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SWEEPSTAKES AND CONTEST LAWS – A U.S. PERSPECTIVE

DLA PIPER

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Editor: Ash Averill, Associate
ashley.averill@dlapiper.com

INTRODUCTION
WELCOME

Welcome to EiG 2013

Last year we referenced the sense of deja vu in the preceding 12 month period and not surprisingly, the same themes and issues have dominated the online gambling industry since 2012.

The European multi-licence approach continues to gain momentum, but at the same time is proving increasingly unviable for a number of operators. In addition the stigma of chasing the grey and black markets (where a wide range of issues from gambling legality, anti-money laundering to local "facilitation payments" may not play out well in listed vehicles, or for those who are seeking absolution in the form of a U.S. licence) and the gloomy economic outlook generally, have combined to sap optimism as well as value.

New European licensing regimes coming fully into force this year include Bulgaria and Romania and those imminently in the pipeline include the Czech Republic, UK, Holland and Ireland. Clearly there has been much written about the disappointing "controlled closing" by the UK (having gone from being at the vanguard of the TFEU arguments to a position where those sentiments were deemed to be outweighed by the tax benefits). Despite this, TFEU arguments are still being brandished elsewhere (notably Germany and Greece) but ultimately these seem to focus now on the terms of a local licence, the tender process and tax position rather than whether it is in principle wrong to require "offshore" European operators to obtain local licences. In short, the TFEU arguments have been considerably diluted and funding the cost of challenge in marginal markets makes little commercial sense. EU "harmonisation" has been replaced with EU "co-operation", with the latter focus being on co-ordinated enforcement. Operators having initiated a compliance model which required them to obtain a local licence or block the market, have been left with some unpalatable choices in the last 12 months.

Independent of this, the question of whether certain social games and virtual currencies should be regulated has become such a conference staple it is hard to voice any novel view. However, the tabloid headline plainly beckons; how do you control the anytime/anywhere gambling culture when every mobile or tablet can access play for money or pay for fun games? When and what should one regulate? The focus has been on games and the immediacy of the gratification, social or otherwise, but surely the same issues apply to sports betting, especially in running where a machine or tablet can provide information and betting opportunities on a drip feed basis.

However, translate that to a retail environment and the same issues are being played out. There remains huge resistance to the proliferation of retail betting in the UK high streets (for example) (not least because the only other retail units on a typical UK high street will include several bookmakers, a pay day lending company and little else). In short, online and offline products are facing the same social responsibility issues. Too often it has been argued by regulators and the tabloid press that more gaming products means more problem gambling, but not if all of those supplying the products are regulated entities with sensible barriers to entry and the regulator has access to reliable data to properly analyse social harm. Surely it is the proliferation of unlicensed gambling that is the problem, and that problem will only continue in circumstances when the barriers to entry too high, or where certain types of product are judged to be more benign than others (and hence licensable) with no valid data to back the policies that are shaped by such a view.

Those product distinctions are becoming less and less relevant. Lotteries may have been instigated in Roman times with a relaxed long tail of delayed gratification from the ticket purchase to the draw, but the instant lottery games represent anything but. And quite how you would argue credibly that subscription fantasy football is "fun" and not a bet on a future sporting event (albeit "events" focussed on certain individuals) is baffling. Maybe the answer lies in the lobbying.

U.S. regulators have complained this year about the fact that there is never a clear enough message given by the gambling industry; it has often been said the most cogent anti-gambling lobby is the industry itself. This is largely due to the various factions continuing to dissemble in their dealings with governments, terrified that a concession to a competitive product offering may destroy the industry's fragile ecology.

It's high time governments gave proper weight to independent evidence rather than the scare mongering by the incumbent operators or stakeholders; the quality of the submissions made to the UK for example on the point of consumption issue was patchy at best and largely anecdotal. Given what is at stake, that is really shocking.

Having a biased opinion (as is common at a conference) is one thing, using that opinion to persuade regulators and governments to shape gambling policies is quite another.

Hilary Stewart-Jones
Partner
DLA Piper, London
hilary.stewart-jones@dlapiper.com

WILL BELGIUM BE THE FIRST TO REGULATE SOCIAL GAMING?

Under the Gambling Act of 7 May 1999 ("Gambling Act"), games of chance can only be offered by licensed operators. Depending on the type of games offered (e.g. casino games, arcade games or betting services), a specific kind of licence must be obtained from the Belgian Gaming Commission (**"BGC"**). This requirement applies to both the offline and online offering of games of chance, it being understood that for the latter category, the Gambling Act refers to the offering of games of chance via "instruments of the information society", including desktop and mobile devices.

Under the current regulatory framework, only the licence holders operating a bricks-and-mortar establishment are entitled to apply for a licence to operate games of chance via instruments of the information society. As a result, it is not possible to only operate online games of chance in Belgium. Moreover, the number of licences to operate games of chance in Belgium is limited; only nine casinos, 180 arcades and 34 organizers of betting services are allowed to offer their services, offline and possibly online, to Belgian residents.

"Unlicensed domestic and foreign operators of games of chance who allow Belgian residents to participate in their offering, risk being placed on the Gaming Commission's blacklist which may ultimately result in criminal sanctions, potentially amounting to over 1 million euros for legal entities" (articles 63-65 of the Gambling Act). This blacklisting practice has been challenged before the courts by two blacklisted operators during interlocutory proceedings, without success however.

Key to assessing the Belgian legal regime is the notion of a "game of chance". The question arises whether "social games" fall under the ambit of the legislation, and if so, to what extent. In November 2012, the BGC reacted against certain "social games" offered on Facebook and was thus one of the first European regulators to touch on the issue of social games and their regulation.

Games of chance are defined as each game "*where a stake of whatever nature, has as a consequence either the loss of this stake by at least one of the players, either a gain of whatever nature for at least one of the players or organizers of the game*" and whereby "*chance is an, even accidental, element influencing the course of the game, the indication of the winner or the determination of the value of the gains*". Crucial in this definition is that the participant needs to wager a stake, hence free games of chance are not regulated under the Gambling Act. This stake needs to result either in a gain for the participant, or in the loss of that stake which is then beneficial to the other participant(s) or the organizer of the game. Further, an element of chance must influence the game to some level. Note that in the case that a game is exclusively influenced by chance, this game would then constitute a "lottery", not subject to the Gambling Act.

The question of whether or not a social game qualifies as a regulated game of chance is a matter of definition. The legal definition of games of chance excludes all games where participants do not need to pay to participate in the game, as in this case where there is no stake. It should be noted however that the BGC issued a recommendation in which it stated that where an operator offers two alternatives, i.e. the possibility to enter into the game either for free or on a paid basis, this game will then be seen as a game of chance, as the free alternative does not change the qualification of the game, as a game of chance.

The question further arises whether a game where the participant needs to make a stake, but where the participant will not be able to win anything, should be considered a game of chance. According to the definition provided in the Gambling Act, one could say such games are games of chance as the stake of the participant will likely flow back to the organizer of the game. However, the BGC has issued draft legislation according to which these specific games are considered so-called "social games". In the BGC's draft legislation, these games can be operated in Belgium without a licence from the BGC unless the BGC has specifically indicated this social game as a regulated game of chance for which a licence is necessary. According to this draft legislation, the BGC will publish on its website the list of social games which cannot be operated without a licence. Further, these social games can only be operated without a licence if a person can spend no more than €100 per month.

The BGC's draft bill is now pending approval or adaptation. If or when the draft will be approved is hard to predict, but it is expected that the bill will be discussed on the political level in Autumn. Should it be approved, Belgium is likely to be one of the first countries to explicitly regulate social games.

Patrick Van Eecke
Partner
patrick.vaneecke@dlapiper.com

Antoon Dierick
Associate
antoon.dierick@dlapiper.com
DLA Piper, Brussels

GAMING – AN ENTERTAINMENT SO DIVINE

It is well-established practice since the CJEU's landmark rulings in *Schindler* (1994) and *Gambelli* (2003) that the supply of games of chance is an economic activity that benefits from the fundamental freedoms guaranteed by the TFEU i.e. the freedom of establishment (Articles 56-62 TFEU) and the freedom of providing services (Articles 49-55 TFEU). In practice, the question is to what extent Member States may restrict the access to this economic activity by licensing requirements, exclusivity rights or outright bans.

According to well-established case-law the Member States can justify restrictions on grounds of general interest, notably to protect the recipients of gaming services, consumers in general or the society as a whole.
The general need to preserve the public order and to fight crime, fraud and, most importantly, ***gaming addiction***, has also been recognized as legitimate reasons to restrict the supply of gaming, provided that the national measures are suitable, proportionate and non-discriminatory. In a recent judgement of January 2013, the CJEU has summarised the case-law in the following words: "*It is necessary, however, to determine whether such a restriction may be allowed as a derogation, on grounds of public policy, public security or public health…, or justified in accordance with the case-law of the Court, by overriding reasons in the public interest… Thus the Court has consistently held that restrictions on betting and gaming may be justified by overriding requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling... In that regard the Court has consistently held that 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 the Member State to determine in those areas, in accordance with its own scale of values, what is required to ensure that the interests in question are protected.*"[1]

Plainly stated, the organisation of games of chance is more likely to offend cultural, moral or religious sensitivities than the supply of "*ordinary*" products or services.
But why? Is it just the threat of addiction? These are quite manifold. Extreme climbers risk their lives, investors their fortune, smokers and drinkers their bodily health.

The addiction to sugar and salt is known to be lethal.[2] Thanks to Michael Douglas we also know about the addiction to sex. One of the undersigned is dangerously addicted to Amazon.co.uk. Every loan is a bargain on the future. Even day-dreaming or meditating can make an individual unfit for life if grown into an addiction…. But if it is not just the threat of addiction, why is gaming still in the "*Schmuddelecke*" (a German word for "*dirty corner*")?

The answer may be in our history books. In the days of antiquity, many activities that we now call *games*, were part of religious and divinatory practices (e.g. the throwing of dice), a mix of future telling and imploring the Gods. We can find glimpses of this in BBC series such as *Rome*. With the Christianisation of Europe, those activities were banned into the underworld of society and only survived in dark taverns populated by drunkards, vagabonds and pirates. There may, however, be more to games and gaming than just moral depravation. In a recently published book, a French anthropologist has demonstrated at the example of a contemporary Eskimo tribe in Siberia that gaming (spielen, jouer[3]) fulfils functions that lay at the very heart of our human condition and fulfil important social functions.[4]

If we take this aspect seriously and reflect on its practical and legal implications, is it not time to acknowledge that gaming is much more than superficial entertainment? Does it not express a part of our inner self, rooted in our DNA? And if so, should the ability of Member States to restrict the organisation of games of chance on moral, cultural and religious grounds not itself be limited, for example by a tighter legal standard? Questions over questions, and we do not have the answer. Why not throw the dice...?

Dr. Bertold Bär-Bouyssière, LL.M.,
Partner
bertold.bar-bouyssiere@dlapiper.com
DLA Piper, Brussels

Michael Marelus
Lawyer
michael.marelus@dlapiper.com
DLA Piper, Brussels

[1] Joined Cases C-186/11 and C-209/11, *Stanleybet International,* Judgment of 24 January 2013, paras 22-24 (references omitted, emphasis added).

[2] Le Monde recently reported that the overconsumption of salt accounts for 25,000 deaths per annum in France alone.

[3] Note that in the German and French languages there is only one word for playing and gaming, whereas the split in the English language facilitates the distinction between, e.g., innocent children playing and wicked adults gaming.

[4] Roberte Hamayon, *Jouer – Une étude anthropologique*, Editions de la Découverte (2012).

CZECH DEVELOPMENTS AND PROPOSED IMPLEMENTATION OF "EU-FRIENDLY" GAMBLING REGULATION

Out with the old and in with the new: this was the general view of the European Commission ("Commission") in respect of the new draft Lottery Act submitted by the Czech Government. According to the Commission, the proposed draft was not in compliance with the EU law and as such, needed to be changed.

In August 2012, when the draft of the new Lottery Act was adopted by the Czech Government, the main argument supporting its implementation was that it allowed for the liberalisation of the Czech gambling market. The draft also removed the ban on a foreign ownership structure. However, the obligation to register the wagers personally in the business premises of the operator remained, as well as a requirement to maintain a Czech registered office, both of which were unsurprisingly declared incompatible with EU law.

Pursuant to the Directive 98/34/EC, the draft was subject to the notification procedure, the results of which the Ministry of Finance received in January 2013. Shortly after, in March 2013, the Czech Government revoked the previous adoption of the proposed draft and ordered the Ministry of Finance to prepare a new draft that would meet the requirements of EU legislation by the end of June 2013. Yet, in June 2013 the Czech Government was disbanded. The subsequent government requested that the Commission extend the deadline for the adoption of a new, compatible Lottery Act until the end of 2014.

Controversy of the current legal regulation of online gambling is illustrated in the case of the Casino Kartáč Group. In order to be able to provide online games, Casino Kartáč applied for a Czech licence. However, the application was refused and a long judicial procedure started. Casino Kartáč argued that the Ministry of Finance acts unjustly by granting licences to online gambling operators on a case-by-case basis when no proper related legislation exists. The proceedings are still pending.

Given the results of the notification procedure, the new Czech legislation would need to forsake the restrictions. The Ministry of Finance stated that it is imperative to adopt an accurate regulation of online gambling, which is currently missing in the Czech Republic. Also, it is not without interest that the legal framework of online gambling might enable the Czech Republic to impose taxes on the providers.

Jitka Stranska
Associate
jitka.stranska@dlapiper.com

Katarina Simova
Student
katarina.simova@dlapiper.com
DLA Piper, Czech Republic

GAME OF CHANCE? BET YOU EUR 0.50 IT'S NOT

The sources of German law on gambling are fragmented. Beside special provisions in the Trade Regulation Act and the Interstate Treaty on Broadcasting, the main regulation finds its place in the newly amended German Interstate Treaty on Gambling ("GlüStV"), which was concluded between the 16 federal states of Germany in February 2013. The GlüStV generally prohibits any public game of chance ("Glücksspiel") without a licence.

The GlüStV defines – as its predecessor provision in the old German Interstate Treaty on Gambling – "*a game of chance is given if in the context of a game a money consideration is required for the opportunity to win and the decision on the prize award depends solely or mainly on chance. In any case, the decision on the prize award depends on chance if the uncertain occurrence or result of a prospective event is relevant for this decision.*"

Licences for legal games of chance (lotteries and sports betting) however may only be obtained from the responsible authorities and some games of chance, such as online casino games, are generally prohibited under the GlüStV.

Furthermore, offering games of chance without a licence can be subject to criminal law prosecution. The German Criminal Act ("StGB") contains, among others, two offences – "organising unlawful gaming" and "participation in unlawful gaming". Both offences also refer to "games of chance" as a central element of the criminal charge.

The apparent consistency between the GlüStV and StGB is deceiving. In reality the definition of "games of chance" under the GlüStV and StGB has been subject to legal disputes.

The definition of game of chance provided for in the GlüStV contains three elements: (i) a money consideration for participation; (ii) the opportunity to win; and (ii) that the outcome mainly or solely depends on chance. The second and third elements are identical under the GlüStV and the StGB. However, the required money consideration ("stake") is subject to legal disputes.

Previous court decisions under the StGB held that the stake must directly serve to finance the prize and the stake must be of considerable monetary value. The definitions of that value vary between EUR 0.50 and EUR 20. In contrast, games of chance under the GlüStV shall – according to this opinion – merely require a payment in order to obtain a winning chance; it does not necessarily have to finance the prize. The definition is thus significantly broader (Bavarian Upper Administrative Court, 10 BV 10.1176; Upper Administrative Court Kassel, 8 B 1552/10).

As a consequence, no materiality thresholds (not even Euro 0.50) would apply to games of chance under the GlüStV. Moreover, games of chance could be illegal under the GlüStV, although organising and participating in them would not constitute a criminal offense under the StGB.

However, the prevailing legal opinion has been that the definitions of games of chance are in fact uniform. The requirement that stakes must be used to finance the prize shall – according to this opinion – apply to both the StGB as well as the GlüStV and a stake of EUR 0.50 is widely seen as too little to qualify the game as game of chance.

This opinion has also been applied to the new GlüStV. The Upper Administrative Court Mannheim (6 S 892/12) held that the definition in the GlüStV and in the StGB is identical at least insofar as the required stake must directly serve to finance the prize. The wording used by the court ("at least in so far") might still leave room to differentiate between games of chance under the GlüStV and the StGB, especially since the monetary value of stakes has not been addressed. However, the main result of this decision, which is one of the first directly applying the new GlüStV, is that courts are likely to take the same approach as before the implementation of the GlüStV and EUR 0.50 is likely not to amount to a stake. Although legal discussion surrounding the definition of games of chance was known to the legislator, clearly, the court decision was not anticipated, as the definition was not amended to give clarification on the link between stake and prize. Moreover, the first voices in legal literature on the new GlüStV have already argued against any form of threshold.

Therefore, from what can be seen, courts still tend to apply a uniform and rather narrow interpretation of games of chance. This leaves more room for social gaming offers, which do not fall under the restrictions of the GlüStV and the StGB. It remains to be seen whether other courts will follow this approach.

Kai Tumbraegel
Partner
kai.tumbraegel@dlapiper.com

Max Wenger
Associate
max.wegner@dlapiper.com

DLA Piper, Germany

ONLINE POKER: LIQUIDITY SHARING, WHAT OPPORTUNITIES?

Italian, French, German, Portuguese, UK and Spanish gambling regulators met in Lisbon at the beginning of July and issued interesting statements that might lead to the implementation of online poker liquidity sharing within Europe, sooner than initially expected.

The current ring-fenced online gaming regulatory regimes in Italy, France and Spain prevent operators from allowing players to compete against one another. Even if an operator holds a local remote gaming licence in all three countries and operates in compliance with the laws, it is indeed obliged to run three separate platforms without having the possibility to share the liquidity, and without taking advantage of any economies of scale.

This issue has become more relevant in the European online poker market now that it is struggling due to competition from online casino games and, in cases such as France, because of the tax model required by local laws. Major poker operators are still making a profit from the sector, but there is no doubt that the sharing of liquidity across the different country-specific poker platforms would considerably boost the growth of the European online poker market, and would make operators' lives easier from a regulatory perspective given that local regulatory gambling regimes oblige them to comply with different frameworks and technical requirements for each country that they want to target.

Based on the press release recently issued by the Italian gambling regulator, AAMS, as far as Italy and Spain are concerned, their local gambling laws already allow for poker liquidity sharing. On the contrary, it appears that France needs to enact a primary law in order to adopt such a regime, but French operators are putting pressure on MPs to make sure that such law is adopted in the shortest possible term.

Therefore, the implementation of a liquidity sharing regime between Italian and Spanish platforms would not require major regulatory changes; but how players subject to different regulatory regimes, technical standards and taxation can interface needs to be assessed. However, based on the feedback received from the regulators, they believe that such inconsistencies might not represent a complex hurdle to the adoption of a liquidity sharing regime. Confirmation of that is also given by the fact that in the UK, if the point of consumption tax is implemented, there will be players on the same platform whose bets are subject to the point of consumption tax and others for which this additional tax will not be applicable. Also, poker liquidity sharing might be a good opportunity for regulators to reduce the differences evident between the regulatory obligations and technical standards provided by their local regimes, which might be considerably beneficial for operators that would be able to better rely on economies of scale.

The timing of this change is still uncertain, but it is clear that major poker operators who currently target a single country will implement long term plans to make sure that at the time when the poker liquidity sharing is adopted they hold a reasonable market share in most of the countries involved. Those operators that have a considerable market share in a single country may find themselves unable to compete with platforms aggregating players from different jurisdictions. Furthermore, once liquidity sharing is put in place, it might be harder to fill in the gaps with operators that already have a strong presence in most of the countries involved.

Giulio Coraggio
Senior Counsel
giulio.coraggio@dlapiper.com
DLA Piper, Italy

WILL LATIN AMERICA BE THE NEXT TO REGULATE ONLINE GAMING?

There are few doubts that the online gambling industry is experiencing a process of re-adjustment: the global operation of .COM platforms is being increasingly complemented with an alternative approach based on access to newly regulated markets. Such a regulatory process is spreading in Europe and it is likely this will be extending to new regions, including Latin America.

Latin America is not an unknown territory for the online gambling industry. On the contrary, just to provide some examples, Costa Rica hosts on its soil more than 400 .COM operators, Panamá has been issuing licences for the operation of online gambling since 2002, and Peru authorised the operation of the first online casino back in 2008.

This region remains as one of the most promising markets in the world, providing the essential elements for establishing reasonable business development expectations. Some of those elements would be the increasing degree of penetration of Internet access (particularly through smartphones); the responsiveness of the players to products that were not offered by traditional operators; or (in the case of betting) the great popularity of sports.

The current legal and regulatory conditions for the operation of these activities in most of the countries in the region is based on an uncertain regulatory environment. As is usual in countries with outdated gambling regulations, in most Latin American countries the operation of this type of business is conditioned upon obtaining licences. Operating without such licences is deemed illegal and, according to the existing (and outdated) legislation, may formally lead to criminal and administrative sanctions. The problem is that the required licences are not available, as online gambling has not been regulated, and, consequently, obtaining such licences is impossible. Regardless of this, there exists a very high demand from players. This has led to a situation that is well known in pre-regulated markets: the national authorities generally tolerate the operation of online activities, since they realise that the applicable legal restrictions would be very difficult to enforce. As a consequence of this, enforcement actions are almost non-existent and the fact is that Latin American players access and transact with offshore online gambling platforms on a mass scale.

This leads to an obvious disconnect between the legal and the market environments, a situation that, pursuant to the experience accrued in regulated countries, can only be corrected by the adoption of updated and workable regulations. In this respect, the fact that some EU jurisdictions (and most notably Spain, given the common language and similarities between the corresponding legal systems) have recently developed new regulatory environments for the operation of online gambling, will likely lead to increasing development of updated regulated environments in Latin America.

Several interesting moves have taken place recently in relation to some significant markets in the region. Namely, the authorities in Argentina are currently debating how to put in place a regulated and unified system for the operation of online gambling activities at a national level. Such discussion is being heavily fuelled by some regional gambling authorities (led by the regional regulator from the province of Misiones) that have already set forth their own licensing systems. Such territory-caped licensing systems have proved to be inadequate to efficiently deal with online gambling and, consequently, would require the enactment of a national regulatory system that establishes a unique licensing system.

In a similar sense, the government from Uruguay has publicly announced that during the course of 2013 it is planning to file a bill before the Parliament in order to regulate gambling activities and, as part of this new legislation, set forth a system of licences for the operation of online gambling activities. The Colombian authorities hope to make similar regulatory developments.

The path seems to be slower in other markets however. Mexico, for example, already has a limited system of licensing for the operation of online betting and the authorities are monitoring online casinos with the aim, in the near future, to set forth a comprehensive licensing system. The position in Brazil is less encouraging, for the time being there aren't any signs from the authorities to abandon the current system of formal prohibition, in spite of the massive access to online gambling platforms by Brazilian players.

These are promising movements, even though we also have to acknowledge they are still limited. In any case, the adoption of regulated environments by the Latin American authorities should be spreading in the coming years and will lead to a more reliable environment for the players, the operators and the authorities.

Albert Agustinoy
albert.agustinoy@dlapiper.com
DLA Piper, Spain

IS SOCIAL GAMING REALLY UNREGULATED?

The social gaming regulatory debate is still with us but there remains uncertainty about where it will lead.

The transition from 2012 to 2013 saw the debate reach a new phase. We moved on from the discussions around whether social gaming could fall within the definition of "gambling", as the laws in the vast majority of jurisdictions were crystal clear. Instead, a more sophisticated discussion has evolved; namely one focusing on whether the players of these products deserved protection, regardless of whether the coins you won were real or simply virtual.

We know how slow legislative processes can be and may lament about that at times. But with social gaming, regulators are taking their time in determining how they feel about products that may contain dice and cards and yet provide a form of entertainment without the chance of a real-world gain. This has to be applauded in some ways, as one would always hope that regulators would act on a basis of a real understanding of businesses rather than as a reaction to the uninformed media seeking out the next controversy.

However, gambling regulators are merely one piece in the puzzle and the focus is shifting to the myriad of other laws and regulations around the world that the social gaming industry is very quick to point out already apply to their activities. E-commerce legislation, consumer regulations, privacy laws and advertising codes already have an impact on their relationship with the consumer.

A couple of weeks prior to EiG 2013, we read the published results of the UK Office of Fair Trading's consultation on the operation of the "freemium model" and how it works within the games environment. The OFT is exploring whether consumers are being treated fairly and is set to impose a set of guiding "Principles" for the industry to follow. This is just one example in one jurisdiction of how consumer protection issues may, soon, take centre stage as the impact of this burgeoning form of entertainment is more closely assessed and analysed.

The supply of any product and service through social media or indeed through any interactive service is already the subject of the regulation, and so, therefore, casino-style social games are already "regulated". However, these consumer regulations are applied in a haphazard way, if at all. As more and more people's lives are impacted by digital entertainment, so the legislators will begin to assess if the regulations are adequate. It is incumbent on the social gaming industry to not only assess the impact of such consumer protection regulations but to actively pursue development and marketing strategies that reflect them. If they don't, sooner or later, someone will make them.

Stephen Ketteley
Partner
stephen.ketteley@dlapiper.com
DLA Piper, London

CAN ANYTHING BE DONE TO STOP IMPLEMENTATION OF THE PoC REGIME IN THE UK?

As the regulatory reform in the UK gathers momentum, it is clear that industry stakeholders are becoming more concerned about the potential impact to their businesses (not so much with the Gambling Commission licensing requirements but with the corresponding 15% profits tax). With that in mind, challenging the UK government and Her Majesty's Treasury ("HMT") seems more appealing by the day. But what avenues are open to operators and is there any hope of mounting a successful challenge?

The proposals in the UK are all the more puzzling insofar as no other Member State has taken steps to essentially create a "controlled closing" of a previously liberal regime. Many have sought to protect incumbent monopolies or achieve a limited liberalisation, but trying to restrict an already saturated, EU compliant market by requiring operators to obtain a licence and pay tax on bets struck with British citizens has made the UK's position unique, and potentially the subject of legal challenge.

Current jurisprudence certainly does not uniformly illustrate that there is a guarantee as to the free movement of gambling services within the EU. The general discretionary margin provided to Member States to regulate gambling, which is not dependent upon any one specific justification, certainly does not help the position. This "light touch" approach gives Member States extensive latitude to regulate gambling and must be taken into account in any analysis of the potential hurdles faced in mounting a successful challenge.

Also, there is a significant disconnect between the way in which the revised gambling licensing regime is addressed and the way in which the corresponding tax regime is dealt with. Although robust arguments may be able to be invoked against the UK Government in respect of the licensing regime, challenges against HMT could prove more difficult and HMT may decide to proceed with a point of consumption tax regardless.

Taking all of this into account, preventing the draft Gambling (Licensing and Advertising) Bill ("Draft Bill") achieving Royal Assent will be an arduous task, but that does not mean all hope is lost.

The judicial review process provides an opportunity to challenge to the way in which a decision has been made. Any application for judicial review must be lodged no later than three months after the grounds to make a claim first arose (or shorter period if specified). The trigger point for judicial review of the licensing and tax reforms in the UK may therefore arise in a number of instances (i.e. once the final version of the Draft Bill is published, when the licensing process commences or at Royal Assent). Judicial review is a necessary precursor to ECJ referral on the basis local remedies must be exhausted prior to any appeal to the higher supranational court. Any arguments raised during the judicial review process can and should also be raised in lobbying efforts to highlight the consequences to the UK government of the Draft Bill being introduced.

If the Draft Bill is introduced, the UK will commence a transitional period and require operators to start applying for licences and register to pay tax. With a judicial review process on-going during this time, although they will not be obliged to, it is possible that HMT and the UK Government would delay implementation until a decision has been reached and the legal challenges exhausted. This will enable operators to continue to benefit from the liberal regime that they have enjoyed since 2007 and a successful judicial review would obviously ensure the current regime remains for a longer term.

That said, a recent announcement by the Ministry of Justice confirmed that it intends to change the test for judicial reviews, making it harder for cases to be brought to court following concerns that the procedure is being abused by campaigners and pressure groups. Government ministers commented that people are using the process as a "delaying tactic" in order to waste time and delay policy being implemented. There has been no indication when such changes may be introduced however, but it is certainly something that potential appellants need to bear in mind.

At the time of writing, a number of operators have resigned to the fact that the point of consumption regime is going to happen, whether it is challenged or not. It seems that the trend amongst operators is to try and mitigate the effects of the (unworkable) 15% tax rather than oppose it. Moreover, the Gambling Commission is gearing up for regulatory change with the publication of two consultations in September, which seek the industry's views on amendments to the licence conditions and codes of practice in anticipation of the licensing regime being implemented in April 2014.

Whether a Member States' margin of discretion in relation to gambling regulation is enough to trump the UK's decision to move to a point of consumption regime is uncertain, but we will never know unless a challenge is mounted.

Ash Averill
Associate
ashley.averill@dlapiper.com
DLA Piper, London

SWEEPSTAKES AND CONTEST LAWS – A U.S. PERSPECTIVE

Sweepstakes and contests remain extremely popular forms of marketing and promotion to consumers in the United States. There have been several important recent developments that marketers will need to consider when planning and implementing such promotions in the United States.

Legislative Developments

The most significant legislative development this past year is Florida's amendment of its Game Promotion Statute. The amendments, which took effect on April 10, 2013, prohibit charitable organisations from operating a game promotion, including nationally advertised game promotions that are offered to Florida residents. Additionally, the statute only allows for-profit organisations to run game promotions on a "limited and occasional basis" as an advertising and marketing tool in connection with and incidental to bona fide sales of consumer products or services. No guidance has been issued on what will constitute a "limited and occasional basis", but Florida officials have publicly stated that there are no immediate plans to limit the number of promotions a for-profit entity may offer each year.

Vermont was one of the very few states that prohibited consideration in skill contests. Effective April 26, 2013, it amended the sweepstakes law to allow operators to charge an entry fee, service charge, purchase, or similar consideration in order to enter, or continue to remain eligible for, a game of skill or other promotion, as long as it is not based on chance.

Dot Com Disclosures

In March 2013, the Federal Trade Commission ("FTC") released online advertising disclosure guidelines titled *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*. *.com Disclosures* is designed to help businesses avoid claims of unfair and deceptive trade practices. The guidelines are very important to online sweepstakes and contest promoters as they provide guidance on how to make effective disclosures in the online and mobile context. In determining the effectiveness of a disclosure, the FTC considers the placement, proximity, and prominence of the disclosure as well as distracting factors and whether the disclosure is sufficiently important that it should be repeated several times. Moreover, although the FTC recognizes the popularity of hyperlinks as a way to provide disclosures, it cautions that hyperlinks must be obvious and labelled in a way that conveys the true nature and importance of the disclosure.

Privacy

Privacy remains a hot button issue in the United States. There has been key legislative and regulatory developments in the areas of mobile privacy, children's privacy and telemarketing. Both the FTC and the California Attorney General ("AG") issued guidance in the past year regarding disclosures of privacy policies and information gathering practices using mobile applications (see California AG's *Privacy on the Go* and the FTC's *Mobile Privacy Disclosures*). Promoters using mobile sweepstakes or contest applications should ensure that their applications comply with this guidance.

There has been a surge of class action lawsuits under the Telephone Consumer Protection Act ("TCPA"), which prohibits making automated calls or text messages to mobile phones (so-called robocalls) without express prior written consent. The TCPA provides for statutory damages of US$500 to US$1500 per unsolicited call/text message and a number of marketers and advertisers have entered multi-million dollar settlements in cases involving text promotions. The Federal Communications Commission ("FCC") which regulates the TCPA has also issued regulations governing the form of consent that must be obtained prior to making these calls. Marketers making use of SMS or text message communications in contest or promotions will need to ensure they have the proper consent in compliance with the TCPA and the FCC regulations.

Finally, new rules under the Children's Online Privacy Protection Act ("COPPA") went into effect July 1, 2013. COPPA generally prohibits collecting personal information from children under 13 without prior parental consent. The new rules expand the definition of personal information to include geolocation information, photos, videos, and persistent identifiers, provide for additional methods of obtaining parental consent, and expand the definition of the types of websites and other applications that are subject to COPPA. With respect to contests, promoters can still use the "one time contact" exception if they only collect online information to enter the child in the contest, and then only contact such children once when the contest ends to notify them if they have won or lost. At that point, promoters must delete the online contact information they have collected. If a marketer wants to have further contact with the child, then they need comply with COPPA's notice and parental consent procedures.

Scott W. Pink
Attorney
scott.pink@dlapiper.com
DLA Piper, California

YOUR EiG CONTACTS

Albert Agustinoy
Madrid
T +34 91 788 7321
M +34 673 260 293
albert.agustinoy@dlapiper.com

Timothy Lowry
Atlantic City
T +1 609 449 7025
timothy.lowry@dlapiper.com

Kai Tumbraegel
Cologne
T +49 221 277 277 242
kai.tumbraegel@dlapiper.com

Patrick Schwarzbart
Munich
T +49 89 2323 72 113
M +49 173 253 4542
patrick.schwarzbart@dlapiper.com

Antoon Dierick
Brussels
T +32 2 500 1643
antoon.dierick@dlapiper.com

Stephen Ketteley
London
T +44 20 7153 7662
M +44 7884 475825
stephen.ketteley@dlapiper.com

Hilary Stewart-Jones
London
T +44 20 7153 7661
M +44 7899 060089
hilary.stewart-jones@dlapiper.com

Giulio Coraggio
Milan
T +39 02 80 618 619
M +39 334 688 1147
giulio.coraggio@dlapiper.com

Ashley Averill
London
T +44 20 7796 6721
M +44 7841 317562
ashley.averill@dlapiper.com

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