voluntarily left the team, though he would later recant his admissions.[93]

54.4.14 Florida State University (2003)

In 2003, a former Florida State University quarterback was accused of gambling on college and professional games.[94] The player was eventually charged with one misdemeanor count of gambling. Two other people involved in the scheme, including a student equipment manager, were charged with one felony count of bookmaking. The quarterback was removed from the team and later pleaded no contest to gambling and unrelated theft charges and was sentenced to probation. He did not return to college athletics but did play professional football for various teams in the National Football League and Arena Football League.[95]

54.4.15 Ohio University (2007)

In 2007, Ohio University (OU) officials discovered that five baseball student-athletes had violated various elements of NCAA Bylaw 10.3. First, a senior pitcher was charged with accepting professional sports wagers. Later, two unnamed players suspected of placing bets were suspended from the team. A fourth student-athlete (who was no longer on the team) was charged with bookmaking. None of the students were alleged to have placed wagers on OU sports, the Bobcat baseball team ,or other student-athletes, nor was there any evidence of efforts to shave points or otherwise improperly influence the outcome of OU games. The three players were declared ineligible by the NCAA.[96]

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[92] Jones and Handel 2002.

[93] Gustafson 2002.

[94] Drape 2003, p. D2.

[95] Maske 2005, p. E8.

[96] Arkley 2008.

54.4.16 University of Toledo (2007)

Suspicious betting patterns and unusual gambling wagers related to the University of Toledo football caused Las Vegas Sports Consultants, Inc. to alert state authorities to potential gambling activities at the school.[97] Subsequent investigations revealed that a Toledo football player and a gambler from the Detroit, Michigan area had schemed to point shave in several games during the 2005 season.[98] The Toledo player was removed from the team for his involvement and did not return to college athletics. He was charged criminally as well, though the case was later dropped by investigators.[99] The NCAA visited the Toledo campus but declined to pursue a formal investigation into the gambling activity.[100]

54.4.17 Others

The cases noted above are those that received at least minor coverage in the news media. A common theme among those cases is that offenders were student-athletes in the sports of men's basketball or football. A review of the NCAA data demonstrates that gambling activity is by no means limited to those two revenue producing sports or to NCAA student-athletes. Between the years 2003 and 2008, there were 27 other reported cases of NCAA rule violations by student-athletes, coaches, and administrators who had gambled on college or professional sports. Student-athletes in such sports as soccer, track and field, tennis and golf have been found in violation of NCAA gambling rules as well. Other gamblers held positions from head coach, to video coordinator to athletics director. Wagers by both student-athletes and administrators ranged from as little as $5.00 to the $1,000 range. NCAA officials frequently cite this depth and variety in violations when they adopt additional anti-sports gambling regulations or push for stricter legislation on sports wagering by the federal government.[101]

54.5 Additional Considerations

In 2005, the NCAA released data from a 2004 study that surveyed over 21,000 male and female student-athletes among its three divisions.[102] The data revealed

[97] Gillispie 2007, p. C11.
[98] McCarthy 2007b, p. C1.
[99] Gillispie 2007, p. C11.
[100] NCAA n.d.d.
[101] NCAA n.d.i.
[102] NCAA 2003.

that 69% of male student-athletes reported participating in gambling activities and 35% reported participating in gambling activities that directly violated NCAA rules.[103] A second NCAA study on the issue was commissioned in 2007 and its results are pending.[104] A 2000 University of Michigan study presented similar findings regarding the gambling habits of college athletic officials. In that study, 40% of those surveyed reported gambling on sports.[105]

In light of the 2004 study and that the stricter legislation was not in and of itself curbing illegal sports gambling among its members, the NCAA created additional non-legislative policies that restrict activities associated with gambling.[106] For example, the NCAA Division I Men's Basketball Championship may not be conducted in states where sports gambling is permitted. This includes the states of Nevada and Oregon, although Oregon permits only limited gambling on professional sports. NCAA policy further prohibits its committees from conducting meetings or formal social activities in casinos and the NCAA asks that its corporate sponsors not engage in promotions connected to the outcome of sporting competitions. The NCAA also performs background checks on the officials it hires to referee the "March Madness" tournament and requires gambling to be addressed at its annual training of those referees.[107]

The NCAA also has created staff positions at the national level to combat college sports gambling. For example, the NCAA established a governmental relations office based in Washington, D.C., to monitor Congressional bills and to influence legislation related to many intercollegiate athletics issues, including gambling on NCAA sports.[108] In addition, the NCAA has created a sole, multifaceted unit called the "Agents, Amateurism and Gambling" department within its Indianapolis headquarters. The department was created to ensure that the NCAA addressed its biggest concerns (sports agents, amateurism, and gambling) all in one since it believes that sports agents and sports gambling pose two of the greatest threats to the integrity of the NCAA's product: amateur college sport. The NCAA maintains that even the slightest infiltration of gambling influences, both external and internal, could damage the purity of its college sports. This department is headed by one director who oversees a staff of five individuals, and the staff investigates allegations of sports gambling at NCAA member institutions. The NCAA also sponsors educational programs that provide assistance to college campus administrators to conduct sports wagering workshops, broadcasts of anti-sports wagering public service announcements during the championship games aired by broadcast and cable television. It produces a booklet in partnership with

[103] NCAA; Huang et al. 2007.
[104] NCAA n.d.i.
[105] Vollano and Gragg 2000.
[106] NCAA n.d.h.
[107] Timanus 2007.
[108] Stoldt et al. 2006.

the National Endowment for Financial Education entitled "Don't Bet On It," aimed at educating students about the dangers of sports wagering and engages in research in the area of youth gambling and campus gambling.[109] Additionally, a recent educational endeavor entitled "When Gambling Takes Control of the Game" was aimed at educating high school student-athletes of the addictiveness and dangers involved in sports gambling.[110]

54.5.1 Exceptions to NCAA Rules/Bylaws

There are a few notable exceptions to the NCAA gambling provisions. First, as noted above the NCAA Bylaws do not apply to horse racing since there is no corresponding NCAA sport. Also, the rules do not apply to non-monetary wagers made between teams in light of tradition in the sport (e.g., losers give-up jerseys in rowing), or to ''friendly wagers" made during the course of purely recreational sports.

54.5.2 Governmental Regulation

Although the NCAA has taken a proactive position regarding the prohibition of sports wagering within its membership, the federal and state governments have also attempted to legislate anti-gambling prohibitions nationwide. Sports gambling regulation (and gambling in general) falls under the government's ability to protect the health, safety, and welfare of its citizens under its "police power." Additionally, regulation of gambling activities, can generate millions of dollars in revenue for individual states that may use these revenues to improve and fund road rehabilitation projects, the educational system, and so on. Though federal laws such as the Wire Communications Act of 1961,[111] the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),[112] and the Bribery in Sporting Contests Act of 1979[113] emerged in the last several decades, newer attempts to regulate sports gambling related to NCAA, high school and Olympic sports have modified the sports wagering landscape to a certain degree. The following sections outline a few attempts (some successful, some not) to regulate gambling directly or indirectly related to intercollegiate athletics. The NCAA has fully supported much of the legislation.

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[109] NCAA 2004b.

[110] Funderburk 2007, p. C7.

[111] 18 U.S.C. Section 1084, 2008.

[112] 18 U.S.C. Section 1961, et seq., 2008.

[113] 18 U.S.C. Section 224, 2008.

54.5.2.1 Professional and Amateur Sports Protection Act

In 1992, President George H. W. Bush signed the Professional and Amateur Sports Protection Act of 1992 (PASPA) into law[114] in order to "to stop the spread of state-authorized gambling and to protect the integrity of sporting events."[115] Nevada, the only state at that time that had legalized sports gambling, was granted immunity from the Act, which makes it unlawful for a governmental entity, or a person acting pursuant to the law of such an entity, to operate, sponsor, advertise, promote, license, or authorize a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur, Olympic, or professional athletes participate. The states of Delaware, Montana, and Oregon are also exempt from the Act but only Nevada and Oregon actually operate sports betting. The Act also exempts pari-mutuel betting (horse racing) and jai alai games.

54.5.2.2 Student Athlete Protection Act

In 2000, the Student Athlete Protection Act was introduced as a bill which attempted to prohibit high school and college sports gambling in all states including states where such gambling was permitted prior to 1991.[116] This Act, if signed into law, would have removed the exemption that Nevada received under PASPA related to high school and college games, including the Olympics. Although sponsored by Representative Thomas Osborne (Nebraska), who prior to being elected to Congress served as the head football coach at the University of Nebraska, this bill never became law as Congress failed to vote on it prior to its session expiring.

54.5.2.3 Amateur Sports Integrity Act

Another attempt to close the "Nevada Loophole," with support from the NCAA, was known as the Amateur Sports Integrity Act.[117] The Act served many purposes, but one of the most significant was to modify the impact of PASPA by preventing any state (including Nevada) from allowing legal wagers on high school or college sports. Senator John McCain (Arizona) sponsored this bill and it received substantial coverage by the media, but similar to the Student-Athlete Protection Act, the bill never became law as it failed to be voted on before the legislative session expired.

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[114] 28 U.S.C. Section 3701, et. seq., 2008.

[115] Roberts 1997.

[116] H.R. 3575, 2000.

[117] S. 1002, 2003.

54.5.3 Internet Issues

Sports wagering has expanded, of course, to the Internet. Concerns over sports gambling on the Internet continue to be addressed at the state and federal levels. For example, in 2006 Washington state made online gambling a class C felony.[118] The NCAA has expressed considerable concern over the integrity of its college sports product in this regard although regulation, enforcement, or prohibition of Internet gambling may prove to be a struggle and unmanageable.[119]

54.5.3.1 Unlawful Internet Gambling Enforcement Act (2006)

In October 2006, President George W. Bush signed a bill into law which made it much more difficult to send money to Internet gambling web sites. This law now prevents credit card companies from processing online and illegal gambling activities. The Unlawful Internet Gambling Enforcement Act[120] was actually included in the SAFE Port Act, which is designed to assist in the prevention of terrorist attacks on the United States related to shipping containers that enter US ports.[121] The SAFE Port Act attempts to prevent online gamblers from using credit cards, checks, and other electronic funds transfers in order to gamble. Any Internet casino that attempts to accept credit card payments, Internet bank transfers, or any other illegal gambling payments should be blocked from doing so under this law. The Act places significant roadblocks in the path of people who have become accustomed to easy access to online sports books.

As technology advances at a record pace, regulation of Internet gambling and enforcement of prohibitions will likely remain problematic for state and federal governments and NCAA officials.

54.6 Conclusion

As the largest and most influential amateur sports organization in the United States, the NCAA has a legitimate interest in protecting its college sports product from unscrupulous influences. One of the most important issues related to protecting the integrity of college sports is to attempt to prevent participants from affecting the outcome of a sports contest in order to increase or decrease the odds of a successful gambling wager. The NCAA has had to address numerous gambling scandals throughout its first century and, as a direct result, the organization

[118] RCW Section 9.46.240, 2008; Skolnik and Ho 2006.

[119] Werner 2008.

[120] 31 U.S.C. Section 5361–5367, 2008.

[121] Pub.L. 109–347, 2006.

has imposed serious sanctions for violations of its Bylaws found the in the NCAA Manual. Although it is impossible to prevent all forms of gambling on college sports, particularly with the advent of the Internet, the NCAA has worked with federal and state governments to enact, modify, or influence legislation which protects the honesty of the sports contests which fall under its purview. In the end, the NCAA's position is quite clear that betting on college sports is unacceptable for any student-athlete, coach, or administrator affiliated with its intercollegiate membership.

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Chapter 55
U.S. Gaming and Sports Facility Financing

W. S. Miller

Contents

55.1 The Historical Connection Between Gaming and Professional Sport

Throughout their history, North American sports leagues have traditionally attempted to build up significant firewalls between themselves and any type of gaming operations.

With regard to issues such as ownership, leagues have traditionally been fairly strict about ensuring that their members do not have ties to gaming operations.

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For example, in 1980, Major League Baseball (MLB) rejected the sale of the Chicago White Sox to Edward J. DeBartolo, Sr. reportedly because of his ownership of three horse racing tracks in.[1] This conservative, zero-tolerance approach was also seen again early in 2008 when the National Football League (NFL) forced Tilman Fertitta to sell his minority stake in the Houston Texans because he was the Chairman of Landry's Restaurants, Inc. which had recently acquired the Golden Nugget Casino in Las Vegas, Nevada.[2]

Sponsorships are another area where sports organizations placed stringent prohibitions against the connection between themselves and gaming entities. Early this decade, Major League Baseball's San Diego Padres were reportedly told by the league that they could not sell the naming rights to their new facility to the Sycuan Band of the Kumeyaay Nation because of the tribe's gaming interests. This occurred despite the fact that the tribe was allowed to be the presenting sponsor of the team's 2000 season.[3]

The placement of teams has also been an area where sports organizations have traditionally tried to avoid any connections with gaming interests. In the mid-1990s, the expansion of the National Basketball Association (NBA) into the Toronto, Ontario market was threatened because the province offered a sports lottery game that featured NBA teams.[4] The issue was resolved when the province pulled the league's games from the lottery.[5] In addition, various league executives and observers have stated that Las Vegas has never secured a major league team despite demographics that are comparable to other major league cities because of the city's significant gaming presence.[6]

This chapter will discuss how this firewall between gaming interests and professional sports in the United States is slowly disappearing because of the need for the professional sports industry to tap into the large revenues generated by gaming for items such as sponsorships, advertising, potential owners, and most importantly, the development of new sports facilities. Section 55.2 covers how sports facilities have traditionally been financed in the United States. Section 55.3 discusses the issues facing professional sports that are leading to the changing position toward gaming. Section 55.4 shows examples of how the professional sports industry is reducing its anti-gaming position. Section 55.5 illustrates how gaming revenues could be used to finance sports facilities. Finally, Sect. 55.6 looks to the future and what might happen in this developing relationship.

An item of note is that references to the gaming industry throughout this chapter will, in fact, be referred to as gaming. North American sports leagues have tended to use the term gaming, or occasionally entertainment, when referring to potential

[1] Durso 1980, p. D15.

[2] Manfull 2008.

[3] Rodrigues 2000, p. 1.

[4] Grange 2007, p. S4.

[5] *Id.*

[6] Kulin 2006, p. A1.

business or marketing partners that have connections to the gaming industry. The term gambling is often used by the industry and the media when there is a violation of the rules prohibiting a connection between the sports and gaming industry.

55.2 Historical Financing of Sports Facilities

In contrast to the relatively consistent position of sports organizations toward gaming over the years, the financing of professional sports facilities in North America has seen many changes throughout the history of the industry.

In the early twentieth century it was common for sports teams to finance and construct their own facilities. Iconic former baseball stadiums such as the original Comiskey Park, Ebbets Field, Forbes Field, Shibe Park, New York's Polo Grounds and Sportsman's Park were all constructed using private financing.[7] Existing baseball icons such as Fenway Park and Wrigley Field were also privately financed.[8]

This began to change in the 1950s as the era of the franchise free agency began. In 1953, Major League Baseball's Boston Braves sold Braves Field, the team's privately financed facility in Boston, and moved to a new publicly funded multi-purpose stadium in Milwaukee, Wisconsin[9] Later that decade, the Brooklyn Dodgers and New York Giants sold their privately funded facilities in New York and moved to new publicly funded stadiums constructed for their use in California.[10]

The trend accelerated from the 1960s into the early 1990s and extended to virtually all professional sports. Facilities such as Oriole Park at Camden Yards, Giants Stadium, the Hubert H. Humphrey Metrodome, the Louisiana Superdome and the RCA Dome were all built with public funds.[11] Perhaps more importantly for the sports franchises, the leasing arrangements with the teams allowed them to retain a significant portion, if not all, of the revenues generated from their events.[12]

However, in the 1990s, the industry experienced another shift as taxpayers and governmental entities around the country were less willing to pay the full and ever-increasing costs for new sports stadiums and arenas. In Milwaukee, voters staged a recall election and removed a state senator from political office because of his vote in support of a 0.5 percent sales tax increase that would help fund a new home for

[7] Comiskey Park n.d.; Ebbets Field n.d.; Forbes Field n.d.; Shibe Park n.d.; Polo Grounds n.d.; Sportsman's Park n.d.

[8] Fenway Park n.d.; Wrigley Field n.d.

[9] Braves Field n.d.

[10] Forbes Field n.d.

[11] Oriole Park at Camden Yards n.d.; Giants Stadium n.d.; Hubert H. Humphrey Metrodome n.d.; Louisiana Superdome n.d.; RCA Dome n.d.

[12] Miller and Anderson 2001.

Major League Baseball's Milwaukee Brewers.[13] Ironically, this effort occurred in the same market that helped start the trend toward public financing of professional sports stadiums in the 1950s.

55.3 The Perfect Storm

At the same time as the aforementioned events were occurring on the facility development and financing side, professional sports leagues and franchise owners were faced with significantly higher labor costs due to players securing free agency and other benefits through the courts and collective bargaining processes. New owners also faced increasing capital costs upon acquiring their new teams because franchise acquisition and expansion fees had increased dramatically over the past two decades.

Simply put, professional sports leagues and franchises started facing a perfect storm in the 1990s, of higher labor costs, higher facility development and operational expenses, and a growing unwillingness of taxpayers and governments to pay for sports facilities, which continues to this day.

55.4 The Changing Mindset Toward Gaming

In light of the aforementioned perfect storm, sports leagues and franchises needed to look for new sources of revenue that would meet their growing needs. As a result, the once-seemingly impenetrable firewall between sports and gaming appears to be breaking down.

55.4.1 Sponsorship and Advertising

The first and most obvious area in which the wall between professional sports and gaming started to breakdown is in the area of sponsorships and advertising.

55.4.1.1 General Sponsorships and Advertising

Teams in all four major leagues now have gaming interests as sponsors. Teams such as the Arizona Cardinals, Arizona Diamondbacks, Phoenix Suns, San Diego Chargers and San Diego Padres have Indian tribes with gaming interests as

[13] Stephenson 2001.

sponsors.[14] Major League Baseball's Chicago White Sox, Florida Marlins, Los Angeles Dodgers and San Francisco Giants have also had gaming interests as sponsors during the past decade.[15] The former Montreal Expos, who were owned by Major League Baseball at the time, had GoldenPalace.com as a sponsor of the team's radio broadcasts in 2003.[16]

The NFL, which has consistently been the most opposed to the establishment of any link between itself and gaming of the four major sports, allowed the Fort McDowell Yavapai Nation, a tribe with gaming interests in Arizona, to contribute $1 million toward the Arizona Super Bowl Host Committee for Super Bowl XLII in 2008.[17]

Even the National Collegiate Athletic Association (NCAA), which has been staunchly opposed to any connection between sports and gaming, now allows its member schools to pursue sponsorship agreements with entities that have gaming connections. In October 2007, the University of Minnesota announced an agreement with the Shakopee Mdewakanton Sioux Community in which the tribe will donate $12.5 million to the school in a deal which will result in the tribe securing naming and design rights for the main entrance of the school's new 50,000-seat football stadium. Ten million dollars of the agreement will go toward facility construction with the remaining $2.5 to be used for scholarships. The tribe announced that it will install native shrubbery, educational kiosks, statues, benches and a pond at the $288 million facility.[18]

In February 2008, the University of New Mexico entered into a $2.5 million agreement with the Laguna Pueblo tribe that named the tribe's Route 66 Casino Hotel as the exclusive gaming sponsor of New Mexico athletics. The University of Arizona and University of Nevada also have sponsorship agreements with Indian gaming tribes.[19]

55.4.1.2 Naming Rights

In what is traditionally the biggest sponsorship a North American sports organization can secure, facility naming rights, there has also been an apparent loosening of the restrictions in some leagues to allow teams to enter into agreements with gaming-related entities.

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[14] Boeck 2008.

[15] Johnson 2000, p. C8.

[16] *Expos broadcasts gain cyber-sponsor* 2003, p. S2.

[17] Boeck 2008.

[18] Estrada and Shelman 2007, p. 1B.

[19] *New Mexico AD says partnership with Casino Hotel is all business* 2008.

Atlanta Braves

In 2008, Major League Baseball's Atlanta Braves entered into a multi-year, "eight-figure" sponsorship agreement with the Mississippi Band of Choctaw Indians that saw the premium seating level of Turner Field, the team's home stadium, renamed as The Golden Moon Casino Level. The tribe operates two casinos and is over 300 miles from Atlanta. In addition to the naming rights, the deal also includes stadium banner ads, club level signage, electronic signage and program advertising.[20]

Fresno Grizzlies

In 2003, the Pacific Coast League's Fresno Grizzlies ended a sponsorship agreement with the Table Mountain Casino because of concerns about certain activities in the agreement potentially violating the industry's guidelines established by Minor League Baseball.[21]

In 2006, Chukchansi Gold Resort and Casino entered into a 15-year, $16 million agreement to rename the Grizzlies' home as Chukchansi Park. The deal included $1 million paid up front and $1 million annual payments.[22] It also allows Chukchansi the use of three luxury suites and to use the facility for other entertainment events.[23] It is important to note that team officials indicated that the deal would be marketed as being for a resort destination and not a gaming establishment.[24]

Lottery Games

In contrast to their previously strong opposition to such connections, professional sports leagues, such as the National Basketball Association, National Hockey League and Major League Baseball, now maintain official corporate partnerships with state and provincial lotteries and the suppliers with work with them. These efforts include sponsorships, advertising and the direct licensing of team logos for games.

For example, in 2006, Major League Baseball owners unanimously approved a five-year deal between the league and Scientific Games, Inc., a lottery ticket provider for states around the country. The deal allowed Scientific Games to use MLB team logos on scratch-off lottery games around the country.[25] Since the deal

[20] Manasso 2008.
[21] Hostetter 2003, p. C1.
[22] Robison 2006, p. A1.
[23] Clough 2006, p. A1.
[24] Robison 2006, p. A1.
[25] Shea 2007, p. 1.

was struck, the logos of 27 Major League Baseball teams have been used on the scratch-off lottery tickets in 22 different states.[26]

The Massachusetts Lottery paid $225,000 to become a sponsor of a tour throughout the Commonwealth of Massachusetts for the Red Sox 2004 World Series trophy, the first won by the team since 1918. Ironically, in light of later agreements entered into by the league, an MLB spokesperson said at the time of the deal that the league had no problem with the sponsorship "as long as it does not include the sales of [lottery] tickets."[27]

Since the trophy tour sponsorship and the aforementioned Scientific Games agreement, the Massachusetts Lottery and the Red Sox have combined to issue team-branded lottery tickets for the 2006–2008 seasons. The 2008 version is a $20 scratch-off ticket that awards a $10 million top prize, 20 $1 million prizes and 100 Red Sox road trips.[28] Previous versions included season tickets, facility tours, game tickets, spring training trips and game-used merchandise.[29]

55.4.2 Team Ownership and Placement

Another area in which the North American professional sports leagues are loosening the previously impenetrable firewall between their industry and gaming interests is team ownership. As noted earlier, leagues would often reject potential owners or a market if there was a slight connection to gaming. As seen below, this position is clearly changing as well.

55.4.2.1 ITT

Arguably, the move of professional sports leagues toward allowing gaming interests to own sports franchises occurred in 1994 when ITT Corporation, an owner of three Nevada casinos at the time, acquired a partial ownership of Madison Square Garden and in the process acquired 50% ownership stakes in both the National Basketball Association's New York Knicks and National Hockey League's New York Rangers.[30] Both leagues approved the transactions provided that ITT remove wagering on their respective leagues at the sports books in the casinos owned by the entity.[31]

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[26] Wangsness 2008, p. B2.
[27] Kreda 2005, p. S5.
[28] Wangsness 2008, p. B2.
[29] Talcott 2006, p. E1.
[30] Chass 1998, p. 8-1.
[31] Finder 2004, p. A1.

55.4.2.2 The Ilitches

Marian Ilitch is the owner and operator of the MotorCity Casino in Detroit, Michigan.[32] In conjunction with her husband, Mike, the Ilitches jointly own the National Hockey League's Detroit Red Wings franchise. The league told the *New York Times* that it had no problem with the arrangement because the casino does not have a sports book.[33]

To illustrate the conflicting and complicated approaches taken by different professional sports leagues in the United States with regard to gaming, in contrast to the position taken by the NHL, Mike Ilitch is listed as the sole owner of Major League Baseball's Detroit Tigers franchise.[34] Despite the team fact that the team's media guide listed his wife Marian as an owner of the team for five years prior to her obtaining an interest in the Motor City Casino, she has not been listed as having any affiliation with the Tigers organization since she acquired an interest in the gaming operation.[35]

55.4.2.3 The Maloofs

In 1999, with the ITT transaction having seemingly laid out a blueprint for future transactions in the NBA, the Maloof family paid a reported $260 million for a controlling interest in the Sacramento Kings and the team's home arena, Arco Arena.[36] The acquisition marked a re-entry into the game for the family which had previously owned the Houston Rockets in the early 1980s before entering the casino business.[37] The Maloofs, who now operate the Palms Casino in Las Vegas, do not offer wagering on NBA games at the sports book located in the casino.[38] There are obvious ties between the two entities. For example, in October 2000, Kings players and cheerleaders appeared at the groundbreaking of the Palms.[39] The casino has been a sponsor of the team and had signage and television commercials on team broadcasts. The Palms has also offered Kings' season-ticket holders special hotel packages.[40] As part of their ownership of the Kings, the Maloofs also own the WNBA's Sacramento Monarchs franchise.[41]

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[32] Chass 2006, p. D8.
[33] Chass 1998, p. 8-1.
[34] Chass 2006, p. D8.
[35] *Id.*
[36] Grover 2000, p. 110.
[37] Chass 1998, p. 8-1.
[38] Chan 2002, p. A1.
[39] Voisin 2000, p. C1.
[40] Chan 2002, p. A1.
[41] Grover 2000, p. 110.

55.4.2.4 Connecticut Sun

In 2003, the Mohegan Tribe acquired the Women's National Basketball Association's Orlando Miracle franchise for a reported $10 million and relocated the renamed Connecticut Sun to its Mohegan Sun Arena in Uncasville, Connecticut.[42] The 10,000-seat arena is located inside the casino complex.[43] Under state law, Sun employees are not allowed to gamble at the casino because they are employees of the gaming entity.[44] The Tribe does not operate a sports book at the facility.[45] The team and facility do undertake some cross-promotion efforts but there are restrictions put in place by the league to create some separation between the gaming and sports activities.[46]

55.4.2.5 Las Vegas 51s

In early 2008, Major League Baseball approved the sale of the Pacific Coast League's Las Vegas 51 s franchise to Stevens Baseball Group.[47] The transaction is significant because it appears to be one of the first allowing gaming related-interests to own a baseball franchise. The Stevens family owns a stake in both Riviera and Golden Gate casinos in Las Vegas.[48] In enhancing the ties between his properties, Stevens announced plans for a new 51s promotion in which every time the team scores 10 runs at a home game, everyone will receive a free shrimp cocktail at the Golden Gate Casino.[49]

55.4.2.6 2007 NBA All-Star Game

Another significant move toward breaking down the gaming/sports firewall occurred in February 2007 when the National Basketball Association hosted its annual All-Star Game at the Thomas and Mack Center in Las Vegas. As part of its bid for the game, the city agreed to remove the game from all the sports books in the city.[50] The game continued a developing effort by the city to be associated with

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[42] Greenberg 2003, p. D6.
[43] Boeck 2007, p. 4C.
[44] Goodman 2003, p. D1.
[45] WNBA arrives at Connecticut casino 2003, p. E7.
[46] Hiestand 2003, p. C1.
[47] Dewey 2008, p. 1C.
[48] Spillman 2008, p. 1D.
[49] Dewey 2008, p. 1C.
[50] Juliano 2007, p. D4.

the game as it also hosts the NBA summer league and various USA Basketball events on a periodic basis.[51]

55.4.2.7 Las Vegas

Owners in three of the four major sports leagues (MLB, NBA and NHL) have expressed interest in possibly moving to Las Vegas over the past several years.[52] The NBA has stated that the removal of the league from the city's sports books would be a key element to a successful attempt at luring the league which has drawn opposition from gaming executives.[53] The NHL has publicly expressed more openness on the sports book issue than other major professional sports leagues should a team consider a move to Las Vegas.[54]

55.5 Facility Financing and Gaming

The final, and arguably most lucrative, firewall that could be removed between gaming interests and professional sports organizations is in the area of facility financing. As noted later in this section, there have been instances of state-sanctioned gaming revenues being used to finance sports facilities already. However, in light of the aforementioned needs for additional facilities and the revenue to build them, it is likely that we will see the use of gaming revenues in general as a much more likely option for North American sports facilities in the twenty-first century with private gaming interests also becoming involved in the sports facility financing process.

In light of how the gaming industry is set up and regulated in North America, there are three likely methods that could be utilized to have gaming interests fund sports facilities, through the state or province, via Indian tribal gaming, or through private interests. This section explores each of these options.

55.5.1 State/Province

The state/province method is the one that has seen the most extensive use to date in terms of using gaming revenues to fund professional sports facilities with four major league buildings opened to date and a new National Hockey League arena on the way.

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[51] DuPree, p. 1E.

[52] Kulin 2006, p. A1.

[53] Robbins 2007, p. 1.

[54] *Id.*

This method has likely been the most utilized because it has given professional sports organizations cover when questioned by the media and public about the gaming/sports connection because, in essence, the governmental body acts as a protective intermediary layer between the gaming and sports interests.

Under the state/province method, the financing structure is rather straightforward. The governmental body collects revenues from the gaming entity. It then funnels all or a portion of those revenues toward the financing of the professional sports facility project. From a league/team perspective, ideally these gaming revenues would be mixed with other types of funding to reduce the direct appearance of the gaming entity funding the sports facility. However, as we have seen earlier, it appears that this "stigma" is becoming less of an issue for most professional sports organizations.

In terms of collection, states or provinces can collect the gaming revenues from one of three sources, lotteries, private operations or Indian gaming.

55.5.1.1 Lotteries

The main method using state/province gaming funding to finance professional sports facilities has been through the collection of lottery funds. The financing structure is again rather straightforward. The state/province can either create new, dedicated sports games, or it can siphon off revenues from existing games and then forward on those revenues to the entity that is financing the proposed facility. In essence, the lottery serves as a voluntary tax that participants pay toward the new arena or stadium.

In light of the extensive use seen to date, with two examples being in the notoriously gaming-averse National Football League, it is possible that lotteries could become a larger piece of the financing puzzle for sports facilities in the future as the leagues and teams are clearly on board with the concept.

However, there are some political and social risks involved with the lottery-based approach. First, many lotteries are created in an effort to benefit schools or other noteworthy general public benefits. The creation of new games or the use of existing revenues could reduce those general social benefits and create significant backlash for professional sports organizations. Second, as seen below, to date, lotteries have only been a small part, and not a significant piece of the financing puzzle for most sports facilities. The question remains whether they would be a stable, efficient method of financing an entire stadium or arena on an industry-wide basis. The following sections detail the four successful uses of lotteries to fund professional sports facilities to date.

Baltimore Orioles

The first professional sports facility to be funded with state lottery proceeds was Oriole Park at Camden Yards, the home of Major League Baseball's Baltimore

Orioles. The financing plan consisted of the Maryland Lottery offering four new games annually that were designed to be solely for the use of the Maryland Stadium Authority, the builder and operator of Oriole Park at Camden Yards.[55] The $210 million facility was virtually entirely paid for from lottery proceeds with the team paying a reported $9 million toward the facility which was used for the development of skyboxes.[56] In its 2007 fiscal year, the Maryland Lottery paid out $21 million to the Maryland Stadium Authority for the financing of Oriole Park and other sports facilities in the state.[57]

Baltimore Ravens

Utilizing a similar financing approach as seen for its neighbor, Oriole Park at Camden Yards, M&T Bank Stadium, the home of the National Football League's Baltimore Ravens, opened in 1998 at a reported cost of $229 million. The State of Maryland covered approximately $200 million of the facility cost through the use of Maryland Lottery proceeds.[58] In its 2007 fiscal year, the Maryland Lottery paid out $21 million to the Maryland Stadium Authority for the financing of M&T Bank Stadium and other sports facilities in the state.[59]

Seattle Mariners

Opened in 1999 at a reported cost of $517 million, Safeco Field, the home of Major League's Baseball's Seattle Mariners, is partially being financed by the sale of sports-themed lottery scratch-off tickets.[60] The initial legislation required that the games be sports-themed with two to four games being created annually.[61] The Washington Lottery was required to provide a $3 million revenue stream to the facility in 1999 with a four percent annual increase after that for the life of the twenty-year bonds.[62]

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[55] Jasperse 1995.

[56] National Sports Law Institute of Marquette University Law School 2007a.

[57] Maryland Lottery n.d.

[58] National Sports Law Institute of Marquette University Law School 2007b.

[59] Maryland Lottery n.d.

[60] National Sports Law Institute of Marquette University Law School 2007a.

[61] Safeco Field n.d.

[62] Postman 2000.

Seattle Seahawks

Again utilizing an approach similar to that of its neighbor, Safeco Field, Qwest Field, the home of the National Football League's Seattle Seahawks, opened in 2002 at a reported cost of $360 million. Washington Lottery is contributing a reported $127 million toward the project.[63] In contrast to the Safeco Field legislation, the Washington Lottery can use any type of lottery game it sees fit in order to pay off the Qwest Field obligation. The lottery was required to contribute $6 million to the project starting in 2002 with a four percent annual increase.[64]

55.5.1.2 Private Gaming Entity Payments

Under United States law, individual states have the right to control and license gaming within their borders. This right also includes the ability for the state to generate revenue from the granting of those licenses to private entities. As a result, it is legally possible for states to initially license the development of private gaming operations or increase the number of private gaming licenses offered for the purpose of funding or partially funding a professional sports facility.

Such an approach could obviously face significant political and social hurdles in order to secure the approval of the professional league that the team plays in. While granting the leagues and the teams a degree of separation away from the gaming entity, it might not be the most preferred method of funding from the league and team perspective because of those same social and political issues. However, as more governmental bodies begin to suggest the use of gaming revenues to fund professional sports facilities, this is becoming an option that leagues will undoubtedly have to strongly consider moving forward.

Pittsburgh Penguins

In September 2007, the Commonwealth of Pennsylvania and the National Hockey League's Pittsburgh Penguins completed an agreement designed to keep the team in the Steel City. The deal calls for the Commonwealth to build the team a new $290 million arena that is currently scheduled for a 2010 opening.[65]

The new facility will be paid for through a bond issue that will be repaid through three revenue streams. First, the team will pay rent in an amount of $3.6 million to $4.3 million depending upon the amount of parking facilities constructed for the arena.[66] Second, the Commonwealth will contribute $7.5 million annually from

[63] National Sports Law Institute of Marquette University Law School 2007b.

[64] Postman 2000.

[65] Belko 2007, p. B1.

[66] *Id.*

a new Gaming Economic Development and Tourism Fund which was created after Pennsylvania allowed an expansion of slot machine gaming.[67] Finally, the individual selected by the Commonwealth to operate the Pittsburgh-area casino, Don Barden, will contribute an additional $7.5 million annually toward the repayment of the arena bonds.[68] Thus, $15 million of the revenues used to pay back the bonds every year will be coming directly from private gaming payments made to the Commonwealth of Pennsylvania.

As Allegheny County Executive Dan Onorato told the *Pittsburgh Post-Gazette* at the time of the lease signing, "The Penguins are here because of gaming. Let's be clear about that."[69] In addition to the Barden proposal, the other casino license bidders had also made commitments to help fund the new Penguins' arena if they were selected by the Commonwealth.[70]

55.5.1.3 Indian Gaming

In contrast to private gaming, any gaming efforts undertaken by Indian tribes are highly regulated by the United States government under the Indian Gaming Regulatory Act (IGRA).[71] As discussed in the following section, the IGRA contains a variety of restrictions on whether tribes can offer gaming, the types of gaming they can offer and what they can do with the proceeds.

However, as was the case with private gaming, the IGRA does allow states to collect some revenues from the tribes who are engaged in gaming under the Act. While the tribes are regulated in how they can use these revenues, states have few restrictions imposed upon them. The following section will discuss how states can secure and use potential revenues from Indian gaming in an effort to finance and construct a professional sports facility.

55.5.2 Indian Gaming

Gaming operations owned by Native American tribes have experienced explosive growth over the past three decades. In 1975, the first tribe started a bingo game to raise funds for a tribal fire department and raised $150 during their first night of operation.[72] In 2006, the 225 tribes engaged in gaming generated $25.7 billion in revenues through their various operations.[73]

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[67] Stark 2007, p. 35.

[68] Belko 2006, p. B1.

[69] Belko 2007, p. B1.

[70] Belko & Rotstein 2007, p. A3.

[71] 25 U.S.C. Sect. 2701, 2008.

[72] McAuliffe Jr 1996, p. A1.

[73] National Indian Gaming Association n.d.

Perhaps most importantly for professional sports leagues, several of these tribes have expressed a willingness to branch out from gaming and invest in professional sports teams and facilities. Over the past twelve years, ten Indian tribes have expressed public interest in working on eight different proposed major league sports facility projects.[74] This is not surprising as the combination makes sense from a business standpoint and could, if structured properly, prove beneficial for all the participants.

However, there are social and legal issues that would have to be addressed before such efforts were undertaken on a large-scale basis. The first issue would be the same as that faced by other gaming operations, overcoming the social stigma of gaming and building in firewall protections to ensure the safety of sport in the minds of the public. The second issue would be a legal one, to create a financing structure that satisfies all the requirements of the Indian Gaming Regulatory Act.[75]

The Indian Gaming Regulatory Act was passed by the United States Congress in 1988 in the hope of providing a standardized financial and regulatory structure for tribes and states across the country. The Act imposes strict restrictions on tribes who wish to participate in gaming operations and on what the tribes can do with any revenues generated from such operations.

For the purposes of developing professional sports facilities under the Act, the Indian gaming and professional sports industries would likely be looking at one of the following four approaches: taxation, tribal-state compacts, partnership agreements or direct ownership. Each of these approaches is discussed in more detail below.

55.5.2.1 Taxation

One of the traditional ways of generating revenues for the purpose of financing a professional sports facility has been through taxation. However, this does not appear to be a strong possibility for Indian gaming revenues under the current law.

First, the IGRA specifically prohibits such taxation by states under federal law.[76] Second, courts have taken the position that the imposition of fees can also be considered a tax, and therefore banned under the Act. In the case of *Cabazon Band of Mission Indians v. Wilson* (1994), the United States Court of Appeals for the Ninth Circuit prohibited the State of California from collecting from the tribes a standard, uniform licensing fee that the state imposed upon any entity showing simulcast horse racing from tracks around the country.

In light of the language of the IGRA and the *Cabazon* ruling, it is unlikely that taxation will be a viable option for using Indian gaming revenues to fund professional sports facilities.

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[74] Miller and LeBlanc 2008.

[75] 25 U.S.C. Sect. 2701, 2008.

[76] 25 U.S.C. Sect. 2710(d)(4), 2008.

55.5.2.2 Tribal-State Compacts

Under the IGRA, Indian tribes and states are required to enter into contracts that are known as tribal-state gaming compacts in order to permit the tribe to conduct certain types of high-stakes gaming at their operations, including; slot machines, black jack and lotteries.[77]

The Act does not permit the states to require that the tribes make payments beyond what are deemed to be reasonably necessary for the state to regulate the tribe's gaming operations in the state in order to secure a tribal-state compact. However, tribes are allowed to make voluntary payments to the state in order to accelerate the approval process and maintain good relations with the state.[78] Once the state receives these revenues, it can spend those revenues in a wide variety of ways.

As such, this creates an opening for the use of Indian gaming revenues to be utilized to fund sports facilities. In essence, it would undertake the same structure as the state-regulated approaches discussed in the last section. The state would collect the gaming revenue from the tribe as part of the tribal-state gaming compact process and then direct those monies to be utilized for the financing of a professional sports facility.

Detroit Tigers

In 1995, the State of Michigan utilized $55 million from its Michigan Strategic Fund to help pay for Comerica Park, the newly proposed home of Major League Baseball's Detroit Tigers. The Michigan Strategic Fund was initially funded by revenues from oil and natural gas leases held by the state. However, after its inception, the state also began adding the eight percent of casino slot machine and electronic machine revenues it received from Indian gaming compacts to the fund.[79] The $300 million facility opened in 2000.[80]

Resch Center

In 2001, the State of Wisconsin provided $1.5 million in funding that it received from tribal-state gaming compacts to Brown County as partial funding for the Resch Center, a new 11,000-seat, $47 million arena in the Green Bay market.[81] The facility is home to the Green Bay Blizzard of Arena Football 2.[82]

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[77] 25 U.S.C. Sect. 2703(8) & Sect. 2710(d), 2008.

[78] 25 U.S.C. Sect. 2710(d)(3)(C).

[79] Lane 1995, p. 28.

[80] National Sports Law Institute of Marquette University Law School 2007a.

[81] Hildebrand 2001, p. 2A.

[82] Green Bay Blizzard n.d.

55.5.2.3 Traditional Business Agreements

Under the IGRA, gaming tribes are allowed to reinvest their gaming proceeds in a wide variety of business agreements provided they are related to the economic development of the tribe.[83]

It is easy to envision a wide variety of business scenarios that could occur under this relatively open-ended structure that benefit the tribes and the financing of a professional sports facility. For example, facility or team naming rights, large sponsorship or advertising agreements, retail outlets and other similar ventures, could be created. The tribe could conceivably even build an entire stadium or arena on or near their reservation lands and strike a lease agreement with a major league professional sports team to play at the facility. These developments could provide the tribe with additional non-gaming-related economic development while providing another piece of the financing puzzle for a professional sports organization.

Norwich Navigators

In 1995, the Mashnantucket Pequot tribe, owner and operator of the nearby Foxwoods casino, contributed a reported $500,000 toward the construction of Thomas J. Dodd Stadium, the new home of the Class-AA Eastern League's Norwich Navigators. The money was utilized to build eighteen skyboxes at the facility. The tribe reportedly obtained the use of two of those skyboxes and a picnic area at the ballpark.[84]

Mohegan Wolves

In 2002 and 2003, the Mohegan Sun Arena was the home arena for Arena Football 2's Mohegan Wolves franchise.[85] The Mohegan Tribe leased the facility, which had a capacity of 7,500 for indoor football, to the expansion franchise. At the time of the initial announcement of the franchise, the league stated that the fact that the casino was not funding the team and that there was not a sports book at the facility were reasons for the league's approval of the arrangement.[86]

New Yankee Stadium

The new Yankee Stadium which is scheduled to open in 2009 will feature two partnerships between the team and Indian gaming tribes. The Mohegan Tribe has a

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[83] 25 U.S.C. Sect. 2710(b)(2)(B)(iii), 2008.

[84] Horgan 1995, p. E1.

[85] Mohegan Wolves n.d.

[86] Holtz 2001, p. 14CN-1.

three-year agreement to operate The Batters Eye, a 322-person sports bar at the facility that will also host non-game day functions.[87] The Seminole Tribe of Florida will also have a presence at the facility through its subsidiary Hard Rock Café chain. The facility will feature both a Hard Rock Café and a restaurant known as NYY Steak.[88]

55.5.2.4 Direct Ownership

Operating under the same concept as the previous section, the IGRA allows gaming tribes to reinvest their gaming proceeds into a variety of business ventures provided that they are utilized for the economic development of the tribe.[89]

It appears that under virtually all circumstances, constructing a new stadium or arena and then acquiring ownership of a professional sports franchise to serve as a tenant for that facility would satisfy the requirements of the Act.

Connecticut Sun

As discussed earlier in this chapter, in 2003, the Mohegan Tribe acquired complete ownership of the WNBA's former Orlando Miracle franchise for a reported $10 million and moved the team to its wholly owned Mohegan Sun Arena in Uncasville, Connecticut.[90] The arena is located inside the overall Mohegan Sun gaming and entertainment complex, which has 300,000 square feet of gaming space.[91] The team's players and front office staff are all employees of the casino and are restricted from taking part in gaming activities at the facility.[92]

55.5.3 Direct Private Gaming Interest Ownership and Leasing

The final and perhaps most lucrative approach for utilizing gaming revenues to fund professional sports facilities would be direct agreements between private gaming interests and sports organizations.

The structure would be rather simple. The privately owned gaming entity would construct the sports stadium or arena and then either acquire a professional sports franchise or strike a lease agreement with such a team to play at its facility. Such

[87] Roura 2008, p. 57.
[88] "Seminole Tribe," 2008.
[89] 25 U.S.C. Sect. 2710(b)(2)(B)(iii), 2008.
[90] Greenberg 2003, p. D6.
[91] Adams 2003, p. 1A.
[92] Goodman 2003, p. D1.

an approach would simply eliminate the intermediary function that state and local governments played in the earlier approaches we discussed.

In many respects, we have already seen such a structure implemented in a league affiliated with one of the major professional sports leagues. As discussed in the previous section, the WNBA's Connecticut Sun is owned by the Mohegan Tribe and play their home games in Mohegan Sun Arena, which was built by the gaming tribe as part of a larger sports, entertainment and gaming complex in Uncasville, Connecticut.

The reasons for professional sports leagues and organizations to embrace this concept are obvious. Gaming interests are looking for new ways to attract patrons and sports offer a natural attraction for potential customers. On the sports side, they are looking for new ways to fund ever-more expensive sports facilities along with securing potential new fans. In fact, it can be argued that both industries are moving away from their roots and moving further toward the entertainment business with each passing year.

Despite the fact that most sports organizations increasingly accept the associations with gaming interests described earlier in this chapter, the direct linking of gaming interests to the funding of sports facilities will not be an easy one. To be sure, this is not because of a lack of interest on either side or because it would difficult to accomplish contractually. The main issue will be crossing the public perception and media-driven hurdles that still exist in this country.

In an effort to quell some of these perceptions, sports organizations will likely have to address a few issues. First, the decision will have to be made as to whether the gaming and sports activities will be in the same location. Second, firewalls will likely have to be put in place to satisfy the public. Finally, legal and collective bargaining issues will also have to be taken care of. For example, would revenues generated by gaming at a sporting event have to be shared with players under traditional revenue sharing terms in collective bargaining agreements?

While there are substantial hurdles in place for direct relations between private gaming interests and professional sports organizations, the potential benefits and obvious synergies between the two industries make it likely that this will be one of the key issues that leagues face in the early part of the twenty-first century.

55.5.3.1 Orleans Arena

The Orleans Hotel and Casino in Las Vegas, Nevada is also the home of the 9,500-seat Orleans Arena.[93] The facility is owned by the Boyd Gaming Corporation which has sixteen casino entertainment properties in Illinois, Indiana, Louisiana, Mississippi, Nevada and New Jersey.[94]

[93] Coast Casinos n.d.

[94] Company history n.d.

The arena, located approximately one mile from the Las Vegas Strip, has been the home of the East Coast Hockey League's Las Vegas Wranglers franchise since 2003.[95] From 2003 to 2007, the facility also housed the Arena Football Leagues Las Vegas Gladiators franchise.[96] Both the Wranglers and Gladiators were owned by private ownership groups who leased the facility from Boyd Gaming.

55.5.3.2 Calgary Flames

In 2003, the National Hockey League's Calgary Flames announced plans to pursue a casino license with the idea of placing the gaming facility inside the Pengrowth Saddledome, the team's home arena. The proposed facility would have cost $25 million to build and generated an estimated $6 million in annual revenue. According to published reports, the NHL supported the proposal because the proposed gaming venue was not going to contain a sports book.[97] The proposal would have required a major renovation of the arena in order to create a self-contained area for the gaming operations.[98] As of 2008, the team had not secured a license for the purpose of conducting gaming at the Saddledome.

55.5.3.3 Pittsburgh Penguins

In late 2005, the National Hockey League's Pittsburgh Penguins announced that they were working with Isle of Capri Casinos Inc. on a proposal for a new arena in Pittsburgh. If granted a gaming license by the Commonwealth of Pennsylvania, Isle of Capri was going to provide funding for the proposed $290 million arena on a site adjacent to its proposed casino location in the Hill District area of Pittsburgh. The arena would have then been owned by a city-county sports authority and the team would not receive any direct financial revenues from the gaming facility other than the presence of the new arena.[99]

In 2006, the two companies also announced that they would donate any profits that the two entities received from the redevelopment of 28 acres of land upon which the team's current facility, Mellon Arena, sits.[100]

The overall Isle of Capri proposal received the full support of NHL Commissioner Gary Bettman who told the *Associated Press* in November 2006, "If Isle of Capri gets the license, the building comes in the ground, the Penguins stay in

[95] Las Vegas Wranglers n.d.

[96] Las Vegas Gladiators n.d.

[97] *Hockey's slot gets a new meaning* 2003, p. D2.

[98] Goodman 2003, p. D1.

[99] Belko 2005.

[100] Belko 2006, p. B1.

Pittsburgh, where I think they belong, and this thing is over … That is the scenario that best deals with the future of the team in Pittsburgh."[101]

In late 2006, Isle of Capri was not selected for a gaming license in Pittsburgh and, as discussed earlier in this chapter, the team ended up striking another deal with the Commonwealth for a new arena in 2007.[102]

55.6 Conclusion

Over the past 150 years, North American professional sports organizations and gaming have maintained a distant relationship. In light of the problems that gambling caused the sports industry in its early years and at various points throughout the twentieth century, it is somewhat understandable that the sports organizations have tried to erect firewalls between themselves and gaming. However, both the sports and gaming industries have undergone significant change and evolution over the past two decades.

Legalized gaming has become a highly regulated industry whether it is conducted by private interests or Indian tribes with gaming operations. Whether it is federal regulation of Indian gaming through the Indian Gaming Regulatory Act or individual states monitoring private gaming interests, the industry has a much different perception in the minds of most people as compared to only a few decades ago.

There has also been a growing acceptance of gaming operations by the American public. Indian gaming, state lotteries and state sanctioning of private gaming have grown exponentially over the past two decades. As NBA Commissioner David Stern told the *Seattle Times* in 2003, "America made the bet, and they bet on gambling. We're talking about state-sponsored and state-produced gambling, where they routinely use state resources to drive their citizens to gambling. Anyone who doesn't think that isn't living in America."[103]

The sports industry has also undergone dramatic changes. In an effort to draw more fans, the games have shifted away from being mere sports events to becoming entertainment experiences. Increased operating expenses have also necessarily led many sports organizations to look for new ways of generating revenue and reconsider old prohibitions and stigmas associated with previously taboo revenue streams.

As we look ahead in the twenty-first century, it seems inevitable that the growing closeness between sports and gaming interests will continue. As industry executive Mike Dietz told the *Detroit News* regarding the growing connection between baseball and gaming, "Everything costs more—to field a team, to give fans what

[101] Robinson 2006.

[102] Rossi 2006.

[103] Greenberg 2003, p. D6.

they want. There are a lot of bills to pay and a lot of reasons to be open-minded about new sources of revenue … Baseball has gotten wise and smart about how to extract revenues out of things other than baseball."[104] This same argument can be extended to the other professional sports leagues as well and we are already starting to see this change take shape. The minor leagues are starting to embrace the concept with advertising, ownership and even facilities being paid for through gaming revenues. The major leagues are finally starting to come on board as well. As noted earlier, gaming sponsors and advertisers are becoming commonplace for teams in all the major leagues besides the National Football League. The barriers to gaming interests taking full or partial ownership in sports franchises is also diminishing. The strict prohibitions from decades ago have been replaced by a more flexible "gaming is allowed, but sports books are not" approach in most leagues.

The final frontier is also breaking down as we see gaming entities begin to pay for the construction of new major league stadiums and arenas around the continent. Minor league organizations have already begun to embrace the concept. Included in this group is the WNBA, an affiliate of the National Basketball Association. Many forget that some major league stadiums have already been paid for in near-total or partially through state-approved or sanctioned gaming. Facilities such as Oriole Park at Camden Yards, M&T Bank Stadium, Comerica Park, Qwest Field and Safeco Field owe their very existence to gaming revenues. The near future is likely to see private gaming interests or an Indian tribe with gaming interests construct and operate a facility with a major league tenant much as Orleans Arena and Mohegan Sun Arena are operated on the minor league level.

To be sure, there will be some public uproar and media backlash but the marriage is inevitable. In fact, if Isle of Capri had secured a gaming license in the Commonwealth of Pennsylvania in 2007, the new home of the NHL's Penguins would have been solely constructed through private gaming revenues. The evolution, and likely future stance of the industry on the marriage between gaming interests and the financing of professional sports facilities, can be seen in NHL Commissioner Gary Bettman's quote to the Pittsburgh Post-Gazette about the Penguins and governmental officials working with gaming interests to secure a new home for the team

"It's the way Allegheny County and the State (sic) of Pennsylvania want to finance an arena. The county and state had no problem publicly funding a football stadium and a separate baseball stadium. It's really a question of how the local authorities see fit to accomplish that goal. Gambling has become so persuasive, through lotteries and legalized casinos. Our issue really relates to whether or not there's a sports book. If there's no sports book, I don't think it's presented much of an issue for any of our leagues. I don't think we want them [slot machines] on the concourse. But the fact of the matter is that there are lots of multipurpose facilities adjacent to operations that do other things."[105]

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[104] Shea 2007, p. 1.

[105] Kovacevic 2004, p. B7.

As Commissioner Bettman's quote indicates, while the use of gaming revenues to fund sports facilities is an issue over which the professional sports leagues will obviously have a say, it is one in which the league's needs for facility capital and the stance of local governments trending toward the use of gaming revenues to fund professional sports facilities is likely to overcome any longstanding objections held by most of the leagues against such usage provided direct sports gaming is not included.

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Chapter 56
U.S. Professional Athletics

Anita Moorman

Contents

The relationship between gambling and professional sports in the United States can be traced back to the Black Sox scandal of 1919 after eight Chicago White Sox baseball players were indicted for fixing the 1919 World Series.[1] While none of the players were convicted of the game fixing allegations, they were all banned from Major League Baseball (MLB). Consequently, Major League Baseball became the first professional sports league to prohibit gambling in some form. Other sports experienced similar scandals.

"War is Declared on Golf Gamblers" was the headline in the *New York Times* on May 9, 1920, in response to rampant gambling on golf tournaments that led the United States Golf Association to condemn pool-selling, bookmaking, and individual wagering on tournaments as against the best interests of the game.[2]

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[1] Udovicic1998, pp. 401–424.
[2] *War is declared on golf gamblers* 1920.

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Eventually, almost every major professional sports league would confront gambling scandals[3] and even aggressively lobby for legislation prohibiting sports betting in any form.[4] Major League Baseball, the National Basketball Association (NBA), and the National Football League (NFL) collectively pay millions of dollars to lobbying firms which specialize in issues involving internet gambling and/or sports betting.[5] However, despite these efforts, gambling scandals continue to emerge in professional sport.

During 2007, gambling scandals involving National Basketball Association referee, Tim Donaghy[6] and alleged match fixing by the fourth ranked men's professional tennis player, Nikolay Davydenko[7] have once again intensified efforts by governing bodies to monitor and prevent gambling activities.

Most professional sports leagues have endured gambling scandals and thereafter experienced a common evolution. First, the awakening phase—where the league becomes aware of the existence of gambling in the sport due to a scandal and the perceived threat gambling poses to the integrity and credibility of the sport. Second, the prohibition phase, when the league decries all things related to gambling and wagering, and invests league commissioners or professional associations with broad powers to prohibit all forms of gambling and wagering. And third, the partnership phase, when the leagues recognize that the gaming industry is growing, accepted, and perhaps impossible to regulate, thus the leagues relax some rules to attempt to balance the shift in attitudes about gaming with the threats still posed by business relationships with gambling enterprises.

The presence of gambling in sport is most commonly decried as a threat to the integrity of sport.[8] Fueled by the fact that historically almost all forms of gambling were illegal and also viewed as immoral, gambling that was occurring was being driven by organized crime or other criminal interests. As the amount of money being wagered on sports gambling continued to rise, so did fears that corrupting influences would try to affect the outcomes of sports contests thereby damaging the reputation and integrity of the sport. It is estimated that Americans illegally wager between $80 and 380 billion annually on sporting events.[9]

Professional sports leagues have vehemently opposed any form of gambling connected to the outcome of a sports contest, even state lotteries tied to sports contests. In 1977 the National Football League sued the State of Delaware to prevent the state from conducting an NFL themed sport lottery. The NFL's suit alleged trademark infringement by the state lottery. However, the federal district court held that the lottery could continue so long as the lottery tickets and other

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[3] Standen 2006, pp. 639–668.

[4] McKelvey 2004, pp. 23–41.

[5] King 2008, pp. 14–15.

[6] *Donaghy bet on games he worked in'06–07 season, feds say* 2008.

[7] Assael 2008; Clarey 2007.

[8] Fecteau 2003, pp. 43–49; Ostertag 1992, pp. 19–49.

[9] *Levinson* 2006, pp. 143–178.

promotional materials contained sufficient disclaimers that made it clear that the NFL had no affiliation with the lottery.[10]

More recently, as Congress considered the passage of the Professional and Amateur Sports Protection Act of 1992 (PASPA), commissioners from three of the four major professional sports leagues in the United States testified about the threat that gambling posed to the integrity of their respective sports and urged Congress to impose a federal ban on sports betting of any kind. MLB Commissioner Fay Vincent testified "one remembers that the Office of the Commissioner of Baseball was created in direct response to the 1919 Black Sox. Scandal. Protecting the integrity of the game is our primary job."[11] NBA Commissioner David Stern also emphasized integrity of the game in his testimony and stated "sports betting places athletes and games under a cloud of suspicion …"[12] NFL Commissioner Paul Tagliabue further testified "legalized sports gambling send s a regrettable message to our young people."[13] Congress did respond with a federal ban on state lotteries that employed a wagering scheme related to the outcome of sports contests.[14] Four states which had already approved sports wagering were exempted from the PASPA; although only two of those, Nevada and Oregon, still allow wagering on sporting events.[15]

This chapter will review the current policies and practices among each of the four major professional sports leagues in the United States relative to gambling. It will also compare a variety of practices in individual professional sport such as golf and tennis that address concerns regarding gambling activities.

56.1 Analysis of Professional Sports Leagues Regulation of Gambling, Wagering, and Betting Activities

For each of the leagues, their policies and rules will be categorized into rules affecting internal operations and rules regarding external relationships. Regulations of internal operations primarily relate to the relationship between the players and the league. Regulations affecting external relationships primarily relate to the leagues advertising, promotional, and sponsorship activities, thus controlling the advertising partners and business relationships with the league, teams, and players.

[10] *NFL v. Delaware* 1977.
[11] McKelvey 2004, pp. 23–41.
[12] McKelvey 2004, pp. 23–41.
[13] McKelvey 2004, pp. 23–41.
[14] Professional and Amateur Sports Protection Act of 1992.
[15] Levinson 2006, pp. 143–178.

56.1.1 Internal Operations

Internally, professional sports leagues define the rights and duties of the league, teams, and players with respect to gambling. None of the professional sports leagues regulate gambling activities beyond those associated with the sport in question. In other words, an NBA gambling restriction may prohibit an NBA player from placing a bet on his team or another team in the NBA, but would not prevent that player from engaging in otherwise lawful sports betting and wagering. And many professional athletes readily admit to participating in a variety of gambling activities. For example, Charles Barkley recently stated he has been gambling for 20 years and acknowledged a $400,000 gambling debt to a Las Vegas casino and that he had lost millions of dollars throughout his career.[16] His admission is not uncommon among professional athletes. Professional golfer John Daly's gambling losses over the course of his career have been reported to exceed $50 million.[17]

Internal gambling restrictions apply almost exclusively to the players, managers, officials, and owners betting in their sport. Regulations may empower the Commissioner to act in the best interests of the sport or to preserve the integrity of the sport by either adopting prohibitions against gambling and other forms of wagering or punishing those who violate the prohibitions. Another type of internal regulation involves provisions inserted into the Collective Bargaining Agreements (CBA) between the players' unions and the league to acknowledge the authority of the Commissioner to act to preserve the integrity of the game vis a vis gambling. Additional limitations may be imposed upon players either in the Standard Player Contract, Mandatory training programs, or Club Rules.

56.1.1.1 Office of the Commissioner

The Commissioners of three of the four major professional sport leagues are vested with the authority to act in the best interests of the sport or to preserve the integrity of the sport in terms of creating rules and/or enforcing rules regarding gambling. For example, when MLB created the office of the Commissioner following the 1919 World Series scandal and selected Judge Keenesaw Mountain Landis as the first commissioner of baseball, one of his first actions as commissioner was to impose a lifetime ban on the eight White Sox players involved in the scandal. The National Basketball Association acted similarly in 1951 when Commissioner Maurice Podoloff prohibited NBA players from betting on and fixing team games following an indictment of two player/owners. The National Football League Commissioner also relied upon competitive integrity arguments to support its prohibitions against player betting.[18]

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[16] Ritter 2008.

[17] Daly's gambling losses 2006.

[18] Standen 2006, pp. 639–668.

Specifically, for MLB the Major League Constitution provides in Section 2: "The functions of the Commissioner shall include … to investigate … any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball …"[19] Section 3 then authorizes the MLB Commissioner to take punitive action against any Major League Club, owner, officers, employees, or players for conduct not in the best interest of baseball. Lastly, Section 4 which limits the Commissioner's authority to act unilaterally on some matters, expressly excludes any limits on the Commissioner's authority to act on matters involving the "integrity of, or public confidence in, the national game of Baseball" (MLB). The Commissioner has used this authority on a number of occasions most notably when then Commissioner A. Bartlett Giamatti imposed a lifetime suspension on Pete Rose for engaging in conduct not in the best interests of baseball. Rose had violated Major League Rule 21, which forbids players, coaches, and managers from betting on Major League Baseball games in connection with which they have a duty to perform.[20] Since Rose bet on the Reds while he was the manager of the Reds, he had a duty to perform as manager which was compromised when he began betting on the outcomes of those games.

The NFL Commissioner, Pete Rozelle, exercised similar authority in 1963 when he indefinitely suspended Green Bay half-back Paul Hornung and Detroit defensive tackle Alex Karras for placing bets on their own teams and on other NFL games. He also fined five other Detroit players $2,000 each for betting on one game in which they did not participate.[21]Article VIII of the Constitution and Bylaws of the National Football League 1999 addresses the selection and authority of the NFL Commissioner. Section 8.13(A) empowers the Commissioner generally to suspend and fine owners, players, coaches, and officials for "conduct detrimental to the welfare of the League or professional football." Section 8.13(C) specifically addresses gambling and wagering and provides the Commissioner with broad authority as follows:

> [w]henever the Commissioner, after notice and hearing, determines that a person employed by or connected with the League or any member club … has bet money or any other thing of value on the outcome or score of any game or games played in the League or has had knowledge of or has received an offer, directly or indirectly, to control, fix, or bet money or other consideration on the outcome or score of a professional football game and has failed to report the same … the Commissioner shall have the complete and unrestricted authority to enforce any or all of the following penalties.

The penalties available to the NFL Commissioner include an indefinite suspension, a lifetime ban from the League, cancellation of player contracts, forced stock sale, fines, cancellation or forfeiture of interests in a team, assignment of

[19] Major League Baseball 2006.

[20] Office of the Commissioner of Baseball 1989.

[21] NFL 2008.

stadium leases, assignment of players on the Selection or Reserve lists, and other punishments determined by the Commissioner.[22]

The NBA Constitution, Article 35 addresses the Commissioner's authority to regulate "misconduct" by players.[23] This section requires each team to incorporate the misconduct provisions into each player contract. Article 35 authorizes the Commissioner to act in response to alleged gambling or wagering in a number of ways. First, subsection (b) expressly permits the Commissioner to dismiss and perpetually disqualify any player who is found guilty of offering, agreeing, conspiring, aiding, or attempting to cause any game of basketball to result otherwise than on its merits. However, the NBA Commissioner may only exercise this authority after a hearing. Subsection (c) authorizes the NBA Commissioner to impose fines or suspend players or both for any act or conduct that is "prejudicial to or against the best interests of the Association or the game of basketball" (NBA). This subsection does not require a hearing specifically. However, Section 35 has yet another subsection dealing expressly with allegations of gambling by players. Subsection (f) provides as follows:

Any Player who, directly or indirectly, wagers money or anything of value on the outcome of any game played by a Team in the league operated by the Association shall, on being charged with such wagering, be given an opportunity to answer such charges after due notice, and the decision of the Commissioner shall be final, binding and conclusive and unappealable. The penalty for such offense shall be within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members.[24]

Despite the NBA Commissioner's broad power to act in the best interests of the game in subsection (c), it is more likely that the specific language in subsection (f) would control the Commissioner's decision making regarding allegations of player gambling.

56.1.1.2 Collective Bargaining Agreements

As discussed above, most of the Constitutions or Bylaws of the major professional sports leagues require the clubs and players to agree to certain terms and conditions. This agreement will be included in the respective Collective Bargaining Agreement which binds all the players. Collective Bargaining Agreements for each of the leagues address gambling in a variety of ways. For example, the NFL CBA provides that a player may be disciplined for conduct detrimental to the integrity of the game. Major League Baseball expressly exempts issues involving integrity of the game from the CBA grievance process thereby permitting the

[22] National Football League 1999.

[23] NBA 1989.

[24] *Id.*

Commissioner to act independently. The NBA CBA mandates gambling awareness training programs. And the NHL CBA requires players to abide by club rules and incorporates the Standard Club Rules by reference. These rules will be discussed in the following section. Each of the CBAs will be discussed in greater detail below.

Major League Baseball's CBA does not expressly prohibit gambling, but it does require players to abide by the MLB Constitution and rules, including Rule 21(d) related to betting and discussed in detail in the following section. The CBA does however provide that a 'Grievance' shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball … In the event a matter filed as a Grievance in accordance with the procedure hereinafter provided in Section B gives rise to issues involving the integrity of, or public confidence in, the game of baseball, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such procedure and thereafter be processed in accordance with the procedure provided above in this subparagraph (b). The order of the Commissioner withdrawing such matter shall constitute a final determination of the procedure to be followed for the exclusive and complete disposition of such matter, and such order shall have the same effect as a Grievance decision of the Arbitration Panel.[25]

This provision in the CBA would presumably make it quite difficult for a player to avail himself of the grievance protections commonly seen in salary, trade, and other disciplinary disputes if the matter would rise to the level of preserving the integrity of the game. Historically, since MLB has treated matters involving allegations of gambling as involving the integrity of the game, it is reasonable to assume that it would continue to do so even though it has not amended its constitution to expressly identify gambling or betting as practices that undermine the integrity of the game of baseball.

The National Football League's CBA, Article XI, Section 1 addressing League Discipline provides as follows:

Notwithstanding anything stated in Article IX (Non-Injury Grievance):

(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field other than as described in Subsection (b) below, or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within twenty (20) days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.…

(c) On receipt of a notice of appeal under subsection (a) or (b) above, the Commissioner will designate a time and place for a hearing to be commenced within ten (10) days thereafter, at which he or his designee (other than the person appointed in (b) above)

[25] Major League Baseball and the Major League Baseball Players Association 2006.

> will preside. The Commissioner will consult with the Executive Director of the NFLPA concerning the person to serve each season as the Commissioner's designee. The hearing may be by telephone conference call, if the player so requests. As soon as practicable following the conclusion of such hearing, the Commissioner will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement with respect to that dispute …[26]

This provision of the NFL CBA clearly authorizes the Commissioner to impose fines or suspensions for conduct detrimental to the integrity of the game of professional football. The NFL Standard Player Contract, discussed below, contains an express definition of what conduct may be deemed detrimental to the League and the game of professional football. Gambling is identified as conduct deemed detrimental to the game of professional football.

The National Basketball Association CBA does not expressly prohibit gambling, but does address gambling in a few different ways. First, it stipulates the form of the Standard Player Contract which contains a section on Conduct (including betting) discussed more fully below. The CBA also addresses player conduct in Article VI which provides as follows:

"Section 4. Mandatory Programs

> (a) NBA players shall be required to attend and participate in educational and life skills programs designated as 'mandatory programs' by the NBA and the Players Association. Such 'mandatory programs,' which shall be jointly administered by the NBA and the Players Association, shall include … Team Awareness Meetings (which shall cover … gambling awareness), and such other programs as the NBA and the Players Association shall jointly designate as mandatory.
> (b) When a player, without proper and reasonable excuse, fails or refuses to attend a 'mandatory program,' he shall be fined $20,000 by the NBA; provided, however, that if the player misses the Rookie Transition Program, he shall be suspended for five (5) games."[27]

Next, the NBA CBA contains Article XXXI: Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline. Article XXXI, Section 8 provides:

"Special Procedures with Respect to Player Discipline

> (a) A dispute involving … (ii) action taken by the Commissioner (or his designee) (A) concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) resulting in a financial impact on the player of $50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing

[26] National Football League Players Association and National Football League Management Council 2002.

[27] National Basketball Association and National Basketball Players Association 2005a.

before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration; but instead shall be processed exclusively as an 'Appeal' before the Commissioner (or his designee) as follows:

(1). Within twenty (20) days following written notification of the action taken by the Commissioner (or his designee), a player affected thereby or the Players Association may appeal in writing to the Commissioner.
(2). Upon the written request of the Players Association, the Commissioner shall designate a time and place for hearing as soon as is reasonably practicable following his receipt of the notice of appeal.
(3). As soon as reasonably practicable, but not later than twenty (20) days, following the conclusion of such hearing, the Commissioner shall render a written decision, which decision shall constitute full, final and complete disposition of the dispute, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement.
(4). In the event such appeal involves a fine and/or suspension imposed by the Commissioner's designee, the Commissioner, as a consequence of such appeal and hearing, shall have authority only to affirm or reduce such fine and/or suspension, and shall not have authority to increase such fine and/or suspension.

(b) A dispute involving … (ii) an action taken by the Commissioner (or his designee) that concerns the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) results in a financial impact on the player of more than $50,000, shall be processed and determined in the same manner as a Grievance under Sections 2–6 above; provided, however, that the Grievance Arbitrator shall apply an 'arbitrary and capricious' standard of review.…
(d) In the event a matter filed as a Grievance in accordance with the provisions of this Article gives rise to issues involving the integrity of, or public confidence in, the game of basketball, and the financial impact on the player of the action being grieved is $50,000 or less, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such processing and thereafter be processed in accordance with the appeal procedure provided in Section 8(a) above.[28]

Lastly, the NBA CBA contains Anti-Collusion Provisions in Article XIV which are directed toward collusive action between NBA teams or their employees/agents which would interfere with contract negotiations and player trades. Section 2 of the CBA describes a number of collective actions that would NOT violate the anti-collusion provisions including any action taken by the NBA League Office to exclude from the League, suspend or discipline any place for reasons involving gambling, drugs, or the commission of a crime. It would appear that the NBA is concerned that if the League and the teams act collectively to regulate athletes involved in gambling, drugs, or criminal activity, that that collective act may inadvertently trigger the Anti-Collusion Provisions of the CBA. Thus, those types of collective actions were exempted from the Anti-Collusion provisions. Interestingly, the CBA is not specific about identifying gambling as conduct for which players will be disciplined, instead it is implied in the integrity of the game provisions and incorporated by reference to the NBA Constitution, Section 35, within the standard player contract.[29]

[28] *Id.*
[29] *Id.*

The National Hockey League's (NHL) CBA, Section 30.7, incorporates Exhibit 14 to the CBA, the Standard Club Rules for players. Section 30.7 provides:

> (a) "Each Club may require its Players to abide by some or all of the rules set forth in the 'Standard Club Rules' annexed hereto as Exhibit 14.
> (b) Each Player must be given written notice of the specific rules in the Standard Club Rules that the Club intends to apply for the upcoming season. Such notice must be given by no later than the first day of Training Camp for each applicable Playing Season (or, for a Player who later joins the Club, within three (3) days of his arrival). In each case, receipt of such Club rules must be acknowledged by each Player in writing."[30]

Of the four major professional sports leagues, the National Hockey League has the least aggressive policies toward gambling. Interestingly, as mentioned earlier, while the other three leagues even actively lobby for legislation to prevent sports gambling, the NHL's lobbying expenditures are instead limited to issues of televisions rights, performance enhancing drugs, and eminent domain.[31]

56.1.1.3 Standard Player Contracts

An extension of the Collective Bargaining Agreements and the League Constitution and Bylaws is the standard player contract. The League Constitution will require that a standard player contract be created and adopted. The players association and the league will negotiate the terms of the standard player contract. And each of the major professional sports leagues have either included language in the standard player contract or incorporated such language from the CBA related to gambling, wagering, or betting. In addition to including express prohibitions on gambling, some player contracts will also prohibit any conduct that is detrimental to the integrity of the sport or not in the best interest of the sport. The inclusion of gambling prohibitions and the "best interests" or loyalty language in the Standard Player Contract are consistent elements among the various leagues' efforts to manage player gambling and betting. The key provisions from each league's standard player contract is summarized below.

The NFL Standard Player Contract contains several general restrictions on player conduct as well as loyalty provisions. First, Section 2 provides

> Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game.[32]

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[30] National Hockey League and the National Hockey League Players Association 2005a.

[31] King 2008, pp. 14–15.

[32] National Football League Players Association and National Football League Management Council 2002.

Next, Section 11 states "If at any time, in the sole judgment of Club … Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract."[33] Section 14, "Rules" states that the "Player will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during the term of this contract."[34] But by far the most direct and unambiguous prohibition on gambling is contained in Section 15 which provides as follows:

Integrity of Game Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity … or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.[35]

As is presented below, the NFL prohibitions on gambling are the most comprehensive and clear of the major professional sports leagues. They not only expressly prohibit numerous gambling activities including bribes, fixing games, or even associating with gamblers or gambling activities, but further expressly acknowledge gambling as a threat to the integrity of the league.

The MLB Uniform Player Contract does not expressly identify gambling as a prohibited activity or a threat to the integrity of the game as is evidenced in the NFL Standard Player Contract. Instead, MLB incorporates those restrictions by reference to the Major League Constitution and Major League Rules. The Uniform Player Contract also includes a Loyalty Clause by which the player agrees to "conform to high standards of personal conduct, fair play, and good sportsmanship."[36] The Uniform Player Contract further provides:

The Club is, along with other Major League Clubs, signatory to the Major League Constitution and has subscribed to the Major League Rules … 9(a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Constitution, and the Major League Rules, or other rules or regulations in effect on the date of this Uniform Player's Contract …[37]

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Major League Baseball 2006.

[37] Major League Baseball and the Major League Baseball Players Association 2006.

These provisions would bind the player to Sections 2 and 3 of the Major League Constitution discussed previously and League Rule 21(D) discussed below. In addition, the general loyalty clause could also be construed to apply to gambling activities.

The NBA Uniform Player Contract contains a loyalty clause whereby the player agrees "to give his best services, as well as loyalty, to the Team, and to play basketball only for the Team …; and (iv) not to do anything that is materially detrimental or materially prejudicial to the best interest of the Team of the League."[38] However, the NBA Uniform Player Contract also provides express prohibitions on gambling similar to the express provisions utilized by the NFL. The NBA Uniform Player Contract, Section 5, Conduct provides:

> (a) The Player agrees to observe and comply with all Team rules, as maintained or promulgated in accordance with the CBA, at all times whether on or off the playing floor. Subject to the provisions of the CBA, such rules shall be part of this Contract as fully as if herein written and shall be binding upon the Player … …
> (c) For any violation of Team rules, any breach of any provision of this Contract, or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player, the Team may reasonably impose fines and/or suspensions on the Player in accordance with the terms of the CBA … …
> (e) The Player agrees that if the Commissioner, in his sole judgment, shall find that the Player has bet, or has offered or attempted to bet, money or anything of value on the outcome of any game participated in by any team which is a member of the NBA, the Commissioner shall have the power in his sole discretion to suspend the Player indefinitely or to expel him as a player for any member of the NBA, and the Commissioner's finding and decision shall be final, binding, conclusive, and unappealable. (emphasis added).[39]

The NBA Uniform Player Contract does not go quite as far as the NFL contract and specifically identify gambling as a threat to the integrity of the league, but it does grant the Commissioner considerable authority to respond to violations of the Conduct provisions.

In the NHL Standard Player Contract the player agrees to play to the "best of his ability."[40] The Standard Player Contract also includes a loyalty clause wherein the player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interests of the Club, the League or professional hockey generally."[41] Section Four of the Standard Player Contract also mandates compliance with Club rules and states:

The Club may from time to time during the continuance of the SPC establish reasonable rules governing the conduct and conditioning of the Player, and such

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[38] National Basketball Association and National Basketball Players Association 2005.

[39] National Basketball Association and National Basketball Players Association 2005.

[40] National Hockey League and the National Hockey League Players Association 2005a.

[41] *Id.*

reasonable rules shall for a part of the SPC … For violation of any such rules or for any conduct impairing the thorough and faithful discharge of the duties incumbent upon the Player, the Club may impose a reasonable fine upon the Player … The Club may also suspend the Player for violation of any such rules.[42]

Section 18 further provides that the Club and the Player agree to be bound by the League Rules and the Collective Bargaining Agreement.

The Standard Player Contract also contains one express provision that may encompass gambling activities, although the provision is not as clear and direct as represented in the NFL or NBA player contracts. The NHL Standard Player Contract, Section 9, provides "it is mutually agreed that the Club will not pay, and the Player will not accept from any person, any bonus or anything of value for winning or otherwise attempting to affect the outcome of any particular game or series of games except as authorized by the League By-laws."[43] While this provision may be applicable in the event a player received a bribe or other incentive to affect the outcome of a game, it has most commonly been applied to restrict performance bonuses for players from the Club. It would likely not apply in a situation where a player had merely bet on another NHL game in which he did not participate; or arguably even if one in which he did participate it was not intended to affect the outcome of the game. Notably, neither the NHL CBA nor the Standard Player Contract acknowledges the inherent threat gambling poses to the integrity of the game, nor does the CBA authorize the Commissioner to discipline players to preserve the integrity of the game.

56.1.1.4 Club Rules

A final mechanism for regulating gambling activities by professional athletes is found in the Team or Club rules. As mentioned in the previous section, a number of the leagues' standard player contracts mandate compliance with league, team, and club rules. Thus, some of the leagues have recognized and approved team or club rules regarding gambling activities.

For example, every clubhouse in MLB and minor league baseball posts MLB Rule 21(d) in its locker rooms.[44] Rule 21(d) reads as follows:

> (d) Betting on Ball Games
>
> Any player, umpire, or club official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform shall be declared ineligible for one year. Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform shall be declared permanently ineligible.[45]

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[42] *Id.*

[43] *Id.*

[44] Masteralexis (18 February 2008) personal communication; Major League Baseball n.d.

[45] Major League Baseball n.d.

The NHL has also adopted uniform club rules including Standard Club Rule 2 which provides "Gambling on any NHL Game in prohibited."[46] The notes included with the NHL Standard Club Rules indicate that a "first offense" of any club rules may only be punished by imposing a $250 fine; and any subsequent fine is limited to $500 in native currency. At the end of the season, the fines accumulated by a player are donated to a charity of the player's choice. Of course, as mentioned in the previous section, the National Hockey League CBA does not acknowledge the inherent threat gambling poses to the integrity of the game, nor does the CBA authorize the Commissioner to discipline players to preserve the integrity of the game. Even the portions of the CBA that do vest the Commissioner with authority to discipline players for off-ice conduct are subject to numerous procedural and hearing requirements before a player can be suspended or fined.

Thus, while the gambling prohibition in Standard Club Rule 2 is clear and direct, the punishment for violating the rule is minimal in contrast to the penalties typically available in the other major professional sports leagues. Overall, the NHL's gambling restrictions are less rigorous than the other three major leagues. This could explain why the gambling scandal involving Phoenix Coyotes assistant coach, Rick Tocchet, did not result in a significant suspension for violating NHL gambling policies. Tocchet operated a gambling ring together with two other men which handled approximately $1.7 million in bets during the 6 weeks before the Super Bowl.[47] Authorities reported that up to a dozen NHL players may have placed bets through Tocchet's operation. In addition, Wayne Gretzky's wife was also reported to have placed bets with Tocchet. All parties involved in that scandal including other coaches, players, and Wayne Gretzky's wife were adamant that they never bet on hockey. Deputy Commissioner, Bill Daly, said that there was no evidence that any betting on NHL games had occurred.[48] The NHL commissioner, Gary Bettman, did suspend Tocchet 3 months after Tocchet pled guilty to promoting gambling and conspiracy to promote gambling and sentenced to 2 years' probation. Tocchet took a leave of absence following the filing of charges against him in 2006. The NHL conducted an internal investigation and determined his role was not as involved as initially reported and reinstated Tocchet as the Coyotes assistant coach in February 2008 following his probation and his 3-month suspension.[49] Tocchet recently accepted a coaching position with the Tampa Bay Lightning.

Both the NHL and MLB's club rules are direct and specific prohibitions of betting and/or gambling. Neither the NBA nor the NFL seems to regulate gambling activities through club or team rules, instead relying more heavily on the Standard Player Contract and Commissioner's authority. However, despite the club rules in the NHL and MLB neither are as powerful as the NFL's Section 15

[46] National Hockey League 2005b.

[47] Associated Press 2006.

[48] *Id.*

[49] Associated Press 2008.

which ties gambling directly to integrity of the sport and vests the Commissioner with the authority to discipline. Of the four major professional sports leagues, the NFL is clearly the most aggressive and vigilant in its prohibitions against gambling.

56.1.2 External Relationships

While internal league gambling restrictions have been strengthened, external policies defining permitted advertising relationships have been relaxed to permit professional sport clubs to pursue partnerships with gaming enterprises to increase club revenues. McKelvey[50] examined the evolution of rules used by the major sports leagues to regulate advertising and promotional activities of the league and the teams. Initially, all leagues refused any advertising or promotional relationships with gaming enterprises. This ban included state lotteries. The National Football League even sued the State of Delaware to prevent the state from conducting a state lottery using results or scores from NFL games.[51] The NBA and NHL both filed similar legal challenges to state-run lotteries.[52] However, over time, each of the leagues, except the National Football League, relaxed these restrictions slightly to permit limited associations between sport teams and gaming enterprises.

For example, in 1985, Major League Baseball began relaxing restrictions on advertising to allow clubs to accept advertising from federal, state, or local lotteries so long as the advertising did not include or use Club names, logos, announcers, or personnel.[53] Official sponsorship relationships were still prohibited. Presently, MLB rules allow clubs to enter into advertising, sponsorships, and promotional agreements that may include Club names, logos, announcers, personnel or mascots. However, the lottery game or promotion may not be contingent upon the outcome of the event. Essentially, lotteries may advertise with Club names and logos, but may not put a club name or logo on the actual lottery ticket. Lotteries may also distribute lottery tickets inside stadiums, purchase advertising inside the stadium; and sponsor other game promotions.[54] Sports themed lottery games continue to grow in popularity fueled partly by the growing acceptance of the partnerships between the lottery and the local sports team.

With regard to casinos or other legalized gambling entities, MLB clubs may permit advertising, sponsorships, and promotional activities. No advertisements, sponsorship materials, or promotional materials may use the Club name or logos or be identified in any way with the club or MLB, except that both the

[50] McKelvey 2004, pp. 23–41.

[51] N.F.L. v. Governor of the State of Delaware 1977.

[52] McKelvey 2004, pp. 23–41; Standen 2006, pp. 639–668.

[53] McKelvey 2004, pp. 23–41.

[54] *Id.*

casino and the club may include logos together on giveaway items involved in a promotional event. Thus, if a casino wished to purchase advertising on a billboard inside the stadium it may do so, so long as the club or MBL logos are not displayed as part of the advertisement. However, if the casino wished to sponsor a promotional event and give away a neck tie to attendees, the neck tie or other promotional item could include both the casino's logo and the Club's name or logo.

The National Basketball Association and the National Hockey League have also relaxed restrictions on advertising and sponsorship relationships between teams and lotteries or casinos. The NBA and WNBA were the first professional sports leagues to license the use of team logos to state lotteries. The licensing agreement also permits the sale of lottery tickets inside NBA and WNBA venues and free distribution of lottery tickets to fans as promotional items.[55] Additionally, NBA Commissioner David Stern approved the purchase of a WNBA team by the Mohegan Sun Resort and Casino in 2003. The National Hockey League also entered into a licensing agreement with a state lottery licensing company which began offering scratch-off games with cash prizes as well as team merchandise and tickets as prizes. Teams are permitted to sell and/or distribute free lottery tickets to fans in the arena. The NHL Calgary Flames even applied to the Alberta Gambling and Liquor Commissions to build a casino inside the publicly owned arena.[56] For the past 3 years, the Calgary Flames have sponsored a Celebrity poker tournament to raise funds for the Flames Foundation for Life. The poker tournament was held at Deerfoot Inn and Casino with Calgary Flames players, coaches, and management participating in the sold out event.[57]

Contrary to the fairly rapid expansion of advertising and sponsorship arrangements between professional sport teams and state lotteries or casinos, the National Football League continues to restrict these relationships. The NFL only permits teams to accept generic advertising that does not use team names or logos or anything that could resemble a sponsorship. Even this limited opportunity is restricted to state and city lotteries, state or city off-track betting facilities, and horse or dog racing tracks. No advertising can be accepted from casinos.[58] Distribution of lottery tickets in stadium or as giveaway items is not permitted in NFL stadiums, nor can the teams accept advertising even from approved lotteries if the lottery game is sport themed. The NFL has even refused advertising from the Las Vegas Convention and Visitors Authority.[59]

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[55] *Id.*

[56] *Id.*

[57] Calgary Flames Limited Partnership 2008.

[58] McKelvey 2004, pp. 23–41.

[59] *Id.*

56.1.3 Emerging Issues for Other Professional Sports Organizations

A number of other professional sport organizations have also adopted rules and regulations to curb or limit gambling activities. Recent allegations of match fixing buckled the ATP Tour in the fall of 2007. The International Tennis Federation, the ATP, the WTA Tour, and the four Grand Slam events convened an independent panel which reviewed 73 matches held over the past 5 years.[60] Of those 73 matches, 45 were subject to further review. The panel produced a report of its findings which also concluded that some players were vulnerable to corrupt approaches from people outside tennis.[61]

The ATP Tour created a task force to develop uniform rules regarding wagering, match fixing, and collusion that all the sport organizations governing professional and amateur tennis could then adopt. It was reported that the USTA, WTA, and Grand Slam Series would adopt similar rules in an effort to establish a uniform anti-corruption program.[62] The 2008 ATP Tour rules contain detailed provisions related to wagering and collusion applicable to tournament organizers, owners, ATP employees and agents, and players. With regard to ATP tournament organizers, owners, employees, and agents, Section 7.01(H) provides:

> No ATP or Challenger Series Tournament, ATP member or any person who directly or indirectly has a controlling ownership interest therein or who is the Designated Representative (as defined in the ATP By-Laws) or Tournament Director or other employee or agent of an ATP or Challenger Series Tournament or ATP member (excluding employees or agents who do not have executive or material management authority) shall engage in any form of gambling or wagering in connection with any ATP or Challenger Series Tournament.[63]
>
> The ATP Tour has also adopted a formal anti-collusion program which is spelled out in detail in Section 7.05, Article C. Section 7.05(C) identifies the following punishable offenses.
>
> Commission of any offense set forth in Article C or D of this Program or any other violation of the provisions of this Program shall constitute a 'Corruption Offense' for all purposes of this Program.
>
> (1) Wagering
>
> (a) No Player nor any of his Player Support Personnel shall, directly or indirectly, wager or attempt to wager money or anything else of value or enter into any form of financial speculation (collectively, 'Wager') on the outcome or any other aspect of any Event.
> (b) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, induce, entice, persuade, encourage or facilitate any other person to Wager on the outcome or any other aspect of any Event.

[60] Lehourites 2008; Clarey 2007.

[61] Lehourites 2008.

[62] *Id; Rules are sought to address match-fixing, gambling* 2007.

[63] Association of Tennis Professionals (ATP) 2008a.

(2) Corruption

(a) No Player nor any of his Player Support Personnel shall, directly or indirectly, contrive or attempt to contrive, or be a party to any effort to contrive or attempt to contrive, the outcome or any other aspect of any Event.
(b) Without limiting the requirements set forth above under 'Best Efforts,' no Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, induce, entice, persuade, encourage or facilitate any Player to not use his best efforts in any Event.
(c) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, request, receive, accept or agree to receive or accept any Consideration, either (i) with the intention of influencing the Player's efforts in any Event, or (ii) that could otherwise bring the Player or the game of tennis into disrepute.
(d) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer, promise, provide or agree to provide any Consideration to any Other Player, whether the Other Player is an opponent of such Player or otherwise, either (i) with the intention of influencing the Other Player's efforts in any Event, or (ii) that could otherwise bring the Player, the Other Player or the game of tennis into disrepute.
(e) No Player nor any of his Player Support Personnel shall, directly or indirectly, solicit, request, receive, accept or agree to receive or accept any money, benefit or other consideration (whether financial or otherwise) (collectively, 'Consideration'), for the provision of any information concerning the weather, players, court conditions, status, outcome or any other aspect of any Event (other than the provision of information to a reputable media organization not affiliated with Wagering for disclosure to the general public).
(f) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer, promise, provide or agree to provide any Consideration to any other Player (an 'Other Player'), whether the Other Player is an opponent of such Player or otherwise, for the provision of any information concerning the weather, players, court conditions, status, outcome or any other aspect of any Event.
(g) No Player nor any of his Player Support Personnel shall, directly or indirectly, offer compensation to the Tournament in exchange for a Wild Card.[64]

Shortly after adoption of the new Anti-Corruption policy, the ATP suspended two players for betting on matches and reinforced its commitment to rigorous enforcement of the betting ban.[65] The ATP Tour rules also restrict tournament organizers and owners from entering into advertising relationships with any companies associated with gambling.[66]

Despite the "War on Gambling" announced in 1920, and in contrast to the current efforts seen in professional tennis, the United States Golf Association (USGA) expressly permits gambling and wagering; and seems to recognize it as a common aspect of the game of golf. USGA rules address gambling primarily as a threat to amateurism, rather than to the integrity of the sport. The USGA rules warns that "An *amateur golfer* must not take any action, including actions relating to golf gambling, that is contrary to the purpose and spirit of the *Rules*."[67]

[64] Association of Tennis Professionals (ATP) 2008a.
[65] Tomickova 2008; Townend 2008.
[66] ATP, Section 7.02(J)(1)(b)(viii), 2008.
[67] USGA, Rule 7–2, 2008.

However, the USGA has also adopted a Policy on Gambling which provides "there is a distinction between playing for prize money,[68] gambling or wagering that is contrary to the purpose and spirit of the *Rules*,[69] and forms of gambling or wagering that do not, of themselves, breach the *Rules*" (USGA). The USGA Policy on Gambling identifies acceptable and unacceptable forms of gambling.

56.1.4 Acceptable Forms of Gambling

There is no objection to informal gambling or wagering among individual golfers or teams of golfers when it is incidental to the game. It is not practicable to define informal gambling or wagering precisely, but features that would be consistent with such gambling or wagering include:

- the players in general know each other;
- participation in the gambling or wagering is optional and is limited to the players;
- the sole source of all money won by the players is advanced by the players; and
- the amount of money involved is not generally considered to be excessive.

Therefore, informal gambling or wagering is acceptable provided the primary purpose is the playing of the game for enjoyment,and not for financial gain.

56.1.5 Unacceptable Forms of Gambling

Other forms of gambling or wagering where there is a requirement for players to participate (e.g. compulsory sweepstakes) or that have the potential to involve considerable sums of money (e.g. calcuttas and auction sweepstakes—where players or teams are sold by auction) are not approved.

Otherwise, it is difficult to define unacceptable forms of gambling or wagering precisely, but features that would be consistent with such gambling or wagering include:

- participation in the gambling or wagering is open to non-players; and
- the amount of money involved is generally considered to be excessive.

An *amateur golfer's* participation in gambling or wagering that is not approved may be considered contrary to the purpose and spirit of the *Rules*[70] and may endanger his Amateur Status. Furthermore, organized events designed or promoted

[68] USGA, Rule 3–1, 2008.

[69] USGA, Rule 7–2, 2008.

[70] Rule 7–2.

to create cash prizes are not permitted. Golfers participating in such events without first irrevocably waiving their right to prize money are deemed to be playing for prize money, in breach of Rule 3–1.

Note: The Rules of Amateur Status do not apply to betting or gambling by *amateur golfers* on the results of a competition limited to or specifically organized for professional golfers (USGA).

The final note seems to condone gambling by amateurs if they are wagering on the results of a professional golf competition. The rules are silent as to any restrictions imposed on professional golfers to avoid gambling and wagering on golf matches. However, considering that sports betting is illegal in every state except Nevada, it is not clear why the USGA does not have rules or policies similar to other professional sports leagues or organizations discouraging or even prohibiting gambling by the athletes, amateurs, and professional alike.

The PGA prohibits players from having a financial interest in the performances of other players or their winnings so that the tournament prize pool is not compromised. Thus players cannot split purses. Players are also prohibited from gambling on the premises where a PGA Tour event is being played subject to a 2-year suspension for a violation of the anti-gambling rule.[71] However, it is commonly known that players bet against each other during practice rounds prior to tournaments.[72]

The LPGA Tour is even less restrictive than the PGA Tour. Tour professional Laura Davies admits to gambling on sports of all kinds and was even given permission by the LPGA to sign a 1-year endorsement contract with a Venezuela-based internet betting parlor that offers wagering opportunities on LPGA events.[73] The LPGA Commissioner was hesitant to approve the relationship, but determined that since the LPGA had held events in Las Vegas and Atlantic City sponsored by casinos, it would not be able to ban players from accepting similar partnerships. A similar deal was offered to John Daly, but PGA Tour officials recommended that he avoid the partnership even though the PGA Tour permits players to endorse resorts that also have casinos or gambling entities so long as the player only promotes the resort side of the company. Endorsing gambling activities directly is prohibited by the PGA Tour, but not the LPGA Tour.[74]

56.2 Conclusion

The major professional sports leagues employ a variety of techniques to regulate and restrict gambling. These techniques are largely directed toward the players and restrict players from gambling on the sport in which they play. The leagues are in

[71] Weiler and Roberts 2004.

[72] Standen 2006, pp. 639–668.

[73] Diaz 2001.

[74] *Id.*

a position to impose restrictions through the use of league rules, terms contained in the respective collective bargaining agreements and/or the standard player contract, and even club rules. Penalties for violating the various rules or policies can range from a minimal fine to an indefinite suspension. Three of the four major sports leagues also aggressively oppose internet gambling and sports betting. But while the leagues oppose internet gambling and sports betting, the need for new revenue streams has produced a growing number of commercial partnerships between sports teams and state lotteries; and even a few partnerships with casinos. The leagues are walking a fine line to balance the threat unregulated gambling can and has posed to the integrity of the sport.

Governing bodies for a number of other professional sports also restrict gambling by players but not as vigilantly as the major professional sport leagues. The ATP Tour has recently implemented comprehensive rules prohibiting gambling that also carry severe penalties, but only after encountering serious allegations of match fixing during 2007. The USGA, PGA, and LPGA lag well behind the ATP Tour and WTA in regulating gambling activities.

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Chapter 57
Concluding Remarks

Ian S. Blackshaw

Corruption is widespread around the world and is on the increase, according to the latest Report from Transparency International (TI),[1] a global organisation which fights corruption. It appears that corruption has increased over the last 3 years, most noticeably in Europe and America, and one in four people report paying bribes in 2009; and, in Sub-Sahara Africa, this practise increased to one in two! Another staggering statistic to emerge from the TI Report is that a third of people under the age of 30 report paying a bribe in 2009, compared to less than one in five people over the age of 51.

In introducing the Report, Huguette Labelle, Chair of TI, observed that:

> The fall-out of the financial crises continues to affect people's opinions of corruption, particularly in Europe and North America. Institutions everywhere must be resolute in their efforts to restore good governance and trust. It is heartening that so many people are ready to take a stand against corruption. This willingness must be mobilised.

Clearly corruption is rife and affects every sphere of life, including sport, and it behoves the International Sports Governing Bodies to take all possible steps to eradicate corruption and corrupt practises from their respective sports,[2] especially corruption that tends to result from Sports Betting and the corresponding possibilities of Match Fixing, in cahoots with corrupt bookmakers, that present

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[1] Report of 9 December, 2010, available by logging onto the Transparency International official website at www.transparency.org.

[2] See 'Kick corruption out of football' by Ian Blackshaw, TMC Asser International Sports Law website, www.sportslaw.nl, 22 November, 2010.

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themselves in various parts of the world. Of course, the civil authorities also have a role to play in the fight against corruption generally and corruption—in one form or another—engendered by Sports Betting through the introduction of appropriate policies and legal controls.

The Policy and Legal Regulation of Sports Betting has been well covered in this Book in a largely representative number of countries around the world, with their diverse backgrounds, traditions and cultures, enabling the reader to make a useful comparative analysis and thereby gain a better appreciation of the problems and issues presented by Sports Betting and the legal and policy measures that can and are being taken, if not to eliminate them, at least to contain and discourage them.[3]

One common denominator, however, that emerges from these accounts and seems to stand out is the use of State Lotteries for financing so-called "good causes" or "public benefit" activities, which, in both cases, include Sport. A case, perhaps, of the end justifying the means, especially in those countries where betting is generally frowned upon?

Online Betting on Sports Events is also an increasing phenomenon, which, by the very nature of the Internet, is difficult to control and regulate and, therefore, tends to receive a sort of passive tolerance and tacit approval by National Authorities—not least, in the United States, for example.

The subject of this Book is a very complex—but fascinating—one and the various contributors have acquitted themselves well of the task of explaining the essential features and peculiarities of the Policy Aims and the Legal Regulation of Sports Betting in their respective countries.

The position adopted by the European Union (EU) in relation to Betting in general and Sports Betting in particular, which is also covered and well explained in the Book, presents an interesting state of affairs. Legally speaking, Sports Betting is not only an economic activity—despite the fact that the winnings are uncertain and not, in any way, guaranteed—but also falls within the ambit of the applicable EU rules on the freedom to provide services within the Single European Market. Interestingly, Sports Betting in the EU does not benefit from the application of the "specificity of sport" principle, which is now enshrined in the Lisbon Treaty, although, generally speaking, it seems to me, to be honoured more in theory than in practise!

[3] For example, the World Governing Body of Snooker (WPBSA) opened a so-called 'Snooker Hotline' on 12 November, 2010 with the aim of tackling corruption in the sport, following the former World Champion, John Higgins, being cleared of match-fixing allegations made against him but being fined £75,000 and banned for 6 months for bringing the sport into disrepute as a result of failing to report an illegal approach to lose frames. According to David Douglas, the WPBSA disciplinary chief, "It is a hotline and email service for the players that is anonymous or otherwise. The players can use it to report suspicious activities or to enquire about information about the rules and regulations. It is a case of the WPBSA being pro-active and making sure we are not arrogant to think that corruption is not a part, or could not be a part, of the sport." The WPBSA Integrity Unit will be responsible for pooling the information into a database, which the WPBSA will use in consultation with gambling associations and betting exchanges.

As Tjeerd Veenstra points out in his Foreword to this Book:

> Not only is it enjoyable to watch a sporting event, but added excitement and interest come from also being able to bet on the outcome of it.

I would quite agree with that, which, of course, is all well and good, but for Sport and Betting on Sports Events to co-exist satisfactorily and symbiotically, there has to be integrity and fairness in each and in equal measure; otherwise, both are undermined and suffer accordingly! In the case of sport, who wants to watch a "fixed" match, and which sponsors wish to associate themselves with a tainted sport? The desired outcome of integrity in betting and also in sport can only be achieved through an ongoing partnership between the Sports Governing Bodies, the Civil Authorities and the Betting Industry itself, in order to eradicate and keep corruption out of sport and corruption out of betting on sport for good. This means that each of these stakeholders always needs to be ahead of the game—and that is quite a tall order for them to achieve!

Acronyms

AAMS	Italian gaming regulator
AEDAPI	Spanish Association of Internet Betters (Spain)
AFP	Global news agency
ARJEL	Online Games Regulations Authority (France)
ASBL	Non-profit Association (Belgium)
ATG	AB Trav och Galopp (Sweden)
ATP	Association of Tennis Professionals
BFU	Bulgarian Football Union
BGN	Bulgarian Lev
BRA	Bicycle Racing Act (Japan)
BRIC	Grouping acronym that refers to the countries of Brazil, Russia, India and China, which are all deemed to be at a similar stage of newly advanced economic development
BST	Bulgarian Sport Totalizer
C-LoRo	9th Convention concerning Loterie Romande (Switzerland)
CAS/TAS	Court of Arbitration for Sport
CBA	Collective Bargaining Agreements
CC	Civil Code
CE	EC Treaty
CFA	China Football Association
CILP	Inter-Cantonal Convention on the Supervision, Licencing and Distribution of Profits from the lotteries and betting (Switzerland)
CNPD	National Data Protection Authority (Portugal)
CNSE	National Committee for the Elite Sport (Switzerland)
COI	Committee on Infractions (USA)
Comlot	Lotteries and Betting Commission (Switzerland)
CONAR	Conselho Nacional de Auto-regulamentação Publicitária (Brazil)
CONI	Italian National Olympic Committee

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CRPC	Consumer Rights Protection Centre (Latvia)
CSA	National Regulatory Authority for the Audiovisual Sector (France)
CSLAC	China Sports Lottery Administrative Center
CVR	Central Business Register (Denmark)
DKK	Danish Krones
DNS	Domain Name System
DTC	Data transmission center
EC	EC Treaty
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EGBA	European Gaming and Betting Association
EHKL	Estonian Association of Gambling Operators
EL	European Lotteries
EOK	Estonian Olympic Committee
EP	European Parliament
EU	European Union
FA	Football Association
FAI	Football Association of Ireland
FAMA	Andalusian Association for Disabled People
FBI	Federal Bureau of Investigation (USA)
FDJ	Company that has been entitled to offer online sports betting (Française des Jeux) (France)
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
FIHO	Foundation for financing the organisation for the disabled and humanitarian organizations (Slovenia)
FOBT	Fixed odds betting terminals (Ireland)
FRF	Romania Football Federation
FSA	Financial Services Authority (UK)
FŠO	Foundation for financing of Sports Organisations (Slovenia)
FSRC	Financial Services Regulatory Commission (Caribbean)
GATS	General Agreement on Trade in Services
GATS	General Agreement on Trade in Services
GBP	United Kingdom Pound Sterling
GCB	Netherlands Gaming control board
GCC	Golden Chips Casino, Inc. (USA)
GFF	Greek Football Federation
GGR	Gross Gaming Revenu
GlüStV	Austrian Gambling Act
GPK	Code of conduct for promotional games (The Netherlands)

GURI	Italian Gazette
HRA	Horse Racing Act 1948 (Japan)
HUF	Hungary Forint
IAAF	International Association of Athletics Federations
ICC	International Cricket Council
ICC CWC	ICC's Cricket World Cup
IGRA	Indian Gaming Regulatory Act (USA)
IKV	Inter-Cantonal Convention on the organisation of the lotteries (Switzerland)
IOC	International Olympic Committee
IRS	Income Tax (Portugal)
ITF	International Tennis Federation
ITL	Italian Lire
JEP	Belgian Jury of Advertising Ethics
JFO	Joint forces operations (Canada)
JRA	Japan Racing Association
KNVB	Dutch Football Association
LA	Swedish Lotteries Act
LAE	National State Lottery and Betting Organization (Spain)
LBO	Licensed betting offices (UK)
LCIT	Corporate Income Taxation (Bulgaria)
LFP	National Professional Football League (Spain)
LLP	Federal Lotteries and Commercial Betting Law (Switzerland)
LMJ	Federal Games of Chance and Casinos Law (Switzerland)
LPGA	Ladies Professional Golf Association (and tournament) (USA)
LPM	Law on Identification Card Attached to Prize Money (Japan)
LSSI	Information Society Services and Electronic Commerce (Spain)
LTAF	Law on the Federal Administrative Tribunal (Switzerland)
LTL	Lithuanian Litas
LVL	Latvian Lats
LVLLP	Federal Law on the Lotteries and Commercial Betting (Switzerland)
MAFF	Ministry of Agriculture, Forestry and Fisheries (Japan)
MboatRA	Motorboat Racing Act (Japan)
METI	Ministry of Economy, Trade and Industry (Japan)
MEXT	Ministry of Education, Culture, Sports, Science and Technology (Japan)
MIC	Ministry of Internal Affairs and Communication (Japan)
MiFID	Markets in Financial Instruments Directive (Ireland)
MKD	Macedonian Denar
MLB	Major league baseball (USA)
MOTOE	Motosykletistiki Omospondia Ellados NPID (Greece)
MoUs	Memoranda of understanding (UK)
MPA	Swedish Marketing Practices Act
MS	Member States

NAASH	National Association for the Advancement of Sports and Health (Japan)
NAR	Ministry of Agriculture, Forestry and Fisheries (Japan)
NBA	National Basketball Association (USA)
NCAA	National Collegiate Athletic Association (USA)
NFL	National Football League (USA)
NGB	National Governing Body
NGO	Non-Governmental Organization
NHL	National Hockey League (USA)
NI	Northern Ireland
NIF	Norwegian Olympic and Paralympic Committee and Federation of Sports
NRA	National Racing Association (Japan)
NZLC	New Zealand Lotteries Commission
NZRB	New Zealand Racing Board
ODI	One Day International (Caribbean)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
OLLP	Ordinance to the Federal Lotteries and Commercial Betting Law (Switzerland)
OLMJ	Ordinance concerning games of chance and casinos (Switzerland)
ONCE	National Organization for the Blind—(Spain)
ONLAE	National State Lottery and Betting Organization (Spain)
OPAP	Entity Providing Sports Betting (Greece)
PASPA	Professional and Amateur Sports Protection Act (USA)
PMU	Company that has been entitled to offer online horse racing (France)
PMUR	Pari Mutuel Urbain Romand (Switzerland)
PreCCA	Prevention and Combatting of Corrupt Activities Act (South Africa)
PSSI	Indonesian Football Association
RaLLP	Regulations on the implementation of the Federal Lotteries and Commercial Betting Law (Switzerland)
RBCB	Racecourse Betting Control Board (UK)
RCC	Advertising Code Committee (The Netherlands)
RCMP	Royal Canadian Mounted Police
RF	Russian Federation
RGA	Remote Gambling Association
RICO	Racketeer Influenced and Corrupt Organizations Act (USA)
RLoto	Regulations concerning lotteries, tombolas and lotos (Switzerland)
Rp.	Rupiah (Indonesia)
Rs.	Rupee (India)
RSD	Serbian Dinar

RSFSR	Russian Soviet Federated Socialist Republic
RvK	Code of conduct on advertisement for games of chance (The Netherlands)
S.E.	State Enterprise
SAYS	State Agency for Youth and Sports (Bulgaria)
SBIP	Sports Betting Integrity Panel (UK)
SBIU	Sports Betting Intelligence Unit (UK)
SEA games	South-East Asia Games of 2005
SEK	Swedish Krona
SENS	Netherlands State Lottery
Sk	Slovak Koruna
SPCA	Society for the Prevention of Cruelty to Animals (New Zealand)
Sport NI	Sports Council of Northern Ireland
SPV	Act on Sports Promotion Voting (Japan)
SROC	Sports Rights Owners Coalition (UK)
STJD	Superior Tribunal de Justiça Desportiva (Brazil)
TAB	Totalisator Agency Board (New Zealand)
TEC	Treaty on the Functioning of the European Union
TFEU	Treaty on the Functioning of the European Union
TFF	Fédération Turque de Football (Turkey)
TSSB	Sports betting model (Tanda Sumbangan Sosial Berhadiah) (Indonesia)
TT Pro League	Trinidad and Tobago Professional Football League
UE	European Union
UEFA	Union of European Football Associations
UIGEA	Unlawful Internet Gambling Enforcement Act (USA)
UK	United Kingdom
UNIRE	National Equine Organization (Italy)
US	United States
USC	United States Code
USD	United States Dollar
USGA	United States Golf Association
USTA	United States Tennis Association
UW	University of Washington
VAT	Value Added Tax
WICB	West Indies Cricket Board
WIGC	World Interactive Gaming Corporation (USA)
WIPA	West Indies Players Association
Wks	Act on Games of Chance (The Netherlands)
WNBA	Women's National Basketball Association (USA)
WPBSA	World Governing Body of Snooker
WSE	World Sports Entertainment
WTO	World Trade Organization

NATIONAL AND INTERNATIONAL LEGISLATION

INTERNATIONAL LEGISLATION

EUROPEAN UNION

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COUNCIL OF EUROPE

NATIONAL LEGISLATION

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GERMANY

GREECE

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JAPAN

KENYA

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LITHUANIA

LUXEMBOURG

MACEDONIA

NETHERLANDS

NEW ZEALAND

NORWAY

PORTUGAL

RUSSIA

SPAIN

SWEDEN

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KENYA

MACEDONIA

NETHERLANDS

NEW ZEALAND

NORTHERN IRELAND

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