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Welcome to the third edition of *The Gambling Law Review*.

I was very pleased last year that we managed to increase the coverage of the guide from 16 chapters to 25. This year I am pleased again to say that we have increased coverage to 29 chapters, including new contributions from four important jurisdictions – Bulgaria, France, Macao and the Netherlands. I am delighted to welcome the new authors and thank them for their contribution, as I am also very pleased to thank those who have found the time and resources to continue to make a contribution to this work. We are getting fatter!

What are the aims of this book? There are several. First and foremost, to provide a short summary of the gambling law of the jurisdictions in question. Second, to achieve that in a format that is uniform enough to allow comparison between the different legal systems but also flexible enough to recognise that gambling law springs from different sources in different jurisdictions – in some countries it is founded in the criminal law, in other places it forms part of civil or administrative law and, of course, it is sometimes rooted in a common law and sometimes in a civil code tradition. The third aim is to allow practitioners in the field to be updated on developments over the course of the year – with a section in each chapter dealing both with the main milestones of the past 12 months and the likely developments to come. Have we achieved that end? Of course, it is for others to judge – but I was heartened to meet a fellow professional at this year’s International Casino Exhibition in London who congratulated me for ‘that little grey book’, which he said he frequently consulted and found ‘immensely useful’. And not only useful, but up to date and freely available online, as a resource for everyone.

Which brings me to the fourth (and normally unspoken) aim of this book, which is to showcase the work of some of the leading gambling lawyers across the world, without whom this book would not exist. Each has given their time and considerable experience to produce something comprehensive and digestible – and as a summary of their own thoughts and work in the field. And so, may I make this suggestion to readers from the gambling world on behalf of my co-authors? If you find this Review useful, then please give them a call, safe in the knowledge that you will get more of the same quality.

The gambling world has been a busy place again in the past 12 months. What are the key themes? Let me pick three.

**New jurisdictions**

More and more governments are turning their minds to the regulation of gambling. The most obvious shift is in the United States, where the Supreme Court has just been considering the constitutional implications of a ban on gambling. During the preparation of this Preface, we have heard that the US Supreme Court has ruled 6:3 that the Professional and Amateur
Sports Protection Act of 1992 violates the 10th Amendment to the US Constitution, and therefore should be struck down. The 10th Amendment protects the power of individual states to make their own laws, in all circumstances where the Constitution does not explicitly give power to the federal government. It is therefore anticipated that the Supreme Court decision will mark a new turning point in the United States’ relationship with gambling, more than a decade after UIGEA caused tremors across the world. There are plenty of states with draft legislation awaiting such a decision, and we will have to see the reaction of sports bodies seeking to find a way to tap into their share of a rich new market. The US is surely one of the most lucrative potential markets for sports betting – not only because it is a wealthy nation, but because it is one in which sport is marketed and televised more than in perhaps any other country in the world. With baseball, American football, basketball and ice hockey, there are four incredibly well-followed and, above all, data-rich sports that would be the subject of a very substantial betting market. Interesting times.

The US is not the only place where change is coming. We have seen new laws progressing in many countries, including Ireland, Sweden and Switzerland, and a host of significant shifts in legislation in countries as far apart as Australia and Slovenia. Further, there has been a continuing flow of decisions from the Court of Justice of the European Union in relation to the gambling regimes across Europe, and let us not forget the Asian markets, including India, where the pace of change has been somewhat slower (but the potential prize is very substantial indeed).

Regulators keep getting tougher
It feels as though regulators and governments are becoming better organised and tougher on operators. Although there are still places where ‘soft touch’ regulatory regimes persist, more regulators are making life harder for operators, with new rules and higher penalties for non-compliance. There is an increasing focus on financial crime, money laundering and social responsibility. Industry has reacted by improving its standards, but still feels embattled against waves of criticism, which in some cases seem to impose a higher threshold than for other adult industries. Indeed, I would argue that the increased levels of regulation are more the product of an increased ability to regulate, rather than an increased need. For one thing, although the amount of regulated gambling going on in the world is certainly increasing, that may reflect the fact that regulation is more effective, and that gambling that had previously operated on a black market basis is now being brought within the fold. And even if the amount of gambling going on in the world is increasing, there is no substantial evidence that the amount of problem gambling or underage gambling is on the rise.

Traditional barriers are dissolving (again)
One of the most interesting features of the international gambling industry over the past two decades is the way that it has continued to engage in paradigm shifts. After many centuries of a land-based tradition, the internet and mobile communication created an international betting market for the first time. And now, just as we are getting used to that, new developments are changing that model again. For example, bitcoin and cryptocurrency technology, which was in its infancy only a couple of years ago, is now becoming mainstream – already being used by some operators and requiring serious consideration by regulators. Many still hold the view that there are hidden dangers with such cryptocurrencies – and of course they are not without risk. However, they also provide some interesting possibilities in
terms of ensuring provenance and traceability of funds and even that the tokens can only be used by those over the age of 18.

We have also witnessed a growing convergence of gambling and game playing, a development that throws up both paradoxes and new challenges. Studies show that for many the entertainment experienced by playing games is not lessened if there are no monetary stakes, and so one must ask whether social gaming represents a fundamentally new chapter in gambling psychology and practice. Equally, the rise of social gaming models blurs the barrier between what is regulated and what is not – with e-sports, and in game rewards (‘loot boxes’) also confusing the picture. Traditional models and expectations of what gambling is and how that form of entertainment is monetised are radically changing – and that leads to very important questions about whether the limits of regulation need to be redefined.

In the context of these changes, an annual review of the world of gambling law surely has an important place. I close by thanking my co-authors and the editorial team at The Law Reviews for their organisation and encouragement.

Carl Rohsler  
Memery Crystal  
London  
May 2018
Chapter 1

GAMBLING: A LEGAL AND PHILOSOPHICAL OVERVIEW

Carl Rohsler

I INTRODUCTION

The following chapters of this book set out a comparative analysis of the laws relating to gambling across a variety of states and jurisdictions. The objective of such a work must necessarily be limited to providing a general guide to the laws in each individual state. However, bringing together these summaries also affords a different opportunity: the chance to compare and contrast different legal approaches. Comparative analysis is important because it helps us to understand rather than simply know the law, by explaining and demonstrating the different cultural contexts in which law has developed to mirror and control the societies in which those laws operate.

Gambling law is an apt topic for such an analysis for a number of reasons. First, compared with some legal disciplines (such as financial regulation, digital copyright, competition or telecoms law) gambling has a very long history and deep roots in human culture and legislation. To give two examples, until 2007, UK gambling law included contributions from the Gaming Acts dating back as early as 1710 and 1738. The current law relating to gambling in India (the Public Gambling Act), dates from 1867. There are many other examples.

Second, gambling is often considered to be a distinct field of human activity, subject to a discrete set of rules that address some fairly basic legal problems about controlling human conduct. Consequently, the corpus of available materials is thankfully quite limited, but the subject matter is a topic that affects and interests the public in general, involving consumers’ basic rights and desires, and also social dangers, the potential for criminality, addiction and so on, as well as having moral and religious resonance. In short, anyone who wishes to understand gambling law needs to keep in mind two principles: that all gambling law is local and, more importantly, that the attractions of and risks associated with gambling are universal.

A further reason why gambling law is one of the most interesting areas for academic study is that, in the past two decades, the advent of the internet has caused the availability of and social attitudes toward gambling to change considerably. This in turn has forced national governments to reconsider how the law should change and adapt to deal with these new technological and cultural developments. Gambling is therefore not only a field of diverse legal approaches, but an example of law undergoing rapid evolution. Currently, no fewer than 10 different EU Member States are considering changes to their laws on gambling regulation, and several governments outside the EU are actively engaged in creating regulatory regimes for gambling for the first time.

1 Carl Rohsler is a partner at Memery Crystal LLP.

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As a result, one of the unusual challenges that faces gambling lawyers is the need to advise not only on what the law is in a particular jurisdiction, but also to assist gambling operators (and sometimes regulators) to understand how to predict future developments in the law. Businesses involved in gambling (be they operators, or those who provide ancillary services to operators) often have an obsessive focus on the way that the law might develop — how different countries may liberalise (or restrict) access to gambling, how they are likely to tax and regulate it, and their attitude to foreign interference in a local market. In such activities there is always a significant tension between the desire to capitalise on changes to the law (or uncertainties in its enforcement or interpretation) and the overall desire to remain compliant and operate within the licences that have been granted to the operator.

In making those judgements one has to understand the underlying attitudes and pressures on lawmakers, and the different solutions and models that might be developed. So it is worth spending time considering the wider contexts and characteristics of gambling in order to develop what might be described as an ‘instinctive feel’ for how a particular jurisdiction or government will deal with the issues involved. First, therefore, let us look (albeit very briefly) at some of the cultural influences that have shaped attitudes to gambling.

II CULTURAL CONTEXTS

Gambling is one of those activities that has an essentially universal appeal. Wherever we look in the world and in whatever culture, we find humans competing, protecting families and bonds of kinship, engaging in commerce, involved in conflict and, when time allows, creating art and playing. The urge to hazard and to play is something found in all cultures and at all periods in history after man as a species developed a sufficient sophistication to have time for some kind of leisure. We find gaming tokens in ancient Egypt, Meso-America, across the Roman Empire and deeply ingrained in Asian culture. In short, gambling as an activity is as ubiquitous as art or music.²

The question for the student of gambling, as for the anthropologist, is not whether people will gamble, but how gamblers, governments and wider society view and control such conduct. Although gambling is a human constant, the way in which society views such conduct has varied widely over the centuries. Very often, the basis of the treatment of gambling is religious or cultural. But as with many religious or cultural ideas, the ideas that lie behind such religious or cultural notions are pragmatic. Let us isolate some of these.

In many cultures, we find gambling frowned upon because at its heart is a conflict between players, which leads to one person giving up his or her possessions to another unwillingly as a result of losing. One can trace the roots of such a belief back into the very earliest societies when resources for survival were scarce and required a group effort to deliver a harvest capable of sustaining the community through the winter seasons. In such circumstances, spending time in a pursuit in which people redivided those resources (rather than creating new ones) was essentially counterproductive — and so should be an activity either banned altogether or at least heavily restricted to those times and places when there was true leisure to be taken. It was, in essence, a waste of precious time and something that brought people into needless conflict — so a number of societies condemn gambling on the

---

² An excellent study of the history of gambling is Random Riches: Gambling Past and Present, edited by Manfred Zollinger (Routledge, 2016).
basis that it is socially divisive and unproductive. In that respect it can be distinguished from 
sports, which might be said to increase stamina, strength or skill, and therefore have some 
element of social utility.

III RELIGIOUS CONTEXTS

Apart from the lack of social utility in gambling, one widespread religious concept is that 
in order to be close to the divine, man must disassociate himself from material desires. 
Christianity has strong views on the need for poverty and simplicity of life, as well as the 
importance of giving away material possessions. In Buddhism, the desire for things is seen 
as the central barrier to the attainment of enlightenment, and in Hinduism the ideals of 
living simply, without luxury, and of working hard are central to the ‘dharma’, or duty that 
each individual undertakes in life. The excitement and worldliness of gambling for monetary 
winnings seem contrary to all of these ideals. The contrast between the divine and the 
material could not be more clearly juxtaposed than in the image (recorded in all four gospels) 
of Roman soldiers casting lots for Christ’s garments at the very point of his crucifixion.3

Another way in which gambling comes into conflict with religious observance is that it 
emulates certain aspects of religious practice. One important function of the priestly classes 
of many early religions was the prediction of the future (success in battle, times of flood 
and times of harvest or the will of God more generally) by interpreting an act of nature or 
of random chance. In ancient Rome, the interpretation of entrails (‘haruspication’) was a 
relatively mainstream part of religious practice (from which we have the more common word 
‘auspices’). There are many other forms of divination that play on the random, including 
numerology and ceromancy (the dropping of hot wax into water). Prominent among these 
are ‘sortilege’ (the drawing of lots) ‘osteomancy’ (the casting of bones) and ‘cartomancy’ – 
the prediction of the future using cards such as the tarot. In each of these three practices 
one can see immediate parallels with gambling behaviour, where marked knuckle bones are 
transformed into dice, the drawing of lots mirrors the selection of lottery tickets and the 
shuffling and turning of the tarot deck is transformed into the card games that we know so 
well today.

In case this is thought to be a somewhat slender and theoretical basis as a cultural 
foundation for gambling, it is worth noting that there are more than 70 references in the Old 
Testament to the drawing of lots to determine God’s will (including, for example, the decision 
to throw Jonah into the whale and David’s decision to start battle against the Philistines). 
The tools of divination (the stones of ‘Urim and Thummim’) were literally attached to the 
breastplate of the priest in the Book of Exodus. In the New Testament, following the death 
of Judas, the apostles decided upon the identity of the new apostle (Matthias) by a similar 
process, and in a completely different religious context, the identity of the Dalai Lama is 
revealed by random selection of names spun round in bowls of barley meal.

So at the heart of gambling behaviour we find practices that emulate important sacred 
rites. It is literally an act of playing with ‘the wheel of fortune’ or calling upon the ‘Fates’ 
or ‘Lady Luck’. Gambling may therefore be seen as a misuse of religious tools for worldly 
purposes. All these factors create feelings of suspicion (perhaps even superstition) in relation

to gambling. To be clear, gambling and religious divination are not the same, and do not necessarily spring from the same origins, but they do tap into the same deep human beliefs about fate, luck and predicting the future.

IV SOCIAL PERCEPTION AND SOCIAL RISKS

One of the difficulties of legislating for gambling is that it encompasses a wide variety of different social activities with completely different social perceptions and risk factors. In considering the gambling landscape of a particular jurisdiction and the way that gambling is likely to be regulated, it is important to have an overall grasp of what is popular, and why. This includes a consideration of how gamblers are perceived (and how they perceive themselves), the types of gambling that are popular and the risks arising to players as a result. This is a very complex topic, well beyond the scope of an introduction such as this, but suffice it to say that to understand legal systems designed to control gambling, one requires an understanding of the role and character of different forms of gambling within that society.

One may start with the types of gambling that are actually popular. Poker is a very popular game in the US, but in India it is largely unknown, with rummy being the more popular card game. Sic bo and Pai gow are not popular in the West, but form a mainstay of Asian gambling. Backgammon only has wide appeal in Turkish, North African and Arab societies while Pachinko is a curiously Japanese phenomenon.

Another way of dividing the landscape is to categorise gambling by demographic and social risk. High-stakes casino games may often be regarded as pastimes reserved for rich tourists and James Bond-esque characters who can afford to lose and require little in the way of social protection. However, a government considering the regulation of gaming machines in working men’s bars or cash betting on cricket by millions of citizens on the Indian subcontinent might quite properly focus on the social harm that gambling can cause in societies where disposable income is low. Other forms of gambling, such as bingo, have a completely different social connotation and function – being primarily a ‘risk-free’ activity enjoyed as part of friendly sociability (and may therefore actually act as a form of ‘social service’ rather than a social risk). Still other forms, such as lotteries, actually form a mainstay of charitable giving (and may not even be regarded as a form of gambling by many of those who buy tickets).

V GOVERNMENT AS GAMBLING OPERATOR

Even if gambling is treated simply as a morally neutral economic activity, it requires some form of legal control in the same way as other commercial activities. There needs to be a degree of regulatory oversight to ensure fairness and consistency (all the more so in relation to an act that is inherently unpredictable and prone to manipulation). Consequently, as a matter of public order, governments have often intervened in order to ensure a measure of consistency and fairness.

However, and almost inevitably, the involvement of government in gambling has not been restricted to its control or suppression. For many centuries, different types of ruling authority have recognised that there is much to be gained from organising and permitting gambling as a valuable means of deriving state revenue. There are many historical examples of governments appropriating control of gambling. Lotteries have been used to fund military
expenditure, cultural monuments and to raise funds to help with disasters. State lotteries remain one of the most ubiquitous forms of gambling (and in some jurisdictions is the only form of gambling allowed).

The intervention of government in gambling gives rise to a sometimes uncomfortable conflict of interest. Once a government organises and profits from gambling through taxation, it cannot by the same token condemn it as illegal or morally inappropriate. National lotteries may help many good causes, but the net economic effect of such state-based gambling is nearly always a redistribution of wealth away from the poor (who proportionately spend more of their disposable income on lottery tickets than the rich) in favour of the better off (who tend to enjoy the type of educational, cultural and sporting activities that lotteries often fund). Further, governments that regulate gambling have to tread a careful balance between criticising the social harm that gambling can cause to a small minority of players, and accepting and acknowledging their own involvement as a gambling operator.

VI MODELS OF REGULATION

Academics have distinguished five different generic models for describing the different regulatory approaches to gambling, which exist along a spectrum. They may be summarised as follows:

a Some governments (mostly those that have a strong religious component – such as some Arab and Asian regimes) regard gambling as a sin. Since such governments regard part of their duty to eradicate sin within the population, these states take the view that gambling should be the subject of a near or total ban. The criminal law is used to prevent gambling, but also to prevent the advertising of gambling or access to online gambling sites located abroad.

b There are governments that take a highly paternalistic approach towards social freedoms of their populace, and seek to impose tight controls on gambling. Such societies may have a limited state lottery or other state-owned gambling, but will not usually allow gambling to be operated by private enterprise. Such governments may also permit casinos to exist in tourist destinations, but ensure that access is restricted to the foreign population only and that local people are barred. Examples of this type of approach (expressed generally) include India, Vietnam and North Korea.

c There are governments that recognise the social dangers of gambling, but also the freedoms of their own citizens to make a choice about their forms of entertainment. These governments generally restrict access to gambling but also take a pragmatic view that prohibiting gambling is extremely difficult (and may not be morally justifiable in a democratic society) and therefore permit most forms of gambling, though subject to careful regulation. Most continental European governments used to fall within this category, though a number have now moved to greater liberalisation of the market.

d There are governments that treat gambling as being merely another form of commerce and that provide a liberal regime for operators. In these jurisdictions, one is likely to find gambling opportunities integrated within normal retail environments. Such jurisdictions still have rules designed to protect children and the vulnerable from

4 For example, as discussed in Professor Peter Collins’ Gambling and the Public Interest (Praeger, 2003).
exposure to gambling and will normally have a blend of private enterprise-led gambling of all forms as well as some state-controlled gambling (such as a national lottery). The UK is an example of such a liberal regime.

Finally, are those jurisdictions that actively encourage gambling within the state as a means of generating tax revenue and employment for the local population. Formerly, such states were interested primarily in encouraging tourism using the inducement of gambling and entertainment. Destinations such as Macao and Las Vegas exemplify this approach. However, more recently the prevalence of online gambling has created new ‘hot spots’ of activity (Gibraltar, Malta, the Isle of Man, Alderney, Kahnawake and Curaçao being obvious examples). In such jurisdictions, governments seek not to attract tourists, but gambling operators with favourable tax regimes and promises of robust technology and flexibility of approach.

VII THE ‘DNA’ OF REGULATORY REGIMES

Aside from the overall intention of regulation, there is also the question of the historical perspective of the relevant regulator. In certain jurisdictions, regulation has developed in an environment where the principal function of the regulator was to ensure that those who were involved in gambling had no connections with organised crime. In such jurisdictions, the level of due diligence on potential licensees can be extremely extensive and issues of ultimate beneficial ownership, source of funds and affiliates and other related third parties are often the subject of very detailed investigation. Other jurisdictions where criminal involvement in gambling is or has been less common are inclined to take a more ‘risk-based’ approach, targeting resources in proportion to the perceived social harms of types of gambling. Finally, there are those jurisdictions that might be said to provide a more ‘light-touch’ regulatory approach. This can manifest itself in a number of ways – either in allowing ownership structures to be permitted that are more or less opaque, imposing less rigorous reporting obligations, imposing less strict rules in relation to account ownership/know-your-customer checks and so on. It may be harsh (but it may also be fair) to say that at the end of the spectrum are regimes designed to provide a badge of respectability to operators who wish to enjoy the benefits of a largely toothless regime.

VIII LEGAL CONTROL OVER GAMBLING

The traditional way of controlling gambling activity was (1) to restrict those individuals who could offer gambling services and (2) to control the premises from which gambling could legally take place. For many years, this approach worked perfectly well and provided a good measure of control for governments as well as defining in clear terms where the gambling was taking place and therefore which authority should regulate (and if appropriate, tax) its conduct. Indeed, that method still provides a perfectly workable mechanism for the control of much gambling activity around the world.

However, with the advent of freely available long-distance telephony and, subsequently, remote communication such as the internet, new questions arose about ‘where’ gambling was taking place and therefore which government should or could control its regulation as a matter of law.
At this point, it is important to emphasise that there is no ‘right’ answer to the issue of jurisdiction. Different governments have taken different approaches, each of which is essentially legitimate. All models operate by reference to the basic ‘building blocks’ of a gambling transaction.

The first of these is the customer. Normally, one considers the customer to be an individual interested in enjoying gambling services. Of course, in some cases, the individual customer may itself be a gambling operator seeking to offset or ‘hedge’ its risk. However, irrespective of whether the customer is in the business of gambling itself, one can still recognise it as a distinct counterparty.

The next building block is the gambling operator, which may be defined in a variety of different ways but, for present purposes, can be said to be the organisation that is in the business of offering gambling services.

In addition to these building blocks, there are one or two other key activities that might be used as a point of control. The first of these is the location of the provider of the financial services that enables the gambling to take place. The provider of financial services is not itself in the business of gambling, but it may be said to be an accessory involved in assisting, aiding or abetting the gambling to take place. The other activity normally associated with gambling is advertising – essential to the process of bringing the customer to the gambling operator.

In order to demonstrate how these building blocks can be arranged to create a coherent legislative strategy (and one that can change), it is probably best to provide some examples.

IX THE UK POSITION ON JURISDICTION – A STORY OF CHANGE

In English law, the general test for determining whether the English criminal courts have jurisdiction over a particular matter is known as the ‘last act test’. In summary, one analyses each of the acts that constitute the criminal offence (the actus reus) and then determines whether the last of these occurs within the UK borders. Where this is the case, the English courts will have jurisdiction to prosecute the accused party. However, where the ‘last act’ takes place outside the United Kingdom, the offence is deemed to take place abroad and is normally beyond the power of the courts. Applying that test to the concept of unlicensed gambling, the consensus view is that the ‘last act’ that constitutes the offence of ‘providing facilities for gambling’ takes place when a betting or gaming instruction is received by the gambling operator and acted upon (i.e., a bet is accepted or a decision to partake in the game is acknowledged). Until that point, no gambling has taken place at all. Based upon that analysis, the offering of gambling by an operator outside the United Kingdom could not create an offence justiciable by the English courts. However, and by contrast, were there to be an offence of advertising foreign gambling (as indeed there was until 2014) then that offence would be completed at the point that the advertisement was effective within the United Kingdom (i.e., published and available to UK citizens) and therefore would be justiciable by the English courts even in circumstances where the operator was based outside the UK.

This approach had a number of advantages. First, it created legal certainty and showed due deference to principles of international comity. It also allowed for a measure of control because although UK citizens could freely gamble with operators abroad, there was still a measure of control in relation to advertising of those services in the UK. However, the approach also had shortcomings. It created a ‘two-tier’ regime, with operators both within and without the UK being able to access the UK market despite operating at different tax
regimes, placing UK-licensed operators at a competitive disadvantage. Also the law did not fully achieve the policy objective of protecting the UK public from illegal or unregulated gambling offered from abroad.

The regime changed by virtue of the passing of the Gambling (Licensing and Advertising) Act 2014. Under that legislation, the test of whether a licence was required changed from being based upon the location of the relevant gambling equipment (i.e., the locus of the gambling) to the location of the customer. In doing so, the new law sought both to level the competitive playing field from a fiscal and regulatory point of view, but also to increase the level of protection for the UK consumer. However, in taking that step, the law necessarily created a difficulty: how can one practically compel an operator who ignores the new law, and who may not have assets or individuals within the jurisdiction that can be the subject of a prosecution by the English courts? Gambling offences are not the type of offence that are normally prone to calls for extradition proceedings, partly because they are not inherently serious enough criminal offences to fall within the ambit of most international treaties that cover extradition, and also because the normal rule in such matters imposes an obligation on the country seeking extradition to show that the conduct complained of is actionable both in the law of the prosecuting state and in the state where the accused is located (the ‘double actionability’ test). So each approach to jurisdiction has its advantages and shortcomings.

X THE US POSITION – A FEDERAL APPROACH

The same types of problems can be seen with the evolution of the law in the US. The US legal position is complicated by the interaction of federal and state law. These topics are covered in more detail in chapters 3 and 22, and so the arguments are not rehearsed here in any detail. However, the federal government has specific powers set out in the US constitution and other law-making powers are expressly retained by individual states under the constitution in order to provide those separate jurisdictions with a power to legislate on matters for their own citizens. It is for this reason that the prevalence of gambling in Nevada is at the opposite end of the spectrum from that allowed in states such as Utah. Indeed, one of the roles of federal government is to protect the autonomy of individual states to be self-governing in such matters. Indeed, one of the first pieces of federal legislation to deal with gambling was the Interstate Wire Act of 1961, which was specifically designed to prevent betting transactions being conducted across state borders. For a number of years, a debate raged as to the interpretation of the Wire Act and whether it prohibited all forms of gambling on an interstate basis or only sports betting. To oversimplify a highly complex story, that ambiguity was largely resolved by the passing of the Unlawful Internet Gambling Enforcement Act 2006 ( UIGEA). That legislation led the large majority of online gambling operations outside the United States to cease any activity within the US. UIGEA specifically targeted not only those offering services to US citizens but also ancillary service providers such as financial services providers.

Subsequently, a number of states (notably Nevada and New Jersey, but there are others) have legislated separately for online gambling activity and a number of foreign operators have applied for licences to conduct online gambling within those states. But the position still remains a ‘patchwork’, with the chances of any federal legislation dealing with gambling...
remaining a distant and theoretical possibility. We are now seeing a major challenge to that paradigm with the decision currently in the hands of the US Supreme Court, with 23 states currently preparing to permit betting within the state if a favourable decision is given.

XI PROBLEMS ARISING OUT OF INTERNATIONAL TRADE AGREEMENTS

The ability of national governments to determine their own gambling policies has also fallen into conflict with international trade agreements. These agreements once again highlight one of the difficulties in dealing with gambling law – namely whether gambling should be considered a form of commerce to be treated like any other supply of goods and services or whether the special considerations that we have highlighted in this chapter mean that it is more apt to be regulated on the basis that national governments should be entitled to determine the best policy in line with the social, political and religious landscape prevalent in the state concerned.

One such international trading agreement is the General Agreement on Trade in Services, and during the past decade we have seen challenges to the US regime described above based upon the fact that it distorts international trade by effectively creating a barrier to those states wishing to act as exporters of gambling services to the rest of the world.7

Another example of the interrelation of trade law with social protection and fiscal and penal law is to be found in the many battles that have been fought on gambling policy in Europe. The European Treaty guarantees the rights of persons in EU Member States to enjoy free movement of goods and services, and freedom of establishment. National governments may create laws that derogate from those overarching freedoms, but only to the extent that they are proportionate, necessary and actually intended to achieve the effect of protecting local populations from social harm or criminal activity. Many EU Member States traditionally controlled gambling activity using laws that were directly contrary to the principles of free movement and freedom of establishment, and these laws were subject to a number of different challenges either by the European Commission or by individual operators who sought to show by one means or another that those laws were actually designed for the protection of national gambling interests (often controlled by the state) or for the protection of fiscal revenue. Over the past 10 years, those challenges have largely been successful and, as a result, we have seen significant shifts in gambling policy across a multitude of European states. It is likely that that process will continue for at least the next decade, and as this book goes to print, there is a substantial challenge being brought to the legislation in Germany.

XII WHAT IS A ‘GAME’ ANYWAY?

We have already mentioned the fact that different activities are treated either as gambling, or investment or harmless entertainment depending on an often artificial and culturally based notion of what is socially acceptable. But just as different societies have different views of social norms, so do social norms change through time. One good example of this is the notion of ‘sport’. Many societies distinguish between competitive sports and forms of gambling, seeing the former as positive and socially acceptable, and the latter as socially divisive and, therefore, morally questionable. But the distinguishing features of what is a sport

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7 In particular, see the challenge brought by the government of Antigua and Barbuda under the TRIPs Agreement.
and what is a game can vary over time. Over the past decade, as electronic communications and computers have become ubiquitous, we have seen the rise of e-sports, computer games and other forms of activity that cross the boundaries. How should they be treated? Many people enjoy computer games, and many people believe that children spend far too long playing such games rather than engaging in more traditional sporting activities. How should society treat these developments? Is someone who is addicted to video games in precisely the same predicament as someone who is addicted to running marathons? The issue of whether something is classified as gambling is often seen as a reason for restricting its availability, but gambling has to be seen as a form of activity that exists across an ever-changing spectrum of social leisure activity.

XIII CONCLUDING COMMENTS

The comments above are necessarily a highly simplified analysis of gambling law and policies across the world. They are by no means designed to be a complete summary of the legal position in any state. However, the aim is to show that common issues and policies directed towards common problems created by the nature of gambling can be identified. Many states are still struggling with the challenges created by online gambling and shifts in the social acceptability of that industry. This book demonstrates how wide the spectrum of responses can be. Nevertheless, over the past 20 years, remote communication, particularly in the form of online gambling, has caused immense structural changes. The next decade will no doubt be full of similar changes and challenges, but it might be said that we have moved a long way in our understanding of the types of approach that are possible in dealing with this complex social and legal phenomenon. Increasingly, regulators are cooperating and discussing problems of common interest – be they issues of money laundering, player protection or tax. We can expect differences to persist. But if there is a theme for the future it is that gambling has become truly international, and governments of all types are moving to accept and address the challenges that globalisation creates, by a cooperative approach.
Chapter 2

GAMBLING AND EUROPEAN LAW

Philippe Vlaeminck, Robbe Verbeke and Justine Van den Bon

I INTRODUCTION

In 1992 the Member States discussed for the first time the issue of gambling in the internal market following a report prepared by Coopers & Lybrand for the EU Commission. At the European Council meeting of 11–12 December in Edinburgh they agreed not to pursue any harmonisation of gambling activities at European level.\(^2\)

As a result of this decision, the EU gambling debate shifted to a large extent towards the Court of Justice of the European Union (the Court). The Court has provided rulings in more than 40 cases. New cases are still regularly referred from national courts throughout the EU. The importance of preliminary referrals has even increased given recent changes in the European Commission’s position on gambling (see below).

This chapter will address a number of important aspects related to gambling following from the most relevant case law of the Court.

Taxation will not be discussed in this chapter, and neither will the existing secondary legislation be reviewed, as in most relevant matters gambling services have explicitly been excluded from the scope of application.\(^3\) The competition law aspect in the gambling sector relates to a variety of issues such as state aid cases in the horse race betting sector but will not be discussed in further detail.\(^4\)

1 Philippe Vlaeminck is a partner, Robbe Verbeke is a senior associate and Justine Van den Bon is a junior associate, at Pharumlegal. References to EU law are references to the current TFEU articles even if at the time of the case the EC Treaties did apply.


3 In the Commission staff working document on “Online gambling in the Internal Market” accompanying the Communication Towards a comprehensive framework for online gambling of 23 October 2010, the Commission refers to the long-standing definition that exists for gambling activities in general in EU secondary legislation as being the one relied upon to exclude such services from the Electronic Commerce Directive (2000/31/EC). Also in later secondary legislation gambling is explicitly excluded, namely so in the Services Directive (2006/123/EC), the Audiovisual Media Services Directive (2010/13/EU) as well as in the recent proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market.

4 We refer to, among others, the following cases: Commission Decision of 19 June 2013 on State aid No SA.30753 which France is planning to implement for horse racing companies; Commission Decision of 2 July 2013 on State aid No. SA.35200 – German – Rennwett- und Lotteriegesez (RWLG); Commission Decision of 10 August 2016 on State aid No SA.46216 – United Kingdom – Horserace Betting Levy; Commission Decision of 3 January 2017 on State aid No.46556 – Finland – Aid to the central and regional trotting tracks in Finland and Commission Decision of 4 December 2017, SA.48604 – Denmark – aid scheme for the horse racing sector.
GAMBLING AS AN ECONOMIC ACTIVITY OF A PECULIAR NATURE

The first landmark gambling case was referred in 1992. A British law imposed a ban on national lotteries, following which lottery tickets for the German lottery sent by mail to citizens living in the United Kingdom were seized by the customs authorities. This was put into question insofar as the law prevented companies established in other Member States from providing such services in the United Kingdom. The Court’s ruling in Schindler rendered in 1994 was extremely important for the discussion on gambling in the internal market.5

Several Member States had disputed the competence of the EU, arguing that gambling was not an economic activity within the ambit of the Treaty Establishing the European Community (the EEC Treaty) and, as a consequence did not fall under the free movement principles. The Court, however, considered gambling to be an ‘economic activity’ within the meaning of the EEC Treaty, thus falling under the freedom to provide services, today provided in Article 56 of the Treaty on the Functioning of the European Union (TFEU). Nonetheless, it is an economic activity of a peculiar nature given the particular moral, religious and cultural aspects of lotteries, like other types of gambling, in all the Member States. Lotteries involve a high risk of crime or fraud and are an incitement to spend, which may have damaging individual and social consequences.6

In light of the peculiar nature of gambling, the Court affirmed several times that free, undistorted competition in the market of games of chance can have severely detrimental effects. The general approach, as used for other services on the internal market, of promoting free competition to the benefit of the consumer in terms of quality, and price is not maintained when it comes to gambling services. Operators of games of chance would be led to compete with each other in inventiveness to make what they offer more attractive, thereby increasing consumers’ expenditure on gaming as well as their risk of addiction.7

III THE ORGANISATION OF GAMBLING IN THE MEMBER STATES

i Restrictions and their justifications

General

As indicated above, gambling services are regulated by the Member States rather than by the EU. In the absence of EU harmonisation in the field, Member States are free to set the objectives of their policy on betting and gaming in accordance with their own scale of values and, where appropriate, to define in detail the level of protection sought. This also holds true for online gambling.8

As a consequence, holding a licence to offer gambling in a Member State will not suffice to be entitled to provide similar services in another Member State. The Court has explicitly

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6 Ibid., par. 60.
7 Judgment of the Court of 24 January 2013 Stanleybet International e.a., joined Cases C-186/11 and C-209/11, EU:C:2013:33, par. 45 and judgment of the Court of 30 April 2014 Pfleger e.a., C-390/12, EU:C:2014:281, par. 46.
denied the application of the principle of mutual recognition in the field of gambling, meaning that a Member State must not recognise the controls and rules set in place by another Member State. The EFTA Court takes the same view.\(^9\)

However, this does not mean that Member States are not subject to any limitations in how they organise their gambling markets. When a Member State implements legislation restricting the free movement principles, notably the freedom to provide (gambling) services, then this is to be considered a derogation from the general principle and it must meet certain conditions in order to be justified.

Basically, any national measure that creates a framework in which gambling services cannot be offered freely throughout the internal market of the EU, can be considered a restriction of the freedom to provide services enshrined in Article 56 TFEU.

Such limitation to the freedom to provide services can be justified under the following conditions:

\begin{itemize}
  \item[a] either they are imposed for reasons of public order, public security or public health (Article 62 TFEU \textit{iuncto} Article 52 TFEU);
  \item[b] either they are imposed for ‘overriding reasons in the public interest’,\(^10\) which includes consumer protection, combating fraud and crime, but also combating the squandering of money. In this case, the measures in question may not be discriminatory.\(^11\)
\end{itemize}

In addition, restrictive measures imposed must be proportionate, meaning they are suitable for the objectives pursued and not go beyond what is strictly necessary. Moreover, national legislation is appropriate only if it genuinely reflects a concern to attain it in a consistent and systematic manner.\(^12\) This condition is an assessment also known as the proportionality test.

**Proportionality test**

The proportionality test has been clarified in the abundant case law of the Court, and whether a restrictive measure complies with this proportionality test is generally for the national courts to assess on the basis of the Court’s findings.

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 proportionality of the relevant provisions. 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 that they seek to ensure.\(^13\)

\(^9\) EFTA judgment of 30 May 2007, case E-3/06, Ladbrokes v. Norway, available at www.eftacourt.int/uploads/tx_nvcases/3_06_Judgment_EN.pdf, par. 87. In this case, the EFTA Court was asked to formulate an advisory opinion on the Norwegian sport betting market. An advisory opinion of the EFTA Court is comparable to a preliminary ruling of the Court of Justice of the European Union, except that an advisory opinion is not binding upon the national Court which referred the question concerned to the EFTA Court.


\(^11\) See, e.g., Stanleybet International e.a., joined cases C-186/11 and C-209/11, par. 22.

\(^12\) Stanleybet International e.a., joined cases C-186/11 and C-209/11, par. 27 and judgment of the Court of 28 February 2018 Sporting Odds, C-3/17, EU:C:2018:130, par. 33.

\(^13\) Liga Portuguesa de Futebol Profissional and Bwin International, C-42/07, par. 58.
In *Carmen Media* the Court 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 they comply with the proportionality test.  

When looking at national restrictive measures, it is important to take into account that the Court does not recognise standalone fiscal objectives pursued by Member States in their gambling policy, without a consistent and protective regulatory framework in place. They thus cannot serve as a justification of restrictions on the freedom to provide services.  

Incidentally, a restriction on gambling activities may benefit the budget of the state. Moreover, restrictions must also serve to limit betting and gaming activities in a consistent and systematic manner. Member States’ authorities cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify restrictive measures, while at the same time inciting and encouraging consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse. This concern to reduce opportunities for gambling or to fight gambling-related crime must not only be met at the time of its adoption, but also thereafter. National courts must thus adopt a dynamic approach when assessing the proportionality and consistency of a measure.

It is thereby for the Member State wishing to rely on an objective capable of justifying a restriction to supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality. The national court must carry out a global assessment of the circumstances in which restrictive legislation was adopted and implemented. If a Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue, it does not deprive that Member State of the possibility of establishing that an internal restrictive measure satisfies those requirements.

Within this context of a restrictive market approach, the theory of ‘controlled expansion’ developed in *Placanica* came as a correction. The objective of drawing players away from clandestine betting and gaming – and, as such, activities that are prohibited – to activities that are authorised and regulated, may be entirely consistent with a policy of controlled expansion. But, in order to make the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled, authorised operators must be able to represent a reliable, and 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. This was later confirmed in *Pfleger.*

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14 Judgment of the Court of 8 September 2010 *Carmen Media*, C-46/08, EU:C:2010:505, par. 60 referring to the judgment of 6 March 2017 *Placanica*, joined cases C-338/04, C-359/04 and C-360/04, EU:C:2007:133, par. 49.
15 Judgment of the Court of 15 September 2011 *Dickinger and Ömer*, C-347/09, EU:C:2011:582, par. 55 and *Pfleger e.a.*, C-390/12, par. 54.
16 Judgment of the Court of 11 June 2015 *Berlington Hungary e.a.*, C-98/14, EU:C:2015:386, pars. 60 and 61. This has recently been confirmed in *Sporting Odds*, C-3/17, par. 28.
17 Judgment of the Court of 6 November 2003 *Gambelli*, C-243/01, EU:C:2003:597, pars. 67 and 69. The Court confirmed this in *Berlington Hungary e.a.*, C-98/14, par. 61.
19 *Pfleger e.a.*, C-390/12, paras. 50 to 52 and the case-law referred to.
20 *Placanica*, joined cases C-338/04, C-359/05 and C-360/04, par. 55.
21 *Pfleger e.a.*, C-390/12, par. 56.
The Court later confirmed the possibility of controlled expansion with a view to protecting consumers to the extent that there is a large illegal market.\(^\text{22}\) This was previously also held, but in a slightly different way, by the EFTA Court.\(^\text{23}\)

ii The monopoly and licence systems
Both the conferral of exclusive rights to a single body\(^\text{24}\) (the monopoly system) and the attribution of licences\(^\text{25}\) (the licence system) have been recognised by the Court as potentially proportionate measures to reach the objectives of limiting exploitation of the human passion for gambling in order to avoid the risk of crime and fraud related to games of chance.

Limited authorisation of gambling must indeed reflect a concern to bring about a genuine diminution in gambling opportunities.\(^\text{26}\) Equally, the co-existence of a monopoly for certain games of chance and concessions to private operators for other games of chance can be a proportionate measure in light of the objectives pursued.\(^\text{27}\)

Monopoly system
A monopoly system can be in conformity with EU law, as is clear from the following case law of the Court.

The conferral of exclusive rights to operate gambling to a single public body can be a proportionate measure in order to reach the objectives of limiting exploitation of the human passion for gambling and to avoid the risk of crime and fraud related to games of chance.\(^\text{28}\)

It has even been held, both by the EFTA Court\(^\text{29}\) and the Court,\(^\text{30}\) that a monopoly system sometimes serves the aim of fighting addiction related to gambling more effectively than would be the case with a system authorising the business of operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework.

When seeking a particularly high level of protection, a Member State is entitled to take the view that it is only by granting exclusive rights to a single entity – which is subject to strict control by the public authorities – that it can tackle the risks connected with the gambling sector. Thereby pursuing the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness.\(^\text{31}\) However, when it comes to combating criminality and in order to be consistent with this objective, national legislation establishing a gambling monopoly must be based on a finding that criminal and fraudulent activities linked to gaming and gambling addiction are a problem

\(^{22}\) Judgment of the Court of 3 June 2010 Sporting Exchange (Betfair), C-203/08, EU:C:2010:307 and judgment of the Court of 3 June 2010 Ladbrokes, C-258/08, EU:C:2010:308.


\(^{25}\) Judgment of the Court of 31 January 2008 Centro Europa, C-380/05, EU:C:2008:59, par. 100.


\(^{27}\) Sporting Odds, C-3/17, par. 33.

\(^{28}\) Lääärä, C-124/97, par. 42.

\(^{29}\) EFTA Court Judgment of 14 March 2007, E-1/06, ESA v. Norway, available at www.eftacourt.int/uploads/tx_nvcases/1_06_Judgment_EN.pdf, par. 51. The monopoly on gaming was thus found to be compatible with the free movement provisions as enshrined in the EEA Agreement.

\(^{30}\) Judgment of the Court of 8 September 2010 Markus Stoss and Others, joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504.

\(^{31}\) Ibid., pars. 81 and 83; Dickinger and Ömer, C-347/09, par. 48 and judgment of the Court of 30 June 2011 Zeturf, C-212/08, EU:C:2011:437, par. 41.
in the territory of the Member State concerned, which the expansion of authorised and regulated activities would be capable of solving.\textsuperscript{32} It has recently been confirmed by the Court that it is for the national courts to carry out a global assessment of the circumstances in which restrictive legislation was adopted and implemented on the basis of the evidence provided by the competent authorities of the Member State, seeking to demonstrate the existence of objectives capable of justifying a restriction of a fundamental freedom guaranteed by the TFEU and its proportionality.\textsuperscript{33}

In \textit{Dickinger and Ömer}, the Court specifically recognised the legality of a monopolistic gambling model with regards to online gambling.\textsuperscript{34}

In \textit{Markus Stoss}, the Court held that a monopoly will only satisfy the requirement of proportionality, insofar as the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and quantitatively planned by reference to the said objective and subject to strict control by the public authorities.\textsuperscript{35} In \textit{Sporting Exchange}, the Court has elaborated on the notion of strict control, and stated that this can comprise either 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.\textsuperscript{36}

In the same respect, any advertising issued by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order to channel consumers towards authorised gaming networks (policy of ‘controlled expansion’).\textsuperscript{37} In \textit{Markus Stoss, Carmen Media}\textsuperscript{38} and \textit{Winner Wetten},\textsuperscript{39} the Court further clarified the conditions under which a monopoly system can be compliant with EU law. A monopoly may be considered not suitable for achieving the objective for which it was established when at the same time advertising measures emanating from the holder of such a monopoly and relating to other types of games of chance that it also offers are not limited to what is necessary in order to channel consumers towards the offer emanating from that holder, but are designed to encourage the propensity of consumers to gamble and stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities.\textsuperscript{40}

It must also be noted that, even if the monopoly system is found to be incompatible with the provisions on free movement, this does not necessarily lead to an obligation for the Member State concerned to liberalise the market in games of chance if it finds that such a liberalisation is incompatible with the level of consumer protection and the preservation of

\textsuperscript{32} Zeturf, C-212/08, par. 72.
\textsuperscript{33} \textit{Sporting Odds}, C-3/17, par. 53. See to that effect also the judgment of the Court of 14 June 2017 Online Games, C-685/15, EU:C:2017:452, par. 67.
\textsuperscript{34} \textit{Dickinger and Ömer}, C-347/09. See also \textit{Liga Portuguesa de Futebol Profissional v. Bwin International}, C-42/07.
\textsuperscript{35} \textit{Markus Stoss and Others}, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, par. 83.
\textsuperscript{36} \textit{Sporting Exchange (Betfair)}, C-203/08, par. 59.
\textsuperscript{37} \textit{Markus Stoss and Others}, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, par. 103.
\textsuperscript{38} \textit{Carmen Media}, C-46/08.
\textsuperscript{39} Judgment of the Court of 8 September 2010 \textit{Winner Wetten}, C-409/06, EU:C:2010:503.
\textsuperscript{40} \textit{Markus Stoss and Others}, joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, par. 107.
order in society which that Member State intends to uphold. Member States remain free to undertake reforms of existing monopolies in order to make them compatible with the Treaty provisions, *inter alia* by making them subject to effective and strict controls by the public authorities.\(^{41}\) This has been confirmed by the Court in *Ince.*\(^{42}\)

**Licence or concession system**

A licensing or concession system can also be in conformity with EU law. A licensing system that restricts the number of operators in the national territory is capable of being justified by general interest objectives.\(^{43}\) This kind of limitation on the freedom to provide services must also comply with the proportionality test as set out above and must reflect a concern to bring about a genuine diminution of gambling opportunities.\(^{44}\)

It is consistent case law that national legislation that prohibits operating activities in the betting and gaming sector without a licence or police authorisation issued by the state, constitutes a restriction on the freedom of establishment and the freedom to provide services.\(^{45}\) However, the Court confirmed in *Biasci* and *Rainone* that Member States are allowed to set out the obligation to be granted a concession and a police permit in order to open betting activities.\(^{46}\)

In *Engelmann* the Court ruled that a limitation of the number of concessions can be justified as it enables a limitation on gambling opportunities, and thus allows for the attainment of a public interest objective. Limiting the licence duration for a casino to 15 years can also be justified having regard to the concessionaire’s need to have a sufficient length of time to recoup the investments required by the setting up of a gaming establishment.\(^{47}\)

As regards licensing in a semi-monopolistic system, the Court held in *Sporting Exchange* that competition in the market of games of chance would be detrimental and therefore limitations can be justified. Restrictions regarding the procedures for the grant of a licence to a single operator, or for the renewal thereof, may be regarded as being justified if the Member State decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct state supervision of a private operator whose activities are subject to strict control by the public authorities. In this case, the grant or renewal of exclusive rights without any competitive tendering procedure was not disproportionate.\(^{48}\)

**Dual system**

It is also possible that in one Member State, some types of games of chance are subject to a public monopoly, while others are subject to a system of authorisations granted to private operators. This has recently been confirmed by the Court in *Sporting Odds*.

Still, such a system of dual organisation of the market for games of chance may be contrary to Article 56 TFEU if it is found that the competent authorities pursue policies

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41 Stanleybet International e.a., joined cases C-186/11 and C-209/11, par. 46.
43 Centro Europa, C-380/05, par. 100. The Court refers here to *Placanica*, joined cases C-338/04, C-359/04 and C-360/04, par. 53.
44 Zenatti, C-67/98, pars. 35 and 36.
45 Gambelli e.a., C-243/01, par. 59.
46 Judgment of the Court of 12 September 2013 *Biasci and Rainone*, C-660/11, EU:C:2013:550, par. 27.
48 Sporting Exchange (Betfair), C-203/08, par. 60.
seeking to encourage participation in games of chance other than those covered by the state monopoly rather than reduce opportunities for gambling and limit activities in that area in a consistent and systematic manner so that the aim of preventing incitement to squander money on gambling and of combating addiction to the latter, which was at the root of the establishment of the said monopoly, can no longer be effectively pursued by means of the monopoly.49

Such a system of dual organisation of the market for games of chance exists in many Member States, where there will often be the coexistence of a monopoly lottery operator with licence holders for other types of games of chance (e.g., casinos or sports betting).

iii. The allocation of exclusive rights and licences

The manner in which gambling rights are granted or refused must equally be in line with the rules of the EU. This means, most notably, when issuing gambling licences (or similar authorisations), public authorities are bound to comply with the fundamental rules of the Treaties in general, including Article 56 TFEU and, in particular, the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency.50

In Costa and Cifone, the Court held that the obligation of transparency applies if the licence in question may be of interest to an undertaking located in a Member State other than that in which the licence is granted. Without necessarily implying an obligation to call for tenders, that obligation of transparency requires the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition and the impartiality of the award procedures to be reviewed.51

The principle of equal treatment requires that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. If there is unequal treatment by discriminating certain operators, justification must be based on reasons of public order, public security or public health (see Article 62 TFEU iuncto Article 52 TFEU). It is thereby settled case law that grounds of an economic nature, such as the objective of ensuring continuity, financial stability or a proper return on past investments for operators who obtained licences, cannot be accepted as overriding reasons in the public interest.52

Rules on granting gambling licences apply equally to the renewal of existing licences.53 In the same vein, it was considered that the renewal of old licences without putting them out to tender was not an appropriate means of attaining the objective pursued, going beyond what was necessary in order to preclude operators in the horse race betting sector from engaging in criminal or fraudulent activities.54

49 Sporting Odds, C-3/17, pars. 23 and 24.
50 See, e.g., Sporting Exchange (Betfair), C-203/08, par. 39; Judgment of the Court of 7 December 2000 Telaustria and Telefonadres, C-324/98, EU:C:2000:669, pars. 60 to 62; Judgment of the Court of 10 September 2009 Eenwaasser, C-206/08, EU:C:2009:540, par. 44 and judgment of the Court of 13 April 2010 Wall, C-91/08, EU:C:2010:182, par. 33.
52 Costa and Cifone, joined cases C-72/10 and C-77/10, pars. 57 and 59.
53 Engelmann, C-64/08.
54 Commission v. Italy, C-260/04, par. 34.
The right to offer gambling services can be granted through a licence, but also by way of a service concession. Until recently, service concessions were not governed by any of the directives by which the EU legislature has regulated the field of public procurement. The applicable rules for authorities granting concession were grounded on the above-mentioned principles derived from Article 56 TFEU and the Court's case law on that subject.

Since currently, however, the Concession Directive applies to certain gambling service concessions, but not to lotteries. Still, the granting of concessions for lottery services should be in accordance with the Court's case law.

In other words, if a Member State opts to grant, for instance, a state-owned or directly controlled company the right to exclusively offer certain gambling services, it is not required to comply with the principles of non-discrimination and transparency. It may simply appoint the service provider of its choice.

IV ONLINE GAMBLING

In Liga Portuguesa, the Court established the core principles of the Member States’ discretionary power in the field of online gambling. A key element in the reasoning of the Court is that games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared to the traditional markets for such games. This because of the lack of direct contact between consumer and operator. The Court thus found internet games to be more dangerous than physically offered games, even when regulated and controlled by the competent authorities of the Member State of residence of the consumer. Member States are therefore allowed to impose proportionate restrictions on the offer of online gambling services.

The fact that the principle of mutual recognition does not apply is especially relevant for online gambling. Simply because an operator is licensed in one Member State, this does not mean that this licence should be recognised in another Member State. The consequence is that cross-border services provision, which is notably done via the internet when it comes to gambling, is as such not allowed. Even passive provision of games of chance can be prohibited or restricted, meaning that the mere accessibility of online gambling products from a Member State can be sufficient to be regarded as providing services there. Member States are hence allowed to block all unauthorised websites of operators offering online gambling services accessible to its consumers.

In Carmen Media the Court clearly recognised again the added dangers of games of chance over the internet, which should be taken into account in assessing the proportionality of the measures put in place by the Member States. A stricter approach may be considered required and a prohibition measure covering any offer of games of chance via the internet may, in principle, be regarded as suitable for pursuing the legitimate objectives determined such

55 See, e.g., Sporting Exchange (Betfair), Case C-203/08, par. 39.
57 Liga Portuguesa de Futebol Profissional, C-42/07, pars. 68 to 70.
58 Sporting Exchange (Betfair), C-203/08 and Ladbrokes, C-258/08.
as the protection of young persons, even though the offer of such games remains authorised through more traditional channels. The responsibility for an effective enforcement system and tackling illegal online gambling lies with the Member States.

In Biasci and Rainone, the Court continued on the notion of ‘direct contact’. The fact that an operator must have both a licence and a police authorisation in order to access the market in question is not, per se, disproportionate in the light of the objective pursued by the national legislature, which is to combat criminality linked to betting and gaming. However, precluding all cross-border activity (in particular business-to-business) in the betting and gaming sector, irrespective of the form in which that activity is undertaken and, in particular, in cases where there is the possibility of direct contact between consumer and operator and where physical checks for police purposes can be made of an undertaking’s intermediaries who are present on national territory, is contrary to the provisions of Article 49 and 56 TFEU.

However, recently, the Court ruled in Sporting Odds: that in order to link land-based to online gambling, it could in some circumstances be considered disproportionate to reserve the grant of a licence to organise online games of chance exclusively to operators of games of chance holding a concession for a casino situated on national territory. The Court finds that this a discriminatory rule that can only be justified if it is covered by an express derogating provision, such as Article 52 TFEU, namely public policy, public security or public health. It is thus not enough to argue that online gaming, which involves higher risks than traditional games of chance, can only be reserved to trustworthy operators running a casino on national territory that satisfy the requirements of consumer protection and public order.

V OTHER ISSUES

i Advertising
The Court has at regular intervals been asked to pronounce itself on the scope of advertising in the context of a Member State’s gambling policy.

In the context of the policy of ‘controlled expansion’, operators should be allowed to extend their games of chance, advertise on a certain scale and use different kinds of distribution channels in order to compete against illegal operators. This is to be able to offer a reliable alternative to illegal gambling.

Advertising is allowed when it is necessary to attract players to the controlled channels of games of chance, but it cannot incite players to excessive gambling. It must thus remain measured and strictly limited to what is necessary to channel consumers. Stimulating active participation, such as by trivialising gambling or giving it a positive image because of the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours, is not allowed.

59 Carmen Media, C-46/08, par. 105.
60 Biasci and Rainone, C-660/11, pars. 27 and 37.
61 Sporting Odds, C-3/17, pars. 40 to 44.
62 Placanica, C-338/04, par. 55.
63 Dickinger and Ömer, C-347/09, par. 68.
64 Markus Stoss and Others, joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, par. 103.
In *HIT LARIX*, the Court stated that Member States may prohibit advertising for foreign (land-based) gambling establishments and make an exception only for those operators that can demonstrate that the level of protection in their country of establishment is similar to the level of protection in the Member State where they want to make publicity. However, the Court also added that such condition could be seen as disproportionate if it would require the rules to be identical (even in the case such rules would have been pursuing the objective of player protection) or alternatively, in case the rules were not directly related to risks inherent to gambling (regardless of the objective of the legislation).\textsuperscript{65}

Finally, in *Sjöberg and Gerdin*, the Court found that the freedom to provide services precludes 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 the national territory without the due authorisation. Also here, the Court ruled that advertising to residents of that state can be prohibited if gambling is prohibited and where gambling is organised for the purposes of profit by private operators in other Member States.\textsuperscript{66}

### ii Sanctions

In *Placanica*, the Court ruled that it is not compliant with EU law to apply criminal sanctions against the concerned operator for not abiding by the administrative conditions linked to the concession system if such conditions are found to be disproportionate.\textsuperscript{67} In other words, if an operator did not have the possibility to acquire a licence, and this was a result of a restriction that is not compliant with EU law, this operator cannot be sanctioned for offering gambling services without a licence. This has been confirmed in the *Pfleger* case.\textsuperscript{68}

Another way by which gambling operators may dodge sanctions for offering gambling services without the necessary licence, is by invoking, as the case may be, that the legislation on the basis of which they would be sanctioned was not notified to the European Commission under the Notification Directive\textsuperscript{69} when this was actually required.

If legislation had to be notified, but that did not happen, it is not possible to rely upon the provisions of that legislation against an individual.\textsuperscript{70}

### VI OUTLOOK

Currently, when discussing the outlook of what will happen at EU-level, one topic that emerges is Brexit. What will happen when the United Kingdom leaves the EU and how the new relationship between them will be constructed is totally unclear today. However, in two gambling cases the Court clarified the position of Gibraltar in its relations with the UK.

\textsuperscript{65} Judgment of the Court of 12 July 2012 *HIT LARIX*, C-176/11, EU:C:2012:454, pars. 29 to 32.

\textsuperscript{66} Judgment of the Court of 8 July 2010 *Sjöberg and Gerdin*, joined cases C-447/08 and C-448/08, EU:C:2010:415, pars. 46 and 57.

\textsuperscript{67} *Placanica*, joined cases C-338/04, C-359/04 and C-360/04, par. 71.

\textsuperscript{68} *Pfleger e.a.*, C-390/12, par. 64.


the GBGA and Fisher cases, the Court declared that, from an internal market perspective, Gibraltar and the United Kingdom form part of one single Member State, meaning that the free movement provisions of the EU Treaties do not apply to services provided between Gibraltar and the United Kingdom.71

On 7 December 2017, the Commission decided to close all infringement procedures and pilot cases, and to reject all complaints in the gambling sector. This is in line with its political commitment to be more strategic in enforcing EU law. The Commission considers that complaints in the gambling sector can be handled more efficiently by national courts also in light of the numerous judgments of the Court on national gambling legislation. The Commission encourages the use of national remedies when facing problems with EU law in the gambling sector.

With that decision, the Commission also referred to its recommendation on consumer protection and advertising in the online gambling sector.72 This recommendation was the subject of an annulment proceeding brought by Belgium. According to Belgium, the European Commission exceeded its competence by adopting a recommendation without legal basis and in disrespect of the institutional balance. The Court ruled here that, following the Order of non-admissibility by the General Court, the recommendation is, in light of the wording, the content and the purpose of the contested recommendation, not intended to have binding legal effects, with the result that it cannot be classified as a challengeable act for the purposes of Article 263 TFEU.73

According to the Court, recommendations are intended to confer on the institutions a ‘power to exhort and to persuade’, distinct from the power to adopt acts having binding force. The Court further stated that it is not sufficient that an institution adopts a recommendation that allegedly disregards certain principles or procedural rules in order for that recommendation to be amenable to an action for annulment.74

More recently, the Commission adopted a general recommendation on fighting illegal content online,75 in which illegal content is defined as ‘any information which is not in compliance with Union law or the law of a Member State concerned’. The Commission is also working on a comprehensive policy to address taxation in the digital single market, which may very well affect taxation on online gambling services.

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74 Ibid., pars. 26 and 28.
Chapter 3

OVERVIEW OF US FEDERAL GAMING LAW

Behnam Dayanim, Reade Jacob and Edward J George

I KEY TERMS

US statutes, jurisprudence and academic literature often refer to several types of gaming, each with a distinct meaning and often with distinct legal implications, regulatory requirements and penalties for non-compliance. On one end of the spectrum are traditional gambling games such as lotteries, table games and sports betting. Gambling games vary widely but, with few exceptions, share three fundamental characteristics: consideration, prize and chance. These are among the most highly regulated forms of gaming in the United States and are detailed below:

a Lotteries, bingo and other house-banked games are the quintessential gambling games. All involve payment of consideration and award prizes based in whole or in part on chance. Lotteries, roulette, most slots and similar games typically depend entirely on chance. Other games, such as blackjack and craps, include elements of skill but still incorporate sufficient amounts of chance to warrant treatment as gambling.

b Poker and other peer-to-peer games, where the players compete against one another and not the casino operator or ‘house’, are a second type of gambling game. As these games are viewed as involving chance, they too are considered to be gambling.

c Sports betting and horse race wagering involve – as their names imply – wagering on the outcome of live sporting and horse racing events. Horse racing (and, in a few states, dog racing) is treated differently from other sports betting; as a result, the legal strictures involving each will vary.

On the other end of the spectrum are games whose legal status is unclear. These games (or their earlier forebears) were not traditionally considered gambling, but their meteoric rise in popularity (made possible by the internet) and the substantial revenues they generate have led regulators – and zealous plaintiffs’ attorneys – to question whether they belong under the rubric of gambling laws.

i Skill games

Skill games are games that require payment to play and that award valuable prizes, but in which outcomes are determined by the skill of the participants rather than by chance events.
outside of their control. How much skill is required to avoid designation as gambling will vary from state to state, and some states would include at least some forms of skill games as gambling even if no chance is present.

ii  Fantasy sports
Fantasy sports competitions take a variety of forms. Traditional fantasy sports revolve around a small group of people drafting a roster of real-world athletes from various real-world teams so as to create a ‘fantasy’ team. Participants compete against one another by comparing the ‘fantasy’ points earned by their fantasy teams. Fantasy points are awarded based on the statistical results of the underlying athletes in real-world sporting events, like passing yards, receptions and touchdowns. Participants often play for bragging rights or for side wagers, and contribute a nominal entry fee in order to participate. The biggest distinction between traditional fantasy sports and their modern cousin – daily fantasy sports – is that they take place over the course of a full season of the underlying sport. Daily fantasy sports (DFS), as their name implies, take place over a much shorter time frame. Participants still draft rosters of fantasy athletes to compete against other participants, but over the course of a week, a weekend or even a single day. Many other variants have emerged as the competitive landscape expands, such that now DFS also includes other non-roster styles of game, such as head-to-head competitions, ‘pick ’ems’, question-and-answer predictions and many more.

iii  Social casino games
Social casino games are online or mobile games, often offered on social networks or similar platforms. They recreate casino games such as poker, slot machines and bingo. These games recreate the sounds and images of a casino but differ from the actual casino games in one important respect – the player need never pay to participate and (in most variants) can never win a prize of any real-world value. These games typically award credits or virtual ‘coins’ to extend gameplay or allow for purchase of special virtual features, and most operate on a ‘freemium’ model. ‘Freemium’ games are free to play, but players have the ability to use real money to purchase additional ‘credits’ or features that would otherwise be earned through extended gameplay. Very few social games award cash prizes to players; those that do typically employ a ‘sweepstakes’ model to ensure that paying players are not given an advantage over free players.³ Social games that award monetary prizes lie outside the scope of this chapter. Outside the purview of the gambling laws are certain speculative or hedging financial transactions, such as binary options or commodity futures trading. Those types of transactions are often expressly carved out from statutory gambling prohibitions and fall outside the scope of this chapter.

II  GENERAL LEGAL BACKGROUND
Gambling is regulated at the federal, state or tribal and local levels in the United States. States serve as the primary regulators, taking a lead role in defining the scope of permitted and unlawful activities, enforcing criminal gambling prohibitions and licensing legal gambling

³  Sweepstakes generally avoid gambling prohibitions by providing a free alternative method of entry (AMOE) that is of ‘equal dignity’ to the paying method – in other words, that affords the AMOE entrant an equal opportunity to the paying participant to win the prizes awarded.
operators. The federal government mainly plays a supporting role in enforcing state laws and prosecuting multistate enterprises, although the federal ban on sports betting is a prominent exception.

### Relevant federal statutes

This subsection outlines the nine federal laws that address gambling most directly and includes a brief discussion of certain additional ancillary laws that may play a role in certain cases. Most of these statutes define prohibited gambling conduct by reference to state law. In other words, the activity does not violate the federal statute unless it violates an underlying state prohibition. The statutes provide a tool through which federal law enforcement authorities can pursue such unlawful conduct and impose enhanced penalties for that conduct. Congress often enacted these statutes in recognition of the fact that sophisticated criminal enterprises often do not respect state boundaries and can be difficult for state authorities to pursue.

#### The Wire Act

The Wire Act is an exception to the rule. Unlike most other federal statutes dealing with gambling, the Wire Act does define what it prohibits. More particularly, the statute prohibits anyone ‘in the business of betting or wagering’ from:

> knowingly using 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.\(^4\)

The Wire Act exempts from liability any 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.\(^5\)

The only federal courts of appeals to have considered the question concluded that the Wire Act applies only to gambling on sporting events or sporting contests.\(^6\) After years of disagreement with that holding, in September 2011, the Office of Legal Counsel for the Department of Justice issued a memorandum concurring with that appellate decision.\(^7\)

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4 18 USC Section 1084(a).
5 Id.
6 US v. Lyons, 740 F.3d 702, 718 (1st Cir.), cert. denied, 134 S. Ct. 2743 (2014); In re Mastercard Int’l, Inc, 313 F.3d 257, 262 (5th Circuit 2002). But see US v. Lombardo, 639 F Supp 2d 1271, 1291 (D Utah 2007) (concluding that Section 1084(a) is not confined to sports betting or wagering).
The Professional and Amateur Sports Protection Act
The Professional and Amateur Sports Protection Act of 1992 (PASPA) purported to prohibit states from authorising betting on sporting events, but included three ‘grandfathering’ clauses. These clauses authorised continued sports betting in those states in which it was already legalised and operated, or that enacted permissive legislation within one year of PASPA. Only those forms of sports betting in effect in that state were permitted to continue; new forms were not authorised. Four states qualified for the exception: Delaware, Montana, Nevada and Oregon. Oregon, which had allowed betting on National Football League (NFL) games in 1989, outlawed it after the 2006–2007 NFL season. New Jersey – for whom the one-year-after-enactment grandfather clause was ostensibly written – failed to enact permissive legislation in 1993. As a result, New Jersey (not to mention all other states) is barred from legalising sports betting, despite several failed attempts to do so. In 2016, New Jersey challenged the constitutionality of PASPA, arguing that it should be permitted to repeal its state prohibitions on sports betting notwithstanding the federal law or, if not, that the law is unconstitutional. The federal appellate court rejected the state’s challenge, but the Supreme Court agreed to hear the case. That court held oral arguments in December 2017. (The Supreme Court challenge will be discussed in further detail below.)

The Illegal Gambling Business Act
The Illegal Gambling Business Act (IGBA) is more typical of federal gambling statutes. It attaches liability to anyone who ‘conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business’. ‘Illegal gambling business’ includes a gambling business that, inter alia, is a violation ‘of the law of a state or political subdivision in which it is conducted’. This statute also requires an assessment of where the gambling business is conducted and of who is considered to be ‘conduct[ing], financ[ing], manag[ing], supervis[ing], [or] direct[ing]’ the business.

The Travel Act
The Interstate and Foreign Travel or Transportation in Aid of Racketeering Act (the Travel Act) makes it unlawful to ‘travel’ or ‘use . . . any facility in interstate or foreign commerce . . . with intent to . . . distribute the proceeds of any unlawful activity; or . . . otherwise to promote, manage, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity’. Under the Travel Act, an ‘unlawful activity’ is defined

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8 28 USC Section 3702.
9 28 USC Section 3704(a).
10 28 USC Section 3704.
11 Nat’l Collegiate Athletic Ass’n v. Christie, 926 F Supp 2d 551, 556 (DNJ 2013) (‘PASPA’s ‘grandfather clause’ resulted in exceptions for four states: Delaware, Oregon, Montana and Nevada.’).
13 18 USC Section 1955.
14 Id.
15 18 USC Section 1952.
specifically to include ‘any business enterprise involving gambling . . . in violation of the laws of the state in which [the unlawful acts] are committed or of the United States’. The underlying state crime need not be a felony. A violation of a state gambling law that is a misdemeanor is sufficient. In essence, the Travel Act creates a federal scheme to punish enterprises that use interstate or foreign facilities in violation of state law. It is, therefore, like the IGBA, fundamentally a federal reinforcement of state law. As a result, the applicability of the Travel Act turns largely on the nuances of the applicable state law and what, precisely, it defines as unlawful. Simply put, without a violation of state law, there can be no violation of the Travel Act.

_Wagering Paraphernalia Act and Johnson Act_

The Wagering Paraphernalia Act precludes the transportation in interstate or foreign commerce of any:

- record, paraphernalia, ticket, certificate, bills, slip, token, paper, 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.

A similar statute prohibits the transport in interstate or foreign commerce of any ‘gambling device’.

_Anti-Lottery Act_

The Anti-Lottery Act prohibits the carrying (or mailing) in interstate or foreign commerce of:

- any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance.

Contraband further includes advertisements of such lotteries and lists of prizes drawn or awarded. The Anti-Lottery Act also dictates that if businesses purchase lottery tickets in-state for out-of-state buyers, it is a criminal activity, unless the two states have agreed to allow such purchases. The statute contains several exemptions from its prohibitions, including state-run lotteries, charitable fishing contests and savings promotion raffles, which award prizes to those who make qualifying deposits in savings accounts or other savings vehicles.

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16 Id. at Section 1952(b). The statute encompasses a variety of other state crimes as well. In fact, it has figured prominently in the news of late as the basis for the much-publicised indictment of Atlanta Falcons quarterback Michael Vick in connection with unlawful dog fighting.


18 18 USC Section 1953.

19 15 USC Section 1172.

20 18 USC Sections 1301 and 1302.

21 18 USC Section 1307.

22 18 USC Section 1305.

23 18 USC Section 1308.
Overview of US Federal Gaming Law

Indian Gaming Regulatory Act

Tribal gaming falls under the Indian Gaming Regulatory Act of 1988 (IGRA). The IGRA grants federally recognised Native American tribes the:

exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.24

The IGRA established the National Indian Gaming Commission (NIGC), whose role is to monitor gaming on Indian lands, inspect Indian gaming premises, conduct background investigations, examine and audit books and records, promulgate regulations and guidelines, and collect fees and fines. As a practical matter, the NIGC typically plays an oversight role, leaving principal regulatory authority to individual tribal gaming regulators. The IGRA divides gaming into three categories, or classes (appropriately designated I, II and III). Class I gaming is social (non-commercial) gambling with small prizes. Class II gambling encompasses bingo and other non-banking card games25 that are either expressly authorised within the particular state or not expressly prohibited by the state and played in conformity with any state laws governing card rooms. Class III gambling includes all other forms of gambling and may not be operated in the absence of a tribal–state compact.26

Tribal–state compacts may contain provisions relating to the applicability of the state’s criminal and civil laws to the licensing process, the allocation of criminal and civil jurisdiction between the state and tribal lands, comparable taxation provisions for the tribal gaming activity and standards related to licensing and operation of gaming activities.27

To date, compacts have been formed with Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Washington, Wisconsin and Wyoming.28

By some accounts, tribal gaming accounts for approximately one-third of total lawful commercial and tribal gambling in the United States.29

24 25 USC Section 2701(5).
25 A ‘banking’ (or ‘banked’) card game is one in which the player is playing against the ‘house’. Blackjack is an example of a banking card game. Non-banked card games, by contrast, are played against other players, and the operator typically makes its revenue by collecting a percentage or ‘rake’ of the pot of player funds. These games are thus commonly called ‘percentage’ games. Poker is a classic example.
26 25 USC Section 2710(d)(1)(C).
27 25 USC Section 2710(d)(3)(C).
Interstate Horseracing Act

The Interstate Horseracing Act (IHA) was enacted in 1978:

_to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States._30

It provides that:

>[n]o person may accept an interstate off-track wager except as provided in this [Act].31

The IHA was amended in 2000 to clarify that it permits remote wagering over the phone, internet or other electronic media.32 The statute now defines an ‘interstate off-track wager’ as a:

>legal wager placed or accepted in one state with respect to the outcome of a horserace taking place in another state and includes pari-mutuel wagers, where lawful in each state involved, placed or transmitted by an individual in one state via telephone or other electronic media and accepted by an off-track betting system in the same or another state.”33

Thus, an interstate _pari-mutuel_ wager placed or transmitted by an individual customer is an ‘interstate off-track wager’ permitted under the IHA if it meets two requirements:

- _a_ it must be ‘lawful in each state involved’; and
- _b_ it must be accepted by an ‘off-track betting system’.

Such systems must be ‘conducted by the state or licensed and otherwise permitted by state law.’34

The IHA also sets forth a framework for the agreements that are required with host racetracks in order to permit simulcasts of the races and the acceptance of wagers on those races.35 The IHA requires the consent of five different parties for any off-track wagering agreement.36

There has been much discussion in the academic literature and among gaming lawyers as to the relationship between the IHA, which permits interstate off-track wagers, and the

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30 15 USC Section 3001(b).
31 15 USC Section 3003.
32 Conference Report on HR 4942, 146 Cong Rec H11265, 11271 (2000); see also 146 Cong Rec H11230, 11232 (2000) (remarks of Rep. Frank Wolf (R-VA)) (explaining that the amendment was intended to ‘codify [the] legality of placing [horseracing] wagers over the telephone or other electronic media like the internet’).
33 15 USC Section 3002(3).
34 15 USC Section 3002(7).
35 For a more detailed explanation of how these agreements operate, see Churchill Downs, Inc., 605 F Supp 2d at 874–75.
36 Those parties are: (1) the applicable authorised horsemen’s group; (2) the host racing association; (3) the host state racing commission; (4) the off-track racing commission; and (5) all currently operating tracks within 60 miles of any off-track betting office, or, if there are none, then the closest such track in an adjoining state. 15 USC Section 3004.
Overview of US Federal Gaming Law

Wire Act, which prohibits them (as a species of sporting event). The US Department of Justice has taken the position – although only in public statements, never in an actual prosecution – that the Wire Act prohibition continues to apply, notwithstanding the IHA.

By contrast, the consensus of most scholars and practitioners in the space – and that of the authors – is that the IHA, as both the more specific and more recent statute, trumps the Wire Act ban, so long as the wager complies with the IHA’s requirements. Indeed, for quite some time, the advance-deposit-wager industry has broadly accepted online horse race wagers pursuant to the statute on precisely that premise, and the federal government has taken no steps to stop that activity.

The Unlawful Internet Gambling Enforcement Act

Congress enacted the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) to attack the perceived problem of internet gambling by targeting the processing of the financial transactions necessary for the gambling to take place. The UIGEA created a federal crime: being aware of the receipt by a person ‘in the business of betting or wagering’ of monies in connection with participation of another person in ‘unlawful internet gambling’. It also directed the issuance of regulations designed to require financial transaction providers to identify and block payments involving unlawful internet gambling.

Moreover, the statute defined ‘unlawful internet gambling’ to mean a ‘bet or wager [that] 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’. That was the first (and remains the only) time that the term has been defined as a matter of federal law.

In turn, ‘bet or wager’ is defined to mean:

\[
\text{the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.}\]

The UIGEA provides an express safe harbour for fantasy sports competitions, excluding them from the definition of a ‘bet or wager’ under the statute if they satisfy three criteria:

\[\begin{align*}
a & \quad \text{‘All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.’} \\
b & \quad \text{‘All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.’} \\
c & \quad \text{‘No winning outcome is based (i) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (ii) solely on any single performance of an individual athlete in any single real-world sporting or other event.’}
\end{align*}\]

37 31 USC Section 5363.
38 31 USC Section 5362(10)(A).
39 31 USC Section 5362.
40 31 USC Section 5362(1)(E)(ix).
If the fantasy or simulation sports game or educational game or contest involves a team or teams, then it must also be true that ‘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 organisation’.41

The statute also excludes interstate off-track wagers that are permissible under the IHA from its prohibition,42 along with intra-state internet gambling that is:

\[ \begin{align*}
&a. \text{initiated and received within a single state;} \\
&b. \text{expressly authorised by the laws of the state;} \\
&c. \text{does not violate any other federal gambling laws.} 43
\end{align*} \]

The regulation issued pursuant to the statute, known as Reg GG (12 CFR 233), expands on the statutory requirements, most notably by requiring financial transaction providers to implement procedures that are designed to determine whether their commercial customers are internet gambling businesses and, if they are, to ascertain whether that gambling activity is unlawful. The regulation suggests that the provider require the customer to supply evidence of state or tribal licensure of its activities or, failing that, a reasoned legal opinion explaining why no such licensure is required.

The regulation also makes clear that participants in automated clearing house systems, card systems, check collection systems, wire transfer systems and certain types of money transmitting businesses ‘may rely on a written statement or notice by the operator of that... payment system’, and that the system’s ‘policies and procedures’ are designed to identify and block unlawful internet gambling transactions.44

\[ \text{ii Ancillary criminal laws} \]

Several other criminal statutes can be invoked in the gambling context:

\[ \begin{align*}
&\text{a. Money laundering statutes, 18 USC Sections 1956 and 1957, prohibit knowingly engaging in certain financial or monetary transactions, or international transportation or transmission of funds, with the ‘proceeds’ of a wide range of predicate crimes or ‘specified unlawful activities’, including gambling in violation of the Wire Act or state law.} 45 \\
&\text{b. The Racketeering and Corrupt Organizations Act (RICO) imposes substantial criminal penalties where there is a ‘pattern of racketeering activity’.} 46 \\
&\text{The statute defines the term ‘financial transaction’, in part as ‘(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.’ 18 USC Section 1956(c)(4).} \\
&\text{41 Id.} \\
&\text{42 31 USC Section 5362 (10)(D).} \\
&\text{43 31 USC Section 5362 (10)(B).} \\
&\text{44 12 CFR Section 233.5.} \\
&\text{45 The statute defines the term ‘financial transaction’, in part as ‘(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.’ 18 USC Section 1956(c)(4).} \\
&\text{46 18 USC Section 1962.} \\
\end{align*} \]
or threat involving a litany of federal offences, including violations of the Wire Act, Wagering Paraphernalia Act, Travel Act, Illegal Gambling Business Act or money laundering.\(^{47}\)

Other potentially relevant statutes include conspiracy and bank or wire fraud.\(^{48}\) In all of these cases, liability arises only if the defendant is violating some other federal or state statute.

### iii State laws

State laws with respect to gambling vary widely. Generally, however, gambling is prohibited unless the state passes legislation expressly permitting such conduct. Four states – Delaware, New Jersey, Pennsylvania and Nevada – expressly permit and license internet gambling.\(^{49}\) The remaining 46 states and the District of Columbia do not allow online gambling – other than in a few cases some form of online lottery – although many permit gambling at bricks-and-mortar establishments or on riverboats.

In Delaware, only the state Lottery Commission is authorised to conduct internet gambling, and it has contracted with suppliers to that end. In New Jersey and Nevada, licences are restricted to bricks-and-mortar casino licensees, and Nevada – unlike Delaware and New Jersey – only permits internet poker.

In late October 2017, Pennsylvania became the fourth state to authorise internet gambling as part of the biggest gambling expansion in the state since it first authorised casinos more than a decade ago. In addition to internet gambling, the legislation expanded casino-style gambling to truck stops and airports.\(^{50}\)

Georgia, Illinois, Kentucky and Michigan allow online sales of lottery tickets, while Kentucky and Michigan allow online game play.\(^{51}\)

In those states where gambling is legalised, regulatory schemes are complex and comprehensive. State licensing requirements – whether for brick-and-mortar casinos or online gambling operators – are typically intrusive and require deep scrutiny of the licensee applicant and its key employees. Even certain categories of service providers are subject to scrutiny, although typically at a lesser degree of intensity. The purpose of suitability review is to ensure that licensees are honest, and of good character and integrity. In addition to determining whether a licensee’s past history and associations indicate that the person will not undermine effective regulation and control of gaming, suitability review also ensures that licensees possess the qualifications necessary to run a gaming operation. For example,

\(^{47}\) 18 USC Section 1961.  
\(^{48}\) 18 USC Sections 371, 1344, 1843.  
\(^{49}\) 29 Del Code Section 4826; NJ Stat Ann Section 5:12-95.17 et seq; 4 PaCSA et seq; Nev Rev Stat Section 463.745 et seq.  
in Nevada, casino licences are not granted unless applicants show that they possess adequate business acumen, competence and experience, and that they have secured adequate and appropriate financing.\(^{52}\) Other states adopt a similar approach.

### iv Sanctions

Illegal gambling can be sanctioned at both the state and federal level, with the type of punishment varying by state. While generally the federal statutes do not criminalise mere play (that is, they will not punish the actual gamblers), some states do criminalise gambling, often making it a misdemeanour. By contrast, both states and the federal government apply criminal penalties against those who offer or promote gambling, often as felonies. The penalties can be severe, ranging from five years’ imprisonment under the Wire Act, to as many as 20 years under RICO and the federal anti-money laundering statutes.

### III CURRENT STATUS AND RECENT DEVELOPMENTS

Gambling has achieved mainstream acceptance of some form in nearly every state, with some form of gambling currently permitted in 48 states.\(^{53}\) The type of gambling permitted by the states varies widely. Some states only permit state-sponsored lotteries, while others have racetracks, casinos or sports wagering.\(^{54}\)

Recent developments in gambling regulation have focused on sports betting and non-traditional gambling games. The latter includes skill games, fantasy sports competitions, social casino games and internet sweepstakes cafes. Outside of the regulatory context, e-sports have gained momentum in the United States and appear on the cusp of mainstream awareness. Whether their growth trajectory will lead them into legal difficulties like those experienced by DFS (discussed in subsection iv, below) remains to be seen.

#### i Sports betting

New Jersey has twice attempted – and twice failed – to legalise sports betting within its borders in recent years. Its first attempt was a 2012 statute that confronted PASPA’s sports wagering ban head on by affirmatively authorising state regulators to license casinos and racetracks to conduct sports betting. The state’s position was that PASPA was unconstitutional. The courts disagreed, invalidating New Jersey’s law.\(^{55}\)

Smarting from that defeat, New Jersey’s second attempt was less direct. Rather than affirmatively authorising sports betting, New Jersey simply repealed its criminal prohibition against sports betting so that engaging in such activity would no longer be considered unlawful, but only if the betting took place at a licensed casino venue. That ‘partial repeal’ was also challenged and invalidated, a decision affirmed by the Third Circuit en banc. New Jersey sought US Supreme Court review, and the Court (somewhat surprisingly to most observers) agreed to hear the case. Oral arguments of counsel took place in December 2017, and the case remains pending. The thrust of New Jersey’s argument is that PASPA should be construed to permit a state to repeal its prohibitions on sports betting as, otherwise,

\(^{52}\) Nevada Revised Statutes, Section 463.170(3).


\(^{54}\) Id.

the law impermissibly would ‘commandeer’ the regulatory powers of states, compelling them to devote state resources to enforce federal law.56 A principle of US constitutional law, known as the anti-commandeering principle, imposes limitations on the ability of the federal government to impose such obligations.57 (Note that New Jersey did not advance an additional constitutional argument – that PASPA impermissibly discriminates among the states by granting Nevada, Oregon, Delaware and Montana certain exemptions from its prohibitions.) At the time of writing, a decision is expected by June 2018. The Court could choose to uphold PASPA in its entirety or at least its key provisions, rejecting New Jersey’s challenge; invalidate the statute, leaving states largely free to legalise and regulate sports betting within their borders; or construe the statute to allow for ‘repeal’, whether full or ‘partial’, but not allowing states to affirmatively regulate the activity.

How the Court rules will determine whether New Jersey and other states are able to move forward with sports betting efforts. Note that even if PASPA is repealed, questions concerning the states’ ability to allow internet or mobile sports betting will remain, given the Wire Act’s separate prohibitions on the transmission of bets or wagers using ‘a wire communication facility for the transmission in interstate or foreign commerce’.58 That term has been construed to encompass the use of the internet.

Outside of New Jersey, sports wagering proponents have stepped up lobbying efforts in Washington aimed at overturning the federal ban. Those efforts also are likely to be impacted by the Supreme Court ruling, as a decision invalidating PASPA may lessen the perceived need for federal legislative action. In addition to New Jersey, Pennsylvania, Mississippi, West Virginia and Connecticut have passed bills legalising sports betting, which will take effect if PASPA is invalidated, and several other states, including California, are considering similar measures.59 Advocates argue that legalisation and regulation is necessary to protect the integrity of sports, as prohibition has simply driven sports betting underground where it cannot be monitored.

Importantly, the sports leagues (which have been staunch opponents of sports betting for a long time) are starting to modify their views. Most notable is National Basketball Association commissioner Adam Silver, who has vocally supported repeal of the federal ban.60 In February 2017, Major League Baseball commissioner Rob Manfred expressed his willingness to look into embracing sports betting as a ‘form of fan engagement’.61 Other professional leagues remain more circumspect, but it is noteworthy that both the National Football League and Major League Baseball have inked deals with companies that provide statistical support services for legalised sports wagering outside the United States.62

56 Brief for Petitioners at 3-5, Governor of NJ v. NCAA, 137 S.Ct. 2327 (2017).
57 Id.
58 18 USC Section 1084(a).
Interestingly, along with rethinking their positions, the leagues have begun advocating for an ‘integrity fee’, typically quantified as 1 per cent of the ‘handle’ or total value of bets placed, to be remitted to the leagues ostensibly to cover additional expenses incurred in protecting the integrity of competition in the face of a legalised sports betting environment. The leagues also advocate for a requirement that sportsbooks license game data from them or their designated providers, again purportedly to ensure the accuracy and integrity of results.63

ii Internet sweepstakes cafes

Internet sweepstakes cafes operate in a number of ways – most often, by selling internet time to patrons and sometimes by offering other copying, faxing and related services. Along with the purchase of internet time, patrons receive entry into sweepstakes. In most cases, patrons can obtain a limited number of free sweepstakes entries on a daily basis, either upon request in person or by mailing a form. (This feature is designed to remove the element of consideration from the transaction, and therefore to take the activity outside the purview of most state gambling laws.) Patrons often play simulated gambling games on their computer terminals to reveal winning sweepstakes entries.

When these cafes are prosecuted under standard gambling law principles, they are generally convicted as mere subterfuges for unlawful gambling activity, since evidence shows that patrons’ primary motivation in purchasing internet time is to play the sweepstakes, rather than to use the internet and other available services.64 Indeed, the purchased time often goes unused – not surprisingly, since wi-fi and other forms of internet access are broadly available, often without charge or fee. Nonetheless, state legislatures, alarmed by the proliferation of these cafes, in many states have passed legislation specifically targeting them. At times, those statutes are worded quite expansively and may carry with them unanticipated consequences for other, more innocuous activities.65

iii Skill games

Skill games that require payment to play and that award prizes meet two of the three traditional elements of gambling under most state laws: consideration and prize. In order to avoid the reach of gambling prohibitions, these games rely upon the fact that they have arguably eliminated the third traditional element: chance. As states differ in the legal tests they apply when evaluating the chance element, each game requires a state-by-state analysis to determine its legality.

Three main tests have emerged in the states to determine the quantum of chance that will distinguish lawful games of skill from unlawful games of chance. The ‘predominance’ or ‘dominant factor’ test asks courts to assess which of the two elements – skill or chance – is ‘the dominating factor in determining the result of the game’.66 The predominance test is

64 See, for example, US v. Davis, 690 F3d 330, 339–320 (5th Circuit 2012).
65 Hest Technologies Inc v. State ex rel Perdue, 749 SE2d 429 (NC 2012) (upholding a state law that prohibited the operation of an ‘electronic machine or device’ to conduct a sweepstakes through the use of an ‘entertaining display’).
used in the plurality of the states and is the most commonly invoked standard. The second most prevalent legal standard is known as the ‘material element test, where ‘gambling occurs even if skill is the dominant factor, as long as chance is a material element’. Still other states deem games unlawful if they entail ‘any chance’. A few states prohibit even pure games of skill if they require placement of a bet or wager and award a prize. In those states, absent extenuating circumstances, skill games will be considered unlawful.

Unfortunately, there is very little case law dealing with the types of skill games that are most prevalent online today, and therefore it is unknown how these tests would apply to those games if challenged.

iv Fantasy sports

The legality of fantasy sports has been hotly contested in the past two years. Although the UIGEA provides a safe harbour for fantasy sports, the safe harbour provides sanctuary only from the proscriptions of the UIGEA itself; it cannot absolve from liability those competitions that run afoul of state or other federal laws. Moreover, today’s DFS models, with their head-to-head competitions and variation in game play and rules, at times face difficulty in fitting within the contours of the statute’s safe harbour.

Beginning with New York in late 2015, 2016 saw a number of state attorneys general issue written opinions asserting DFS to be illegal gambling under state laws, and that DFS operators were in violation of state law. New York’s attorney general went so far as to initiate civil suits alleging false advertising and unlawful gambling, and seeking to enjoin the operation of the two most prominent DFS operators – FanDuel and DraftKings – in that state. (FanDuel and DraftKings later settled the gambling aspects of those suits in March 2016, and the false advertising aspects in October 2016 for $6 million each.) These negative opinions usually claim that DFS are not contests of skill within the meaning of their respective state laws, since outcomes are ultimately determined by the athletic performance of others, over whom the participants exert no control. By contrast, only a handful of attorneys general have taken the opinion that DFS is legal under state gambling laws.

68 Tenn Code Ann Section 39-17-501(1).
69 See, for example, Town of Mount Pleasant v. Chimento, 737 SE2d 830 (SC 2012) (‘Whether an activity is gaming/gambling [under South Carolina law] is not dependent upon the role of chance and skill, but whether there is money or something of value wagered on the game’s outcome.’); see also Ark Code Ann Section 5-66-113 (prohibiting ‘bet[ting] any money or valuable thing on any game of hazard or skill’).
Since then, however, a number of states have moved to regulate fantasy sports, including through licensing, taxation and consumer-protection-focused disclosures; even New York, whose attorney general was one of the earliest opponents of DFS, legalised and now regulates DFS. 74

Notwithstanding 2015’s flurry of attorney-general activity, there is little case law addressing the legality of fantasy sports. At the time of writing, a multi-district consolidated class action litigation against FanDuel and DraftKings (also alleging, in part, that DFS constitute unlawful gambling) remains pending. The action consolidates nearly 80 individual putative class cases and remains in early stages. Aside from that current activity, only two pre-existing federal district court decisions address fantasy sports in any detail – Humphrey v. Viacom Inc et al, No. 06-2768, slip opinion, 2007 WL 1797648 (DNJ 20 June 2007), and Langone v. Kaiser, No. 1:12-cv-02073, slip opinion, 2013 WL 5567587 (ND Ill 9 October 2013).

Humphrey is the more significant of the two, as it reinforced the centrality of ‘risk’ in evaluating whether consideration for purposes of gambling is present. The plaintiff in Humphrey sought civil recovery under the qui tam laws of several states, which required him to show that money had been lost by a wager, bet or stake upon a game of chance. 75 He pointed to the entry fees and prizes as evidence of money lost in a wager upon a game of chance. Without deciding whether fantasy sports are games of skill or chance, the New Jersey court noted three central elements common to the fantasy leagues at issue:

\[ \begin{align*}
&a \quad \text{the entry fee was paid unconditionally;} \\
&b \quad \text{prizes (of predetermined amounts, not dependent on the fees received) were guaranteed to be awarded; and} \\
&c \quad \text{the operators of the leagues did not compete and could not win the prizes themselves.} 
\end{align*} \]

Together, those factors led the court to conclude that the entry fees were not bets or wagers that would violate the gambling laws of the identified states. 77 The fact that the operator did not participate in the contest – and, in fact, was indifferent to the outcome – was central to the Humphrey court’s analysis.

The Langone court principally involved a claim under Illinois’s gambling loss recovery statute to recover ‘losses’ suffered by participants on an online fantasy sports site operated by a major fantasy sports provider, FanDuel. The court ruled for FanDuel after finding that the plaintiff was unable to identify purported losers and amounts of loss with sufficient particularity, and because FanDuel’s role in hosting contests and collecting entry fees did not make it a ‘winner’ in any particular wager. The court did not reach the question of whether FanDuel’s contests would be considered ‘gambling’ or otherwise in violation of state laws.

74 N.Y. Racing, Pari Mutuel Wagering and Breeding Law, Section 1400 et seq.; Va Code Section 59.1-556 et seq.; Ind Code Section 4-33-24; see also Mont Code Section 23-5-801 et seq. (authorising limited forms of fantasy sports but expressly prohibiting play online).
75 Humphrey, 2007 WL 1797648 at *5.
77 Humphrey, 2007 WL 1797648 at *8-9.
Whether the Humphrey analysis would apply squarely to today’s DFS variants may yet be determined in the context of the New York litigation or other potential, future cases. At the same time, state moves to clarify fantasy sports’ legal status will likely result in a very different landscape for fantasy sports over the coming years.

### Social casino games

Legal disputes over social casino games also erupted for the first time in 2015, with a spate of litigation, brought predominantly by one particularly active plaintiffs’ firm, alleging that the games are unlawful. Each game challenged relies on the above-described ‘freemium’ model whereby players can play for free or opt to spend real money to play more quickly or for other in-game perks, but not one of the games offers monetary or other ‘real-world’ prizes. The suits were all predicated upon plaintiffs’ purported ‘losses’ stemming from amounts voluntarily spent to play the games. Claims were brought under gambling loss recovery statutes, for common law unjust enrichment, and sometimes under the auspices of consumer protection laws. Five have been dismissed,78 and a sixth raising similar issues remains in early, procedural stages.79

Against that unbroken track record of dismissal, one contrary decision stands out. On 29 March 2018, the US Ninth Circuit Court of Appeals in Kater v. Churchill Downs Inc, found that because virtual chips extend the ‘privilege of playing the game without charge’, they are a ‘thing of value’ under Washington state law. Because the virtual chips were a ‘thing of value’, the court found that the ‘Big Fish’ social casino game fell within the state’s definition of gambling. The court’s analysis appears to have rested on the erroneous premise that users of Big Fish must purchase additional chips if they exhaust their initial supply and wish to continue playing.80 In fact, players receive periodic allotments of free chips with which to play, rendering any purchase unnecessary so long as the player is willing to wait the designated interval to resume play. The court noted the defendant’s assertion to that end but refused to consider it given the procedural posture of the case. (The case was before the court on the defendant’s motion to dismiss. Typically, in considering such a motion, a court must accept the well-pleaded allegations of the plaintiff’s complaint as true.) The court remanded the case for further proceedings in the trial court. It is too early to tell how the Ninth Circuit’s decision will reverberate, if at all, with other courts, or, for that matter, whether the trial court, once a proper factual record is made, will rely on that full record to reach a different conclusion. Moreover, at the time of writing, the defendant, Churchill Downs, has indicated an intention to seek rehearing of the decision. How this plays out remains to be seen, but, for the moment, the Ninth Circuit’s unprecedented ruling appears to have created a new sense of uncertainty concerning the status of these games.

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Almost since the Department of Justice reversed its position on the applicability of the Wire Act to internet gambling, efforts have been underway to try to reverse the impact of that ruling and to prohibit states from regulating internet gambling. Those efforts have encountered difficulty in the face of objections that such legislation would intrude upon state prerogatives and of the general paralysis that has gripped Congress in recent years.

In 2016, however, Republican Senator Lindsey Graham of South Carolina reportedly caused to be inserted into a committee report for an unrelated Senate funding bill language that implicitly rejected the Justice Department’s interpretation (ignoring the fact that the Department’s memorandum accords with the highest federal courts to have considered the issue).81 Although the funding bill to which the committee report was attached was not enacted, Senator Graham remains focused on the issue. During the January 2017 Senate confirmation hearing of current Attorney General Jeff Sessions, Senator Graham asked for Sessions’ view on the 2011 Department of Justice Office of Legal Counsel memorandum, which (in his description) ‘allow[s] online video poker, or poker gambling’.82 (Notably, he similarly questioned Obama Attorney General Loretta Lynch during her confirmation hearing in 2015.83) Sessions responded that he was ‘shocked’ at the memorandum and ‘criticized it’ at the time, and he expressed his willingness to ‘revisit it and . . . make a decision about it based on careful study’.84 Sessions did acknowledge that ‘some justification or argument . . . can be made to support the Department of Justice’s position’ and admitted that he hadn’t studied the issue enough to articulate a firm view during the hearing.85 At the time of writing, there has been no public indication that the Department of Justice is actively revisiting the issue.

As a result of that exchange and Sessions’ own prior opposition to internet gambling while a senator, observers are closely watching for a reversal of the 2011 Office of Legal Counsel memorandum. Meanwhile, there is every reason to believe that Senator Graham, and perhaps others, will continue pressing for legislative reversal, as they have previously.86

As their name implies, e-sports are competitive games played with the aid of computers, video game consoles or other electronic means. In robust markets such as South Korea, e-sports are played by well-compensated professional teams with corporate sponsors, and tournaments attract thousands of spectators. E-sports have gained traction more slowly in the United States, although they appear poised to enter mainstream consciousness. Streaming platform Twitch.tv, where players livestream their game play, ranks number four in peak internet traffic

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85 Id.
in the US (behind Apple, Google and Netflix, and ahead of Facebook).87 Las Vegas has played
host to a number of e-sports tournaments in recent years. Indeed, in March 2017, a dedicated
e-sports arena opened at the Neonopolis complex in downtown Las Vegas.88
But with recent prize pools reaching as high as US$20 million,89 and the staggering
revenue earned from ancillary products such as advertising and streaming subscriptions
(Amazon acquired Twitch in 2014 for nearly US$1 billion), e-sports may soon be on the
radar of state and federal regulators. At least one recent lawsuit reveals that it is already in
the crosshairs of plaintiffs’ attorneys and concerned parents.90 Whether e-sports promoters,
players, fans and video game makers will learn from the daily fantasy sports experience is an
open question.
One issue that has already arisen is ‘skin gambling’. ‘Skins’ do not affect game play but
are collective in-game items that affect the look and feel of the game, and can be bought,
sold and traded. This transferability makes them ripe for use as virtual currency to facilitate
gambling – both on e-sports tournaments and more traditional forms of online gambling
such as casino games. In 2016, game developer Valve, which owns popular game Counter
Strike: Global Offensive and operates online trading platform Steam, was the subject of
two civil lawsuits alleging that it facilitated an unlawful gambling market.91 Soon after, the
Washington State Gambling Commission also demanded that Valve take steps to prevent skin
gambling through the Steam platform or face civil or criminal repercussions.92 Valve prevailed
in the civil suit93 and has thus far resisted Washington regulators’ demands to disable features
of Steam that would prevent skins from being traded on third-party sites.94
Beyond the skin gambling issue, e-sports are susceptible to other potential hurdles,
including cheating. Because the stakes involved in winning e-sports continue to rise, the
consequence of cheating has grown, as have the incentives to make the attempt. The nature
of most e-sports games also can make cheating more difficult to detect. Riot Games recently
achieved some success in pursuing organised cheating, extracting US$10 million from a
software developer whose product purportedly enabled cheating in League of Legends.95
Separately, unlike fantasy sports, where the underlying athletic competitions themselves
are widely accepted as skill-based, the skill-chance ratio in the video games underlying e-sports
– games like League of Legends and StarCraft – is not as well-understood or established. That

5365302.
88 Mick Akers, ‘E-sports enthusiasts get boost with Neonopolis arena’, Las Vegas Sun (22 February 2017),
89 Chris Morris, ‘Largest Prize Pool in Esports History Tops $20 Million’, Forbes (13 July 2017), available at
92 Id.
93 McLeod v. Valve Corp, Case No. C16-1227, 2016 WL 5792695 (W.D. Wash. 4 October 2016) (granting
motion to dismiss).
94 Assael, supra note 86.
95 Kat Greene, Riot Games Nets $10M in ‘League of Legends’ Cheating Deal, Law360 (2 March 2017),
creates complications for those hoping to replicate the DFS model in which observers are able to win prizes of real value based on the performance of e-sports participants and can even have ramifications for contests that limit prizes to the participants.

Because much of the revenue in e-sports comes from non-controversial streams such as advertising, sponsorships and streaming subscriptions, the e-sports industry may be able to avoid the interstices of gambling law in which DFS has been caught up, but the experience of Valve shows that it is worth monitoring developments in this space in the months and years ahead.

IV OUTLOOK

If the recent past is any indication, we expect that 2018 and beyond will continue the trend toward expansion of commercial and tribal gambling at the state level. We also think the debate over sports betting will gain momentum in Congress, with greater movement toward elimination of the federal prohibition. Nonetheless, we envision that as a multi-year effort and doubt we will see repeal of the ban this year.

The debate over internet gambling continues, with a few states – notably, California and New York – actively considering its legalisation, and Pennsylvania finally enacted legislation late in 2017. Congressional activity seems to have quieted, with the focus shifting to sports betting, but the possibility of a renewed effort to pass a nationwide ban remains real.

In anticipation of a reversal of PASPA (whether judicially or legislatively), a few states have enacted legislation conditionally legalising sports betting and several others are considering similar measures.

DFS and other fantasy sports will continue to garner much attention – through litigation, enforcement and legislative activity – and even Congress is considering stepping in. In a similar vein, we expect e-sports to continue to grow and to encounter inevitable legal and regulatory growing pains as an incident to that growth.

The Trump administration remains a wild card. With over a year in office, the administration still has not had opportunity to weigh in on a gambling issue of any consequence. President Trump’s past involvement with the gaming industry (having owned a casino in Atlantic City and with prior casino relationships in Nevada) may predispose him to sympathise with gambling proponents. However, one of his more prominent election supporters Sheldon Adelson (himself a prominent gambling magnate) vociferously opposes internet gambling (while supporting sports betting), and the President’s attorney general has also been antagonistic. How those conflicting forces translate, if at all, into a policy agenda on internet gambling, sports betting or other issues remains to be seen.

One thing is for certain: with the Supreme Court’s ruling on PASPA looming and with Pennsylvania set to launch internet gambling this year, 2018 promises to end looking much differently than it began.
Chapter 4

ALDERNEY

Wayne Atkinson and Michael Lyner

I  OVERVIEW

i  Definitions

The definitions for most gambling concepts are set out in the Gambling (Alderney) Law, as amended (the 1999 Law). The 1999 Law provides that:

a  Gambling is defined as all forms of betting, gaming and wagering, and any lotteries.
b  Lawful gambling means any form of gambling made lawful under Section 6 of the 1999 Law.
c  Gaming means the playing of a game of chance for winnings in money or money’s worth, regardless of whether any person playing the game is at risk of losing any money or money’s worth, but does not include the making of bets by way of pool betting.
d  Game of chance includes a game of chance and skill combined, and a pretend game of chance or of chance and skill combined, but does not include any athletic game or sport.
e  Pool betting is specifically defined as follows (and will fall within the definition of gambling):

bets made by a number of persons:

(a)  on terms that the winnings of such of those persons as are winners shall be, or be a share of, or be determined by reference to, the stake money paid or agreed to be paid by those persons, whether the bets are made by means of a totalisator, or by filling up and returning coupons or other printed or written forms, or in any other way, or

(b)  on terms that the winnings of such of those persons as are winners shall be, or shall include, an amount (not determined by reference to the stake money paid or agreed to be paid by those persons) which is divisible in any proportions among such of those persons as are winners, or

(c)  on the basis that the winners or their winnings shall, to any extent, be at the discretion of the promoter or some other person.²

These definitions have the effect that, in Alderney, games of pure skill and competitive sports for prizes are excluded from the definition of gambling. However, sports betting, including fantasy sports, does fall within the Alderney regulatory regime.

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1  Wayne Atkinson is a group partner and Michael Lyner is an associate at Collas Crill.
2  Section 20, the 1999 Law.
The 1999 Law specifically excludes from its application contracts entered into by way of business, the making or performance of which involve dealing in any way with an investment, or making arrangements for another person to deal in any way with an investment, or offering or agreeing to do so. The definition of investment is necessarily wide and includes rights under an investment contract, rights under a contract for differences, options and futures contracts.

ii Gambling policy

‘Except as may be provided by the provisions of any Ordinance made under [the 1999 Law], all forms of gambling are unlawful.’ The lawfulness of gambling in or from within Alderney is therefore provided for by a series of ordinances that legalise gambling only when conducted from within a set regulatory framework.

Gambling is an industry in Alderney and the Alderney Gambling Control Commission (AGCC) has been in operation since 2000 to regulate it by way of the granting of licences and the supervision of licensees. Alderney is considered one of the world’s leading jurisdictions for the regulation of remote gambling and the island works hard internationally to encourage the development of the industry, while the AGCC set supervisory standards that are both appropriate to the industry and ensure the reputation of the island is protected.

iii State control and private enterprise

Beyond the regulatory requirements imposed on gambling under the 1999 Law there are no state controls on gambling and the Alderney regime does not favour the state over private enterprise.

Alderney law does exempt securities issued by the States of Alderney or the States of Guernsey, or by or under the authority of the UK government, by reason of any use or proposed use of chance to select particular securities for special benefits, if the terms of the issue provide that the amount subscribed is to be repayable in full in the case of all the securities.

No limits apply to the number of licences available from the AGCC.

iv Territorial issues

Gambling is uniformly regulated across Alderney with no territorial distinctions made on the island. However, while Alderney forms part of the Bailiwick of Guernsey, it is a separate legal jurisdiction. Alderney laws in respect of gambling do not apply on Guernsey, Sark or Herm, all of which are subject to laws made by the States of Guernsey. The Bailiwick of Guernsey regulates a range of financial services businesses and, depending upon the manner in which remote gambling operators conduct their businesses, parts of this financial services regulation may apply either to the operators themselves or to their directors and service providers.

v Offshore gambling

The States of Alderney has a permissive attitude towards the provision of gambling services, and there is no general restriction in relation to foreign operators providing gambling products.

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3 Section 19(3), the 1999 Law.
4 Section 5, the 1999 Law.
5 Section 19(1), the 1999 Law.
to Alderney citizens. The AGCC is very much a global citizen in this regard and has worked with a number of other gambling regulators to sign memoranda of understanding around the sharing of information relating to licensees including with the Nevada Gaming Control Board in January 2011; the Casino Regulatory Authority of Singapore in October 2012; and the British Gambling Commission in February 2013.

This is in the context of remote gambling only. Any foreign operator who wants to provide land-based gambling would need to apply and obtain the relevant licences locally.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence
Alderney is the northernmost of the inhabited Channel Islands and politically it is part of the Bailiwick of Guernsey, a British Crown dependency. As stated above, Alderney is a separate legal jurisdiction.

The States of Alderney is the legislature of the island, although Alderney sends two representatives to the States of Guernsey as well. While Alderney enjoys full autonomy in law (except in matters of foreign affairs and defence, like the other Channel Islands and the Isle of Man), under the provisions of a formal agreement entered into between the governments of Alderney and Guernsey, certain matters have been delegated to Guernsey. These transferred services include policing, customs and excise, airport operations, health, education, social services, childcare and adoption. Immigration is the responsibility of the UK (UK law applies), with day-to-day operations carried out by the Guernsey Border Agency. In addition to the transferred services, both the UK and Guernsey may legislate on other matters with the consent of the States of Alderney.

Gambling legislation was first put forward in Alderney in 1975 in the form of the Gambling (Alderney) Law 1975. The 1999 Law is now the primary legislation regulating gambling within Alderney.

The significance of remote gambling to the island’s wider economy and its global status in the field unsurprisingly have led to a deep pool of subsidiary legislation in this regard, with no fewer than 40 separate pieces of subsidiary legislation relating to gambling on the statute book. Of these, the Alderney eGambling Ordinance 2009 (the 2009 Ordinance) and the Alderney eGambling Regulations 2009 (the 2009 Regulations) are the most significant pieces of legislation for remote gambling operators.

ii The regulator
The AGCC was established in 2000 under the 1999 Law. The AGCC is the regulatory authority tasked with the responsibility of ensuring and maintaining the integrity of the online gambling industry in Alderney.

The AGCC’s stated primary objective is to protect and enhance the reputation of Alderney as a first-tier regulatory jurisdiction by seeking to ensure that:

a all electronic gambling is conducted honestly and fairly, and in compliance with good governance;

b the funding, management and operation of electronic gambling remains free from criminal influence; and

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6 Section 1, the 1999 Law.
c electronic gambling is regulated and monitored so as to protect the interests of the young and the vulnerable, and without compromising this primary objective, to work with other agencies in the development of eGambling activities regulated by the AGCC.

The duties of the AGCC are to keep under review the extent and character of gambling on the island of Alderney and, in particular:

a to grant such licences to an applicant as may be necessary for the purpose of providing and operating any form of gambling;
b to supervise and control, including by way of inspection and the imposition of conditions, the conduct and operation of any form of gambling so licensed;
c to investigate the character and financial status of any person applying for, or holding, a licence or otherwise concerned with the provision, operation or management of any form of gambling;
d to ensure that all fees, royalties and other monies payable to the States by a person providing or operating any form of gambling are duly paid and accounted for; and
e to perform such other functions as are assigned to the AGCC by the 1999 Law or by Ordinances made under it.7

The AGCC’s responsibilities are therefore effectively related to the licensing of new applicants as well as the supervision of existing licensees and gambling more generally.

The licensing process involves the review of all applicants to determine their fitness and propriety as well as a review of a licensee’s gambling equipment and systems, internal controls and operating procedures.

Licences and certificates are not subject to time-based renewal but granted indefinitely and the number of licences the AGCC is able to grant is not subject to any kind of cap.

iii Remote and land-based gambling

Both remote and land-based gambling are permitted in Alderney. Notwithstanding this, the island’s small population size and worldwide stature in the field of remote gambling has meant that the focus of almost all regulation is remote gambling.

iv Land-based gambling

Alderney does have specific and separate legislation in respect of land-based gambling.8 Owing to the island’s small population, land-based bookmaking has, however, been negligible to non-existent over the past decade.

v Remote gambling

The legal operation of online gambling in Alderney was the creation of a number of ordinances dating back to 2001 that allowed for applications to be made to the AGCC for the issuance of remote licences.9

7 Section 2, the 1999 Law.
Following the 2001 regulation by Alderney of online gambling, commonly referred to by the AGCC as ‘eGambling’, Alderney became one of the first non-European Economic Area jurisdictions to be white-listed by the UK. This allowed Alderney licensees (and those of other white-listed jurisdictions) to advertise and offer gambling services in the UK without obtaining a Gambling Commission operating licence, until the white-list regime was ended by the Gambling (Licensing and Advertising) Act 2014.

The legislation was overhauled by the States of Alderney in 2009 and the 2009 Ordinance is now the most significant piece of legislation for the purposes of remote gambling, and is intended to be as future-proofed as possible in a technology-driven industry. The 2009 Ordinance provides the current framework for the legal provision of remote gambling from within Alderney. eGambling is defined in the 2009 Ordinance as where the gambling transaction with an eGambling licensee or Category 1 or Category 2 associate certificate holder is effected remotely by a customer by means of a telecommunication device.

Licences available are:

a the Category 1 or business-to-consumer (B2C) licence, for an operator that has the direct contractual relationship with the customer (using either its own platform or someone else's); and

b the Category 2 or business-to-business (B2B) licence, for an operator that manages the platform and any games approved to run on that platform without the direct customer relationship.

Alderney has positioned itself as a global leader in the regulation of remote gambling, particularly in the B2B space. Its licensees hold a significant proportion of the global market.

vi Ancillary matters
An eGambling licensee or a Category 1 or Category 2 associate certificate holder may exercise its eGambling licence or its Category 1 or Category 2 associate certificate only if: every person that performs functions identified by the licensee or certificate holder in its approved internal control system as those of a key individual holds a current key individual certificate; or if every person designated as a key individual by the AGCC in accordance with regulations made under Paragraph 19 of the 2009 Ordinance holds a current key individual certificate.10

A person who is a key individual and who does not, without reasonable excuse, hold a key individual certificate is guilty of an offence and is liable, on conviction, to a fine not exceeding £25,000.

III THE LICENSING PROCESS

i Application and renewal
As outlined in Section II.v, above, there are two types of licence available in Alderney, distinguished on the basis of the two distinct functions of eGambling with licences covering the player relationship, and the provision of games and betting activities: Category 1 or B2C licence; and Category 2 or B2B licence.

A single entity may choose to hold either or both licences. The application process is identical irrespective of whether an application is made for one or both types of licence.

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10 Paragraph 19(1), the 2009 Ordinance.
In addition to the licences above the following certificates may be required in Alderney:

- a Category 1 associate certificate for B2C activities, the equivalent of a Category 1 eGambling licence, for operators based outside of Alderney, a new category of licence, introduced in January 2018;
- a Category 2 associate certificate (formerly known as a foreign gambling associate certificate) for B2B activities, for foreign-based operators equivalent to a Category 2 eGambling licensee but based outside Alderney;
- a core services provider associate certificate for third parties providing gambling software to a licensee or Category 1 or Category 2 associate certificate holder; and
- a hosting certificate for the physical accommodation of gambling equipment, which must meet the AGCC’s technical standards.

The Alderney licence application process can be considered to have three constituent parts: suitability, fair games and adequate process.

The first stage of the application process requires applicants to submit a completed application form with supporting documents as well as key individual certificate applications in respect of all key individuals who don’t already hold a key individual certificate. A ‘key individual’ is an associate, someone who occupies or acts in a managerial position, someone who carries out managerial functions, or someone who exercises significant influence over the operations of the applicant. A deposit of £10,000 must be paid in respect of the AGCC’s expenses in investigating and processing the application.

After receiving an application, the AGCC will typically seek a meeting with the applicant to talk through the business plan and intended remote gambling operations as well as the staff and corporate entities involved in the application.

Successful completion of the first stage will result in a licence being issued on payment of the applicable licence fee, and the licensee will proceed to the second stage of the process.

Stage 2 requires the AGCC to assess licensees as being adequate with regard to their internal control system, gambling equipment and capitalisation. The application process is suggested by the AGCC to have a time frame of six months, though this is necessarily influenced by the timelines in which applicants supply required information.

Licensees are required to submit regular financial and operational reports, which include information relating to player activity, suspicious transactions and significant player deposits or losses in addition to their broader anti-money laundering reporting obligations.

Licensees are subject to an annual audit requirement in respect of their financial accounts.

ii Sanctions for non-compliance

Contravention of any provision of the 1999 Law (or any ordinance made under it) is an offence.\(^\text{11}\) Additionally the 1999 Law creates specific offences of cheating by fraud or unlawful device or practice in any gambling transaction\(^\text{12}\) – the penalties for which include imprisonment for up to five years – and inciting young persons (i.e., those under 18) to gamble.\(^\text{13}\)

\(^{11}\) Section 13, the 1999 Law.
\(^{12}\) Section 11, the 1999 Law.
\(^{13}\) Section 12, the 1999 Law.
Penalties for offences that are not specified (i.e., that do not relate to a specific offence) are as follows:

\[ a \] in the case of a first offence, a fine not exceeding £25,000 or imprisonment for a term not exceeding six months, or both; and

\[ b \] in the case of a second or subsequent offence under the same provision, a fine not exceeding £50,000 or imprisonment for a term not exceeding two years, or both.

In addition to the criminal offences contained in the 1999 Law, the 2009 Ordinance sets out a number of offences specifically in relation to remote gambling. Sanctions applicable to these offences include requiring rectification of a specific issue by the relevant licensee or certificate holder, issuing a formal caution, fines and suspension, or revocation of a licence (or suspension or withdrawal of a certificate).\[14\]

The most well-known use of the AGCC’s sanction powers remains the suspension and subsequent revocation of the licences held by a number of companies trading as Full Tilt Poker following investigations by the AGCC. In that case, the AGCC found its investigation showed a shortfall of funds in the group caused by third-party theft and by covert seizure of funds by US authorities, both of which it stated had been concealed from the AGCC.

IV WRONGDOING

Alderney, as part of the Bailiwick of Guernsey, is subject to the anti-money laundering regime established by the States of Guernsey under the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 and ancillary legislation.

Owing to Guernsey’s status as a leading international finance centre, it is highly focused on compliance with international standards (as represented by the Financial Action Task Force and Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) in respect of the application of sanctions, prevention of terrorist financing and prevention of money laundering. The Guernsey legislation and guidance in this regard is regularly updated to reflect international best practice.

The 2009 Regulations make clear the standards licensees are expected to meet in respect of these issues and impose a modified form of the customer due diligence and transaction reporting requirements that financial services businesses in the Bailiwick are expected to meet.\[15\]

Licensees are required to appoint a money-laundering reporting officer to report suspicious activity. Failure to report, where appropriate, may result in criminal prosecution. Licensees are assessed in respect of their processes in this area as part of the licensing process and on an ongoing basis.

V TAXATION

For taxation purposes, Alderney is part of the Guernsey taxation regime and treated as part of Guernsey. There is no corporate tax, VAT or other tax or duty applicable to gambling licensees.

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\[14\] Section 12, the 2009 Ordinance.

\[15\] Schedule 16, the 2009 Regulations.
in Alderney. The corporate tax regime for Guernsey and Alderney companies has been approved by the EU. Under this regime (‘zero-10’) companies with non-resident shareholders are not liable for any corporate tax, so the effective rate for a foreign-owned company is zero per cent.

In order to benefit from the zero per cent corporate tax regime, licensees must demonstrate that (1) they are resident in, and managed and controlled from, the Bailiwick; and (2) the main permanent establishment that generates all or the majority of their group profits is in the Bailiwick.

Guernsey income tax for individuals is set at 20 per cent with a maximum charge of £220,000 per year on Guernsey-sourced income and a maximum charge of £110,000 on non-Guernsey income. More than 90 days in Guernsey will establish residency and 180 days will establish sole or principal residency. Social security is set at 6 per cent for employees and is capped at annual earnings of £120,000.

VI ADVERTISING AND MARKETING

Advertising and marketing are regulated under the 2009 Regulations, which simply state that advertising carried out by, or conducted on behalf of, a Category 1 eGambling licensee:

- must be truthful;
- must not be distasteful;
- must not promote gambling by, with or through persons under the age of 18 years, and this factor must be taken into account when determining media selection and placement of the advertising;
- must not encourage people to engage in excessive participation in eGambling that would be socially irresponsible or could result in harm to them or others;
- must not imply or convey any message that a person’s status, general abilities or social success can be attributable to gambling;
- must not challenge or dare people to participate in eGambling;
- must not, having regard to the expected returns to customers through eGambling, promote or suggest any unrealistic expectation of winning;
- must not bring into disrepute:
  - the island of Alderney;
  - the Commission; or
  - in any broader context, the Bailiwick of Guernsey; and
- must comply with any requirements relating to the content or nature of advertising imposed in the jurisdiction covering the target market for that advertising.16

Similar requirements extend to advertising by temporary eGambling licensees, Category 2 eGambling licensees, Category 1 associate certificate holders and Category 2 associate certificate holders respectively.17

VII THE YEAR IN REVIEW

The most significant recent development was the passing of the Alderney eGambling (Amendment) Ordinance 2018 (the 2018 Ordinance) into law in early January 2018. The

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16 Regulation 4(c), the 2009 Regulations.
17 Regulations 8(1)(c), 6(c) and 60(b), the 2009 Regulations.
2018 Ordinance amended the 1999 Law and the 2009 Ordinance, adding the Category 1 associate certificate to the licencing regime. Alderney continued to welcome new licensees in 2017, and also saw a number of merger and acquisition transactions involving remote gambling operators. These trends have continued in early 2018.

VIII OUTLOOK

It is expected that Alderney will continue to grow as a remote gambling jurisdiction looking to access newly opening markets and continuing to build its relationships with other gambling regulators. New licence applications are still being processed, notwithstanding international political upheaval, and Alderney continues to market itself as a remote gambling jurisdiction to a range of different global market places.

With the addition of a further category of licence, the Category 1 associate certificate, concerns have been raised that operators could move their headquarters away from Alderney, given B2C associate certificates may now be offered to those who are not located on Alderney, but wish to be subject to the existing legislative regime. What impact this will have remains to be seen, however, the expectation is that there will be no actual reduction in the number of Alderney-based gambling operating licences and an increase in licensees overall.

The General Data Protection Regulation continues to loom large on the horizon with EU and local legislation coming into effect on 25 May 2018. While Alderney is outside the EU it is expected that the Bailiwick of Guernsey (and hence Alderney) has put in place legislation for an equivalent regime under the Data Protection (Bailiwick of Guernsey) Law 2017 (the 2017 Law), and that those processing or controlling personal data (such as Category 1 licensees) will therefore need to meet European data protection standards. Data subject rights such as portability, subject access requests and the right of erasure will be applicable to many, if not all, licensees when processing personal data and considerations such as the legal basis for and minimisation of data usage will come to the fore under the 2017 Law.

Developments aided by new and innovative technologies being utilised by remote gambling operators could provide the next challenge for the existing legislation. A leading mobile-first iGaming platform provider and turnkey operator, licensed by the AGCC, has agreed a cryptocurrency partnership with a social casino operator, pursuant to which a branded cryptocurrency will be made available as a payment method on the casino operator’s platform. Whether regulation is needed to account for the changing face of eGambling technology will depend on any further developments in the coming months.
I OVERVIEW

i Definitions

In general terms, for an activity to be classified as gambling in Australia, it must involve the staking of money or other valuable consideration of real-world value on the outcome of an event determined in whole, or in part, by chance and with the objective of winning a prize.

Where an activity does not satisfy these criteria, it is not generally considered to be gambling under Australian law.

‘Trade promotions’, being free-to-enter competitions for the promotion of trade,2 are also regulated under gambling legislation in each jurisdiction. These competitions are subject to specific restrictions and, in certain jurisdictions, are only able to be conducted where a permit has been issued by the relevant regulator.

Fantasy sports operators have existed in the Australian market for some years. Initially, they were regulated as a form of trade promotion, whereas now they are treated by regulators as a form of bookmaking.

No specific regulation of ‘pool betting’ exists in Australia. Exclusive licences are granted to totalisator operators in all Australian jurisdictions. These operators are licensed to accept bets relating to a contingency (generally, the outcome of a racing or sporting event), which are then contributed to a pool that is paid out by reference to successful bets (after the operator deducts a percentage of the pool as commission, as well as various fees and taxes).

Spread betting and betting on financial products are regulated by the Corporations Act 2001 (Cth). To be conducted legally, operators must obtain an Australian Financial Services Licence. These products are regulated under a different regulatory regime to gambling products; however, in certain circumstances a sports betting licence may also be obtained.

ii Gambling policy

In Australia, there is a general prohibition in all jurisdictions on the conduct and promotion of gambling. Legislative exemptions exist for gambling activities that are conducted under a licence. These activities include:

\[ a \] lotteries (both in venue and online);
\[ b \] wagering and sports betting (both in venues and online);
\[ c \] slot machines, or ‘pokies’ (just in venues); and

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1 Jamie Nettleton is a partner, and Nicola Austin and Mia Corbett are solicitors, at Addisons Lawyers.
2 It is possible for the purchase of a product or service to be a condition of entry.
d) land-based casinos where casino games, including poker, baccarat and blackjack (among others) can be played.

The paternalistic approach to the regulation of gambling services by the state and federal governments is a response to the concerns that arise from the adverse social consequences associated with gambling. However, gambling has long been a part of Australia’s culture and identity and, together with racing and sport, is well established in the national consciousness. State and territory-based regulation of gambling in the early 20th century marked the beginning of the legislative regime in place today. With the introduction of online wagering in the late 20th century, the industry continues to flourish, despite the continuing conflict between the economic returns provided by the gambling sector to the state and territory governments, and sporting and racing bodies, and the pressure for governments to take action to minimise problem-gambling behaviour.

iii) State control and private enterprise

Historically, all the lottery and totalisator operators were government-owned entities. Almost all states and territories (Western Australia being the exception in respect of its totalisator and lottery) have corporatised and privatised their gambling operators. All leading gambling businesses in Australia (most of whom are listed) conduct business under a licence granted by a state or territory government (or regulator).

The principal licensed gambling operators are:

a) Tabcorp Holdings Limited, which, since combining with Tatts Group Limited (Tatts) (see Section VIII, below) has the exclusive right to conduct lotteries through retail outlets in Queensland, Tasmania, New South Wales, Victoria, South Australia, the Australian Capital Territory and the Northern Territory, and the exclusive right to conduct totalisators (and off-course betting) in New South Wales, Victoria, the Australian Capital Territory; Queensland, South Australia, Tasmania and the Northern Territory;

b) The Star Entertainment Group Limited, which operates casinos in Sydney and in South East Queensland;

c) Sky City Pty Ltd, which operates casinos in Adelaide and Darwin (the casino in Darwin is reported as being for sale);

d) Crown Resorts Limited, which operates casinos in Melbourne and Perth (and Sydney from 2024) and also conducts the Australian Betfair betting exchange;

e) Sportsbet Pty Limited, a sports bookmaker; and

f) CrownBet Pty Limited (owned by The Stars Group), a sports bookmaker that recently acquired William Hill’s Australian operation (see Section VIII, below).

In Western Australia, the totalisator and lottery are conducted through state-owned corporations, respectively operated by Racing and Wagering Western Australia and LotteryWest. However, the Western Australian government is expected to follow the lead of other states and territories and conduct a tendering process in the near future in respect of the exclusive licence to operate the state’s totalisator.

Separate exclusive licences are also issued in each state and territory in respect of the conduct of Keno games in land-based retail venues.
Save for Queensland, the right to operate a casino has been the subject of an exclusive licence in the relevant jurisdiction. The recent issue of new casino licences in New South Wales and Queensland is discussed further in Section II, below.

Wagering services are not only provided by totalisator operators (who also provide fixed-odds betting services) but also by on-course bookmakers (some of whom also operate online) and corporate bookmakers (mostly licensed in the Northern Territory).

iv Territorial issues
As mentioned in subsection iii, above, licences to conduct gambling are issued by the relevant state or territory government (or regulator), including those listed in Section II, below. Traditionally, gambling was conducted solely in venues. However, as a result of new technologies and the challenges posed by gambling monopolies in most Australian states and territories, a number of gambling businesses (particularly in the wagering sector) are licensed to conduct gambling remotely. This includes corporate bookmakers, most of whom are subsidiaries of leading European online betting companies.

However, it is generally understood under principles of Australian constitutional law that gambling services provided under a licence issued in any state or territory of Australia are able to be provided to residents of other Australian states and territories. This principle was confirmed by the decision of the High Court of Australia in Betfair Pty Ltd and Another v. Western Australia (2008) 244 ALR 32.

Each licensing jurisdiction imposes different licence conditions on its licensed operators, by reference to the relevant legislation. Most online corporate bookmakers, for example, are licensed in the Northern Territory by the Northern Territory Racing Commission (NTRC).

v Offshore gambling
In 2001, the federal government enacted the Interactive Gambling Act 2001 (Cth) (IGA), which prohibits the provision of ‘interactive’ (or online) gambling services with an ‘Australian customer link’. The IGA is enforced by the Australian Communications and Media Authority (ACMA) and the Australian Federal Police. In September 2017, the IGA was amended by the Interactive Gambling Amendment Act 2017 (Cth) in response to claims that the existing legislation was ineffective. The amendments, among other things, increased penalties and gave the ACMA greater investigative and enforcement powers (see Section VII, below).

Broadly speaking, the IGA prohibits the provision of ‘prohibited interactive gambling services’ to persons present in Australia (the Section 15 Offence), and ‘regulated interactive gambling services’ without an Australian licence (the Section 15AA Offence) (together, the Operational Prohibitions). Regulated interactive gambling services include wagering services (with the exception of in-play sports betting services provided via an internet carriage service, including VoIP technology, which is prohibited) and lottery services (with the exception of instant or scratch lotteries, which are also prohibited). In addition, the IGA prohibits the advertising in Australia of ‘prohibited interactive gambling services’ and, unless the relevant party is licensed in Australia, ‘regulated interactive gambling services’ (the Advertising Prohibition).

The IGA targets the supply of online gambling to residents of Australia by offshore operators, but does not prevent Australian residents from accessing those offshore services, or the provision of services by Australian operators to customers in other countries.
A defence is available where the operator did not know, or could not reasonably have
known, that their service had an ‘Australian customer link,’ that is, that any or all of the
customers of the service were physically present in Australia.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

Australia is a federation. In practice, this means that legislative power is divided between the
federal government and the eight constituent states and territories. Traditionally, the power to
regulate gambling activities in Australia was reserved by the states and territories.

This changed in 2001 with the enactment of the IGA. Save for legislative reform
proposed by the federal government in 2012 to regulate the sale and use of poker machines
(which is no longer in effect, save to a limited extent), and the IGA, the federal government
has recognised that the regulation of gambling is a matter within the jurisdiction of the states
and territories.

The IGA prevails over state and territory legislation to the extent of any inconsistency.
That is, even where certain conduct does not contravene the IGA, it may nonetheless be in
breach of state and territory gambling laws.

Whereas the IGA regulates interactive (or online) gambling services, state and territory
legislation continues to regulate land-based gambling activities and sets out different
regulatory frameworks for different types of gambling, including casinos, sports betting,
poker machines and lotteries.

Even though the federal government’s proposed poker machine regulation in November
2012 was unsuccessful, there remains the possibility that the federal government may
intervene in the future to regulate further land-based gambling, particularly poker machines.

In addition to regulating the manner in which land-based gambling is conducted,
legislation in each state and territory also establishes separate regulatory bodies.

ii The regulator

The key responsibilities assigned to the state and territory regulators include granting
licences, monitoring compliance of gambling operators and enforcement of legislation where
necessary. The key regulators in each jurisdiction are:

a New South Wales: Liquor and Gaming NSW;
b Victoria: Victorian Commission for Gambling and Liquor Regulation and the
Department of Justice and Regulation;
c Australian Capital Territory: ACT Gambling and Racing Commission;
d Northern Territory: the NTRC;
e Western Australia: Department of Racing, Gaming and Liquor;
f South Australia: Independent Gambling Authority;
g Tasmania: Liquor and Gaming Commission;
h Queensland: Office of Liquor and Gaming Regulation; and
i Australia-wide: the ACMA.

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3 There is also specific state and territory legislation regulating interactive gambling, for example, Chapter 7
of the Gambling Regulation Act 2003 (Vic).
In certain states and territories, a different regulator is responsible for the regulation of casinos. For example, the Independent Liquor and Gaming Authority is responsible for determining the regulatory arrangements that apply to the operation of casinos in New South Wales. Certain racing and sporting bodies have also been given the right to regulate certain activities of individual and corporate licensed bookmakers.

iii Remote and land-based gambling

The Australian legislative framework for the gambling sector distinguishes between remote and land-based gambling; both are regulated at the federal and state and territory levels.

As indicated in subsection i, above, interactive (or online) gambling services are regulated at the federal, and state and territory levels, while land-based gambling is regulated mostly at the state and territory level.

At the state and territory level, the distinction is due in part to the different regulatory frameworks that exist for the different types of gambling services, such as casinos and gaming machines. In addition, the distinction can be attributed to the rapid evolution of the market and the often outdated legislation at the state and territory level. For example, in New South Wales, the Unlawful Gambling Act 1998 (NSW) (NSW UGA) does not contemplate online gambling. However, the preferred position of Liquor and Gaming NSW, the New South Wales regulator, is that the NSW UGA applies equally to both online and offline forms of gambling.

iv Land-based gambling

Land-based gaming is regulated largely by state and territory legislation, which is principally directed at gambling products or services that are venue-based. These include operators of wagering and lottery terminals, and poker machines. However, certain federal laws apply to land-based gambling, such as the laws relating to anti-money laundering and counter-terrorism financing (see Section IV, below).

Generally, an exclusive licence has been granted in each state or territory to conduct off-course betting in retail venues. Similarly, an exclusive licence has been granted to provide lottery products (which are available for sale by retailers, principally in newsagents).

Further, licensed venue operators are permitted to conduct land-based machine gaming (such as slot machines, known in Australia as poker machines). These venues include casinos, pubs and clubs. The sole exception to this principle is in Western Australia, where poker machines are only permitted in casinos. Certain restrictions are imposed on the operation of gaming machines by licensed venue operators, such as caps on the total number of poker machines in any particular venue, locality or in the jurisdiction as a whole. The regulatory regime in respect of poker machines differs substantially from jurisdiction to jurisdiction with Victoria, for example, having a mandatory pre-commitment system in place (which players can opt out of).

Until recently, there was a limited number of casino licences granted in each state and territory. However, in recent years, this exclusivity has been relaxed. Previously, in New South Wales, the exclusive casino licence was held by Echo Entertainment Group Ltd (now The Star Entertainment Group Ltd). In 2015, the New South Wales state government granted a licence to Crown Resorts Limited for the construction and operation of Crown Casino at its new Barangaroo development in Sydney (which is scheduled for completion in 2024). Similarly in Queensland, the government has granted additional casino licences to various private entities.
Various restrictions exist at the state or territory levels that apply to licensed online wagering operators (even where based in another state or territory). These restrictions set out mandatory requirements relating to advertising, warning messages and pre-commitment as well as a requirement to pay a product fee in respect of races and some sporting events that take place in that state or territory.

v  Remote gambling
The IGA prohibits the supply of online gambling services to persons present in Australia, unless the service provider is licensed by a regulatory authority in an Australian jurisdiction. However, the ability of wagering operators to provide in-play sports betting is restricted to bets placed over the telephone via a voice call or via a ‘place-based betting service’, that is, online in-play betting on sporting events using ‘electronic equipment’ at the venue of a licensed operator.

Generally speaking, licensed operators may offer remote or online gambling services and no distinction exists between the online platforms or devices on which a gambling product may be offered to customers.

Licences granted to Australian operators to provide gambling services online often impose restrictions on the location and manner in which the licensed operator may conduct its gambling business. For example, gambling operators licensed by the NTRC are required to locate various aspects of their gaming operations in the Northern Territory. In addition, the conditions of the licence have the effect that bets are deemed to be placed, received and accepted in the Northern Territory for the purposes of the licence, irrespective of where the customer placing the bet is located.

vi  Ancillary matters
Depending on the gambling service, ancillary licences may be required in addition to the principal licence granted to the operator to conduct the gambling business.

For example, in addition to those operators that conduct gambling activities in a casino or other land-based venue, separate licences are required to be held by manufacturers and suppliers of poker machines, as well as testing agents.

In most cases, key employees or close associates of licensed operators are required to hold a separate licence, or at least be approved by the regulator prior to commencing their role.

III  THE LICENSING PROCESS
i  Application and renewal
The process involved in applying for a licence to conduct a gambling business in Australia depends on the type of licence and the jurisdiction in which it is sought. For example, in respect of remote wagering, the Northern Territory is the leading licensing jurisdiction in Australia and licences are granted by the NTRC. While other states and territories have their own licensing regimes, these regimes have not been ‘tried and tested’ in the same way as the Northern Territory regime.

There are a number of licensing options, depending on the nature of the gambling service to be provided. Licences may be granted to conduct bookmaking and online lotteries. For simplicity, we have limited our response to the process relating to the grant of sports bookmaking licences.
In order to be eligible to obtain a licence, applicants must be registered in Australia as a corporate entity under the Corporations Act 2001 (Cth). The company and key personnel must also meet suitability and probity requirements prescribed by the relevant licensing authority.

In addition to satisfying the eligibility requirements, an applicant will generally need to provide the following information:

- the applicant’s certificate of registration and a copy of its constitution;
- police check documentation for each key employee;
- a business plan;
- prescribed financial and personal information, both for the applicant and key employees;
- the current prescribed licence fee; and
- a Deed of Release and Authorisation to enable the regulator to conduct all necessary inquiries.

The licensing process will typically last for up to nine months. The probity process involving land-based casino licences may involve a period of over a year.

The duration of the licence will depend on the nature of the gambling service being provided and the agreement reached between the licensing authority and the operator, as set out in the licence conditions.

In light of the investment required in respect of land-based gambling operators, exclusive totalisator and casino licences typically remain in effect for a term exceeding 10 years.

ii Sanctions for non-compliance

Restrictions on the manner in which a gambling business may be conducted are usually contained in the terms and conditions of a licence and the underlying legislation. Failure to comply may lead to sanctions for breach of the licence, contravention of prohibitions set out in the relevant legislation, or both.

This most frequently arises as a result of periodic reviews conducted in connection with the operation of a casino. In many cases, the casino may be found not to have complied fully with the terms of its licence, resulting in the imposition of a fine and other penalties.

As it is beyond the scope of this chapter to outline the full framework for liability, our analysis is set out in general terms. Offences and sanctions in respect of non-compliance with licence conditions and the relevant laws vary between the states and territories.

At the federal level, the Operational Prohibitions under the IGA carry significant penalties of up to 5,000 penalty units for a criminal offence (equivalent to A$5.25 million for a corporation) and 7,500 penalty units under the new civil penalty provision introduced by the Interactive Gambling Amendment Act 2017 (Cth) (equivalent to A$7.875 million for a corporation), see Section VII, below.

Individuals

Generally, liability is placed on the operator of a prohibited gambling service rather than the customer for the participation in such services. However, liability may be placed on individual users of gambling services in limited circumstances. For example, gambling legislation in New South Wales and Western Australia prohibits the placement of a bet on an
Australian race with an unlicensed wagering operator. Notwithstanding these prohibitions, we consider it unlikely from a policy perspective that authorities will prosecute individuals under these provisions.

**Overseas operators**

An overseas operator may be found liable where an offence provision is expressly stated to have extraterritorial effect. The offence provisions in the IGA are expressed to apply extraterritorially. However, the practical difficulties that exist in enforcing Australian legislation against overseas operators has previously inhibited enforcement activity under the IGA. This problem was addressed by the Interactive Gambling Amendment Act 2017 (Cth), which conferred new powers on the ACMA, including the ability to notify international regulators of licensees acting in contravention of the IGA.

**Directors and officers**

There is no general principle extending liability to directors or officers of a gambling operator for the acts of a company. However, in cases where there is a prohibition on certain activities, certain legislation extends these prohibitions to the directors and officers of the company in line with the aiding and abetting provisions of Australia's criminal laws. For example, Section 53 of the NSW UGA stipulates that a director of a corporation that is in breach of the NSW UGA will commit an offence where the director ‘aids, abets, counsels or procures the commission of the corporate offence’.

At the federal level, directors and officers of operators acting in contravention of the IGA can also be nominated by ACMA to a ‘Movement Alert List’ maintained by the Department of Immigration and Border Protection, with the aim of restricting their travel to or from Australia.

**Agents**

As a general principle, various parties may be found liable under the aiding and abetting provisions of Australia’s criminal laws. The broad language of the advertising prohibition also extends liability to marketing affiliates.

The Interactive Gambling Amendment Act 2017 (Cth) has also extended liability under the IGA to parties such as business-to-business (B2B) service providers, who may be considered to have ‘aided and abetted’ the commission of either civil or criminal offences under the IGA (see Section VII, below). This will also extend to include directors and officers.

**Payment processors and internet service providers**

Although the statutory prohibitions do not extend liability expressly to entities involved in money transfers where money is used for gambling purposes, payment processors need to be aware that there is risk in certain circumstances that liability may arise under the aiding and abetting provisions of Australia’s criminal laws, as set out above.

There is no legislative requirement placed on payment service providers and internet service providers (ISPs) to implement technical measures (such as geo-blocking) to prevent Australians from accessing a site permitting access to prohibited gambling content (including services provided by an illegal, unlicensed offshore operator).

In 2015, the federal government ordered a review of the IGA (the O’Farrell Review) in advance of the introduction of the Interactive Gambling Amendment Act 2017. In its
response to the recommendations of the O’Farrell Review, the government indicated that it would discuss with banks and ISPs options for the introduction of payment blocking and ISP blocking technologies as a means of restricting the access of persons located in Australia to illegal interactive gambling services as part of a three-stage plan proposed by the federal government to implement the recommendations of the O’Farrell Review.

IV WRONGDOING

i Money-laundering

Under the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) (2006) and corresponding regulations (the AML/CTF Law), gambling operators in Australia are required to comply with a number of strict reporting and procedural obligations, including, but not limited to:

a verification and ongoing due diligence of the identity of all customers who open an account with the operator;

b maintaining an anti-money laundering and counter-terrorism financing programme (AML/CTF programme), which outlines how they will comply with their obligations under the AML/CTF Law;

c regular reporting to the Australian Transaction Reports and Analysis Centre (AUSTRAC), the body responsible for enforcing the AML/CTF Law, of all suspicious matters, threshold transactions, compliance reports and international fund transfers; and

d keeping records of all transactions, electronic funds transfers, customer identification procedures, AML/CTF programmes and due diligence assessments.

Penalties for non-compliance with the AML/CTF Law are significant. In 2015, AUSTRAC filed an action in the Federal Court against three Tabcorp Group companies for ‘extensive, significant and systemic non-compliance’ with the AML/CTF Law. In March 2017, the Federal Court approved a settlement agreement under which Tabcorp agreed to pay to AUSTRAC a A$45 million penalty (and costs) for contravention of the AML/CTF Law.

ii Organised crime and match-fixing

In Australia, match-fixing is dealt with under relevant criminal legislation in most jurisdictions, (e.g., in New South Wales, Part 4ACA of the Crimes Act 1900 (NSW)). Under legislation in most Australian jurisdictions, wagering operators are required to enter into integrity agreements with each relevant racing controlling body and the leading sporting bodies on which they offer betting products. These agreements allow the operator to use the statistical information relating to the sporting or racing events (and participants) in return for a fee and on the condition that they agree to cooperate with these bodies by providing information about their customers’ betting patterns and behaviour to assist in the investigation of match-fixing.

Generally, these agreements are entered into by wagering operators with the leading sporting bodies on a national basis.
V TAXATION

All Australian companies, including gambling operators, are required to pay corporate income tax (currently 30 per cent for businesses whose annual turnover is less than A$50 million by 2026–27) and goods and services tax (GST) of 10 per cent on all sales. GST is also payable by overseas suppliers of goods and services, including offshore gambling services, to Australian customers.

In addition, a number of additional taxes are imposed specifically on gambling operators. These taxes are imposed by the relevant licensing jurisdiction and represent a significant source of revenue for state and territory governments. The nature and extent of these taxes vary significantly, and include:

- direct gambling taxes calculated by reference to the gambling revenue of the company (as set out in the licence conditions);
- licence fees paid initially or on a periodic basis (depending on the licence held). In the case of exclusive licences such as retail totalisators, there is usually a sizeable upfront fee payable;
- fees charged by sports or racing control bodies to wagering operators in consideration for the use of race field and sports fixture information. This fee is generally calculated by reference to a percentage of gross revenue or turnover of the wagering operator in connection with the relevant sporting or racing event; and
- in some states, a point of consumption tax (PoC Tax), payable as a percentage of revenue derived from customers located in specific jurisdictions (see Section VIII, below).

VI ADVERTISING AND MARKETING

The extent to which advertising of gambling is prohibited depends on the type of gambling in question, the form of the advertising and the jurisdiction in which the advertising is conducted.

There is a complex arrangement of rules that regulate the advertising of gambling, including in state and territory legislation, which varies from jurisdiction to jurisdiction. In addition, there are industry codes (such as the Australian Association of National Advertisers Wagering Advertising & Marketing Communication Code), as well as more broadly applicable laws, such as federal consumer laws (which prohibit misleading and deceptive conduct).

For example, overlapping requirements under state and territory laws make it an offence to publish or otherwise advertise wagering services that, among other things:

- encourage a breach of the law;
- depict children under the age of 18, or target children under the age of 18;
- suggest that winning will be a definite outcome of participating in gambling activities, or exaggerate claims relating to winning;
- suggest that participation in gambling activities is likely to improve a person’s prospects;
- promote the consumption of alcohol while engaging in gambling activities;
- are offensive, or are not published in accordance with decency, dignity or good taste; or
- offer an inducement to participate, or participate frequently in a gambling activity, including an inducement to open a betting account (the Inducement Prohibitions).
Strict laws apply specifically to advertisements published in traditional media, such as on print, television and radio advertising. Recently, the federal government has reformed Australia’s media laws, including by implementing further restrictions relating to the advertising of sports betting in the course of live sports broadcasts (see Section VIII, below). Land-based advertising in pubs, clubs and hotels where retail betting is offered is also subject to restrictions.

There are also strict requirements relating to the display of responsible gambling messages, which vary greatly from jurisdiction to jurisdiction. These messages are required to be included with all advertising material that is published by a gambling operator, including at physical and virtual points of sale.

The Australian Competition and Consumer Commission (ACCC) has also brought a successful action against an Australian online wagering operator for advertising that was deemed to be misleading and deceptive by the Federal Court.6

VII THE YEAR IN REVIEW

i Interactive Gambling Amendment Act 2017 (Cth)

In August 2017, the federal parliament passed the Interactive Gambling Amendment Act 2017, in response to criticism that the existing legislation was ineffective as a means of deterring unlicensed offshore gambling operators from providing services to Australian residents. The key changes introduced by this legislation have been discussed throughout this chapter, and include:

a the introduction of a new civil penalty regime and the Section 15AA Offence;
b expansion of the existing aiding and abetting offence (which triggers the operation of Section 11.2 of the Criminal Code Act 1995 (Cth) and Section 92 of the Regulatory Powers (Standard Provisions) Act 2014 (Cth));
c the prohibition on the use of VoIP technology by licensed wagering operators to facilitate in-play betting services;
d banning the provision of lines of credit by wagering operators; and
e granting of greater enforcement powers to the ACMA, including the power to issue formal warning and infringement notices, seek civil penalty orders and injunctions, notify international regulators and place persons on the Movement Alert List.

As a result of the changes, many overseas operators providing online gambling services previously have withdrawn from the Australian market.

ii Lottery betting

In September 2017, Tatts and the Australian Lottery and Newsagents Association united to launch the ‘Lottoland’s Gotta Go!’ campaign. The campaign was featured in point-of-sale material posters in newsagents and on television across the country, broadcasting the message that Lottoland, a sports bookmaker licensed in the Northern Territory that accepted bets on the outcome of lotteries, should be prohibited from operating in Australia.

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In response, various states announced an intention to introduce legislation that would prohibit, or otherwise impose restrictions on, the provision of secondary lottery products to customers located in that state. In November 2017, the Northern Territory Attorney General formally directed the NTRC to remove ‘Australian lotteries’ as an approved betting contingency. This had the effect of causing those lottery betting providers licensed in the Northern Territory to reduce their offering to betting on the outcome of foreign lotteries only. In March 2018, the Interactive Gambling Amendment (Lottery Betting) Bill 2018 (the Bill) was introduced into the federal House of Representatives. The Bill proposes to prohibit the provision of services for the placing, making, receiving or acceptance of bets on the outcome of Australian and overseas lottery draws to persons located in Australia. At the time of writing, debate has not commenced on the Bill.

VIII OUTLOOK

i Point of consumption taxes

Since July 2017, betting operators have been liable to pay a PoC Tax on bets placed by customers in South Australia at a rate of 15 per cent of net wagering revenue. In early 2017, the federal government discussed the possibility of introducing a point of consumption tax for gambling operators to apply federally. No legislative proposals introducing this tax have been released to date.

Recently, however, various other states have announced their intention to introduce separate PoC Taxes, although Western Australia is currently the only state with a specific implementation date (1 January 2019). It is expected that most states will follow the South Australian model, with some regulators seeking public consultation prior to adoption. The NSW regulator has indicated that it will consider stakeholder submissions in April 2018 before announcing their plan to implement a PoC Tax. The effect of the PoC tax on the viability of the wagering market in Australia has not been the subject of any significant empirical study. Accordingly, the repercussions for the Australian racing and bookmaking industries are largely unknown; however, it is likely to impact materially on the costs of the smaller operators and is likely to lead to a greater incentive towards consolidation (see subsection iv, below).

ii Misleading and deceptive poker machine litigation

In February 2018, the Federal Court of Australia dismissed the application that Aristocrat’s Dolphin Treasure electronic gaming machine (EGM) gave rise to misleading and deceptive representations in contravention of the Australian Consumer Law (ACL). The applicant, an individual, argued that features of the EGM gave rise to an inaccurate representation of the likelihood and value of the return that the player could expect from the machine.

Despite the Court’s finding, it is likely that EGM suppliers, operators and regulatory authorities will continue to come under scrutiny from anti-gambling activists and media. Return to player information may also become the focus of subsequent campaigns for regulatory reform, and is an area that the industry may wish to address voluntarily, particularly as increasing publicity is given to poker machine reform as a key election issue.

iii Advertising restrictions

In March 2017, a suite of reforms were introduced that change the way in which sports betting operators are permitted to advertise their services.
First, the NSW parliament passed legislation to prohibit the advertising of inducements, such as open account offers and bonus bets that can be viewed by persons in NSW. This has the effect of requiring operators to cease advertising inducements completely, as, on some advertising platforms, it is not possible to exclude persons in NSW from accessing the relevant material without removing the relevant information completely. No date has been set as to when these laws will come into effect (although it is expected that it will commence before 30 June 2018).

Secondly, the Victorian government has enacted a law that introduces prohibitions on the display of gambling advertising on public transport, within 150 metres of a school and on public roads, road infrastructure and road reserves. These prohibitions will cover both static betting advertising (including billboards, banners, rolling static displays and the like) as well as movable and digital billboards displaying moving or video images.

Finally, the ACMA has approved and registered new industry codes banning gambling advertisements during the broadcast of live sports on commercial free-to-air TV, pay-TV and radio. Similar bans have also been introduced for online advertising by the Communications Legalisation Amendment (Online Content Services and Other Measures) Act 2017 (Cth).

iv Gambling and elections
In early 2018, the state elections in each of Tasmania and South Australia were held. In each election campaign, a key issue related to the continued availability of poker machines in the relevant state. We anticipate that this will be a recurring feature in future Australian election campaigns.

v Consolidation
In December 2017, Tabcorp Holdings Limited (Tabcorp) and Tatts Group Limited (Tatts) merged after receiving the approval of the Australian Competition Tribunal (ACT). Authorisation for the merger was granted, despite opposition from the ACCC, Racing Victoria, and online sports bookmaker, CrownBet, who argued that the deal was against the public interest. The merger has the effect of creating a single national tote, which the ACT stated would allow Tabcorp and Tatts to compete effectively with corporate bookmakers.

Facing increasing regulatory costs and the greater competition posed by the merged entity that comprises Tabcorp and Tatts, who hold the exclusive right to offer retail wagering services across Australia, it is likely that many Australian operators will look to the international market for support, which is likely to result in further consolidation. This is evidenced by the recent acquisition of CrownBet and William Hill Australia by The Stars Group, which is listed on the Toronto Stock Exchange, in March 2018.
Chapter 6

BELGIUM

Philippe Vlaeminck and Robbe Verbeke

I OVERVIEW

i Definitions

Most of the definitions are provided for in the Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players (the Act), as amended in 2010 and implemented by multiple royal decrees.

Games of chance are defined in Article 2 of the Act as any game by which a stake of any kind is committed, the consequence of which is either loss of the stake by at least one of the players or a gain of any kind in favour of at least one of the players, or organisers of the game and in which chance is a factor, even if only ancillary, for the course of the game, or for determining the winner or his or her gains. It follows from case law from the Council of State that games played in a social network whereby players can pay to receive additional play money are also considered games of chance, even if the player cannot win money in them.2

Certain games of chance under the definition laid down in Article 2 above also benefit from specific definitions. This is the case for betting (or ‘bet’), fixed-odds betting and mutual betting. Betting is defined in general terms as game of chance where each player pays a stake and that results in gain or loss that is not dependent on the acts of the player but on the result of uncertain events that occur without intervention of the players. Fixed-odds betting refers to a bet where the player bets on the result of a particular fact and where the amount of the winnings is determined depending on certain fixed odds and where the organiser is personally liable for paying the amount of the gain to the players. Pool betting is defined as a bet where an organiser acts as intermediary between the different players who play against each other, where the stakes are pooled and distributed among the winners, after deduction of a percentage meant for paying the taxes on games and bets, to cover the organisation costs and a profit margin. Additionally, the Belgian Gaming Commission issued a Notice explaining that spread betting (without benefiting from a specific definition under the Act or any royal decrees) qualifies as betting as outlined above.3

All games and activities that fall under the definition provided for in the Act qualify as gambling activities subject to either a licensing regime or a strict prohibition.

1 Philippe Vlaeminck is a partner and Robbe Verbeke is a senior associate at Pharumlegal.
2 Judgment 232.752 of the Council of State of 29th October 2015 (Gamepoint). The fact that players can win (unlimited amounts of) play money which gives the opportunity to keep on playing, makes this type of game fall within the ambit of the definition of games of chance, read together with the exclusions provided in Article 3 of the Law on games of chance.
In general, poker and other card games, dice games, slot and other types of gaming machines as well as other table games offered within casinos, gaming halls or betting shops fall within the definition of a game of chance and are subject to the rules set out by the Act and its implementing royal decrees.

Lotteries are defined in broad terms in Article 301 of the Belgian Penal Code as any operation provided to the public and aimed at providing winnings based on chance. However, it is commonly agreed that ‘lotteries’ refer to the games provided by the National Lottery operator under the Act of 19 April 2002 on the rationalisation of the functioning and management of the National Lottery (the National Lottery Act) and its implementing royal decrees defining the rules for all types of lottery game. Generally speaking, lottery games refer to draw-based games and scratch cards.

ii Gambling policy

Belgian gambling policy is based on two pillars.

The first pillar is composed of the monopoly regime for public lotteries offered by the state-owned National Lottery operator (with small exceptions for charity lotteries and raffles that receive a prior authorisation and are subject to limitations).

The second pillar is based on a prohibition of all activities that qualify as games of chance under Article 2 of the Act, unless the operator has obtained a licence granted by the Belgian Gaming Commission.4

As regards online gambling, the National Lottery is authorised to provide its lottery games online under the National Lottery Act, while any other games of chance may be offered online provided that operators hold the required licences pursuant to the Act.

Belgium carries out a regime of controlled expansion5 in order to attract players towards a safe and regulated gambling market, through the establishment of a monopoly and the granting of a limited number of licences.

iii State control and private enterprise

As outlined in Section I.ii., all public lottery games (offline and online) may only be offered by the National Lottery operator (i.e., a public undertaking fully owned by the state and subject to the direct control of the government).

The operation of other games of chance is open to competition through the attribution of a limited number of licences.

iv Territorial issues

Games of chance are regulated and licensed at federal level.

The competence granted to municipal authorities is limited to their approval for the establishment and operation of new land-based casinos6 and gaming halls,7 within the perimeters granted to these authorities by the Act.

4 Article 4 of the Act.
6 A concession agreement must be concluded with the municipality in which the casino premises will be operated (Article 31 of the Act).
7 The operation of gaming halls must be performed based on the agreement to be entered into, at the own discretion of the authorities, between the operator and the municipal authorities of the territory in which
Taxation, however, is a regional matter (decided at the levels of the regions of Flanders, Wallonia and Brussels).

v Offshore gambling
The Belgian Gaming Commission is competent to monitor illegal gambling in Belgium and to take subsequent action.\(^8\) It adopts a stringent approach with regard to illegal offshore gambling operators directing their activities to Belgian residents.

The powers of the Gaming Commission are very broad. It can issue warnings against illegal operators but also issue administrative fines.\(^9\) In the first instance, however, the Gaming Commission will not act as prosecuting authority, but will only note infringements and transfer the file to the public prosecutor. If the latter takes action on the basis of the file handed to him or her, the illegal operator may be subject of criminal prosecution (see Section III.ii below). Several international operators have already been sanctioned on that basis.

The Gaming Commission also has in place a mechanism to prevent Belgian residents from accessing illegal (including offshore) gambling websites. This mechanism involves drafting a blacklist, which is available on the Gaming Commission website. This blacklist includes all websites that, in the Gaming Commission’s official opinion, offer gambling to Belgian residents without the required licence. Through a cooperation between the Gaming Commission, the special police IT-crime unit and internet service providers (ISPs),\(^10\) the Gaming Commission informs the police of the name and details of the illegal websites; those data are then transferred to the ISPs that will block the access to the website. The website will then be inaccessible to Belgian residents. If they try to access the website, a stop-page will be displayed with the different logos of the enforcement authorities, stating that the website is no longer accessible because it infringes Belgian law. This system has been contested by a number of remote gambling operators before different courts. Rulings in those cases were unanimously in favour of the government.\(^11\)

II LEGAL AND REGULATORY FRAMEWORK
i Legislation and jurisprudence
The legal and regulatory framework is essentially built around the two pillars of the gambling policy: one set of rules applies to lotteries and another to games of chance (in the strict sense of the word).

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\(^8\) Article 20 of the Act.  
\(^9\) Article 15/2 and Article 15/3 of the Act.  
\(^10\) ISPs committed to cooperating voluntarily through the conclusion of an agreement – the majority of ISPs are parties to this agreement.  
\(^11\) See judgment of the President of the Court of Commerce of Brussels (Flemish Chamber) of 13 June 2012 (Bwin case), and judgment of the Civil Court of First instance of Brussels (Flemish Chamber) of 11 February 2013 (Bet-at-Home case). See also Judgment 232.752 of the Council of State of 29th October 2015 (Gamepoint).
Games of chance are regulated by the Act, which is further implemented by a number of Royal decrees. The regulatory framework is not complete, as a number of Royal decrees are overdue. The Gaming Commission also issues notes in which policy standpoints or other types of clarifications that it deems necessary are communicated.

Lotteries fall outside of the scope of the Act. The National Lottery holds a monopoly on public lotteries, and this is regulated by a specific law. In addition, each game of the National Lottery is regulated by a specific Royal decree. The National Lottery is also subject to a management agreement with the Belgian state. Other charity lotteries offered by non-profit organisations are licensed under an old and succinct law.

### The regulator

The Belgian lottery and private gambling sector are regulated in different ways.

The sector of games of chance is regulated by the Belgian Gaming Commission, which resorts under the Ministry of Justice. The Commission itself is composed of representatives of various Ministers (most notably Justice, Finance, Public Health, Economic Affairs, Interior Affairs), and in general meets once per month. The gaming commission also comprises a secretariat, which runs the day-to-day activities of control and advises the commissioners. The Gaming Commission as such is established by Chapter II of the Act is defined as ‘an advisory, decision-making and regulatory body in respect of games of chance’.

The National Lottery operator (and its national lottery games) is supervised by the government through the competent Minister, who has direct control through two government commissioners. They are competent to assess the compliance of the National Lottery’s activities and operation with the applicable laws, its obligations of public service, its bylaws and the management agreement concluded with the Belgian state. Moreover, both commissioners attend all the meetings of the National Lottery operator’s board of directors and executive committee in an advisory capacity. The commissioners hold inspection and monitoring powers allowing the government to directly control the national lottery operator.

### Remote and land-based gambling

Before the entry into force of the Act of 10 January 2010 that amended the Act to regulate all types of games of chance, including online gambling, only the National Lottery operator was allowed to offer its games online. At that time, the Belgian Constitutional Court found that the particular situation of the National Lottery company regarding the provision of its activities online was in line with the case law of the CJEU, considering, among other things, the characteristics of the operator and its missions of public service.

However, with the entry into force of the amended Act in January 2011, all games of chance the operation of which is allowed under the Act can be offered online.

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12 The law and its underlying policy were contested before the Constitutional Court, which however decided in 2011 that the Belgian gambling regime based on controlled expansion is effectively pursuing consumer protection objectives, and that this regime is compliant with the case law of the CJEU. See Constitutional Court, judgment of 14 July 2011, Case No. 128/2011.

13 Law of 19 April 2002 on the rationalisation, functioning, and management of the National Lottery.

14 Latest version as agreed by Royal decree of 30 August 2016.

15 Law of 31 December 1851 on lotteries.

16 Under Chapter V of the National Lottery Act.

Nonetheless, the mere fact operators are duly licensed to provide games of chance offline is not sufficient. The same operators have to apply for and be granted an online gambling licence, corresponding to their offline gambling licence (qualified as ‘plus licence’) to provide online games of the same nature as their authorised land-based activities.

In general, all games of chance are subject to certain rules already applicable to their offline equivalent. In addition, specific rules are in place, such as a specific solvency ratio of 40 per cent for operators of online gambling under the Royal Decree of 21 June 2011, as well as distinct security and technical requirements. The Gaming Commission has, in addition, issued a number of information notes related to online gambling.

iv Land-based gambling

The Act defines four categories of gambling premises (the operation of which is subject to the prior granting of a specific and distinct licence).

Class I venues, or casinos, are subject to the prior granting of an ‘A licence’ (duration of 15 years, in principle, which is renewable, but potentially shorter if the remaining concession duration for the casino is shorter). These venues are allowed to offer games of chance, automatic or not, in addition to sociocultural events. The number of casinos is strictly limited to nine by the Act, and the municipalities where those casinos may be operated are enumerated in the Act. No casinos can be operated in other locations unless the law is first amended to include a new location.

Class II venues, or gaming halls, are subject to the granting of a ‘B licence’ (duration of nine years, renewable). These venues are only allowed to offer automatic games of chance. They are gaming establishments with only gaming machines (no table games), but without slot machines, which can only be placed in casinos. Moreover, their number is strictly limited to 180 throughout the country. Finally, gaming halls may not be located close to hospitals, prisons, schools, churches and other religious temples, or places where young people regularly meet.

Class III premises refer to pubs and bars, and require a ‘C licence’ to operate a maximum of two gaming machines (low-scale gaming machines, e.g., bingo-type gaming machines). The duration of the C licence is five years and it is renewable.

Class IV venues are betting shops, the purpose of which is exclusively to engage bets. Betting shops may either be fixed (i.e., a permanent venue) or mobile (i.e., a temporary betting shop operated at the occasion of a specific sporting event, at the place of the event and for its duration only). The operation of betting shops requires an ‘F2 licence’ (i.e., a licence that allows bets to be taken on behalf of a betting organiser). F2 licences have a duration of three years and are renewable. F2 licensees have the obligation to take bets on behalf of a betting organiser (i.e., an F1 licence holder). F1 licences are required to organise betting activities and are granted for periods of nine years and are renewable. The number of betting organisers (F1 licences) is limited to 34. In addition, the number of fixed betting shops is

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18 Royal Decree of 21 June 2011 regarding qualitative conditions to be fulfilled by additional licences applicants. This ratio enables the Gaming Commission to ensure the applicant/operator does benefit from sufficient financial means to guarantee the payment of winnings to players, and differs from one type of game to another.

19 Article 29 of the Act.
limited to 1,000, and mobile betting shops to 60. Moreover, the distance between each betting shop operated after 1 January 2011 must be of 1,000 metres (door-to-door walking distance). However, this rule does not apply to betting shops in operation before that date and that have never discontinued their operation since then. F2 licences can also be granted to press shops, which can then offer betting as an ancillary activity.

All games provided by the National Lottery company (i.e., lottery games and sports betting) can be offered via the retail agents that concluded retail agreements with the National Lottery. However, in order to offer betting on behalf of the National Lottery, its agents must hold the required F2 licence. There is no minimum or maximum number of retailers for the National Lottery, but it must ensure a reasonable coverage of the whole Belgian territory, without presenting an offer regarded as excessive. This is part of its mission and fits in with the objectives pursued by the controlled expansion policy (namely, player protection, fight against addiction and fight against fraud).

v Remote gambling
First, it must be reminded that online public lottery games like land-based lottery games fall under the monopoly of the National Lottery and therefore cannot be offered by any other operator. Secondly, as regards other games of chance allowed under the Act, a land-based presence is required in order to be allowed to provide games of chance online (through ‘information society instruments’ to be precise). Indeed, only land-based licensees may apply for online gambling licences (namely, the A+ licence for online casino games; the B+ licence for online gaming machines; and the F1+ licence for online betting). Online licences only authorise operators to provide via information society means games of the same nature as the games they are allowed to offer based on their land-based licences. The ‘plus licences’ have the same duration as their related land-based licences.

In addition, Article 43/8 of the Act requires that the servers on which the gambling products are managed are located in a permanent establishment in Belgium. This rule is applied in conformity with EU case law, and in practice, it is therefore only required that certain data are stored on the Belgian server (for control purposes) and that the gaming website can be taken offline through the Belgian server (for sanctioning purposes).

vi Ancillary matters
For the provision, renting, selling, putting at disposal, import and export, production or any services of reparation and maintenance of gambling equipment, a specific licence E is required. This licence is granted by the Gaming Commission for renewable periods of 10 years. Furthermore, certain equipment put on the market or supplied to an authorised

20 Article 1 of Royal Decree of 22 December 2010 setting the maximum number of fixed and mobile betting shops, the criteria aimed at ensuring a spread of those venues, and the treatment procedures for applications when a licence is released due to a withdrawal or a waiver.
21 Article 2 of Royal Decree of 22 December 2010 setting the maximum number of fixed and mobile betting shops, the criteria aimed at ensuring a spread of those venues, and the treatment procedures for applications when a licence is released due to a withdrawal or a waiver.
22 This stems among other things from Article 4 of the Royal Decree of 30 July 2010 approving the management contract between the National Lottery and the Belgian state.
23 This includes most notably internet (via PC, smartphone, tablet) but other distribution channels are possible.
operator must also receive a certification from the services of the Gaming Commission or another accredited body.\textsuperscript{24} It is important to note that Article 27 of the Act strictly prohibits cumulating any operational licences (required to operate, e.g., a casino, a gaming hall or a betting shop) with an E licence, either directly or indirectly (by means of subsidiaries or branches).\textsuperscript{25}

Furthermore, people working in a casino, gaming hall or a betting shop must hold a personal D licence. This type of licence is granted by the Gaming Commission for an indefinite duration.

Directors or persons who occupy managing or executive positions within a gambling operator must not obtain any licences. Nevertheless, the details as well as a copy of their criminal records are requested during the application process, and these people must be deemed by the Gaming Commission to be apt for the position they hold.

**III THE LICENSING PROCESS**

**i Application and renewal**

Applications for any type of gambling licence must be submitted with the Gaming Commission through registered mail or, when available, online. Specific forms are made available through applicable royal decrees.

Certain eligibility criteria for licences are as follows: as an individual, be a citizen of one of the EU or EEA Member States or, as a legal person\textsuperscript{26} be incorporated under the laws of any EU or EEA Member State; provide the proof of the necessary solvency (including compliance with the required solvency ratio); description of the shareholding structure; proof that the company has no outstanding debts with regard to the tax authorities of any EU Member State; copy of the criminal records of the directors of the applicant; list and rules of games to be offered; and other requirements depending on the type of licence, such as addresses of the place where the server is located in Belgium (online gambling licence), the name and details of the bookmaker or betting organiser (F1 and F2 licences), responsible gaming policies, the advertising policy to be implemented, a plan outlining the structure of the future website, and a description of the security and technical measures to be implemented to protect players, avoid breaches, protect payments, and so on.

Renewal of licences follows the same principles. However, when one of the (34) available F1 licences becomes available, a transparent, competitive and non-discriminatory award procedure is put in place by the Gaming Commission.\textsuperscript{27} Furthermore, concession agreements, the conclusion of which is required to be granted an A licence, are allocated under the rules of service concessions, which requires a transparent, non-discriminatory award procedure.\textsuperscript{28} This also applies to renewals of concession agreements.

\textsuperscript{24} Article 52 of the Act.
\textsuperscript{25} However, in practice the Gaming Commission usually accepts such a double possession when a gambling licensee holds as well an E Licence via one of its subsidiaries, provided that a certain threshold relating to the shares held by the gambling licensee within that subsidiary is not met.
\textsuperscript{26} It must be noted that non-profit associations are not allowed to apply for gambling licences.
\textsuperscript{27} Royal Decree of 22 December 2010 setting the maximum number of betting organisers and the procedure for applications when a licence is released due to a withdrawal or a waiver.
\textsuperscript{28} Directive 2014/23/EU of 26 February 2014 on the award of concession contracts, as implemented by the law of 17 June 2016 regarding concession agreements. See also case law of the CJEU, e.g., CJEU, © 2018 Law Business Research Ltd
For certain licence applications the Gaming Commission must decide within a preset deadline (A and B licence applications must be decided within six months after submitting a complete application file).

Applicants must also pay a security prior to receiving any licence. The amount of this security can go up to €250,000 depending on the type of licence sought. The operational costs of the Gaming Commission are paid by the operators through an annual licensing fee.29

**ii Sanctions for non-compliance**

Any licensee that breaches the terms of its licence can be subject to different sanctions, varying from simple warnings to administrative fines, a prohibition to operate one or more games of chance, suspension or withdrawal of its licence, and even criminal prosecution, which in its turn can lead to fines and even prison sentences. Administrative or criminal fines (as well as imprisonment) can also be applied to non-licensees in breach of the law on games of chance. In any case, before issuing an administrative fine or any other sanction of administrative nature, the Gaming Commission must give the suspected offender the chance to be heard.

The criminal sanctions applicable to illegal operators also apply to anyone who promotes the illegal operation of gambling activities or who facilitates in any way whatsoever that operation, or who advertises those activities or recruits for those operators, and even to players who participate in illegal gambling activities.30

For the unlicensed organisation or operation of a game of chance or a gaming establishment, for illegally cumulating or transferring gambling licences, for the unlicensed provision of services requiring an E licence, and breach of rules applicable to D licences, a person found guilty may be sentenced to between six months’ and five years’ imprisonment or fined between €800 and €800,000, or both.

For the advertising of illegal games of chance or gaming premises, for participation in games of chance known to be illegal, for the recruitment of players for illegal gambling establishments or games of chance, for breach of rules on betting or breach of the obligation to identify anyone entering a casino or gaming hall, and for the breach of rules relating to complementary gifts to customers, a person found guilty may be fined between €208 and €200,000 or subject to imprisonment between one month and three years, or both. These sanctions may be doubled in the case of a second offence within five years of the first conviction, or when the offence has been committed with regard to minors (i.e., under 18 years old). Moreover, judges may seize the funds, materials, tools, machines and any other means used to perform the illegal activity. Finally, judges can also order the closure of the gaming premises or the withdrawal of a licence by the Gaming Commission.31

Breaches of the National Lottery’s monopoly also give rise to sanctions under the Criminal Code.

Individuals or directors of companies found guilty of organising illegal lotteries may be sentenced to between eight days’ and three months’ imprisonment, plus a fine of between

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29 For the amounts, see Royal Decree of 20 December 2016 on the contribution to the functioning, personnel and organisational costs of the Gaming Commission due by holders of licences A, A+, B, B+, C, E, F1, F1+, F2, G1 and G2 for the civil year 2017.
30 Article 4 of the Act.
31 Chapter VII of the Act.
€400 and €24,000. Any remaining prize money, facilities and materials linked to the illegal lottery game are forfeited to the state. If any real-estate property was offered as a prize, it will be seized by the state and the operator will be fined between €800 and €80,000. The distributors, promoters and any person who placed advertisements in any form and by any means whatsoever, may be fined between €400 and €24,000 or sentenced to between eight days’ and one month’s imprisonment. All remaining lottery tickets would also be seized and destroyed.32

IV WRONGDOING

The 4th Anti-Money Laundering Directive,33 subjecting all gambling and lottery operators to AML rules, is transposed into Belgian law by the Law of 18 September 2017 on the prevention of money laundering and terrorist financing and the limitation of cash (the AML Act). All gambling operators are consequently subject to due diligence obligations in principle, such as identification of players and final beneficiaries, and the monitoring of potentially suspicious transactions, etc. The Gaming Commission controls the enforcement of the AML Act, in cooperation with the Belgian Financial Intelligence Processing Unit, police forces and public prosecutors.

In addition, there are rules in place with a view to detect and report suspicious gambling patterns and identify players in certain situations. Any betting operator must, for instance, register players who place bets for an amount of €1,000 or above. This is mainly intended to fight match fixing and related wrongdoing.

Match fixing as such is not a criminal offence under Belgian law. However, it generally consists of a number of illegal actions and falls within the scope of the provisions sanctioning corruption.34 It is hence subject to criminal sanctions accordingly. In the meantime, an informal national platform has been put in place. In addition, the law on games of chance prohibits taking part in any game of chance (including betting) where the participant can exert a direct influence on the outcome.

V TAXATION

Winnings from lotteries or any other games of chance are exempt from taxes.

There is, however, a gaming tax, which is levied by the regional authorities and hence differs (somewhat) depending on which region is competent.35 The applicable tax rates also vary between different types of gambling. This tax is, in principle, levied on the gross gaming revenue (i.e., profits obtained by the operator after deduction of the winnings paid out to

32 Articles 302 and 303 of the Belgian Criminal Code.
34 Articles 246, 504bis and 504ter of the Criminal Code.
35 For information, Belgium is divided into three economic Regions, namely the Flemish Region, the Walloon Region, and the Region of Brussels-Capital.
Belgium

players). However, gaming machines are subject to a gambling tax in the form of a fixed amount per machine per year (differing as well per region and type of gaming machine). There is a different tax rate for online gambling.

The National Lottery operator does pay gambling taxes on its sports betting activities licensed under the Act on games of change. On its public lottery activities, the National Lottery is obliged to pay a monopoly rent, the amount of which is calculated annually and published in a royal decree, as well as ‘subsidies and special contributions’.

Belgium installed VAT on online gambling in the course of 2016. Following this new measure, VAT was levied on online games of chance (including betting) but not on lotteries. The legality of this additional taxation was contested by some operators before the Constitutional Court. On 22 March 2018, the Court decided that the VAT measure was unlawfully implemented and may therefore no longer be applied.

VI ADVERTISING AND MARKETING

As already outlined in Section III.ii, offering gambling services without the appropriate licence, as well as advertising for unlicensed gambling activities, is illegal and can lead to criminal sanctions. As such, any operator not duly licensed under Belgian law, or anyone else promoting the products or services of unlicensed operators may be subject to sanctions.

However, licensed gambling operators and the National Lottery operator are both allowed to advertise their activities, albeit with a certain restraint in order not to undermine the consistency and the objectives pursued by the whole Belgian gambling policy.

The Gaming Commission assesses during the application process for an online licence the advertising policy sought to be implemented by the future operators of online gambling and may raise objections or ask to make modifications should the policy be deemed too aggressive. In addition, gambling advertising must adhere to the general rules as laid down in the Belgian Economic Code (e.g., not mislead players).

Further, more detailed rules on advertising for online gambling are not unlikely to appear in the future but are not in place at this moment. A draft royal decree on advertising for online gambling was notified to the Commission under the Notification Directive 2015/1535. This lays down very strict rules on advertising, especially for online casinos and gaming halls. These would only be able to advertise through direct marketing or on their own website, which also stops the practice of marketing through affiliate websites for online casino gaming. Betting operators can still advertise under the proposed decree but will be severely limited; for example, by prohibitions to advertising during live sports broadcasts, 15 minutes before or after children’s programmes, or before 8pm (except in the framework of sports programmes), as well as the general rule that there can be a maximum of one gambling commercial per commercial break. There are possibly some arguments to be made against the legality of the proposed decree, and if it is adopted it can be expected that it will be brought before the council of state for legal scrutiny by some of the affected operators.

The National Lottery has in place a Code on ethical advertising. In any case, the National Lottery must advertise for its activities in a responsible manner and with a certain restraint, taking into account its mission of public service as laid down in the management agreement between the National Lottery and the Belgian state.

36 Their infringement could lead to action for damages before commercial courts.
VII THE YEAR IN REVIEW

An important change from the past year was the implementation of VAT on online gambling. The federal structure of the Belgian state with tax competencies for the regions (whereas VAT is levied at the federal level) raised questions as regards the legality of the VAT measure. There were also questions on the differentiation between online gambling (VAT levied) and land-based gambling (no VAT) and on the differentiation between lotteries (no VAT) and other types of gambling (VAT levied). Therefore, certain online operators, as well as the Walloon government challenged the law imposing VAT on online gambling. The Constitutional Court quashed the VAT on online gambling.

In an ongoing dispute between certain casino operators and a gaming hall operator, the scope of certain provisions in the law on games of chance were put under scrutiny. In January 2016, a judgment was issued by a Brussels court37 in which it was ruled that offering betting and casino games on one and the same website is illegal, and that offering to directly participate in betting online is also illegal. The Brussels Court of Appeal, however, reviewed the case and found that the Belgian law on games of chance must not be interpreted as precluding to offer betting and casino games together on one website (or that offering online betting as such would be illegal). The Council of State (the highest administrative court) had already ruled in the same sense as the Brussels Court of Appeal, but it also referred a question to the Constitutional Court to know whether a difference of treatment between land-based venues (prohibition to offer betting and casino games in one venue) and online websites (provision of both activities on the same website) is compliant with the Belgian Constitution. The Constitutional Court found that this difference in treatment indeed amounts to an unconstitutional discrimination. It is unclear how the Council of State will now rule, as the case is still pending there and a final judgment must be issued that takes into account the ruling of the Constitutional Court.

Another ongoing issue that keeps attracting media attention is the problems faced by online operators in verifying the identity of their players when opening an account with them. It is possible to bypass identity checks, and therefore persons that are not allowed to gamble can still register and play.

VIII OUTLOOK

In the context of the infringement proceedings ‘re-activated’ in November 2013 by the European Commission, Belgium received an official request for information targeting the transparency of its gambling system. The Commission had issues with the rules relating to the legal conduct of online gambling businesses; the required physical presence in order to be granted an online gambling licence; and the granting to the National Lottery of a betting licence (F1 licence). The European Commission, however, announced at the beginning of December 2017 that it decided to close all infringement proceedings against Member States regarding their gambling policies.

National restrictive measures can still be questioned before national courts, which can judge that these restrictions are contrary to EU law. The national courts in question can make a preliminary referral to the Court of Justice for additional guidance. In a very recent

37 Commercial Court of Brussels (Flemish Chamber), judgment of 27 January 2016.
judgment following a Hungarian preliminary referral, the Court opined that, based upon the limited arguments developed by the Hungarian government in Court, the Hungarian ‘licence plus’ is difficult to be justified under EU law.38

This judgment may put some pressure on the Belgian system, although it cannot be interpreted as a direct condemnation of the Belgian ‘licence plus’ approach, since the underlying justifications and circumstances are substantially different from the Hungarian situation.

It can also be expected that legislative changes will be required to amend the situation created by the judgment of the Constitutional Court finding that there is discrimination in the possibility of offering betting and casino gambling on one single website. It is possible that these changes will lead to a prohibition to offer these different types of gambling services jointly. If that would be the case, a number of online gambling operators will have to make fundamental changes to how they operate their websites in Belgium.

It still remains to be seen whether the hotly debated royal decree on online gaming and advertising will be adopted and, if so, whether it will withstand legal scrutiny by the Council of State. The draft decree in question also attempts to regulate the registration process further. It will in any case be the intention to close all potential loopholes and make sure that operators know the exact identities of their players from the beginning. Furthermore, as mentioned, a number of executive royal decrees that should complete the regulatory framework are still missing.

Overall, the outlook for the Belgian regulatory framework is, in our opinion, one that potentially announces a review process. However, this is not expected to take place under the current government.

Chapter 7

BRAZIL

Luiz Felipe Maia¹

I  OVERVIEW

Brazil is the largest and most populated country in Latin America, with a total area of 3,265,080 square miles and a population of more than 207 million people² (it is the fifth-largest country in the world with regards to size and population). Brazil is a federation divided into 26 states, one Federal District and 5,570 municipalities.

Since 2012, owing to the depreciation of the real against the US dollar and the economic recession that began in 2015, Brazil’s GDP has decreased and the country is now the world’s ninth-largest economy,³ having formerly been the sixth-largest in 2011.

Almost all gambling activities have been prohibited in Brazil for over 70 years. Since the general ban on games of chance in 1941, the only legal gambling activities are the lotteries under the state monopoly, and horse race wagering. According to Brazilian law, poker is a game of skill and is therefore not illegal.

With the economic turmoil, it has been said that gambling regulation (and taxation) may help the government raise revenues. Two bills of law are currently under discussion in the Congress, but this year’s presidential election may slow down the final decision on the matter. LOTEX, the instant lottery, is expected to be privatised in 2018.

i  Definitions

Gambling, in general, is not regulated in Brazil. In fact, since the 1940s, Brazil has been a closed market for gambling, with only state-owned lotteries and horse race wagering. For a brief period in the 1990s, bingos and slot machines were permitted, but they were banned in the mid-2000s.

As a consequence, Brazil’s gambling regulation is still incipient. ‘Game’ is a contract type expressly nominated, but not defined, by the Brazilian Civil Code. Its definition is provided by jurisprudence.

Luiz da Cunha Gonçalves⁴ defines a game contract as ‘a commitment, agreed as for hobby or as for desire for money, between two or more individuals, in which each player

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¹ Luiz Felipe Maia is founding partner at FYMSA Advogados.
agrees to pay a certain sum of cash or something else to the other party(ies) if he/she loses, based on some future event, which implementation depends, at least in part, on the activity of the players’.

Clóvis Beviláqua,5 the author of the previous Brazilian Civil Code, defines a game contract as a random contract, in which two or more people promise a certain sum, among the contractors, to the person for whom the result of chance is most favourable. In the same vein, Pablo Stolze Gagliano and Rodolfo Pamplona Filho6 provide a very detailed explanation on game contracts:

In fact, the contract game can be defined as a legal transaction whereby two or more people hold a particular promise (usually with pecuniary content) in favour of the person who achieves a favourable result in the performance of an act in which everyone participates.

Note that the game (and thus the success or failure of each party) necessarily depends on the performance of each party (called a player), either by his intelligence, or by his skill, strength, or simply luck.

The bet contract, in its turn, is a legal transaction in which two or more people with different opinions on a certain event, promise to perform a particular action (in general, with monetary content) to the benefit of the party whose opinion prevails. Hence, in the bet, there is not the requirement for the active participation of each party (called a bettor) to influence the outcome of the event, but rather only the expression of her/his personal opinion.

The difference between a ‘game’ and a ‘bet’ is that the result of a ‘game’ will depend on the action of the parties, while the result of a ‘bet’ depends on facts unrelated to the parties’ will. It is important to highlight that these definitions have been created by jurisprudence and are not expressly set forth by law, although they are widely accepted and applied by the courts.

‘Games of chance’ are defined by Article 50 of Decree-Law 3,688/1941 (the Misdemeanour Law or Criminal Contravention Act) as:

a. a game in which winning or losing depends exclusively or principally on chance;
b. bets on horse races outside the racetrack or other authorised venues; and
c. bets on any other sport competition.

‘Public place’ is defined as:

a. a private house in which games of chance are held, when those who usually take part are not members of the family that lives at the house;
b. a hotel or collective residence where the guests or residents are offered games of chance;
c. the headquarters or premises of a company or association where games of chance are held; and
d. an establishment intended for the operation of games of chance, even if its purpose is disguised.

5 Clóvis Beviláqua, Direito das Obrigações, third edition (1931).
Games of chance are treated as misdemeanours, which are recognised by law as offences punishable by minor penalties (Article 61 of Law No. 9,099/95). In other words, a misdemeanour is a less offensive crime when compared to a criminal violation of Brazilian law. The purpose of using the term ‘misdemeanour’ is to implement the ‘moral police’, which, according to Professor Humberto José da Nova, includes ‘safeguarding morality’ in order to ‘prevent certain illegal and vicious acts, or defend certain moral sentiments regarded as indispensable to harmonious social coexistence, the effects of which are harmful to the interests of the collectivity’.7

Contrary to this, ‘games of skill’ are those whose results depend on ability of the player, more than on luck. These are legal.

‘Lotteries’ are defined by Article 51 of the Misdemeanour Law as the operation of payment of prizes depending on the result of the draw of tickets, lists, coupons, vouchers, signs, symbols or similar means.

Article 51 of the Law prohibits the operation or promotion of unauthorised lottery games in Brazil, including the distribution of foreign lottery tickets in the country. The Brazilian numbers game Jogo do Bicho (‘the animal game’), which is similar to a lottery, is also prohibited.

Horse race betting is regulated by Law No. 7,291 enacted on 19 December 1984 and its 1988 regulation, Decree No. 96,993.

Finally, contest regulation is subject to federal jurisdiction in Brazil. Therefore, there is equal legal treatment in all of the 26 states and the Federal District. In Brazil, whenever a contest is held to promote the sale of products or to promote brands, it is deemed as a prize promotion, subject to Law No. 5,768, of 20 December 1971 and Decree No. 70,951 of 9 August 1972. The following ordinances also apply:

a. Ordinance MF 422 of 18 July 2013 establishes the cases in which contests are not deemed as exclusively artistic, cultural, sportive or recreational for free prizes or awards distribution purposes.

b. Ordinance MF No. 41 of 19 February 2008 regulates the free distribution of prizes for advertisement purposes, when performed by raffle, gift certificates, contests or similar operations.

The four types of free distribution of prizes to consumers are outlined in more detail below:

a. Raffle: raffling elements are distributed, numbered in series, and those to be awarded are defined based on the results of the extraction of the Federal Lottery or on a combination of numbers from such results.

b. Gift certificates: gift certificates are randomly hidden inside a product or the product’s respective package. The gift certificate will be exchangeable for the prizes in the exchange stations.

c. Contests: contests are based on forecasts, calculations, intelligence testing, games of skill or competitions of any nature.

Similar operation: type conceived from combination of factors suitable to each one of the other types of prize promotion, preserving the original concepts for qualifying competitors and verifying the winners. It may be presented as ‘Similar to Contest’, ‘Similar to Gift Certificate’ and ‘Similar to Raffle’.

Contests for advertising purposes must be authorised by the Ministry of Finance, either by Caixa Econômica Federal (Caixa), Brazil’s largest state-owned public bank that is under the supervision of the Ministry of Finance, or by the Secretariat of Fiscal Monitoring, Energy and Lottery, depending on the company’s activities.

In order to avoid fraud or confusion between cultural contests and prize promotions, the Brazilian Ministry of Treasury has defined some procedures to assess whether a contest is considered to be a prize promotion or not. Ministerial Ordinance No. 422 of 18 July 2013 sets forth the cases in which a contest loses its exclusive artistic, cultural, sportive or recreational aspect and becomes a prize promotion (subject to the applicable rules and previous authorisation):

Article 2. If at least one of the following elements is present, to the extent it sets the aim of commercial promotion, the contest shall not be deemed as exclusively artistic, cultural, recreational or sportive:

I – advertising of the sponsors, of third parties, or of any of their products or services, on the disclosure materials by any channel or means, except for the mere identification of the contest sponsor;

II – trademark, name, product, service, activity or other identification element of the sponsor or of any third party in the material to be produced by the contestant, on the mechanics of the contest, or in the name or advertising of the contest;

III – presence of any element of chance or any payment by the contestants, at any stage of the contest;

IV – mandatory acquisition or use of any good, right or services by the contestants or winners;

V – contestant or winner exposure to products, services or brands of the sponsor or a third party, in any media;

VI – guessing;

VII – promotion of the contest on the sponsor’s third parties’ product packaging;

VIII – mandatory data filling, poll answering or any kind of advertising acceptance;

IX – award that involves the sponsor’s product or service;

X – contest held in social network, permitted only its advertising in that media;

XI – contest held on TV, pursuant paid enrolment; and

XII – linking to events and commemorative dates, as sports championships, Mother’s day, Christmas, Valentine’s day, Father’s day, Children’s day, Anniversary of State, Municipality, or the Federal District and other similar hypotheses.

Contests are equally not deemed as exclusively artistic, cultural, sports or recreational when the registration or participation is:

I – made through phone calls or Short Message Service-SMS offered by a mobile phone operator;

II – subject to the due payment of any product or service offered by the sponsor or a third party; or

III – restricted to the sponsor’s or third party’s clients.

ii Gambling policy

As a rule, gambling has been prohibited in Brazil since 1946, when the last casino permits were cancelled. A number of scholars believe the gambling prohibition in Brazil was a reaction to the industrialisation of the country, because of the need to make free men dedicate their
time to work and not to leisure. This, together with the religious belief that ‘in the sweat of thy face shalt thou eat bread’, caused gambling to be seen as something negative. However, this belief is no longer socially widespread in Brazil.

There is, however, a general perception that gambling activities in Brazil are a cover for money laundering, and that gambling activities are operated by criminal organisations. This derives from the fact that, despite the general prohibition currently in place, bingo halls, slot machines and Jogo do Bicho can be easily accessed in Brazil.

### iii  State control and private enterprise

Poker and other games of skill, as well as social games, can be operated by private entities. These activities do not require any specific licence.

Horse race wagering is restricted to non-profit entities that own the racetracks, duly authorised by the Ministry of Agriculture, Livestock and Food Supply. These entities may appoint agents to facilitate wagering on their behalf, and can also hire private suppliers, which are not subject to licensing or any specific regulation.

Lotteries can only be state-owned. Caixa was granted the control of the federal lottery as result of Decree No. 50,954 of 14 July 1961, which cancelled all lottery licences granted to the private sector.

In addition to Caixa, only the states that had their own lotteries running when Decree-Law No. 204 of 27 February 1967 was enacted are authorised to run their own lotteries. These lotteries are:

- **a** Loteria de Paraíba – Lotep;
- **b** Loteria de Rondonia – Lotoro;
- **c** Loteria de Ceará – Lotece;
- **d** Loteria do Pará – Loterpa;
- **e** Loteria de Rio de Janeiro – Loterj;
- **f** Loteria do Rio Grande do Sul – Lotergs;
- **g** Loteria de São Paulo;
- **h** Loteria Social de Alagoas;
- **i** Servico de Loteria do Estado do Paraná – Serlopar;
- **j** Loteria de Minas Gerais – Loteria Mineira;
- **k** Loteria do Estado do Distrito Federal;
- **l** Loteria do Estado do Mato Grosso do Sul;
- **m** Loteria do Estado do Pernambuco;
- **n** Loteria do Estado do Piauí;
- **o** Loteria do Estado de Goiás; and
- **p** Loteria do Estado do Mato Grosso – Lemat.

Federal and state lottery operators (i.e., Caixa and the state’s equivalent entities) may contract suppliers by means of public procurement. There is not any specific licence requirement for these suppliers. The federal government is in the process of organising the public bid for privatisation of instantaneous lotteries (sweepstakes).

### iv  Territorial issues

Starting in 1993, when bingo and slot machines were legalised, the state lotteries started to develop new gaming products, issuing authorisations for bingo venues, slot machine parlours and even online gaming based on state laws that allowed such activities in the territory of
Brazil

each state. Only in 2007 did the Brazilian Supreme Court definitely rule that states and municipalities could not legislate on gambling. For this purpose, a Binding Decision (Binding Decision No. 2) that has to be followed by lower courts established that: ‘Any state or district law or legislative act that regulates raffles and consortiums, including bingo and lotteries, is unconstitutional.’

In 2009, however, when faced by a claim that the State Lottery of Rio de Janeiro’s expansion towards keno-style gaming was unconstitutional,8 one judge from the same Supreme Court declared that state lottery regulations enacted before Binding Decision No. 2 of 6 June 2007 are valid.

v Offshore gambling

A legal loophole currently allows offshore operators to offer their gambling products to Brazilian citizens. One of the general rules about contracts in the Brazilian Law is that a contract by and between absent parties is deemed executed in the place of the proponent. This is set forth by Article 9, Paragraph 2 of the Law of Introduction to the Brazilian Rules of Law (Decree-Law No. 4,657 of 4 September 1942) and repeated in Article 435 of the Brazilian Civil Code.

As a consequence, if an offshore operator’s website is hosted in another jurisdiction where gambling is authorised, the contract between the Brazilian client and that operator is valid and subject to the operator’s jurisdiction’s law. This has some legal consequences in Brazil regarding consumer protection laws and money evasion, the latter with potential criminal aspects. So far, however, there have not been any attempts by the Brazilian government to bring any action against foreign operators.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

According to the Criminal Contravention Act, games of chance are prohibited in Brazil. Any form of gambling activity that has not been expressly legally authorised may be considered illegal under the scope of the Act and, therefore, anyone carrying out such an activity may be prosecuted. Decree Law No. 50,954 of 14 July 1961 establishes Caixa’s monopoly on lotteries, and Law No. 7,291 of 19 December 1984 and Decree Law No. 96,993 of 17 October 1988 regulate horse race betting.

ii The regulator

The Secretariat of Fiscal Monitoring, Energy and Lottery of the Ministry of Finance is in charge or regulating lottery activities in Brazil. State lotteries must comply with the gaming standards set forth by the Secretariat, and may not create new gaming products.

The Ministry of Agriculture, Livestock and Food Supply is the entity responsible for the regulation of horse racing.

Poker, recognised as a sport by the Ministry of Sports, is not regulated. Neither are social games nor any other kind of games of skill.

The free distribution of prizes is regulated by the Ministry of Finance and is subject to previous authorisation by Caixa or by the Secretariat, depending on the operator.

iii Remote and land-based gambling
There is not any distinction between online gambling and bricks-and-mortar gambling for horse racing, provided that the general wagering plan expressly states the possibility of both. For the lotteries, Caixa does not allow their points of sale to accept remote bets.

iv Land-based gambling
Land-based gambling in Brazil is restricted. Caixa has licensed over 13,000 lottery points of sale that are privately operated with permission (small venues that also operate as bank assistants, accepting payments of general services bills). Jockey clubs have their own agencies and agents (around 200), that are authorised to accept wagers on local and international races. Poker has become very popular in Brazil and there are many poker clubs open in the largest cities.

v Remote gambling
Brazil’s federal legislation does not contain any provision related to online gambling, specifically. Horse racing entities already offer bets online in Brazil and Caixa only offers online betting for their account holders. The majority of the remote gambling activities in Brazil involve offshore operators, mainly sports betting and bingo.

III THE LICENSING PROCESS

i Application and renewal
The application for a horse racing gambling licence should be made before the Ministry of Agriculture. The applicant must be a non-profit entity legally incorporated in Brazil, in ownership of a racetrack, and also needs to demonstrate the technical and economic viability of the weekly racing schedule and the floor plan of the race field. That entity must present the draft of a general betting plan (which includes the rules applicable for each game to be run by the operator, such as prize, ticket value, minimum and maximum betting amounts, and payout).

Horse racing entities must also apply for their agents’ licences before the Ministry of Agriculture, Livestock and Food Supply. This application must be made by the authorised horse race entity, which must be entirely responsible for any and all acts of the agent. The agent licence is granted to the agent (person or company) to facilitate wagering only at the specified venue. Horse racing personnel and suppliers do not need to apply for licences and are not regulated.

Both authorisations, for the horse racing entities and their agents, are valid without any time limitation. Revocation may occur when there is a non-observance of rules and procedures after the due administrative process.
ii Sanctions for non-compliance

Article 22 of Law No. 7,291 of 19 December 1984 and Articles 91–97 of Decree-Law No. 96,993 of 17 October 1988 define the penalties applicable to horse race betting operators in breach of those regulations:

a penalty;
b fine; and
c revocation of licence.

Article 50 of the Misdemeanour Law establishes that the operation of games of chance in a public place or in a place available to the public is subject to imprisonment, from three months up to one year, and a fine. In addition, introducing foreign lotteries in Brazil with the objective of sale, results in a penalty of a prison term of between four months and one year, and a fine (Article 52).

Taking part as a player in illegal gambling may result in a fine. As Article 50 of the Misdemeanour Law has been recently amended by Law No. 13,155 of 4 August 2015, it is now the case that players and affiliates involved with online or offline illegal gambling are subject to a fine ranging between 2,000 reais and 200,000 reais.

The penalty for advertising unlicensed lotteries is a fine. According to Article 50 of the Advertising Self-Regulation Code of the National Council for Advertising Self-Regulation (CONAR), any advertising that ‘induces to criminal or illegal activities’ is subject to penalties that may include a warning, a recommendation to modify the advertisement and a recommendation to suspend it.

Those who operate international payments to offshore gaming companies without the due reporting to the Brazilian Central Bank (and consequent payment of taxes) may also be held liable for unreported remittance of funds, according to Article 22 of Law No. 7,492 of 16 June 1986, subject to imprisonment from two to six years and a fine, plus the payment of all due taxes.

IV WRONGDOING

The Brazilian Civil Code classifies bets as contracts, therefore only those over 18 years of age are legally allowed to gamble. This is also set forth in the Brazilian Child and Adolescent Protection Statute, which rules that venues where billiards and snooker are played, and venues where bets are made, should not permit children and teenagers to enter.

Although they are not specially aimed at gambling activities, general advertising rules in Brazil that may have an impact on gambling are included in Decree-Law No. 57,690 of 1 February 1966 and Decree-Law No. 4,563 of 31 December 2002, and anti-money laundering rules in Law No. 9,613 of 3 March 1998 and Law No. 12,846 of 1 August 2013.

Article 1 of Law No. 9,613/1998 defines the crimes related to laundering or concealment of assets, rights and valuables as:

Concealment or dissimulation of the nature, origin, location, availability, handling or ownership of assets, rights or valuables directly or indirectly originated from criminal activities.
According to Article 10 of the same law, all companies that pay prizes are obligated to identify their clients and keep records for at least five years. Brazil has been a member of the Financial Action Task Force since 2000. It has also been a member of the Financial Action Task Force of South America since 2000.

Law No. 12,846/2013 is the anti-corruption law in Brazil, which focuses on companies (either Brazilian or foreign) with operations in Brazil. This law created civil and administrative responsibilities, as well as criminal responsibilities, and may be compared to the UK Bribery Act.

V TAXATION

Lotteries are not taxed, since they are owned and operated by the state. Their revenues, however, have pre-established social destinations set forth by law, such as funds for sports, education, health, culture, etc.

Jockey clubs, as non-profit entities, pay the ordinary corporate taxes (with exception to the taxes on income), and the contribution to the Coordination Commission for National Horse Breeding of 1.5 per cent of the adjusted net win (wagers minus prizes for winning bets minus prizes for horsemen).

The gamblers are also taxed. As per Article 676 of Decree Law No. 3,000 of 26 March 1999, all prizes paid for lottery and horse racing winnings are subject to an exclusive withholding income tax of 30 per cent of the prize amount. Poker prizes, on the other hand, are subject to a different income tax withholding. If there is a labour relationship between the winner and the legal entity promoting the event, or if the winner is not resident in Brazil, the income tax to be withheld is 25 per cent. If there is not any employment bond and the winner is resident in Brazil, the withholding tax will be 15 per cent.

VI ADVERTISING AND MARKETING

Article 57 of the Misdemeanour Law expressly rules that publishing, even if indirectly, the operation or results of unauthorised lotteries in newspapers, radio or any other format is a contravention, punishable by a fine. As to other forms of gambling, there is no express reference to advertising restrictions in the criminal law.

Decree-Law No. 57,690 of 1 February 1966 and Decree-Law No. 4,563 of 31 December 2002 regulate advertising in Brazil and, according to the latter, all advertisement in Brazil must comply with the rules set forth by the Standard Rules Executive Council (CENP).9 This council is responsible for regulating the commercial relations between advertisers and agencies, while CONAR is responsible for ensuring ethics in advertising content.

Both CENP and CONAR are non-governmental organisations formed by members of the advertising industry to define their own statutes and codes. CONAR’s Self-Regulation Code also includes a general rule that advertisements should not contain anything that ‘induces criminal or illegal activities’ (Article 21).

Based on this general rule, many gaming and poker companies have faced difficulties trying to advertise in Brazil. In 2009, CONAR prohibited Full Tilt Poker from advertising.

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on the Discovery Channel. That decision was based on the assumption that poker was a game of chance, illegal in Brazil. After deliberation, CONAR decided that poker is a game of skill, and allowed its advertising. In that same year, CONAR also prohibited Sportingbet from advertising in Brazil. This prohibition was upheld by the Brazilian courts after it was challenged by Sportingbet.

As a rule, there has not been any restriction for advertising social gaming websites (the ‘.nets’), since their activity is legal in Brazil.

VII THE YEAR IN REVIEW

As far as the regulation of gaming in Brazil is concerned, 2015 was probably the busiest year for over a decade, since the shutdown of the industry in 2004. 2016, on the other hand, was a great disappointment.

After five months of lengthy discussions, Law No. 13,155 was approved on 4 August 2015 by Congress, authorising the operation of fixed-odds sports betting (run by Caixa) by licensed horse racing entities and by licensed private companies.

The former President, Dilma Rousseff, however, vetoed the articles of the aforementioned law that authorised sports betting, arguing that ‘the creation of this fixed-odds lottery would require a more comprehensive regulation in order to ensure legal and economic security, appropriate levels of fraud prevention and tax evasion control. Furthermore, the law did not provide any mechanism to prevent negative social impact.’

Despite the veto, and mainly because of Brazil’s pressing need to find additional sources of revenue for the government, the President held a meeting with a number of Congress leaders on 14 September 2015 in order to assess if, from a political standpoint, gaming regulation could be reconsidered and made viable. This meeting was widely published in the media and the result was surprisingly positive.

As a result, the government communicated its openness to regulate the gaming industry to Congress, which started working on the basis of pre-existing bills of law on the matter.

On 30 September 2015, the President of the Senate, Renan Calheiros, included Bill of Law 186/2014,10 drafted by Senator Ciro Nogueira, among the topics discussed by the Special Commission for National Development (CEDN), which led to a fast-track procedure to obtain approval for strategic bills, which are needed for the overall improvement of the economy (the ‘Agenda Brazil’).

On 28 October 2015, the Chamber of Deputies created another Special Commission to draft the Brazilian Gaming Regulatory Framework. Since then, the Commission has been holding weekly meetings and hearings.

On 9 December 2015, the CEDN Commission approved the substitutive bill of law presented by Senator Blairo Maggi and on 10 March 2016 the Bill of Law received five new amendments, which means it can be voted on in the Senate.

After extensive discussion, on 30 August 2016, the Commission of the Deputies approved the report on the new draft of Bill 442/1991, which was sent to the Chamber of Deputies’ plenary to be scheduled for vote. Also, in August, Bill of Law 186/2014 was returned to the Senate and its draft was replaced by a new version, presented by Senator Fernando Bezerra, its new rapporteur.

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Senator Fernando Bezerra presented several versions of the draft, the latest on 4 November 2016. On 9 November, the Commission of the Senate finally approved Bill of Law 186/14, and on 14 December a request from Senator Magno Malta was approved.

On 13 December 2016, several experts were invited to speak at the General Commission of the Chamber of Deputies about gaming regulation.

Bill of Law 186/2014 was rejected by the Justice and Constitution Commission on 7 March 2018 by a vast majority of 13 against it and only two senators in favour (the rapporteur and Senator Ivo Cassol). With such a defeat, the Bill is unlikely to be presented at the plenary for vote. In this sense, the President of the Senate has already spoken that he will not schedule the Bill for vote this year.

In the state of Rio Grande do Sul, in the south of Brazil, a court decision has stated that gambling is not prohibited in that state because the prohibition set out in Article 50 of the Misdemeanor Act of 1941 would be unconstitutional. The public attorney has appealed that decision and now the case is pending judgment by the Federal Supreme Court, where it has been granted ‘general repercussion’ effects, which means that the decision of this case will be binding to all other similar cases in the country.

Until the judgment is released, the effects of the prior decision from the Rio Grande do Sul court remain in force. As a result, many bingo halls are opening in the state, without any regulation. This lack of regulation may result in political pressure on the state, but depending on how the operators behave, it may create the opposite effect.

Once a bill of law is approved in the floor of one of the houses, it will have to be approved by the other house. If amended, it will need approval by the house of origin before being subject to the President's sanction. We do not expect this process to be completed until the end of 2018. This delay is a consequence of the unprecedented political crisis that has arisen from the corruption scandals involving several important politicians, including the former and the current presidents. The current President, Michel Temer, was trying to push the social security, labour and tax reforms for legislative approval in 2017 and the gaming bill was supposed to be voted only after that. Now, because of the presidential and congress elections in the second semester of 2018, it is very unlikely that regulation will be approved this year. There is room, however, for casinos and sports betting regulations. The first is part of the tourism regulation, which is currently under discussion, and the latter as a Bill of Law from the government in the second semester, once the LOTEX tender is over.

VIII OUTLOOK
Lotex, an instant lottery, was created by Law No. 13,155 of 4 August 2015, and Law No. 13,262 of 22 March 2016 redefined the object of Lotex to include events of great popular appeal, commemorative dates, cultural references, licensing of brands or characters, and other graphic and visual elements in order to increase its commercial appeal. This change was significant and represents a major advance for instant lotteries in Brazil.

In Brazil, an instant lottery is limited to the so-called ‘scratch card’ sector. However, instant lotteries encompass various types of games and bets that are common in other countries, but non-existent in Brazil. The aim of the government is to encourage these other modalities that are still unexplored, in order to further increase the profitability of this economic activity.

11 Extraordinary Appeal 966.177 RG/RS.
The first step for the privatisation of Lotex was the issuance of Law No. 13,262 of 22 March 2016, which authorised Caixa Econômica Federal to set up Caixa Instantânea S/A, a wholly owned subsidiary, to manage and operate Lotex throughout the country.

The Secretariat for Economic Monitoring of the Ministry of Finance believes that the concession will expand competition, as well as modernise and improve the lottery market in Brazil. Turnover from ticket sales would be split into three: (1) 65 per cent for payout; (2) 18.3 per cent for the concessionaire; and (3) 16.7 per cent for the federal government.

The concession term will be for 15 years and the minimum bid for the right to operate LOTEX will be 542.215 million reais. The contract total value is estimated as approximately 14.43 billion reais.

The privatisation project has been monitored by the Federal Audit Court (TCU). In the first phase of the process, the TCU approved the economic and financial model under Award 514/2018, dated 14 March 2018. The next phase shall commence after the invitation to bid is made public.

A draft of the invitation to bid was submitted to public evaluation between September and October 2017. The definitive version of the invitation to bid was published on 4 April 2018.

The tender of LOTEX will be an auction, being the winner determined by the highest bid, which shall be paid to the Ministry of Finance.

As per the invitation to bid, the participation in the auction is open to Brazilian or foreign legal entities, solely or jointly in consortiums, collective investment entities and investment funds. It is strictly forbidden that any legal entity (and its related or affiliated companies, companies under its control and companies under common control) to be a member of more than one consortium.

The bidders will be required to submit the tender guarantee, the qualification documents and the bid proposal (in written form) on a certain date, which will be set in the invitation to tender. All documents must be submitted by an accredited agent that has a power of attorney to represent the bidder. One must also note that the bidder shall submit two copies of each document, as well as three flash drives containing each document.

As concerns the tender guarantee, it can be granted in cash, Brazilian government bonds, performance bonds or bank guarantees. In the event that the bidder is a consortium, the required tender guarantee value is increased by 30 per cent.

The written offers for the bid will be disclosed during a public hearing, which shall take place on 14 June 2018 at 10am. The ranking of the bidders shall be published online on the same day and the result will be published on 17 August 2018.
Chapter 8

BULGARIA

Nadya Hambach

I OVERVIEW

i Definitions

The primary gambling legislation in Bulgaria is the Gambling Act, which came into force on 1 July 2012.

The Gambling Act distinguishes between several types of games: lottery games, sports betting and betting on horse and dog races, betting on guessing of facts, betting on random events, games on gaming machines, and casino games.

Lottery games are gambling games in which the player participates by means of, inter alia, tickets, slips or tokens. The winning is subject to a particular number, combination of numbers, sign or figure being identified or guessed correctly.

The Gambling Act distinguishes several types of lottery games:

a traditional – a lottery game where all issued tickets with consecutive serial numbers are run. It is organised at certain intervals of time;

b raffles – a lottery game, which is run only with tickets sold. It is organised as a one-off, or at certain intervals of time;

c lottery game with numbers – a lottery game where a bet is made on a particular number, combination of numbers, sign, figure, etc. It is organised at certain intervals of time. The types of lottery games with numbers are: totto, lotto, bingo, keno and their varieties; and

d instant lottery – a lottery game that is run by tokens with consecutive serial numbers on which numbers, combinations of numbers, signs, figures, and other symbols are reflected, written down by type, order and sequence under protection cover. It is organised as a one-off.

Sports betting and betting on horse and dog races are games in which the winnings depend only on the correct guessing of the outcomes.

Betting on guessing of facts is betting in which the winning depends entirely on guessing correctly or giving a true answer in relation to an existing fact.

Betting on random events includes gambling games not otherwise regulated in the Gambling Act, in which the winning exclusively depends on the chance of occurrence of an event.

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Games with gambling machines are games organised in specifically and individually licensed gambling arcades. ‘Gambling machine’ is defined in the Gambling Act as a device in which a bet is made by coin, banknote, token, push-button, magnetic card, or by any other means, where the winning is determined by a random number generator.

Casino games are games on the roulette wheel, card games, including poker, dice games and their varieties.

The Gambling Act does not have a dedicated regulation for fantasy sports. The general definition of gambling applies to them: ‘any game of chance where a bet is made and there may be either chance determined winning or a loss of the bet’.

Games that are not considered to be gambling are entertainment and sports games in which demonstration of knowledge and skills are required and that are not based prevalingly on chance. If a fee is paid for the purpose of accumulation of a prize fund for these games, the latter shall be fully distributed among the players. There is a general prohibition for such games to be organised online or remotely.

Amusement gaming machines are not subject to a gambling regulation. The Gambling Act defines them as technical devices used for recreation, amusement, demonstration of knowledge and skills, and ones with cognitive purpose. They may award a prize in the form of an additional game, or an in-kind prize of insignificant value (equivalent of €10).

Financial spread betting, foreign exchange trading and binary options are regulated by the Financial Instruments Market Act and monitored by the Financial Supervision Commission. Some forms of spread betting may also qualify as sports betting or betting on random events under the Gambling Act.

The Gambling Act requires that the payout ratio for gambling machines should be at least 80 per cent of the total amount of the bets being made (the same applies to the software of the slot machines, when gambling is organised online). The payout ratio for bingo or keno, totto or lotto, raffles, betting on random events, betting on guessing of facts and instant lotteries should be at least 50 per cent of the total value of the tickets, receipts or bets purchased or made.

ii Gambling policy

Generally, gambling in the ex-communist countries was either prohibited or extremely restricted for a very long time. In Bulgaria, until the communist regime ended in 1989, there were several casinos operating almost exclusively for foreign tourists. Therefore, the potential of the sector boomed immediately in the first years of democracy. The gambling industry developed so rapidly in Bulgaria that it initiated a regulation (with the Ordinance from 1993) to ensure stable long-term development.

Bulgarian lawmakers considered that gambling is a sensitive business activity, but at the same time, one that is in demand by society. They decided the only efficient way to differentiate legal from illegal operations and effectively protect the consumers was to impose strict rules that would make the business environment suitable for development of a competitive and well-controlled gambling market.

The first Gambling Act came into force on 30 November 1999, and regulated, among others: types of gambling, the licensing regime, and requirements and restrictions. It was a strong and balanced regulatory framework for the further development of the industry, and remained as such until new technology trends meant that appropriate updates to the legislation were required.
The introduction of remote gambling regulation was not a smooth process. The new Gambling Act was drafted and discussed for more than four years before it finally came into force on 1 July 2012.

iii  **State control and private enterprise**

Bulgaria’s regulations are some of the few in Europe that do not legally assure state monopoly for certain gambling games.

Any private operator that fulfils the requirements provided by the law is able to apply for a licence to conduct gambling activities in Bulgaria. There is no limitation on the number of licences and no requirements in the Gambling Act or the secondary legislation that could be considered as leading to an oligopoly or monopoly of the market.

iv  **Territorial issues**

Gambling in Bulgaria is regulated on a national level and controlled by the State Commission on Gambling based in Sofia.

v  **Offshore gambling**

The only companies eligible to apply for a gambling licence in Bulgaria are companies established in countries within the EU, EEA or Switzerland.

There is an explicit prohibition on applicants whose capital owners are non-commercial legal entities or legal entities registered in an offshore zone.

The above requirement should be carefully interpreted together with the provisions of the Act on economic and financial relations with companies, registered in jurisdictions with preferential tax regime, related to those persons and their real owners (in force since 1 January 2014), which restricts offshore companies or persons related to them from participating directly or indirectly in licensing procedures in Bulgaria, and this restriction affects gambling as well. The Ministry of Finance publishes a list of jurisdictions considered to be offshore jurisdictions.

Based on the above, offshore companies cannot be granted a gambling licence, and are therefore considered to be illegal gambling operators and subject to administrative and criminal sanctions.

Administrative sanctions apply for operators performing gambling activities in Bulgaria without a licence, whereas a fine of up to the equivalent of €2.5 million could be imposed. Illegal gambling operations are explicitly regulated as a criminal offence in the Criminal Code sanctioned with imprisonment of up to eight years and a fine.

As an additional control tool, the Gambling Act also introduces blacklisting and blocking by internet service providers (ISPs). ISPs are bound to ban access to the blacklisted websites under the administrative sanction in the Gambling Act.

II  **LEGAL AND REGULATORY FRAMEWORK**

i  **Legislation and jurisprudence**

The primary gambling legislation in Bulgaria is the Gambling Act, which has been in force since 1 July 2012 and has been amended several times since its adoption. The amendments reflect policymakers’ aims to reduce the administrative burden and make the licensing process even more feasible.
The secondary legislation includes, but is not limited to, the following acts:

a. Regulation N 1 for identification and registration of players, saving data on organising remote gaming in Bulgaria and submitting information for the games to the servers of the National Revenue Agency;

b. a regulation for the documents necessary to obtain a gambling licence;

c. a regulation for approving testing labs to perform testing and certification of gambling equipment and gambling software, and the rules for performing such testing and certification;

d. a regulation for making and maintaining electronic registry by the State Commission on Gambling;

e. a tariff for the fees due in the licensing procedure for a gambling licence;

f. general game rules for lottery games;

g. general game rules for sports betting;

h. general game rules for casino games;

i. general game rules on betting on random events;

j. general rules for organising games with gambling machines;

k. general technical requirements to the control systems of gambling games and gambling equipment;

l. general technical and functional requirements to gaming software communication equipment of remote gambling games; and

m. general rules for performing financial control when organising casino games and games with gambling machines.

ii. The regulator

The State Commission on Gambling within the Ministry of Finance issues, refuses to issue, terminates and revokes gambling operational and manufacturing licences; adopts general mandatory rules for the different types of gambling games and locations; issues guidelines for the implementation of the Gambling Act; and imposes sanctions on illegal gambling activities.

iii. Remote and land-based gambling

The current Gambling Act regulates, for the first time, both online and remote gambling.

Online gambling is defined by the law as a way of organising a gambling game where players bet directly via the internet or another electronic means of communication, and the communication between the player and the gambling operator is conducted directly and electronically.

All types of gambling games, with the exceptions of raffles and instant lotteries, could be organised online, upon obtaining a valid licence from the State Commission on Gambling.

iv. Land-based gambling

Land-based gambling activities are allowed upon obtaining a licence for the gambling location. Land-based gambling locations are gambling arcades, casinos, bingo arcades and betting shops. They must meet particular requirements on premises, safety-related requirements and prohibition of giving players loans, etc., in order to play.
There is a limitation on the minimum number of gambling machines to be in operation in a gambling arcade, depending on the number of inhabitants in the town or village in question. For instance, in a town with more than 500,000 inhabitants the number of gambling machines in operation could not be below 50.

v Remote gambling
Bulgaria requires a separate licence for legal remote gambling operations in the country and does not recognise licences issued abroad.

To obtain an online gambling licence in Bulgaria, the applicant should have its main server in the territory of Bulgaria, in the territory of another EU or EEA Member State, or in Switzerland. If the main server is not in Bulgaria, a local control mirror server should be placed in Bulgaria. Additionally, a bank account for the depositing of bets and paying out winnings should be opened with a bank licensed in Bulgaria. A very important requirement is the establishment of a real-time connection between the main or local control server of the operator and the servers of the State Commission on Gambling or the National Revenue Agency. The applicant must operate with software and a gambling system that have had preliminary tests and been certified from an approved testing lab in accordance with the requirements of the Gambling Act.

vi Ancillary matters
Manufacturing, distribution and maintenance of gambling equipment are activities subject to licensing in accordance with the requirements of the Gambling Act.

Gambling operations could be performed only with gambling equipment and software that have been preliminarily certified and approved, and that are manufactured by a gambling equipment manufacturer or software provider licensed under the Gambling Act.

Personal licences for individuals holding specific positions within a gambling operator are not required.

III THE LICENSING PROCESS

i Application and renewal

Licensing requirements
The State Commission on Gambling is the governmental and administrative authority responsible for proving the eligibility of applicants for a gambling licence and issuing gambling licences. A separate gambling licence is required for organising different types of games.

To be eligible to apply for a licence, the applicant should meet the following criteria:

a be a Bulgarian legal entity or a legal entity registered in an EU or EEA Member State, or in Switzerland. The Gambling Act stipulates that when the applicant holds a valid licence, issued by a competent authority in another EU or EEA Member State, or Switzerland, common regulatory requirements should not be proved again during the examination of the application by the State Commission on Gambling. In this case, the State Commission on Gambling shall act in compliance with the mutual cooperation and exchange of information agreement signed with the relevant state gambling
authority. If there is no such agreement for evidencing those common requirements, the applicant shall provide a certificate, issued by the competent state gambling authority, that has issued its licence;

\( b \) make an investment in Bulgaria or in another EU or EEA Member State, or in Switzerland, of a value between the equivalent of €50,000 and €500,000, in accordance with the type of gambling to be organised, and shall be in a possession of financial funds for operational costs at an amount that varies between the equivalent of €100,000 and €500,000, in accordance with the type of gambling to be organised;

\( c \) do not have as beneficial capital owners (possessing more than 33 per cent of their capital), managers or members of a managing body who have been criminally convicted (unless rehabilitated); have not been declared insolvent in the past three years and unsatisfied creditors remain; have not committed a crime against financial, tax and social security systems or have unpaid public duties at the amount of more than equivalent of €2,500; have not been previously deprived from obtaining a licence, sanctioned for illegal gambling operations; or have not participated in a legal entity whose gambling licence has been revoked in Bulgaria, in another EU or EEA Member State, or in Switzerland; and

\( d \) do not have as capital owners non-commercial legal entities or legal entities registered in an offshore zone.

An additional requirement for applicants for an online gambling licence is a lack of administrative enforcement measures for a period of five years prior to the date of filing the licence application.

If the applicant for an online gambling licence does not have a local establishment, the latter should have an authorised representative in Bulgaria to sign contracts and documents on its behalf and represent it before the courts and authorities in Bulgaria.

The Gambling Act has a special provision regarding the ‘participation of foreign persons’ (legal entities not registered or natural persons who are not residents of an EU or EEA Member State, or Switzerland) in the legal entity that is making the application. For such entities, a much higher investment threshold is applicable.

**Licence validity**

Subject to the Gambling Act, the standard licence validity is five years (or shorter if the applicant explicitly requests). The licence may be extended an unlimited number of times upon proving compliance with the valid requirements.

The Gambling Act allows that the initial licence can be granted for a period of 10 years. The only difference in the requirements is that the investments made must be double the amount that they would be if the licence was valid for five years.

**Licence fees**

The tariff for the fees due in the licensing procedure for a gambling licence stipulates the applicable licensing fees, dividing them into two parts – the examination of the application documents (which varies from the equivalent of €1,000 and around the equivalent of €19,000 depending on the type of games to be organised), and the granting of the licence (which varies from the equivalent of €2,500 and around the equivalent of €19,000, depending on the type of games to be organised, for offline gambling, and the equivalent of €50,000 for online gambling). Upon the expiration of a six-month period after the decision of the State
Commission on Gambling for granting a licence is voted, the applicant should submit a proof for making the required investments. In relation to this, there is a third fee due – for examining the related documents and approving the investments (the equivalent of €1,000).

No annual maintenance fees are due during the licence validation.

**Duration of licensing procedure**

The State Commission on Gambling generally examines the licence application and its accompanying documents within 60 days. In case of factual or legal complexity, the State Commission on Gambling may prolong the examination period by an additional 30 days.

**ii Sanctions for non-compliance**

**Administrative sanctions**

For organising gambling games or performing any activity regulated by the Gambling Act without a licence, administrative sanctions shall be imposed of up to the equivalent of €1 million for organising online gambling games, and up to the equivalent of €100,000 for organising offline gambling games.

If a legal entity engages in any of the activities of manufacturing, import, distribution or servicing of gambling equipment without a licence, an administrative sanction of up to the equivalent of €100,000 may be imposed.

In addition, if the revenues from illegal gambling activity exceed the equivalent of €2.5 million, the sanctions imposed could reach €2.5 million.

In the event of a repeated violation, the above-mentioned sanctions may be doubled.

Article 93 of the Gambling Act stipulates that ‘any gaming and communication equipment used for the organisation of gambling games without a licence shall be confiscated, regardless of the fact whose property it is.’ Any received funds are also subject to confiscation.

Persons or legal entities that install or use gambling equipment, accept bets, effect payouts of winnings, or otherwise assist or intermediate in the actual performance of the illegal gambling, are subject to administrative sanction with a fine of up to the equivalent of €7,500.

The administrative sanction for ISPs that do not block internet access to blacklisted operators is a fine ranging from the equivalent of €5,000 to €30,000.

Legal entities that publish, broadcast or disseminate advertisements of gambling games in violation of the advertisement rules prescribed by the Gambling Act are subject to a fine of up to the equivalent of €15,000. Where the violation is committed repeatedly, the penalty shall be equivalent to double the statutory amount.

Licensed operators that break the rules are subject to various administrative sanctions and measures, including temporary or permanent revocation of the licence.

**Criminal penalties**

Illegal gambling operations are explicitly regulated as a criminal offence in the Criminal Code (Article 327, Paragraph 1), sanctioned with imprisonment of up to six years and a fine. In very dangerous cases, the penalty could be imprisonment of up to eight years and a fine.

A player who gambles in illegal gambling operations is subject to a penalty sanction of imprisonment for up to one year.
IV  WRONGDOING

Policymakers focus on gambling as a sensitive business activity to ensure prevention of money laundering, organised crime connected to gambling activities and match fixing.

The general provisions of the Bulgarian Anti-money Laundering Act apply to gambling activities. These are: (1) identification of clients or their beneficial owners; (2) data collection; and (3) ongoing control and disclosure of information regarding suspicious operations, transactions and clients. Further, verification and identification of players must be made by making entries in the relevant registries, as well as in cases where a transaction or operation exceeding the amount of €3,000 is being made. Persons conducting operations or transactions with gambling operators are obliged to declare their money’s origin if the amount exceeds €15,000, or €5,000 if the payment is made in cash. Operators are obliged to implement adequate internal policies and know-your-customer procedures.

V  TAXATION

Together with regulating remote gambling operations for the first time, Bulgarian policymakers have prescribed a tax rate of 15 per cent on the turnover. This initial tax in fact closed the market, even though the regulation was meant to liberalise it. Upon further public consultations, as of 1 January 2014, the taxation model for online gambling changed, and for the time being it is 20 per cent of the gross gaming revenue.

For offline gambling, taxes are as follows:

a  15 per cent tax on the stakes for offline number games – totto and lotto, lotteries, sports betting and betting on dog and horse racing, betting on random events and guessing of facts;

b  20 per cent tax of the amount of the received fees and commissions for games for which such are collected; and

c  a flat tax rate is calculated per quarter for offline casinos and gaming halls – for gaming machines, the equivalent of €250; for a gaming seat for a roulette table, the equivalent of €11,000; and for other games, the equivalent of €2,500.

The above tax is an alternative to the corporate tax, meaning that corporate tax is not additionally due.

Gambling operators are obliged to pay additional annual contributions for responsible gambling projects as follows: online operators, the equivalent of €25,000 per year; casino operators, the equivalent of €5,000 per year; and all other gambling operators, the equivalent of €2,500 per year.

Players are not obliged to pay income tax on their winnings.

VI  ADVERTISING AND MARKETING

Gambling advertising is, in general, legal for licensed operations.

It is nevertheless restricted to names of games, the operator’s registered trademark, game results and winnings, and conducted draws. Licensed operators are allowed to sponsor in support of sports, culture, healthcare, education and social welfare.

The Gambling Act prescribes penalties for breaching the advertising rules, both for the legal entities that publish, broadcast or disseminate advertisements of gambling games in violation of the advertisement rules prescribed by the Gambling Act, and the operators.
VII  THE YEAR IN REVIEW

Bulgarian gambling legislation has set some very important prerequisites to open, transparent and reliable business environments. There is no limitation on the number of licences that can be issued. There are no discriminatory requirements that would create unsurmountable hurdles for EU or EEA operators, and there is no need for an operator to establish a local company or move its whole infrastructure to Bulgaria in order to get a licence there. The licensing procedure is transparent and feasible.

The number of online licences issued as at 31 December 2017 is 25, and these have been to both local and foreign operators. As at 31 December 2017, the number of casinos in Bulgaria is 26 and the number of gaming arcades is 847.2

VIII  OUTLOOK

There are no developments in gambling law that are being publicly discussed as likely to happen in 2018.

The Gambling Act is generally compatible with the EU laws (in particular, Article 49 of the TFEU) and meets the sensitive proportionality test that the Court of Justice of the European Union applies in gambling cases because of the specific character of the gambling business and the need to protect public order and public values. It has been notified to the European Commission in accordance with Directive 98/34/EC before final voting and has been amended with respect to the comments provided by the European Commission and some Member States.

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2 Data extracted from the annual industry country report for 2017 made by the Bulgarian Trade Association of the manufacturers and operators in the gambling industry.
Chapter 9

CZECH REPUBLIC

Vojtěch Chloupek

I OVERVIEW

i Definitions

Under Czech law, gambling is generally defined as a game of chance, betting or a lottery in which a participant wagers a bet while no return of such bet is guaranteed, and the win or loss is entirely or partly subject to chance or unknown circumstance. This definition derives from Section 3 of the Act No. 186/2016 on gambling (the Gambling Act).

The Gambling Act explicitly differentiates seven ‘types of gambling’ described below. Any game that fulfils the general definition but does not meet the requirements of one of the below listed types of gambling is prohibited. Therefore, operators need to make sure that their games either fall into one of these seven categories or do not satisfy the general definition (e.g. no bet involved or a skill-based game); otherwise they could be risking non-compliance.

<table>
<thead>
<tr>
<th>Type of gambling</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lottery</td>
<td>A numerical lottery, cash prize lottery, in-kind prize lottery or instant lottery.</td>
</tr>
<tr>
<td>Odds betting</td>
<td>A game where a win is subject to guessing of a betting event (in particular a sport result or event of public attention). The prize is determined based on the winning probability (odds).</td>
</tr>
<tr>
<td>Totalisator game</td>
<td>Same as odds betting but the prize depends on the number of winners because the total amount of wagered bets is distributed among all who correctly guessed the betting event according to a predetermined payout percentage.</td>
</tr>
<tr>
<td>Bingo</td>
<td>A game in which a win is subject to achieving the full predetermined pattern of numbers on the betting ticket. Such pattern on the ticket is marked off by the better based on the randomly drawn numbers that are called out in succession, while neither the number of the betters nor the payouts are determined in advance.</td>
</tr>
<tr>
<td>Technical game</td>
<td>A game operated through a technical device directly handled by the player (including, without limitation, reel slot machines, electromechanical roulettes and electromechanical dice).</td>
</tr>
<tr>
<td>Live game</td>
<td>A game in which the players play against the house or one another at the live game tables, while the number of betters and bets at one spin (round of betting) are not determined in advance.</td>
</tr>
<tr>
<td>Raffle</td>
<td>A game where wins are determined based on a draw that includes only the betting tickets that have been sold.</td>
</tr>
<tr>
<td>Small-size tournament</td>
<td>A knockout type of a card game tournament, in which the number of the game participants has been agreed in advance and the total deposits by one gambling participant wagered in one tournament do not exceed 500 koruna per 24 hours.</td>
</tr>
</tbody>
</table>

Because the above list of allowed types of gambling is exhaustive, questions arise (and will inevitably arise in future) with respect to certain games such as fantasy leagues, pool betting, spread betting, skill competitions (e-sports) and free prize draws. We give our brief view on these below, although there is no official or definitive guidance on these yet.

1 Vojtěch Chloupek is a partner at Bird & Bird sro advokátní kancelář.
A free prize draw is quite similar to what Czech law traditionally considers to be ‘consumer lottery’ or a ‘consumer game’. As such and subject to other further conditions deriving from consumer protection laws, these types of games will be permissible. Some forms of consumer lotteries were heavily restricted and even prohibited before the adoption of the Gambling Act.\(^2\) The Gambling Act itself does not limit consumer lotteries from being hosted as they are deemed to be a business practice (Directive 2005/29/EC) and not within the scope of the Gambling Act (i.e., they are not a type of gambling).

Pool betting (pari-mutuel betting) is essentially the same as totalisator games as defined under the Gambling Act and, therefore, is allowed.

Spread betting is not currently being offered by any one of the major licensed Czech gambling operators. In theory, such a game could be operated under the definition of a live game, but this, along with the game’s rules, would have to be discussed with the licensing authority, which is the Ministry of Finance (the Ministry).

Fantasy league is not specifically regulated by the Gambling Act as a separate type of gambling, but its operation should be allowed under the Gambling Act as long as its rules meet the criteria of a live game or a technical game.

Skill competitions, such as e-sports, are hard to pinpoint from a regulatory standpoint, since the term is wide ranging. Mere betting on an outcome of an e-sports match (or any other skill competition) is allowed, but would require an odds betting licence. However, a game, where one might bet on one’s own performance (pay participation fee) and where a win or prize is paid out at the end based on the participant’s results, might fall under the category of a live game as defined by the Gambling Act and, therefore, could require a gambling licence in order to be operated in compliance with the Gambling Act. The amount of luck or unknown circumstance in such a game is crucial when assessing whether or not a skill game requires a gambling licence.

Hedging financial products (e.g., insurance) and gambling have a lot in common, since the outcome in both is dependent on luck or an unknown event. According to the Czech Civil Code, both fall under the category of aleatory (risky) contracts. The Civil Code further makes hedging financial contracts enforceable, unlike obligations from bets concluded between individuals (natural persons), which are not enforceable under the Civil Code. Note that bets made between a licensed gambling operator and individuals (consumers) are enforceable.

### ii Gambling policy

Gambling is generally allowed under the Gambling Act with the number of licences not being limited. Each applicant for a gambling licence is entitled to obtain it, provided that the regulatory requirements are met. However, on a local level, individual municipalities may decide to restrict gambling within their city limits. Municipalities are only able to restrict land-based operations of technical games, live games, bingo and small-size tournaments. Municipalities have no influence on the operation of online gambling.

### iii State control and private enterprise

The gambling market is open to anyone who meets the Gambling Act’s requirements. The Czech Republic neither owns nor operates any form of gambling.

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\(^2\) See Section 1 of Act No. 202/1990 on Lotteries and Other Like Games.
The only exception is the ‘receipt lottery’, launched on 1 October 2017. This is not, however, a real ‘lottery’ according to the Gambling Act, since the participation in it is free of charge and open to anyone who submits a tax receipt obtained while purchasing goods or services. The intention behind the introduction of the receipt lottery is to increase tax revenues and not to compete with other gambling operators.

iv Territorial issues
Gambling in the Czech Republic is predominantly regulated on a national level with some regional aspects. Generally, each person applying for a gambling licence has to obtain a ‘basic licence’ from the Ministry. For certain types of land-based gambling (technical game, live game and bingo), the applicant needs to obtain an additional licence to ‘place a gambling venue’ from each city in which the gambling venue is planned to operate. Municipalities may decide to ban operation of technical games, live games, bingo and small-size tournaments within their city limits on a non-discriminatory basis. If a certain city bans gambling within its limits, the applicant won’t be able to operate in this city. Nonetheless, the basic licence would still be valid and the gambling operator would have the option to move its venue to another city.

Additionally, small tournaments and raffles (if the prize pool is higher than 100,000 koruna) must be notified to a city in which they are supposed to be hosted, so that the city has the option to prohibit them.

v Offshore gambling
One of the intentions of the Gambling Act was to give the Ministry effective means of stopping offshore gambling operators from offering their services to Czech citizens. The Ministry was granted with the power to place a gambling operator without a Czech licence (e.g., a Maltese licence would not suffice) on a blacklist. Once blacklisted, payment and internet connection providers are obligated to block payments and internet connection to such entities.

The Ministry’s ability to place entities on the blacklist is new, which means that whether it will be effective remains to be seen. To date, the Ministry has already placed 10 web pages on the blacklist; however, most of them seem to be interconnected as the domain names are almost identical. Furthermore, a payment account identifier is listed in six cases only. Apart from the blacklist provisions, most of the illegal gambling operators that used to operate in the Czech Republic prior to the effective date of the Gambling Act have voluntarily decided to withdraw from the Czech market or cease their operation until they obtain a Czech gambling licence.

The blacklist provisions of the Gambling Act may be interpreted rather broadly and even web hosting entities, and potentially other service providers, which enable illegal gambling may be placed on the blacklist.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence
The relevant gambling legislation in the Czech Republic is as follows:
a Act No. 186/2016 on Gambling, which sets out the basis for gambling legislation;
b Act No. 187/2016 on Gambling Tax, specifying the gambling tax obligations of gambling operators (tax rate, tax calculation, tax period, etc.);
Czech Republic

c Act No. 280/2009 the Tax Code, which covers all tax related proceedings (gambling, income, VAT, etc.);
d Act No. 500/2004 on the Administrative Code, specifying the rules for administrative proceedings (e.g., licencing, emplacing on the blacklist);
e Act No. 586/1992 on Income Tax;
f Act No. 40/2009 the Criminal Code (operation of unlicensed gambling constitutes a criminal offence);
g Act No 40/1995 on Regulation of Advertising;
h Act No. 253/2008 the Anti-Money Laundering Act; and
i individual decrees issued by municipalities restricting gambling within their city limits.

ii The regulator

The Ministry is the gambling supervising authority. Some gambling aspects are also supervised by the Czech Customs Administration (Customs) and by the relevant local municipalities.

Customs not only supervises land-based gambling operations but it is also the entity with exclusive powers to impose fines for violations of the Gambling Act with respect to land-based gambling. The Ministry supervises both land-based and online gambling, grants, changes or withdraws basic licences but it is only authorised to impose fines with respect to online gambling violations. Last but not least, municipalities grant, change or withdraw licences for gambling venues.

iii Remote and land-based gambling

The Gambling Act distinguishes between remote and land-based gambling. The most significant difference is that only a one-step licence process is required (basic licence) for operation of online gambling. In addition to the basic licence, land-based gambling operators need to obtain a gambling venue location licence (second step). Some municipalities may decide to exclude gambling within their territory (or its part), which means that the gambling venue location licence cannot be obtained for that particular location. Online gambling may be carried out within the whole territory of the Czech Republic and cannot be restricted on a local level.

The aim of the Gambling Act is, however, to treat both online and land-based gambling equally and, therefore, the differences between the two are insignificant and usually originate from the nature of land-based gambling (e.g., no internet blocking) or online gambling (e.g., no video surveillance requirements).

iv Land-based gambling

The number of land-based gambling venues is not limited by any national or local quota. A municipality may, however, decide to prohibit land-based gambling within its city limits. Such restrictions have to be carried out in a non-discriminatory way. Municipalities are not allowed to choose one specific gambling operator.

With respect to types of gambling venues, there are only two types in the Czech Republic: casinos and gambling rooms (sometimes also referred to as gambling parlours).

The differences between the two are mostly seen in the legally permissible types of gambling offered, number of slot machines and venue opening hours.

Casinos may offer live games, technical games, bingo or a combination of live games with either technical games or bingo, and may be open 24 hours a day. The number of technical game devices (slot machines) is, however, limited. If a casino intends to offer
technical games, then at least 30 slot machines must be operated. For each live game table, a casino may operate an additional 10 slot machines. If 10 live game tables are operated throughout the day, then a casino may operate an unlimited number of slot machines, provided that at least 30 are already in operation. There is a minimal tax associated with the number of slot machines as stated in Section V, below.

Gambling rooms may only offer technical games and must operate at least 15 devices. A gambling room's opening hours are limited to between 10am and 3am. Municipalities may further restrict the opening hours of gambling venues by a decree.

Betting shops (venues offering sports betting or totalisator games) are not considered as gambling venues and, therefore, do not have to meet the same regulatory requirements. Lottery tickets may also be sold without any venue-specific restrictions and, therefore, lottery tickets are normally sold at post offices, tobacco shops, etc. Not even municipalities are empowered to restrict land-based sports betting, totalisator games and sales of lottery tickets within their city limits.

v Remote gambling

Remote (online) gambling is generally allowed and the same regulatory obligations as for land-based gambling apply. Only raffles and small-size tournaments may not be provided online.

Gambling operators need to obtain a basic licence for the operation of online gambling (lotteries, odds betting, totalisator games, technical games, bingo or live games).

Online gambling operators are prohibited from offering or providing any devices (tablets, etc.) to players enabling them to play an online game of chance on such device. If this restriction would not be in place, the secondary licence to place a gambling venue that grants municipalities the power to decide whether or not to allow gambling within their city limits would lose its purpose, since online gambling licences are valid within the whole territory of the Czech Republic.

vi Ancillary matters

Gambling operators are not required to purchase gambling equipment from licensed entities and are free to choose from a variety of national or even foreign suppliers. However, in order to use a gambling device in a gambling venue, the gambling operator has to get the gambling device certified and obtain a professional assessment and approbation of service worthiness for such device. Certifications may be issued only by professional entities appointed by the Ministry. According to the list of appointed professional entities maintained by the Ministry (last updated on 3 March 2018), six entities are able to issue certifications.

Only an EU- or EEA-based legal entity complying with certain statutory requirements (such as organisational requirements, transparency of ownership structure) may apply for a basic gambling licence. Individuals holding a managerial or similar position within a gambling operator do not require any specific personal licence. An applicant for a basic gambling licence must, however, demonstrate to the Ministry that it possesses substantive, personnel and organisational capacity required to carry out its activity. According to the Ministry's guidance note on the basic licence application, an applicant needs to cooperate with at least five individuals who have more than three years of experience with gambling operation and provide the Ministry with excerpts of their CVs.
The Gambling Act requires the gambling operators to equip gambling rooms and casinos with monitoring devices, make a back-up copy of their surveillance footage, and store the original and back-up footage for two years.

III THE LICENSING PROCESS

i Application and renewal

As outlined in Section II.iii, above, the licensing process is different for online and land-based gambling licence applications.

The land-based gambling licensing process has two steps (basic licence and venue location licence), while the online gambling licensing process has only one step (basic licence). The difference between the land-based and online licensing processes is not significant, as it mostly reflects the nature of the type of gambling.

ii Basic licence

A formal application for a basic licence has to be filed with the Ministry. The application has to be submitted with all the necessary documents specified in the Gambling Act. The documents consist of:

a. an excerpt from a commercial or similar register proving that the applicant (1) is a legal entity, (2) is based in an EU or EEA Member State, (3) has established a supervisory body and (4) is not subject to liquidation;

b. a diagram of its organisational structure containing at least a diagram of the statutory and supervisory body including their powers, other group companies and uninterrupted ownership chain showing the applicant’s beneficiary owners;

c. financial statements showing that the applicant’s equity amounts to at least €2 million;

d. proof of transparent and unobjectionable origin of its resources (alternatively the applicant may request that the Ministry verify the origin of resources);

e. proof of substantive, personnel and organisational capacity of the applicant, such as CVs of relevant individuals, information on previous activities of the applicant, etc.;

f. an excerpt from the relevant insolvency register if the applicant is a foreign entity;

g. lists of executive directors, statutory and supervisory board members and beneficial owners of the applicant (and other corporate bodies if applicable) (the management);

h. proof that a ‘surety’ has been provided – according to the Gambling Act, the applicant has to provide a monetary surety either by making a deposit into the Ministry’s account or in the form of a bank guarantee. Surety is required for every type of gambling except for raffles and small-sized tournaments, and is provided in order to cover potential unpaid winnings, unpaid taxes and fines imposed on the operator (basic licence surety). The surety is paid separately for each type of gambling and for each form of gambling (land-based or online). However, only one deposit is required if multiple games falling into the same category are operated. For example, various online games based on a random number generator (RNG), online roulette, online blackjack and online baccarat would all fall into the same category of online technical games, provided the player only plays against the house. Therefore, only one surety of 50 million koruna would be required;

i. proof of debt-free status of the applicant and members of its statutory and supervisory body, its proctors and beneficial owners (a declaration from the Czech tax and customs
authorities and from Czech national social security and healthcare agencies or equivalent documents issued by the relevant authorities of a foreign state along with their certified translations).

j proof of clean record of the applicant and members of its statutory and supervisory body, its proctors and beneficial owners (the Ministry is able to obtain data from the Czech Criminal Record based on provided identification data of the relevant individuals or entities);

k a ‘game plan’ for each type of gambling the applicant intends to operate. The game plan shall describe the rules of each game, the drawing or winning determining process, winnings or methods of their calculation, payment methods and payout terms;

l certification (as specified in Section II.vi, above); and

m a document on the location of the gambling servers if a game uses RNG.

Other documents may be required for specific types of gambling, for example, an applicant applying for land-based live games has to provide the Ministry with a sample of the casino chips set.

The documents may not be older than three months at the time of submission of the application.

The Ministry issued a guideline on how to properly file and fill out a gambling licence application (available only in Czech).

The basic licence may be issued for a period of up to six years and may not be transferred from one entity to another. According to the Gambling Act, a prolongation of a basic licence is not possible.

Licence fees are relatively low in the Czech Republic – for example, the fee for a basic licence is only 5,000 koruna.

The process of granting a basic licence should, according to the Code of Administrative Procedures, take 30 days (or 60 days in difficult cases). The reality, however, may be different, as the time for awarding the initial licences by the Ministry has taken longer than this.

iii Licence to place a gambling venue

For a land-based operation of bingo, technical games and live games, a subsequent licence for a gambling venue has to be obtained from a territorially relevant municipality. The application for a gambling venue licence also needs to be accompanied by the following documents required by the Gambling Act:

a a basic licence;

b proof that ‘a surety’ has been provided. This is an additional surety and is not to be confused with the basic licence surety. This surety is calculated based on the number of gambling venues that the gambling operator intends to operate, and is different for casinos and gambling rooms. The surety for placement of each gambling room is 1 million koruna; however, the Gambling Act requires 10 million koruna as a minimum regardless of the number of gambling rooms. On the other hand, 50 million koruna is the maximum surety for placement of gambling rooms, regardless of the number of gambling rooms of one operator. Surety for each placement of each casino is 10 million koruna per casino; however, the Gambling Act requires 20 million koruna as a minimum regardless of the number of casinos of one operator. As with the gambling rooms, there is a maximum amount of surety of 50 million koruna. Sureties secure the payment of players’ winnings, taxes and other duties of the gambling operators;
c a certificate for each specific slot machine to be operated in the gambling venue;
d a legal title to use the gambling venue (e.g., lease agreement); and
e a scheme of the video surveillance system. This means a one-page scheme that will demonstrate that the locations of individual cameras are sufficient (specific technical requirements are not set by the Gambling Act for video surveillance systems).

The licence for a gambling venue may be granted for the term of the legal effects of the basic licence, but for no longer than three years.

The scope of both the basic licence and the licence for a gambling venue may be altered upon application.

iv Notification

Small tournaments and raffles (with prize pools higher than 100,000 koruna) have to be notified to the territorially relevant municipality, which may decide to prohibit them from taking place. The notification is administratively less demanding.

v Sanctions for non-compliance

Both natural persons and legal entities may be sanctioned for non-compliance with the Gambling Act and related gambling legislation. The Czech legislation defines two types of breaches of the law based on their severity and associated sanctions: administrative offences (less severe, usually sanctioned by a monetary fine) and criminal offences (more severe, often sanctioned by imprisonment of individuals or dissolution of legal entities).

Since gambling entails overlays to other respective fields, such as employment, advertising, tax, anti-money laundering and data protection, it is quite impossible to enumerate all possible breaches of gambling-related legislation. Usually, breaches of ancillary legislation (advertisement, data protection, employment, etc.) will constitute only an administrative offence, which might be sanctioned by a monetary fine.

Breach of the Gambling Act might also be punished by monetary penalties, but if the breach is severe enough, then an injunction of gambling operation might also be used as a sanction. Additionally, if the gambling operator ceases to comply with the licensing terms, the gambling licence might be withdrawn.

Illegal operation of gambling constitutes a criminal offence in the Czech Republic. Usually, the criminal proceedings are led against Czech nationals (natural persons) who operate unlicensed land-based slot machines. It is just a matter of time until criminal proceedings will be initiated with natural persons operating illegal online gambling.

Generally, even legal entities are criminally liable in the Czech Republic. Therefore, a legal entity may be criminally liable for illegal gambling operation, tax evasion or money laundering.

Furthermore, as of 1 January 2017, the Ministry keeps a list of unlicensed online games that includes the respective web page address and payment account identifier. A game can only be placed on the list based on administrative proceedings before the Ministry. Once a game is placed on the list, all internet service providers must block the web page and all payment providers must block all payments credited or debited to the relevant payment account.
IV  WRONGDOING
Gambling operators must take steps to prevent crime and other wrongdoing. As of 1 January 2017, an amendment of the Anti-Money Laundering Act is effective, newly requiring gambling operators to carry out identifications of players and know-your-customer processes similar to those carried out by payment and credit institutions. Anti-money laundering legislation is, however, very complex and outside the scope of this chapter.

V  TAXATION
Gambling is subject to a special sector tax under the Gambling Tax Act. The tax basis of the gambling tax is the difference between the total value of accepted bets or wagers and the total value of paid winnings (the tax base). The gambling tax rate is 23 per cent of the tax base, with the exception of technical games that are subject to a 35 per cent tax rate. Additionally, land-based operators of technical games have to account for a ‘minimum tax’ per each slot machine, which is 9,200 koruna per calendar quarter. The gambling tax is paid on a quarterly basis. Each gambling operator (even an illegal operator) is subject to gambling tax regardless of the location of its registered seat or main office.

If a gambling operator has a registered seat or main office within the territory of the Czech Republic, then it is subject to corporate income tax. The corporate income tax is 19 per cent of the net income of a company.

If a land-based gambling operator serves drinks, beverages, meals or cigarettes in the gambling venue, then it also has to pay value added tax, which is currently 21 per cent. Gambling operators are prohibited from offering free beverages or cigarettes to players.

Players’ winnings are not subject to any additional taxation, provided that the players’ winnings come from a game held by a licensed gambling operator with a licence from an EU or European Economic Area Member State. Winnings from a gambling operator with a Maltese licence are, therefore, not subject to any personal income tax.

VI  ADVERTISING AND MARKETING
Advertising of gambling is permitted in the Czech Republic. However, this is only true for gambling operators with a basic licence.

On 1 January 2017, the Act on Advertising was amended and introduced new gambling advertising restrictions, which specify that gambling advertisements:

a  must not target people under the age of 18 (minors);
b  must not give the impression that gambling can serve as a source of income;
c  must clearly state that minors are excluded from gambling; and

d  must include the text: ‘Ministry of Finance cautions: Participation on gambling may lead to addiction’.

Natural persons and legal entities that ordered, manufactured or spread advertising in breach of the above-mentioned advertising restrictions are liable under the Act on Advertising and may face monetary fines. Advertising of illegal gambling may, depending on its volume, constitute a criminal offence as well.

Additionally, a gambling venue must not use any advertising, or display any message or any other gambling promotion for winning opportunities (including through text or audiovisual means) on the exterior of the gambling venue. A casino or a gambling room must

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indicate that the premises are a ‘casino’ or ‘gambling venue’ on a sign that is near the entry to the venue (only one sign is required). Windows and displays of gambling rooms must not allow anyone to see the venues’ interior from the outside. Such promotional restrictions are contained in the Gambling Act and may therefore be punishable by monetary fines or even by injunctions of gambling operation (for up to two years).

VII THE YEAR IN REVIEW

As mentioned in this chapter, a number of changes have been made to the Czech gambling legislation (new Gambling Act, amendments to Anti-Money Laundering Act, Act on Advertising, and the new Act on Gambling Tax just to name a few).

With respect to case law, the placement of an illegal online gambling website on the list of illegal gambling operators (blacklist) and the related internet provider (IP) blocking provisions have been contested on a constitutional level by a group of 21 senators who filed a motion with the Constitutional Court to declare the relevant IP blocking sections of the Gambling Law unconstitutional, claiming they could be a form of unconstitutional censorship. The Constitutional Court, however, upheld the wording of the Gambling Act and kept the relevant provisions intact. No additional gambling case law has been published.

VIII OUTLOOK

There are quite a few interpretational issues with respect to the Gambling Act and especially gambling advertising (use of trademarks, sponsorships, etc.). We are hoping that the Ministry or Customs will decide to issue some additional guidelines that would help the gambling operators navigate through the interpretative issues, especially with respect to advertising.

Furthermore, the Gambling Act does not expressly provide any e-sports or social gaming provisions. Nonetheless, the legal definition of a game of chance under the Gambling Act is quite wide and may even include e-sports. This issue has not yet been addressed by either the Ministry or the courts of law. The Ministry is currently preoccupied with the licensing procedures, but when those are finished it is expected that the Ministry will pay more attention to e-sports regulation owing to its increasing popularity.
Chapter 10

DENMARK

Henrik Norsk Hoffmann

I OVERVIEW

i Definitions

Danish gambling legislation provides the following definitions of games and their different categories.

Games
Lottery, combination games and betting:

a lottery: an activity where a participant has a chance to win a prize, and where the odds are based exclusively on chance;

b combination games: activities where a participant has a chance to win a prize, and where the odds are based on a combination of skill and chance; and

c betting: activities where a participant has a chance to win a prize, and where bets are taken on the outcome of a future event or the occurrence of a future event.

Class lottery
A lottery that is divided into several classes, with separate prize draws for each class.

Pool betting
Bets where all or part of the prize depends on the size of the total pool of bets or is split between the winners.

Slot machines
Mechanical or electronic machines that can be used for games where the player can win a prize.

Online games
Games concluded between a player and a gambling operator using remote communications.

Land-based games
Games concluded between a player and a gambling operator or a gambling operator’s dealer who meet in person.

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Contrary to most gambling regulations, Danish gambling legislation does not distinguish between online poker and other online casino games. Poker is considered a casino game and is not subject to specific regulations, and is consequently regulated under the same rules as any other online casino game.

**Definitions in law**

Fantasy league games are considered and regulated as pool betting and require a licence to be offered. This allows an operator to offer daily fantasy leagues as well as the more traditional season fantasy leagues.

Spread betting is considered a financial product and cannot be offered under a betting licence. The offering of spread betting is restricted to registered financial companies and is regulated under the Danish Financial Services Act LBK No. 182, 18 February 2015.

Competitive sports for prizes are not considered betting or gambling, and can be offered without a gambling licence. The same is ultimately true for skill competitions, but skill competitions often have an element of chance, for example, a drawing between correct answers in a quiz where more than one participant has the correct answer, but only one can be the winner, and consequently are close to the legal definition of combination games. However, if the questions are not simple to the extent that the average person would get everything right with little or no effort, such competitions are not considered to be gambling and therefore do not require a licence.

Free prize draws are considered gambling as they fulfil the definition of a lottery under Danish law. However, since the element of a wager is not present in a free prize draw, a licence is not required to offer such draws legally, but a gambling duty on the prize must be paid by the operator.

**Distinction between speculative and hedging financial products**

Article 2 Section 3 of the Danish Gambling Act excludes betting on the future value of financial instruments that lie outside the scope of the Gambling Act, and such betting, for example spread betting, is consequently regulated by the Financial Services Act.

This does not exclude all betting on financial products, and it is generally considered inside the scope of the Gambling Act and legal under a betting licence to offer fantasy league-style games on publicly noted shares, bets on which share will perform best on a given trading day, etc.

**ii Gambling policy**

The structure of Danish gambling legislation is that the offering of gambling is generally prohibited unless the operator has a licence to offer gambling.

On the offering of betting and online casino, there is no limitation to the number of licences that can be granted, and anyone who fulfils the legal requirements and satisfies the Danish Gambling Authority that the operation can be run responsibly and will be sufficiently funded will be granted a licence.
iii State control and private enterprise

The offering of lotteries as defined in the Gambling Act (except for games positively exempted as allowed casino games) is restricted to state-owned operators. Denmark has three different types of class lotteries, and Danske Spil A/S holds the monopoly to offer any other kind of lottery.

All other types of gambling have been opened up to privately owned operators who have obtained a gambling licence.

iv Territorial issues

In Denmark, gambling is regulated and licensed nationally. With regards to Greenland and the Faroe Islands, the local governments have full jurisdiction and autonomous authority regarding regulated gambling. Currently, Greenland allows gambling on the same premises as offered in the Gambling Act and the Faroe Islands have continued with a complete ban.

v Offshore gambling

The key element with regards to offshore gambling is whether or not an offshore gambling operator is targeting the Danish market.

Under the Gambling Authority’s current interpretation and enforcement of the Gambling Act, accepting wagers from players located in Denmark without having a Danish licence is not contrary to Danish law provided that the operator accepting such wagers is not targeting its offering of gambling products at the Danish market.

An operator is considered to be targeting the Danish market if one or more of the following conditions are fulfilled:

a the gambling website is offered in a Danish-language version;

b the operator offers customer services in Danish;

c games are offered that are considered to only be of interest to Danish players. For example, betting on lower-ranking Danish sporting events, betting on the outcome of Danish parliamentary elections, or slot machines with the theme of a Danish TV show, movie and similar screenings unknown outside of Denmark;

d Danish kroner are accepted or offered as a currency on the gambling website;

e there is acceptance of payment services such as the Danish debit card payment system DanKort, which is exclusive to the Danish market;

f there is marketing and advertising in the Danish media;

g marketing and advertising is in Danish; and

h there is direct marketing targeting Danish consumers, where the operator sender is aware that the recipient is based in Denmark.

If an operator targets the Danish market without a Danish licence, the Gambling Authority has shown great commitment to having such offering shut down. So far the Gambling Authority has had a great deal of success doing this, and in most cases cease-and-desist letters have proven sufficient.

Article 65 of the Gambling Act provides the Gambling Authority with the legal authority to block payment services to an operator offering gambling in Denmark without a licence. The same provision allows the Gambling Authority to block access from Denmark to the violating operator’s website or websites.

Further, Article 59 places a complete ban in Denmark on advertising of unlicensed gambling.
In all cases where cease-and-desist letters have proven insufficient to stop the unlicensed offering, the Gambling Authority has successfully gained court orders to force internet service providers (ISPs) to prevent access to certain websites where unlicensed gambling was offered and targeted at the Danish market.

For all the time that the Gambling Act has been in force (currently, more than five years), the Gambling Authority has not made use of its legal authority to block payment services.

After an initial period with a substantial number of cease-and-desist letters and ISPs blocking access to websites, the letters and advertisement ban, combined with critical mass in terms of number of operators with a licence to offer gambling, seems to be sufficient to keep most unlicensed gambling out of the Danish market.

The Gambling Authority estimates the unlicensed offering of gambling in Denmark to represent 5 per cent or less of the total Danish gambling market. The operators are less optimistic but still estimate that approximately 80-85 per cent of the Danish market is licensed and compliant.

The Gambling Authority has not yet had to pursue enforcement, including fines for violation of the Gambling Act, outside Denmark, so the enforceability of the Gambling Act against a foreign operator has not yet been identified.

The Gambling Authority is pursuing and developing cooperation with as many foreign gambling regulators and gambling commissions as it can, in order to improve its chances of receiving assistance if a foreign operator violates Danish law, and to promote a higher degree of uniformity and mutual recognition of standards within, in particular, the online gambling industry.

The Gambling Act does not restrict the number of licences that can be granted in any way, and is therefore in compliance with EU law, at least in terms of the types of games that have been liberalised as a result of the law reform. The EU-wide enforcement of Danish law against a foreign EU-based entity can therefore not be excluded.

However, regarding games that are still part of Danske Spil A/S’s monopoly, the legality of the Gambling Act from an EU law perspective is unclear. The government has given no justification for maintaining a state monopoly on the offering of, for example, lotteries and scratch cards, and consequently the enforcement of this part of the legislation outside of Denmark is questionable at best.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

Danish gambling legislation was built around a complete prohibition of any kind of gambling activities, dating back to the 18th century. Over time, a series of acts were implemented introducing exceptions to the complete prohibition of gambling. The prohibition includes a ban on the provision of, the participation in and the promotion of gambling.

On 4 June 2010, the new Gambling Act was passed unanimously in the Danish parliament, and the Act entered into force on 1 January 2012. Until then, the main exception to the general prohibition was the state-owned monopoly operator, the public limited liability company Danske Spil A/S, which was granted an exclusive licence to offer betting, lotteries and online gambling. The state monopoly governed both online and offline gambling, and
from the administrative practice of the Danish tax authorities it could be concluded that, unless a game was expressly excluded from the licence through legislation, then Danske Spil A/S was licensed to provide the game.

The new Gambling Act was intended to serve two purposes: to open the market for privately owned national and international betting and online casino operators; and to clean up the complex web of regulations, executive orders and unclear jurisdictional issues between local police, local government and national government regarding the offering of gambling.

The Gambling Act is now the main legislation, and it governs all gambling in Denmark whether it is land-based or online, for profit or charity.

The Gambling Act can be characterised as framework legislation, and was drafted to be applicable in the future and to withstand the rapid technological development related to remote gambling in particular.

One measure that makes this possible is that the relevant minister (currently the Minister of Taxation) has been granted the legal authoritative powers to issue specific regulation on certain areas.

In this regard, these powers are granted to the Gambling Authority, which has now issued a number of executive orders on land-based betting, online betting, online casinos, land-based slot machines, land-based casinos and lotteries for the common good.

Since the enactment of the Gambling Act, it has been the philosophy of the Gambling Authority to seek dialogue with all stakeholders, including players and operators, to develop the market for the mutual benefit of all stakeholders.

As a result of this approach, any issues thus far have been resolved without involving the Danish courts, and consequently there is no case law available that has shaped the law or offered any interpretations of the law that differ from those enforced by the Gambling Authority.

The Gambling Authority has published several guidelines of interpretation regarding various specific topics including sales promotions, advertisement for bonuses, anti-money laundering rules, etc., but although these guidelines specify the Gambling Authority’s interpretation of the gambling legislation, they are not law and do not express the view of the Danish courts. Ultimately, only the courts are competent to interpret Danish law with binding effect.

ii The regulator

With the law reform expressed by the enactment of the Gambling Act on 1 January 2012, all powers regarding the regulation of gambling in Denmark have been combined and the Gambling Authority now has sole jurisdiction of all regulatory and compliance matters related to gambling.

Before the law reform, the Gambling Authority had the status of a department within the Danish Tax Administration (SKAT). With the reform, the Gambling Authority was detached from the administration and responsibility area of SKAT and converted into an independent authority with its own management and budgetary responsibilities.

iii Remote and land-based gambling

Danish gambling legislation differentiates between land-based casinos and online casinos. Land-based gambling is defined as games concluded by a player and a gambling operator, or
the gambling operator’s dealer, meeting physically. Online gambling is, on the other hand, defined as games that are concluded between a player and a gambling operator using remote communications.

While online gambling is not restricted as regards the number of possible licensed operators, there are restrictions regarding land-based gambling.

The current regime allows for eight land-based casinos, and consideration to geographic location is given when granting a licence, thereby creating a sort of geographical competitive protection for land-based casinos.

Similarly, the geographic location of slot machine halls and similar venues is considered when granting a licence. However, with regard to slot machine halls, there is no limit to the number of operational licences that can be granted, and consequently the geographic protection from competition is typically not available, and there is far less protection than is given to land-based casinos.

Another major difference is the tax rate. While the land-based industry is taxed depending on the gross gambling revenue (GGR) achieved (between 45 per cent and 75 per cent), the online gambling duty is set at 20 per cent of GGR regardless of the size of the GGR.

For a land-based operator, all personnel involved in the gambling operation must, as a main rule, be approved in writing by the Gambling Authority. Part of the approval proceeding is a thorough background check of the person in question. The approval is considered a personal licence as such, but resembles a premises licence in many ways.

### iv Land-based gambling

The primary venues for land-based gambling are casinos, slot machine halls and outlets for lottery games and betting.

Secondary venues are poker tournaments organised by licensed poker associations or poker tournament organisers.

There are currently eight onshore casino licences and two offshore casino licences available for ‘land-based’ casinos in Denmark.

A land-based casino licence allows the operator to offer casino games. Although there is no exhaustive definition as to what constitutes a casino game, a casino licence allows the casino to offer baccarat, punto banco, blackjack, roulette and slot machines.

Any other game, including poker, can only be offered by the land-based casino if an additional approval has been granted by the Gambling Authority to the casino.

A land-based casino can be allowed to operate in a specific location. Among the criteria for approval of the geographic location are:

- it must be in a place or area frequented by tourists;
- it cannot be in the immediate vicinity of a school, or any other building where children are present; and
- the location must be approved by local police and the city council.

Similar criteria are applied when considering an application for a licence to operate slot machines.

Slot machines operated under a different licence than the land-based casino licence are allowed only smaller maximum wagers and smaller maximum prices than those slot machines operated inside the casino.
With regard to outlets for lottery and betting (including betting shops), there are no defined geographical restrictions and, similar to slot machine halls, there are no limitations in numbers.

The operation of the outlet requires that the person in charge be approved by the Gambling Authority, but the offering of the games themselves does not require an additional licence for a land-based outlet other than the licence granted for offering and operating the game in question. In other words, the offering of Danske Spil A/S’s scratch-card games does not require a licence to offer scratch-card games for a land-based outlet. The only licence required is Danske Spil A/S’s licence to offer the game.

v Remote gambling
Operators holding a Danish online licence can offer remote gambling without restrictions as to media. In other words, gambling can be offered via the internet, mobile phones, tablets, television and any medium suitable for remote communication. However, under Danish law, a computer set up in a public place that can only access one particular online casino is considered to be a land-based casino offering and requires a land-based casino licence.

Danish gambling legislation allows open liquidity and thereby allows Danish players to be active in games where players from other jurisdictions also play. This is particularly important with regards to poker and jackpot pools.

A licence to offer online gambling only grants the operator a licence to offer gambling in Denmark. Taking wagers from non-Danish players is not covered by the Danish licence and the legality will, from a Danish legal point of view, depend entirely on the laws in the country from where the wager is placed.

The main rule regarding servers under Danish law is that servers on which the gaming software and other operational software are run must be located in Denmark. The exceptions are if the servers are placed in a jurisdiction with which the Gambling Authority has a cooperation agreement in place; in such cases, the server and the equipment do not need to be in Denmark.

Finally, as a last resort the Gambling Authority has the power to accept that a server can be placed in any jurisdiction in the world if the Authority is of the opinion that its power to enforce Danish law and secure compliance is not jeopardised by its physical location.

vi Ancillary matters
The responsibility for compliance with Danish law is placed solely with the operator that holds the licence. The licensed operator is free to choose its suppliers, affiliates, white-label operators and other contracting partners. However, regardless of who is at fault, if a violation of the licence or the law occurs, the licensed operator is liable.

Consequently, there is no licence granted to manufacturers or software suppliers, as it is the licensed operator’s sole responsibility to secure 100 per cent compliance throughout the entire supply chain.

Certification of technical standards and functionality, including business practices, must be completed by a testing lab that fulfils the requirements defined by the Gambling Authority. However, it is also the licensed operator’s responsibility to make sure that the chosen testing lab has the required skill and experience to conduct testing and certification in compliance with Danish law.
An individual does not need a personal licence, but a licensed operator must be prepared at any given time to prove to the Gambling Authority that key individuals involved in technical set-up, finances, anti-money laundering, operation, etc., are sufficiently skilled and experienced to hold these positions.

Particularly with regard to land-based gambling operations, all staff must be approved by the Gambling Authority. This approval is mainly a background check and cannot be compared with the due diligence check that is conducted on individuals in some jurisdictions.

III THE LICENSING PROCESS

i Application and renewal

The phrase ‘gambling operators’ is commonly used as a collective term for natural persons and legal entities that provide gambling activities.

As a rule, licences to provide and arrange gambling can be granted to natural persons and legal entities. An exception is made for licences for the provision and arrangement of local pool betting on local cycle racing on tracks, dog racing on a racecourse and pigeon racing, since such licences can only be granted to legal entities that are organisers of such types of racing and that are members of the relevant sport’s central organisation or association.

Moreover a licence for local pool betting on horse racing can only be issued to associations that have held such a licence for a number of years, and licences to arrange charitable lotteries can only be granted to associations, institutions or committees composed of at least three persons.

A licence to provide and organise gambling can only be issued to operators who:

a have not filed for reconstruction, bankruptcy or debt restructuring or are not under reconstruction, bankruptcy or debt restructuring;

b 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 gambling; and

c do not have unpaid, outstanding debt to the public sector.

In addition to the above requirements, a gambling licence may only be granted to natural persons above the age of 21 who are not under guardianship and for whom a surrogate decision maker has not been designated.

If a natural person or a legal entity is resident or established outside Denmark or any Member State of the EU or the EEA, a licence can only be issued to the operator if it has appointed a representative who has been approved by the Gambling Authority.

The representative can either be a natural person or a legal entity. The representative should be resident or established within Denmark and must fulfil the same requirements as the applicant itself. Moreover, the representative should be authorised to represent the operator in relation to the public authorities and in legal proceedings as well as criminal proceedings.

Along with the licence application form, the applicant must provide documentation that the operator is sufficiently funded and is in possession of the skills and experience necessary to run a gambling operation professionally and compliantly.

This documentation should be submitted in the form of annual accounts, budgets, business plans, CVs of key individuals, various policies and reports on compliance, corporate
governance, security, anti-money laundering, licences in other jurisdictions, statements from accountants and possibly guarantees issued in favour of the applicant by third parties such as a bank or a mother company.

Further, the applicant needs to submit documentation of the technical setup, including system security and integrity. Standard records should show that the required data vault in the Danish system, referred to as SAFE, is fully functional and compliant, and grants the Gambling Authority remote access to all relevant data on game and money transactions involving Danish players.

The final part of the application material is the certification of the gambling system including game software, random number generator, report generators and the back-end system including anti-money laundering surveillance, financial transaction systems, know-your-customer procedures and storage of personal information.

The processing of an application typically takes from three to six months for the Gambling Authority, but in most cases the processing time is closer to three months than six months.

The licence application fees for 2018 are:

\( a \) single licence (a distinction is made between a betting licence and an online casino licence) = 273,500 kroner;

\( b \) double licence (application for both betting and online casino at the same time) = 382,900 kroner; and

\( c \) income limited licence = 54,700 kroner.

Both the betting and the online casino licences are limited to five years, and in addition to the application fee and the gambling duty a licensee must pay an annual licence fee, which is calculated on the basis of the realised GGR. With effect from 1 July 2016 the annual licence fees were changed. The reason behind the change was to reduce the annual fee for small and medium-sized operators and to increase the fee for the largest operators. In addition, more GGR intervals were added. The annual fee in 2018 varies from 54,700 kroner to 4,923,000 kroner.

Since the first licences were issued on 1 January 2012, none of the existing licences have been renewed under the Gambling Act. The renewal fee for an application of renewal of an existing licence is 109,400 kroner for a single licence and 136,800 kroner for a double licence.

It was originally announced by the Gambling Authority that due diligence connected with the reapplication was going to be considerably reduced compared to that of a new applicant. However, for an operator the difference is difficult to identify at least in regards to the financial and corporate due diligence. Because of the technical change management system of the Gambling Authority and the regular reporting requirements on technical issues the reapplication process is almost entirely focused on financial and corporate matters. The reapplication procedure takes approximately three months.

ii Sanctions for non-compliance

The most common sanction for violation of Danish gambling law is a fine. A fine is always determined on the basis of the facts of each individual case, but is usually not settled at less than 10,000 kroner. The fine for violation of Danish law regarding unsolicited direct marketing using remote communication media is 100 kroner per message sent, but no less
than 10,000 kroner. In other words, if a marketing email is sent to 10,000 individuals who have not given their consent to receive such marketing material, the fine will be at least 1 million kroner.

In severe cases, the sanction for offering unlicensed gambling can be set at up to one year of imprisonment.

For licensed operators that operate in violation of either their licence or the gambling law, change of licence conditions, suspension and revocation of the licence are sanctions that the Gambling Authority can use to enforce gambling law, and compliance with legislation and regulation.

For payment service providers and ISPs, criminal liability only comes into play if the provider in question disobeys, disregards or ignores a court order to block payments to or from an operator, or if access is granted to the operator’s website despite a court order to block it.

For advertisers, the same sanctions apply as those applicable to operators who offer gambling without a licence.

IV WRONGDOING

A licensed operator has an obligation to have the necessary anti-money laundering proceedings in place, including conducting a source of funds investigation, politically exposed person checks, suspicious activity reporting, etc. It is the operator’s responsibility to ensure that such measures and proceedings are working and that they are sufficient to comply with applicable legislation and regulations.

Operators are obliged to report suspicious activity to the district attorney for special financial and international crime.

Further, betting operators have an obligation to have necessary and sufficient measures in place to identify and combat match-fixing.

V TAXATION

The Danish gambling duty is calculated on the basis of GGR, which is defined as wagers minus winnings.

For betting and online casinos, the gambling duty is 20 per cent of GGR. Regarding peer-to-peer games such as poker and betting exchanges, the calculation base of the gambling duty is the commission charged by the operator to facilitate the game.

For land-based betting, the rate of the gambling duty depends on the realised GGR in a certain period, and it varies from 45 per cent to 75 per cent of GGR.

The gambling duty on prizes awarded in prize draws and games without wagers is 15 per cent of the prize exceeding 200 kroner for cash prizes and 17.5 per cent of the value (market value) exceeding 200 kroner for non-cash prizes.

Winnings from licensed gambling are tax-free for the player, but winnings from non-licensed gambling are personal income and are taxed as such with tax rates of up to 62 per cent.

Gambling is exempt from VAT in Denmark, which also means that a Denmark-based operator cannot deduct VAT expenses when purchasing goods and services.

With regard to corporate taxes, the gambling duty is seen as a tax-deductible business expense, which can be deducted in the operator’s corporate taxes.
VI ADVERTISING AND MARKETING
As a rule, marketing of licensed games is accepted under Danish gambling legislation. However, the licensee must take necessary measures to ensure that sales promotion is not sent to players who have excluded themselves from participation in gaming temporarily or permanently.

Furthermore, Danish legislation prohibits offering and marketing to persons under the age of 18. There are only a few exceptions in this regard. The first exemption to this rule is charity lotteries where the age restriction does not apply. The second exception is the offering of land-based lotteries by Danske Spil A/S and class lotteries, which can be marketed and offered to everybody above the age of 16.

The licence holder must ensure that all relevant information of the games offered under the licence is easily accessible to the players and the Gambling Authority.

Furthermore, the marketing for gambling has to give a realistic impression of the chances of winning, and cannot display those chances as being greater than they actually are. Celebrities can only be used in the marketing for gambling operations if the message of the marketing campaign or advertisement does not portray the celebrity as being successful because of gambling, unless this is actually the case.

Finally, games offered under a licence must be described as amusement activities and the marketing cannot describe gambling as a way to solve economic problems or a way to gain social status.

Marketing of unlicensed gambling is prohibited and sanctioned with fines and imprisonment for up to one year. For those that advertise for unlicensed gambling, the sanction is a fine.

The Gambling Authority has launched a new service that will allow Danish residents to opt out of all gambling-related direct advertisement with one registration. The new database will be run parallel to the register of self-excluded persons, and operators are encouraged to cross reference their mailing lists immediately before sending out marketing material. There are still some important potential issues with this service in terms of personal data protection and timing, and it is unclear if the Gambling Authority has legal authority to make the use of this service mandatory.

VII THE YEAR IN REVIEW
The year 2017 saw the first court decision in a civil case, where a player had sued an operator for reimbursement of money lost with the operator. The claim was based on an argument that the operator should have known that the player had developed a gambling problem. The lawsuit was further fuelled by the fact that the operator in question had accepted a fine of 500,000 kroner for alleged violation of AML requirements, in particular with regard to source of funds investigations. The player had received a substantial amount of money in damages as compensation for a suffered work injury. There was regular contact between the player and the operator’s customer service. Sometimes there were complaints from the player that he was playing more than he wanted to, at other times the player confirmed that he was doing well and had not lost more than he could afford. At regular intervals during the process the operator provided the player with information about problem gambling, treatment for problem gambling and links to self-exclusion programmes, all of which were apparently ignored by the player. When the player told a customer service agent that he had a gambling problem, the account was shut down by the operator. The District Court of Herning in
Denmark found that if there is an obligation for an operator to take the initiative to shut down a player's player account, then this obligation did not materialise earlier than the point in time where the operator in this case did shut the account down. Consequently, the court found in favour of the operator and dismissed the claim for damages raised by the player.

Also in 2017, the Danish parliament passed amendments to the Danish gambling law allowing operators with an online casino licence to offer bingo and for operators holding a betting licence to offer horse race betting and betting on dog and pigeon races. However, the new bingo regulation suffered from political manoeuvring and came out with a limitation in variations that can be offered and some technical requirements that may be costly for the providers to comply with. Amendments have been made already and are currently awaiting the conclusion of the notification process with the EU Commission.

The year 2017 was the sixth consecutive year with considerable growth in GGR on the open gambling markets, thus underlining the perception that the new Danish gambling legislation is working well, and that business is growing and is generally positive for licensed operators in Denmark. However, the growth numbers are somewhat influenced by the increased amount of bonus money available as the competition on the Danish market increases. Bonus money cannot be deducted when calculating the GGR, and consequently the GGR numbers published in the DGA statistic overview are inflated. A considerable number of potential new operators are beginning to show interest in entering the Danish market, possibly because of the strong numbers on the Danish market and the fact that the Swedish market is about to be opened on a similar legislative regime, making the Scandinavian markets more attractive in general.

VIII OUTLOOK

The considerations regarding a possible sale of Danske Spil A/S to private operators seem to have been put on hold for the time being, but there are reasons to believe that they have not definitively been given up. There are, at this point in time, no major changes on the way on the Danish market. Bingo and horse race betting can be offered in Denmark, with effect from 1 January 2018, and it is unlikely that we will see any changes on the remote gambling regulations until the effect of this addition to the scope of the Danish licences has been seen. The most likely changes to come in the near future are changes in the land-based markets. A process is ongoing regarding the use of self-service betting terminals, and the regulations for land-based slot machines and land-based casinos date back to the time before remote gambling was an issue, and are in severe need of an overhaul if land-based gambling is to have a future in Denmark.

With effect from 25 May 2018, the EU Regulation on General Data Protection enters into force, with considerable increase in fines for violation. This regulation is likely to have an impact on most operators’ compliance work since more reporting and documentation of internal processes regarding the collection and processing of general personal data is required.
I OVERVIEW

i Definitions

The French Homeland Security Code (HSC) defines gambling as ‘any operation made available to the public, regardless of its designation, for the purpose of causing the hope of a gain whose realisation depends, even partially, on chance and in consideration for which the operator requires a financial contribution from participants’.\(^2\)

This definition is often broken down into four criteria. A prohibited gambling offer is regarded as any game: (1) that is offered to the public; (2) that presents a chance of gain for the players; (3) whose outcome partially results from chance; and (4) that requires a financial contribution from the player, regardless of the actual designation and nature of such game, and whether a later reimbursement of the financial contribution is possible or not.

In addition, Law 2010 476, dated 12 May 2010, relating to the opening and regulation of the online gambling market (the Online Gambling Law) specifies that ‘online gambling’ should be seen to be any gambling or betting operation performed exclusively through an online communication service, and that ‘online gambling operators’ are all persons offering to the public, on a regular basis, online gambling or betting services with stakes having a monetary value and under terms and conditions that constitute a standard agreement to be accepted by the players.

ii Gambling policy

Under French law, agreements relating to gambling and betting are to be construed as aleatory contracts, in which the importance of the profits and losses incurred by either or both parties shall depend on the occurrence of an uncertain future event.

Gambling on games of chance has been forbidden for a very long time under French law, and this prohibition is currently expressed in Article L.322-2 of the HSC.

In addition, a new Article L.322-2-1 has recently been introduced specifically for the purpose of indicating that ‘such interdiction shall also apply to games whose functioning relies on the player’s skills’.

The classic differentiation that existed under French law between wagering on games of chance or wagering on games of skill – the former being forbidden and the latter licit – has

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1 Alexandre Vuchot is managing partner, Cathie-Rosalie Joly is a partner, Rami Kawkabani is an associate and Samy Smaoui is a senior associate at Bird & Bird AARPI.
2 Article L.322-2 of the HSC.
thus been abandoned, and both types of wagers are now explicitly prohibited under French law, as French authorities considered that the dangers of compulsive and addictive gambling do not vary with the degree of skill or chance required.

If the prohibition of gambling can thus be considered a general principle of French law, it is important to note that a very important number of exceptions and specific regimes do exist. From the state-owned gambling operator to traditional cockfighting, through the countless online offers, the study of French gambling law is that of a series of exemptions and exceptions detailed herein.

iii State control and private enterprise

La Française des Jeux

The French National Lottery was created in 1933 for the purpose of aiding war veterans. La Française des Jeux (FDJ), the state-owned gambling operator, was founded in 1976 and inherited the exclusive rights on the organisation of lottery games that had previously been granted to the French National Lottery. In 1985, sports betting was authorised in France for the first time and exclusive rights on the organisation of such activity were also granted to the FDJ by decree.

However, with the coming into effect of the Online Gambling Law, the FDJ applied for and obtained a licence as an online gambling operator, and was confronted with competition for the first time. The FDJ ventured into the organisation of online poker events, but it quickly withdrew from such activities. The FDJ also developed a complete online sports betting offer.

The FDJ, however, remains a giant in the French gambling market.

The Pari Mutuel Urbain

Horse betting in hippodromes was authorised and regulated in France in 1890. In 1930, horse racing companies, which were solely allowed to organise horse betting, were authorised to propose betting on their races outside of hippodromes. Those licensed horse racing companies decided to establish a common structure, the Pari Mutuel Urbain (PMU), to provide betters with a centralised service. In 1985, the PMU became an economic interest group, gathering 57 horse racing companies – all non-profit associations. Today the PMU is the largest European horse betting operator.

Similarly to the FDJ’s situation with sports betting, the PMU has been facing competition online after the online horse betting market was opened to competition and regulated by the Online Gambling Law in 2010, thus reducing the scope of the PMU’s exclusive rights. The PMU also decided to venture into the online gambling market following the coming into effect of the law, and obtained licences from the French Online Gambling Regulation Authority (ARJEL) to offer horse betting, sports betting and poker games online.

The PMU has retained its exclusive rights on the organisation of land-based horse betting on the French territory, and has also become one of the largest operators of online sports betting in France.
Casinos

Casinos can be opened following a very specific licensing procedure, which involves public authorities at both national and local levels. Each individual casino needs to obtain a licence from the Ministry of Home Affairs, which can only be granted in specific geographic areas listed by the applicable law, which are detailed in Section I.iv below.

Gaming clubs

Gaming circles were non-profit associations that were allowed to offer specific card games of chance to their members as long as the gaming activities they offered remained a simple accessory to other activities of a social, cultural or charitable nature. Gaming circles were not allowed in cities in which there was a casino, but numerous gaming circles existed within Paris. All but one of those have, however, been shut down by public authorities, and the single remaining one has been ordered to modify its legal structure into that of a gaming club, a new type of profit-based legal entity whose creation was recently authorised on a simple trial basis by the French National Assembly.

ARJEL-licensed online gambling operators

The FDJ and PMU’s monopoly over online gambling and betting ended with the coming into effect of the Online Gambling Law, which authorised licensed privately owned online gambling operators to offer three types of online gambling services: sports betting, horse betting and gambling ring deck card games (although, poker was and remains the only such game authorised).

Many private operators requested and obtained licences when the Online Gambling Law was first passed, but only 15 licensed operators still exist on the French online gambling market today.

The licensing process and specific obligations imposed on online gambling operators are detailed further in the Section III below.

Territorial issues

Even though the French national territory is generally perceived as a whole and treated as such under the law, a few territorial issues specific to the regulation of gambling do exist.

Ancient customs

A few localities in Northern France and on the island of Réunion (a French overseas region located in the Indian Ocean) are allowed to maintain their gallodromes, traditional cockfighting pits, as cockfighting is an ancient local custom that has continued without interruption to this date. A few gallodromes still exist, however, the creation of any new one has been expressly forbidden by the French authorities.
Specific law applicable to Paris

A law adopted in 1920 expressly forbids the installation of a casino in Paris, and within a radius of 100 kilometres around it. Such interdiction is still applicable today, which makes Paris the only European capital without a casino.³

Instead of actual casinos, several gaming circles existed in Paris, but their offers were highly regulated and limited to a much smaller number of games than casinos. A new law on Paris, which was adopted in 2017 and came into effect on 1 January 2018,⁴ however, suppresses the specific regime applicable to gaming circles and authorises the government to experiment for three years with the creation of gaming clubs, a newly created type of legal entity, in Paris.

Casinos

Besides the general prohibition of casinos in Paris, the law specifies in much detail the geographic settings in which the operation of a casino can be considered: licences can only be granted by cities hosting significant seaside, thermal or climatic resorts, as well as touristic cities of more than 500,000 inhabitants that are equipped with a national theatre, orchestra or opera, and that contribute more than 40 per cent of the financing of the concerned cultural institution. In relation to the requirements applicable to this last category, French law even goes so far as indicating a minimum number of annual events that should be hosted by the aforementioned cultural institutions to permit the opening of a casino.⁵

v Offshore gambling

Online gambling

If the territorial scope of gambling law obviously limits the actions that the French authorities can undertake in order to prevent offshore casinos targeting French consumers from a legal point of view, several mechanisms have been implemented by law to fight such practice and limit online access to such casinos from France.

ARJEL was therefore authorised to request internet service providers and hosting providers to block the access to reported websites and search engine operators to stop referencing them.

The ARJEL can also propose that the Ministry of the Budget impose measures for blocking financial flows. Illegal operators are also subject to criminal penalties.

French gamblers do not incur criminal penalties – ARJEL simply insists on the fact that players willing to take such risks will not benefit from its protection and are more likely to be taken advantage of by fraudulent websites.

Casinos on French ships

The law provides that casinos can be installed on board French commercial ships transporting passengers under specific conditions.⁶ In particular, such casinos are only allowed to operate

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³ One should be aware of the fact that a casino does exist in Enghein-les-Bains, a small city located less than 15 kilometres away from the centre of Paris. This casino first opened in 1901 and benefitted from a specific exemption allowing it to reopen in 1931. Such legal exemption still applies today.
(1) outside the administrative limits of seaports, as regards ships transporting passengers on journeys contained within the European Union, and (2) in international waters as regards other ships.7

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

Most regulations applicable to gambling and betting operations under French law are contained in the Civil Code, the Homeland Security Code and the Online Gaming Law, but the provision of a number of other gambling products is governed by specific laws and regulations.

Civil, commercial and criminal courts have all rendered decisions whose study is relevant when considering French gambling law as an ensemble, but statutes remain the primary source to examine in France. Indeed, in terms of gambling, French case law is mostly limited to the interpretation of that primary source.

Over its decade of existence, ARJEL has delivered a number of decisions and opinions that have helped to outline the French gambling landscape, and the ARJEL website should be one of the first to consult when considering whether an online gambling activity could be licit under French law.

ii The regulator

Gambling in France is regulated by different public authorities and administrative bodies, whose jurisdiction depends on the nature of the considered gambling activity and, in particular, whether it is land-based or online.

Land-based gambling regulator

The monopolistic activities of the FDJ and the PMU are mostly governed by specific laws. The FDJ acts under the supervision of the Ministry for the Economy and Finance, while the PMU acts under the conjoined supervisions of the Ministry for the Economy and Finance, the Ministry of Home Affairs and the Ministry of Agriculture (because of the relationship between the PMU and the French equine industry).

The Ministry of Home Affairs issues all land-based gaming licences, regardless of the type of establishment considered. While the opening of any casino or PMU retailer has been subject to prior authorisation from the Ministry for years, a recent decree has just imposed the same obligation for the opening of any FDJ retailer.8

The Renseignements Généraux (the intelligence division of the French police) were for a very long time responsible for enforcing compliance with French gambling law, but were dismantled in 2008 as part of a reorganisation of French intelligence services. The Service

8 Decree 2017-1306 relating to the operation of retailers of lottery games, sports betting and horse betting, and to racing companies.
central des courses et jeux, a new police service specifically focused on gambling activities and responsible for the surveillance of gambling establishments and hippodromes, was then created by the adoption of a decree.9

If local prefects perform most of the day-to-day administrative functions in relation to land-based gambling, diverse commissions (in particular, several committees within the Ministry of Home Affairs and the Ministry for the Economy and Finance) have exclusive regulatory powers in relation to specific gambling activities.

**Online gambling regulator**

Online gambling in France is supervised by ARJEL, a public entity created by the Online Gambling Law in 2010. ARJEL has vast and numerous powers and is, in particular, responsible for granting licences, enforcing online gambling regulations, as well as fighting against gambling addiction, illegal gambling websites, and fraud and money laundering.

### iii Remote and land-based gambling

French gambling law, as previously discussed, is built around the principle of a general prohibition, in which successive laws have carved various exceptions and exemptions. Laws and regulations have defined the conditions under which the FDJ can offer lottery games or sports betting and the PMU can offer horse race betting, but land-based gambling itself does not have an actual definition under French law.

Remote gambling does not have a legal definition either. The activities authorised under licence by the Online Gambling Law are indeed remote gambling, but they only cover internet-based gambling services and one should therefore consider that it does not apply to any other form of remote gambling (through post or phone communication, in particular). One should, however, note that ARJEL considers that the licence granted to Online Gambling Operators authorises them to offer mobile phone applications to provide access to their services, if such applications offer the necessary guarantees in terms of security and if the offered services are compliant with the granted licence.

### iv Land-based gambling

**National lottery**

The most notable derogation from the prohibition of gambling in France dates back to a 1933 decree that authorised the creation by the French government of a monopolistic national lottery, which has survived to this date. This national lottery is now called the Loto and is managed by the FDJ, as detailed above.

Besides the Loto, EuroMillions and the other games of chance offered by the FDJ, lotteries that are made exclusively for charitable or non-profit purposes, traditional lotto and bingo games offered to a limited audience for an insignificant price, fairground lotteries and promotional lotteries offered within the context of marketing campaigns can also be authorised, subject to compliance with a number of specific rules.

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9 Decree 2008-612 relating to the organisation of the central administration of the Ministry of Home Affairs.
Horse betting
Horse racing has an ancient history in France, and horse racing companies have been allowed to offer pool betting since the late 19th century (the term pari-mutuel and the concept it describes, which are now commonly used across jurisdictions, are originally French). Betting offers on horse racing are now subject to a monopoly entrusted to the PMU. As per the situation of the FDJ with sports betting, this monopoly still exists today but now only covers land-based horse betting.

Sports betting
Sports betting has been allowed in France since 1985, but has been subjected to a monopoly. FDJ, the semi-public company that holds the monopoly on lottery games, was given exclusive rights on the organisation of sports betting in the French territory. If such monopoly still exists today, its scope has been reduced to only cover land-based sports betting since the adoption of the Online Gambling Law.

Casinos
Casinos are only allowed in specific areas in France, subject to a licence by the Ministry of Home Affairs and placed under the authority of such Ministry and that of the Ministry of the Budget. Casinos are heavily regulated and the very nature and rules of the games that they are allowed to offer is determined by public authorities.

Gaming circles and clubs
All gaming circles have closed down, except a single one in Paris, and a new form of company called gaming clubs has recently been created under French law. Gaming clubs must obtain a specific licence from public authorities and they are allowed to offer even fewer games than casinos, but they are not subject to the specific geographical restrictions applicable to casinos.

Greyhound racing and cockfight betting
Greyhound betting is also allowed, but greyhound races are not very popular in France and the audience interested in gambling on such events is quite confidential. The audience interested in betting on cockfights is even more limited, but the practice remains tolerated as part of a cultural exception specific to very few localities.

Remote gambling
Any operator, whether foreign or France-based, that intends to market online gambling services targeting French users needs to apply for a gambling licence with ARJEL.

To assess whether an operator targets French users, several criteria will be taken into account, and the authorities will, in particular, verify whether the website is registered with a .fr domain name or drafted in the French language and whether the offered services are blocked for French users or presented in a manner that appears to specifically target French users. For instance, French courts have considered that a foreign-based online gambling website registered with a .fr domain name, containing the mention ‘First Poker Website in France’ and indicating a French contact phone number, should be governed by French law.

10 Decree 85-390 relating to the organisation and operation of sport forecast games.
ARJEL provides an exhaustive list of the games and events that are authorised under the Online Gambling Law:

a Poker games: Texas Hold’em limit; Texas Hold’em pot limit; Texas Hold’em no limit; Omaha 4 High pot limit; Omaha 4 High/Low limit; Omaha 4 High/Low pot limit; Omaha 5 High pot limit; Seven Card Stud Poker High limit; Seven Card Stud Poker High/Low limit; Seven Card Stud Poker Razz (or Low) limit; Triple draw deuce to seven (2–7) Lowball (or low) limit.

b Sports betting: a list detailing the sports competitions that can be subject to online gambling and the types of events in such competitions that can be subject to betting (number of goals, final score, etc.) is regularly updated by ARJEL.

c Horse betting: a schedule mentioning the horse race events that can be subject to online gambling is published by ARJEL every year.

vi Ancillary matters

Protection of minors

Specific decrees expressly forbid the provision of any gambling services to minors and the payment of any gambling gain to minors.\[^{11}\]

Gambling operators are required to prevent minors, whether or not emancipated, from participating in any gambling activity (the participation of minors in gambling activities is only allowed for very specific types of games, such as lotteries in relation to non-profit purposes, fairground activities and traditional bingos).

Licensed online gambling operators must require all players to indicate their age at subscription and upon every subsequent visit to their websites. In addition, their websites must feature a warning stating that minors cannot participate in gambling activities, whose precise contents and appearance are strictly regulated.

Protection against gambling addiction

Any individual who wishes to fight his or her gambling addiction can request from the Ministry of Home Affairs his or her voluntary inscription\[^{12}\] on a list of compulsive gamblers, which is communicated to casino, gaming club and gambling website operators.

All such operators must actively prevent listed players from participating in any gambling activities. Licensed online operators are also required to:

a display information on their websites regarding the existence of the list and the possibility for players to receive help;

b offer self-exclusion mechanisms to players seeking temporary or definitive withdrawal from the games;

c immediately terminate the account of any individual that becomes listed; and

d require, as part of their account creation processes, that players set a weekly limit on the amounts that can be transferred from their bank account to their gambling account and on the cumulative amount of stakes they can gamble.


\[^{12}\] The only individuals whose inscription on this list is not voluntary are criminally sentenced individuals, whose inscription has been requested by a judge or people whose conduct is likely to disturb the proper operation and tranquillity of gambling establishments.
FDJ and PMU retailers are not required to verify whether players are listed as compulsive gamblers.

**Personal licences**

Land-based casino managers and board members must obtain an authorisation from the Ministry of Home Affairs, which can be suspended or revoked at any time. Indeed, changes in the situation of the managers and board members are closely monitored by the Ministry of Home Affairs. Similarly, all staff members with responsibilities relating to access control, security personnel and CCTV operators must obtain a specific authorisation from the French Ministry of Home Affairs.\(^{13}\) Newly authorised staff members must undergo special training to monitor players and detect signs of compulsive and addictive gambling.\(^{14}\)

The rules applicable to online gambling operators are less comprehensive, but ARJEL may refuse to grant a licence to an operator if any of its owners, managers or executive officers has been convicted in the course of the previous 10 years for committing any of a series of criminal offences listed by decree.

**Software**

A guide detailing the technical requirements applicable to online gambling on the ARJEL website provides details regarding the technical requirements that online gambling operators must comply with. In particular, the software (and each new major version of the software) must be approved by ARJEL prior to the beginning of any online gambling operation using the concerned software.

Applications shall contain the source code of the concerned software and random number generator, as applicable. It must also contain a security vulnerability analysis detailing the reasons of such vulnerabilities, how they affect the operation of the software and how they can be remedied.

The application for approval must also contain a specific analysis that covers potential vulnerabilities and, in particular, establishes through statistical tests that: (1) the generating processes are actually random; (2) the random results are not foreseeable even with a thorough knowledge of the algorithm, the generator and previous results; and (3) generated data series are not repeatable.

### III THE LICENSING PROCESS

**i Application and renewal**

*Land-based gambling operators*

As the FDJ owns exclusive rights on the organisation of lotteries and land-based sports betting and the PMU owns exclusive rights on the organisation of land-based horse betting, there is actually no licensing process to describe in this section.

Licences can, however, be obtained to open casinos in specific locations, as previously discussed. Even though a legal entity or an individual can operate several casinos in different places, each casino must be the object of a single application process and the licence potentially granted will only apply to such establishment.

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\(^{13}\) Order dated 15 July 1947 on the regulation of games in clubs.

\(^{14}\) Order dated 14 May 2007 on the regulation of games in casinos.
Before a casino can begin operating, the applicant that wishes to become an operator must reach an agreement with the host city and obtain a formal authorisation from the Ministry of Home Affairs, which will remain subject to diverse forms of control by different public authorities and is of a temporary nature. Indeed, the law provides that the duration of the agreement between the casino operator and the city cannot exceed 20 years and that the licences are temporary themselves.

**Online gambling operators**

Companies willing to obtain a licence must submit a separate application for each gambling category they want to operate in (gambling ring deck card games, horse race betting or sports betting), but a single company can submit three distinct applications and attempt to obtain the three types of licence from ARJEL. The decision to issue or refuse a licence is taken by a specific ARJEL committee, which can grant operators a non-assignable renewable five-year licence.\(^{15}\)

ARJEL only issues licences to operators that have the technical, economic and financial capacity required to comply with their obligations, both in terms of gambling service and in terms of public order protection, anti-money laundering, public security, and the fights against terrorist financing and compulsive gambling.

In the application form, the operator must, in particular, provide a description of its economic, financial and accounting state and information concerning:

- its gambling website;
- the gambling services it intends to operate;
- the accounts of the players;
- the actions it intends to take against compulsive gambling and against fraudulent and criminal activities;
- how it will proceed to avoid any conflict of interest; and
- its IT architecture.

ARJEL must respond within four months and may request any additional information and documents from operators while reviewing their application. If ARJEL does not provide an answer within four months, the application will be deemed rejected.\(^{16}\)

Licence fees vary depending on the number of applications (€5,000 for a single application, €8,000 for two applications and €10,000 for three applications). In addition to this initial application fee, operators must also pay an annual fee of €20,000 for a single licence, €30,000 for two licences and €40,000 for three licences.

**ii Sanctions for non-compliance**

**Illegal online gambling offer**

Operating online gambling services targeting French users without a licence can be punished by a fine of up to €90,000 and imprisonment of up to three years. Such sanctions can be increased to €200,000 and seven years where the illegal online gambling offer is made by an organised group.\(^{17}\) Even though foreign-based operators targeting French users could in theory

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15. Article 21 of the Online Gambling Law.
17. Article 56 of the Online Gambling Law.
be punished by such sanctions, ARJEL usually begins by informing them of their obligations under French law by sending them a formal notice requiring that they immediately cease targeting French users and that they block any access to their website by French users. Such requests are generally followed by the foreign-based operators, and proceedings very rarely go further than this first step.

ARJEL may also request that internet service providers or hosting providers block the access to websites offering illegal online gambling and that relevant search engines stop referencing them. If no measures are taken, the President of the Paris Tribunal de Grande Instance can order an ISP blocking measure. In addition, the Minister of the Budget can, upon a proposal from ARJEL, block any movement or transfer of funds from online gambling operators operating without licence for a renewable period of six months.

**Sanctions applicable to licenced online gambling operators**

Licensed online gambling operators can also be punished for failing to comply with their obligations under the online gambling law, which may result in: (1) a warning from ARJEL; (2) a reduction of the duration of their licence (up to one year); (3) a suspension of their licence (up to three months); or (4) a withdrawal of their licence, accompanied by a prohibition from applying for a new licence for up to three years.

ARJEL may also impose administrative fines, whose amount may vary with the seriousness of the breach, the status of the online gambling operator, the damaged caused by the breach and the benefit derived from this breach. In any event, such sanction cannot exceed 5 per cent of the online gambling operator's turnover over the previous financial year (increased to 10 per cent for repeated breaches). Should a breach occur during the first year of business of an online gambling operator, the sanction shall be capped at €150,000 (or €375,000 for repeated breaches).

**IV  WRONGDOING**

**i  Gaming debts**

Gaming debts are not actionable. The French Civil Code expressly provides that ‘the law does not grant any action for a gaming debt or for the payment of a bet.’ A player against which an action for payment of a gambling debt is being brought could therefore invoke this gambling exception and attempt to escape payment.

French courts, however, consider that such gambling exception was adopted for the purpose of fighting against illicit gambling offers and that licensed operators offering licit gambling services should, however, be able to bring payment actions against their customers.

However, the gambling exception shall be opposable even to licensed operators, where the debt relates to loans knowingly granted for the purpose of financing gambling.

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18 Article 61 of the Online Gambling Law.
20 Article 43 of the Online Gambling Law.
21 Article 1965 of the Civil Code.
ii Anti-money laundering legislation
Gambling operators are required by law to implement measures permitting the identification of their customers, appoint a representative responsible for reporting any suspicious operation to the French anti-money laundering authority (TRACFIN) and implement a number of adapted internal controls.23

The internal controls implemented by online gambling operators must comply with the requirements specified by ARJEL,24 which is responsible for ensuring compliance with the anti-money laundering legislation by licensed online gambling operators.

Online gambling operators are also required to comply with any asset-freezing measures issued by the French authorities over the funds of any concerned individual or legal entity.

V TAXATION

i Taxation imposed on gambling operators
Diverse forms of taxation and social contributions are imposed on the lottery tickets sold by the FDJ, for a total representing about 25 per cent of their costs.

Casinos are subject to progressive taxation, which varies depending on the total amount of their gross gambling revenue. Gaming clubs are subject to a similar form of taxation. A player’s casino gains in excess of €1,500 are subject to 12 per cent taxation, which shall be directly collected by the casino.

Sports and horse race betting operators (whether land-based or online) and online poker operators are subject to taxation based on the total amount of wagers, as well as a social security contribution. In addition, a specific tax applies on the commissions earned by French companies on amounts bet on French horse racing events from abroad.

In addition to the various taxes imposed on the national and local level, each sport betting operator must execute an agreement with the relevant sports federation for the purpose of specifying the cost of the ‘betting right’ to be paid by the operator to the federation.

ii Taxation imposed on gamblers
As a general principle under French fiscal law, gambling gains are not subject to income tax.25 The interests generated by such gains, however, are subject to such taxation, and winners of important gains could be subject to the French wealth tax, but the law has recently been modified to only apply to real-estate wealth.

Gains earned by professional players that appear to depend more on skill and strategy than on mere chance (notably with the game of poker) shall be filed with tax authorities as non-commercial profits, and are indeed subject to French income tax. For the purpose of the enforcement of such law, any person who earns substantial and regular amounts by playing games, so that such activity should be regarded as professional, shall be considered a professional player.

23 Article L.562-1 et seq. of the HSC.
VI ADVERTISING AND MARKETING

In addition to the traditional rules applicable to advertising in France, advertisements that relate to gambling are subject to a number of additional specific requirements.

Any advertisement for a licensed gambling operator must be clearly identified as such and it must contain a specific warning against compulsive gambling (containing a telephone helpline for compulsive players and a link to the website equivalent if the advertisement is made online).

In addition, advertisements relating to gambling must not be published on any website, paper publication or audiovisual media targeting minors or broadcast in any movie theatres playing a movie targeting minors.26

VII THE YEAR IN REVIEW

i Loot boxes in video games

Following a trend largely followed in the video game industry, an AAA video game released worldwide offered players the possibility to buy loot boxes, consumable virtual items that can be redeemed to receive a randomised selection of further virtual items, to unlock contents within the game. It has been estimated that around €2,000 or 4,500 hours of play would be necessary to gain access to the entirety of the game.

Following a question from a senator regarding this game and the law applicable to such loot boxes, the president of ARJEL published a letter disclosing his personal opinion on the matter. This letter identified three major problems:

a such micro-transactions are almost necessary to progress in the game, whereas such necessity is not clearly indicated to consumers prior to their purchase;

b the contents of loot boxes are purely random, which makes them comparable to paying lotteries; and

c those contents can sometimes be resold, which clearly evidences the fact that those virtual contents do have a monetary value.

However, no sanction was ever imposed on the editor of the concerned video game, and the president of ARJEL concluded that a regulation of this sector appears improbable in the short term. Indeed, ARJEL had very similar interrogations at the time of the rise of social gaming online, but its interrogations were not followed by any concrete action and still no regulation of social gaming exists in France, several years later.

ii Regulation of e-sports competitions

Since the entry into force of French Law No. 2016-1321 dated 7 October 2016, the general ban on sweepstakes no longer applies to e-sport competitions involving competitors’ physical presence, provided participation costs are lower than a fraction of the total organisation cost, including the total price of the rewards at stake (the rate of the fraction and the maximum amount are set by decree). Such competitions are subject to prior declaration to public authorities.

26 Article 7 of the Online Gambling Law.
Online e-sports competitions must not be subject to participation costs, but the law clearly indicates that internet access fees and the cost of the acquisition of the video game concerned cannot be considered a financial sacrifice.

iii Fantasy leagues considered as online betting by ARJEL

In a decision that followed a request for information from several online gambling operators and companies interested in offering online fantasy league games in France, ARJEL expressly stated that such games should be regarded as elementary bets under pool betting and that licensed sports betting online gambling operators could therefore offer them lawfully.27 ARJEL slightly adjusted its list of authorised bets for such purpose and, in order to prevent any potential fraud, imposed that gambling on fantasy leagues only be offered as pool betting and be limited to combined bets consisting of at least 10 elementary bets.

VIII OUTLOOK

i The difficult transition from circle to club

Paris still remains the only European capital in which there is no casino. In addition, as previously discussed, all but one of the French gaming circles have closed down, as the newly created status of online club came into effect at the beginning of 2018.

However, as at the time of writing, a few months after the gaming club licensing process was implemented, the first French gaming club has not yet opened its doors to the public. It appears that the competent authorities received fewer applications for licences under this new status than they had initially expected.

This can be explained by the fact that gaming clubs are only allowed to offer games of poker, baccara, punto banco and mahjong. Blackjack, roulette and gambling machines cannot be offered by gaming clubs, despite the fact that such games are the most commonly played in French casinos.

However, several prominent casino owners in France have since indicated that they either have or will submit applications, and the first Parisian gaming club should be open to the public soon.

ii Towards partial privatisation of the FDJ?

The French government recently indicated that it was considering the possibility of selling FDJ shares, but had not made any final decision as to the importance of such participations or to the manner in which such participations would be put on the market.

The French government has not disclosed any detail regarding its exact intentions, but the Agence des Participations de l’Etat (the public agency responsible for representing the state in companies in which it holds a participation) was asked to prepare a report on the government’s options, should it decide to go forward with partial privatisation.

27 ARJEL Decision 2016-030 dated 14 April 2016.
I  OVERVIEW

i  Definitions

In contrast to other jurisdictions where ‘gaming’ or ‘gambling’ might serve as useful terms to distinguish between products that will be subject to specific gambling regulation, in Germany, a product must qualify as a ‘game of chance’ to fall under the scope of the Interstate Treaty on Gambling (the Interstate Treaty), the main legal framework of relevance in this context. This is the case whenever valuable consideration is given in exchange for a chance to win and the determination of winnings is entirely or predominantly a matter of chance in the context of a game. In this chapter, such games of chance will also be referred to as ‘gambling’.

Bets are also considered games of chance as per the Interstate Treaty, yet a licensing regime open to private operators was only established for fixed-odds sports betting offerings. Horse race betting offerings are also licensable. Betting on events other than sports (and horse races) – such as political events or financial products and tradings (including spread betting, FX trading, binaries, contracts for difference, etc.), sometimes also referred to as ‘social betting’ – is impermissible as per German gambling laws and may be subject to other regulation, namely financial services and banking regulation, rather than gambling regulation. Pool betting offerings are reserved for the state monopoly, since such offerings are commonly classified as a kind of lottery.

Lotteries in general are defined as games of chance that are directed at a majority of persons, involve a certain payment, a specific game plan and the chance to win money as opposed to other prizes of monetary value (this would be referred to as a draw in Germany).

Games that do not fall under the Interstate Treaty’s definition of a game of chance and, consequently, are not subject to specific gambling regulation (but may likely still be subject to other rules and regulations that are aimed at ensuring consumer protection),

depending on the element of a game of chance they lack, are commonly either referred to as skill games (no predominant element of chance) or free-to-play games (no consideration paid to participate, free prize draws acting as an example). Although ultimately subject to a case-by-case analysis, where German jurisprudence may, but only to a limited extent, provide some guidance, so-called social games will mostly classify as skill games. In the absence of specific regulation, the legal classification of fantasy league games offered to German players

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1  Joerg Hofmann and Matthias Spitz are senior partners, and Jessica Maier is a senior associate, at Melchers Rechtsanwälte Partnerschaftsgesellschaft mbB.

2  For example, the Act Against Unfair Competition; Act for the Protection of Minors; Interstate Treaty on Broadcasting; Interstate Treaty on the Protection of Minors in the Media; and Sweepstakes Ordinance.

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will depend on the specifics of the product (i.e., its overall design and structure), and the question of whether, with this design and structure, the game qualifies as game of chance as defined in the Interstate Treaty.

Against this background, skill competitions and competitive sports for prizes also do not typically fall within the scope of gambling regulation in Germany.

ii Gambling policy

Consumer protection, in particular the prevention of gambling addiction and protection of minors and other vulnerable persons, the channelling of players towards the regulated market, the guarantee of an orderly and fair gambling offering, combatting of fraud and other gambling-related crimes as well as the protection of the integrity of sports are the declared goals of German gambling regulation. While Germany has been known to take a fairly restrictive position towards gambling, gambling – with the exception of online casino gambling – is neither generally prohibited nor particularly encouraged through licensing in German gambling laws. The protectionist approach of the German states over their lottery (and sports betting3) monopoly and years of continued criticism under EU law (which go hand in hand), however, must be seen to be characteristics of German gambling regulation. As a result, gambling regulation in Germany is constantly undergoing some kind of reform usually triggered by a decision from the Court of Justice of the European Union (CJEU) or national courts or intervention on the part of the European Commission confirming that the European fundamental freedoms are not sufficiently ensured, and the regulatory goals cannot be achieved by means of the current regulation and licensing opportunities. However, the European Commission announced in December 2017 that, as a general policy regarding the gambling sector, it would close all pending infringement procedures and complaints. Still, German policymakers are called to act since the problems identified in relation to the current Interstate Treaty regarding compliance with EU law have not yet been resolved.

iii State control and private enterprise

The principal German legal framework on gambling allows, only to a limited extent, for gambling to be operated by private enterprises rather than the state. For example, in most German states land-based casinos are owned by the state and the operation of lotteries is exclusively reserved for the state-owned lottery companies, which the German states are very protective of. With regard to lotteries, private operators may only apply for brokering licences, which allow them to sell lottery tickets on behalf of the state lottery companies to promote their products, (i.e., the traditional lotteries). In the sports betting sector, as prominently confirmed by the CJEU in the Ince case (336/14), an unlawful de facto state monopoly persists despite the state monopoly having already been held to contravene EU law in 2010.4 The sports betting licensing process that was introduced by and initiated under the current Interstate Treaty, and was supposed to allow for the issuance of 20 licences, was confirmed to have been unlawfully designed and conducted, and could never be completed because of multiple legal flaws.

3 The sports betting monopoly was held to contravene the EU in the CJEU’s Carmen Media decision of 10 September 2010 (C-46/08). On 4 February 2016, the CJEU confirmed that, contrary to EU law, a de facto monopoly still persists to date in the Ince case (C-336/14).

4 CJEU, judgment of 10 September 2010, C-46/08, Carmen Media.
iv  Territorial issues
Within the German federal system, gambling law is traditionally regulated at state level. This means that, in principle, gaming is regulated by the respective state law of each of the 16 states. In order to achieve some uniformity, the states agreed on common principles and regulations for certain fields of gambling law in terms of the Interstate Treaty. This includes the sports betting sector, for example, where the state of Hesse was empowered to act on behalf of all 16 German states. Under the Second Treaty Amending the Interstate Treaty on Gambling (the Amendment Treaty), which did not enter into force on 1 January 2018, this responsibility was to be assumed by the state of North Rhine-Westphalia.

In Germany, there are no particular localities that have a favoured status for gambling in terms of, for example, tourist islands or reservations where particular groups have autonomy. From January 2012 until February 2013, the state of Schleswig-Holstein pursued its own gambling policy, which allowed for online casino and sports betting licences to be issued, instead of joining the other 15 states in the Interstate Treaty. However, after a change in government, Schleswig-Holstein ultimately joined the Interstate Treaty. Consequently, with the exception of Schleswig-Holstein licensees (i.e., operators who obtained a licence under the Schleswig-Holstein gaming regime), in relation to whom the former Schleswig-Holstein regulation continues to apply, the Interstate Treaty restrictions also apply in Schleswig-Holstein.

v  Offshore gambling
The attitude of German gambling supervisory authorities to offshore gambling operators (i.e., those who offer gambling products to German citizens but are based outside of Germany) can be considered to be problematic as the German states continually fail to strike a lawful balance when selecting the operators that they intend to enforce against. Ignoring the main goal of German gambling regulation (i.e., to ensure consumer protection), the enforcement activity of German states with regard to offshore operators tends to be targeted at EU-licensed operators for reasons of practicality rather than at operators that do not have adequate licensing or sufficient consumer protection measures in place. Irrespective of the question of how, in light of the fundamental European freedoms, enforcement taken against EU-based and licensed gambling operators can be legally justified in the current situation, the proportionality and consistency of such an enforcement practice can be questioned – an aspect that certain German administrative courts have also identified as a problem, and which may become more difficult as a result of a judgment handed down by the Federal Administrative Court in October 2017, where the legal grounds were published on 13 March 2018 and the court considerably loosened the requirements enforcement authorities have to adhere to.

German authorities would derive the legal basis for acting against foreign operators from the Interstate Treaty, which, as per Section 9, allows them to make investigations into alleged violations of the Interstate Treaty and to interdict the respective offering or advertising therefor. They may also resort to payment blocking measures under this provision. However, payment blocking raises a number of legal questions, namely connected to data protection

5 A list of all Schleswig-Holstein licensed online casino and sports betting operators may be found at: www.schleswig-holstein.de/DE/Fachinhalte/Gluecksspiel/genehmigungsinhaber.html?sessionid=67BD3786BAE76ED967285D78A5C9BFF1.
laws that still have to be resolved, which is why German authorities tend to act behind the scenes speaking to payment service providers rather than strictly imposing payment blocking measures.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

As mentioned in Section I.i, above, the basic legal framework for gambling in Germany is the Interstate Treaty of 2012 – the third attempt of the German states in recent years to create a uniform and EU-law-compliant gambling regulation.

The current Interstate Treaty entered into force on 1 July 2012 following a legislative process that had to be initiated as a result of the CJEU finding that the state monopoly on sports betting that was provided for in the Interstate Treaty of 2008 (which was itself introduced because the former state monopoly stipulated in the then applicable Interstate Treaty was held to be unlawful for lacking justification by the Federal Constitutional Court) contravened EU law.

The current Interstate Treaty has been subject to criticism from the time it entered into force and the failure of the sports betting licensing process, which was introduced by the current Interstate Treaty and confirmed by national courts and most prominently by the CJEU in the *Ince* case to be unlawful, finally triggered the reforms that are currently still being discussed (see Sections VII and VIII, below).

Alongside the Interstate Treaty, gambling law is regulated by other state legislation, for example the Gambling Acts implementing the Interstate Treaty, Casino Acts and ordinances. For historic or general reasons, some federal laws also influence gambling, such as the Race Betting and Lottery Act, the Trade Regulation Act, the Criminal Code and the Fiscal Code.

ii The regulator

In a gambling regulation context, Germany has more than one regulator, which makes the question of which authority will be responsible very complex. As a general rule, the type of gambling offered and where it is offered will be influential factors for which regulator will be responsible. The responsibilities range from individual municipalities acting as regulators (e.g., in the land-based gaming hall sector) to the respective ministries (or subordinate authorities) of the German states (e.g., in relation to brick-and-mortar casinos or in relation to coordinating enforcement actions against suspected unlawful gambling operators or violations of the Interstate Treaty and the applicable state Gambling Act) to authorities that have assumed a central responsibility for a certain sector and, as such, act on behalf of all German states in relation to this sector.

Again depending on the product, and specifically the relevance of products that do not qualify as ‘games of chance’ (see Section I.i, above), other authorities, such as the Federal Financial Supervisory Authority, may occasionally be considered the responsible regulator.

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7 Federal Constitutional Court, judgment of 28 March 2006, File No.: 1 BvR 1054/01.
iii Remote and land-based gambling

The Interstate Treaty generally prohibits the operation and brokerage of online games of chance. The only exceptions made by the Interstate Treaty in this context concern sports betting, horse race betting and lotteries. Online casinos therefore are not currently licensable, yet some German state are currently pushing for licensing opportunities to be included as part of ongoing reform discussions. In contrast to online gambling, land-based gambling is widely permissible. While the operation of traditional lotteries is covered by the state monopoly, the operation of other types of gambling can generally be licensed.

iv Land-based gambling

Land-based gambling is only permissible in certain venues. Such venues have to fulfil certain requirements. Details will either be stipulated in the law, detailed in the application requirements or form part of the licence.

Casino games can only be operated in casinos. The operation of casinos in some states is reserved for the public authorities, other states provide a limited number of licences for private operators. The number of casinos allowed per state will, however, always be limited and will vary between the states. In Baden-Württemberg, for example, three land-based casinos are allowed whereas in Mecklenburg-Western Pomerania six casino locations are provided for in the respective Casino Act.

The current Interstate Treaty provides for a maximum number of 20 sports betting licences to be issued – a restriction that supposedly will be lifted at least to some extent under future legislation. It also has to be determined how this change will impact the limitations on the number of permissible betting shops per operator that are set out in the current state Gambling Acts or other acts transposing the Interstate Treaty, and vary considerably depending on the state in question. Like the limitations on licences, the limitations on the number of permissible betting shops have been criticised for having been arbitrarily determined. For example, Brandenburg allows for 18 betting shops per licensee, Lower Saxony provides for 2,400 shops with a maximum of 500 per licensee and Baden-Württemberg provides for a maximum of 600 shops. The limitations raise further questions when compared with the number of existing lottery ticket sale venues (e.g., about 3,250 in the state of Baden-Württemberg), which the states may be expected to want to protect.

Concerning gaming halls, there is no statutory limit on the number of available licences, but this sector is undergoing some major changes. The strict minimum distance requirements that gaming halls must adhere to (i.e., between other gaming halls, and between gaming halls and institutions such as schools or addiction centres) and the requirement that gaming halls may not be operated in the same building as land-based casinos or betting shops, effectively limits the number of permissible gaming halls in practice.

v Remote gambling

The Interstate Treaty imposes a general ban on online gambling. As per the law, exceptions only apply for licensed traditional lotteries, horse racing and sports betting. The Interstate Treaty does not provide for a licensing system for online casino offerings. This situation is criticised by experts of the industry as well as the European Commission. In a pilot process initiated in 2015, the European Commission made clear that it considers the ban ineffective in achieving the goals set out by the Interstate Treaty. However, in December 2017, the European Commission announced that, as a general policy regarding the gambling sector, it would close all pending infringement procedures and complaints.
Interestingly, at least one German state, Schleswig-Holstein, has in the past allowed for online casino licences to be issued. These licenses are still valid but they are limited in scope to the territory of Schleswig Holstein and are supposed to expire in 2018.

vi Ancillary matters

Operators applying for a licence will, as part of the licensing process, have to prove that any equipment used has been approved as per the requirements that will be set out in the respective licensing process, including that operators must provide certificates or other documents on their business-to-business (B2B) partners. There is no specific licensing process for gambling-related B2B services.

In relation to persons acting in key positions, it will again have to demonstrated in the licensing process that these persons are sufficiently qualified and have the necessary expertise to conduct the business reliably and responsibly. There is no specific licensing process (e.g., for personal licences) that employees of gambling operators would have to undergo.

III THE LICENSING PROCESS

i Application and renewal

In terms of general requirements that apply throughout all gambling sectors, gambling operators are usually required to demonstrate individual reliability and capability, as well as the transparency and security of their business. A peculiarity of licensing procedures in Germany is the requirement to submit ‘concepts’ (i.e., comprehensive descriptions of the gambling operation to be licensing that cover these aspects), such as a security concept (covering IT security and data protection), social concept (describing protection of minors and responsible gaming measures), business concept (detailing the viability of the operation and projected development over the licence term), sales or marketing concept (of particular relevance for franchising in land-based gambling operations) as well as a payment processing and AML concept (which overlaps with the requirement for internal AML policies under the federal AML Act).

With regard to the individual reliability of managerial staff, German gambling law neither prescribes nor provides for obtaining personal licences, such as in the UK. Hence, the operator applying for a licence will have to provide evidence in the form of, for example, criminal records, CVs and qualifications of the relevant individual. The reliability of the applicant has to be proven by disclosing details on shareholders and, if applicable, on trustees. Capability involves being able to properly conduct gambling both from a financial and an operational perspective.

Although the Interstate Treaty provides an overarching framework for the regulation of gambling in Germany, additional laws may apply to the licensing process dependent on the gambling product:

a Operating licences are reserved for the state lottery companies but privately owned lottery brokers may apply for a licence to distribute the state lottery products online and offline. Licensing requirements to retail outlets are included in the local Gambling Acts.

b Casino gaming, including slots and table games such as poker, baccarat and blackjack, is licensed under the Casino Acts of the 16 states. Licences may either be issued by the respective state government or a city, but the number of available licences is usually limited by the law.
c Slot machine gaming in gaming halls, bars and restaurants is subject to a plethora of licensing conditions and product restrictions under the Interstate Treaty and the federal Trade Regulation Act, specifically minimum distance requirements between gaming hall premises, limits to stakes, payouts and winnings.

d Horse race betting may be licensed online and offline by the gambling regulators of the states to bookmakers and the horse racing associations (totalisers), which may exclusively offer race track betting. The number of licences for bookmakers is not limited under the federal Horse Race Betting and Lottery Act, although stringent licensing conditions have in fact reduced the interest of bookmakers in such licences.

The licensing of sports betting under the Interstate Treaty is subject to a complex licensing regime that the German states have so far failed to implement because of a lack of transparency in the process.8

ii Sanctions for non-compliance

Since regulators are subject to the principle of proportionality, breaching licence conditions in the first instance is unlikely to immediately trigger fines or revocation but an order will be given demanding the licensee to explain the breach and remedy it within a deadline of a few weeks. If the order is not adhered to it will usually be followed by a fine, which may range from a few thousand euros to tens of thousands of euros depending on the size of the gambling operation and the severity of the breach, and may be imposed in case of non-compliance within the given deadline. The regulator may also attempt to enforce compliance by suspending the licence, reducing its term or revoking it (Section 4e(4) of the Interstate Treaty).

Unlicensed gambling operations are subject to the general means of enforcement outlined under Section 9 of the Interstate Treaty, where the administrative enforcement cycle usually consists of (1) a hearing letter, (2) delivery of an interdiction letter, failure of which would result in a fine, and (3) subsequent court proceedings involving a principal lawsuit on the lawfulness of the interdiction and its legal basis (the Interstate Treaty) as well as a claim for interim legal protection to suspend the interdiction. As a consequence, it may take years for interdiction letters to become legally executable.

Although the Interstate Treaty provides a legal basis for payment blocking, no such blocking order has officially been issued to banks or payment processors by the responsible regulator at the Lower Saxony Ministry of the Interior. Instead, over the past years, this regulator has resorted to a ‘harassment strategy’, which means contacting banks or payment processors with unsolicited information of alleged non-compliance of gambling operations with German regulations.

Internet service provider blocking was removed from the German gambling regulations in 2012 and is highly unlikely to be included in the regulations in any future reform as it failed to satisfy expectations in the area of enforcement of media regulators against illegal pornography on the internet.

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8 CJEU, judgment of 4 February 2016, C-336/14 (Ince).
IV  WRONGDOING

Participating in money laundering is a crime for any individual in Germany and land-based casinos as well as operators of online gambling under the current AML Act are required to take risk-adequate measures to prevent money laundering in their respective operations. Failure to do so may amount to liability for an administrative offence, which may be sanctioned by a fine of up to €100,000 or skimming of gross profits. In case of gross negligence, it may even incur criminal liability resulting in punishment by a fine or imprisonment.

In April 2017, the criminal offence of ‘sports betting fraud’ (i.e., match-fixing) was incorporated into the Criminal Code. Manipulating sports competitions as an athlete or coach – whether related to sports betting or not – may incur criminal liability for a fine or imprisonment up to three years (Section 265c and 265d of the Criminal Code).

V  TAXATION

The type of taxes imposed on gambling operators heavily depends on the gambling product in question and to what extent state legislation will be of relevance. The land-based casino sector acts as a good example in this context. While online casino offerings in some states will be subject to a combination of gross gaming revenue and profit taxation, operators in other German states will have to pay taxes on gross gaming revenue (i.e., the amount by which the total of all stakes exceeds the total of all winnings paid out) while being exempted from corporate taxation. Tax rates range between 20 per cent and 80 per cent depending on the respective state. Additional levies may be imposed or progressive tax rates that depend on the economic capability of the casino operator will be applied. Similarly affected by state legislation, slot machine operators are subject to municipal amusement taxes (tax rates vary from 12–20 per cent and the tax will be based on the gross income generated from the slot machines) that they have to pay in addition to regular corporate tax.

Other gambling offerings are subject to federal taxes. Any operator offering licensed or unlicensed sports or horse race betting to German customers, for example, is subject to a 5 per cent federal sports betting tax on stakes. Online casino operators targeting German customers are subject to 19 per cent VAT. There had been some debate regarding the applicable tax base. The Federal Ministry of Finance, however, finally confirmed gross gaming revenue as the tax base in Autumn 2017.

VI  ADVERTISING AND MARKETING

Advertising and marketing of gambling overall must be considered to be subject to a very restrictive regime and influenced by a number of laws and regulations including, for example, the Interstate Treaty, the Gambling Acts of the individual states, the Advertising Guidelines, the Act Against Unfair Competition and specific laws for the protection of children and minors.

In general, advertising of gambling offerings – irrespective of where the operator is based – is only allowed for games of chance that can be legally offered in Germany. German authorities interpret this to mean that only German-licensed operators may legally advertise the licensed products. Arguably, in the current situation and on the basis of the Ince case, exceptions apply in relation to EU-licensed sports betting operators. Online casino operators,
with the exception of Schleswig-Holstein licensees, will have more difficulties in arguing that their advertising activities are legal given the total ban on online games of chance that is stipulated in the Interstate Treaty.

Any advertising of unauthorised games of chance, misleading advertising or advertising that is directed at minors or other risk groups, or does not comply with basic advertising standards, is regarded as being unlawful advertising and as such is prohibited, as is most online and TV advertising. Online and TV advertising, in principle, is prohibited, but may be allowed for licensed sports betting, horse race betting and lottery operators subject to these operators obtaining a permit from the responsible authority.

In terms of possible penalties for unlawful advertising, Section 284(4) of the Criminal Code provides for a fine or imprisonment for up to one year to be imposed. However, state prosecutors have been very reluctant to prosecute gambling operators for advertising, most likely because of the legal uncertainty and criticism under EU law, and the constitutional requirement to ensure consistency of criminal statutes.

VII THE YEAR IN REVIEW

In 2017, the legal landscape for gambling regulation in Germany was primarily characterised by a struggle between the German states to find common ground in relation to changing the current Interstate Treaty, which is ongoing, and an important court decision that could have a significant impact on the risk assessment gambling operators have to undertake when targeting the German market.

While the prime ministers of the German federal states had originally agreed on a so-called ‘Second Treaty Amending the Interstate Treaty on Gambling’ (the Amendment Treaty) earlier in the year, several state governments over time, as result of changes in their governments following state elections, were no longer convinced that they should ratify the Amendment Treaty in its minimalist (i.e., sports betting-focused) form. The Schleswig Holstein government had already advocated against ratification in June 2017, arguing that the reforms were insufficient and online casinos needed to be regulated as well. It was later joined by the states of North Rhine Westphalia and Hesse, and the Amendment Treaty was ultimately not ratified by these three states. In order to take effect, the Amendment Treaty would have had to have been signed by all 16 federal states. Reform discussions, therefore, continue.

In October 2017, the Federal Administrative Court handed down a judgment that was fully published on 13 March 2018, in which it confirmed the legality of the total ban in light of national and EU law. It was already feared that based on a press release issued on 27 October 2017 the judgment could considerably impact on the line of argument relied upon by operators with regard to the European fundamental freedoms to justify their

9 For more details on the basic advertising standards, see the Advertising Guidelines that were issued by the Gambling Committee, a body consisting of representatives of the highest gambling supervisory authorities in the 16 states. Although the Bavarian Constitutional Court held the Advertising Guidelines to be incompatible with the Bavarian Constitution in a decision of 25 September 2015 (File Nos.: Vf. 9-VII-13; Vf. 4-VII-14; Vf. 10-VII-14), these standards must still be considered relevant for advertising content. In relation to the Advertising Guidelines, the Bavarian Constitutional Court had mainly criticised that these were issued by the Gambling Committee, which arguably is an unconstitutional body.

10 Federal Administrative Court of 26 October 2017, File No: 8 C 14.16/ 18.16.
offerings in Germany. In practice, the judgment can also be expected to increase the risk of enforcement action being taken. The judgment, however, turned out to be rather weakly drafted, and is heavily criticised among legal experts for its many flaws and questionable application of CJEU case law.

**VIII OUTLOOK**

Since the ratification of the Amendment Treaty failed in 2017 and reform discussions regarding a broad reform of German gambling regulation can continue, there is reason to hope that German gambling regulation may actually undergo some positive changes in the foreseeable future. The German states in favour of opening the market and looking at gambling regulation properly will, however, have some considerable work ahead of them to convince the other German states, especially states that traditionally have been anti-online gambling. If no consensus for a broad reform can be found, they may even want to consider pursuing their own gambling regulations as Schleswig-Holstein did in 2012. Yet, discussions are still at a very early stage, and reform discussions could go various ways. A disappointing scenario could result in back-pedalling to only minimalist reforms, yet there are no indicators of this being discussed at the time of writing, notwithstanding the legal arguments that speak against only minimalist reforms as proposed in the Amendment Treaty, which was not ratified in the end.

An aspect that could impact on the reform discussions as well as the overall legal environment affecting online gambling operators on the German market, are the legal grounds of the above-mentioned judgment of the Federal Administrative Court, which were published on 13 March 2018. Immediate reactions have so far primarily been limited to criticism, yet we can also expect increased enforcement activity. To what extent the judgment will actually impact on the reform discussion will have to be monitored. Operators and other stakeholders in the industry will, however, be well advised to up their game in terms of lobbying.
I OVERVIEW

i Definitions

The Gibraltar Gambling Act 2005 (the Gambling Act) is the principal legislative instrument regulating gambling activity in Gibraltar. The statute not only makes provision for the licensing and regulation of land-based gambling, but also gambling services through remote means (such as the telephone and internet). This legislation is partly modelled on the UK Gambling Act 2005.

The legal definition of ‘gambling’ is contained in Section 2(1) of the Gambling Act to include:

a betting (including pool betting) and bookmaking;
b gaming; and
c promoting or entering a lottery.

Furthermore, ‘betting’ is defined as:

…making or accepting a bet on –

a the outcome of a race, competition or other event of any description;
b the likelihood of anything occurring or not occurring; or

c whether anything is or is not true.

However, this does not include any bet made or stake hazarded in the course of, or incidental to, any gaming, and the expressions bet, betting and bookmaking shall be construed accordingly.

‘Gaming’ is defined in the Gambling Act as: ‘the playing of a game of chance for a prize’ and a ‘game of chance’ includes:

a a game that involves both an element of chance and an element of skill;
b a game that involves an element of chance that can be eliminated by superlative skill;
c a game that is presented as involving an element of chance; or
d a game where a computer generates images or data taken to represent the actions of another participant or participants in the game.
Finally, a ‘lottery’ is defined as:

*any scheme for the distribution of prizes by chance or lot in which the participants or a substantial number of them make a contribution for the purposes of participation in the chances of the lottery and includes tombola, but does not include any gaming.*

With regard to free prize draws, the proposed offering will need to be considered carefully to determine whether it is licensable or not. In gaming it is possible that a player playing a game for a prize does not necessarily (unlike in lotteries) make a bet or stake on the game. This analysis becomes important when looking at social gaming or free play games that might still be regarded as requiring a licence. Such offerings would definitely not require a licence if there is no prize.

### ii Gambling policy

Gibraltar’s first gambling statute was enacted in the 1950s and covered the provision of land-based gambling services. The legislation did not envisage the provision of gambling services through remote means.

However, in the 1990s, Gibraltar saw the first remote providers of gambling in the jurisdiction, most notably Victor Chandler and Ladbrokes, which commenced their telephone betting operations from here. The jurisdiction’s reputation as a centre for remote operator business was consolidated in the early 2000s when the first internet gambling service providers were established in Gibraltar. These initial licence arrangements were extended under the terms of the old legislation, which did not provide for gambling through remote means. Therefore, specific and bespoke arrangements were granted pursuant to individual licence agreements on terms contractually agreed between the operators and the Gibraltar government as the Licensing Authority.

The increasing numbers of internet gambling providers relocating and establishing their business in Gibraltar, and the commercial pressures of some of the larger businesses who wished to list their shares on the stock exchange, gave rise to the enactment of the current Gibraltar Gambling Act 2005. This legislation is significantly modelled on the UK Gambling Act 2005. The statute not only makes provision for the licensing and regulation of land-based gambling, but also gambling services through remote means (such as the telephone and internet).

The Gibraltar government has therefore, for a number of decades, supported and encouraged the industry, in particular the remote gambling industry, in a regulated environment with reputation being of paramount importance to the jurisdiction.

### iii State control and private enterprise

All types of gambling products can be commercially offered in Gibraltar with the exception of lotteries. In relation to the latter, the only lottery permitted under the Gambling Act is the Gibraltar government lottery and small bazaars, fetes and fairground-style lotteries (of the types identified in Schedule 2 of the Gambling Act). The Gibraltar government lottery is a small lottery not offered remotely, and is based on printed tickets.

### iv Territorial issues

Gibraltar as a geographical jurisdiction is very small, and there is a common licensing and regulatory framework for the entire jurisdiction. There is no sub-delegation of authority to
other municipalities as there are none, and the administration of these matters are handled by the relevant authority, being the Gibraltar Licensing Authority, for the jurisdiction as a whole.

v Offshore gambling

The government of Gibraltar has a permissive attitude in respect of the provision of gambling matters, and there is no general restriction in relation to foreign operators providing gambling products to citizens of the jurisdiction. However, this is in the context of remote gambling. Any foreign operator who wants to provide land-based gambling would need to apply and obtain the relevant licences locally.

There is a general provision on control of advertising in the Gambling Act, which empowers the Minister for Gambling to prescribe rules governing the advertising of gambling activities authorised under a remote gambling licence after due consultation with the Gambling Commissioner, the Licensing Authority and individual remote gambling licence holders. Although to date no such rules have been published, these may prohibit under penalty advertisements that are:

a indecent, pornographic or offensive;
b false, deceptive or misleading;
c intended to appeal specifically to persons under the minimum permitted age, currently 18 years of age; or
d in breach of copyright laws.

However, it should be noted that copyright and intellectual property rights are specifically safeguarded by other legislative instruments. It should also be noted that these advertising rules are also applicable in respect of licensees in Gibraltar. It is difficult to prohibit advertising from foreign operators through the various media. Enforcement will necessarily have to go through the appropriate legal channels in the jurisdictions involved and, depending on the treaty arrangements between Gibraltar and those jurisdictions and the nature of the infringement, the process of enforcement will be different (either through police cooperation or court process).

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

As highlighted in Section I.ii, above, the principal legislation governing gambling activities in Gibraltar is the Gambling Act. The Gambling Act sets out a licensing and regulatory framework for both land-based gambling and remote gambling. The definitions of gambling and gaming are set out in Section I.i, above. The different categories of gambling include betting (such as pool betting) and bookmaking, gaming and lottery. The ‘gaming’ element includes all types of casino games, poker, slots, machine gaming, bingo and all other number games without limitation.

Competitions based purely on skill are not subject to any licensing or regulatory framework in Gibraltar, but the Gambling Act does cover games of chance that can be eliminated by superlative skill (the most obvious of these being poker).

Financial spread-betting offerings are required to operate under a dual-licensing system pursuant to both the Gambling Act and the Financial Services (Markets in Financial
Instruments) Act 2006. While primarily regarded as an offering that is regulated by the Financial Services Commission (the Gibraltar financial services regulator), the Gambling Commissioner acts as a secondary regulator.

ii The regulator

All licensing and regulatory matters are determined by the Licensing Authority. The Licensing Authority, pursuant to the Gambling Act, is the Minister for Gambling. All regulatory aspects (post-licensing) are within the remit of responsibility of the Gambling Commissioner and his or her regulatory team. Although the roles are distinct and separate, the personnel and infrastructure organisations of both departments are merged into one. This ensures a more streamlined approach whereby the licensing and regulatory teams work closely to complement each other. This results in a more efficient exercise of their duties, which benefits licence holders.

Part VIII of the Gambling Act contains the enforcement provisions in relation to compliance by licence holders to the terms of their licences. Section 42 of the Gambling Act grants extensive powers of investigation, reporting and powers of entry where a licence holder is suspected of carrying on activity contrary to the provisions and terms of their licence, the Act or in a manner which is otherwise prejudicial to the public interest, the interest of any customer or potential customer or to the reputation of Gibraltar. This part of the Gambling Act also sets out the powers of the Licensing Authority to suspend or revoke a licence and enables a Justice of the Peace, if satisfied with the information laid before him or her, to grant the Gambling Commissioner or the police with a warrant to search premises.

iii Remote and land-based gambling

The Gambling Act provides for both land-based and remote gambling. While both are catered for in the legislation, the respective licensing regimes and requirements are different, as set out in subsections iv and v, below.

Each licence holder, whether offering remote or non-remote gambling services, is, however, obliged to:

a publicise its rules so that persons entering premises or accessing a website, as the case may be, can readily see them;

b establish and at all times maintain in operation an effective system of internal controls and procedures to monitor the activities authorised under its licence and for it to comply with its obligations under the Criminal Justice Act in respect of any transactions that may give rise to suspicions of money laundering on the part of the participants;

c take all reasonable steps to prevent an underage person from participating in the gambling activities offered;

d nominate a place for the safekeeping of transaction records, and keep true and fair annual financial records, which have to be audited (these are to be kept for at least five years) and that are to be provided annually to the Gambling Commissioner;

e maintain approved banking and payment processing arrangements;

f promptly inquire into complaints; and

g pay all such charges, fees and gaming taxes as are prescribed by the Licensing Authority.
iv Land-based gambling

The Gambling Act carefully prescribes the licensing regime applicable to land-based operators. Essentially, five different licence categories are available to those seeking to provide land-based, bricks-and-mortar services within Gibraltar. The following is a brief overview of the form of activity that an operator may seek to provide under each licence:

a Bookmaker’s licence: this allows the holder to undertake, either on his or her own account or as agent, the business of receiving or negotiating bets. Furthermore, it should be noted that it shall be an offence for any person to keep or use any premises, or cause, or knowingly permit any premises to be used as a place where persons resorting thereto may effect any betting transactions without having previously obtained a bookmaker’s licence.

b Pool promoter’s licence: this allows the holder to run pool betting operations. Strict restrictions are imposed on the use of premises for the provision of pool betting services where the owner of such premises does not hold a pool promoter’s licence.

c Gaming operator’s licence: this allows the holder to conduct or provide gaming facilities (this includes the provision of games of chance for a prize, such as casino games). Restrictions are also imposed on the use of premises to conduct gaming operations.

d Lottery promoter’s licence: this allows the holder to promote or operate lotteries.

e Gaming machine licence: this allows the holder to keep on his or her premises gaming machines for the purpose of land-based gaming services.

Land-based gambling in Gibraltar occurs primarily in casinos (of which there are currently two licensed). Certain bars and restaurants also have single, stand-alone machines under gaming machine licences. Non-remote gambling licensees must conduct their business from approved premises and must maintain their licence in accordance with the conditions upon which it is issued.

The Gibraltar government conducts a lottery. The Gambling Act prohibits land-based lotteries operating in Gibraltar other than the Gibraltar government lottery and other small bazaars, fete and fairground style lotteries (of the types identified in Schedule 2 of the Gambling Act). No similar restrictions apply when conducting online lotteries from Gibraltar targeted at end users located outside Gibraltar.

v Remote gambling

Under the Gambling Act ‘remote gambling’ is defined as:

gambling in which persons participate by means of remote communication, that is to say, communication using –

a the internet;

b telephone;

c television;

d radio; or

e any other electronic or other technology for facilitating communication.

The Gambling Act establishes a licensing and regulatory framework for the provision of gambling services through remote means.

However, the first ‘remote gambling’ licences issued in Gibraltar predate the enactment of the 2005 legislation. There are currently only 34 licensed remote gambling operators in
the jurisdiction given that the government has applied a very restrictive and selective policy towards the licensing of operators in the jurisdiction by requiring a substantive presence resulting in real accountability to the regulator, constant monitoring of operations and ensuring that gambling services are provided responsibly with appropriate measures to protect the young and problem gamblers.

Although there is no limit to the number of licences that may be issued in Gibraltar, given the current licensing policy, which requires a bricks-and-mortar operation with key equipment in the jurisdiction (including servers), the number of licensees is selectively kept low and the increase in licences will be steady and controlled. There should nonetheless be a steady rise of licensees in Gibraltar as opportunities develop for medium-sized businesses with niche markets and products that have not partnered with other complementary operations or otherwise merged.

While the legislation envisages that anyone can apply, there are various criteria applied by the authorities in determining whether to license an operator. The principal criterion is that described above: real presence with senior individuals managing the business and with key technical equipment in the jurisdiction.

**Business-to-business and business-to-consumer**

The Gambling Act only envisages one type of remote gambling licence: the operator licence. There are, however, subcategories of this licence depending on the nature of the services provided, which are ‘casino’ (including poker, bingo, slots), ‘betting’ and ‘lottery’.

Notwithstanding the single type of licence, the Licensing Authority recognises the business-to-business (B2B) model and will extend a licence for such operations pursuant to the current Gambling Act and contractual arrangements agreed between the parties. There are numerous B2B operators in the jurisdiction who provide hardware, software and operational or platform support and solutions to business-to-consumer (B2C) gambling operators. We are seeing a very steady increase in the number of B2B providers applying for and obtaining Gibraltar licences who recognise opportunities for their business in the local market and in using Gibraltar as hub for provision to operators in other regulated jurisdictions.

Most of the larger B2C operators also provide, as a significant element of their business, B2B services. The majority of these are white label services pursuant to which the operator provides the core gambling services, as well as customer services, registration and account handling, to a third party that owns a brand and websites. All white labels entered into by Gibraltar operators require prior Licensing Authority approval, which in most cases is a relatively straightforward procedure involving the submission of due diligence documentation on the white label partner.

vi Ancillary matters

The government of Gibraltar announced a general review of the gambling licensing and regulatory framework, given that the principal legislation was passed in 2005 and the online gambling industry and third-party suppliers have developed significantly since.

A draft report has been prepared for the Gibraltar government’s consideration by a working group established for such purposes. A paper was circulated within the industry and given to interested stakeholders, and the anticipated responses will feed into the analysis of the changes proposed. This envisages building on the strong regulatory licensing and tax regime already in place. The less prescriptive environment into which Gibraltar and the United Kingdom may be moving may indeed provide space for further reforms and adjustments.
Gibraltar has built up a critical mass of knowledge, personnel, regulatory experience and political support for the online gaming industry. These features and the jurisdiction’s broader attractions remain in place. Gibraltar is determined to ensure that its economy remains highly competitive and very attractive as a base from which to operate international business.

III THE LICENSING PROCESS

i Application and renewal

See Section II.ii, above.

Licensing application and processing will depend on the type of licence being sought (non-remote or remote). In general terms, the applicant will need to prove their reputation, provide a business plan and demonstrate their skills in the sector. The investment in the jurisdiction and local plans will be very relevant in the assessment to be made by the Licensing Authority.

Given the territorial limits of the jurisdiction, there is little movement on land-based gambling operations. There are currently two licensed casinos locally and a number of betting shops. Most applications therefore arise in the context of remote gambling operators.

Although there is no limit to the number of remote gambling licences that may be issued in Gibraltar, given the current licensing policy, which requires a bricks-and-mortar operation with key equipment in the jurisdiction, the numbers of licensees are selectively kept low and it is not anticipated that there will be a sharp increase in licences.

While the legislation envisages that anyone can apply, there are various criteria applied by the authorities in determining whether to license an operator. The principal criterion is that described above: real presence with senior individuals managing the business and with key technical equipment and infrastructure in the jurisdiction. Paragraph (4) of Schedule 1 to the Gambling Act provides that in determining whether the applicant for a licence is a ‘fit and proper person’, the Licensing Authority shall take into account, to the extent appropriate:

- the person’s character, honesty and integrity;
- his or her business reputation, current financial position and financial background;
- the business plan in respect of the activities;
- his or her experience of conducting the gambling activity to which the proposed licence would relate;
- his or her conduct, or that of any person associated with him or her, under any similar licence granted by the appropriate authorities in any comparable jurisdiction outside Gibraltar;
- the actual or proposed ownership and the structure of the business;
- the ability to maintain a minimum required reserve so as to ensure that all winnings or prizes, as the case may be, are paid;
- the technical infrastructure and ability to conduct the gambling that would be authorised under the proposed licence;
- the proposed control measures to ensure that any internet website proposed to be operated by the licence holder contains no obscene or indecent content, or any links to such content;
the proposed control measures to ensure that, so far as is reasonably practicable, compulsive gamblers and persons under the minimum permitted age are not able to gain access to any of the gambling facilities that would be authorised under the proposed licence; and

the proposed control measures and procedures to seek to identify money laundering and other suspicious transactions.

The application for an online gambling licence is a two-stage process. It involves an initial approach to the Licensing Authority for an in-principle response on whether an application would be favourably considered before progressing to the second, formal application stage. Once an in-principle favourable approval is received, the formal licence application is prepared and submitted and includes, *inter alia*, an application form, business plan and due diligence of the group and its partners and core gaming suppliers.

There is a £10,000 fee payable on application and a £2,000 annual renewal fee. Quite separately, there are gaming charges applicable (see Section V, below).

**ii  Sanctions for non-compliance**

With regard to non-remote betting and betting offices and gaming and gaming establishments, the licensee must conduct its business from approved premises and must maintain its licence in accordance with the conditions upon which it is issued. In the case of remote gambling, the licensee must ensure it complies with the provisions of the Act, its licence terms and the Codes of Conduct issued by the Licensing Authority, in particular the Remote Technical and Operating Standards for the Gibraltar Gaming Industry.

Quite apart from the specific obligations and conditions that a licence holder needs to comply with depending on whether it is offering remote or non-remote gambling services, each licence holder is obliged to follow the same rules (a–g) as provided in Section II.iii, above.

Part VIII of the Gambling Act contains all the enforcement provisions in relation to the compliance by licence holders to the terms of their licences. Section 42 of the Gambling Act grants extensive powers of investigation, reporting and powers of entry when a licence holder is suspected of carrying on activities contrary to the provisions of his or her licence, the Act or in a manner which is otherwise prejudicial to the public interest, the interest of any customer or potential customer or to the reputation of Gibraltar. This part of the Gambling Act also sets out the powers of the Licensing Authority to suspend or revoke a licence and enables a Justice of the Peace to grant the Gambling Commissioner and or the police with a warrant to search the premises.

The Gambling Act imposes significant penalties on those persons providing remote gambling services without having previously sought and obtained the relevant approvals and licences (these penalties apply equally to B2B and B2C operators). On summary conviction, the penalty may include a fine of up to £5,000 or a maximum of three months in prison, or both. On conviction or indictment, there may be a fine or imprisonment for a term not exceeding one year, or both.

**IV  WRONGDOING**

i Consequences for unlicensed operators
The Act imposes significant penalties on those persons providing remote gambling services without having previously sought and obtained the relevant approvals and licences – see Section III.ii, above.

ii Anti-money laundering
Gibraltar has enacted legislation to comply with the EU’s Fourth Money Laundering Directive (the Directive). The primary piece of legislation in this area is the Proceeds of Crime Act (POCA). The Act contains a number of sections relating to anti-money laundering (AML), and the Terrorist Asset-Freezing Regulations 2011 are also applicable in the jurisdiction.

In particular, Section 33 of the Gambling Act 2005 stipulates that all remote and non-remote gambling licensees must comply with the provisions of the POCA. In addition, the licence conditions for remote gambling operators provide that remote gambling licensees need to ensure compliance with the Financial Service Commission (FSC) Guidance Notes on AML and related matters (in addition to the separate Codes of Practice issued by the Gambling Commissioner).

Under Section 36 of the Act, which is applicable to all licence holders in Gibraltar, all licensees need to establish and maintain an effective system of internal controls and procedures in respect of any transactions that may give rise to a suspicion of money laundering. Gibraltar’s Financial Intelligence Unit (GFIU), which, together with the FSC ensures money laundering compliance and vigilance within the financial services industry, has recourse against relevant financial businesses, which includes casinos and other online operators. They require that systems and training are in place to prevent money laundering, including know-your-client procedures, record-keeping and internal reporting procedures.

Under the POCA, the Licensing Authority is designated as the supervisory body for AML in the gambling industry. The Gambling Commissioner is empowered to issue guidance notes and to monitor the gambling industry’s compliance regarding anti-money laundering and terrorist financing.

The Gambling Commissioner has also issued a comprehensive Anti-Money Laundering Code of Practice (the Code) for the gambling industry. This is a detailed document that sets out the standards and thresholds required by the Gambling Commissioner from all Gibraltar remote gambling licensees.

Broadly, the Code provides:

a guidance on the identification of the methods used to launder money, including conversion, disguising or disposing of illegally obtained funds;

b key provisions for operators to adhere to the different types of due diligence, training, record-keeping, anonymous and multiple accounts, politically exposed persons and suspicious activity; and

c additional considerations for both remote and non-remote gambling operators.

iii Suspicious transaction reporting
Pursuant to the Gambling Act, a licence holder is required to give written notification to the Licensing Authority of all the facts known in relation to a suspicious transaction within 24 hours or as soon as is practical. The licence holder may take all reasonable and proportionate steps in closing or suspending the account of the suspicious registered participant.

The Anti-Money Laundering Code of Practice provides a detailed procedure relating to making and submitting suspicious activity reports (SARs). Section 3.23 states that where the
conduct or activities of a customer gives rise to the knowledge or suspicion that the customer is or is attempting money laundering, an internal suspicious activity report should be made by the relevant staff member to a nominated manager or officer at the earliest opportunity. These SARs will then be provided directly to the Licensing Authority and the GFIU (by hand). The Commissioner will also liaise directly with the GFIU on any technical aspects relating to the SAR.

V TAXATION

The taxation of companies and individuals in Gibraltar is governed by one piece of primary legislation, the Income Tax Act. This is supported by subsidiary legislation enabled by the provisions of the Income Tax Act.

The corporate tax system was introduced on 1 January 2011 and established a 10 per cent rate, though it may be possible to mitigate this in the appropriate circumstances.

In this regard, Gibraltar also transposed the EU Parent Subsidiary Directive under the Parent Subsidiary Company Rules 1991. Under these provisions, a parent company is not liable in certain circumstances to tax in respect of dividend income paid by a subsidiary to its parent. Likewise, a Gibraltar company making a dividend payment out would not have to withhold tax.

Separately, gambling operators in Gibraltar are also subject to certain duty charges. This is levied at a rate of 1 per cent of turnover in respect of betting services and 1 per cent of gaming yield in relation to gaming services (casino and poker), but is subject to a minimum of £85,000 a year and a maximum of £425,000 a year. It is likely these arrangements will change as part of the review of the gambling legislation that is under way.
I OVERVIEW

i History of gaming in India

India has a complicated and lengthy history with gaming. Archaeologists have found dice made from cubes of sandstone and terracotta that date back to the Indus Valley civilization in 3300 BC, and there is evidence that the Indus Valley people engaged in cockfighting and betting. Some of the ancient Indian mythologies also have a strong reference to gaming.

Gambling during Diwali (an Indian religious festival of India) has religious connotations and is considered auspicious. The courts in India recognise gambling on Diwali, provided it takes place among friends and not in a public place. In the case of Nimmagadda Raghavalu & Others v. Unknown, the Madras High Court held that:

\[
\text{Gambling is not an offence and it becomes one only when it takes place in a common gaming house or a public place. The mere fact that occasionally people used to play cards and perhaps for money does not necessarily make it a common gaming house. The presumption of gambling on Diwali is not so strong as the gambling at other times . . . . A person simply allowing the use of his house to gamblers during Diwali festival without any idea of demanding rent etc, cannot be said to be keeping a common gaming house. Gambling on Diwali day should not be considered to be an offence.}
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ii British India and gaming

Prior to the promulgation of the Constitution of India, gambling in India was governed by the Public Gambling Act 1857. The Public Gambling Act 1857 was likely derived from the Gaming Act 1845 and the Betting Act 1853, enacted by the Parliament of the United Kingdom. The British Acts of 1845 and 1853 sought to make wagering contracts unenforceable but repealed the Unlawful Games Act 1541, where games of skill such as bowling and tennis were deemed unlawful. This approach seems to be reflected in the Indian Public Gambling Act 1857, which prohibited public gambling and the keeping of the common gaming houses, but made an exception for games of skill.

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1 Vidushpat Singhania is the managing partner of Krida Legal.
4 Nimmagadda Raghavalu v. Unknown, AIR 1953 Mad 243.
Prior to the promulgation of the Constitution, horse racing in India was licensed in the Bombay Presidency under the Bombay Race-Courses Licensing Law 1912. Similarly, in the Bengal Presidency, Act VIII of 1867 allowed for subscription, prizes and staking on horse races.

Besides this, the British government in India used to run lotteries and used funds from the lotteries fund, to develop towns. It can thus be stated that while public gambling was prohibited during the British rule in India prior to the Independence of India, horse racing and lotteries were largely permitted.

### iii Independent India and gaming

After the promulgation of the Constitution of India and it coming into effect on 26 January 1950, the issues pertaining to gaming were divided. Betting and gambling were listed under Entry 34 of the State List (i.e., List II of the Seventh Schedule). This means that only the state legislature has the power to make laws pertaining to betting and gambling. Lotteries are mentioned in Entry 40, List 1 of the Union List, meaning that the Parliament of India is the appropriate body to make laws pertaining to lotteries. In addition, the state legislature has the power under Entry 62 of the State List to make laws pertaining to taxation of betting and gambling.

After the Constitution of India came into effect, most states adopted the principles of the Public Gambling Act 1857 with certain amendments, and each state has its own act on gambling.

### iv The Indian gaming market

A perception exists worldwide that gaming in India is illegal or unregulated. However, this is not true. The gaming industry in India is estimated to be worth US$60 billion – this includes regulated and unregulated gaming. The gaming industry of India can broadly be classified into the following:

- **lotteries**;
- **horse racing**;
- **prize competitions**;
- **sports betting**;
- **games of skill**; and
- **games of chance**.

#### Lotteries

Lotteries are specifically excluded from the ambit of gambling through the states’ gambling acts. Until 1998 there was no law with respect to regulation of lotteries. Parliament enacted the Lotteries (Regulation) Act 1998 with the object of regulating lotteries, and to provide for matters connected therewith and incidental thereto. On 1 April 2010, the government of India issued the Lotteries (Regulation) Rules 2010, further regulating the lotteries in the country with regards to number of draws, minimum prize payout, etc.

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‘Lottery’ has been defined in the Lotteries (Regulation) Act 1998 under Section 2(b), as follows:

‘lottery’ means a scheme, in whatever form and by whatever name called for distribution of prizes by lot or chance to those persons participating in the chances of a prize by purchasing tickets.

Horse racing
Most states have adopted the Public Gambling Act 1867 with an amendment pertaining to horse racing, whereby it has been specifically excluded. Under the amended gambling acts of the states, the following definition of gambling is given:

‘Gaming’ includes wagering or betting on any figures or numbers or dates to be subsequently ascertained or disclosed, or on the occurrence or non-occurrence of any natural event, or in any other manner whatsoever except wagering or betting upon a horse-race when such wagering or betting upon a horse-race takes place:

(a) on the day on which such race is to be run; and
(b) in any enclosure where such race is to be run, and sanction of the Provincial Government set apart from the purpose, but does not include a lottery.

In the case of Dr KR Lakshmanan v. State of Tamil Nadu, the Supreme Court of India recognised that horse racing, football, chess, rummy, golf and baseball are games of skill. It further held that betting on horse racing was a game of skill as it involved judging the form of the horse and jockey, and the nature of the race, among other variables.

The exception created in the gambling acts and the Supreme Court case of Dr KR Lakshmanan v. State of Tamil Nadu have crystallised the legal position of horse racing and wagering on horse racing. The 11 states that allow horse race betting are Andhra Pradesh, Assam, Delhi, Haryana, Karnataka, Maharashtra, Meghalaya, Punjab, Tamil Nadu, Uttar Pradesh and West Bengal. However, active horse racing currently takes place at the turf clubs in Bangalore, Chennai, Delhi, Hyderabad, Kolkata, Mumbai, Mysore, Pune and Ooty.

Prize competitions
Prize competitions in India are regulated under the Prize Competitions Act 1955. ‘Prize competition’ has been defined under Section 2(d) of the Act:

‘Prize competition’ means any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name) in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words, or figures.

The Prize Competition Act’s applicability extends to the following states: Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union, and Saurashtra, all erstwhile Part C states, and Pondicherry, Dadar and Nagar Haveli, Goa, Daman and Diu.

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Sports betting

The status of sports betting, whether it is a game of skill or a game of chance, has not been clarified by the Supreme Court of India or a High Court of a state. In the absence of a judgment on the same, a grey area exists pertaining to the legal status of sports betting in India. Sikkim has taken the initiative of legalising online sports betting within the state, with the promulgation of the Sikkim Online Gaming (Regulation) Act 2008. Under this Act, a licence for placing bets on sports games such as football, cricket, lawn tennis, chess, golf and horse racing can be issued.

In Meghalaya, the sport of Téer (a form of archery) has been excluded from within the ambit of the state’s Gambling Act, and betting on it is licensed.

Games of skill

Games of skill are identified as a separate category because various states in India (excluding Assam7, Odisha (Orissa)8 and Telangana9) have gambling acts that exclude games of skill from the ambit of gambling. In the absence of a legislative definition of a game of skill, the Supreme Court in Dr KR Lakshmanan v. State of Tamil Nadu;10 State of Andhra Pradesh v. K Satyanarayana;11 and State of Bombay v. RMD Chamarbaugwala12 has laid down that a game of chance is where the element of chance predominates over the element of skill, whereas a game of skill is where the element of skill predominates over the element of chance. The card games of rummy and bridge, along with other sports like golf and chess, have been classified as games of skill. In R Shankar Creation Association v. State of Karnataka,13 the Karnataka High Court classified poker, darts, carom and chess, among others, as games of skill.

The government of Nagaland under the Prohibition of Gambling and Regulation and Promotion of Online Games of Skill Act 2015 (the Nagaland Act) has defined games of skill as:

Games of skill shall include all such games where there is preponderance of skill over chance, including where the skill relates to strategizing the manner of placing wagers or placing bets or where the skill lies in team selection or selection of virtual stocks based on analyses or where the skill relates to the manner in which the moves are made, whether through deployment of physical or mental skill and acumen.

All games enumerated in Schedule A of the Nagaland Act will be classified as games of skill. Schedule A includes games such as chess, sudoku, quiz, bridge, poker, rummy, nap, virtual sports, virtual games like monopoly or racing, and virtual fantasy games.

7 The Assam Game and Betting Act, 1970
8 The Orissa Prevention of Gambling Act, 1955
9 The Telangana State Gaming (Amendment) Ordinance, 2017 dated 17 June 2017 and the Telangana State Gaming (Second Amendment) Ordinance, 2017 dated 8 July 2017.
10 See footnote 6, supra.
Games of chance

Games of chance for stakes fall within the ambit of the gambling acts of the states and are largely prohibited. Some states, for example Goa, have created exceptions within their gambling acts, allowing for authorised gaming. Thus licences are issued in the state of Goa for games of chance in casinos, which are operated on land as well as offshore. The state of Sikkim has also promulgated the Sikkim Casino Games Act 2004, which allows for casino operations within the state.

State control and private enterprise

Lotteries

Under the Lotteries (Regulation) Act 1998, it is the state governments that have the power to organise, conduct and promote lotteries, subject to the conditions prescribed. The lotteries department of each state, generally established under their revenue departments, are in charge of running lotteries. States have appointed agents that are private companies, to operate and promote lotteries on their behalf within the state and to other states. Lotteries in India are permitted in the following states: Maharashtra; Mizoram; Bodoland Territorial Council; Goa; Sikkim; Andhra Pradesh; Nagaland; Kerala (only paper lottery); Punjab; and West Bengal.

In addition to the above, the national lottery of Bhutan is also sold in India. This has been allowed through the Trade, Commerce and Transit Agreement between the Republic of India and the Royal Government of Bhutan.16

Horse racing

Horse racing in India is primarily controlled by the six turf clubs, namely:

- the Royal Calcutta Turf Club;
- the Royal Western India Turf Club Ltd;
- the Madras Race Club;
- the Bangalore Turf Club Ltd;
- the Delhi Race Club; and
- the Hyderabad Race Club.

These turf and race clubs lay down the rules of racing, as well as control their enforcement. The licences to conduct horse races were issued to them by their respective state governments. The totalisator and the bookmakers at these race clubs, including for off-course betting, are

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14 As of 30 November 2015.
15 The Bodoland Territorial Council is not a state as per the Indian constitution. This is an area in the north-eastern region of India, which was created recently by carving out areas from eight districts of Assam, namely, Kokrajhar, Dhubri, Bongaigaon, Barpeta, Nalbari, Kamrup, Darang and Sonitpur within the state of Assam. It is an autonomous administrative unit constituted under the Sixth Schedule of the Constitution of India covering an area of 8795km2 (provisional).
16 Reference to Article 1 of the Agreement: ‘For the purpose of this Agreement, the term ‘free trade and commerce’ in Article I shall be understood to include within its scope the sale of Bhutan lottery tickets in India and the sale of Indian government and state lottery tickets in Bhutan, subject to the relevant laws which may be in force in the territories of the Kingdom of Bhutan and India, as the case may be.’
licensed under the respective state’s act on entertainment and betting tax. In Delhi it is the Delhi Entertainments and Betting Tax Act 1996, and in Andhra Pradesh it is the Andhra Pradesh (Telangana Area) Horse Racing and Betting Tax Regulation 1358F.

**Prize competitions**

Prize competitions in India are offered under a licence issued by states under the Prize Competition Act 1955. A prize competition can be offered by a person who has procured the licence from the state, provided that the maximum prize that can be offered in such a competition does not exceed 1,000 rupees and there are not more than 2,000 entries.

**Sports betting**

The legal status of sports betting (i.e., whether it is a game of skill or a game of chance) is not clear in India. The only state where sports betting can be offered is Sikkim. Licences have been issued to private operators to offer sports bets.

In Meghalaya, bets can be placed on teer (a traditional game of the state) under a licence. These licences are issued under Section 14A of the Meghalaya Amusement and Betting Tax (Amendment) Act 1982.

**Games of skill**

Games of skill are outside the ambit of states’ gambling acts. Whereas games of skill for stakes, like horse racing and teer, require a licence from state governments, other games of skill like rummy and bridge can be offered without a licence in most states.

Nagaland has sought to regulate and license games of skill throughout India, through the Nagaland Act. The Nagaland Act contemplates the regulation and promotion of games of skill through the issuance of licences. A licence can be procured by a person, firm, company or limited liability company incorporated in India that is substantially held and controlled in India. A licensee is allowed to offer games of skill across India, in states where such games are not classified as games of chance and in states where an exception for games of skill exists in the state’s gambling act.

**Games of chance**

Games of chance like casino games can be offered in Goa and Sikkim under a licence. Licences have been issued to private entities within these states.

**vi Offshore gambling**

Foreign direct investment (FDI) in India is governed by the Foreign Exchange Management Act 1999 (FEMA) and the regulations made thereunder. FDI is subject to the Foreign Direct Investment Policy (the FDI Policy), as amended. The FDI Policy was formed by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, and is implemented by the Reserve Bank of India (RBI). The DIPP has a practice of issuing a consolidated version of the FDI Policy encompassing the contents of all the press notes, press releases, circulars and clarifications issued by it from time to time.

Under the FDI Policy, FDI remains prohibited in certain sectors, including lottery business, gambling and betting. Besides FDI, any form of foreign technology collaboration, such as licensing for franchise, trademark, brand name, management contract, etc., for lottery business, gambling and betting activities has also been prohibited under the prevailing FDI
Policy. The rationale of prohibiting FDI and technological collaboration in the aforesaid sectors is to discourage foreign investments in lottery, gambling and betting businesses that have been judicially held to be mere ‘games of chance’, as opposed to ‘games of skill’. Thus, while FDI for games of chance and lotteries is prohibited, there is a lack of clarity on whether the same prohibition applies for games of skill, sports betting, horse racing, teer and prize competitions.

Under FEMA, the Foreign Exchange Management (Current Account Transactions) Rules 2000 (the Current Account Rules) were framed to impose reasonable restrictions for current account transactions. The Current Account Rules provide that transactions included in Schedule I are prohibited. Remittance from lottery winnings, racing or riding, purchase of lottery tickets, football pools, sweepstakes, etc., are included within Schedule I, which essentially means that all foreign exchange gaming transactions are prohibited. Thus, an offshore gaming operator is unlikely to be able to offer his or her services from outside India within India.

If the public has access to a foreign gaming website within India, then the courts would be able to exercise jurisdiction as per the principle in Banyan Tree Holding (P) Limited v. A Murali Krishna Reddy and Anr.\(^{17}\) This jurisdiction would be exercised on the basis that the site is an interactive website and seeks to target website users in India. The authorities could look at initiating action for violation of the applicable Indian laws (a website offering a game of chance would be in violation of a state’s gambling Act). Under Section 69A of the Information Technology Act 2000, the government has the power to direct its agency or an intermediary to block access to the infringing website. Intermediaries under the Information Technology (Intermediaries Guidelines) Rules 2011 and the registrar accredited with the Internet Corporation for Assigned Names and Numbers have blocked access to gaming websites coming from outside India.

II LEGAL AND REGULATORY FRAMEWORK

i Jurisprudence

Lottery

The Supreme Court of India in BR Enterprises v. State of UP\(^{18}\) has held that a lottery is a game of chance and is not a business or trade; rather, it is in the nature of res extra commercium. The Supreme Court also held, while interpreting Section 5 of the Lotteries Act 1998,\(^{19}\) that a state could not exclude other states from its own lottery. Either the state had to declare itself as a lottery-free zone or permit lotteries from other states. In a subsequent judgment, in All Kerala Online Lottery Dealers Associations v. State of Kerala,\(^{20}\) the court distinguished from the principle of the earlier judgment (the BR Enterprises case) and held that paper lotteries and online lotteries fell in different classes. Therefore a state would be permitted to ban online lotteries and allow paper lotteries or vice versa, without violating the provisions of Section 5 of the Lotteries Act 1998.

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17 2011 (5) RAJ 255(Del); CS (OS) No.894/2008 decided on 23 November 2009.
19 Section 5, Lotteries Act 1998: ‘A state government may, within the state, prohibit the sale of tickets of a lottery organised, conducted or promoted by every other state.’
20 Civil Appeal Nos. 3518–3520.
Horse racing
Horse racing and betting on horse racing has been classified as a game of skill by the Supreme Court in Dr Lakshmanan v. State of Tamil Nadu, therefore it is considered outside the ambit of gambling. Horse racing and betting on horse racing is permitted in licensed premises.

Prize competitions
In News Television India Ltd v. Ashok Waghmare, the Bombay High court held that prize competitions do not include skill games, and even popular TV quiz shows like Kaun Banega Crorepati (a version of ‘Who Wants to be a Millionaire’) are excluded from its ambit.

Sports betting
The status of betting on sports, and whether it is a game of skill, has not been addressed by the High Courts of the states or the Supreme Court. However, the Supreme Court has directed the Law Commission of India to consider whether betting on sports can be regulated in India.

Games of skill
The issue of games of skill for stakes, and whether they fall within the ambit of a state’s gambling act, has not been adjudicated upon by the Supreme Court. In absence of an express judgment of the Supreme Court, contrary opinions exist among the High Courts of the states. In the case of D Krishna Kumar v. State of AP, the Andhra Pradesh High Court held that since games of skill fall outside the ambit of Andhra Pradesh’s Gaming Act, games of skill for profits and stakes would therefore also fall outside the Gaming Act. However, the Madras High Court in DG of Police, State of Tamil Nadu v. Mahalakshmi Cultural Association, held that while games of skill at physical premises fall outside the ambit of the state’s gambling act, games of skill for stakes and profit fall within its ambit and are therefore prohibited. An appeal against this decision was filed by the Mahalakshmi Cultural Association in the Supreme Court. This appeal was withdrawn by the appellants on the ground that the criminal case against them had been dismissed, thus the appeal had become infructuous. The government of Tamil Nadu, however, took a stand that the state government had not initiated any action against the online operators, as it had not taken a decision as to whether an online game of rummy fell foul of the law or not.

The Punjab and Haryana High Court, in its decision dated 18 April 2017 in Varun Gumber v. Union Territory of Chandigarh and Ors, held the fantasy game format offered by one of the fantasy game operators to be a game of skill.

The Telangana government, in the Telangana Gazette in June 2017 and July 2017, prohibited the residents of Telangana to play or operate any game of skill in the state of Telangana for stakes.

21 See footnote 6, supra.
25 SLP Civil No. 15371/2012.
26 CWP No. 7559 of 2017.
27 Telangana Ordinance No. 4 of 2017 dated 17 June 2017.
28 Telangana Ordinance No. 6 of 2017 dated 8 July 2017.
The Gujarat High Court, in its decision dated 4 December 2017 in the case of *Dominance Games Pvt Ltd v. State of Gujarat and ors*, held that poker is a game of chance, and hence prohibits it in the state of Gujarat.

ii The regulator

Lotteries are regulated by the Directorate of Lotteries under the Finance Department of each state. Horse racing, and betting on horse racing, is regulated by the relevant turf authority or club. The entertainment tax inspector performs a limited role of inspecting the books for detecting tax evasion, if any, however, this is likely to change with the Central Goods and Services Act 2017.

For prize competitions, states have formulated rules where the manner of procuring the licence has been laid down. Applications are to be made to the authorities designated by the states.

The licensing and regulator under the Sikkim Online Gaming Act 2008 is the officer designated by the Lotteries Department (government of Sikkim).

The regulator for casinos in Sikkim is the authorised officer, appointed by the Department of Tourism (government of Sikkim). However, in Goa, a gaming commissioner is to be appointed under Section 13C of the Goa Public Gambling (Amendment) Act 2012.

The regulator for the online games of skill under the Nagaland Act is the Finance Commissioner or any other authority designated and empowered on his or her behalf.

iii Remote and land-based gambling

Lotteries are offered in a paper format as well as online, across states where lotteries are permitted. Paper lotteries are generally offered through lottery shops and stalls. Kerala has made a distinction between paper lotteries and online lotteries, prohibiting online lotteries within its territory.

Horse racing and betting on horse racing is permitted only in licensed premises. Betting on horse racing takes place at the race clubs, for the races held at that particular track, as well as races broadcast from other tracks. Certain states like Maharashtra, Tamil Nadu and Andhra Pradesh have also allowed off-course betting shops.

The Prize Competition Act 1955 does not make a distinction between paper-based and online prize competitions. These competitions are generally conducted through dailies and posts.

Online sports betting offered through parlours on an intranet network is permitted in Sikkim.

The principle law that governs gaming is the Public Gambling Act 1867. This Act does not make a distinction between premises-based and online gaming. The states that have permitted casinos allow the offering of casino games only at the premises, whether they are on land or on ships or cruises.

Online games of skill can be offered across India under the Nagaland Act.

29 Special Civil Application No. 6903 of 2017.
III LICENSING PROCESS

i Application and renewal

Lottery

Lotteries are operated and promoted by state governments. States invite private enterprises to partner with them to promote and market the state’s lottery through a tendering process. The Request for Proposal document is generally released on a payment basis by each state for such tendering. Some of the tender conditions are:

a operations must continue in India for five years;
b the applicant must have been a profitable vendor for three years;
c the applicant must a minimum experience of one year in the past three years;
d the applicant must have a state government certificate supporting the experience of the vendor;
e there must be a deposit of earnest money; and
f there must be an advance payment of sale proceeds.

Horse racing

No new licences for horse racing have been issued in the past two decades. Thus, the opportunity to procure a horse racing licence is limited. Punjab has enacted the Punjab Horse Race (Regulation and Management) Act 2013. The tender on a design, build, operate and transfer basis for a proposed race course was floated, but no bids were received for it.30

Sports betting

Licences for sports betting are issued in Sikkim. An application for a licence needs to be made to the government of Sikkim. The designated authority, as per the notification of the Sikkim government dated 11 June 2009, is the Secretary to the government of Sikkim (Finance, Revenue and Expenditure Department). The application needs to be made using Form 1 accompanied by a bank draft of 500 rupees in favour of the director, Sikkim State Lotteries. After examining the application and making due enquiries (no time period is provided), the government can grant a provisional licence on the payment of fee of 100,000 rupees in Form 2. The provisional licence is granted to enable the licensee to set up the infrastructure and comply with other licensing requirements. Subject to compliance with the licensing terms, a regular licence in Form 2A is issued for a period of five years on the payment of a fee of 10 million rupees.

Licences for teer bookmakers can be issued under Section 14(3)A of the Meghalaya Amusement and Betting Tax Act. Further, under Section 14A(1)m of the Meghalaya Amusement and Betting Tax Act, terms and conditions for a licence are to be prescribed. Details pertaining to the licensing conditions and the process to be followed for licensing, are not readily available.

Prize competitions

Under the prize competition rules of states,31 the application for running a prize competition needs to be made in Form A and should be submitted personally or sent by registered post

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to the licensing authority. The licence is effective throughout the state. The fee for granting a licence is 25 rupees where an entry fee is charged, and 10 rupees where no such fee is charged. The fee for renewal is half of the initial fee.

Games of skill

No licence is required to operate a game of skill outside the state of Nagaland. Licences have been issued under Section 7 of the Nagaland Act. Licences for a period of five years can be issued to individuals, firms or companies provided:

- they are not engaged in gambling;
- they do not have a criminal history;
- the controlling stake and exercise of executive decisions is within India; and
- the technology and support platforms are within India.

Under the Nagaland Act, rules have been formulated to govern the licensing process. Under Rule 4(3) an application needs to be made accompanied by documents supporting the credentials of the promoters, audited financials, note on software technology platform, business plan and financial projections. A non-refundable application fee of 50,000 rupees through a demand draft also needs to be deposited. The details are then forwarded to the empanelled firm, which then makes an enquiry and issues a certification or recommendations for compliance. If a certification is issued by the empanelled firm, the licensing authority is bound to issue a licence within 14 days. In the event that recommendations are received from the empanelled firm, the recommendations shall be referred to an ad hoc committee or expert committee formed under the Nagaland Act for its recommendations, which are not binding on the licensing authority.

Under the Nagaland Act licences can be issued for a game or bouquet of games (three or more games). An annual licence fee of 1 million rupees per game per annum or 2.5 million rupees for a bouquet of games per annum for the first three years is payable. For the subsequent two years, 2 million rupees per game per annum or 5 million rupees for a bouquet of games per annum is payable. In addition, the licensee is required to pay an amount of 0.5 per cent of the gross revenue generated as royalty to the state government.

Games of chance

Under Section 13A of the Goa, Daman and Diu Public Gambling Act 1976, the government may authorise any electronic amusement games or slot machines in five-star hotels (and such table games and gaming on offshore vessels as may be notified) subject to certain conditions, including payment of recurring and non-recurring fees. The validity of licences granted by the government of Goa is generally five years. The annual licence fees for onshore Goan casinos are as follows:

- up to 100m2 – 40 million rupees (hiked by 5 million rupees in the Goa Budget 2017);
- 100m2 to 300m2 – 50 million rupees (hiked by 5 million rupees in the Goa Budget 2017);
- 300m2 to 500m2 – 55 million rupees (hiked by 5 million rupees in the Goa Budget 2017); and
- over 500m2 – 70 million rupees (hiked by 5 million rupees in the Goa Budget 2017).

For offshore casinos (passenger capacity-based), the fees are:

- up to 100 passengers – 80 million rupees;
b 100 to 200 passengers – 100 million rupees (hiked by 15 million rupees in the Goa Budget 2017);

c 200 to 400 passengers – 110 million (hiked by 15 million rupees in the Goa Budget 2017); and

d over 400 passengers – 112 million rupees (hiked by 10 million rupees in the Goa Budget 2017).

The renewal fee for both onshore and offshore casinos is 3 million rupees as outlined in the Goa Budget Speech 2017.32

Under the Sikkim Casino Games (Control and Tax) Rules 2007, an application for a licence needs to be made through Form A. Provisional licences under these Rules are granted for a period of five years and can be renewed. A licence fee of 50 million rupees is payable for a casino licence.

IV TAXATION

i Lotteries

Lotteries used to be subject to a lottery tax or charge. The states of Kerala, Punjab, West Bengal and Maharashtra imposed lottery taxes. Maharashtra imposed a tax of 50,000 rupees per draw for online lottery companies. Provisions under the Maharashtra Tax on Lotteries Act 2006 were applied while assessing lottery tax.33 However, with the promulgation of the Central Goods and Services Tax 2017 (GST), a dual rate of tax on lotteries was introduced on 18 June 2017. While the state-run lotteries would attract a GST of 12 per cent on the face value of the ticket, lotteries authorised by a state government would attract a tax of 28 per cent on the face value of the ticket.34 In addition, as per Section 115BB of the Income Tax Act, winnings on lotteries in the hands of an individual are taxed at 30 per cent.

ii Horse racing

Previously, different states had different rates of taxes on horse racing. In Delhi and Andhra Pradesh, an entertainment tax of 15 per cent was levied on all money paid to the totalisator and the bookmakers.

In Maharashtra, the rate of taxation is 10 per cent on the investment in the case of the totalisator and 20 per cent on the investment in the case of the bookmaker.35

In July 2017, the government introduced the GST, which subsumed the services tax, the entertainment tax and all other state indirect taxes. The GST council placed gambling and totalisator services provided by a racecourse as well as betting with licensed bookmakers

in racecourses in the 28 per cent tax band. Further, the GST Council on 18 January 2018 provided clarification pertaining to GST on horse racing, which stated that GST would now be leviable on the entire bet value (i.e., total of face value of any or all bets paid into the totalisator or placed with licensed book makers, as the case may be).

In addition, all winnings of a player or individual are taxed under Section 194BB of the Income Tax Act at 30 per cent.

**iii **Prize competitions

Under Section 194B of the Income Tax Act, all winnings from prize competitions, such as crossword puzzles, are taxed at 30 per cent.

**iv Games of skill and games of chance**

Under entry 34 of the Central Goods and Service Tax notification dated 28 June 2017, all services rendered pertaining to an entry into a casino would be chargeable with a GST of 28 per cent on the gross amount collected as admission charge or entry fee. In a subsequent circular dated 4 January 2018, it was clarified that the tax of 28 per cent would apply on entry to casinos as well as on betting and gambling services being provided by casinos on the transaction value of betting (i.e., the total bet value), in addition to GST levy on any other services being Circular No. 27/01/2018-GST provided by the casinos (such as services by way of supply of food and drinks, etc., at the casinos).

Under Section 194B of the Income Tax Act, all winnings from card games and other games of any sort, betting and gambling are taxed at 30 per cent.

**V ADVERTISING AND MARKETING**

The regulatory framework with regard to TV shows and advertisements, and possible electronic dissemination of material projecting gaming, is envisaged in the Code for Self-Regulation in Advertising (the Code), the Cable Television Network Rules 1994 and the Consumer Protection Act 1986.

The Advertising Standards Council of India issues the Code for specifically dealing with various issues regulating advertisement content. The Code permits advertisements pertaining to prize competitions and lotteries, wherein it requires that all material conditions should be stated for the consumer to obtain a true and fair view of their prospects in such activities.

Under the Cable Television Network Rules 1994, advertisement of gambling is prohibited, but the advertisement of games of skills, such as horse racing, rummy and bridge, is not prohibited.

Under the Consumer Protection Act 1986, unfair trade practices are prohibited. This would include the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest.

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37 Example (f), Chapter 1 of the Code.
VI  THE YEAR IN REVIEW

Owing to the Indian Premier League’s betting and fixing scandal, the Supreme Court formed a Committee under the aegis of Justice Mukul Mudgal to determine the facts. This Committee recommended to the Supreme Court that betting in sports should be legalised and regulated. The Committee formed under the aegis of the former Chief Justice of India, Justice RM Lodha, confirmed this recommendation. The Supreme Court in its judgment dated 18 June 2016 in *BCCI v. Cricket Association of Bihar*[^38] has made a reference to the Law Commission of India to consider legalisation of sports betting. The Law Commission in this regard is seeking opinions from stakeholders and has also engaged with the UK India Business Council to understand the legislative framework and governance by the UK Gambling Commission and the Isle of Man Gambling Commission.

Considering the act of Telangana prohibiting the playing and operation of any games of skill for stakes from or in the state of Telangana, and the Gujarat High Court’s judgment classifying poker as a game of chance in the state, thus prohibiting it, a number of operators have come together to form associations to advocate for their games, as well as self-regulate their services to avoid government regulations. These bodies are:

- **a** the All India Gaming Federation, which seeks to conduct advocacy and regulate the entire gaming industry of India;
- **b** the Rummy Federation, which seeks to conduct policy advocacy for the rummy industry, particularly after the Telangana Gambling (Amendment) Act 2017 prohibiting rummy for stakes in the state, as well as seeking to self-regulate the industry; and
- **c** the Indian Federation of Sport Gaming, which seeks to self-regulate the sports gaming industry of online sport-based games of skill including e-sports, fantasy sports and casual sport games.

In the lottery segment, the Supreme Court created a distinction between online lotteries and paper lotteries in the *All Kerala Online Lottery Dealers Association* case, and thus prohibited online lotteries from other states, in states where online lotteries were not offered by the state itself.

The Nagaland Act was promulgated in March 2016. Six licences have been issued under the Act as of March 2017.[^39]

With growing interest in the e-sports sector among people in India, the Esports Federation of India (ESFI) was formed as a company under Section 8 of the Companies Act, 2013 to promote, organise, educate and control e-sports in India and to provide facilities for training in e-sports, and build and sustain the eco-system for e-sports in India, not limited to organising leagues and tournaments.

VII  OUTLOOK

There has been much debate on the regulation of sports betting in India. With the support of the Supreme Court, the Law Commission of India is likely to submit its report on legalisation of sports betting in 2018. Once submitted, the report is likely to cause debates on its content.

[^38]: Civil (Appeal 4235 of 2014 with Civil Appeal 4236 of 2014).
The Nagaland Games of Skill Act 2016 has been promulgated and seeks to license games of skill from Nagaland for the entire country. It is not yet clear whether this Act survives the constitutional test of a state’s power to legislate on this aspect. The Sikkim online gaming licences have been issued and the coming year will be key in determining its commercial success.

A 1976 notification issued by the state of Kerala exempted games such as rummy, darts, cup and coin contests from the ambit of gambling. Based on the notification, the government has been advised to include games of poker and bridge in the list of exempted games, it remains to be seen whether this is accepted. The petitioners in the judgment classifying poker has a game of chance have filed an appeal before the division bench of the High Court of Gujarat. The rummy service providers from the state of Telangana have filed a writ petition in the High Court of Andhra Pradesh challenging the constitutional validity of the Telangana Gaming (Amendment) Act 2017, classifying game of skill for stakes as betting.

The government of Puducherry has expressed its desire to legalise offshore casinos in the state.40 The government of Andhra Pradesh is also considering the development of a casino strip, similar to the strip in Las Vegas, within the state.41

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41 ‘Offshore casino in Vizag, AP may have first mover advantage’, 11 September 2015, The Hindu.
I OVERVIEW

Definitions

Many forms of gambling have been regulated in Ireland for centuries. Irish law distinguishes primarily between three main forms of gambling: betting, gaming and lotteries.

Betting

Betting is governed by the Betting Act 1931, as amended by the Betting (Amendment) Act 2015 (the Betting Acts).

The word ‘bet’ is not defined in Irish law. Instead, the Betting Acts state that ‘. . . the word bet includes wager . . .’. The scope of what constitutes a bet has fallen to be determined at common law by the courts, although case law is rare. In Mulvaney v. The Sporting Exchange Ltd trading as Betfair, Clarke J stated that:

While bookmaking is not defined in that legislation it seems to me that the term bookmaker derives from a person or body ‘making a book’ on an event. In other words, the person or body concerned offers odds on all or a significant number of eventualities arising in respect of the same event (for example, offers odds on each horse winning or offers odds on either team winning a football game, or, indeed that game resulting in a draw). Thus, a person carrying on the business of bookmaking is someone who habitually offers to cover a range of possible eventualities on future uncertain events. Two private individuals entering into a wager on the same future uncertain event could not remotely be said to be engaged in the business of bookmaking.

Accordingly, the general consensus arising from case law is that betting encompasses a bookmaker setting fixed odds against a future event, taking bets on that event and paying out winnings.

Gaming

Gaming is governed primarily by the Gaming and Lotteries Acts 1956-2013 (the Gaming and Lotteries Acts).

Gaming is defined in the Gaming and Lotteries Acts as ‘playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazardred by the players’. A stake is
defined as including ‘any payment for the right to take part in a game and any other form of payment required to be made as a condition of taking part in the game but does not include a payment made solely for facilities provided for the playing of the game’.4

Lotteries
Lotteries are permitted by the Gaming and Lotteries Acts, but are heavily regulated and there are restrictions on their operation. As per the Gaming and Lotteries Acts, a lottery ‘includes 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’.5

The Irish National Lottery falls outside the scope of the Gaming and Lotteries Acts and, instead, is regulated by the National Lottery Act 2013 (the 2013 Act), which repealed and replaced the terms of the National Lottery Act 1986. In 2013, following a competitive tender process, the Irish government awarded a 20-year licence to operate the Irish National Lottery to a consortium involving An Post (the Irish post office) and led by the UK national lottery operator, Camelot. The most notable feature of the 2013 Act is the establishment of a new office, the Regulator of the National Lottery, whose primary functions are to ensure that the Irish National Lottery is run with all due propriety, to ensure that participants’ interests are protected and to ensure that the long-term sustainability of the Irish National Lottery is safeguarded.

Tote/pari-mutel betting
The Totalisator Act 1929 provides for the establishment and regulation of the Totalisator6 by the Irish Revenue Commissioners. The Irish Horse Racing Industry Act 1994 provided that the Irish Horse Racing Authority could apply for and hold a totalisator licence. This was later transferred to Horse Racing Ireland by the Horse and Greyhound Racing Act 2001, and the licence is currently held by a subsidiary of Horse Racing Ireland called Tote Ireland. Tote Ireland’s current licence is due to expire in 2021. Bord na gCon (the national greyhound board) is licensed to operate a totalisator at greyhound tracks.

Financial spread betting
Spread betting on financial instruments is governed by the Markets in Financial Instruments Directive (2004/39/EC) and regulated by the Central Bank of Ireland.

Prize bonds
Irish Government Prize Bonds are regulated separately from other forms of gaming and lotteries. They are described in the Finance (Miscellaneous Provisions) Act 1956 as non-interest

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4 Ibid.
5 Ibid.
6 Defined in the Totalisator Act 1929 as ‘an apparatus or organisation by means of which an unlimited number of persons can each stake money in respect of a future event on the terms that the amount to be won by the successful stakers is dependent on or to be calculated with reference to the total amount staked by means of the apparatus or organisation in relation to that event but not necessarily on the same contingency, and the said word includes all offices, tickets, recorders, and other things ancillary or incidental to the working of the apparatus or organisation’.

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bearing securities that are ‘subject to such conditions as to repayment, redemption or otherwise as [the Minister] thinks fit and in relation to which chance may be used to select particular securities for prizes’.

**Pool betting**

There is no equivalent in Ireland to the types of pool betting licences (non-remote and remote pool betting licences) that can be obtained from the UK Gambling Commission and that can be used by operators to provide pool betting or fantasy sports products. Instead, if an operator in Ireland wishes to provide a pool betting or fantasy sports product in which the amount of money won by the successful customers is calculated by dividing the total pool (minus commission) by the number of winners, it would be necessary to analyse the characteristics of the product to determine whether it could be characterised as a bet or a game under Irish law.

### ii Gambling policy

Although gambling has a long history in Ireland, the Irish authorities have recognised that the legislation governing gambling requires modernisation. As currently drafted, betting (remote, non-remote and intermediary) is permitted where a licence has been issued under the Betting Acts. Gaming and lotteries (except for the National Lottery) are primarily governed by the Gaming and Lotteries Acts. However, under the Gaming and Lotteries Acts, gaming is prohibited unless it falls under one of the exemptions contained in the Acts.

Those exemptions broadly relate to gaming that takes place in circuses, carnivals and amusement halls, and gaming that is operated in a certain way. The Gaming and Lotteries Acts have not been updated to take account of internet gaming. It is, however, common for operators that are lawfully licensed overseas to offer online gaming services to Irish customers provided that the gaming contracts are not governed by Irish law.

There is a political desire to modernise Irish gambling law. On 15 July 2013, the government published the heads of the Gambling Control Bill 2013 (the Scheme), which, if enacted, would have modernised Ireland’s legislative framework for all types of online and land-based gambling. However, in early 2018, media reports indicated that there are plans to scrap the Scheme and prepare and publish a new, updated Scheme, on the basis that the original Scheme is now considered outdated and no longer fit for purpose. See Section VIII, below, for further information.

The Irish National Lottery is designed to raise money for charities and good causes.

### iii State control and private enterprise

For the most part, gambling in Ireland is the subject of private enterprise and the normal principles of free competition apply. Private citizens and companies, whether based in Ireland or abroad, are entitled to apply for a betting licence subject to fulfilling the various requirements to obtain a licence. The main exception to this policy is the Irish National Lottery, which is the subject of the 2013 Act, under which a single licensee is chosen to operate the Irish National Lottery following a competitive tender.

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7 Department of Justice and Law Reform, Options for Regulating Gambling (December 2010) 3.
iv Territorial issues

Where regulated, gambling is generally regulated nationally. There are generally no special states, municipalities or localities in Ireland that have separate gambling legislation. Northern Ireland is part of the United Kingdom and its gambling laws are separate to those of the Republic of Ireland.

v Offshore gambling

Offshore gambling operators who offer betting services or betting intermediary services by remote means to Irish citizens are required to obtain either a remote bookmaker’s licence or remote betting intermediary’s licence from the Irish authorities under the Betting Acts. Remote in this context is described as meaning, in relation to a communication, any electronic means including the internet, telephone and telegraphy (whether wireless or not). It is clear from the list of operators who have obtained the necessary licences that there is a significant number of offshore gambling operators offering betting products to Irish citizens.

Online gaming products (e.g., casino, slots, bingo) are governed by the Gaming and Lotteries Acts, although the legislation has not been updated to take account of online internet gaming. The focus of the Gaming and Lotteries Acts is on gaming carried out in amusement halls, arcades, funfairs, carnivals, travelling circuses and slot machines and therefore quite how it is to be applied to the type of games offered online is unclear. However, it is common for operators who are licensed in other jurisdictions to offer online products to Irish customers. It is important in such circumstances that the contract between the operator and the Irish customer is not governed by Irish law. Operators should also be aware that the Gaming and Lotteries Acts prohibit the promotion, advertising and the provision of unlawful gaming products so it is important that operators are familiar with these provisions.

The Irish Revenue Commissioners actively monitor compliance by remote operators with the licensing regime that applies for remote bookmakers and remote betting intermediaries. We are aware that the Irish Revenue Commissioners have actively pursued operators who have not registered as remote bookmakers and remote betting intermediaries. In addition, we are also aware that the Irish Revenue Commissioners actively follow up with operators if they are not registered and paying remote betting tax, remote intermediary duty and VAT on e-gaming activities, and have wide-ranging powers in order to ensure compliance.

Under the Betting Acts, the Irish Revenue Commissioners have the power to issue compliance notices to third parties who provide facilities or services (e.g., advertising, internet service provider (ISP), telecommunications, payment services) to unlicensed remote betting and betting intermediary operators requesting them to cease supplying such services to unlicensed operators. Failure to comply with a compliance notice is an offence and can lead to a fine of up to €50,000. In addition, various civil and criminal sanctions may also apply.

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8 Betting Act 1931 Sections 1 and 7C.
9 Available from the website of the Irish Revenue Commissioners.
II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence
There are a number of different, parallel legislative regimes that control and regulate gambling in Ireland:

a the Betting Acts, which govern betting in Ireland;
b the Gaming and Lotteries Acts, which govern gaming, lotteries and other similar activities;
c the National Lottery Act 2013, which governs the Irish National Lottery; and
d the Totalisator Act 1929, which governs the Totalisator.

These legislative regimes are currently under review by the Irish legislature and reform is expected in 2018 and 2019 (see Section VIII, below).

ii The regulator
There is no Irish equivalent to the UK Gambling Commission, although it is proposed under the Scheme that almost all forms of betting, gaming and lotteries would be brought under a single legislative and regulatory umbrella, the Office of Gambling Control Ireland (OGCI), which it is proposed will be funded from licensing fees.

The bookmaker, remote bookmaker and remote betting intermediary licences are granted by the Irish Revenue Commissioners, who administer the licensing process and maintain public registers of those who have been granted a licence. As part of the process of obtaining a licence, the applicant (or the relevant officers of the applicant where the applicant is a company) must first obtain certificates of personal fitness. The Department of Justice and Equality is charged with awarding certificates of personal fitness to overseas applicants. Applicants who are based in Ireland may apply for a certificate of personal fitness from a superintendent of the Irish police.

The Irish National Lottery is regulated by the Regulator of the National Lottery, whose primary functions are to ensure that the Irish National Lottery is run with all due propriety, to ensure that participants’ interests are protected and to ensure that the long-term sustainability of the Irish National Lottery is safeguarded. Small lotteries (which must be carried out for a charitable purpose) may be carried out under a permit granted by a superintendent of the Irish police or a licence granted by a district court.

The licensing of amusement halls and funfairs may be determined by a local authority or local district court. Certain very limited (and low-stakes) gaming may take place in these venues with the appropriate licence. The Irish Revenue Commissioners also licenses low-stakes gaming machines.

The Totalisator is governed by the Totalisator Act 1929, which provides that the Minister for Finance awards the relevant licence to operate the tote.

Spread betting on financial instruments is governed by the Markets in Financial Instruments Directive (2004/39/EC) and regulated by the Central Bank of Ireland.

iii Remote and land-based gambling
The Betting (Amendment) Act 2015 (the 2015 Act) brought remote bookmakers (e.g., internet and mobile betting providers) and remote betting intermediaries (e.g., betting exchanges) within the scope of the existing licensing regime that applied to bricks-and-mortar betting shops in Ireland. The 2015 Act extended the existing 1 per cent turnover on a bookmaker’s
activities to online and mobile operators and introduced a 15 per cent commission tax on betting exchanges. 'Commission charges' are defined in the Finance Act 2002 (as amended) as 'the amounts that parties in the State to bets made using the facilities of a remote betting intermediary are charged, whether by deduction from winnings or otherwise, for using those facilities'.

Under the 2015 Act, a traditional land-based bookmaker's licence permits a limited amount of remote betting without the need to obtain an additional remote bookmaker's licence. The value of remote betting on a standard bookmaker's licence may not exceed the lower of €200,000 or 10 per cent of that bookmaker's yearly turnover.

The Gaming and Lotteries Acts apply to all forms of gaming, but have not been updated since the introduction of remote gaming. See Section VIII, below, for details of the reform that is anticipated in this area.

iv  Land-based gambling

While the Betting Acts envisage the business of bookmaking being carried out in registered bookmaker's premises, the Gaming and Lotteries Acts provide for a number of different locations in which forms of gaming can take place (e.g., amusement halls, carnivals, and circuses). Depending on the type of gambling to be performed, there are a range of restrictions. There is no formal limit on the number of gambling premises of a particular type that can be granted.

Casinos are illegal in Ireland if they promote or provide facilities for any kind of gaming that is deemed 'unlawful gaming' for the purposes of the Gaming and Lotteries Acts. This includes gaming in which, by reason of the nature of the game, the chances of all the players, including the banker, are not equal, or gaming in which any portion of the stakes is retained by the promoter or is retained by the banker other than as winnings on the result of the play. Private arrangements are excluded from the scope of the Gaming and Lotteries Acts. This has given rise to the operation of private members' clubs as casinos and card clubs, which it may be argued fall outside the prohibitions on gaming contained in the Gaming and Lotteries Acts. Aside from the requirement to become a member, a process that is not standardised, the opening hours, age restrictions and general operation of such clubs are not regulated.

The Totalisator Act 1929 provides for the establishment and regulation of the Totalisator by the Irish Revenue Commissioners. The Irish Horse Racing Industry Act 1994 provided that the Irish Horse Racing Authority could apply for and hold a totalisator licence. This was later transferred to Horse Racing Ireland by the Horse and Greyhound Racing Act

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10 Defined in Section 1 Betting Act 1931 as 'premises for the time being registered in the register of bookmaking offices kept by the Revenue Commissioners under this Act'.
11 Gaming and Lotteries Act 1956 Section 14.
12 Gaming and Lotteries Act 1956 Section 7.
13 Gaming and Lotteries Act 1956 Section 6.
14 Defined in the Totalisator Act 1929 as 'an apparatus or organisation by means of which an unlimited number of persons can each stake money in respect of a future event on the terms that the amount to be won by the successful stakers is dependent on or to be calculated with reference to the total amount staked by means of the apparatus or organisation in relation to that event but not necessarily on the same contingency, and the said word includes all offices, tickets, recorders, and other things ancillary or incidental to the working of the apparatus or organisation'.

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2001 and the licence is currently held by Tote Ireland. As stated in Section I, above, Tote Ireland’s current licence is due to expire in 2021. Bord na gCon is licensed to operate a totalisator at greyhound tracks.

v Remote gambling
Remote betting and the provision of remote betting intermediary services are generally permitted in Ireland, meaning that an operator that is licensed by the Irish Revenue Commissioners in Ireland may provide betting services to Irish citizens in Ireland by remote means\textsuperscript{15} using equipment which may be located in Ireland or abroad.

As stated in Section I.v, above, online gaming products such as casino, slots and bingo are governed by the Gaming and Lotteries Acts, although that legislative regime has not been updated to take account of online internet gaming. The focus of the Gaming and Lotteries Acts is on gaming carried out in amusement halls, arcades, funfairs, carnivals, travelling circuses and slot machines, and therefore it is unclear how it is to be applied to the type of games offered online. It is common, however, for operators who are licensed in other jurisdictions to offer online products to Irish customers. It is important in such circumstances that the contract between the operator and the Irish customer is not governed by Irish law. Operators should also be aware that the Gaming and Lotteries Acts prohibit the promotion, advertising and the provision of unlawful gaming products so it is important that operators are familiar with these provisions.

vi Ancillary matters
Suppliers of key equipment (e.g., manufacturers of gambling equipment or software suppliers) are not currently required to obtain licences in order to supply to operators. This is set to change when the Scheme is enacted (see Section VIII, below).

III THE LICENSING PROCESS

i Applications
The Betting Acts make provision for three types of betting licences:

\begin{itemize}
 \item \textit{a} a bookmaker’s licence;
 \item \textit{b} a remote bookmaker’s licence; and
 \item \textit{c} a remote betting intermediary’s licence.
\end{itemize}

A licensed bookmaker may accept bets by remote means without a remote bookmaker’s licence, provided that the total value of the remote bets accepted is less than €250,000 or 10 per cent of the turnover derived from the operations covered by the bookmaker’s licence for the year concerned.\textsuperscript{16}

\begin{itemize}
 \item \textsuperscript{15} Defined in Section 1, Betting (Amendment) Act 2015 as meaning ‘in relation to a communication, any electronic means, and includes (a) the internet, (b) telephone and (c) telegraphy (whether or not wireless telegraphy)’.
\end{itemize}
Under the 2015 Act, a licence can now be taken out by a body corporate as well as an individual. The application process for the three types of licences essentially involves two stages. The applicant (or in the case of an application by a body corporate, each ‘relevant officer’ of the body corporate) must first obtain a certificate of personal fitness (COPF). Applications for COPFs from remote operators must be made to the Minister for Justice and Equality, following the placement of an advertisement in two daily, national newspapers. Applications for COPFs from terrestrial bookmakers ordinarily resident in the state must be made to a superintendent of the Irish police. The superintendent or Minister for Justice has up to 56 days to either grant or refuse an application.

Once COPFs have been obtained, the operator has a 21-day window within which their licence application form must be submitted to the Irish Revenue Commissioners. The fully completed application form must be accompanied by the COPF, a valid tax clearance certificate and payment of the licence duty. A licence will be issued by the Irish Revenue Commissioners where the application meets all requirements and on payment of the appropriate licence duty. The licence duty payable on the first application and renewal of a bookmaker’s licence is €500. The licence duty payable on the first application for a remote bookmaker’s licence and remote betting intermediary’s licence is €10,000, and the duty payable on renewal is based on turnover and commission charges. The licence may be paid in full at the time of application or renewal or in two equal instalments.

Application forms must be completed online using the Revenue Online Service (ROS). Not all ROS services are available automatically so it may be necessary to first register for ROS with the Irish Revenue Commissioners. As a practical point for operators, this process of registering for ROS can take a number of weeks.

The standard duration of a licence is two years. Bookmakers’ licences will expire on 30 November of every second year. Remote bookmakers’ licences and remote betting intermediaries’ licences will expire on 30 June of every second year. The requirements and processes that apply to the first licence application also apply to applications for licence renewal.

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18 The Department of Justice will generally require Certificates of Personal Fitness for at least two Relevant Officers with one of the those Relevant Officers having to come within Section 1(a) Betting (Amendment) Act 2015.
20 Ibid.
21 Betting Act 1931 Sections 4(6), 5(5) and 5A(5).
24 Ibid.
26 Ibid, footnote 23.
27 Ibid, footnote 23.
28 Ibid, footnote 23.
30 Ibid.
For retail bookmakers, if the bookmaking business is only being conducted on-course, the holder of the licence must apply for a separate authorisation to accept bets on-course. If the bookmaking is being conducted from a premises, a certificate of registration of premises is required.

There is no licensing regime contained in the Gaming and Lotteries Acts.

ii Sanctions for non-compliance

It is an offence to act as a bookmaker, a remote bookmaker or as a remote betting intermediary without a licence.31 The penalty for acting without a licence is a class A fine (maximum fine of €5,000) on summary conviction or, on conviction on indictment, a maximum fine of €150,000 or imprisonment for up to five years, or both.32 Where a further offence is committed, conviction on indictment carries a maximum fine of €300,000 or imprisonment for up to five years, or both.33

It is an offence to represent oneself as a bookmaker, a remote bookmaker or as a remote betting intermediary without a licence.34 The penalty for this offence is a class A fine on summary conviction or, on conviction on indictment, a maximum fine of €100,000.35 Where a further offence is committed, conviction on indictment carries a maximum fine of €250,000.36

The 2015 Act allows the Irish Revenue Commissioners to serve a ‘compliance notice’ on persons who provide unlicensed operators with certain services and facilities, for example, providing internet services for the purpose of carrying on a remote bookmaking operation or advertising a remote bookmaking operation carried on by an unlicensed operator.37 In addition, payment services or advertising could potentially be the subject of a compliance notice. It is an offence to fail to comply with a compliance notice. The penalty for failure to comply is, on summary conviction, a class A fine or imprisonment for up to six months or both, or, on conviction on indictment, a maximum fine of €50,000 or imprisonment for up to two years or both.38

It is an offence to make a bet or engage in a betting transaction with a person under the age of 18 years.39 The offence carries a penalty of a class A fine or imprisonment for up to six months on summary conviction, or, on conviction on indictment, a maximum fine of €50,000 or imprisonment for up to two years, or both.40

There is also a range of sanctions for non-compliance with the Gaming and Lotteries Acts. In practice, the most potentially serious of these sanctions is that any gaming instruments used in the commission of an offence under the Gaming and Lotteries Acts can be the subject of a forfeiture order. It has been publicly acknowledged by the Department of Justice that ‘there are serious problems with the enforcement of laws governing gaming’.41

31 Betting Act 1931 Section 2(1).
32 Betting Act 1931 Section 2(6).
33 Betting Act 1931 Section 2(7).
34 Betting Act 1931 Section 2A(1).
35 Betting Act 1931 Section 2A(2).
36 Betting Act 1931 Section 2A(3).
37 Betting Act 1931 Section 32B(1).
38 Betting Act 1931 Section 32B(10).
39 Betting Act 1931 Section 23(1).
40 Betting Act 1931 Section 23(3).
IV  WRONGDOING

The Fourth Anti-Money Laundering Directive (AMLD4) was due to be implemented in Ireland on 26 June 2017, with the aim of further strengthening the EU’s defences against money laundering and terrorist financing, and ensuring the soundness, integrity and stability, and confidence in the financial system as a whole.

However, it has not yet been implemented at the time of writing, and as a consequence, the European Commission instigated infringement proceedings against Ireland and 17 other European Union Member States for their inaction at the end of last year.

The European Parliament recently confirmed that inter-institutional negotiations held in January 2018 resulted in an agreement among Member States to progress with a Fifth Anti-Money Laundering Directive (AMLD5), which would amend the preceding directive. A final text was adopted at plenary level on 19 April 2018.

The stated aim of AMLD5 is ‘to extend the scope of the Fourth Directive so as to include providers of gambling services engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers’. In essence, the objective is to modernise the anti-money laundering and terrorist-financing provisions in AMLD4 to prevent such criminal activity in light of the advent of new, intangible forms of currency, for example, Bitcoin, which could be exploited for fraudulent gains in any financial system, including gambling entities. It appears that Section 16 of AMLD5 will amend Article 47 of the AMLD4 to require Member States to take steps to ensure that gambling service providers who offer virtual currencies as means of payment are regulated.

V  TAXATION

Bookmakers in Ireland are subject to betting duty at 1 per cent of turnover. Remote bookmakers must also pay this duty on bets entered into with persons resident in Ireland.

Remote betting intermediaries are subject to a betting intermediary duty that is currently 15 per cent of their commission charges. ‘Commission charges’ are defined in the Finance Act 2002 (as amended) as ‘the amount that parties in the State to bets made using the facilities of a remote betting intermediary are charged, whether by deduction from winnings or otherwise, for using those facilities’.

Unlike most other European jurisdictions, gaming services are not specifically exempted from VAT in Ireland. As a result, online providers who are licensed overseas but who are providing e-gaming services to Irish customers should be registered and charging Irish VAT at 23 per cent on play from Irish customers. Generally speaking, the amount on which VAT is charged is the consideration actually received by the operator from Irish customers. For non-pooled gaming (e.g., slots, casino), this will typically be the net revenue (i.e., after free bets or plays) that the operator receives. For pooled gaming (e.g., poker), the consideration that will be subject to VAT is the rate that the e-gaming operator receives, which is applicable to Irish customers.

Casinos that operate in Ireland as private members’ clubs must all register and charge VAT on customers’ winnings.
VI ADVERTISING AND MARKETING

For retail bookmakers, Section 20(1) of the 1931 Act prohibits a retail bookmaker from setting up or maintaining in or outside his or her shop:

any attraction (other than the mere carrying on of his business of bookmaking) which causes or encourages or is likely to cause or encourage persons to congregate in or outside such premises.

Section 20(3) contains a prohibition on a bookmaker from:

proclaim[ing] or announc[ing] or permitt[ing] any other person to proclaim or announce in such premises to the persons there present the terms or odds on or at which he is willing to take bets in relation to any particular race, match, or other contest, or in respect of any competitor in any such contest.

Section 20(4) prohibits a retail bookmaker from exhibiting (or permitting to be exhibited) in or outside his or her shop (or that is visible from the street):

any lists or statements of the terms or odds on or at which he is willing to take bets in relation to any particular race, match, or other contest, or in respect of any competitor in any such contest, or lists or statements of the competitors entered for or withdrawn from or taking or likely to take part in any such contest, or statements of facts, news, or forecasts in respect of any such contest, or any other incitement or inducement to bet.

The Broadcasting Commission of Ireland is an independent statutory organisation responsible for some of the key aspects of television and radio services in Ireland. Its General Commercial Communications Code (the Code) addresses standards with regard to all forms of commercial communication, including advertising, sponsorship and teleshopping. Section 8.8 of the Code covers gambling and provides that commercial communications that seek to promote services to those who want to bet are acceptable.

Section 8.8 of the Code also provides that such communications may contain the address of the service provider and factual descriptions of the services available but may not contain anything that could be deemed to be an 'encouragement to bet'. Information detailing special offers, discounts, inducements to visit any betting establishment (including online), references to betting odds available or any promotional offer intended to encourage the use of services of this nature are not permitted.

A revised version of the Code that governs commercial communications such as advertising, sponsorship and product placement on Irish licensed television and radio stations, which took effect from 1 June 2017, includes enhanced provisions, such as prohibitions on advertising of remote bookmaking operations without a remote bookmaker's licence, and certain portrayals of gambling (e.g., children gambling or that gambling can be a solution to personal or professional problems, or financial concerns).

In addition, recent decisions of the Advertising Standards Authority of Ireland (ASAI) provide useful guidance for the betting and gaming industry as to where the lines between permitted and non-permitted advertising of promotions are drawn. In particular, care should be taken if using phrases such as ‘risk-free bet’ or ‘money-back special’. In addition, advertised headline offers must be consistent with any restrictions or clarifications in the applicable terms and conditions.
i  Risk-free bet

In 2016, the ASAI considered an email sent by a bookmaker advertising a risk-free bet[42] for customers who downloaded a new app. A recipient of the email complained to the ASAI that he did not think the offer was risk-free. It required punters to place a bet for £5; if they lost this bet they could then receive another free £5 bet. The complainant argued that the label ‘risk-free bet’ implied that his initial £5 would be returned if he was unsuccessful.

In its response to the ASAI denying the complaint, the advertiser claimed that risk-free bet was a term frequently used in the sector and commonly understood to have the meaning given to it (i.e., that a punter who lost would receive another bet, rather than be refunded their stake). The advertiser highlighted that the offer was described in three steps in the body of the email and the details were not hidden in the terms and conditions. It also stated that as the customer had chosen to receive its marketing emails, he would be familiar with the language used in the gaming industry.

Upholding the complaint, the ASAI determined that ‘risk-free’ could be understood by some consumers to mean that if they lost their initial bet, their stake would be refunded to them. While the ASAI acknowledged that the body of the email explained the terms of the offer clearly, it still found the advertisement to be in breach of three sections of the ASAI Code relating to honesty, misleading advertising and misleading promotions.

ii  Consistency with terms and conditions

In other recent decisions involving the gambling sector, the ASAI has emphasised the need for headlines or text in promotional offers to be consistent with the terms and conditions. For example, in a decision delivered in January 2016,[43] the ASAI held that an advertisement that contained headline text that was subject to an important clarification contained in a footnote was not compliant as there was no asterisk in the headline to draw attention to the footnote. In a previous decision given in 2015[44] advertisers were reminded that it was not compliant to make a headline offer if it was subsequently meaningfully restricted by the terms and conditions.

The ASAI is a self-regulatory body set up by the advertising industry in Ireland to promote standards in commercial advertising in compliance with a Code of Standards for Advertising. While the ASAI Code does not have a legislative basis, commercial marketing communications found to be in contravention of the Code by the ASAI Complaints Committee must be amended or withdrawn by organisations who agree to abide by the Code. In addition, decisions of the ASAI may be taken into account when applicable advertising or consumer protection legislation is being considered. For example, an advertisement that breaches the ASAI Code could, in certain circumstances, also be deemed to constitute a ‘misleading commercial practice’ for the purpose of the Consumer Protection Act 2007 and give rise to civil and criminal liability.

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VII THE YEAR IN REVIEW

The Gaelic Athletic Association Congress, which governs the Irish national sports of Gaelic football and hurling, voted on 24 February 2018 to ban gambling and betting companies as sponsors of the national sports.45 This decision illustrates the heightened public concern surrounding gambling addiction, and will undoubtedly place further pressure on the government to demonstrate its efforts to combat the negative consequences of gambling.

Separately, unlike in the United Kingdom, gambling debts in Ireland are unenforceable.46 This position was challenged in a recent Circuit Court case involving an action brought by a gambler against a small amusement centre. He claimed that it had refused to pay him €11,713 he had won after he placed several bets on an automated roulette machine.

The plaintiff alleged that on 2 and 3 March 2015, he first won about €7,500. When he sought to cash it out, he was given €2,500 in cash and €5,000 worth of chips, before being told to play more and that he would be paid at the end of the night. The court heard that after he won a further €6,713, the plaintiff was told by a manager to cash out. When he went to the cashier counter, he was told the casino had no more cash for the night but that he would be paid the following day. He had also been told that an engineer would later check the roulette machine. The plaintiff claimed the amusement centre refused to pay him despite multiple requests.

In reaching his decision and reaffirming the position in Ireland that gambling debts are unenforceable, the Circuit Court judge stated that he had to rely on the 1956 Act which states that ‘no action shall lie for the recovery of any money or thing which is alleged to be won’. The judge went on to say that ‘[i]f you happen to be too lucky while placing a bet or gambling, the person can simply say “no you’re not entitled to the money”. That is simply the law in Ireland’.47

VIII OUTLOOK

The Minister for Justice announced plans in 2011 for new legislation on gambling in Ireland. In presenting his plans, the Minister noted that ‘the present laws are not adequate to deal even with aspects of gambling which they were intended to cover’.48

The heads of the Scheme were published on 15 July 2013.49 The intent of the Scheme was that it would, if enacted, provide a comprehensive overhaul of Ireland’s outdated gambling laws and would result in most forms of gambling being regulated by a single piece of legislation.

Since the initial publication of the Scheme in 2013, limited progress has been made. However, a number of recent high-profile cases involving prominent sportspeople and

46 Gaming and Lotteries Act 1956 Section 36.
gambling addiction, coupled with increased public concern about children under 18 engaged in gambling activities, has led to an increased political desire to implement legislation to give effect to the Scheme. If legislation is enacted to give effect to the proposals outlined in the Scheme, it will result in a fundamental change in gambling law and regulation in Ireland.

On 10 January 2018, it was widely reported in the media that the government would scrap the Scheme in favour of drafting and publishing an updated Scheme, on the basis that the original Scheme is, on reflection, outdated and no longer fit for purpose. It is anticipated that the revised Scheme will now tackle new developments in the industry, such as social media advertising, crypto-currencies and secondary lottery providers.

It is anticipated that the revised Scheme will be published in 2018 or early 2019.

Outlined below are a number of the anticipated key features of the revised Scheme.

i Independent regulatory authority

In a significant departure from what was originally proposed, it is now anticipated that an independent regulatory authority will be established to regulate the gambling industry in Ireland. In contrast, it was previously envisaged that the Department of Justice would provide regulatory oversight of this area through the creation of the Office of Gambling Control, Ireland (OGCI).

Media reports suggest that the duties of this independent authority will include overseeing advertising, sports sponsorship, access for those under 18, a social fund for access to treatment for addiction, and a research function. It is, as of yet, unclear whether this authority will have responsibility for issuing licensing, ensuring compliance with the Scheme, how the Scheme will be enforced once enacted or how the authority will be funded. It is reasonable to suggest that the new body will assume most of the functions that were expected to be carried out by the OGCI and in this event, the new independent regulator will probably grant licences to promoters who will incur a licensing fee that will go towards funding the independent regulator. Similarly, just as the OGCI was to be the ultimate enforcer of gambling laws in this jurisdiction, it is likely that the independent regulator will also be equipped with similar powers to fulfil this role (e.g., the power to order ISP blocking measures to prevent, disrupt or obstruct access to unlicensed remote services).

ii Online gambling and social media advertising

Media reports also suggest that online gambling and social media advertising will be considered in the revised Scheme. A government spokesperson has been quoted as saying that the Scheme should be updated in order to ‘protect consumers and vulnerable people’. It could be argued that the inclusion of advertising restrictions in primary legislation, as suggested by us at the time of the publication of the original Scheme, could render them inflexible, as it would potentially make these rules more difficult to amend as necessary.

iii Licensing system

It is anticipated that the revised Scheme will update the licensing system in Ireland. Following publication of the original Scheme, several submissions were made to the Department of Justice and Equality in relation to the complex licensing system envisaged by the original Scheme. The majority of these submissions sought a more streamlined licensing system. Of particular interest will be whether the revised Scheme will reduce the number of licences
proposed in the original Scheme (43 different licences in total), with a view to minimising potential administrative backlog and simplifying the system for promoters who may find it unduly difficult to determine what licence to apply for.

iv Additional issues

Other issues that are reported to be included in the revised Scheme are the regulation of gaming machines, the regulation of casinos and the protection of children against gambling. Legislation for land-based casinos and casino games was provided for in the original Scheme, in addition to provisions to allow for gaming in betting shops and enhanced player protection measures. No specific mention has been made of these provisions in relation to the revised Scheme.

v Timing

Having received approval at government level, the government will now commence discussions with stakeholders in the gambling industry with a view to gauging keys issues to be tackled in the new and improved General Scheme. It is reported in the media that the updated Scheme will be made publicly available at the end of summer 2018.

In addition to the decision to publish a new and updated Scheme, some initial steps were taken in 2017 to modernise the Gaming and Lotteries Acts. The General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017 (the 2017 Bill) was published on 2 August 2017 and, while it has not yet been enacted and accordingly is not yet legally binding in Ireland, it is an indication that the Gaming and Lotteries Acts will be modernised in 2018. The main objective, according to the preamble to the 2017 Bill is to ‘provide greater clarity and certainty for all promoters and participants involved and to combat fraudulent behaviour’ in the gambling sector.

The key features of the 2017 Bill include the following.

Permit application procedure

Head 70 of the 2017 Bill provides that gaming that is promoted at certain defined events and locations, including licensed premises, requires a permit in order to be lawful. The superintendent of the Irish police in the district in which it is intended to promote the gaming event is charged with issuing gaming permits at their discretion based on a number of specified factors, including the character of the applicant, the number of permits already issued in the locality and the purpose of the proposed gaming event. The 2017 Bill also requires the superintendent to maintain and update a public record of all permits that have been issued, suspended, revoked or surrendered. It is anticipated that this will result in greater transparency in the local Irish gambling scene and ensure that participants in these regulated gaming events can be certain that the promoter does not have a track record of having their licence revoked, in turn reducing the capacity for fraudulent behaviour. Furthermore, the superintendent may grant the permit subject to certain conditions and in the event that these conditions are breached, Head 70 of the 2017 Bill provides that the superintendent shall have the power to investigate possible infringements and enforce penalties. Head 98 of the 2017 Bill provides for more severe punitive sanctions in the form of increased fines and greater terms of imprisonment.
Charitable gambling activities

The 2017 Bill would require any charitable beneficiary of a raffle or lottery to be registered with the Charities Regulatory Authority. This is presumably to provide greater transparency in the sector and to minimise fraudulent activity. Additionally, promoters of raffles or lotteries for charitable or philanthropic purposes will have to state clearly in their application to the superintendent in writing that this is the case in order to avail of an exemption from having to obtain a permit (Head 76 of the Bill).

Stakes and prizes

In order to reflect inflation since 1956, the 2017 Bill has augmented the stakes and prizes that are permissible with maximum rates of stakes and prize money for licensed gambling machines being raised to allow for a stake of up to €10 and a prize of up to €750. The 2017 Bill draws a distinction between stakes and prizes permitted in certain defined gaming and lottery activities where the promoter of the event may personally benefit (allowing a stake of up to €10 and a prize of up to €3000) and those permissible in the context of a charitable or philanthropic event where a maximum prize of €5000 is permissible. In all cases, the promoter is only entitled to recoup up to 5 per cent of the total tickets sales with regard to expenses incurred in promoting the gaming event.

Minimum age requirements

Perhaps because of increased public concern and media reports on the rise of gambling addiction among minors, the 2017 Bill proposes to standardise the age limit for participating in betting and gambling at 18. Under the Gaming and Lotteries Acts, some activities mandate an 18-year limit, while others are open to 16-year olds. Setting the minimum age at 18 would bring the minimum age into line with the limit set by the National Lottery Act 2013 and Betting Acts.
Gambling in Israel is defined primarily through its prohibition. The Israeli Penal Law 5737-1977 (the Penal Law) contains the only definition under Israeli law of the types of activities that constitute gambling and betting, by reference to the following categories:

- ‘Prohibited game’ – a game at which a person may win money, valuable consideration or a benefit according to the result of a game, those results depending more on chance than on understanding or ability;
- ‘Lottery’ – any arrangement under which it is possible – by drawing lots or in another manner – to win money, valuable consideration or a benefit, more by chance than by understanding or ability;
- ‘Betting’ – any arrangement under which it is possible to win money, valuable consideration or benefit, by guessing something, including lotteries based on the results of sports matches and contests.

These definitions are intentionally broad and, as a result, they overlap somewhat. From an academic perspective, the legislator’s intention was to distinguish lotteries and betting from prohibited games – the former two are based on a specific arrangement or contract between an offeror and offeree, whereas the latter involves an activity defined by the predetermined rules of a particular game.

While the Penal Law does not use the terms ‘game of chance’ or ‘game of skill’, the statutory definitions (and the subsequent interpretation of them by Israel’s courts), are predicated on the ‘predominance test’ (as captured by the phrase ‘more by chance than by understanding or ability’). In other words, activities in which skill or knowledge outweigh chance or randomness in determining the outcome will be excluded from the scope of ‘prohibited game’ and ‘lottery’ under Israeli law.

Notwithstanding, Israeli courts have added a ‘twist’ to the aforementioned predominance test. In a 2011 ruling, the District Court of Tel Aviv determined that where a particular betting game consists of both skill and chance, the ‘social interest and utility’ of the game in question should also be taken into account before considering its legality.
the matter at hand, the court ruled that the hybrid activity was, in fact, a form of prohibited gambling (rejecting an expert opinion stipulating the predominance of skill in determining the outcome of the activity).

Furthermore, in a ruling issued in May 2017 (as yet unpublished) the Tel Aviv Magistrate’s Court ruled that when determining whether a particular game is one of chance or skill, the game must be assessed in relation to an amateur player playing a single hand. This ruling is subject to appeal, and does not itself constitute a binding precedent but it is demonstrative of the restrictive view Israeli courts take towards gambling.

Against that backdrop, and though the matter has not been addressed to date by Israeli courts, it is the author’s view that Israeli courts are likely to consider activities such as ‘fantasy sports’ as a form of prohibited gambling. While Israeli authorities tolerate true competitions of skill played for prizes, an activity with monetary prizes predicated on the outcome of an external sporting event (or multiple events) is likely to be considered by Israeli courts as falling within the definition of betting, an area exclusively reserved under Israeli law to Israel’s sports-betting monopoly.

The Israeli Ministry of Finance has issued a blanket permit for the conduct of promotional draws and sweepstakes, conditional on these being free to enter. Businesses may conduct a promotional draw no more than twice per calendar year, and at least 120 days apart. Other conditions (such as oversight by a lawyer or accountant) apply as well.4

Binary options, contracts for differences, spread betting and other speculative activities related to financial instruments, currencies, securities and the like, are not considered a form of gambling under Israeli law. These activities are regulated under Securities Law 5728-1968. The Tel Aviv District Court ruled in 2016 that trading in binary options does not constitute a form of prohibited gambling.5 However, the Israeli Securities Authority (the Authority) has prohibited Israeli licensed trading platforms to offer binary options to Israeli retail customers.6 A 2017 amendment to the Securities Law severely restricts the involvement of Israelis in binary options trading (either with Israeli end users or elsewhere). The explanatory notes accompanying the amendment made reference to the Authority’s position regarding the ‘gambling-like’ characteristics of binary options trading.

**ii Gambling policy**

Israel is notoriously conservative with respect to gambling. An intersection of religious and socialist values has resulted in Israel banning most forms of gambling.

While the laws related to gambling have scarcely changed in recent years, the existing law contains a relatively broad prohibition. The Penal Law prohibits organising ‘lotteries, betting and prohibited games’ (Section 225) and participation in prohibited games (Section 226). Section 225 provides that a person organising or conducting a prohibited game, lottery or betting is liable to a penalty of up to three years’ imprisonment or a fine of up to 452,200 shekels. Section 226 provides that a person playing a prohibited game is liable to a penalty of

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4 Announcement Regarding General Permit for the Conduct of Lotteries for Commercial Promotion Under the Penal Law 5737-1977 (in effect as of 1 January 2010).
5 Class Action 25717-10-13 Bar-Or et al v. ETdtrader Ltd et al.
up to one year’s imprisonment or a fine of up to 29,200 shekels. Oddly, Section 226 does not refer to betting or lotteries. In other words, the sanctions on participation are triggered only by playing a ‘prohibited game’.

Israeli courts have expanded upon the language of the Penal Law, most notably by ruling that online gambling and betting available to Israeli consumers violates Israeli law (despite the fact that the law predates the internet). The Israel Police has taken enforcement action against online gaming (focusing primarily, but not exclusively, on operations with an Israeli nexus). After an Israeli court refused to uphold a police order requiring internet service providers (ISPs) to ban access to foreign online betting sites, members of Israel’s parliament tabled a bill to introduce such measures into the Penal Law (the bill did not, eventually, become law). The Bank of Israel has prohibited the transmission of funds related to gambling by Israeli financial institutions, and the State Comptroller has called on all Israeli authorities to take action to curtail the availability of internet gambling in Israel. In short – Israel’s authorities are actively seeking to uphold the gambling ban, both offline and online.

Various Israeli governments have considered a limited liberalisation of the blanket ban on bricks-and-mortar gambling, by allowing the construction of a small number of casino resorts in Eilat, a resort destination on the Red Sea. No such initiatives have achieved any meaningful traction.

In 2017, the Israeli Minister of Finance revoked the permit granted to the National Lottery to operate a limited number of video lottery terminals (VLTs). This revocation has been judicially challenged by Lottery concessionaires and as at April 2018 the matter remains pending before the High Court of Justice. Statements made by the Ministry of Finance suggest that the Ministry further wishes to revoke the permission granted to the Israel Sports Betting Board to conduct horse race wagering. The Ministry of Finance has also announced the establishment of a public committee to review the existing legislation in Israel pertaining to sweepstakes and promotional prize draws, with a view at possibly restricting or re-regulating such activities.

### iii State control and private enterprise

The only forms of legal gambling in Israel (other than a very limited exemption for purely social gambling activities) are the national lottery and a limited sports betting service operated by the state.

These services are regulated as follows:

- **a** The National Lottery was established in 1951. It offers several weekly draws, scratch cards, a weekly subscription lottery, and various other lotteries and raffles. The operations of the National Lottery are supervised and regulated by the Ministry of Finance.

- **b** The Israel Sports Betting Board (ISBB) was established in 1967 under the Law for the Regularisation of Sports Betting 5727-1967. The ISBB has the exclusive right to organise and regulate sports betting in Israel. It offers betting on football and basketball games, as well as a limited horse race wagering service (the latter activity may be banned by the Ministry of Finance, as noted above).

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7 HCJ 239/17 Haim Tal et al v. Minister of Finance.
iv Territorial issues

The regulation of gambling in Israel is entirely on the national level (local authorities have no jurisdiction on gambling-related matters). Notwithstanding, there have been proposals (none of which have progressed) to carve-out Israel’s prime resort location, the city of Eilat, from the general prohibition on terrestrial gambling.

v Offshore gambling

With respect to online gambling, Israeli courts have ruled that Israeli law applies to online gambling conducted by foreign operators, when it is made available to Israeli players. In other words, when a party to the gambling transaction is located in Israel, the entire activity would be viewed as a violation of the prohibition on gambling. Enforcement has focused on operators specifically targeting the Israeli market (i.e., advertising to Israelis, using the Hebrew language, etc.). To date, Israeli authorities have never taken enforcement action against foreign operators with no presence in Israel, that have not specifically targeted the Israeli market.

As noted, the police have attempted to order Israeli ISPs to block access to a specific list of online gambling sites, however the blocking orders were appealed by the ISPs and struck down by the Israeli Supreme Court for lack of explicit legal authority. A bill that would empower police to issue orders aimed at preventing those in Israel from accessing websites offering online gambling services was presented to Israel’s legislature, but was not passed into law.

To foil financial transactions related to online gambling as well as other illegal online activities, the Bank of Israel (which regulates financial and credit institutions in Israel) has issued regulations imposing certain restrictions on financial transactions involving online gambling.

Furthermore, in 2010 the Israeli State Comptroller published a comprehensive analysis of the illegal online gambling market in Israel. The report covered a broad spectrum of governmental agencies. The State Comptroller has urged Israeli enforcement authorities to implement the necessary measures to disrupt gambling-related transactions and block access to illegal gambling websites from within Israel.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The primary piece of legislation regulating gambling in Israel (i.e., the prohibition on gambling) is Chapter 12 of the Penal Law. The Penal Law defines the types of activities that constitute gambling and betting, the prohibitions applicable to such activities, and the limited exemptions available under law.

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8 Regarding the classification of foreign entities offering services in Israel see, Class Action (Tel Aviv) 30284-01-10 Simon Davuch v. Connective Group Ltd and Special Requests (Tel Aviv), 908617/07 Carlton v. The National Unit for the Investigation of Fraud.
9 Administrative Appeal (Supreme Court) 3782/12 The Commander of the Tel Aviv-Jaffa District Israel Police Israel v. The Israel Internet Association.
10 Bank of Israel, Supervision of Banks Division, Conduct of Banking Business Procedure No. 411.
Additionally, the Law for the Regularisation of Sports Betting 5727-1967 governs the activities of the ISBB.

ii The regulator
The only forms of regulated gambling in Israel are the National Lottery, regulated by the Ministry of Finance, and the ISBB (which is a self-regulating statutory corporation).

iii Remote and land-based gambling
Israeli law does not separately regulate remote and terrestrial gambling. In fact, the law does not specifically refer to remote gambling. The application of the Penal Law to remote gambling was the result of a judicial interpretation of the scope of the law.

iv Land-based gambling
Land-based gambling (other than the National Lottery and the national sports betting offering) is illegal under Israeli law.

v Remote gambling
With the exception of the online betting services offered by the ISBB, online gambling is illegal under Israeli law.

III THE LICENSING PROCESS
Commercial gambling is illegal in Israel, so this section is not applicable.

IV WRONGDOING
Israeli law enforcement agencies have taken action against unlawful gambling operations. The police have raided unlawful gambling houses and venues used for gambling, and have also taken action against individuals and businesses involved in unlawful online gambling. To date, direct enforcement action has focused primarily on gambling operations conducted by organised crime or from within Israel itself.

Gambling offences are considered source offences under the Prevention of Money Laundering Law 5760-2000. Therefore, unlawful gambling activity may also constitute a money laundering offence. Indeed, individuals involved in unlawful gambling activity have been indicted and convicted of money laundering offences in addition to primary convictions for unlawful gambling offences.

V TAXATION
Since commercial gambling is unlawful in Israel, and the only lawful forms of gambling are conducted by the state, the only relevant tax is the tax on gambling winnings.

The winners of prizes (including prizes from lotteries and betting organised by the ISBB) may be subject to taxation.

Prizes in excess of 50,000 shekels are subject to withholding tax at source. Tax rates are incremental for prizes between 50,000 shekels and 100,000 shekels, and are set at 30 per cent for prizes above 100,000 shekels.
VI ADVERTISING AND MARKETING

Section 227 of the Penal Law specifically prohibits the advertising of illegal gambling and betting. It reads:

*If a person offers, sells or distributes tickets or anything else that attests to a right to participate in any lottery or betting, or if he prints or publishes an announcement of a lottery or betting, he is liable to one year imprisonment or a fine of 150,600 shekels.*

The law does not distinguish online advertising from traditional advertising, nor does it distinguish advertising for foreign gambling operations from advertising of local operations. Historically, the police have taken action against advertisers specifically targeting Israeli customers, both online and offline.

In 2017 the Ministry of Finance imposed strict limitations on the advertising of gambling activities by the National Lottery.

VII THE YEAR IN REVIEW

The most significant development over the past year has been the decision by the Ministry of Finance to revoke the permit previously granted to the National Lottery to operate a limited number of VLTs. The revocation occurred as part of the renewal of the National Lottery’s licence. The Ministry’s decision to revoke the permit was strongly opposed by Lottery concessionaires as well as by local government (which is a major recipient of Lottery revenue). The decision to revoke the permit has been judicially challenged and the matter remains pending before the High Court of Justice (as at April 2018).

In addition, the Ministry of Finance has announced that it intends to further restrict the availability of gambling in Israel by disallowing the offering of horse race wagering by the ISBB. The Ministry is also considering revising the existing regulations on sweepstakes and promotional draws, a move that may result in such activities being further restricted.

Finally, in October 2017, the Israeli Knesset adopted legislation effectively banning the participation of Israelis in binary options trading and ancillary activity.

VIII OUTLOOK

As noted, Israel is notoriously conservative with respect to gambling. Therefore, it is unlikely that the coming year will bring any liberalisation to the market. In fact, it is more likely that the coming year will see the introduction of bills intended to further restrict the availability and proliferation of online gaming (e.g., through ISP blocking measures) and additional restrictions on the activities of the National Lottery and ISBB.
I  INTRODUCTION

On 15 December 2016, the Act Promoting Implementation of Specified Integrated Resort Areas (the Act) was enacted in the Japanese Diet session with an aim to legalise gambling to be operated by private entities in Japan, which is the latest development in a long-standing debate on whether to legalise and permit casinos in designated areas of the country. The Act aims to promote the establishment of an integrated resort (IR) (and casino) in Japan. Therefore, it only has 23 articles laying out the very basic concepts.

Among the small number of articles, one specifically says that the measures to implement the IR should take place within one year. The government intended to submit the subsequent implementation bills to the Diet session in 2017 and established a body called the IR Promotion Advisory Council, tasking them to formulate the basic concepts for the implementation of the IR. In response to this, in the summer of 2017, the Advisory Council issued a white paper setting out various matters (the White Paper).

However, the implementation bills were not passed during the 2017 Diet sessions because of the re-election that took place, which limited the opportunity to discuss these bills. The Japanese government now intends on legislating these implementation bills during the 2018 Diet session, which is taking place at the time of writing.

II  CURRENT STATUS AS TO THE LEGALITY OF GAMBLING IN JAPAN

Under the current Japanese legislation, gambling, in general, is prohibited under Article 185 of the Penal Code, with the exception of betting on something for momentary amusement or specific events or sports permitted under special laws, which are:

$a$ the four public sports – horse racing, bicycle racing, powerboat racing and motorcycle racing – all of which are run by local governments or government corporations;

$b$ the public lottery; and

$c$ Japanese Football Pools.

Licences are required to operate these forms of gambling activities, which under the current legislation, are granted only to local governments or government-related entities.

In this context, Article 185 of the Penal Code provides that a person who gambles shall be punished by a fine or a petty fine of not more than ¥500,000, unless the item that is placed
on the bet is that of momentary amusement. The term ‘gamble’ is understood as ‘an act where more than two persons bet on an outcome of a contest of chance to contend for a prize in the form of property or asset’ (Tokyo High Court, 28 November 2006).

The ‘outcome of a contest of chance’ means an outcome that is something unpredictable or out of the contestants’ control. The Old Supreme Court case of 13 November 1911 found that if the outcome of a contest depends upon an element of chance to any degree, the outcome shall fall under the ‘outcome of a contest of chance’, even if such outcome depends on certain skills of the contestants (except when the outcome is evident in advance on the basis of any gap between the contestants’ skills).

Accordingly, Japanese court precedents have found that the outcomes of games of ‘igo’ (Old Supreme Court case of 10 June 1915), mah-jong (Old Supreme Court case of 28 March 1935) and Japanese chess (shogi) (Old Supreme Court case of 21 September 1937) all fall under the category of ‘outcome of a contest of chance’.

To ‘bet to contend for a prize in the form of property or asset’ means the winner wins and the loser loses a prize in the form of property or asset. If one of the contestants does not lose any property, that is, he or she has no risk of losing his or her property, the contestants are not contending for a prize in the form of property or asset (Old Supreme Court case of 30 April 1917 et al).

Article 186 Section 2 of the Penal Code further prescribes that a person who, for the purpose of profit, runs a place for gambling or organises a group of habitual gamblers shall be punished by imprisonment not less than three months but not more than five years. The term ‘running a place for gambling’ is understood to mean providing, as a host, a certain place for gambling that is under the host’s control (Supreme Court Case of 14 September 1950). In this context, ‘certain place for gambling’ is understood to mean that a physical location or actual gathering of the players to such location is not required (Supreme Court case of 28 February 1973).

The crime of running a place for gambling also requires running a place for gambling and ‘obtaining profit’ (Article 186 Paragraph 2) and the term ‘obtain profit’ is understood to mean having the intention of obtaining illegal financial benefit (in the form of fees, commissions or others) in consideration.

The Penal Code has a certain carve-out stating that gambling will not constitute a violation of the Penal Code, if the ‘item which is placed on bet is that of momentary amusement’. This term is understood to be something of very low value that will not unduly stimulate a person’s passion for gambling. The Supreme Court of Japan, however, has found that cash does not, regardless of its amount, fall under the definition of ‘momentary entertainment’.

Thus, gambling that is legally permitted under the current Japanese law is limited to gambling facilitated by licensed public entities, and interpretations of gaming and gambling regulations to date have been generally consistent with this general rule.

III OFFSHORE GAMING SERVICES

On 1 November 2013, a deliberation concerning the legality of online gambling was conducted in the Japanese Diet and, upon such deliberation, the government presented its view concerning online gambling, which is that participating in online gambling operated outside Japan through the internet from Japan (or participating in casinos outside Japan airing live through the internet from Japan) will constitute gambling in Japan if a part of such
gambling was conducted within Japan, such as participating through the internet from one’s home in Japan (i.e., the person in Japan was not physically present at the gambling house overseas).

Accordingly, in 2016 there was a case where several players located in Japan who were playing an online gambling game distributed by an offshore online gaming service provider (Smart Live Casino) through a server located outside of Japan (United Kingdom) were convicted of illegal gambling. In this case, it was reported that the relevant gambling website had descriptions written in Japanese since September 2014 and was open from early evening to after midnight Japan time and, in addition to that, the dealer was Japanese and the users were able to talk with the dealer in Japanese.

It is considered that these factors formed the grounds for the website to be considered as providing services that were targeted at Japanese people. It should be noted, however, that this case was dealt with under summary proceedings, which are not a formal trial at a summary court. A trial in these proceedings takes place only with an examination of documents submitted (no public trial including witness examination takes place) while parties are not present. Therefore, it is unclear whether the court would come to the same conclusion in a formal trial. In fact, despite some of the players being convicted of illegal gambling, the Japanese Public Prosecutors Office decided that it would drop charges against one of the players who did not agree to summary proceedings, and therefore, it is unclear whether the court would come to the same conclusion if this was tried in the formal trial. Also, to the best of our knowledge, no action was taken against Smart Live Casino.

IV CURRENT STATUS OF THE LEGALISATION OF CASINOS IN JAPAN

In light of the general prohibition on gambling, official discussions on whether to legalise casinos in Japan have been taking place for some time now, dating back to 2006 when the Liberal Democratic Party (LDP) produced a report entitled ‘Japan’s Basic Policy concerning the Introduction of Casino Entertainment’. These discussions have continued since then, and in 2013, the LDP and certain other members of a cross-party group called the ‘Alliance for the Promotion of International Tourism’ (the Alliance), including as its members Shinzo Abe, the current Japanese Prime Minister, and Taro Aso, the current Treasurer and former Prime Minister, submitted the bill to legalise casinos to the Japanese Diet, which was subsequently passed at the Japanese Diet session on 15 December 2016.

i The Act

The Act aims to carry out a two-stage legislative process by (1) passing an act to facilitate the development of integrated resorts and (2) passing subsequent acts to actually implement integrated resorts.

Since the Act focuses only on facilitating the development of integrated resorts, it contains only 23 articles, which describe the basic policy and the process for the introduction of casinos in Japan. Thus, the passage of various subsequent series of bills will be necessary in order to actually legalise the operation of casinos in Japan. Subsection ii, infra, gives a brief explanation of the Act’s key points.
The Act’s aim to legalise only land-based casinos

Article 1 of the Act provides that:

[i]n light of the fact that promoting implementation of Specified Integrated Resort Areas contributes to the development of tourism and local economies... the purpose of this act is to set out the fundamental principles, fundamental policies and other fundamental matters relating to the promotion of the implementation of Specified Integrated Resort Areas...

Article 3 of the Act further provides that:

[t]he implementation of the Specified Integrated Resort Areas shall be promoted on the basis of achieving international competitiveness and attractive extended stay sight-seeing visits.

As indicated above, Articles 1 and 3 illustrate that the Act in its current form is only contemplating legalising casinos that people physically visit, thereby promoting tourism, and is not necessarily aiming to legalise online casinos.

In response to the passage of the Act, an official discussion has started at a cabinet meeting to establish a consolidated measure to address gambling and gaming addiction in general, which not only addresses gambling (i.e., casinos, lotteries and public sports) but also certain financial commodities (such as foreign exchange transactions), or pachinko and other gaming.

Therefore, it is possible that during the course of the discussion to address gambling and gaming addiction problems, further discussions may arise with regard to legalising online casinos through different legislation.

Private entities as casino operators; potential cap to the casino floors

Article 2.1 of the Act expressly provides that a specified integrated resort will have ‘casino facilities (limited to those established and operated in the Specified Integrated Resort Areas by private entities . . .), convention facilities, recreation facilities, exhibition facilities, lodging facilities and other facilities accepted to contribute to the promotion of tourism operated by a private entity’, thereby opening the doors for private entities to become casino operators.

On the other hand, the Act expressly excludes public entities from establishing and operating casino facilities.

The Act includes no provision restricting the operator to an entity incorporated in Japan; therefore, foreign operators should be very much welcomed.

In this context, the White Paper states that there should be a limit to the floor size of the casino within the IR and that this should be determined ‘taking into consideration of the Singapore casino’.

While the White Paper is silent on the exact ratio or figure, setting a limit on the size of the casino means the size of the IR itself may be affected. And this would affect the local governments, especially those that have contemplated a large-size casino and IR with a large-size investment from the private operators.²

² Subsequently, the Working Team of the government agreed in April 2018 that the gross floor area of a casino shall be 3 per cent of the IR or less.
iv Multiple layers of the selection process

Article 2.2 of the Act provides that a specified integrated resort area should be ‘an area certified by the competent minister as an area where a Specified Integrated Resort can be established, based on the application of the local government’.

The wording in Article 2.2 indicates that there will be at least two layers of the selection process: (1) selection by the competent minister of the local government where the integrated resort would be established; and (2) selection by the local government of the operator to operate the casino.

The Act is silent as to which selection procedure will precede the other (the Act is also silent as to which ministry will be in charge, since Article 11 of the Act provides that the ‘Casino Control Committee shall be established as an external organ of the Cabinet Office’, it is widely assumed that the head of the Cabinet Office (i.e., the Prime Minister) would be the competent minister in question); however, the White Paper has given guidance to this issue that, in principle, the selection of an operator by the local government will come first since the competent minister would not be able to select the local government where an integrated resort is to be established by the location alone, and without knowing the actual plans contained in the application of the local government. As such, an applicant operator must propose a plan that is appealing and attractive to the local government, so that the local government will prepare the application to be submitted to the competent minister adopting such plan. The local government’s application adopting the applicant operator’s plan must then be selected by the competent minister as the location that is appropriate to be designated as a specified integrated resort area.

In this context, the White Paper is consistent with the ongoing discussion to seek careful and phased introduction by limiting the number of casinos to be established, as IRs are considered facilities that should not be established all over the country. Therefore the number of facilities and the areas in which they are initially established shall be on a trial basis, which may be gradually increased. In doing so, the White Paper maintains the position of considering establishing them in large cities as well as local regions. There are controversial views as to the actual number of locations where the IRs are to be established initially, ranging from two to three (which was originally discussed) to four to five (which was very recently proposed by the project team established by the ruling party). The White Paper also expressly states that there should be ‘1 casino for 1 IR’, so the current thinking is not having multiple casinos competing against each other in a single location, but rather have such competition during the selection process.

A frequently asked question is where the first location for integrated resorts will be; however, since there will be a selection process for the locations, while the mass media speculate and try to predict, the actual location will be chosen based on numerous factors including the political conditions at the time of selection.

V THE SELECTION CRITERIA OF A CASINO OPERATOR AND THE EFFECT ON POTENTIAL FOREIGN APPLICANTS

The Act provides first that the specified integrated resort areas shall be promoted ‘by taking advantage of regional characteristics and the innovation and vitality of the private sector’s ability to contribute to the development of the regional economies and redistribute to the community the proceeds of the healthy casino facilities’ (Article 3), and also that ‘[t]he
government shall take necessary measures so that the Specified Integrated Resort Areas will have the features central to establishing genuine internationally competitive and attractive tourist destinations while utilising regional characteristics’ (Article 6).

Based on these provisions in the Act, it can be surmised that a foreign operator considering whether to participate in the selection process needs to prepare a proposal that is appealing to the local government, not only from a financial perspective, but also from the perspective of understanding the regional characteristics and the needs of the community.

Having to include this level of specificity in an application could be one of many cross-border difficulties that a potential foreign operator may face, since the regional characteristics and the needs of the community, especially in Japan, may be quite different from that in the operator’s own country and other regions of operations. Additionally, the needs of the community and regional characteristics in Japan are different between regions that qualify as an ‘urban-type’ integrated resort where the number of citizens and infrastructure are well established, compared to ‘suburban-type’ regions, which are tourist destinations for vacation purposes.

Further, Article 7 of the Act provides that:

\[
\text{[i]he government shall utilise the funds, management skills and technical skills of the private sector, and take other necessary measures so that the implementation of the Specified Integrated Resort Areas will strengthen the international competitiveness and stimulate other areas of the economy, such as by improving the country’s tourism industry and increasing job opportunities.}
\]

Therefore, although there is no nationality requirement for a casino operator, a foreign operator applicant must prepare a proposal that is not only financially feasible, but that can also improve Japan’s tourism industry and increase job opportunities.

VI CONCLUSION

This chapter makes clear that Japan is at a very early stage of discussion regarding the legalisation of casinos, and the Act is not sufficient to permit the operation of a casino, for the law itself states that the ‘necessary legislative measures for this purpose should be taken with the intent of doing so within one year after the enforcement of this act’ (Article 5). Therefore, various legislative measures need to take place to actually implement the establishment of integrated resorts.

While the Act provides that these measures should take place within one year, and the government currently intends to submit the subsequent implementation bills during the Diet session in 2018, which is taking place at the time of this writing, it is possible that debates on how to implement the law might delay such measures, particularly because of the opposition’s strong concerns expressed with respect to various matters, including the measures to be taken against gambling addiction problems.
Chapter 18

MACAO

Pedro Cortés and Óscar Alberto Madureira

I  OVERVIEW

i  Definitions

There are several types of gaming permitted in the Macao Special Administrative Region of the People’s Republic of China (Macao), including animal races, lotteries and sports betting. Legal gaming is essentially divided in two major types of activity:

a  Lotteries, sports betting (football and basketball only) and pari-mutuel betting, which comprises bets on animal racing (horses or greyhounds) and where the total amount that was bet in one session is subsequently divided between the winners after deduction of commission and taxes in proportion to the betted amount.

b  Games of chance and fortune in casinos, the results of which depend exclusively, or principally, on the luck of the player. In Macao, the operation of these games is restricted to areas classified as casinos by the law.

ii  Gambling policy

The operation of gaming activities in Macao (land-based casinos, lotteries, sport betting and animal races) is subject to the prior authorisation of the government, which is granted under the form of a concession, and, in the case of land-based casinos, following an international public tender to be set by Macao.

iii  State control and private enterprise

The operation of gaming activities is restricted to Macao (i.e., it is considered a forbidden activity, which may be pursued through a concession (or subconcession) granted by the government to private companies). All existing concessionaires and subconcessionaires (gaming operators) for the operation of games of chance and fortune in casinos in Macao are private companies incorporated in Macao and are subject to Macao laws and regulations.

iv  Offshore gambling

Macao authorities do not actively engage in activities to stop offshore gambling operators. However, there are certain control mechanisms in place. The advertising of gaming activities (onshore or offshore) is prohibited and is subject to administrative fines.

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II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The legal framework for lotteries and pari-mutuel betting comprises the following:

- Ordinance No. 27/86/M, dated 1 February 1986;
- Law No. 12/87/M, dated 17 August 1987 (instant lottery);
- a concession contract between Macao and the Wing Hing Lottery Company for the operation of Chinese lotteries, dated 24 August 1990 and extended to 31 December 2017 (Chinese lotteries);
- Ordinance No. 163/90/M, dated 27 August 1990 (horse racing);
- Ordinance No. 138/98/M, dated 5 June 1998 (sports lottery – football);
- Chief Executive Order No. 62/2000, dated 27 April 2000 (sports lottery – basketball); and
- a concession contract between Macao and Companhia de Corridas de Galgos Macau (Yat Yuen) for the exclusive operation of greyhound races in Macao. The concession contract has been consecutively renewed by the Macao government and its current term was extended in December 2016 to 20 July 2018.

The following legislation is applicable to games of chance and fortune in casinos:

- Article 8 of Law No. 4/89/M (the Advertisement Law) prohibits the advertising and publicising of games of chance and fortune.
- Article 1171 of the Macao Civil Code establishes that gaming and betting are sources of civil obligations, as opposed to the previous regime where they were only natural obligations (valid and enforceable in Macao courts) if certain legal requirements are fulfilled (e.g., the activities must occur in authorised gaming areas and must follow approved gaming formats and specific rules). If the legal requirements are not fulfilled, the gaming and betting will be considered illegal, and gaming debts will not be enforceable.
- Law No. 16/2001 (the Macao Gaming Law) sets the general framework for the operation of games of fortune or chance in (land-based) casinos.
- Administrative Regulation No. 26/2001 provides the terms and conditions of the public tender organised to grant concessions to operate games of fortune or chance in land-based casinos.
- Administrative Regulation No. 6/2002 establishes the rules for the licensing of gaming promoters (junkets). This regulation was amended by Administrative Regulation No. 27/2009, dated 10 August 2009, which established a new set of requirements for the payment of commission or another type of remuneration owed to gaming promoters;
- Administrative Regulation No. 34/2003 establishes the Gaming Inspection and Coordination Bureau (DICJ), which is the regulatory authority responsible for monitoring and supervising gambling activities in Macao.
- Law No. 5/2004 (the Gaming Credit Law) establishes the legal framework for the issuance of credit facilities for gaming in Macao casinos.
- Law No. 10/2012 establishes the legal framework for entering, working in and gambling in Macao casinos and gaming areas. It also establishes the procedure for exclusion and self-exclusion from Macao casinos and gaming areas.
- Administrative Regulation No. 26/2012 sets the technical standards of slot machines and other related gaming equipment, as well as the legal framework for the registration of gaming machines suppliers.
DICJ Guidelines – occasionally, the DICJ releases instructions and guidelines on certain specific issues related to casino operations. The DICJ has released guidelines on topics such as anti-money laundering, responsible gaming, gaming promoters’ commission cap and accounting requirements, technical specifications of gaming machines and casino internal risk control measures. These instructions and guidelines are mandatory and applicable to all gaming operators in Macao and, despite the fact that they do not carry the same weight as applicable laws, penalties may be enforced if they are infringed.

Concession contracts – casino gaming concession contracts detail the rights and obligations of the gaming operators in accordance with the applicable legal framework, and the existing contracts (three concessions and three subconcessions) establish the general and specific obligations that gaming operators must perform. One of the most relevant clauses established in the contracts is that all legal disputes arising from the contracts shall be exclusively governed and resolved under Macao law and in Macao courts – the Macao legal system cannot be bypassed by the laws and courts of other jurisdictions.

The regulator

In Macao, the official entity with powers to provide guidance and assistance to the Chief Executive on the definition and execution of the economic policies applicable to the operation of casino games or other ways of gaming, such as pari-mutuel betting, is the DICJ. As established under the law defining and setting the DICJ legal framework (Administrative Regulation No. 34/2003), its main responsibilities include:

- examining, supervising and monitoring the activities of gaming operators, especially regarding their compliance with legal, statutory and contractual obligations;
- examining, supervising and monitoring the eligibility and financial capability of the gaming operators or any other parties defined under applicable laws;
- collaborating with local government in the process of selecting locations and issuing authorisations and classifications of casino games or any other types of gaming-related operations;
- authorising and certifying all the gaming equipment and utensils used by gaming operators under each concession contract;
- issuing licences and guidelines for casino gaming promoters;
- inspecting, supervising and monitoring the activities of the gaming promoters, especially regarding their compliance with the legal, statutory and contractual obligations, and other responsibilities stipulated under applicable legislation;
- inspecting, supervising and monitoring the suitability of the gaming promoters (individuals or corporations), as well as their partners and principal employees and collaborators;
- investigating and sanctioning any administrative breaches by any gaming operator, gaming promoter or any other relevant entity or individual, in accordance with the applicable legislation or guidelines;
- ensuring that there is a good working relationship between the major gaming industry stakeholders (i.e., gaming operators, the government and the public), making the best efforts to ensure that they are all in compliance with the existing regulations that protect the interests of Macao; and
executing any other guidelines and duties of a similar nature to those outlined above according to the Chief Executive's orders or legal provisions.

iii Remote and land-based gambling
Online gaming is not allowed to be operated in Macao. Gaming in casinos is restricted to land-based venues.

iv Land-based gambling
The operation of games of chance and fortune is restricted to land-based casinos and slot-machine parlours. Betting and lottery shops are operated outside casino premises, and greyhound races are installed in appropriate venues.

v Remote gambling
The existing gaming concessions and subconcessions do not grant the gaming operators the right to operate any form of online game as they are exclusively granted for the operation of games of fortune in land-based casinos. Furthermore, despite the limitation imposed by the concession (and subconcession) contracts, Law No. 16/2001 also establishes under Article 4 that online gaming licences (which are also granted by means of a concession contract to be entered into between the government and a selected concessionaire) are autonomous and separated from of the concessions for the operation of games of chance and fortune in land-based casinos. Until now, this possibility had not been regulated and there is no government authorisation to operate online games.

Despite the restrictions mentioned above with regard to operating online games in Macao, residents are permitted to register themselves on online gaming platforms or websites located overseas. There are no current plans to implement measures to block residents’ access to such platforms or websites.

vi Ancillary matters
Manufacturers and suppliers of gaming machines and all related equipment doing business in Macao and to be operated in Macao casinos must obtain proper authorisation from the DICJ, which will conduct suitability and technical assessments under the requirements established by Administrative Regulation No. 26/2012.

The legal framework setting the technical standards and supply requirements of gaming machines and related equipment to be installed in Macao casinos (or other authorised gaming venues) is established under Administrative Regulation No. 26/2012. Under this regulation, the gaming machine suppliers and manufacturers, and their shareholders and directors, are also subject to a suitability assessment to be carried out by the DICJ. Licensed manufacturers from specific major gaming jurisdictions (Nevada, New Jersey, Mississippi, Australia, New Zealand, United Kingdom and Singapore) may submit a formal request to waive such procedure.

There are no laws and regulations establishing a legal framework for any forms of remote supply, technology support or machines.
III THE LICENSING PROCESS

i Application and renewal

According to the current legal framework, the candidates to the public tender for granting a gaming concession must be companies incorporated in Macao with a permanent Macao resident as managing director, who must own at least 10 per cent of the share capital of the candidate company.

As there are already three concessionaires and three subconcessionaires, unless Law 16/2001 is amended, it is currently not possible to open any public tender for casino gaming concessions, which means that it is not possible to apply for any sort of gaming licence concession or subconcession in Macao. That said, the requirements outlined below refer to the only international public tender opened in 2001 by the Macao government for the issuance of existing gaming concessions.

According to the law, the candidates to the public tender for granting a gaming concession must be companies incorporated in Macao with a permanent Macao resident as managing director, who must own at least 10 per cent of the share capital of the candidate company.

In addition, the main shareholders of the tender candidates (holding 5 per cent of more of the share capital), their directors and main employees (holding relevant positions in operations) must be subject to an official procedure to verify their suitability for the role.

Another critical aspect is the demonstration of the financial capacity of the tender candidates. This must be established by proper guarantees of sufficient financial coverage of the financial investment by tender candidates, which may be provided either by financial institutions or by the candidate’s main shareholders. This financial capacity must be maintained throughout the period of the gaming concession and, therefore, is subject to the continuous control and supervision of the DICJ.

Suitability requirements are important restrictions for candidates placing a bid under a public tender for a gaming concession, but they are not limited to the tender stage – successful candidates must continue to meet the requirements for the duration of the concession (20 years). Articles 14 and 15 of Law No. 16/2001 state that experience, reputability and suitability are mandatory requirements for all concession holders, as well as their financial capacity.

Likewise, all directors and shareholders holding at least 5 per cent of the gaming operator’s share capital, as well as its key employees, will be continuously subject to suitability monitoring by the DICJ. Besides, the scope of activity of the gaming operators shall be restricted to the operation of games of chance and fortune in casinos. Gaming operators are, therefore, prevented from carrying out other types of activities.

Moreover, according to Law No. 16/2001, gaming operators are not allowed to operate with capital that is below 200 million patacas.

Competitive restraints are also placed upon gaming operators, which, among other things, prohibit anticompetitive agreements and practices among the gaming operators or companies from the same groups, as well as the abuse of dominant position and the control of shareholdings. As a consequence of the latter, gaming operators and the shareholders holding at least 5 per cent of the corporate capital cannot, directly or indirectly, hold 5 per cent or more of the capital of other operators.

Law No. 16/2001 also defines Macao as a ‘continuous gaming zone’ jurisdiction, which means that its casinos are supposed to operate 365 days a year, 24 hours a day and suspension of activity can only occur in very exceptional cases that require prior government approval. The operation of games of chance and fortune should only take place in an authorised land-based.
Macao casino, despite the possibility of such activity being carried out on-board ships or aircraft duly registered in Macao after obtaining necessary government approval. Another exception would be having government approval to operate gaming activities at the customs-cleared area of Macao International Airport, though this has not happened yet.

Unless the current legal framework is amended by the relevant authorities, the granting of casino gaming licences (concessions and subconcessions) is subject to an international public tender process to be put forward by the government. The public tender for casino gaming concessions is mainly regulated by Administrative Regulation No. 26/2001, as amended. This Regulation held particular significance when it was enforced because it stated the casino gaming concessions’ tender rules and the requirements of the tender bids of the 2001–2002 tender process. The Regulation is still in force and the rules established by it are applicable to the new international public tender process.

With regard to public tenders, Regulation No. 26/2001 establishes the basic rules for granting a casino gaming concession, creating certain legal requirements regarding the suitability and financial capacity of the candidates, as well as the legal procedure to check and evaluate the technical quality and financial soundness of the gaming investments and development projects submitted. Further, the regulation has also established that the concessionaires would have to pay a premium in exchange for the granting of each casino gaming concession, which would have to take in account the size of each gaming operation and investment.

Eligible candidates must be Macao-incorporated companies with a minimum capital share of 200 million patacas and with Macao permanent residents as managing directors.

At the time of writing, there is no information about if and when a new tender may occur but it is known that current concessions and subconcessions are going to expire in 2020 (SJM and MGM) and 2022 (Galaxy, Venetian Wynn and Melco Resorts).

In terms of concession time limits, Article 13 of Law No. 16/2001 states that the term of a gaming concession shall be set under the concession contract entered into between each concessionaire (and subconcessionaire) and the government, provided that the term does not exceed 20 years.

In cases like SJM (and MGM) in which the gaming concession and subconcession has been granted for a shorter period of time – 18 years only – the government may, at any time and up to six months’ prior to the term of the concession and subconcession, allow one or more extensions, provided that the extensions do not exceed the 20-year period.

However, concession and subconcession contracts may, in exceptional circumstances, be extended for an additional period of five years upon justifiable grounds and duly substantiated by the Chief Executive. This extension may also result in amendments to other clauses in the concession and subconcession contract.

The termination of the gaming concession and subconcession may occur by way of government initiative in cases of severe breach of concession agreement provisions and in cases of severe infringement of any other legal provisions governing the underlying activity, such as applicable rules, regulations and DICJ Guidelines or for reasons of public interest.
Macao

ii Sanctions for non-compliance

Article 29 of the Macao Basic Law and Article 1 of the Macao Criminal Code establish the ‘principle of legality’, which means that in Macao every criminal offence must be stated in legislation. Gaming-related crimes are not an exception and the legislation setting out the criminal offences strictly related to or arising from gaming activities is set out below:

a Law No. 8/96/M (the Illegal Gambling Law) sets the punishments for a significant number of gaming-related activities.

b Law No. 9/96/M (the Law on Criminal Offences in Animal Racing) sets the punishments for activities related to animal race betting.

c Law No. 6/97/M (the Law on Organised Crime), partially revoked, defines what shall be considered as criminal association and sets the punishments applicable to activities carried out by individuals who are part of criminal organisations.

d Law No. 2/2006 (the Anti-money Laundering Law) sets the legal framework and the punishments applicable to individuals involved with financial operations related with money laundering crimes.

e Law No. 3/2006 (the Anti-terrorism Financing Law) sets the legal framework and the punishments for individuals involved in financial operations related to the financing of terrorism.

f Administrative Regulation No. 7/200 sets the Preventive Measures for the Crimes of Money Laundering and Financing of Terrorism in Macao.

g Law No. 6/2016, on the enforcement of freezing of assets, sets the legal framework to enforce UN Security Council sanctions involving the freezing of assets and funds of identified terrorists.

h Guideline No. 1/2016 – the DICJ instruction on anti-money laundering and combating of the financing of terrorism for the gaming sector – sets the procedures to be applied under casino-related financial operations and the procedures to be followed by casino cages and Macao licensed gaming promoters.

IV WRONGDOING

Over the years, continuous efforts have been made to combat money laundering in Macao. Aside from the main anti-money laundering framework, which consists of Law No. 2/2006 (the Anti-Money Laundering Law) and Administrative Regulation No. 7/2006 (preventive measures for the crimes of money laundering and financing of terrorism), since 2015 the DICJ has set higher standards for anti-money laundering compliance by introducing new accounting requirements to be observed by gaming promoters and new guidelines (Guidelines No. 1/2016) applicable to gaming operators and promoters, and introducing a risk-based approach and enhance customer due diligence procedures, requiring, among others, the identification of patrons and reporting of suspicious and high-value gaming-related transactions – equal to or greater than 500,000 patacas.

It is widely known that money laundering is a very serious concern worldwide and based on the recent approach and declaration of Macao officials it has became an important objective to local authorities. Therefore, with the enactment of new guidelines and legislation intended to be implemented by gaming operators and gaming promoters, an important step has been taken for stricter compliance with the recommendations made by the Asia/Pacific Group on Money Laundering in the last review of Macao legislation, which occurred in November 2016. Virtual currencies cannot be used for gaming activities in Macao.

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V TAXATION

A tax obligations and compulsory levies regime is established under the applicable laws (for gaming operators and promoters) and under the concession and subconcession contracts.

Article 27 of Law No. 16/2001 provides that gaming operators are required to pay the government a special gaming tax corresponding to 35 per cent of the gross gaming revenue, which shall be paid on a monthly basis up to the 10th day of each month.

In addition to the special gaming tax, gaming operators are required to pay the government an additional 1.6 per cent of their gross gaming revenue to the Macao Foundation, a local public foundation that promotes cultural, scientific, social, economic and educational development of the region. Gaming operators are also required to pay an amount equivalent to 2.4 per cent of their gross gaming revenue for urban development, tourism promotion and social security purposes. This percentage is mandatory for all gaming operators, with the exception of SJM, which also pays the same 1.6 per cent to the Macao Foundation, but only 1.4 per cent goes to urban development, tourism promotion and social security purposes because of other obligations entered under the concession contract.

Moreover, pursuant to Article 20 of Law No. 16/2001, concession and subconcession agreements provide for the obligation of paying the government an annual premium for the concession and subconcession that it is divided into two different amounts: a fixed amount of 30 million patacas for all gaming operators; and a flexible amount that varies in accordance with the number of table games and electronic gaming machines operated by each gaming operator.

Gaming operators are therefore required to pay 300,000 patacas annually for each VIP table in addition to the fixed amount of 30 million patacas referred to above, as well as 150,000 patacas for each table game allocated on the mass market floors and 1,000 patacas for each gaming machine installed on the relevant gaming floors (including slot-machine parlours separately operated by some gaming operators).

Theoretically, the gaming operators would be also subject to the payment of corporate taxes up to a maximum of 12 per cent of their annual profits (complementary tax). However, because of the considerable amount that has been paid to Macao as special gaming tax and additional contributions to entities such as the Macao Foundation, gaming operators have been gradually released from paying corporate tax on their profits.

Gaming promoters are also subject to pay a special tax that is calculated based on the commission paid to them by the gaming operators. This tax corresponds to 5 per cent of the amount received as commission or other compensation paid to gaming promoters by the gaming operators.

VI ADVERTISING AND MARKETING

Under Law No. 16/2001 gaming concessionaires must carry out games of chance and fortune in casinos.

Thus, concession (and subconcession) holders can only provide the services described by Law No. 16/2001 and stated in the concession agreement. Therefore, table games and game machines (e.g., slot machines) can only be offered inside land-based casinos and other authorised venues (such as slot-machine parlours duly authorised by the DICJ), whereas horse racing, greyhound racing and sports betting are offered outside these authorised venues.

In fact, under the provisions of Macao laws and regulations, sports betting, pari-mutuel betting and animal racing do not qualify as games of chance and fortune. According to
Law No. 16/2001 it is not legal to offer *pari-mutuel* betting or operations offered to the public (lotteries) in a casino environment (i.e., in duly authorised gaming areas, although this prohibition does not extend to the building where the casino is installed), even though the same piece of legislation provides that lotteries may be exploited by casinos upon the authorisation of the Secretary for Economy and Finance, provided that the relevant concession contract has been amended accordingly.

Essentially, gaming operators are able to offer, without exception, all table games referred to under Law No. 20/2001 as well as other games duly authorised and regulated by the government, and several types of gaming machine, which shall be also subject to the government's prior approval. The type of games not covered by casino concessions and subconcessions are: *pari-mutuel* betting (horse racing and greyhound racing); operations offered to the public (sports betting and lotteries); and interactive casino games (i.e., online games), which are not regulated in Macao.

With respect to gaming promotion and advertising, Macao authorities have a very conservative approach. Under the Advertisement Law (enacted in 1989), games of chance and fortune cannot be advertised if the game is the main focus of the advertisement. This would, in principle, allow gaming operators to advertise providing that this is not the case. However, in practice, local authorities strongly discourage all gaming operators and promoters from launching advertising and promotional campaigns outside authorised gaming areas. For example, it would be allowed within the integrated resort area where the casino is located, but not elsewhere.

This appears to be in conflict with some of the concessions and subconcessions entered into between gaming operators and the government, which require operators to conduct advertising and marketing campaigns both in Macao and abroad.

**VII THE YEAR IN REVIEW**

Pursuant to the official ban on the use of mobile phones at betting tables, the government plans to introduce tougher penalties for violations of legislation in the gaming industry in the near future. The DICJ announced that it will ‘complete supplementary laws for violations and related penalties that weren’t previously included, amend outdated rules, and bring in new regulations’.

The government is also trying to pass some amendments that, despite not being exclusively related to gaming, will have a significant impact on the Macao gaming industry. For example, in early 2016, the government announced the possibility of imposing a total smoking ban in local casinos. This would make Macao the only major gaming jurisdiction in the world where smoking in casinos would be completely forbidden. The proposal includes casino premises and the existing airport-style smoking lounges. However, Macao gaming operators and some members of the legislative assembly believe that this could strongly harm the gaming industry. According to the latest version of the proposed amendment, the government will allow the casinos to install smoking lounges on their premises but smoking outside these lounges will be strictly forbidden.
VIII OUTLOOK

At the time of writing, there are no records of any legislative changes to be implemented by the relevant authorities. Nevertheless, the expiry of the term of the concession and subconcession contracts is approaching and therefore it is expected that some changes to the existing legal framework may occur in the medium term.

The following are possible outcomes:

a Very conservative approach: Law No. 16/2001 is not changed and a new international public tender opens in 2020 for the remaining concession (of SJM).

b Conservative approach: the SJM concession (and MGM subconcession) is extended for an additional two years so that expiry occurs in the same year. The government extends all concessions and subconcessions for a sole period of five years.

c Mildly conservative approach: conversion of the three subconcessions into concessions, as effectively there are no material differences between the terms of these gaming contracts. If this occurs, Law No. 16/2001 will have to be amended accordingly.

d Liberal approach: Macao gaming law changes to a licensing regime.

Other legislation related to the operation of gaming promotional activity may also be enacted, continuing the authorities’ efforts to set international operating standards for such activity and for entities performing such business.

Additionally, it is also expected that legislation setting up a list of penalties to be applicable in case of breach of applicable laws and concession contracts, as well as a more detailed legal framework on matters involving corporate social responsibility or the use of gaming chips, may be also enacted in Macao after the granting of the new gaming concessions.
Chapter 19

MALTA

Andrew J Zammit, Martina Borg Stevens, Nicole Attard and Yasmine Aquilina

I OVERVIEW

i Definitions

Maltese law permits both online and land-based gambling, and the following forms of gambling are catered for: amusement games, casino gaming, commercial tombola games, commercial communication games, gaming devices, remote gaming, sports betting, the National Lottery and other lotteries, and non-profit games. These types of gambling fall under three categories – gaming, betting and lotteries.

Betting

The Lotteries and Other Games Act (LOGA) defines betting as the playing of a bet; a bet is defined as a game in which the player is required to forecast any result or outcome in respect of one event or a set of events. Betting may be divided into remote and land-based categories.

Land-based betting may be classified under one of two broad categories, namely:

a racecourse betting, which is a bet on a horse or dog race conducted on a racecourse; or

b sports betting, which is a bet on a sport event or a set of sport events.

Remote betting is defined as ‘the negotiation or receiving of any bet by a means of distance communication’. Fixed-odds betting, pool betting and spread betting would fall under this definition.

Lotteries

The National Lottery is Malta’s main lottery. The licence for the operation of all the National Lottery games is exclusive and was awarded to Maltco Lotteries Limited in 2012 for 10 years. By way of general information, the games that form part of the National Lottery are Super 5, Lotto, Scratchers Instant Tickets, U*Bet, Quick Keno and Bingo 75.

A remote gaming licensee may also provide online lotteries.

1 Andrew J Zammit is a managing partner, Martina Borg Stevens and Nicole Attard are associates, and Yasmine Aquilina is an advocate, at GVZH Advocates.

2 Chapter 438 of the Laws of Malta.

3 Remote Gaming Regulations (RGR’s) Article 2.
Malta

Gaming

The Remote Gaming Regulations (RGRs) define ‘gaming’ as an agreement, scheme or arrangement between two or more parties to play a game of chance together in which a prize or reward consisting of money or some other item of value, worth, advantage or opportunity is offered or can be won, and becomes the property of the winner under defined conditions established for the purpose of the game. In this regard, the game’s result is totally accidental and therefore the player’s skill is not required.

On the other hand, a game of chance and skill is a game for money or prizes with a monetary value, the results of which are not totally accidental but depend, to a certain extent, on the skill of the participant. For example, poker would generally be deemed to be a game of chance and skill.

‘Remote gaming’ is defined in the RGRs as ‘any form of gaming by means of distance communications’. The same regulations specify that ‘means of distance communication’ includes:

any means which may be used for the communication, transmission, conveyance and receipt of information (including information in the form of data, text, images, sound or speech) or for the conclusion of a contract between two or more persons without the simultaneous physical presence of those persons.

The Skill Games Regulations (SGRs) define a ‘skill game’ as ‘a game for money or money’s worth and through means of distance communication, the result of which is determined by the use of skill alone or predominantly by the use of skill and is operated as an economic activity, but does not include a sport event’. Such skill games are exempt from the licensing requirement. Additionally, a ‘controlled skill game’ means a skill game that is subject to a licensing requirement in terms of the SGRs.

From the above analysis, ‘fantasy league’ (which offers a prize of money or money’s worth) may be classified as a game of chance and skill. According to a ruling given by the Malta Gaming Authority (MGA), ‘fantasy sports’ are defined as controlled skill games and would require a licence in terms of the SGRs.

Skill competitions and competitive sports for prizes would fall under pure skill game as there is no element of chance. Furthermore, gaming devices, which offer the possibility of winning a prize, are primarily regulated under the Gaming Device Regulations (GDRs).

Bingo and tombola halls are also regulated under Maltese law.

ii Gambling policy

Gambling has been present in Malta for centuries. In fact, lotto games are likely to have started operating in the 17th and 18th centuries. However, during this time, gambling was not regulated and it was only in 1922 that the Public Lotto Ordinance (PLO) was enacted, establishing the government monopoly for the organisation of lotto activities. In 1934 a subsequent law was enacted – the Racecourse Betting Ordinance (RBO), which sought to regulate horse and dog racing licences.

4 Chapter 438.04 of the Laws of Malta.
5 Chapter 438.11 of the Laws of Malta.
6 SGRs Article 2.
7 Ruling in terms of Regulation 6 of the SGRs (27 January 2017) – Ruling Reference: SGR/001.
A few years later Malta sought to regulate gambling further by enacting the Kursaal Ordinance, which regulated casino activity. Said Ordinance was subsequently superseded by the Gaming Act,\(^8\) which sought to provide further controls and reinforcement of the regulatory framework for casinos.

In 2001, the Maltese legislator enacted the LOGA, which created and established the regulatory body – the MGA. The LOGA incorporated all gambling legislation into one single instrument, with the exception of casino gambling, which continued to be regulated by the Gaming Authority.

Remote gaming has been regulated in Malta since the year 2000, through amendments to the PLO. These regulations remained effective until the RGRs were promulgated in 2004. The new regulatory regime became both game-neutral and technology-neutral (applicable to all types of technologies, namely the internet, mobile and other types of remote gaming).

Today, Malta has established itself as a regulatory hub having issued hundreds of licences to various betting companies,\(^9\) making it one of the leading and most highly regarded European jurisdictions for the regulation of remote gaming. In fact, the European Court of Justice has referred to Malta’s gaming law framework as being sophisticated.\(^10\)

### iii State control and private enterprise

Gambling operations are not owned or operated by the state; however, the National Lottery may be conducted under ministerial authority, or by any person in whose favour a concession is granted.

### iv Territorial issues

Gambling is regulated and licensed nationally.

### v Offshore gambling

The LOGA provides that a game of chance, or a game of chance and skill, cannot be operated, promoted or sold by any person in Malta unless it is authorised to be operated under any law in Malta.

An exception to this rule is if the game is authorised to operate under any law enacted by a Member State of the EU, by a Member State of the European Economic Area (EEA) or by any jurisdiction or territory approved by the MGA. Therefore, Malta employs a ‘recognition’ regime in terms of which a gaming operator licence issued by another EEA Member State is permitted to offer its games in Malta, and also to enter into business-to-business (B2B) agreements with Malta-based licensees.

Malta also recognises a licence issued in respect of a remote gaming operator by a jurisdiction that falls outside of the EEA zone, but which is approved by the MGA.

The MGA requires the terms and conditions of the licensee to state that it is the player’s responsibility to establish whether their gaming activity is legal.\(^11\)

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\(^8\) Chapter 400 of the Laws of Malta.
\(^10\) Case C-347/09 (Preliminary Ruling from the Bezirksgericht Linz) [2011] 98.
\(^11\) Section 2.7.1.5 of the MGA’s system documentation form, which must be submitted at the licensing stage.
II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The LOGA caters for all types of gambling besides land-based casinos, which are regulated by the Gaming Act. The LOGA provides for the following:

a a general prohibition of games as outlined in Section i.v, supra;
b definitions as to what constitutes a ‘game’, a ‘game of chance’ and a ‘game of chance and skill’;\(^{12}\)
c the structure of the MGA;
d racecourses and racing clubs, and the structure and functions of racecourse control boards;
e the way the National Lottery and other games such as non-profit games and commercial tombola games are licensed; and
f offences and penalties incurred for violating the provisions of the Act or regulations made thereunder.

The RGRs regulate remote gambling in Malta, whereby the main issues that are covered are the following:

a the way online operators are licensed;
b the criteria that a gaming system is required to fulfil in order to be approved by the MGA; and
c the requirements with respect to, among other matters, player registration, handling of funds, payout of winnings to players and advertising.

ii The regulator

The MGA is the primary regulatory body that is responsible for the governance of all gaming activities in Malta – both land-based and remote. Its main functions are to issue licences and to monitor the conduct of operators. Moreover, the MGA is also responsible for preventing, detecting and combatting criminal activity in gaming activities, ensuring that games are operated and advertised fairly and responsibly.

iii Remote and land-based gambling

As mentioned in subsection ii, supra, Maltese law regulates both remote and land-based gambling.

iv Land-based gambling

Casino

As a general rule, there is no limitation with regard to the number of licences that can be issued; however a concession must be obtained from the Minister of Finance. There are currently four licensed casinos operating in Malta: Dragonara Casino, Oracle Casino, The Casino at Portomaso and Casino Malta.

\(^{12}\) See Section I, supra, for definitions.
In April 2015, the MGA launched the Cruise Casino Regulations, wherein cruise liners are now able to operate their on-board casinos solely for registered passengers while berthing in Malta or Gozo overnight and within territorial waters.\(^\text{13}\)

**Lottery ticket sale venues**

No person may sell games forming part of the National Lottery without a valid permit issued by the MGA. As of March 2018, there are around 240 Maltco Lotteries points of sale around the Maltese islands.

**Betting shops**

In order for gaming parlours (betting shops) to be issued with a licence (which is valid for 12 months) they have to be at least 75 metres away from the following premises:

\begin{itemize}
  \item [a] educational establishments (in 2015, language schools were removed from the list of establishments);\(^\text{14}\)
  \item [b] senior citizens care facilities;
  \item [c] places of worship;
  \item [d] general venues or infrastructure covering M.U.S.E.U.M, SATU, SEDQA, APPOGG, Caritas, and sports and training facilities; and
  \item [e] playgrounds and playing fields.\(^\text{15}\)
\end{itemize}

**Remote gaming**

No person shall operate, promote, sell or abet remote gaming in or from Malta unless such person is in possession of a valid licence issued by the MGA, or is in possession of an equivalent authorisation by the government or competent authority of an EEA Member State, or any other jurisdiction approved by the MGA.

The RGRs establish four classes of licences as follows:

\begin{itemize}
  \item [a] Class 1 licence (examples include casino-type games and online lotteries) whereby operators manage their own risk on repetitive games. It is also possible to have a Class 1 on 4 licence whereby the Class 1 licensee operates its games on the software and in certain cases through the equipment of a Class 4 licensee;
  \item [b] Class 2 (examples include fixed-odds betting), whereby operators manage their own risk on events based on a matchbook. It is possible to have a Class 2 on 4 licence whereby the Class 2 licensee operates its games on the software and in certain cases through the equipment of a Class 4 licensee;
  \item [c] Class 3 – a licence to promote or abet remote gaming in or from Malta (examples of a Class 3 licence include poker networks, peer-to-peer (P2P) gaming and game portals). It is also possible to have a Class 3 on 4 licence whereby the Class 3 licensee operates its games on the software and in certain cases through the equipment of a Class 4 licensee; and
\end{itemize}

\(^\text{13}\) Chapter 400.03 of the Laws of Malta.


\(^\text{15}\) MGA Locations for Gaming Parlours Directive 2011.
Class 4 – a licence to host and manage remote gaming operators, excluding the licensee itself, whereby software vendors provide management and hosting facilities on their platform. In essence this is a B2B gaming licence.

A controlled skill game shall not be organised in or provided from Malta unless it is licensed according to the terms of the SGRs, is in possession of an equivalent authorisation by the government or competent authority of an EEA Member State, or is exempt from the requirement of a licence under the LOGA or any other law.

The SGRs establish a ‘controlled skill game service licence’ that is available for operators transacting directly with players (B2C) and a ‘controlled skill game supply licence’ that is available for B2B service providers offering the gaming platform to controlled skill game service licensees. Licensees are to provide all the geographic locations and addresses of the premises where the technical infrastructure hosting gaming systems, control systems and regulatory data will be located.

In the event that a licensee has the intention of maintaining systems in a cloud environment, said applicant must provide the MGA with a complete list of all geographic locations and addresses of premises where the infrastructure may or will be used.

When assessing a proposal or application, the MGA will take into account the geographic location of the critical components. A component of an operator’s system is considered to be ‘critical’ when an increased regulatory or business integrity, safety, privacy and compliance risk is present.

Furthermore, the MGA requires that the infrastructure must be located in Malta, any EEA Member State or in any other third-country jurisdiction wherein the MGA is satisfied that the same regulatory principles can be applied.

Ancillary matters

The licensing or sale of remote gaming software does not create the requirement for a Maltese licence unless the vendor is managing the software for the gaming operator.

With respect to gaming devices (which offer the possibility of winning a prize), the relevant licence is required in order to manufacture, assemble, service, supply, use or operate such device. In this respect:

a. a Class 1 licence is required for the purposes of manufacture, assembly and repair of gaming devices;
b. a Class 2 licence is necessary for the purposes of supply, lease, sale or transfer of gaming devices;
c. a Class 3 licence is required for a person to make gaming devices available for use, or for the host or operation of gaming devices; and
d. a Class 4 licence is required for a person to administer a central system for gaming devices.

It should be noted that the above-mentioned classes pertain to land-based operations and should not be confused with the classes pertaining to remote-gaming operations.

Personal licence

A licence must be issued to any person who intends to work as a receptionist, dealer, chef de table, cashier, supervisor, watcher, machine engineer, manager or any person who, in view of the MGA, is involved in the gaming operations of a casino.
Prior consent must be obtained from the MGA with respect to any person who intends to work within key roles with remote gaming operators.

III THE LICENSING PROCESS

i Application and renewal

Remote gaming

An applicant must be a body corporate established in Malta under the terms of the Companies Act, and as a general rule, know-your-customer (KYC) information must be submitted as part of its application process.

For individuals involved with the applicant entity, particularly shareholders, directors, and key employees, information would generally take the form of personal background and financial information; criminal record information; information relating to pecuniary, equity and other interests in the applicant entity; and interests in any other commercial activity.

This information is generally substantiated by the submission of birth certificates, passport copies, passport photos, police conduct certificates, and bank and professional references. Where a body corporate is a shareholder of the applicant, the MGA generally also requires the memorandum and articles of incorporation, a certificate of good standing, and bank and professional references in relation thereto.

The MGA conducts probity investigations with other national and international regulatory bodies and law enforcement agencies. An applicant must also submit evidence of possessing the financial means and expertise available to carry out the operations in respect of which his or her application was submitted, and to fulfil all obligations under the law. As a matter of the MGA’s policy, a business plan should also be provided by the applicant.

The various laws also provide that the licensee may be obliged to obtain (and maintain) a bank guarantee in favour of the MGA, which would generally be required to secure players’ funds and winnings, payment of fees, taxes and any administrative penalties or other sums that may be due and payable by the licensee. This is done in order to protect player funds, whereby the mentioned bank guarantee shall be in such amount and for such period of time as determined by the MGA, and if the licensee fails to comply with such order within three working days, the MGA has the right to suspend the licence.16

Depending upon the type of licence required, other information will be requested by the MGA such as specific details in relation to the gaming control systems of the applicant. Examples of such information would include details relating to the games, the manufacturer of such games, certification by third parties, rules of the game, terms, conditions procedures that players must abide by and the system architecture.

If the audit is successful, the MGA will issue a licence with a validity period of five years, which is renewable after the licensee is submitted to further audits. In granting a licence, the MGA always retains the discretion to impose such conditions as it deems appropriate, and may from time to time after the granting of the licence, vary or revoke any condition so imposed, or impose new conditions.

The application fee for a remote gaming licence is €2,300. A further system review fee of €2,500 must be paid in advance for the execution by the MGA’s approved third-party certifiers, and a compliance review fee of €3,500 must be paid for the execution by the MGA’s

16 SL 438.04, Article 40(4).
approved third-party certifiers and auditors. Moreover, current licensees are to pay an annual licence fee of €8,500. With respect to new licensees, further to the implementation of the ‘Gaming Licence Fees Regulations’\(^\text{17}\) (GLFRs), an annual licence fee of €25,000 is due. The licence renewal application fee is €1,500.

**Land-based**

As a general rule, there is no limitation with regard to the number of licences that can be issued in relation to a particular product. However, the National Lottery, as mentioned in Section I.iii, above, can only be operated by one person at any given time, and is granted through a competitive process.

The licensing procedure is (with the exception of the National Lottery), in principle, similar to that described in Section II.v, above in relation to remote gaming, and requires the submission of KYC documentation, financing and information regarding the control system and gaming system of the activities being licensed.

Licences may, in most circumstances, be renewed. On the other hand, the licence to operate the National Lottery is only renewable for a limited period and given the subsistence of specific circumstances.

In relation to the duration of licences granted, licences under the GDRs are granted for one year; a casino licence remains in force for up to 10 years; the National Lottery licence is issued for such term as the MGA, after consultation with the Minister of Finance, may specify in the licence; and licences for tombola halls can be issued for six months or one year, depending on the type of licence required.

Where the licensing process entails the licensing of a premises, information such as a description of the nature, location and dimensions of the premises, architectural plans, relevant diagrams and development permits issued by the Malta Environment Planning Authority in respect of the premises to be licensed, may be required.

With respect to casino licence fees, the law stipulates that the MGA determines the said fee based on the costs incurred by the casino in carrying out its functions under the licence. Changes in the amount cannot be implemented before a 12-month interval has passed.

The fees of gaming devices are as follows:

- **a** Class 1 and Class 2 – an application fee of €2,000 and an annual licence fee of €2,000;
- **b** Class 3 – an application fee of €500 and €125 per relevant gaming device per month; and
- **c** Class 4 – an application fee of €2,000.

With respect to tombola, a one-time licence fee of €1,164.69 should be paid together with the submission of an application for the issuing of a licence, and is applicable to all classes of tombola (bingo) hall.

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\(^{17}\) Legal Notice 409 of 2017 of the Laws of Malta.
Sanctions for non-compliance

As a general rule, the MGA may impose an administrative fine or sanction upon a licensee who contravenes a condition of the licence, including the suspension or cancellation of a licence. Generally this would occur in the following situations:

a. a shareholder or director of the licensee is convicted of a crime or of an offence, or ceases to be a ‘fit and proper person’;
b. if the licensee has failed to discharge financial commitments when such commitments become due and payable;
c. the licensee has failed to comply with any material term or condition of the licence (unless reasonable cause is shown);
d. where the licensee knowingly or negligently supplies the MGA with false or misleading information; or
e. where the MGA reasonably deems it necessary in the national interest to cancel or suspend a licence.

In most cases, it is an offence to engage in any form of gaming that is not duly licensed under the relevant laws. Further details in relation to specific games are outlined below.

Casino

The Gaming Act provides that any person who is deemed guilty of an offence against the said Act, will be liable to a fine of not less than €6,988.12 and not more than €232,937.34. Alternatively, they may be liable to imprisonment of not more than two years, or to both the fine and imprisonment.

Gaming parlours

The GDRs prescribe that failure to comply with any of the regulations under the same GDRs is considered an offence, punishable by a fine of €3,000 to €235,000 in respect of every single contravention. Furthermore, the law applies the concept of vicarious liability in this situation if the contravention comes into being because of the act or omission of an employee or a person in the licensee’s service.

Racecourse betting

The RBO states that any person committing an offence against the Ordinance shall be liable to a fine not exceeding €1,164.69, or to a term not exceeding three months’ imprisonment.

Remote gaming

Any contravention of the RGRs is considered an offence against the LOGA and any person guilty of an offence shall be liable to a fine of not less than €6,988.12 and not more than €232,937.34, or to imprisonment for a term of not more than two years, or to both such fine and imprisonment.

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18 Racecourse Betting Ordinance, Chapter 78 of the Laws of Malta.
IV  WRONGDOING

The prevention of fraud and money laundering has been described as one of the main aims of the Maltese remote gaming regime.  

Regarding the prevention of match-fixing, the MGA has implemented certain preventive measures, whereby as part of its licensing process it requires applicants to submit specifications of their control system and gaming system, which include inter alia, the general procedures to be followed in remote gaming and in playing a game, the processes, the rules and the parameters of the games.

Furthermore, one of the conditions laid down in the RGR requires that the licence applicant must provide information on risk management, management of live betting and risk management in terms of odds compilation.  

In an effort to increase collaboration, the MGA has entered into memoranda of understanding with various other regulators and entities. Furthermore, the MGA, on its own initiative or upon a complaint, or a request for information by any of the parties with whom a memorandum of understanding is present, or by any other enforcement agencies such as the police, may investigate and collect information from betting licensees.

As mentioned in Section III.i, above, when evaluating an application for a gaming licence the MGA will take various aspects into account, namely, the financial background of the applicant, and whether the applicant has followed policies, and will take affirmative steps to prevent money laundering and other suspicious transactions.

Furthermore, licensees are not allowed to accept cash directly from players, and money may only be remitted by the licensee to the player, to the same account from which the funds paid into the player's account originated. Moreover, a licensee shall not make a payment in excess of €2,329.37 out of a player's account until the player's identity, age and place of residence have been verified.

V  TAXATION

i  Land-based

Regarding casinos, gaming taxes are paid to the MGA on a monthly basis and are calculated by the MGA based on the gross earnings of the casino. These can be set off against gross losses over two-month periods. In all cases, the gaming tax must be paid within seven days from the end of the previous month. Furthermore, there is a tax payable on the income derived from the entrance fees of the casino.

Taxes to be paid related to gaming parlours depend on the licence. A Class 3 licence must pay €200 per relevant gaming device per month where the gross gaming revenue of each relevant gaming device does not exceed €1,000 for that relevant month; or 20 per cent of the monthly gross gaming revenue generated by every relevant gaming device where the gross gaming revenue of each relevant gaming device exceeds €1,000 for that relevant month.

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19 Joseph F Borg, 'The Basis of the Maltese Regulation of Remote Gaming and the ongoing supervision of the Authority on its licensees'.
20 RGRs Regulation 9.
21 Ibid, Regulation 35(4).
22 Ibid, Regulation 37(2).
23 Ibid, Regulation 36.
With respect to tombola halls, the Commercial Tombola (Bingo) Regulations provide that a licensee shall pay the MGA 10 per cent of the value of every scoresheet or 30 per cent of the total revenue on entrance fees, or both. Where bingo is being offered by a non-profit organisation, a licensee must tender a duty of €34.94 in respect of each session.

The licensee for a non-profit lottery must, through the MGA, pay the Ministry of Finance 25 per cent on the aggregate retail value of all prizes that can be won in such game.

**ii Remote gaming**

The gaming tax as applicable by the MGA to current licensees is as follows:

- **a** Class 1 – €4,660 per month for the first six months and €7,000 per subsequent month;
- **b** Class 1 on 4 – €1,200 per month;
- **c** Class 2 – 0.5 per cent on the gross amount of all bets accepted;
- **d** Class 3 and Class 3 on 4 per cent to 5 per cent of real income;
- **e** Class 4 – the gaming tax payable by a hosting platform is nil for the first six months of operation, €2,330 per month for the subsequent six months (month seven to month 12) and €4,660 per subsequent month (month 13 onwards) for the entire duration of the licence; and
- **f** controlled skill game service licence – 5 per cent of real income.

The maximum gaming tax payable annually, per licensee in respect of any one licence, is €466,000.

Moreover, besides gaming, tax operators are also subject to corporate taxation at the applied rates.

Regarding winnings from gambling, these do not qualify as income in terms of the Income Tax Act and therefore are not taxable.

Further to the implementation of the GLFRs, new licensees are subject to the payment of a ‘compliance contribution’ payable for each financial year as outlined in the GLFRs and not subject to the gaming tax regime as outlined above.

As of July 2018, the gaming tax regime as outlined above will be abolished and current licensees will instead become subject to the payment of the ‘compliance contribution’ as opposed to the gaming tax.

In terms of the GLFRs, in addition to the payment of the ‘compliance contribution’ and as of July 2018, licensees who offer any gaming service to any player who is physically present in Malta when the gaming service is provided, shall pay a gaming tax of 5 per cent of the gaming revenue generated from the said gaming services during the relevant tax period.

**VI ADVERTISING AND MARKETING**

The Code of Advertising, Promotions and Inducements (the Code), which applies to all types of gaming, lays out the restrictions imposed on a licensee. The Code states generally that a licensee must not engage in advertising that:

- **a** encourages anyone to contravene a gaming law;
- **b** exposes people who are under 18 years of age to gambling;
- **c** encourages or targets people under 18 years of age to gamble;

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24 Subsidiary legislation 438.05 of the Laws of Malta.
d is false or untruthful, particularly about the chances of winning or the expected return to a gambler;
e suggests that gambling is a form of financial investment;
f suggests that skill can influence games that are purely games of chance;
g promotes smoking or the abuse of consumption of alcohol while gambling;
b implies that gambling promotes or is required for social acceptance, personal or financial success or the resolution of any economic, social or personal problems;
i contains endorsements by well-known personalities or celebrities that suggest gambling contributes to their success;
j exceeds the limits of decency; or
k tarnishes the goodwill and privilege that is associated or related in any manner whatsoever with being a licensee, or tarnishes the image or reputation of another licensee.

Furthermore, promotions (except junket gaming and tournaments) must not commit people to gamble for a minimum period of time, or to gamble a minimum amount in order to qualify for player rewards. When a licensee publishes any advertising or conducts a promotion that encourages people to engage in any activity other than gambling, he or she must not refer, directly or indirectly, to the licensee’s gambling facilities.

In relation to casinos, the Gambling Act sets out four forms of advertising that are prohibited as follows:

a informing the public that a premises in Malta is being used as a casino;
b inviting the public to take part as players in any gaming that takes place in a casino or to apply for information about facilities for taking part as players in a casino;
c inviting the public to subscribe any money or money’s worth to be used in gaming in a casino, or to apply for information about facilities for subscribing any money or money’s worth to be so used; or

d inviting the public to take part as players in any gaming that takes place, or is to take place, in any casino outside Malta, or to apply for information about facilities for taking part as players in any gaming that takes place, or is to take place, outside Malta.

The RGRs prohibit a licensee from engaging in advertising that:

a implies that remote gaming promotes or is required for social acceptance, personal or financial success or the resolution of any economic, social or personal problems;
b contains endorsements by well-known personalities that suggest remote gaming contributed to their success;
c is specifically directed at encouraging individuals under 18 years of age to engage in remote gaming; or

d exceeds the limits of decency.

Additionally, a licensee must not engage in any activity that involves the sending of unsolicited electronic mail, whether it is through its own operation or by the intervention of third parties.\textsuperscript{25}

The penalties imposed of are those mentioned in Section III.ii, above.

\textsuperscript{25} RGRs Article 60.
VII THE YEAR IN REVIEW

As a first step towards the proposed overhaul of the gambling legislation in Malta, the Maltese government issued the GLFRs in December 2017. The GLFRs introduce a new fiscal structure, effective as of 1 January 2018.

In anticipation of the proposed changes to the licensing regime, licence fees payable per activity have been abolished, in favour of a singular fee made up of fixed and variable parts. The GLFRs provide for a two-tier licence fee for operators of gaming services in possession of a licence, the ‘compliance contribution’ payable for every licence period and the ‘fixed annual licence fee’.

Further to the transposition of the 4th Anti-Money Laundering Directive26 the MGA set up a new Anti-Money Laundering Unit. The main functions of this Unit include the undertaking of AML/CTF supervisory assessments, which may be conducted through both on-site and off-site investigations, and consequently the Unit will disclose its findings with the Financial Intelligence Analysis Unit in Malta.

VIII OUTLOOK

As a result of the proposed overhaul of gambling legislation in Malta, in July 2017, the MGA issued a White Paper27 in order to advise the government of Malta about reviewing and enhancing the existing regulatory regime.

The proposed legal structure includes a primary Act of Parliament – the proposed Gaming Act (the Act).28 The proposed Act will repeal most of the legislation currently regulating gambling in Malta. Along with the regulations being issued under the Act, it aims to harmonise regulatory principles and create more efficient governance.

The proposed Act will overhaul the current licensing structure with a view to streamlining the process. Pursuant to the proposed Gaming Authorisations Regulations (GARs),29 the licence categories will be two fold; that is, a gaming service licence,30 which is a B2C licence to offer or carry out a ‘gaming service’, and a critical gaming supply licence,31 which is a B2B licence to provide or carry out a critical gaming supply. The B2C gaming service licence will encompass the offering, provision or operation of a gaming service and the hosting of a gaming operation and making a gaming device or gaming system available for use in public premises. On the other hand, a B2B critical gaming supply licence will be available for the supply and management of material elements of a game, software or control

29 Ibid Annex 3.
31 Ibid Annex 3, First Schedule, Regulation 1(b).
system.\textsuperscript{32} No licence or authorisation will be required for the provision of a gaming service or a critical gaming supply where such service or supply is carried out in relation to exempt games that are listed in the Second Schedule of the proposed GARs.

Through the proposed law, the licence term will be extended to 10 years.\textsuperscript{33}

A new low-risk games permit\textsuperscript{34} will be required for the provision of non-profit games, tombolas and advertising lotteries, and subject to certain parameters, these will be exempt from gaming tax.\textsuperscript{35}

Amusement machines will no longer require a licence under the proposed Gaming Act, however, they will require registration with the MGA against a nominal fee.\textsuperscript{36}

The proposed laws will regulate land-based gaming premises through the Gaming Premises Regulations,\textsuperscript{37} which cover physical player interfaces within dedicated premises, access controls and self-exclusion mechanisms and limitations on locations thereof.

With respect to gaming tax, the proposed regulations set a gaming tax of 5 per cent of the gaming revenue derived from end customers located in Malta,\textsuperscript{38} regardless of the channel used – whether land-based or remote.

Operators of gaming devices will be subject to a gaming levy, which will be calculated as a percentage of total gaming revenue through an increasing sliding scale.\textsuperscript{39}

Critical gaming supply licensees will not be subject to any additional gaming tax.\textsuperscript{40} This will mean that the gaming tax paid by current Class 4 licensees will also be abolished, including the fee that current Class 4 licensees are required to pay with respect to hosting or managing operators that are licensed outside of Malta. The rationale behind this decision by the MGA is that providers of critical supplies share revenue together with the B2C providers making use of their services, and therefore the tax payable on such revenue would have already been paid by the B2C provider.

On a separate note, in December 2017, as a result of the increasing interest in distributed ledger technology (DLT) and cryptocurrency, the MGA issued a call\textsuperscript{41} for interested parties to provide further details on DLT and projects relating to cryptocurrency. The Authority is currently drafting guiding principles for the application of DLT within the gaming sector, including the utilisation of cryptocurrency. A publication by the MGA on the matter is expected during the course of 2018. Concurrently, the MGA is also working on a live sandbox environment for the utilisation of cryptocurrencies in this sector. In doing so, the MGA would be able to assess the introduction of cryptocurrencies in a contained and safe environment.

\textsuperscript{32} Ibid page 18.
\textsuperscript{33} Ibid Annex 3, Regulation 6.
\textsuperscript{34} Ibid Annex 3, Fifth Schedule.
\textsuperscript{35} Ibid page 20.
\textsuperscript{36} Ibid Annex 3, Regulation 31.
\textsuperscript{37} Ibid Annex 7.
\textsuperscript{38} Ibid, Annex 8, Regulation 3.
\textsuperscript{39} Ibid, Annex 8, Regulation 5.
\textsuperscript{40} Ibid, page 26.
\textsuperscript{41} Malta Gaming Authority issues call for interested parties to register interest and provide details on Distributed Ledger Technology (DLT) and/or Cryptocurrency projects, Malta Gaming Authority, 5th December 2017; http://www.mga.org.mt/malta-gaming-authority-issues-call-interested-parties-register-interest-provide-details-distributed-ledger-technology-dlt-andor-cryptocurrency-projects/.
Chapter 20

MEXICO

Carlos F Portilla Robertson and Iván Guerrero Sánchez

I OVERVIEW

i Definitions

The Regulations of the Mexican Federal Law of Games and Raffles, published in the Official Gazette on 17 September 2004 (the Regulations) establish four types of gambling permits:

a permits for opening and operating horse and greyhound race tracks, jai alai fronton arenas, remote betting centres (sports books) and betting centres or rooms for drawing numbers (casinos);

b permits for opening and operating facilities for gambling in national fairs (i.e., Feria Nacional de San Marcos);

c permits for the opening and operation horse race tracks in temporary scenarios and cockfighting; and

d permits for lotteries.

Online gaming and slot machines are included in the first type of permit described in point (a) above.

This chapter will not address fairs, horse racing in temporary scenarios or cockfighting. For the purposes of this chapter, and as it is defined in some cases in Mexican legislation, the definitions listed hereunder must be understood as follows:

a Bet: any amount of money (always in Mexican pesos) risked in a game allowed by the Regulations, with the chance of obtaining or winning a prize, whose amount, must be bigger than the amount risked.

b Gambling profit: the revenue of any individual of the income resulting from bets and raffles.

c Games of skill: games where the outcome is determined mainly by mental or physical skill, rather than by chance. Games of skill are not regulated under gambling legislation.


e Lotteries: the sporadic activity in which the holders of any ticket obtained through the pre-selection of any number, combination of numbers or any other symbol, have obtained the right to participate, for free or by payment, in any proceeding previously

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determined and authorised by the Gaming and Lottery Office, according to which one or more winners of some prize are determined through a number or combination of numbers, or a symbol or symbols, drawn at random.

Machines for the drawing of numbers and symbols, better known as slot machines: a device of any kind through which a participant randomly places a bet by inserting a tab, ticket or any means of payment, in order to get a prize.

Online gaming: a betting game that is performed through the web, in real time, through the use of any electronic device that can be connected to the internet, and in which there is no physical contact between the participant and the concessionaire. Online gaming should not be confused with the collection of bets through the internet, telephone or mobile at the remote betting centre also known as Sportsbooks.

Permit holder: any individual to whom the Department of the Interior, through the Gaming and Lottery Office, issues a permit to carry out any activity in the field of gambling permitted by the Regulations.

Sportsbooks: a physical establishment authorised by the Gaming and Lottery Office to collect and operate bets on events, sports competitions and games, conducted in Mexico or abroad, broadcast in real time and simultaneously in audio and video.

ii Gambling policy

On 31 December 1947, President Miguel Aleman Valdes published the Law, which has remained without any amendments for over 70 years. The Law, consisting of only 17 articles, expressly sets forth that ‘gambling and raffles are prohibited throughout the national territory, in terms of this Act’, which for years represented a regulatory gap that the authority has intended to remedy through interpretations, public policies and regulations.

This uncertainty was not fully attended until the ruling of President Vicente Fox Quesada, when the Regulations were published in the Federal Official Gazette on 17 September 2004, which was modified in 2013 with important amendments, in order to make it compatible with historical realities, the needs of the emerging industry and technological advances. However, there is still a lot more to be done in matters such as training, live gambling, online gaming, responsibilities and secure gambling.

In recent years, policies against illegal gaming have been strengthened, causing many closures of unregulated casinos and the revocation of permits. Miguel Ángel Osorio Chong, former Secretary of the Interior, in an appearance before the Mexican Senate, declared ‘the ones that currently exist are enough’, regarding the casinos and sportsbook permits. However, some premises have been granted permits since then, via judicial processes.

On 27 November 2014, the Special Commission to Investigate the Performance of the Entities of the Federal Government related to the Granting of Permits for Gambling and Raffles submitted a new bill. The purpose of this bill is to regulate gambling with betting and raffles so that they may be carried out in a responsible and safe way to guarantee the rights of participants, concessionaires and operators and set the guidelines and limits for authorisation, control, surveillance, inspection and penalties of behaviour on the matter.

This ‘new’ Federal Law was approved on 3 December 2014 by a majority of the members of the Chamber of Deputies, and was sent to the Senate for review and approval. The approval has not happened at the time of writing, and is unlikely to be approved during 2018 because of the federal elections that will be taking place in Mexico.
iii  State control and private enterprise

Even before Mexico became an independent country, the state has been directly involved in several national lotteries, for example, New Spain’s Royal General Lottery (1771), which made the first contribution to public charity, channelling it to New Spain’s Hospice for the Poor. As a result of its success, many other lotteries and raffles took place at the same time at convents, parishes and schools, in order to obtain resources.

Currently, the main purpose of the National Lottery for Public Assistance, which is a decentralised organ of the federal government, is to economically support the federal executive branch’s public welfare activities, obtaining for such purpose any resources obtained thereby through lotteries.

On the other hand, there is no prohibition whatsoever in our legislation against the organisation of lotteries through private parties; in other words, any private party that meets the corresponding regulatory requirements (established by the Law and the Regulations) may organise lotteries that may compete with those organised by the National Lottery for Public Assistance (ruled by the Organic Law of the National Lottery for Public Assistance and its regulations).

Lastly, even though the tickets to participate in the National Lottery for Public Assistance lotteries may be bought through the internet, directly by the National Lottery or third parties, the state does not participate in online gaming.

iv  Territorial issues

In terms of the Mexican Constitution, gambling and raffles legislation corresponds exclusively to the Federal Legislative Power, through Congress. Likewise, the Federal Executive Branch has the power to issue regulations on every law issued by Congress, in terms of Section I of Article 89 of the Constitution.

On the other hand, local congresses of each one of the states are authorised to allow or prohibit the opening of establishments where gambling and lotteries take place, through the authority they have to legislate on urban development matters.

Therefore, although it is true that local authorities are not authorised to prohibit gambling and lotteries, it is also true that they may indirectly prevent and veto the installation of casinos, for example through zoning prohibitions. The Constitution of the state of Guanajuato provides for following prohibition:

*Article 5. The owner of one thing may enjoy and sell it with the limitations and modalities established by the laws.*

*Zonings and buildings to be used as casinos, gambling centres, lottery rooms, gaming houses and similar establishments, as well as for the establishment of show centres featuring naked or semi-naked people are prohibited.*

In the case of Mexico, there are no places or territories that are legally favoured for the opening of casinos. However, there are projects that favour the opening of this kind of establishment in the country’s key or preferred tourist zones, such as the Mayan Riviera, in the state of Quintana Roo, Loreto in Baja California Sur, among others.

Although there is a federal tax on gaming, local legislative powers may establish local player withholding taxes and local operator taxes.
v Offshore gambling

Currently, the authority’s efforts are concentrated on the sector’s internal regulation and control in Mexico. It is forbidden for Mexicans to participate in websites with offers abroad, but there are no effective systems or means of control that may directly pursue the attracting of bets from operators from other countries, or products that exist beyond Mexican borders, specifically online gaming products.

However, and as mentioned below, in order to promote, advertise through any means or publicise any lottery, game or establishment in Mexico where betting takes place, it is essential to prove that the Ministry of the Interior has authorised the petitioner to carry out the corresponding activity, otherwise such activities may not be publicised in any way whatsoever.

Notwithstanding the above, the new bill confers powers to the regulating authority to implement mechanisms to effectively prevent, control or combat offshore gaming activities in Mexico.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The following are the governing gaming and lotteries laws:

a the Political Constitution of the Federal Mexican United States;
b the Law;
c the Regulations; and
d the Federal Law of Administrative Procedure.

Nonetheless, the branches of law covered by the subject are:

a administrative law for the installation and operation of gambling and lottery establishments;
b criminal law for combating illegal gaming and money laundering;
c corporate law for the fulfilment of the corresponding administrative law in the incorporation of licence holders and operators, such as good governance provisions;
d tax law for the payment of taxes and contributions;
e health law to avoid irresponsible gaming and ensure health measures;
f consumer’s protection for the protection of the participant’s rights. Jurisprudence does not play yet a central factor in gaming regulation; and
g anti-money laundering regarding activities associated to the practice of betting games, contests or lotteries.

To date, the area of gambling and lotteries has been regulated by a law dated in 1947 and by regulations dated 2004, which means that there is very little relevant jurisprudence. However, as a result of a constitutional claim (114/2013) filed by the House of Representatives of Congress, demanding the invalidity of the amendments to Articles 2, 91 Section IV, 137 bis, 137 ter and 137 quater of the Regulations, the constitutionality of such legal provisions that allow lotteries of numbers and symbols through the use of machines were analysed, and the Supreme Court of Justice, as Mexico’s highest court, established their validity and lawfulness, which is considered a triumph because it ended a dispute regarding the fact of whether or not such machines are included in the prohibition established in Article 1 of the Law.
ii The regulator

Ministry of the Interior

The Ministry of the Interior, through the Gaming and Lottery Office, is in charge of issuing the corresponding licences in order to hold gambling and lotteries, provided that the requirements established in the Regulations are met.

Attorney general

The attorney general assists the Ministry of the Interior (Gaming and Lottery Office) in the confiscation of all gaming tools and objects, as well as of all goods (machines) or money that constitute any crime.

Department of Health

This federal agency, through the National Commission Against Addictions and in coordination with the National Centre for the Prevention and Control of Addictions, is in charge of carrying out actions for the attention of pathological gaming gambling addiction.

Tax Administration Service

The Tax Administration Service (SAT) is the federal authority in charge of collecting taxes resulting from gambling or lotteries (tax credits).

iii Remote and land-based gambling

It is undeniable that over the past years people's lifestyles have changed as a result of the constant and sudden progress of technology, means of communication and trends. One such progress in technology refers to installation, operation and profit collection through gambling on the internet or mobile phones, as well as participation in online gaming. Unfortunately, such changes have not been adopted by Mexican legislation, since it is mainly focused on the regulation of physical establishments (casinos).

The above is exemplified in the Regulations, which specify only in a limited number of Articles (specifically Articles 85, 86, 87 and 104 of the Regulations) the attraction of telephone, electronic and internet betting. Naturally, such a limited provision left a hole that needed to be filled by several criteria or policies from the authorities, issued through official communications and permits.

Currently, several authorisations for the offering of remote bets by Remote Betting Centres or Foreign Books, as well as for the operation of online gaming through the internet or mobile phones, have been granted through the Gaming and Lottery Office of the Ministry of the Interior.

iv Land-based gambling

Regarding land-based gambling activities, regulations establish and define the following:

a Betting centres, drawing numbers rooms, or both: physical establishments in possession of an operator or licence holder, where the lottery of symbols or numbers takes place through the use of machines. These rooms may be installed together with the remote betting centres or sportsbooks.

b Remote betting centres or sportsbooks: establishments authorised by the Ministry of the Interior to attract and operate bets on events, sports competitions and games
allowed by the gambling profit collection, carried out abroad or within national territory, broadcast live and simultaneously in both video and audio, as well as for number lotteries. The foregoing is in accordance with Article 76 of the Regulations.

Prior to the recent reforms to the Regulations, there was no limit to the number of establishments allowed per licence holder (remote betting centres and number and symbol lottery rooms), therefore, the authority had discretion in determining such number. However, in order to end this practice there is currently a limit of one establishment per licence holder (Article 20 of the Regulations).

v Remote gambling

Taking into consideration that the Ministry of the Interior authorises the development and operation of various games through the internet or mobile phones, the concessionaires are required to seek for and obtain the approval of their internal control systems for the transactions, procedures and rules that ensure no infringement to them and prevent any manipulation of betting systems over the internet or mobile phone, so that these online casinos may be reliable and legal, based on behaviour related to honesty, including towards the users.

A way to achieve this is by using modern software algorithms, as are used for slot machines, which are based on random number generators, which should ensure the inviolability of betting systems and prevent their manipulation.

Moreover and taking into account that online gambling has been legalised in several countries, given that the same have shown positive effects and results on the community, in order to continue with this image, online gambling providers must have the necessary controls, filters and tools to establish and develop responsible gambling, such as:

a Protection of those who are underage. Given that this is a matter of utmost gravity, teenagers under 18 years old must be prevented from having access to and playing at online casinos, through vigorous prevention and monitoring measures and discouragement. This is accomplished through software containing filters that monitor profiles and behaviours, to verify if an underaged person is accessing an online game.

b Responsible gambling. Users will be taught to gamble responsibly at all times so that the same may only be considered as a form of entertainment, conducting activities of education, information, prevention and control for compulsive gamblers addicted to or dependent on betting games.

vi Ancillary matters

During the past years, the trend has been to establish strong control on slot machines, in the understanding that the authority has transferred to licence holders the burden to prove: (1) the lawful import of the machines into the country (through import rules); or (2) otherwise prove their domestic manufacture through the corresponding invoice, and that such documents meet the corresponding Mexican Official Standards such as the 001 (electronic devices for domestic use fed by different sources of electricity – safety requirements and testing methods for type approval) and the 024 (commercial packaging information, instructions and warranties for electronics, electrics and appliances).

Also, licence holders are obligated to file monthly reports regarding their inventory of slot machines, informing the Gaming and Lottery Office about any registrations and cancellations of, or changes to, the machines from one establishment to another and the
final destination of the machines, as well as a quarterly report including the machines in each establishment as of the date of the corresponding report. This is in order to have a full record of the machines that enter and are operating in the country, and to avoid any illegal gaming.

Moreover, the new bill, which is pending authorisation by the Senate, contemplates the obtaining of a registration by all companies engaged in the import, distribution, sale and lease of machines, as well as the obligation to certify or homologate all number or symbol slot machines, in the understanding that those that have not been certified by the authority may not operate in the country.

III  THE LICENSING PROCESS

i  Application and renewal

The requirements for the opening and operation of bets at horse and greyhound race tracks, frontons, and for the installation of remote betting centres and betting centres or drawing numbers rooms are established in Articles 21 and 22 of the Regulations.

In addition to the above requirements, and in order to obtain such licence, the information and requirements established in Article 22 of the Regulations must be met.

Article 33 of the Law establishes a minimum duration of one year and a maximum of 25 years for such premises. The duration may be extended for subsequent periods of up to 15 years provided that the licence holders are up to date in the fulfilment of all of their obligations.

Once the application is filed before the Ministry of the Interior, the Gaming and Lottery Office will analyse whether or not the applicant meets the requirements established by the Regulations. Otherwise, it shall require the applicant to clarify or file the missing information within a period of 10 business days.

In the event that the requirement is omitted, the application will be dismissed. However, if the requirement is fulfilled, the Gaming and Lottery Office will review that the provided information complies with the applicable law.

Once the submitted information and documentation has been analysed, the Gaming and Lottery Office shall issue a resolution in which it may grant the licence, or as the case may be, deny it, duly grounded in law.

The Law and the Regulations do not establish a time frame for the licence-granting process. However, in practice, and in our experience, it takes between six and 12 months to do so. Application is free of charge.

As for the requirements for lotteries: all individuals and legal entities incorporated in accordance with Mexican laws that wish to organise lotteries should comply with the information and documentation established in Article 26 of the Regulations. The duration of this premises shall be a maximum of one year.

ii  Sanctions for non-compliance

Article 17 of the Law and Article 147 of the Regulations provide the sanctions and infractions applicable to persons defaulting on the law, regulations or the terms and conditions of the licence issued by the Gaming and Lottery Office. The administrative sanctions given below may be applied jointly or separately, depending on the nature, seriousness and frequency of the infraction, taking into consideration the individual circumstances of each case:

- a  a fine from 100 pesos to 10,000 pesos;
- b  up to 15 days’ imprisonment;
c suspension of duties for up to one year of players, referees, bookies or any other person who performs any duty in the corresponding show, game, establishment or lottery;
d licence revocation – considered as a serious sanction, this may be applicable whenever infractions are frequent; in other words, whenever they are committed two or more times during one year; and
e closure of establishment – this is considered to be a serious sanction and may be applied whenever infractions are frequent; in other words, whenever they are committed two or more times during one year.

Article 151 of the Regulations provides the scenarios of serious infractions by the licence holder.

In order to impose any kind of sanction, the Ministry of the Interior must previously notify the offender about the beginning of the corresponding administrative procedure, in order for the latter to be able to provide the evidence it deems pertinent and to assert the corresponding legal arguments, in accordance with Article 152 of the Regulations.

The Ministry of the Interior’s authority to impose the corresponding administrative sanction expires in five years, counted as of the day in which the default has been committed or administrative infraction, if consummated, or as of the date in which it ended, in the case of having been continuous. The foregoing is in accordance with Article 133 of the Regulations.

Whenever the infraction is committed by the players, referees, bookies or by any other person who performs any duties in the corresponding show, game, establishment or lottery, the Gaming and Lottery Office may sanction them with suspension for up to one year, or permanent disqualification from performing the respective activity or duty.

Lastly, in accordance with Article 14 of the Law, the penalty of confiscation of all gaming tools and objects and of all goods or money that are of interest thereof shall be applicable, and the dissolution of the business or company that supported the perpetration of the crime may be declared.

IV WRONGDOING

Anti-money laundering regulation is relatively new in Mexico. On 17 October 2012, the Anti-Money Laundering Law was published in the Federal Official Gazette and became effective nine months later – on 17 July 2013.

The Anti-Money Laundering Law has been complemented by the issuance of the Anti-Money Laundering Regulations published on 16 August 2013, as well as by the Anti-Money Laundering Rules published in the Federal Official Gazette on 30 August 2013.

The main factor that leads to the application of the Anti-Money Laundering Law is for an individual or legal entity to carry out what the law has specified to be a ‘vulnerable activity’. Regarding gaming activities, the Anti-Money Laundering Law establishes the following modalities (for transactions higher than a pre-established amount) as vulnerable activities: (1) the sale of tickets, chips or any other kind of similar receipt for the practice of betting games, contests or lotteries; and (2) the delivery or payment of prizes.

Some of the most relevant obligations of those who carry out vulnerable activities are:

a to register as ‘performer’ of the vulnerable activity referred to in Section I of Article 17 of the Anti-Money Laundering Law, before the SAT;
b to identify clients, players or buyers, verifying their identity, based on credentials or official documentation, gathering copies of the documentation supporting such identification (in online gaming, such obligation will have to be fulfilled before the sale of tickets or game credit);
c to ask its clients whether they have knowledge about the existence of the owner or beneficiary and, in any case, to exhibit the corresponding official documentation that allows clients to identify the owner;
d hold, protect, safeguard and avoid the destruction or hiding of information and documentation that serves to support the vulnerable activity, including information identifying its clients or users;
e file notices regarding their respective reportable vulnerable activities before the SAT in the time frames and in the form provided in the regulations; and
f refrain from receiving payments in cash for the purchase of tickets that allow participation in betting games, contests or lotteries, as well as the delivery or payment of prizes (for transactions higher than a pre-established amount).

V TAXATION

The following taxes are applied to gambling operations in Mexico:
a Income tax: for tax purposes, such as Mexican corporations, Mexican residents must pay an income tax called ‘profit tax’ at a rate of approximately 29 per cent. This is applied to their entire income (regardless of its origin) minus authorised deductions (expenses). Casinos shall also pay an income tax called ‘tax on production and services’.
b Licence fees: a licence fee has to be paid by permit holders to the Ministry of the Interior in an amount of 1 per cent or 2 per cent of their income, depending on the origin of the bet and their permit. Generally, the fee is 2 per cent on horse and greyhound race tracks and 1 per cent on national and international sporting events.
c Local and state taxes: some Mexican states impose additional taxes to be paid by casino users (like value added tax). The tax applies to the amount of the prizes received by the users, or for each machine installed.

VI ADVERTISING AND MARKETING

Advertising and publicity for gambling and raffles by any means may only be done once a gambling permit has been received from the Ministry of the Interior, and always in accordance with the following rules:
a permit holders shall not explicitly promote the gambling activities authorised by their permits;
b gambling advertising and publicity must be expressed clearly and precisely in order to prevent inducing the public to an unsuccessful outcome, deception or confusion of the services offered;
c gambling advertising and publicity must always include the permit number;
d advertising should include messages that indicate that the gambling games are prohibited for minors; and
e advertising and publicity should include messages that invite people to play responsibly and with the main purpose of entertainment, fun and recreation.
VII  THE YEAR IN REVIEW

Because of the relevance and importance of the case of drawing of numbers and symbols through machines (slot machines), a brief summary of this matter is below.

On 18 January 2016, the plenary session of the Mexico’s Supreme Court of Justice (SCJN) supported the use of slot machines in casinos, considering them to be lawful as lottery games and not as games of chance or skill.

By unanimous vote, the judges validated five articles of the Regulations (among them being Articles 2 and 91, Section VI, 137 *bis ter* and 137 *quater*), considering that the president, upon amending such articles, did not exceed the provisions in the applicable law.

The central argument is that the Law establishes a closed list of betting games permitted in Mexico, lotteries among them, and, therefore, number or symbol lotteries with the use of machines are permitted. The following may be highlighted among the arguments:

a  Drawing of numbers and symbols through machines share the essential characteristic of all other lotteries regulated by the Regulations. In other words, the result is determined by chance; they are not games of skills or dexterity, but of simple lotteries such as those provided by the law.

b  The Law does not establish a definition of games and raffles, therefore, it cannot be said that the regulations contravene the law in this point.

c  The President exercised his regulatory power in order to regulate the content of Article 2 Section II of the Law, by establishing the rules of operation of the ‘drawing of numbers and symbols through machines’.

Finally, the SCJN considered:

*If the Federal Law of Gambling and Raffles admits the possibility of the existence of raffles without any restriction whatsoever; then, it is clear that 'drawing of numbers and symbols through machines', being a species of such genus, are permitted by the law itself.*

VIII  OUTLOOK

As previously mentioned, there is a new federal law waiting to be approved by Mexico’s Senate. The bill contains some innovations such as the fact that permit holders may only be able to operate the game online (in opposition to authorised operators). Therefore, there would not be any possibility of supporting or delegating such activities or transactions to third parties.

The legal entities obtaining a permit for online games should fulfil the following obligations:

a  publish on the website the identification data of the permit allowing operation of the site, as well as the applicable law on the matter at hand;

b  provide information to the participant on the development of its selection of betting and how to recover it in the event of any communication problems;

c  establish the necessary controls to prevent access to persons referred to in Article 7 of the Law;

d  offer participants chances of restraint with respect to the time of playing the game or the betting amounts;

e  implement alert protocols that enable the detection of people suffering from addiction to gambling;
f publish contact details of the institute and other institutions involved in the prevention and treatment of addiction to gambling;
g refrain from offering free or sample gambling to any person;
h provide support equipment that may process on a daily basis and consistently any questions and requests of participants in all languages in which the online service is provided, as well as to give assistance to the participant;
i have available the means of monitoring and control established in the Regulations;
j ensure the correct speed in carrying out site transactions, and be confident in performing the same;
k comply with homologation processes established by the institute in relation to any format, server, support, hardware, software, website, digital mechanism, connection or bet online game mode;
l ensure operational capacity and information security to guarantee data protection, as well as the confidentiality and integrity of communications;
m ensure uninterrupted connection of any server, connection or online support with the computer server of the institute, allowing it to have control of the activities developed by the concessionaires and to monitor the same in real time, regardless of their original location;
n ensure that each payer has a single account and implement ways of communication or guidance by phone and online for the participant, as well as tests to verify its identity;
o prevent players from betting or paying bets directly between them and implement the necessary controls so that the payments of bets may only be made with credit or debit cards issued by financial institutions recognised by national authorities on the matter;
p without prejudice to the provisions of other laws, preserve detailed information about the transactions performed electronically for at least 180 calendar days, in terms provided for in the Regulations;
q refrain from transferring, leasing, assigning or delivering the permit to a third party to offer online games for exploitation. Consequently, the permit shall be exploited directly by the concessionaire or, in the event of having the corresponding authorisation, by its operator;
r refrain from installing physical modules for the uptake of betting;
s refrain from offering or granting loans and credits to the participant, or otherwise increase the purchasing power of the same;
t the website must have the ‘com.mx’ ending;
u the concessionaire shall install a computer system on national territory to fully support the information provided for in the Regulations in real time; and
v operators shall not be allowed for online gambling. For this reason the concessionaire shall directly operate and exploit it.

Mexico’s Secretary of the Interior has urged the Senate to approve this new Federal Law. However, other reforms have taken priority in the legislative chamber.
Chapter 21

NETHERLANDS

Alan Littler

I OVERVIEW

i Definitions

Article 1(1)(a) of the Betting and Gaming Act (the Act), defines games of chance as ‘an opportunity to compete for prizes or premiums if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence’. A prize or premium is to be understood as anything that has an economic value and thus includes in-kind prizes as well as monetary ones, and may well entail that the definition of a game of chance also captures social gaming. Payment of a stake is not required. No definition of a game of skill is provided for, but so as to ensure consistency when determining whether new games constitute games of chance or not, the Gaming Authority opened a consultation process at the end of 2017 on its draft framework for assessing whether a game amounts to a game of chance. Once the final version of the framework has been published, all stakeholders will be able to have a clearer vision of what amounts to a game of chance.

In its prevailing format, the Act only defines those games of chance for which one or more licences can be awarded for the offering thereof. These are explained in greater detail under Section II.iv below, which also reflects the current lack of a regulatory regime for remote gambling. No general categories such as ‘betting’ or ‘gaming’ are used.

According to the remote gambling bill (the Bill) the future licensing regime for remote gambling will be formed along the lines of two licence types: sports betting and casino gaming. Within these two categories, poker, casino games, slot machines, sports betting (fixed odds), exchange betting, pari-mutuel betting, live betting and short-odds bingo will be permitted, while online lotteries (including long-odds bingo), spread betting and betting on non-sports events will remain prohibited.

ii Gambling policy

The regulation of gambling is guided by offering a legitimate alternative to unlawful offers through which demand can be ‘channelised’. However, the use of monopolies per type has been implemented so as to reduce competition between operators with a view to preventing the excessive consumption of gambling services. Prior to the introduction of some forms of gambling, legislative texts reveal that the generation of revenues (e.g., for sports) was a key motivating factor. The future remote gambling regime will not have a cap on the number of

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licences available, but strict regulatory requirements will be relied upon to achieve the same regulatory objectives. In the near future, Holland Casino’s monopoly on the provision of casino gambling will be dissolved, as the government no longer considers the provision of gambling to be a task of the state. This reform will also increase the overall number of casinos on the market and the number of operators. Gambling is not regulated with a view to it being exported.

iii State control and private enterprise

At present, the Dutch gambling landscape is populated by a mix of state-owned and private entities operating alongside each other, within their clearly defined market segments.

Space for private operators is found within the good causes lottery sector, the slot machine sector and the horse racing totalisator. While holders of licences for non-incidental games of chance (good causes lotteries) are private entities, it must be noted that operators of such licences are prohibited from generating private profits. Scope for the generation of private profit is restricted to the slot machine arcade operators.

The remainder of the licensed gambling market is supplied by state-owned operators. For the time being, the 14 casino venues are operated by state-owned Holland Casino, while various entities under the umbrella of the Nederlandse Loterij operate the state lottery, sports betting, lotto and instant lottery (scratch cards). In April 2016, De Lotto was taken over by the Staatsloterij, resulting in the formation of the Nederlandse Loterij. While the Staatsloterij is a publicly owned operator, De Lotto was a private non-profit making foundation. This takeover, and thus expansion of the state’s gambling operators, conflicts with pronouncements already made that providing gambling is not a task for the state.

iv Territorial issues

The Gaming Authority is the sole body competent to award licences that enable the exploitation of games of chance in the Netherlands. This thus encompasses all of the exclusive licences, as well as licences for non-incidental games of chance and the exploitation licences for slot machine operators. Local municipalities are empowered to award premises licences for slot machine operations within their geographical areas and establish limitations on such venues in local ordinances (e.g., a cap on the total number of venues, opening times).

v Offshore gambling

Other than the forms of gambling explicitly exempt from the prohibition on unlicensed games of chance, all unlicensed forms of gambling that are made available in the Netherlands are unlawful. In terms of the legality of the offer, it is irrelevant whether such offers originate from within the Netherlands or outside. Further, it is irrelevant whether the offer is licensed or unlicensed, or originates from within the EU or EEA or further afield.

With a view to the introduction of a licensing regime for remote games of chance, and subsequently channelling 80 per cent of the market into operations regulated at the national level, the Netherlands has not been aggressive seeking enforcement measures against all operators present on the Dutch market.

In June 2012, the Gaming Authority introduced its enforcement approach, referred to as the ‘prioritisation criteria’, which was expected to bridge a relatively short transitional period until the licensing of remote gambling could begin. Given delays in the legislative process,
the introduction of this licensing regime is still pending, nearly six years later. The passage of
such a length of time, along with political critique regarding the level of enforcement action,
has placed considerable pressure on the enforcement policy.

Through reliance upon the June 2012 prioritisation criteria, the Gaming Authority
sought to prioritise its enforcement efforts against the de facto remote gambling market.
Operators of remote gambling websites that did one of the following three things would be
at a higher risk of enforcement:

a. offer games of chance on a website available in the Dutch language;
b. offer games of chance on a website ending with a .nl URL; or
c. use radio, television or print media advertising targeted at the Netherlands.

The Gaming Authority made clear to the industry that compliance with the criteria reduced
the likelihood of enforcement and did not alter the legal status of the offer – in other words,
prioritisation-criteria compliant offers breached the prohibition on unlicensed games of
chance. Despite this, the Gaming Authority sent letters in the early stages of this approach
to operators, recognising that the changes that had been made entailed that the offer was
compliant with the criteria.

Formally speaking, online advertising was omitted from the prioritisation criteria. However, on two separate occasions, the Gaming Authority warned operators against online
advertising directed at the Netherlands around international sporting and other events, and
national sporting and other events ahead of major competitions in 2014 and 2016. With the
passage of time, the boundaries of the prioritisation criteria became less clear. References were
made to a ‘risk-based approach’ to enforcement, which suggested that the apparent clarity of
the prioritisation criteria would be overridden when a offer was deemed to pose too great a
risk to consumers. This was formulated in the Enforcement Policy of October 2016, which
also suggested that those games that did not strictly fall within the definition of a game of
chance could trigger enforcement measures should the risks of harm be comparable to those
associated with true games of chance.

The most considerable shift in the Gaming Authority’s approach was announced by
way of a press release on the last Saturday in May 2017. As of a couple of days later, on
1 June 2017, a new approach would apply, and equally to those operators that were fully
compliant with the prioritisation criteria. The approach was based upon a non-exhaustive list
of triggers, which include the use of a domain name that refers to gambling and is associated
with the Netherlands (e.g., ‘Clog Bingo’), the presence of symbols that contain elements
closely associated with the Netherlands (e.g., windmills), the use of payment methods closely
associated with the jurisdiction and the absence of geo-blocking measures.

Another potential trigger for enforcement action was not excluding minors from
participating in gambling services. This has the potential to be problematic given that
regulatory regimes, such as those applicable in Malta, do not require operators to immediately
verify the age of a player upon an account being opened, but only upon a trigger at a later
stage. Indeed, the proposed regime in the Netherlands would also give licensees a period of
time in which verification processes could be run (albeit with restrictions on the temporary
account). On paper at least, the Gaming Authority’s approach appears to be stricter than
what the future regulatory regime will require.

It is expected that, as a rule of thumb, those operators that have been sanctioned for
their presence on the Dutch market ahead of the introduction of the remote gambling regime
(where enforcement will most likely have been triggered by a breach of the prioritisation

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criteria, as amended) will not be found to be suitably reliable and will be denied a remote gambling licence under the new regime. While the Bill does not contain a bad actor clause as such, a parliamentary motion that predates the Bill calls for remote gambling operators present on the Dutch market without a local licence to be denied a licence once they become available. During subsequent parliamentary debates on the Bill, the thrust of the Ministry of Justice and Security’s approach has been that those who have been sanctioned will not receive a licence, and neither will those operators that have otherwise persistently targeted the Dutch market. Avoiding sanctions and otherwise not targeting the Dutch market are key to ensuring that the chances of receiving a licence are as great as possible.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

Dutch gambling law permits a range of gambling products to be offered pursuant to the Act, which was initially introduced in 1964 and has been subject to various amendments in the decades since. It is important to note that at present, legislation designed to introduce a licensing regime for remote games of chance is currently before the Senate, the upper house of the Dutch parliament. Absent the legislative reforms that the Bill will introduce, it is unlawful to offer remote games of chance in the Netherlands.

Article 1(1)(a) of the Act performs two key functions: it establishes that it is prohibited to offer unlicensed games of chance in the Netherlands and provides the definition of a game of chance. This prohibition is flanked by two further prohibitions, that on promoting unlicensed games of chance (Article 1(1)(b) of the Act) and that on knowingly participating in such games (Article 1(1)(c) of the Act).

Licensed offers can only be provided offline, subject to two exceptions. First, some of the incumbents are permitted to offer their land-based offering via the internet, which is referred to as the ‘e-commerce exception’. The internet is seen as merely constituting an additional sales channel for the land-based offer, and the ‘e-commerce’ offer must not go beyond the land-based offer. Second, holders of a licence for non-incidental games of chance can also sell their tickets online and operate without the need for an offline outlet. However, neither of these two exceptions represent a true remote gambling offer. In part because of the lack of a licensing regime for remote games of chance, and thus the lack of opportunity to accommodate ‘newer’ forms of gambling, other types of games of chance that may be prevalent within the regulatory regimes of other jurisdictions are not provided for by the Act.

There are several forms of gambling that are exempt from the requirement to be licensed and therefore can be offered without the provider breaching Article 1(1)(a) of the Act, conditional upon applicable conditions being satisfied. Such forms include promotional games of chance and small-scale gambling.

In terms of the scope of the prohibition on promoting unlicensed games of chance, this relates to advertising but does not extend to payment processing. The Gaming Authority had sanctioned a payment services provider for having offered its services to a remote gambling operator that had been sanctioned for offering unlicensed services in the Netherlands, and had done so in breach of the prioritisation criteria. The Gaming Authority took the stance that to ‘promote’ also includes to ‘facilitate’, but on 27 December 2017, the Council of State held that the prohibition on promoting unlicensed games of chance did not extend to payment
services. This may have a chilling effect upon the appetite of the Gaming Authority to bring cases against business-to-business (B2B) service providers. Equally, and in the alternative, it cannot be excluded that it will seek to qualify B2B providers as co-perpetrators or accessories to an operator’s breach of the prohibition on providing unlicensed games of chance.

A key case that has been influential in shaping discourse in the Netherlands is Sporting Exchange. Following the judgment of the Court of Justice of the European Union in the preliminary reference proceedings in Case C-203/08, where the Court held that the lack of a transparent licence allocation procedure for an exclusive licence is incompatible with the freedom to provide services unless the holder thereof is a private operator subject to strict control or a public operator subject to direct control, the Council of State rendered a game-changing decision. In its judgment of 23 March 2011, it held that neither the holder of the single sports betting licence nor that of the horse race betting licence were under suitably strict control so as to justify the lack of a transparent licence allocation procedure. Subsequent judgments of domestic courts have reiterated this position, notwithstanding changes that were made to the governance of De Lotto in an attempt to bring it under sufficiently strict control. The takeover of De Lotto by the Staatsloterij, a state-owned entity, does not automatically justify the lack of a transparent licence process for De Lotto’s licences; De Lotto must be deemed to be under direct control.

This line of case law also resulted in the introduction of a transparent licence allocation process in 2016 for the award of the single horserace betting licence (valid for 2017–2022). The 2011 decision has also shaped legal discourse around the licensing process for the licences for non-incidental games of chance, as well as filtering through to the level of local municipalities in terms of premises licences for slot machine arcades.

ii The regulator

The Gaming Authority, which is based in The Hague, is an independent regulatory organisation tasked with the supervision and enforcement of the Act, including the award of licences available pursuant to the Act.

iii Remote and land-based gambling

While land-based gambling is permitted and regulated, remote gambling is prohibited, given the lack of a legal basis for the Gaming Authority to award remote gambling licences. As noted elsewhere in this chapter, a few opportunities currently prevail for some forms of gambling, offered pursuant to existing licences, to be provided via the internet.

iv Land-based gambling

Casinos

The provision of casino gambling is subject to a monopoly, held since its inception in the 1970s, by Holland Casino, which is owned by the state. Holland Casino operates 14 venues nationwide, providing both table and machine gaming.

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Amusement arcades and machine gaming

In contrast to the entire land-based market, save for licences for non-incidental games of chance, the slot machine sector is the only one to which no cap on the number of licences applies.

In order to operate a slot machine arcade, an exploitation licence is required from the Gaming Authority, while a licence is also required from the relevant local municipality in relation to the premises on which the slot machines are located. Licences can be awarded to cafés and restaurants that are targeted towards those over 18, as well as to premises that are dedicated to the provision of such games of chance. Local municipalities are competent for deciding whether slot machine arcades are permitted within their municipality, and if so, how many, where and other restrictions such as opening times.

Betting shops

Two monopolies prevail in the field of betting: that for sports betting, as operated by Lotto BV, which is part of the Nederlandse Loterij, the public lottery operator; and for horse race betting, which is operated by Sportech Racing BV. Both licences are of the type referred to as ‘semi-permanent’, given that they are valid for a period of five years and have been reallocated to the incumbent holders.

Other offline forms include the lotto, whereby participants predict a given number of symbols from a predefined range, from which a draw is then made. Lotto is offered pursuant to the same licence as that for sports betting. Another form, also offered by Lotto BV, albeit subject to a different exclusive semi-permanent licence, is the instant lottery. This is defined as a lottery whereby prizes are allocated to winning tickets before sales commence. It is offered in the form of scratch cards.

An unlimited number of licences for non-incidental games of chance are available. Traditionally, only four semi-permanent licences were awarded on the basis of this provision, however, this de facto cap was successfully challenged in domestic legal proceedings, also following the Sporting Exchange line of reasoning. All games licensed on this basis must be for the public good, with 50 per cent of revenues going to good causes.

Remote gambling

Because of the lack of the necessary legal basis in primary legislation for the Gaming Authority to award licences for remote games of chance, there is no legal remote gambling offer in the Netherlands. On the basis of current proposals, operators of land-based venues will be prohibited from offering remote products within their premises. All land-based operators will have to obtain remote gambling licences in order to offer their services remotely.

Ancillary matters

In terms of slot machines, a type approval system applies, and it is illegal for an unapproved machine to be present on the Dutch market. Different categories of machines are approved for use in Holland Casino venues, slot machine arcades, and in cafés and restaurants. The type approval system also applies for skill-gaming machines.

B2B licensing is not foreseen for the future remote gambling regime and neither is a system of personal licences.
III  THE LICENSING PROCESS

i  Application and renewal

As a consequence of the ongoing delays to the legislative process of the Bill, details as to the actual remote gambling licensing process have not been released. It is understood that the Gaming Authority aims to go for a ‘big bang’ approach, and that a licence application will take four to six months to be processed.

Other than for licences for non-incidental games of chance and those required for operating slot machines, all licences are exclusive and have been awarded on a semi-permanent or exclusive basis (e.g., Holland Casino). The absence of a transparent licence allocation mechanism has generated considerable case law that resulted in the Sporting Exchange litigation mentioned above, which itself has spurred further cases in the years after the Council of State rendered its 2011 judgment.

Until 2016, the licensing process for non-incidental games of chance was also fraught with the same transparency-related problems, and indeed, a de facto cap prevailed on the number available. Following the Lottovate decision of May 2016, the cap was lifted and a transparent licence allocation procedure introduced. Licences are now available for all legal entities with their statutory seat or HQ within the EU and EEA, and are available for up to five years. Following the completion of the necessary licence application form the Gaming Authority will reach a decision within eight weeks, subject to additional questions being posed to the applicant. The cost for submitting a licence application depends upon the total value of the prizes, and ranges from €226 to €2,268.

In terms of slot machine gambling, an exploitation licence, which has nationwide application, must be obtained from the Gaming Authority. A premises licence must be obtained from the relevant local municipality in which the slot machines are to be operated, in accordance with the requirements of the municipality. Exploitation licences are awarded for a period of 10 years, on the condition that the Gaming Authority is convinced of the integrity of the operator and those persons responsible for the daily operations, and the operator must also have a workshop or contract concluded with an entity that will undertake maintenance and repairs. Should there be grounds for doing so, the Gaming Authority will also test the integrity of the operator during the lifetime of the licence, a negative decision could result in the licence being withdrawn. An exploitation licence application costs €1,815, and €453 is charged annually for supervision. The Gaming Authority must reach a decision within an eight-week period. The relevant licence application forms can be downloaded from the Gaming Authority’s website.

ii  Sanctions for non-compliance

First and foremost, enforcement of the prohibitions contained within the Act occurs on the basis of administrative law by the Gaming Authority, with criminal law only being turned to in instances where administrative law enforcement has failed or when a breach of the Act is accompanied by other criminal offences.

The prohibition on promoting unlicensed games of chance (Article 1(1)(b) of the Act) has been in the spotlight in recent years. This prohibition has been understood to include promoting in the sense of advertising, thereby covering affiliates, for example. However, the Gaming Authority interpreted the provision to also include ‘facilitating’, and on this ground
took enforcement action against a payment services provider for providing such services to an operator that had been fined for offering unlicensed games of chance remotely (enforcement against the operator was triggered by its failure to abide by the prioritisation criteria). At the end of December 2017, the Council of State rendered a decision that pushed back against such an expansive interpretation, finding that the prohibition did not encompass the provision of payment services. The case only related to payment services, but it can readily be imagined that it could have a chilling effect on the appetite of the Gaming Authority to seek enforcement measures against the providers of other intermediary services on the same basis.

It cannot be ruled out that intermediaries might be found to be co-perpetrators or accessories to the breach of the prohibition on unlicensed games of chance as committed by a remote gambling provider. Any case of this nature would be highly casuistic, and such an approach has not been tested before a court of law in relation to remote gambling services. Given that the Gaming Authority’s hands have been tied in relation to the prohibition on promoting unlicensed games of chance, it may well be tempted to undertake this approach, particularly if the passing of the Bill is subject to further delays.

On paper, it is also feasible for consumers who have knowingly participated in unlicensed games of chance to be subject to enforcement action. Doing so amounts to a breach of the prohibition in Article 1(1)(c) of the Act, which qualifies as a minor offence and could result in a fine of up to €8,300. In contrast to some other jurisdictions, in practice, this is not made use of in the Netherlands.

Sanctions for non-compliance with Article 1(1)(a) of the Act (i.e., breaching the prohibition on offering unlicensed games of chance) and Article 1(1)(b) of the Act (i.e., breaching the prohibition on promoting unlicensed games of chance) are:

a Administrative fine awarded by the Gaming Authority, from €150,000 upwards, depending on circumstances. The maximum fine is €830,000, or 10 per cent of the turnover during the previous year if this exceeds €830,000. Entities can also be subject to an administrative order on pain of penalty payments in case of non-compliance.

b Criminal sanctions (a breach of Article 1(1)(a) constitutes an ‘offence’ when committed with intent, and otherwise a ‘minor offence’; and a breach of Article 1(1)(b) constitutes a ‘minor offence’):
- Maximum fine of €20,750 (notwithstanding imprisonment).
- If the proceeds of the crime, or the value of the goods that were used to commit the crime, exceed one-quarter of €20,750, a maximum fine per incident of €83,000 may be imposed.
- If the above fine is not a suitable punishment as far as it concerns legal entities, a fine of €830,000 may be imposed.

Licence holders can be subject to administrative or criminal enforcement measures, and while an administrative order can be used to sanction all breaches of the Act apart from breaches of the requirement to have a premises licence for slot machines, the Act determines per offence whether administrative or criminal sanctions are applicable.

Administrative enforcement measures are available to the Gaming Authority for a range of breaches, such as breaching licensing conditions and allowing participation by minors, and other matters including failing to abide by Article 4a of the Act, which requires licence holders to take measures to prevent ‘as much as possible’ addiction to the games of chance.
that they organise. Criminal sanctions are available when slot-machine gambling is made available without the necessary licences, or machine models are used that have not been approved by the Gaming Authority.

IV WRONGDOING

In terms of the prevention of money laundering, the Netherlands has yet to implement the 4th AML Directive (2015/849) into national law, despite the transposition deadline of 26 June 2017. Existing legislation only applies to Holland Casino and pending proposals concerning the implementation of the 4th AML Directive foresee that the Netherlands will only include Holland Casino within the scope of the implementing legislation. This is subject to review pending the aforementioned remote gambling licensing regime.

With regard to match-fixing, Sportech Racing BV, holder of the horse race betting licence, is under a duty to ensure the safety and reliability of the totalisator, in particular with regard to the manipulation of events. In this regard, the operator is required to: (1) have a warning system in place to identify suspicious gambling patterns and report such occurrences to the Gaming Authority; and (2) work with other betting providers, both domestically and abroad, to combat match-fixing. The sports-betting totalisator, Lotto, is likewise required to ensure the safety and reliability of its offer, again with an eye to preventing match-fixing. However, it is subject to a different set of restrictions that: prohibit it from offering bets on the outcome of amateur events, youth competitions or handicapped sports events; ban the taking of bets on penalties and sanctions; and do not allow it to offer live betting but likewise require the operator to have warning system in place to detect suspicious gambling patterns and to report these to the Gaming Authority. Similarly, it is also required to cooperate with other providers, both domestic and abroad, to tackle match-fixing.

Once regulatory reform has taken place, remote gambling operators will be subject to specific requirements under the revised Act.

V TAXATION

Currently, games of chance are taxed at a rate of 30.1 per cent. The tax base varies, with two distinct camps within the land-based sector. In terms of other taxes, VAT is charged at 21 per cent and corporation tax is split into two bands. Should the taxable amount (taxable profit per annum less deductible losses) be less than €200,000, a rate of 20 per cent will apply, while the rate will be 25 per cent for taxable amounts of €200,000 or more.

Gambling tax is based upon gross gaming revenue (GGR) for slot machines and casino gambling. It also applies, in theory, to remote gambling provided by a Netherlands-based entity. For all other licensed offers, the prize constitutes the tax base. However, gambling tax is only due on prizes greater than €449. In practice, this pushes down the effective rate of taxation paid by some of the incumbents to single digits.

Prior to 1 January 2018, the tax rate was 29 per cent. However, the delays that are still accruing surrounding the introduction of the Bill entail that the state coffers have not received income in the form of tax levied on locally licensed games of chance, contrary to expectations. Therefore the tax rate has been increased by 1.1 per cent for all current licence holders, and the rate will return to 29 per cent six months after the Bill becomes law. This
should coincide with the issuance of the first remote gambling licences by the Gaming Authority. The tax rate for remote games of chance, to be paid by locally licensed operators, will be 29 per cent GGR.

Upon the introduction of the Bill, the 20 per cent GGR was proposed as the applicable tax rate for locally licensed operations. However, members of parliament from the coalition parties successfully passed an amendment to create a single tax rate across all operators. Another amendment was passed that will allow the tax rate to be reduced by up to 4 per cent should the reduction be self-financing. Given the aforementioned tax-free threshold there is no effective single tax rate across the regulated market.

Following reforms in 2008, the Gaming and Betting Tax Act establishes that gaming tax is applicable on winnings from international online gambling; players are due to pay tax, again at a rate of 30.1 per cent, on gross earnings per month from operators outside of the Netherlands. Tax due must be calculated on a monthly basis and losses cannot be offset between months. Given issues surrounding compatibility with EU law, the tax is not due on winnings from remote poker when the operator is established within the EU.

VI ADVERTISING AND MARKETING

Advertising of locally unlicensed games of chance is prohibited pursuant to Article 1(1)(b) of the Act. This provision is not a dead letter; as noted above, the Gaming Authority has taken enforcement action against affiliates advertising the services of remote gambling operators active on the Dutch market in breach of Article 1(1)(a) of the Act.

Article 4a of the Act provides that licence holders are required to take measures so as to prevent addiction arising through the products that they offer and to ensure that advertising activities are carried in a careful and balanced way so that excessive participation can be avoided. This provision of the Act is fleshed out by secondary legislation, notably the Decree on Games of Chance: Recruitment, Advertising and Addiction and the similarly titled Regulation. Further provisions on advertising can be found within the Dutch Advertising Code.

VII OUTLOOK

There will be several key developments in the near future that relate to the remote gambling licensing regime. Consultations are anticipated no earlier than the second quarter of 2018 on the secondary regulations that will provide the market with considerable insight into the details with which operators will have to comply. Similarly, a consultation process on the actual licensing process itself is expected around the same time. At the time of writing, the most optimistic estimate of when the licensing process will commence is the first or second quarter of 2019, with the licensed operations commencing approximately six months later.

Other key developments relate to the privatisation of Holland Casino and the dismantling of its monopoly. In addition to the sale of the state-owned monopolist, the casino bill makes clear that 10 of Holland Casino’s 14 venues will be made available as a single lot. Four venues will become available to other buyers and two new venues will become available. Furthermore, the Netherlands has been divided into five regions; each region will have at least two casinos and there should preferably be at least two providers per region so as to generate some competition between venues. However, information about the privatisation process, how licences will be awarded and the criteria to select which of the 10 venues will be sold as a package is still awaited.
Chapter 22

NEVADA

Sonia Church Vermeys and Erin Elliott

I OVERVIEW

i Definitions

Nevada legalised casino gambling in 1931 when Governor Fred Balzar signed Assembly Bill 98 into law. The Nevada Legislature voted to legalise gambling to help lift Nevada out from under the impact of the Great Depression, and undid a ban on casino gambling in the state that had been in place since 1909. Gambling has been legal in Nevada for over 85 years.

The definition of ‘gambling game’ in Nevada is:

any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value…

The definition excludes ‘games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organisations which are approved’ by the Nevada Gaming Control Board (the Board). Under Nevada law, a ‘wager’ is ‘a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.’

In 1949, Nevada began allowing wagering on horse racing and professional sports at ‘turf clubs’, which were independent from casinos. In 1975, the Nevada legislature authorised race and sports wagering to be offered in Nevada casinos. Nevada sports books offer a variety of wagering options for patrons. Patrons can place parlay wagers, wagers on point spreads and pari-mutuel wagers (participants wagering with each other). Many Nevada sportsbooks offer a mobile wagering application that allows people to place wagers with licensed Nevada race and sports books without the need of going to a betting window in a casino. The registration process for a mobile wagering account must occur in a Nevada race and sportsbook. Currently, any wagers made via the mobile sports wagering application must be initiated from within Nevada.

1 Sonia Church Vermeys is a shareholder, and Erin Elliott is an associate, at Brownstein Hyatt Farber Schreck LLP.
2 NRS 463.0152.
3 NRS 463.0152.
4 NRS 463.01962.
5 NRS 464.005.
7 NGC Reg. 22.140(1).
In 2011, the Nevada Gaming Commission (the Commission; collectively, the Board and Commission will be referred to as the Nevada Gaming Authorities) adopted regulations for interactive (online) gaming in Nevada. By statute, online gaming in Nevada is limited to poker. The first online poker website went live in Nevada in April 2013. In an effort to increase liquidity for the online poker websites in Nevada, the governors of Nevada and Delaware signed a compact in February 2014 to establish a legal framework for interstate poker between players in both states, and the states began sharing online poker players in March 2015.

During the 2015 Nevada legislative session, Chapter 463 of the Nevada Revised Statutes (the Nevada Act) was amended to allow games of skill and hybrid games of skill and chance to be available on casino floors in Nevada. A ‘game of skill’ is defined as ‘a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play’. A ‘hybrid game’ is defined as a ‘game in which a combination of the skill of the player and chance affects the outcome of the game as determined over a period of continuous play’.

In October 2015, the Board issued a notice stating its position that pay-to-play daily fantasy sports (DFS) met the definition of a gambling game under Nevada law and, therefore, anyone offering DFS in Nevada must possess a licence to operate a sports pool issued by the Commission. The Board defined DFS as a gambling game, but did not take a position on traditional season-long fantasy sports.

Section 24 of the Nevada Constitution prohibits the state of Nevada from authorising a lottery. Nevada is one of six states in the United States that does not have a state-affiliated lottery. The other five states are Alabama, Alaska, Hawaii, Mississippi and Utah. In Nevada, a lottery is defined as ‘any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining that property.’ Nevada allows charitable raffles to be offered by ‘bona fide charitable, civic, educational, fraternal, patriotic, political, religious or veterans’ organisations that are not operated for profit’ to conduct a lottery, raffle, or gift enterprise for the benefit of charitable or non-profit activities in the state.

ii Gambling policy

Today, Nevada is home to one of the world’s most recognisable skylines – the Las Vegas Strip. The gaming industry is vitally important to the state’s economy and the welfare of its residents. As such, the gaming industry is heavily regulated at the state level by the Nevada Gaming Authorities to ensure its integrity and longevity. Nevada recognises the importance of strict regulation in order to maintain the industry’s significance, stating that the:

*continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming...[is] conducted honestly and competitively, that [licensed gaming establishments] do not*
To Nevadans, the presence of the gaming industry is a part of daily life. A limited number of slot machines can be found on the bar tops of neighbourhood pubs and taverns and in grocery stores, convenience stores and even airports. Casinos are commonplace, and offer more than just table games and slot machines. Casinos are home to restaurants, theatres, bowling alleys, convention spaces, spas and salons.

iii State control and private enterprise
Unlike other states with state-run lotteries, Nevada does not own any part of the gaming industry. Nevada’s gaming industry relies solely on private and public ownership and investment in the operation of gaming establishments. While there is no rule prohibiting the same owner from having an interest in multiple gaming establishments, the Nevada Act and the regulations promulgated by the Commission pursuant to the Nevada Act (the Regulations) are designed to encourage competition. If the same entity or individual wishes to own multiple casinos in Nevada, the Nevada Gaming Authorities consider a number of factors, such as whether such licensing will have an adverse impact upon the public health, safety, morals, good order and the general welfare of the public.15

iv Territorial issues
As noted above, gaming in Nevada is regulated at the state level by the Board and Commission. In addition, city and county governments also regulate gaming in Nevada. In general, the Board and Commission handle detailed background investigations for casino applicants, while local agencies primarily focus on the regulation and control of liquor sales and issuing ancillary business licences for the operation of various businesses located in a casino. In Las Vegas, for instance, casinos located on the Las Vegas Strip need to receive licences from the Clark County Department of Business Licence and casinos located in downtown Las Vegas need to obtain licences from the City of Las Vegas Business Licence Department.

v Offshore gambling
The Board and Commission have the ability to licence gaming operators in the state of Nevada and individuals affiliated with such companies. Those that operate gaming contrary to the laws of the state are prosecuted by the Nevada Attorney General or the appropriate federal authorities.

There may be regulatory consequences for companies that have operated illegally in the past and then apply for licensure in Nevada. A few years ago, the Board and Commission indicated its likely approach when companies that have operated offshore gambling businesses in the United States come before them for licensing. In 2011, the Nevada Gaming Authorities addressed Caesars Entertainment’s application to approve its association with 888 Holdings, a company that had offered online poker in the United States before 2006. When the Unlawful Internet Gambling Enforcement Act (UIGEA) was enacted in 2006, 888 Holdings pulled

14 NRS 463.0129(1)(b).
15 NGC Reg. 3.070(11).
its operations from the United States. By ultimately approving Caesars’ business dealings with 888 Holdings, the Board and Commission indicated a general willingness to allow companies that ceased operations in 2006 upon the passing of UIGEA to be able to operate in Nevada going forward if they came forward for licensing.

II  LEGAL AND REGULATORY FRAMEWORK

i  Legislation and jurisprudence

The Nevada Act and the Regulations provide the primary legal framework for the regulation of gaming in Nevada. The laws, regulations and supervisory procedures of the Nevada Gaming Authorities are based upon declarations of public policy. These public policy concerns include, among other things: (1) preventing unsavoury or unsuitable persons from being directly or indirectly involved with gaming at any time or in any capacity; (2) establishing and maintaining responsible accounting practices and procedures; (3) maintaining effective controls over the financial practices of licensees; (4) preventing cheating and fraudulent practices; and (5) providing a source of state and local revenue through taxation and licensing fees.16

ii  The regulator

The Nevada Act provides for a two-tier state regulatory system. The Board is a full-time regulatory agency consisting of two members and a chairperson, all appointed by the governor. The Board employs staff allocated among divisions, which perform various functions related to the regulation of gaming, including investigations related to applications for licences and findings of suitability. The Board makes recommendations to the Commission as to how licence applications should be handled. The Commission is a part-time body consisting of four members and a chairperson, all of whom are also appointed by the governor. The Commission makes the final determination on licence applications.

iii  Remote and land-based gambling

The Nevada Act and Regulations provide for the Board to license and regulate both online and land-based gambling. On 22 December 2011, the Commission adopted regulations for the establishment of a regulatory framework for the state regulation of internet poker pursuant to Assembly Bill 258 enacted by the Nevada legislature. These regulations address the licensure of operators, service providers and manufacturers of ‘interactive gaming systems’, which are currently limited to internet poker. The core components of an interactive gaming system must be located in the state of Nevada except as otherwise permitted by the Board.17

iv  Land-based gambling

While licensed gambling is legal in Nevada, there are some restrictions as to where a gaming establishment may be located. In 1997, the Nevada legislature enacted laws to regulate the

16  NRS 463.0129.
17  NGC Reg. 14.010(10).
location of future casinos in counties with a population of 700,000 or more.\textsuperscript{18} As a result, the laws currently only apply to Clark County, where the Las Vegas Strip is located. One of the purposes of restricting the location of future casinos in Clark County is to concentrate:

\begin{quote}
the next generation of large gaming establishments along the Las Vegas Strip...[to] promote responsible use of financial and natural resources by encouraging urban development in those areas where the transportation systems and infrastructure are best suited for such intensive development.\textsuperscript{19}
\end{quote}

New non-restricted gaming establishments\textsuperscript{20} in Clark County must be located in a gaming enterprise district (GED).\textsuperscript{21} Clark County publishes a map that indicates where the GEDs are located. Gaming establishments that were not located within a GED when the law was enacted in 1997 are grandfathered, but 'the establishment may not increase the number of games or slot machines operated at the establishment beyond the number of games or slot machines authorised for such a classification of establishment by local ordinance on December 31, 1996.'\textsuperscript{22} The Commission may approve the placement of a gaming establishment outside of a GED if the petitioner demonstrates that certain enumerated development criteria, such as the enhancement of the local economy and the welfare of the community, have been met.\textsuperscript{23}

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\textbf{v \hspace{1em} Remote gambling}

The Nevada Act and Regulations authorise casinos to offer mobile gaming to their patrons. For a patron to participate in mobile gaming, he or she needs to go through an in-person registration process at the casino. Once authorised, the patron is provided a device that allows him or her to gamble remotely on the casino property. The mobile devices should not work outside the property. Additionally, Nevada has two online poker operators that offer games to people in Nevada and Delaware, and Nevada’s race and sportsbooks allow customers to place bets remotely on games on their mobile sports betting apps (provided the wagers are made in Nevada).

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\textbf{vi \hspace{1em} Ancillary matters}

The manufacture, sale or distribution of gaming devices without a licence is illegal in Nevada.\textsuperscript{24} A ‘gaming device’ means any object used remotely or directly in connection with gaming, or any game that affects the result of a wager by determining win or loss and that does not otherwise constitute associated equipment.\textsuperscript{25}

\vspace{1em}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{18} NRS 463.3074.
\item \textsuperscript{19} NRS 463.3072(2).
\item \textsuperscript{20} ‘Nonrestricted license’ or ‘nonrestricted operation’ means: (1) a state gaming licence for, or an operation consisting of, 16 or more slot machines; (2) a licence for, or operation of, any number of slot machines together with any other game, gaming device, race book or sports pool at one establishment; (3) a licence for, or the operation of, a slot machine route; (4) a licence for, or the operation of, an inter-casino linked system; or (5) a licence for, or the operation of, a mobile gaming system. NRS 463.0177.
\item \textsuperscript{21} NRS 463.309(1). The map is currently available here: http://gisgate.co.clark.nv.us/gisplot_pdfs/cp/ reggaming1711.pdf.
\item \textsuperscript{22} NRS 463.308(3).
\item \textsuperscript{23} NRS 463.3084(2); 463.3086(6).
\item \textsuperscript{24} NRS 463.650.
\item \textsuperscript{25} NRS 463.0155.
\end{enumerate}
\end{footnotesize}
If a particular device is not a gaming device, it may be considered associated equipment in Nevada. Associated equipment is any equipment used in connection with gaming or mobile gaming, which connects to progressive slot machines, equipment that affects the proper reporting of gross revenue, computerised systems of betting at a race book or sports pool, computerised systems for monitoring slot machines and devices for weighing or counting money.\(^{26}\) Any manufacturer or distributor of associated equipment for use in Nevada must register with the Commission pursuant to NRS 463.665.\(^{27}\) The Commission has the discretion to require any manufacturer or distributor of associated equipment to file an application for a finding of suitability.\(^{28}\)

Additionally, Nevada licenses certain service providers. A service provider includes any person who: (1) acts on behalf of another licensed person who conducts non-restricted gaming operations, and who assists, manages, administers or controls wagers or games, or maintains or operates the software or hardware of games on behalf of such a licensed person, and is authorised to share in the revenue from games without being licensed to conduct gaming at an establishment; (2) is an interactive gaming service provider; or (3) is a cash access and wagering instrument service provider.\(^{29}\) The licensing guidelines for service providers vary depending upon what ‘class’ the service provider’s activities fall into. For example, an interactive gaming service provider is required to obtain a Class 1 licence. Other types of service providers are required to obtain a Class 2 licence. These include information technology service providers and location determination providers.\(^{30}\) As of 2016, marketing affiliates are no longer required to be licensed as service providers.

When the Commission issues a licence to a gaming operator, certain individuals affiliated with the casino licensee and the casino licensee’s holding companies need to file applications and be investigated and found suitable. Generally, the Commission will impose a condition on a casino’s licence requiring the general manager of the casino to file an application as a key employee of the casino.

For privately held businesses, the licensing requirements vary depending on the type of entity involved. No person may acquire a 5 per cent or greater interest in a privately held licensee or a holding company, nor become a controlling\(^{31}\) affiliate of such licensee or holding company, nor become a holding company of such licensee or holding company, without first obtaining the prior approval of the Commission.\(^{32}\) The Commission may require any or all of a privately held business entities’ lenders, holders of evidence of indebtedness, underwriters, key executives, agents or employees, as applicable, to be licensed or found suitable.\(^{33}\) For a corporate licensee, in addition to owners of 5 per cent or more of the equity securities issued

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26 NRS 463.0136.
28 NGC Reg. 14.305(1).
29 NRS 463.677(5)(b).
30 Nevada Gaming Control Board Service Provider Licensure Guidelines.
31 ‘Control’ is defined as ‘the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.’ NGC Reg. 15.482-4.
32 See NGC Regs. 15.1594-6, 15A.060 and 15B.060.
33 NGC Regs. 15.530-3, 15A.160 and 15B.160.
by the corporate licensee, all officers and directors of a privately held corporation that holds
or applies for a state gaming license must be licensed individually. Owners under 5 per cent
must register with the Board.

Publicly traded corporations (PTCs) are treated differently under Nevada law than
privately held business entities. The Nevada gaming statutes that deal with PTCs focus on
voting control rather than on equity ownership. Each officer, director and employee of a
PTC that the Commission determines is or is to become actively and directly engaged in the
administration or supervision of, or is to have any other significant involvement with, the
gaming activities of the corporation or any of its affiliated or intermediary companies must
be found suitable and may be required to be licensed by the Commission. A holder of more
than 5 per cent of the voting securities of a PTC registered with the Commission must notify
the Commission within 10 days after filing notice with the United States Securities and
Exchange Commission (SEC). A holder of more than 10 per cent of the voting securities
of a PTC must file an application with the Commission for a finding of suitability within
30 days after the chairman of the Board mails written notice to the owner. Qualified
institutional investors can hold up to 25 per cent of the voting securities of a PTC, but they
need to obtain a waiver from the Commission in order to do so.

In March 2016, the Commission adopted the new Regulation 15C, which created
a licensing framework for private investment companies. Regulation 15C eliminates the
requirement that private equity companies with an ownership interest in a Nevada gaming
licensee must file financial reports with the SEC.

III THE LICENSING PROCESS

i Application and renewal

Under the Nevada Act, the burden of proving qualification to receive a licence is solely on
the applicant. Such approvals are privileges under the Nevada Act and no person has any
right to receive a licence. Once granted, such approvals are revocable privileges and no holder
acquires any vested rights therein or thereunder.

The Nevada Act provides that a licence must not be granted unless the Commission is
satisfied that the applicant is:

(i) a person of good character, honesty and integrity; (ii) a person whose prior activities, criminal
record, if any, reputation, habits and associations do not pose a threat to the public interest of this state
or to the effective regulation and control of gaming..., or create or enhance the dangers of unsuitable,
unfair or illegal practices, methods and activities in the conduct of gaming... or in the carrying on of
the business and financial arrangements incidental thereto; and (iii) in all other respects qualified to
be licensed or found suitable consistently with the declared policy of this state.

34 NRS 463.530.
35 NRS 463.637(1); NGC Regs. 16.410(1) and 16.415(1).
36 NRS 463.643(3).
37 NRS 463.643(4).
38 NGC Reg. 16.010(14).
39 NRS 463.170(2).
The Nevada Act further provides that a licence to operate a gaming establishment must not be granted unless the applicant has satisfied the Commission that:

(1) he or she has ‘adequate business probity, competence and experience in gaming or generally; and
(2) the proposed financing of the entire operation is adequate for the nature of the proposed operation and from a suitable source.\(^{40}\)

ii Sanctions for non-compliance

Unlicensed gambling is a crime in Nevada. It is unlawful for any person to ‘deal, operate, carry on, conduct, maintain or expose for play in the state of Nevada any gambling game, gaming device, inter-casino linked system, mobile gaming system, slot machine, race book or sports pool’ without a licence issued by the Commission.\(^{41}\) It is also illegal to ‘receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any gambling game, slot machine, gaming device, mobile gaming system, race book or sports pool’.\(^{42}\) A violation is a category B felony, which is punishable by imprisonment of between one and 10 years and a fine of up to US$50,000, or both.\(^{43}\) In addition, a ‘person who contrives, prepares, sets up, proposes or draws any lottery…is guilty of a misdemeanour,’ which is punishable by imprisonment for not more than six months, or a fine of not more than US$1,000, or both.\(^{44}\)

The Board and the Commission have broad authority to investigate and discipline licensees and registrants for violations of the Nevada Act and Regulations. If the Board investigates a licensee and thereafter determines that the licensee should be disciplined, it must ‘initiate a hearing before the Commission by filing a complaint with the Commission… and transmit therewith a summary of evidence in its possession bearing on the matter and the transcript of testimony at any investigative hearing conducted by or on behalf of the Board.’\(^{45}\) The Commission has the authority to limit, condition, suspend, or revoke a licence or registration.\(^{46}\) The Commission may also fine a licensee up to US$250,000 for each separate violation, depending on the nature of the violation.\(^{47}\)

The Board and the Commission also have the authority to exclude individuals from entering a gaming establishment or participating in gambling activity. The Board publishes a list of excluded persons on its website. Often referred to as the ‘black book’, individuals on this list are prohibited from entering any gaming establishment. To determine whether an individual belongs on the list, the Board and the Commission may consider the following factors:

\( (a) \) Prior conviction of a crime which is a felony in this state or under the laws of the United States, a crime involving moral turpitude or a violation of the gaming laws of any state; \( (b) \) Violation or conspiracy to violate the provisions…relating to: (1) the failure to disclose an interest in a gaming

\(^{40}\) NRS 463.170(3).
\(^{41}\) NRS 463.160(1)(a).
\(^{42}\) NRS 463.160(1)(d).
\(^{43}\) NRS 463.360(3).
\(^{44}\) NRS 462.250; NRS 193.150(1).
\(^{45}\) NRS 463.310(2).
\(^{46}\) NRS 463.310(4).
\(^{47}\) NRS 463.310(4).
IV  WRONGDOING

The Board is required to continually observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company, by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.49

The Board is required to investigate any apparent violations of the Nevada Act and Regulations.50 It is the policy of the Nevada Gaming Authorities to require that all gaming establishments in Nevada be operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of Nevada.51 Responsibility for the employment and maintenance of suitable methods of operations rests with the licensee, and wilful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for licence revocation or other disciplinary action.52

Regulation 5.011 lists certain acts or omissions that may be determined to be unsuitable methods of operation. These include the ‘failure to exercise discretion and sound judgment to prevent incidents that might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry’, ‘failure to comply with or make provisions for compliance with all federal, state and local laws and regulations and with all commission-approved conditions and limitations pertaining to the operations of a licensed establishment’ and ‘failure to conduct gaming operations in accordance with proper standards of custom, decorum, and decency, or permit any type of conduct in a gaming establishment which reflects or tends to reflect on the repute of the state of Nevada and act as a detriment to the gaming industry’.53

When satisfied that a licence should be limited, conditioned, suspended or revoked, or a licensee fined, the Board shall initiate a hearing before the Commission by filing a complaint. Before such a complaint is filed, the Board may issue an Order to Show Cause. The purpose of an Order to Show Cause is to aid the Board in deciding whether to seek a fine or the limitation, conditioning, suspension, or revocation of a licence.

The Board has full and absolute power and authority to recommend the denial of any application, the limitation, conditioning or restriction of any licence, registration, finding of

48 NRS 463.151(3).
49 NRS 463.1405(1); NGC Reg. 5.040.
50 NRS 463.310.
51 NGC Reg. 5.010(1).
52 NGC Reg. 5.010(2).
53 NGC Reg. 5.011(1), (8). 10.
suitability or approval, the suspension or revocation of any licence, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered, found suitable or approved for any cause reasonable by the Board.54

Acceptance of a state gaming licence or renewal thereof by a licensee constitutes an agreement on the part of the licensee to be bound by all of the regulations of the Commission. It is the responsibility of the licensee to keep him or herself informed of the content of all such laws and regulations, and ignorance does not excuse violations.55

All PTCs that are licensed by the Commission are required to maintain a gaming compliance programme for the purpose of, at a minimum, performing due diligence, determining the suitability of relationships with other entities and individuals, and to review and ensure compliance by the PTC, its subsidiaries and any affiliated entities, with the Nevada Act, the Regulations, and the laws and regulations of any other jurisdictions in which the PTC, its subsidiaries and any affiliated entities operate. The gaming compliance programme, any amendments thereto, and the members of the compliance committee, one such member who shall be independent and knowledgeable of the Nevada Act and Regulations, must be administratively reviewed and approved by the Board.

V TAXATION

Gaming licensees are subject to taxes and fees. Among the types of taxes and fees to which a licensee may be subject are annual and quarterly taxes and fees, and a monthly percentage fee that is based upon the licensee’s gross revenue. Casino licensees must pay an annual fee based upon the number of slot machines operated.56 For establishments operating more than 16 games, the licensee must pay a sum of US$1,000 for each game up to 16 games.57 A licensee must pay an annual excise tax of US$250 upon each slot machine operated.58 In addition, casinos licensees must pay a quarterly fee of US$20 per slot machine operated in the establishment, and another quarterly fee based upon the number of games operated.59 Taxes and fees for other licensing categories such as restricted licensees, operators of slot machine routes and manufacturers vary.

Some casinos may also be subject to Nevada’s live entertainment tax (LET). The LET is an excise tax imposed on admission to any facility in Nevada where live entertainment is provided.60 Resort casinos with concert venues or certain types of nightclubs, bars or restaurants may be subject to this tax. Live entertainment is defined as:

any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.61

54 NRS 463.1405(3).
55 NGC Reg. 5.030.
56 NRS 463.380.
57 NRS 463.380(1)(j).
58 NRS 463.385(1).
59 NRS 463.375(2).
60 NRS 368A.200(1).
61 NRS 368A.090(1).
The types of entertainment considered to be live entertainment, as defined in NRS Chapter 368A, include: (1) music, vocals, dancing, acting, acrobatics, stunts, comedy or magic provided by professionals or amateurs; (2) animal stunts or performances induced by one or more animal handlers or trainers; (3) athletic or sporting contests, events or exhibitions provided by professionals or amateurs; (4) a performance by a disc jockey who presents recorded music; and (5) an escort who is escorting one or more persons at a location or locations in Nevada.\textsuperscript{62} The rate of the tax is 9 per cent of the admission charge to the area or premises (indoor or outdoor) where live entertainment is provided and for which a fee is collected to enter or have access to the area or premises.\textsuperscript{63}

Taxes and fees related to gaming are not just the responsibility of gaming licensees. Gambling winnings are considered income and are therefore taxable. When a player wins US$1,200 or more from a single slot machine bet, for example, the player is given an Internal Revenue Service Form W-2G – Certain Gambling Winnings to report the winnings to the Internal Revenue Service.\textsuperscript{64} A player can expect a federal tax rate of approximately 30 per cent on gambling winnings. Nevada does not have a state income tax, so for Nevada residents, no additional tax is due to the state.

\section{VI ADVERTISING AND MARKETING}

Nevada casinos may advertise their land-based and online offerings in Nevada. However, any advertising must be conducted in a manner that will not bring the gaming industry in Nevada into disrepute. Nevada casinos must conduct their ‘advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness.’\textsuperscript{65} Advertising companies are not required to be licensed as service providers.

\section{VII THE YEAR IN REVIEW}

In March 2018, the Commission adopted amendments to the Regulations pertaining to the operations of nightclubs and dayclubs located on the premises of resort casinos in Nevada. The amended provisions give the Board further discretion in determining which club venues require regulation and further clarifies which individuals who are employed by or who perform services for a club venue must register with the Board.

The Nevada Gaming Policy Committee was created by NRS 463.021 and is comprised of 12 members who meet to discuss matters of gaming policy in Nevada. The Committee met on 29 November 2017 and 5 March 2018 to discuss marijuana and the gaming industry. In 2017, recreational use of marijuana for persons 21 years of age and older became legal in Nevada, and a regulatory framework for the cultivation and sale of marijuana was established. The Committee reaffirmed that Nevada gaming licensees must not participate in the marijuana industry and recommended that licensees ensure that any events on the premises of a licensed gaming establishment do not promote illegal activities or foster incidents that might negatively impact the reputation of Nevada’s gaming industry.

\textsuperscript{62} NRS 368A.090(2)(a).
\textsuperscript{63} NRS 368A.200(1)(a) and 368A.060.
\textsuperscript{64} See Dept. of Treas. Reg. Section 7.6041-1(c).
\textsuperscript{65} NGC Reg. 5.011(1).
Chapter 23

POLAND

Piotr Dynowski and Michał Salajczyk

I OVERVIEW

i Definitions

The Act of 19 November 2009 on Gambling Games (the Act), which is the main act regulating gambling activities in Poland, specifies four forms of ‘gambling games’: games of chance, betting, card games and slot machine games. Each of these forms is further defined in the Act.

Games of chance cover all ‘games, including games organised via the internet, for cash or in-kind prizes, the result of which depends in particular on chance, and the rules of which are specified in the terms and conditions of a given game’. It is often difficult to distinguish whether a game involving both elements of skill and chance should be considered a ‘game of chance’ (and therefore regulated by the Act). It is widely understood that even a minor element of chance is sufficient for the game to be considered a ‘game of chance’, although not all court judgments follow this principle. Skill games are not expressly defined in Polish law; however, it is understood that competitions in which exclusively the skill of participants is assessed (competitive sports included) do not constitute an act of gambling and are not bound by the Act’s restrictions.

In practice, games of chance cover lotteries, roulette, dice games and bingo. The Act further regulates various subtypes of most of these games.

Lottery-style games include:

a ‘number games’ – lotteries where the participants choose specific numbers or other marks and the prize is related to stakes paid (e.g., the national lottery);
b ‘cash lotteries’ and ‘raffle lotteries’ – similar to number games, but where purchase of coupons or other game tickets is required, with cash or in-kind prizes offered;
c ‘promotional lotteries’ – where a purchase of a specific product or service is required to participate, but the participation in the lottery itself is free of charge; and
d ‘audiotele lotteries’ – held via paid phone calls or SMS messages.

Roulettes (or ‘cylindrical games’ under the Act) are defined as games where the ‘participation consists of choosing numbers, signs or other distinguishing marks, the value of the prize

1 Piotr Dynowski is a partner and Michal Salajczyk is an associate at Bird & Bird Szepietowski i wspolncy spk.
2 Article 1(2) of the Act.
3 For definitions of all games, see Article 2 of the Act.
4 Article 2(1) of the Act.
depends on a predefined ratio of the stake and prize, and the result of the game is determined by a rotary device'.\(^5\) Cylindrical games, as well as ‘dice games’ – not further defined in the Act – may only be held in casinos.

Finally, among games of chance there is bingo, in three variants: cash bingo, raffle bingo (depending on the type of prizes) and telebingo (with the draw broadcasted via television).

Betting constitutes another form of gambling regulated by the Act. Betting only occurs when cash or in-kind prizes are offered. Bets that do not involve such prizes are outside the scope of the Act. There are two subtypes of betting available in Poland: totalisator systems and bookmaking.

Totalisator systems are a form of pool betting, where the winnings depend on the sum of stakes paid by all participants. Totalisator systems are only available for results of sports competitions.

Bookmaking, on the other hand, may cover betting for the occurrence of any events. These may or may not be related to sports; bets may also be accepted for so-called ‘virtual events’ – computer-generated results of sports competitions. Bookmaking is a form of betting in which there is no ‘pool’ of bets (as in totalisator systems); instead each prize is calculated on the basis of a fixed ratio of the stake paid (fixed-odds betting). Polish gambling law does not recognise spread betting systems, where prizes are adjusted depending on the scale in which the result exceeds a specific value.

Card games – consisting of games of blackjack, poker, and baccarat – are another category of gambling games. Only card games for cash or in-kind prizes are regulated in the Act – other forms are outside the scope of gambling and permitted.

Slot machine gaming constitutes the final major form of gambling as understood by Polish law. The definition of slot machines is particularly confusing. The Act states that these are ‘games played with the use of mechanical, electromechanical or electronic devices, computers included, as well as games that reflect the rules of slot machine games held via the internet network, for cash or in-kind prizes, where the game features an element of chance’.\(^6\) Therefore it may seem that games with no cash or in-kind prizes (such as computer games) do not fall into this category. The definition is expanded, however, as the in-kind prize also constitutes additional play time or the ability to start a new game free of charge. Moreover, in some cases even games with no prizes at all may be considered as slot machines, because under the Act, ‘games played with the use of mechanical, electromechanical or electronic devices, computers included, as well as games which reflect the rules of slot machine games conducted via the internet network, organised for commercial purposes’ are also considered as slot machines, ‘even if there is no possibility to win any cash and/or in-kind prizes, but the game is of random character’.\(^7\) Read literally, this definition may sometimes even cover typical video games, which often feature gambling-like functionality, such as ‘loot boxes’. Fortunately, the authorities have not, thus far, pursued the video game market.

As a result of the above-mentioned problems in distinguishing between games of chance and skill, as well as the broad definitions of games in the Act, it is often difficult to assess whether or not certain activities constitute gambling. There is also a problem with games that would constitute games of chance were it not for the fact that their characteristics do not correspond with all the features of the specific games of chance included in the

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\(^5\) Article 2(1)(4) of the Act.

\(^6\) Article 2(3) of the Act.

\(^7\) Article 2(5) of the Act.
definitions given in the Act. As the provisions of the Act mostly relate to these specific games, such activities are effectively unregulated, while still fitting within the definition of games of chance (which may only be held in accordance with the Act). For example, free prize draws, which are similar to promotional lotteries but where making a purchase is not required, still constitute a game of chance. There are disputes regarding the legal assessment of this situation. It can be argued that because all games of chance have to follow the Act, and if the Act does not explicitly allow such games to be organised, then they are illegal. On the other hand, free prize draws, in general, do not expose their participants to significant danger – therefore, it is reasonable to expect that they are not outlawed.

Similarly, ‘fantasy league’-style contests are also not defined in Polish law. While in general these resemble skill games more than gambling, such assessment may depend on the details of a particular contest.

In order to address such issues, the Act offers the possibility to obtain a binding interpretation from the minister in charge of public finance in which a game may be assessed on whether it should be treated as a gambling game as understood in the Act.8

Gambling and financial markets are regulated by different legislation and should be considered as separate establishments, although there is no explicit distinction in the Act in this regard. While it can be argued that financial products resemble gambling games in some aspects (the results of both depend on factors outside of participants’ control), it appears that in practice this issue has not caused controversy.

ii Gambling policy
The current state of gambling regulations is mostly the result of the ‘gambling affair’ – a political scandal of 2009, where it was revealed that some prominent politicians of the government and the ruling party were cooperating with gambling business owners and tried to amend the laws on gambling in their favour. In response to the affair, the government introduced the Act, which was meant to show that the government is not influenced by lobbying. The Act is therefore very strict, with major areas of the gambling business outlawed.

The government remains opposed to gambling in general, seeing it as a dangerous addiction and a questionable business. It is not outlawed, however, as it is a source of national income. Still, numerous restrictions on gambling are widely considered a significant burden on the development of the market.

iii State control and private enterprise
Until recently, only number games, cash lottery and telebingo were reserved to the state monopoly (in practice, telebingo games are not currently organised). However, from April 2017, the scope of the monopoly has expanded substantially. The state-owned company Totalizator Sportowy sp z o.o. may now offer casino-style games online and operate newly established slot machine parlours.9 Both areas are exclusively granted to Totalizator Sportowy, although these have not been introduced to the market as at March 2018. Moreover, also in April 2017, Totalizator Sportowy was allowed exclusively to organise multi-jurisdictional lotteries in Poland10 – such games were not present on the Polish market before.

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8 Articles 2(6)-2(7b) of the Act.
9 Article 5(1b)-5(1c) of the Act.
10 Article 5(1a) of the Act.
Private entities operate in other areas regulated by the Act – by managing casinos, betting shops, betting websites, most types of lotteries and bingo. While there are some quantitative restrictions regarding particular licences – the number of casinos and bingo saloons across Poland is limited – it does not seem that monopolies or oligopolies have developed on a national level.

iv  Territorial issues
All laws regarding gambling in Poland apply to its whole territory. Municipalities participate in regulating the market only to a very limited extent, by issuing opinions on placing a casino or a bingo saloon on its territory. A positive opinion of the municipality's council is one of the prerequisites of obtaining a licence.

While the law remains the same for the whole of Poland, the process of its implementation and licencing is decentralised to some extent. While casino licences or betting permits are issued by the minister in charge of public finance (a central authority), several less prominent issues, such as registering slot machines, issuing permits for raffle lotteries and collecting gambling tax, are the responsibility of tax authorities of varying degrees of seniority at the local level.

v  Offshore gambling
Offshore gambling is illegal in Poland. The only gambling activities that may be conducted online by private entities are betting and promotional lotteries. Both require obtaining a prior permit. Other forms of online gambling are either restricted to the state company or banned altogether, with no distinction as to whether operations are conducted within Poland or abroad.

It is illegal to participate in unlicensed gambling in Poland. It is also illegal to participate in any gambling held abroad while the player is located in Poland. Both such acts are prosecuted as fiscal criminal offences.11

As offshore operators are not bound by strict laws in Poland (e.g., high tax rates or limitations on types of games to be held online), they were able to offer better service to players than licensed Polish operators. Because of this, as at 2016, offshore operators controlled up to 90 per cent of the market, according to certain studies. As the legal means to act against offshore operators were limited (they are located outside Polish jurisdiction), instead the authorities opted for prosecuting participants, which is much easier. The number of convictions for participation in foreign gambling has risen in recent years.

From 1 July 2017, a new approach can be used against unlicensed (mostly offshore) operators. The government is able to block access to websites used for offering unlicensed gambling. As at March 2018, over 1,600 addresses (URLs) are blocked. Payment service operators are also required to cease providing their services for such blacklisted websites. These measures are often criticised for being too restrictive, but licensed betting operators commend them as they have reportedly observed a significant increase in sales.

11 Article 107 of the Fiscal Penal Code.
II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence
The legal issues applicable to gambling are mostly regulated in the Act. Criminal sanctions for illegal gambling are provided in the Penal Code and the Fiscal Penal Code.

ii The regulator
There is no separate specialised regulatory body designated to govern the gambling sector in Poland. The main responsibilities regarding gambling (such as issuing casino licences or betting permits) are granted to the minister in charge of public finance.12 Some less prominent powers (such as issuing permits for organising promotional lotteries, registering slot machines etc.), as well as enforcement measures are delegated to the National Revenue Administration (an administrative body responsible for issues connected with tax and customs duty) and its officers – such as the directors of revenue administration chambers and heads of tax offices.

iii Remote and land-based gambling
The Act does not distinguish between online and land-based gambling in detail. The Act simply includes provisions that apply specifically to forms of gambling conducted ‘through the internet’ – a term which is not defined further. Audiotele lotteries, which require a phone call or an SMS message to participate, are also a form of remote gambling, but these may not be conducted online.

Most forms of online gambling in Poland are either prohibited or restricted to state monopoly. The only exceptions are betting and conducting promotional lotteries, which can be held online, but each of them requires a prior permit.

iv Land-based gambling
In general, gambling may only take place in specific locations as indicated in a relevant licence or permit. There are different restrictions regarding each type of venue.

Casinos are venues where the following games may be played: cylindrical games (roulette), dice games, card games and slot machine games.13 Casinos are limited in number. Only one casino can operate in a single location (village or city) of up to 250,000 inhabitants. For cities of more than 250,000 inhabitants, the maximum number of casinos is increased by one per each 250,000 inhabitants (two casinos are available for up to 500,000 inhabitants, three casinos are available for up to 750,000 inhabitants and so on), but there cannot be more than one casino per total population of 650,000 inhabitants in a single province.14 As at March 2018, there are 43 casino licences active in Poland.

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12 In Polish law, acts do not grant responsibilities to specific ministers (such as the Minister of Finance). Instead, every act refers to specific portfolios of government (such as public finance), and these portfolios can be assigned to specific ministers by the Prime Minister.
13 Article 6(1) of the Act.
14 Article 15(1) of the Act.
Cash bingo is only allowed in bingo halls. These are also limited in number, similar to casinos, but with the threshold of one bingo hall per 100,000 inhabitants, with a maximum of one per 300,000 in a province. In practice, no bingo halls operated in Poland as of 2016 (more recent data is not available, but it is very likely that this remains unchanged).

Betting shops are entitled to offer two forms of betting: totalisator systems and bookmaking. There is no limitation on the number of betting shops in Poland. There are currently eight betting operators, with several shops for each of them.

Slot machine gaming is restricted to casinos and recently established slot machine parlours operated by Totalizator Sportowy. There is a limitation on the number of slot machines – no more than one per each 1,000 of inhabitants in one district. They must be located at least a 100 metres from other gaming venues, as well as schools, churches, etc. As at March 2018, state-operated slot machine parlours have not yet been launched. On the Polish market there are, however, numerous unlicensed, privately owned slot machine parlours that the authorities are trying to close down, with severe penalties introduced against their operators in 2017.

Venues which sell national lottery and other state-run number games tickets are not strictly regulated in the Act. The only restriction in practice is an obligation to have a separate cash register for registering sales of lots. In practice, they are operated by private entities acting as agents of the state-owned company, usually at newsagents or other similar locations. There are no restrictions on their number.

**Remote gambling**

Both betting and promotional lotteries (the only forms of online gambling available for private entities to organise) require obtaining a prior permit to be organised. It is effectively impossible to pursue these operations from abroad, because of the requirement to establish either a branch office or a representative in Poland (for companies incorporated in the European Economic Area (EEA)) or a Polish company (for other entities).

For betting, all data related to operations is required to be located within the EEA, with remote 24/7 access provided for tax authorities. A remote betting permit is separate from a land-based one, therefore operators who wish to offer both forms of betting have to obtain two permits (a basic betting licence and a separate licence for each website they want to use for online betting).

The Act does not distinguish between regulations on land-based and online promotional lotteries. For betting, most provisions apply to its both forms, with some of them applicable only to online or land-based forms because of their nature.

The state-owned company Totalizator Sportowy is expected to launch an online casino in Q3 2018. Private operators are not allowed to conduct casino-style games online.

**Ancillary matters**

Certain activity related to gambling, while not constituting gambling per se, is also regulated in the Act. In particular, certain restrictions apply to slot machines. Their manufacturers

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15 Article 6(2) of the Act.
16 Article 15(2) of the Act.
17 Article 15(1a) of the Act.
18 Articles 6(5) and 7a(1) of the Act.
19 Article 15d of the Act.
are required to notify the tax authorities of their scope of business, and keep records of the machines they produce. Moreover, every slot machine has to be registered with the tax authorities before being deployed. Performing technical inspections for the purpose of registration is restricted to entities authorised by the minister in charge of public finance. Similarly, it is also required to register equipment used for gaming, such as randomising devices.\textsuperscript{20}

Other types of gambling equipment are not directly regulated in the Act. Businesses such as gambling software developers do not need to obtain any specific licences.

**Training**

Natural persons are required to undergo training in order to perform some specific tasks related to gambling operations. Training is required for persons directly involved in gambling operations (such as croupiers) as well as supervisors of gambling games, such as directors of gambling venues. Some tasks, notably assisting customers in making bets in a betting shop, are exempt from this requirement. Training may be held internally by a gambling operator or an external training facility; it covers gambling regulations and terms and conditions of games, and has to be repeated after three years.\textsuperscript{21}

### III THE LICENSING PROCESS

**i Application and renewal**

Depending on the type of a game, different licences or permits are required. Applications for licences or permits have to be submitted in writing (online filing is not available) to the relevant authority – the minister in charge of public finance or the director of a revenue administration chamber, depending on the type of game. The specific requirements vary for each type of a game, but in general, the application should include:

| a | the applicant’s identification details; |
| b | information on the planned operation, game or lottery, and any drafts of the terms and conditions of the game; |
| c | financial statements, documents proving the legality of financial resources of the applicant, certificates of no tax or social security arrears, etc.; and |
| d | in case of casino licences, bingo hall permits and betting permits: |
|  | • economic and financial study concerning planned investment and expected profitability, and planned business objectives; |
|  | • certificate or affidavit confirming that the applicant’s operation is compliant with relevant anti-money laundering and counterterrorism financing regulations; |
|  | • documents proving the right to use the venue where gambling is planned (such as lease agreements); and |
|  | • information on the financial status of the applicant and its shareholders. |

After examining the application, an administrative decision is issued, either granting or refusing the licence or permit. A resolution may be expected within six months of the date of filing the application (or two months for promotional lotteries, audiotele lotteries or

\textsuperscript{20} Articles 23–23f of the Act.

\textsuperscript{21} Chapter 3 of the Act.
raffle lotteries). These time restrictions are not binding under the general rules of Polish administrative procedure law, and the authorities may take longer to decide in specific cases. The applicant can appeal against the decision.

Casino licences, bingo hall permits and betting permits are valid for six years and may be extended by another six years. Permits for raffle lotteries, raffle bingo, promotional lotteries, and audiotele lotteries are issued for the period of each game, but no longer than two years.

Licences and permits are granted against a fee that is different for each type of gambling activity. Fees are calculated as specific multiples of a base amount. For each calendar year, the base amount is equal to the average monthly remuneration in the second calendar quarter of the previous year as announced by the President of the Central Statistical Office. For 2018, the base amount is equal to 4,474 zlotys. For example, the cost of a casino licence is 32,000 per cent (320 times) of the base amount, therefore a licence costs 1,431,680 zlotys. A betting permit costs 9,000 per cent of the base amount if the application covers one website.

Where more than one entity applies for a licence that is limited in number (as with casino licences), the minister organises a public tender.

For some games, such as raffle lotteries with only minor prizes, no licence or permit is required and a mere prior notification to tax authorities is sufficient. The notification has to be submitted at least 30 days prior to the planned date of the game.22

ii Sanctions for non-compliance

In general, non-compliance with the Act may result in administrative liability, fiscal-criminal liability or both. The main offence – pursuing gambling operations without a proper licence, permit or notification – constitutes grounds for imposing a fine depending on the type of game that was conducted, in the amount of up to five times the fee for a relevant licence or permit. It is also a crime with sanctions of up to three years’ imprisonment or a criminal fine, or both.23

Other offences include non-compliance with a licence or permit, violating state monopoly, participating in unlicensed gambling or even ownership of a venue where unregistered slot machines are located.24 Administrative fines of up to 250,000 zlotys may also be imposed against internet service providers or payment service providers that fail to comply with obligations concerning website and payment blocking, respectively.

The regulator may also revoke a licence or a permit, in whole or in part, if statutory conditions for such revocation (such as a gross breach of the conditions of a licence or permit) are met.25 The decision of such revocation is enforceable with immediate effect.

Criminal liability for ancillary acts, such as aiding and abetting illegal gambling operations, is also possible under Polish law. Criminal acts may only be committed by natural persons, but the legal entity in the interest of which the act was committed may be required

22 For details on licensing requirements and procedure, see Chapter 5 of the Act.
23 The criminal fine is calculated by multiplying a ‘day-fine unit’ (calculated by the court by taking into account the earnings and other personal circumstances of the offender) by the number of such units as indicated by the court, taking into account the severity of the crime. A fine for conducting unlicensed gambling operations may be between 10 and 720 units, with one unit set between around 67 zlotys and 800,000 zlotys.
24 Article 89 of the Act.
25 Article 59 of the Act.
to cover the fiscal-criminal fines, because of auxiliary liability. Moreover, an additional fine of up to 5 million zlotys, or 3 per cent of annual turnover, whichever is lower, may be imposed on such entity in case of final conviction of its employee, on the basis of the Act on Criminal Liability of Collective Entities for Punishable Offences.

IV WRONGDOING

As there is no separate regulator or enforcement body dedicated to gambling issues in Poland, related wrongdoings are handled by authorities such as the police, public prosecutor service and the National Revenue Administration, depending on the case.

All operators in the gambling sector are of course required to comply with all generally applicable laws. In addition, there are specific anti-money laundering measures imposed on gambling operators. For example, casinos are required to establish the identity of their guests and to provide such information upon request of the authorities. Moreover, in most cases, the companies that apply for gambling licences are required to prove their compliance with anti-money laundering laws as part of licensing procedure.

As of 1 July 2017, internet service providers (ISPs) and payment service providers (PSPs) are required to comply with website and payment blocking, respectively, of online providers deemed illegal by the minister in charge of public finance. After URLs of such providers are recorded into an online register, ISPs have 24 hours to redirect customers wishing to access these URLs to a government website about illegal gambling. PSPs are required to cease providing their services with respect to such blocked URLs.

V TAXATION

Gambling games, with the exception of promotional lotteries, are subject to gambling tax. Gambling tax is also applicable to games held by the state monopoly. Different tax rates are used for different games, ranging from 2.5 per cent (for betting on sports competitions by animals) to 50 per cent (for most casino games and slot machines). The taxation base also varies between games, but in most cases the tax is calculated against turnover from a game. This is often criticised as one of the main reasons that makes the Polish online betting operators unable to compete with offshore entities, as currently the tax (12 per cent of turnover) effectively reduces winnings significantly.

Gambling tax is separate from income tax (including corporation income tax), which is also applicable to gambling operators – with the exception of income from organising raffle lotteries and raffle bingo, which is exempt from income tax because it may only be used for charitable purposes. Games subject to gambling tax are exempt from value added tax.

Gambling tax does not apply to participants, with the exception of winnings from poker tournaments (in this case, the 25 per cent tax is deducted from winnings by the tournament organiser). Winnings are subject to participants’ income tax of 10 per cent, with certain exceptions for minor winnings (up to 2,280 zlotys). As of 1 January 2018, casino

26 Article 24 of the Fiscal Penal Code.
27 Article 15a of the Act.
28 Chapter 7 of the Act.
winnings are subject to income tax (previously they were also exempt). The exemption is expected to be reintroduced by mid-2018 after the government admitted that annulling it had been a mistake.

VI ADVERTISING AND MARKETING

In general, public advertising of most gambling games is restricted in Poland. The definition of advertising is very broad, as it even covers public displays of symbols that resemble gambling games, such as a roulette wheel. In addition, public promotion of gambling games, understood as making public presentations of games, handing over chips or gambling tickets, etc., is also prohibited. These restrictions apply to all casino games, card games and slot machines. On the other hand, number games and lotteries (both operated by state operators and private operators) as well as bingo may be freely advertised.

The general prohibition of advertising and promotion of gambling does not apply when advertising or promotion is held inside gambling premises or on licensed betting websites.

As a result of an amendment introduced to the Act in 2017, advertising of betting is now allowed, although only to a limited extent. Advertising of betting is only allowed for licensed entities – offshore operators are prohibited from advertising in Poland.

The contents and placing of betting advertisements are heavily regulated. For example, advertisements may not invoke associations between betting and personal success, nor may they encourage paying higher stakes as means of increasing one’s chances to win. Advertising of betting is not permitted on TV and radio, or in cinemas and theatres, between 6am and 10pm, save for advertisements that are broadcasted during transmissions of events sponsored by betting operators (such as football matches). Advertisements are allowed in newspapers and magazines, but not on their covers. Out-of-home advertising of betting is only permitted during mass events and sports events sponsored by betting operators.

In addition to regular advertising, betting operators may also exercise ‘informing about sponsorship’, by displaying their names or other forms of identification (such as logos) in messages in which they inform the reader that they sponsor specific persons or entities (such as sports teams). ‘Informing about sponsorship’ may not include other promotional communication, such as slogans.

Advertising gambling outside of its permitted scope constitutes a fiscal crime, punishable by a fine of up to 720 day-fine units. Deriving profits from such advertising is also prohibited. Wrongful advertising may also lead to a revocation of a gambling licence.

VII THE YEAR IN REVIEW

Major amendments to the Act came into force in 2017, with most new regulations effective from 1 April, and some from 1 July.

29 Articles 29 and 29b of the Act.
30 Article 29(9) of the Act.
31 While this is not expressly stated in the Act for anything other than betting, it can be argued that in fact any form of unlicensed gambling may not be advertised in Poland, as (1) advertising of many forms of gambling is prohibited regardless of whether it is licensed, and (2) especially for offshore gambling, it may be argued that such advertising would encourage committing a crime.
32 Article 110a of the Fiscal Penal Code. See footnote 24, supra.
Among the most significant novelties introduced in the amendment was the introduction of blocking unlicensed gambling websites. From July 2017, the minister in charge of public finance is be able to select websites that – in the minister’s opinion – are used to offer gambling games for residents of Poland while not possessing a valid licence or permit. Polish internet service providers are required to redirect users who try to access them to a government website, and payment service providers are required to cease cooperation with such blacklisted operators – this measure is intended to cut off their funding.

The amendment reintroduced slot machine parlours to the market after their de facto banishment in 2009, but this time they may be exclusively operated by a state-owned company (state-owned slot machine parlours have not yet been launched as of March 2018). The company is also expected to start an online casino, as this has also become possible under the new regulations.

Owing to the significance of the new regulation, much of the past year has been spent discussing the outcome of the new laws and preparing for them. The amendment allowed betting operators to introduce new products, such as virtual betting, and led to an increase of marketing efforts, with several operators entering into sponsorship deals with sports clubs. STS and Fortuna, the most prominent betting operators, became sponsors of e-sports teams, which is a clear sign of the increasing popularity of e-sports in Poland.

Blacklisting of unlicensed gambling websites, possibly the most significant change introduced in the 2017 amendment to the Act, has only been in force since the latter half of the year. Therefore, its long-term effects cannot be assessed yet, but according to preliminary reports, the scale of offshore gambling in Poland has significantly decreased throughout 2017, while licensed betting operators (both land-based and online) have observed a significant growth of business, almost doubling their turnover from the previous year. Blocking unlicensed websites is likely to be related to this, at least in part. Nevertheless, the concept of blacklisting and the way it is implemented in the Act remain controversial, with several parties, including the Polish Commissioner of Human Rights, questioning the proportionality of this measure.

VIII OUTLOOK

As of March 2018, there are no upcoming significant changes to the Act. This does not mean that 2018 will be a quiet time for the Polish gambling market – on the contrary, major changes are imminent. The state-owned gambling company Totalizator Sportowy should be launching an online casino and a network of slot machine parlours in 2018. Introducing these will possibly have a major impact on the whole gambling market. The online casino will compete for the customers of online betting operators, but it may also expand the market by attracting clients of offshore, ‘black market’ online casinos. It will also be interesting to observe whether the new slot machine parlours become as popular as they used to be before their banishment.
Chapter 24

PORTUGAL

Duarte Abecasis and Leonor Catela

I  OVERVIEW

i  Definitions

The primary pieces of gambling legislation in Portugal are Decree-Laws Nos. 422/89 of 2 December and 66/2015 of 29 April, which permit both online and land-based gambling, and provide the following definitions of games and their different categories:

a  Games of chance: games in which winning or losing is based solely or mainly on chance. Games of chance include casino games (namely, blackjack and roulette) and also bingo, poker and slot machines.

b  Betting: a gambling activity whereby certain amounts of money are placed on the results of a previously identified event, the outcome of which is uncertain and does not depend on the will of the players. The following types of betting are regulated and permitted in Portugal:
   •  pari-mutuel betting, where a percentage of the bets placed by the betters is distributed among the winners;
   •  fixed-odds betting, where the better bets against the operator organising the bet on the basis of previously defined odds, and the prize is the result of multiplying the amount of the bet placed for the odds; and
   •  betting-exchange, where the operator provides an online marketplace for betters to bet against each other.2

c  Lotteries: games in which a prize is awarded when a number or combination of numbers, or a symbol or symbols, drawn at random coincide totally or in part with the ticket held by the player.

‘Other games’ are considered to be similar to games of chance (i.e., contests, raffles, tombolas, advertisement contests, quiz shows) and consist of operations offered to the public where the hope for gain lies both in the player’s chance and skill or only in luck, resulting in a prize of economic value.

These games are regulated as land-based gambling and are subject to the supervision of the Minister of Internal Administration, which establishes the conditions in which each game can be operated as well as the respective regime.

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1  Duarte Abecasis is a partner and Leonor Catela is a trainee at Cuatrecasas.
2  Although foreseen in the primary law, the technical requirements for betting exchanges are not regulated. Therefore, as of April 2017 no licences can be issued for this gaming activity.
A change in law in the near future may give municipalities the power to authorise such games. Fantasy leagues and skill competitions are yet to be regulated as gambling activity.

ii Gambling policy
In Portugal, the right to operate gambling is reserved by the state and may be granted to private entities through a concession agreement (land-based games of chance), an administrative authorisation and licence (online gambling) or a monopoly regime (state-run games).

The principles laid down in the gambling legislation aim to guarantee public safety and order; prevent excessive and unregulated gambling; control addictive behaviours; protect consumers; protect the integrity of the games; promote responsible gambling; prevent fraud, money laundering and terrorist financing; and demand that operators are fit and proper, and operate in a way that ensures an honest and fair game while preventing minors from playing.

In Portugal, the minimum age for gambling is fixed at 18 years for all types of games and bets.

iii State control and private enterprise
Lotteries, pari-mutuel sports betting, land-based pari-mutuel horse betting and land-based fixed-odds sports betting are state-run games.

State-run games are operated under a monopoly regime by Santa Casa da Misericórdia de Lisboa (SCML), through its Games Department.

SCML is a private entity with public administrative interest under state control and subject to the supervision of the social security ministry.

The operation of land-based games of chance and online gambling is open to competition through the awarding of concession agreements for the former and the issuing of licences for the latter.

iv Territorial issues
The gambling legislation is applicable and enforceable in the national territory of Portugal and the government is the grantor on the concession agreements.

Nevertheless, the procedure for the awarding of concession agreements in the islands of Madeira and Azores is in the competence of the regional government.

v Offshore gambling
The offer of land-based games of chance in places other than those legally authorised is considered a crime in Portugal.

It is also considered a crime if an operator offers (or promotes or organises) online gambling without having a licence issued by the national tourism authority. Portugal does not recognise licences issued by other EU Member States.

Without prejudice to criminal liability, the Gambling Authority has the power to order internet service providers to block illegal websites whenever an illegal operator does not cease its activity and does not remove the gambling service from the internet within a maximum period of 48 hours after being notified for that purpose.

Undertakings that operate illegally in Portugal cease to be considered of good standing and may not be able to apply for a licence.
Gambling advertising by illegal operators is prohibited and is considered an administrative offence. The Gambling Authority is the competent authority to impose the penalties provided under the law.

In May 2017, the Gambling Authority signed cooperation and information exchange agreements with several regulatory authorities, including Spain, France and the United Kingdom, mainly in order to combat illegal online gambling.

The offer of state-run games by entities other than SCML is considered an administrative offence, with the exception of land-based fixed-odds sports betting and land-based pari-mutuel horse racing bets, which is considered a crime.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence
Except for lotteries, which were first permitted in the 17th century, all other games were completely prohibited in Portugal until the beginning of the 20th century.

Games of chance were first regulated in 1927. The actual legal framework for land-based games of chance dates from 1989 and was last amended in 2015.

The operation of bingo halls was first regulated in 1982 and the legal framework dates from 2011 and was amended in 2015.

The online gambling legal framework in Portugal is the Legal System of Rules for Online Gambling and Betting (RJO), approved by Decree-Law No. 66/2015 of 29 April.

State-run games are regulated by several legal decrees and, in 2015, the legal framework that defined land-based fixed-odds sports betting and land-based mutual horse racing bets as state-run games was approved.

ii The regulator
The Gambling Inspection and Regulation Service (SRIJ) is the gambling regulatory authority for land-based games of chance, online games of chance, online fixed-odds sports betting, and pari-mutuel and fixed-odds horse racing betting.

State-run games are subject to the supervision of the Social Security Ministry.

iii Remote and land-based gambling
The gambling legislation clearly distinguishes between online and land-based gambling.

Land-based gambling means gambling carried out in casinos, bingo rooms or other locations previously authorised for the purpose (e.g., betting shops), and that require the physical presence of the player.

Online gambling concerns games of chance, fixed-odds sports bets, pari-mutuel or fixed-odds horse racing bets, in which any devices, equipment or systems are used that enable documents, data and information to be produced, stored or transmitted, when carried out remotely, through electronic, computer, telematics and interactive media, or by any other means.
iv Land-based gambling

Land-based games of chance are subject to a concession agreement granted through a public tender to private undertakings. The operation of games of chance may only occur in casinos existing in specific gaming areas defined by law, or out of casinos in the special cases foreseen in the law (e.g., slot machines, gaming rooms, aircrafts and ships).

In each gaming area only the respective concessionaire may operate a casino.

Bingo is operated in casinos and it is also allowed, by way of a public tender, to be operated by private or public entities in bingo halls in locations previously defined by the member of the government responsible for tourism.

In bingo halls, concessionaires may operate traditional and electronic bingo.

In April 2017, Madeira established a slot machine gaming room within a gaming area that is operated by the concessionaire of the casino. It was installed in Funchal’s Pestana CR7 Hotel and is currently the only slot machine gaming room in operation in Portugal.

Betting shops in Portugal are operated by SCML’s mediators and their activity is restricted to state-run games. Besides betting shops, state-run games may also be sold in other venues, as long as they have a valid permit.

v Remote gambling

Upon the approval of the RJO in April 2015, the operation of fixed-odds sports betting, pari-mutuel and fixed-odds horse racing bets, and games of chance were permitted.

The operation of online gambling is allowed by means of a licence granted by the Portuguese Gambling Authority to private undertakings.

There is no limit on the number of licences that can be granted. Also, applicants may apply for a licence at any time.

Operators must present a technical gambling system (hardware and software, managed by the operator, which includes the website, the reporting front end and the gambling platform) to organise and operate online gambling in Portugal.

Operators are required to ensure that the reporting front end (infrastructure) is located in Portugal and contains the necessary information concerning all transactions, in order to safely ensure the permanent flow of information between operators and the Gambling Authority.

The technical gambling system of the operators has to include security mechanisms, ensuring, in particular:

- the integrity, availability and confidentiality of the communications, and of all the information processed and stored;
- registration of all actions in relation to each player;
- registration of all transactions and operations carried out;
- registration of players and players’ accounts;
- registration of all the changes and occurrences that take place on the gambling platform; and
- the authentication and identification of players.

3 There are 10 gaming areas: Azores, Algarve, Espinho, Estoril, Figueira da Foz, Funchal, Porto Santo, Póvoa de Varzim, Troia and Vidago-Pedras Salgadas.
The technical gambling system has to be located in premises to which the Gambling Authority may have access at any time.

In cases where the location of the gambling platform or any of the components thereof is either virtual or uses components outside Portugal, the operator has to ensure access and the necessary permits from the premises of the Gambling Authority, in order to ensure appropriate control, audit and supervision actions are possible.

vi Ancillary matters

The manufacture, import, transport, trade, display or publicity of land-based gaming equipment, such as casino tables, roulette wheels, slot machines and computer software, specifically intended for the practice of games of chance, needs to be previously authorised by Gambling Authority.

The technical gambling system of online gambling operators has to be certified by third parties previously recognised by the Gambling Authority, and only if the certification is successful it is subsequently audited and homologated by the latter.

State-run games equipment is verified by SCML.

III THE LICENSING PROCESS

i Application and renewal

Land-based games of chance

The concession of land-based games of chance is granted by the Portuguese state through a public tender to private undertakings, incorporated in the form of a limited liability company or equivalent, with its registered office in a Member State of the EU, or in a state that is a signatory state to the Agreement on the European Economic Area, which is bound to administrative cooperation in the field of taxation and the fight against tax fraud and money laundering, provided that, in the case of foreign companies, they have a branch in Portugal.

The public tender specifies all the terms and conditions for the awarding of the concession agreement. These terms and conditions include the cumulative requirements to be met by applicants (good standing, technical and financial capacity), the location of the casino or bingo hall where the gaming activity will be carried out, and the assets allocated to the concession, the period of the concession agreement and the possibility of its renewal and the awarding criteria.

Until 2015, the renewal of the concession agreements in what concerns land-based games of chance was the sole competence of the government. With the amendments made in that year to the legal framework, the renewal of concession agreements is only possible if it is previously provided for in the public tender.

Remote gambling

The operation of online gambling is granted by means of a licence issued by the Gambling Authority to private undertakings incorporated in the form of a limited liability company or equivalent, as referred for land-based games of chance.

There are four different types of gambling licences available: fixed-odds sports betting, pari-mutuel and fixed-odds horse racing bets, bingo and other games of chance.
The licence application has to be submitted on the standard form approved by the Gambling Authority duly accompanied by the documents required for the verification of the good standing and the technical, financial and economic capacity requirements.

The applicant must also submit a structuring plan of the gambling technical system containing a document describing the gambling technical system, its location in the national territory, where the front-end recording infrastructure will be hosted, the identification of the categories and types of online gambling to be operated, the mechanisms for player self-exclusion and for preventing the registration of players banned from gambling, the betting limits, the allowed payment methods and the rules for calculating and paying prizes, the way in which all the transactions in the player account are made, how transactions that involve transfers of funds between the operator and the player are processed, and the information security mechanisms adopted.

If the decision on the approval to grant a licence is favourable, the operator has to proceed to the down payment of the licence fees, present the safety deposits and obtain certification of the technical gambling system in order to the subsequent homologation. Only then will the licence be issued and the operator licensee may begin the operation.

Licences are valid for a period of three years from the date of issue and may be extended for successive periods of three years if the operators maintain all the requirements demanded and if the Gambling Authority’s audit is successful.

ii Sanctions for non-compliance

In land-based games of chance the non-fulfilment by the concessionaires of their legal and contractual obligations constitutes an administrative offence punishable by the application of a fine and by the termination of the concession agreement.

The general rule is indeed the imposition of a fine or sanction. Only in certain cases (e.g., the concealment of gaming revenues, the failure to deliver or to increase the security deposits or the repeated infringement of the gaming legislation or the concession agreement) may the authorities suspend or terminate the concession agreement.

The concessionaires’ responsibilities do not affect the criminal or administrative liability of the respective employees or agents for the infractions the latter may have committed.

The infringement of legal obligations in online gambling constitutes an administrative offence punishable with fines. There are minor, serious and very serious offences of the law and the amount of the fines vary accordingly, from €5,000 to €1 million.

According to the seriousness of the infringement and the fault of the offender, additional penalties may be imposed, such as prohibiting the offender from partaking in any online gambling and prohibiting the right to take part in contract formation procedures or in procedures aimed at granting licences.

IV WRONGDOING

The Portuguese Gambling Authority is the entity responsible for the supervision of the implementation of anti-money laundering (AML) rules by the stakeholders, such as casinos and online gambling operators, and has the power to enter and inspect premises, as well as investigate all suspicious activity related to money laundering and terrorist financing.
Organised crime, including but not limited to match-fixing, is investigated by the Public Prosecutor and police authorities. The Gambling Authority and the sports organisations cooperate closely with the above-mentioned entities, as well as collect relevant information related to this type of criminal activity.

Regarding state-run games, the implementation of AML rules is supervised by the Ministry of Labour, Solidarity and Social Security.

V TAXATION

Gambling in Portugal is subject to different taxes.

Land-based casino games are subject to the special tax on gambling (IEJO), which takes into consideration the different types of the games (games where players play against the casino, games where players play against each other and slot machines) and the geographical gambling area where the casinos are located. The rates grow slightly every five years throughout the concession agreement (until the fifth *quinquennium*, if applicable).

On average, the rates vary between 4.5 per cent and 36 per cent in terms of gross gaming revenue (GGR).

No other general or local tax is claimed regarding the exercise of the gambling activity.

Prize money won by players is not subject to taxation.

Land-based bingo operated in bingo halls (traditional and electronic) is subject to stamp duty of 25 per cent.

Online gambling is also subject to IEJO, which varies according to the different type of game or bet:

- in games of chance (including bingo), and on *pari-mutuel* horse racing bets, the IEJO is levied on the GGR of the operator. The IEJO rate on these games varies progressively between 15 per cent and 30 per cent;
- in fixed-odds sports, betting and fixed-odds horse racing bets, the IEJO is levied on the revenue from the amount of the bets placed (turnover). The IEJO rate on these games varies progressively between 8 per cent and 16 per cent; and
- in games of chance in which players play against each other and where the fees charged by the operator are the sole revenue deriving directly from operating, and in betting exchanges, the IEJO is levied at the rate of 15 per cent. The revenue deriving directly from the pursuit of activities liable to the IEJO is not subject to corporate income tax and stamp duty. Prize money won by online players is not subject to taxation.

State-run games are subject to stamp duty of 4.5 per cent on the amount of the bet and of 20 per cent on the amount of the prize that exceeds €5,000. Stamp duty is borne by players. Mutual horse racing bets are subject to IEJO at a rate that varies from 15 per cent to 30 per cent of GGR.

Players’ winnings are not subject to income tax.

VI ADVERTISING AND MARKETING

Until 2015, only the advertising of state-run games was allowed.

With the approval of the RJO in April 2015, the Publicity Code was also amended, which permitted the advertising of all gambling activities.
According to the Publicity Code, the advertising of gambling has to be conducted in a socially responsible manner; it must respect the protection of minors; it ought to highlight the entertainment aspect of gambling; it must not suggest success, social achievement or special skills may come as a result of gambling; and it may not encourage excessive gambling. It is expressly prohibited to advertise any gambling that is aimed at or uses minors in the message. It is also prohibited to advertise gambling in schools or within a 250-metre radius of schools or other infrastructures intended to be frequented by minors.

The infringement of these rules constitutes an administrative offence punishable by law with a fine and the Gambling Authority is the entity responsible to initiate and manage the administrative procedure.

VII THE YEAR IN REVIEW

The most significant development in gambling in 2017 pertained to the alterations to the legal framework brought forth by Law No. 114/2017 of 29 December, which approved the State Budget for 2018.

Namely, regarding land-based gambling, the costs incurred with inspection actions in casinos and bingo halls, as well as the costs associated with fighting and preventing illegal gambling activities, shall hereforth be partially funded by the revenue collected by each concessionaire operating in slot machine gaming rooms.

With regard to online gambling, operating entities are now allowed to share gaming platforms in order to make access to online gaming and betting for registered players significantly easier. The terms under which the aforementioned entities may proceed to implement the modification to the legal framework in question was subject to further regulation by the Gambling Inspection and Regulation Service. This regulation was recently approved, after the relevant interested parties were heard during the preparation proceedings, as was legally required. Hence, new obligations incumbent on the operating entities were created, namely, the duty to diligently check the player’s identity and its registration status in Portuguese territory.

Pertaining to the entities that are allowed to access share gaming platforms, the Regulation under analysis clarifies that only entities that hold valid licences for the operation of online gambling and betting issued by the Gambling Inspection and Regulation Service and meet the technical gaming requisites set forth in the present Regulation are able to profit from this system.

Regarding taxation, further regard is being paid to the distribution of the tax revenue collected from gambling activities to promote social awareness causes, such as social security policy, healthcare and policies regarding youth and sports.

Likewise, pertaining to the applicable sanctions for non-compliance, the violation by operating entities of additional duties regarding confidentiality and safety requirements now constitutes an administrative offence punishable with fines.

As of March 2018, there are seven operators holding 12 licences: five for fixed-odds sports betting and seven for games of chance.

Although the Portuguese market is young, players have shown a massive interest in the regulated market.

Notwithstanding, there is controversy among international operators regarding the online fixed-odds sports betting taxation regime demanding a change in the actual tax bases and rates.
VIII OUTLOOK

The RJO was designed with the consideration that an initial period of evaluation would be required and that, within a maximum period of two years after the issuance of the first licence (on 25 May 2016), a reassessment of the legal framework should be carried out by the Gambling Authority and presented to the government.

The main issues that the Gambling Authority will focus on are the tax regime and new types of games, such as virtual games and e-sports.
I OVERVIEW

i Definitions

The Romanian primary gambling legislation (Government Emergency Ordinance No. 77/2009 on the organisation and operation of games of chance, as subsequently amended and supplemented), defines the following gambling products:

a Lottery – a game of chance that depends on the random outcome of events consisting of the drawing of numbers, letters, tickets or symbols, regardless of the procedure used and characteristics of the means used to make the draw (drums, wheels, cups and other similar equipment), which can be organised (in case of land-based activity) with or without the players being physically present. In relation to lottery games, the legislation sets forth the rule that both land-based lottery games and online lottery games are under the state monopoly and can be organised only by the Romanian state company, Loteria Română.

b Betting – a game of chance where the participant must indicate the results of future events or where the results are randomly generated by an independent IT system. The legislation expressly regulates three categories of betting: (1) fixed-odds betting (e.g., sports betting), (2) mutual betting and (3) exchange betting, which can be licensed and authorised as land-based or online gambling.

c Casino games – games of chance that make use of specific gaming equipment such as cards, roulettes, dice and gaming tables. A particularity of online casino games is that this category also includes online poker games and online slot machine games, thus permitting the licensed gambling operator for online casino to also offer poker and slot machine gaming on its gaming platform.

d Poker – a game of chance with ‘poker’ playing cards, which is – in case of land-based activities – performed exclusively between the participants in specialised locations.

e Land-based slot machine gaming – defined by reference to one of the following three categories:

- slot machine games with unlimited stakes and winnings played via specific machines or equipment, with the players being physically present, operated in specialised premises where gambling takes place;
- games played via electronic devices that offer limited risk winnings (known in the industry as ‘amusement with price’ (AWP) machines), with the players being
physically present, but that cannot be placed in specialised gambling premises; and
• video lottery games, where the players are physically present and for which the gaming equipment must be connected to a central server running the gaming programme, and that validates the win.

Bingo games – games of chance defined by reference to the means used in performing the activity:
• bingo games played in gaming rooms with the winnings generated by random elements that use lottery-type draw equipment and with the players physically present on the premises;
• bingo games organised via television networks, with the players not being physically present at the time of the draw; and
• online bingo games, which are played entirely without the players being physically present, and that are organised and transmitted via any communication system.

Keno games – games of chance only regulated as online gambling activities, which are included in the category of online bingo and keno games.

Tombola – the activity of drawing numbers, letters or other symbols, regardless of the characteristics of the mechanical, electronic, digital or video devices used to make the draw, whereby players (physically present or not) may win prizes only in kind, where the value of the prizes must have a minimum value of no lower than 50 per cent of the total value of the stakes paid to participate in the game. Tombola games may be organised both as land-based or online activity.

Temporary games – land-based casino games, slot machine games with unlimited winnings and traditional bingo that takes place in tourist resorts or on leisure crafts qualify as temporary games of chance, and are subject to a special temporary licence and authorisation valid for a period of three months.

A distinct category of temporary games exists for poker festivals that are defined by the law as temporary events organised in tourist resorts or other locations, which consist of poker tournaments performed exclusively between the participants. Poker festivals may be organised only by operators that hold a valid licence and authorisation in this respect.

In addition to the above categories expressly defined by the legislation, any other unregulated product that fulfils the conditions of a game of chance (consideration, chance and prize) is also subject to the licensing requirement, since the Romanian regulator is legally competent to analyse such product and determine the category in which the product should be included. This analysis is performed on the basis of a request filed by the operator of the unregulated gambling product with the Romanian regulator, where the game rules and description of the product must be attached to the request.

The legislation does not make any reference to products such as fantasy league, pool betting or spread betting. It is, however, expressly provided that ‘fun games which do not imply winnings based on random elements, but have the purpose to test the force, intelligence or skills of the participant’ as well as ‘sport games, which are not mainly based on hazard and imply skills and knowledge’ are not considered gambling products, and are permitted without a licence and authorisation.

As to what concerns derivative financial products, while the gambling legislation does not make any reference to this matter, the Romanian gambling regulator represented in an
official letter that binary options as well as other types of secondary financial instruments that are expressly provided within the Markets in Financial Instruments Directive cannot be included on gambling platforms.

ii Gambling policy

Gambling is generally permitted in Romania, provided that the required licences and authorisations are obtained, and the applicable legal provisions are observed in the course of business. Gambling is legally allowed in Romania in both its land-based and online forms.

iii State control and private enterprise

As a matter of principle, the very first article of the primary gambling legislation sets forth that organisation and operation of gambling in Romania represents a state monopoly and may be performed only within the specific legal parameters imposed by the gambling regulation.

However, the legislation creates a legal framework where any private operator that fulfils the requirements provided by the law is able to apply for a licence and authorisation in order to conduct gambling activities in Romania. Currently, the criteria and conditions according to which the licences are granted could not be considered as leading to an oligopoly or monopoly situation.

An exception exists in relation to lottery games. The legislation in force establishes the principle according to which both land-based and online lottery games can be organised only by Loteria Română, thus representing a state monopoly.

iv Territorial issues

The Romanian gambling legislation expressly provides that the licence and authorisation granted to a certain operator allows that operator to conduct its activity on a national level, without the need to obtain approvals, authorisations or licences from public authorities other than the Romanian gambling regulator. This provision imposes a notification obligation on local authorities, which means that the operator is bound to inform the local municipality in advance about the commencement of gambling activities in that specific area.

v Offshore gambling

In accordance with the legislation in force, only operators based in the EU, European Economic Area (EEA) or Swiss Confederation may apply for and obtain the necessary licence and authorisation in order to provide gambling services in Romania.

A situation in which a foreign economic operator provides gambling services in Romania without holding the relevant licence and authorisation issued by the Romanian regulator is explicitly regulated by the legislation as a criminal offence sanctioned by imprisonment from one month up to one year or by a fine. Additional sanctions are also expressly provided in the legislation for a legal entity that offers unlicensed gambling services in Romania: the entity shall be dissolved and the amounts derived from the unlawful activity shall be confiscated.

As a separate tool to control and prevent unlicensed activities, the Romanian regulator manages the ‘blacklist’ of unlicensed gambling websites. This list currently comprises over 1,000 internet domain names. In this regard, the legislation also sets forth that internet service providers (ISPs) as well as all service suppliers for the gambling industry, including payment processors, are bound to comply with the decisions taken by the regulator. Specific
reference is made to ISPs that are required to ban access to the blacklisted websites (as well as to those websites promoting unlicensed gambling) under the sanction of a fine ranging from 50,000 lei to 100,000 lei.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The conditions under which the organisation and operation of games of chance are permitted in Romania are outlined in the following normative acts:

- Government Emergency Ordinance No. 77/2009 on the organisation and operation of games of chance (GEO 77/2009);
- Government Decision No. 111/2016 for the approval of the Methodological Norms for implementation of Government Emergency Ordinance No. 77/2009 on the organisation and operation of games of chance (GD 111/2016);
- Government Emergency Ordinance No. 20/2013 on the establishment, organisation and functioning of the National Gambling Office; and
- Government Decision No. 298/2013 on the organisation and functioning of the National Gambling Office.

In addition to the above-mentioned normative acts, gambling activities are also regulated by means of instructions, orders or decisions issued by the National Gambling Office (NGO) in relation to various aspects of gambling activity. The NGO is a specialised body of the central public administration subordinated to the government.

Moreover, certain specific requirements in the field of anti-money laundering and prevention of terrorism are also applicable to gambling activities, and are generally comprised in the following normative acts:

- Law No. 656 of 7 December 2002 on the prevention and combating of money laundering and financing of terrorism; and

(As at the time of writing, both of the above are in the process of being repealed by the new legislation implementing the 4th AML Directive.)

ii The regulator

The competent public authority to supervise and control the Romanian gambling market, and to grant licences and authorisations to gambling organisers, is the NGO.

iii Remote and land-based gambling

The gambling legislation distinguishes between online and land-based gambling, with both categories being separately defined in the regulation, as per the following:

- land-based gambling activities are defined as all games of chance irrespective of whether they are expressly regulated by GEO 77/2009 that fulfil the legal conditions related to a game of chance and are performed through gaming means installed in Romania, and that are not transmitted or performed through any kind of communication system (internet, landline or mobile telephone, or any other transmission systems); and
online gambling activities are defined as comprising all the games of chance irrespective of whether they are expressly regulated by GEO 77/2009 that fulfil the legal conditions applicable for a game of chance and are performed through communication systems of any kind (internet, landline or mobile telephone, or any other transmission system).

iv Land-based gambling
Pursuant to GEO 77/2009 and GD 111/2016, land-based gambling activities may be only operated in specialised locations, which are outlined below.

Casinos
Casinos are the specialised locations used for the operation of games of chance characteristic to casinos. The surface area and structure of casinos must enable the installation of gaming equipment and other technical devices needed to carry out the specific activity, and must be located in buildings intended for use as business premises or in hotels.

Casinos are subject to minimal legal requirements with regard to the location of the premises, adequate surface and safety equipment.

Betting agencies
Betting agencies are the specialised locations for betting activities in which at least one dependent betting terminal is operated and that cumulatively meet several specific conditions in terms of minimum surface area, mandatory equipment, etc.

Locations for the operation of slot machines
All premises used for operation of slot machine gaming activities, irrespective of the type of slot machine, are subject to certain restrictions in relation to the advertising of the premises, as follows:

a. organisers will prevent viewing of the activities carried out within the respective premises; and
b. organisers will not suggest gambling activities by using images, text or other symbols.

In addition, with regard to the specific category of AWP slot machines, GD 111/2016 also provides for a general restriction on advertising, which means that the organiser is prohibited from advertising the gambling activity within the premises where this type of activity is conducted.

Locations for operation of bingo games
Pursuant to GD 111/2016, bingo games performed in specialised gaming halls may only take place in locations that will be placed in specialised premises or business premises, which are registered as the organiser’s main or secondary office and that meet a set of mandatory conditions in relation to the logistic organisation – sufficient electrical lighting system, air-conditioning system, sound system, safety-related requirements, back-up electrical circuit, etc.
v Remote gambling

Offering remote gambling products in Romania is subject to a licensing and authorisation procedure. In order to apply for an online licence and authorisation, several technical and operational requirements must be met. The following requirements are of particular importance:

a Localisation requirements – first, the main server of the operator must be located in Romania or another Member State of the EU or EEA, or in the Swiss Confederation. In addition, if the main server is not located in Romania, safe and mirror servers must be established in Romania.

b Use of Class II licensees – remote gambling organisers may carry out their activities in Romania by relying only on the products and services offered by B2B suppliers that hold a Class II licence issued by the NGO. The activities that entail the obligation to obtain a Class II licence include software development, platform management, payment processing, marketing affiliation or certification activities.

c Certification requirements – any operator applying for an online licence must hold a certification for the gambling system (software and platform being included in the scope of certification) issued by a specialised company that holds a Class II licence issued by the NGO.

vi Ancillary matters

Pursuant to GEO 77/2009 and GD 111/2016, the gaming equipment or components used by land-based gambling operators to conduct their activity (e.g., roulettes, slot machines, slot management systems) will be acquired only from an entity that holds a specific Class II licence issued by the NGO.

With regard to the online gambling sector, as mentioned above, business-to-business (B2B) suppliers are also subject to the Class II licensing requirement.

The legislation does not provide for a personal licence requirement for individuals holding specific positions within a gambling operator. There are, however, certain requirements for the licensing process that refer, in particular, to the directors and shareholders of the applying entity (e.g., criminal record checks, affidavits disclosing, among others, the ultimate beneficial owners).

III THE LICENSING PROCESS

i Application and renewal

As a core rule, only operators based in the EU, EEA or Swiss Confederation may apply for a license and authorisation.

Licensing process for land-based gambling

In order to perform land-based gambling activities, any gambling operator must obtain a Class I licence and one or several authorisations. While the licensing procedure is not product-specific, the authorisation must be obtained for each type of gambling activity intended to be performed.

In order to obtain the licence, the operator must submit an application request along with several corporate and operational documents related to the legal entity itself, and its directors, shareholders and associates.
The authorisation can be obtained by an operator that has been previously granted a Class I licence. However, the regulation allows an operator to submit licence and authorisation applications at the same time provided that the necessary conditions are fulfilled for each of these. The conditions for obtaining the authorisation vary in accordance with the type of gambling activity sought to be performed and refer to operational aspects (such as the game rules for each game offered to the players and the configuration of the gambling premises) or technical requirements (such as certification of the gambling equipment or development of the reporting solution to the NGO of the aggregated financial and operational data of the operator).

From a procedural perspective, the complete documentation must be submitted to the NGO’s registry at least nine working days in advance of the Supervisory Committee’s meeting. Pursuant to GEO 77/2009, ‘requests to be granted with a licence to organise or authorisations to operate shall be resolved within a time frame of 30 days from the date of submission of the complete documentation’. However, considering that the NGO has the competence to request any additional documents or information deemed necessary, in practice, the licensing and authorisation procedure may exceed the initial maximum 30-day time frame provided by the law.

The Class I licence is valid for 10 years with the exception of temporary games of chance for which the licence is valid for three months. The authorisation is valid for one year, with the same exception – for temporary games of chance, the validity of the authorisation is also three months.

Although the licence has validity for 10 years, fees are owed annually in order to maintain this licence. GEO 77/2009 provides the value of the licence and authorisation fees, values that differ according to each type of game of chance. For example, for land-based fixed-odds betting, the annual licence fee amounts to €25,000; for poker clubs, the licence fee is €15,000 per year, etc. The authorisation fees are set differently – for instance, for fixed-odds betting, the authorisation fee amounts to 16 per cent of the revenues obtained by the organiser, but no less than €90,000 per year; for casino games, the authorisation fee is owed for each gaming table, which amounts to €60,000 per table for Bucharest and €30,000 per table for any other city in Romania.

In addition to the licence and authorisation fees, land-based gambling operators are also required to pay an annual contribution to the public foundation for preventing gambling addiction (which has not been established yet). Such annual contribution amounts to €1,000 and must be paid until 15 December of each year.

As far as the prolongation procedure is concerned, with the exception of temporary games of chance, in respect of which prolongation may be requested only once, the licence and authorisation for organisation and operation land-based games of chance may be prolonged, upon request, for validity periods identical to the initial period providing that, prior to the expiry date, the organiser fulfils the conditions for their extension, as per the provisions of the law.

**Licensing process for online gambling**

To a certain extent, the licensing and authorisation requirements for land-based gambling also apply for online activities. As a preliminary observation, while in the case of land-based gambling activities the authorisation must be obtained for each type of activity (or machine,
as the case may be), in the case of online gambling, only one authorisation is to be obtained for all the activities conducted on the same gambling platform (which can be connected to one or several internet domain names).

Other particular conditions applicable for an operator applying for a licence and authorisation to perform online gambling refer mainly to technical and operational requirements.

Thus, the applicant is required to have its entire IT system audited by a specialised testing laboratory that holds a Class II licence, while the gambling software, as well as the random number generation and return-to-player of each game, must also be certified by a Class II-licensed certifier. In terms of the necessary infrastructure, in case the main gaming server is not located in Romania, the operator must establish safe and mirror servers in Romania in order for the NGO to be able to monitor the activity related to the Romanian market and verify any incidents that occur. In brief, while the safe server stores rough replica data of the information from the gaming server, the mirror server must contain centralised reports summarising the daily activity and financial results obtained by the operator.

On the operational side, among other requirements, operators that are not Romanian-based companies are required to appoint an authorised representative (a Romanian legal or natural person) to act as the representative of the operator in relation to the Romanian state authorities.

In terms of costs, the licence fee is calculated by reference to the operator’s turnover. GEO 77/2009 provides for several turnover thresholds in order to determine the applicable licence fee (e.g., the minimum amount of the licence fee is €6,000 per year for a turnover of less than €500,000 per year while the maximum amount is €120,000 per year for a turnover exceeding €10 million per year).

The amount of the authorisation fee for remote games of chance is 16 per cent of the organiser’s revenue, but no less than €100,000 per year.

In addition to the licence and authorisation fees, online operators are also bound to contribute to the public foundation for preventing gambling addiction with a contribution of €5,000 per year. As at the time of writing, this public foundation has yet to be set up.

The regulation also sets forth certain administrative fees to be paid by the online gambling operator when applying for a licence, namely:

- a documentation analysis fee of €2,500 paid on submission of the licence with the NGO; and
- a fee for the issuance of the licence of €8,500 per year, per licence.

### Sanctions for non-compliance

In principle, failure to observe the legal requirements in the field of gambling may lead to civil, administrative or criminal sanctions.

By way of example, administrative liability may be triggered when:

- the organiser of land-based gambling activities allows individuals to participate in games of chance without having valid identity documents in their possession;
- the gambling organiser, without distinction between land-based or online activities, does not pay the participants the winnings obtained in the activity of gambling in three working days, provided that the conditions imposed to the participant in relation to the proof of winnings are fulfilled; or
the gambling organiser, without distinction between land-based or online activities, fails to notify the NGO of any modifications that have occurred to the data on the basis of which the licence and the authorisation were issued by the NGO, within a certain time frame.

The failure of the gambling organiser to comply with the legal requirements can also lead to the suspension or revocation of the licence by the NGO’s Supervisory Committee.

The operation of games of chance without being granted with the required licence and authorisation constitutes a criminal offence and shall be punished with imprisonment from one month to one year or with a fine. Additional sanctions applicable for the criminal offence of unlicensed gambling are that the gambling operator would be dissolved and the amounts derived from the unlawful activity would be confiscated.

Criminal liability may be also triggered when the following gaming products are offered to the players:

- fraudulent games of chance;
- games of chance through radio channels or through other assimilated transmission means;
- games of chance based on the results of clandestine competitions (such as dog fighting, which is expressly forbidden by the Romanian legislation, illegal car racing, etc.);
- clandestine games of chance, the results of which, rather than being random, are influenced by the skill of the person handling the game for the purpose of obtaining revenues; and
- competition games with winnings of any type through telephone lines or other communication systems, television or radio where the obtaining of prizes is based solely on the accuracy of the answers provided to general questions, which involve a participation fee.

The criminal liability of those involved in money transfers for gambling is not subject to the specific gambling legislation and is to be assessed on a case-by-case basis, as such a situation also has potential implications related to anti-money laundering regulations.

With regard to ISPs, based on the provisions of GEO 77/2009, such are obliged to observe the NGO decisions and ban access to the unlicensed gambling websites included on the regulator’s blacklist. Non-observance of this obligation triggers the administrative liability of ISPs, which face a fine ranging from 50,000 lei to 100,000 lei.

With respect to participants in games of chance, according to GEO 77/2009 any individual who participates in Romania in the activity of remote games of chance operated by an unlicensed or unauthorised operator shall face administrative fines ranging from 5,000 lei to 10,000 lei, thus triggering the administrative liability of the player (but not criminal liability).

IV WRONGDOING

One of the main principles governing gambling activity consists of permanently ensuring the prevention and control of criminal activities that may be performed by accessing gambling services.

In what concerns the obligations imposed by the anti-money laundering regulations, the Romanian AML Office, in an official response to a request for clarification, has stipulated...
that the Romanian AML law currently in force (which transposes the 3rd AML Directive) is applicable only for casino operators incorporated as Romanian legal entities and not also for other categories of gambling operators (e.g., foreign online operators licensed in Romania). Through the same response, the AML Office indicated that the national legislation that will transpose the 4th AML Directive will also be applicable only for Romanian-based entities or Romanian citizens.

V TAXATION

From a fiscal point of view, land-based gambling operators that operate in Romania are subject to a 16 per cent profit tax (which is for all types of businesses and not specific to gambling), in addition to any other fiscal obligations imposed under the Romanian Fiscal Code. The Fiscal Code provides for an exception in what concerns land-based casinos, where it is stated that this category may be subject to a 5 per cent turnover tax in case the profit tax is less than 5 per cent of their revenues.

Online gambling operators are subject to corporate tax in Romania only if they are Romanian fiscal residents or if they create a permanent establishment in Romania. Otherwise, the non-resident gambling operator owes income tax in the country of establishment and will be required to pay the annual licence and authorisation fees in Romania, as well as a contribution to the fund for responsible gambling.

In Romania, the revenues obtained by the players are subject to tax charges. In case of land-based games, the operator is required to withhold the applicable tax and subsequently pay such to the state budget. In case of online games, currently, a different taxation system is still applicable in the sense that each player is bound to execute individually the tax duties imposed by the Romanian authorities. However, as at the time of writing, the Romanian government is in the advanced stages of enacting a Government Emergency Ordinance for the amendment of the Fiscal Code, which aims to reintroduce the withholding tax mechanism also for the revenues obtained by the players from online games.

VI ADVERTISING AND MARKETING

The advertising of gambling activities performed in Romania by licensed gambling operators is permitted, provided that the principles regarding protection of minors and responsible gambling are observed.

The Romanian authorities have recently taken certain actions in relation to gambling advertising. The National Audiovisual Council has issued a generic decision in which TV advertising for gambling should be broadcast only during restricted time frames to observe the principle of protecting minors with regard to the audiovisual field.

Further, the NGO has recently published the Code of Ethics on Responsible Communication in Gambling, which includes several restrictive guidelines regarding gambling advertising. However, subsequent to its publication, the NGO clarified that this Code of Ethics is not a legally binding instrument, being issued only for consultation purposes. While it seems that the rules provided by the Code of Ethics are not mandatory, the regulator encourages the operators to voluntarily adopt such.
VII THE YEAR IN REVIEW

The Romanian gambling market has shown a steady growth in the past 12 months and, at the time of writing, there are 22 operators licensed for online gambling, over 270 operators licensed for land-based slot-machine gaming and more than 300 Class II licences have been granted by the NGO for the entire spectre of activities subject to the licensing requirement.

VIII OUTLOOK

Currently, the Romanian gambling market is facing several legislative modifications. First, it seems that the reintroduction of the withholding tax system for the revenues obtained by the players from online gambling is rather imminent. Secondly, the 4th AML Directive is still to be transposed into the national legislation and, once enacted, the new AML legislation might generate a significant impact for the activities of the gambling operators that fall under its scope of application. Last, but not least, it cannot be overlooked that the Romanian authorities have started to be more attentive with regard to responsible gambling matters, as well as advertising conditions for gambling activities.
Chapter 26

RUSSIA

Alexander Skoblo and Ekaterina Merabishvili

I OVERVIEW

i Definitions

The Russian Gambling Law defines gambling as a risk-based agreement on winnings entered into by two or more parties among themselves or with a gambling operator according to the rules set by the gambling operator. The risk element is an essential characteristic for classifying an activity as gambling, especially given the absence to date of detailed regulations on different types of games of chance.

The same law specifically recognises totalisator and bookmaking activities, which are generally subject to less stringent regulation than other types of gambling:

a a totalisator is defined as a gambling venue in which a gambling operator organises bets between players and pays winnings out of the amount of accepted bets after deducting the gambling operator’s fee; and

b a bookmaking shop is defined as a gambling venue in which a gambling operator organises bets between itself and players.

The Gambling Law also encompasses the concept of remote gambling, which entails any form of gambling ‘using data and telecommunications networks (including the Internet) or means of communication (including mobile communications)’.

Lotteries do not constitute gambling within the meaning of the Russian Gambling Law’s definition, and are regulated independently. The Lotteries Law defines a lottery as a game conducted pursuant to an agreement in which one party (the operator) holds a draw for the prize pool of the lottery and the other party (the participant) is entitled to receive the winnings if deemed the winner in accordance with the terms of the lottery.

Russian law and practice do recognise legal concepts such as public promise of a prize, public competition and promotional event, which allow games of skill, business promotions with prize draws and similar contests to be held without triggering gambling or lottery regulations. However, the statutory language dealing with each of these types of events is vague or limited, and official guidance is lacking. Thus, companies operating such events...
should be careful to avoid any elements characteristic of gambling or lotteries, such as a risk factor, an initial stake (bet) or purchase of a lottery ticket, a lack of objective (non-risk based) criteria for determining the winner and a lack of judges.

Prior to 2009, derivatives were regarded from a legal standpoint as a form of gambling, which largely deprived the parties to derivative transactions of any legal means of enforcing their agreements in Russia (because of the fact that, as a general rule, most claims arising out of the operation of or participation in gambling are not cognisable under Russian law). However, as of 2009, derivatives have been expressly regulated by the Russian Securities Market Law and are no longer treated in the same way as gambling.

ii Gambling policy

Russian public policy has tended, particularly in recent years, to reflect conservative and religious values, which naturally promote a more restrictive and paternalistic approach to the regulation of gambling.

Accordingly, as of 1 July 2009 gambling is only permitted within specially designated territories termed gambling zones, of which there may be no more than five, most of which are currently located in relatively remote regions and are generally underdeveloped, even though some strides have been made in the past year. However, this restriction does not apply to bookmaking and totalisator betting, which are allowed both within and outside the gambling zones, as well as online. Lotteries must be authorised and operated by the state, and are conducted nationwide.

Before engaging in the organisation or operation of gambling activities, operators must obtain the relevant licence or permit. Bookmakers and lottery organisers are required to make sizeable mandatory payments to sports federations and to the federal treasury ‘for important social purposes’, respectively. Losses from participation in gambling and lottery cannot be insured. Poker is treated as a form of gambling, not a game of skill (although it had previously been, for a short time, considered a sport).

As mentioned above, very limited legal protections are available in relation to gambling, and these amount mostly to enforcing payout of winnings.

At the same time, Russians’ propensity for gambling is well documented. Owing to the lack of easy access to lawful gambling venues in the five permitted gambling zones, Russian people turn to remote gambling despite the fact that many online casino sites have been blocked by Russian internet service providers in compliance with the rulings of Russian authorities.

Given the budgetary challenges facing Russia in recent years, Russian officials speak, both in the media and at industry events, of liberalising certain aspects of gambling regulations. However, the draft laws that have been put forward so far have scarcely reflected this attitude.

4 Civil Code, Chapter 58.
6 For example, an October 2013 poll by VCIOM, the Russian Public Opinion Research Center, indicated that at least 16 per cent of Russian citizens had played poker. Note that this was at a time when online poker had already been made illegal, but before en masse blocking of online gambling sites. It is hard to define precisely how the blocking of online casinos affected the numbers, especially since many gambling news and statistics sites are also blocked in Russia. However, in our experience a large number of Russian players still participate in remote gambling and are important for the industry.
State control and private enterprise

Russian gambling operators are private Russian companies that are required to obtain either a licence for nationwide operation of totalisator or bookmaking shops, or a permit to operate in a specific gambling zone. The requirements for gambling operators are quite strict, and the process of obtaining the licence or permit can be burdensome.

Since 2014, all lotteries in Russia are organised either by the Ministry of Sports or the Ministry of Finance by decision of the government. The responsible ministry holds a tender to select a private company to act as the actual operator of the lottery process.7

Territorial issues

Gambling (with exception of totalisator betting and bookmaking) is allowed only in the gambling zones designated by the government. There can be no more than five of these, and they must be located within the regions listed in the Gambling Law. A separate state authority is in charge of each gambling zone, handling, among other things, the issuance of operating permits.8 The current gambling zones are:

- Azov-City (Krasnodar region);
- Sibirskaya Moneta (Altai region);
- Primorye (Primorskiy region);
- Yantarnaya (Kaliningrad region); and
- Krasnaya Polyana (Krasnodar region, one of the Sochi area districts).

All five zones are technically active, in that they each have at least one gambling venue open, but are generally underdeveloped. Azov-City, which was for years regarded as the best developed gambling zone, is scheduled to be closed by 1 January 20199 owing to the opening of a gambling zone in Sochi, while an as yet unidentified gambling zone is planned in Crimea. Krasnaya Polyana in Sochi is the newest gambling zone, but appears to be developing at a good pace, as a result of its more convenient location, interest of investors and political support. Krasnaya Polyana has hosted several notable poker tournaments.

The abrupt announcement of the impending closure of the Azov-City gambling zone did little to reassure potential gambling investors. Existing casinos are lobbying for the zone’s preservation (only those operators that received their permits before 23 July 2014 may continue to operate in Azov-City pending its closure).

The same law that mandated the closure of Azov-City provided some limited comfort to current and potential gambling operators, by providing that henceforth a gambling zone cannot be closed until at least 10 years after its establishment. However, that date is already past or fast approaching for the Yantarnaya, Sibirskaya Moneta and Primorye zones, with business there only beginning to develop. The law does not prevent the authorities from closing on short notice a gambling zone that has existed for the requisite 10-year period.

Bookmaking shops and totalisators can operate nationwide under a licence issued by the Federal Tax Service. State lotteries also operate nationwide, or, if permitted by an international treaty of the Russian Federation, in the territory of both Russia and other countries.

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7 Lotteries Law, Article 13.
8 Gambling Law, Articles 9 and 10.
v  Offshore gambling

Because only Russian entities can acquire the licences and permits required to act as gambling operators, it is illegal for offshore operators to offer gambling directly in Russia. However, there is no prohibition on foreign-owned Russian companies obtaining a gambling operator’s permit or licence.

Obviously, Russian regulatory authorities face jurisdictional constraints on their ability to impose sanctions directly upon offshore operators, which usually have no actual business presence or assets in Russia and only provide digital access to gambling sites. Therefore, the principal means of combating offshore operators is to include their websites, and related sites (e.g., advertising sites or e-money sites that explicitly allow payments to offshore gambling operators), in the ‘prohibited websites register’.\(^{10}\) Russian internet service providers are required to block access to such websites, unless and until the prohibited content is removed. More detailed information on the prohibited websites register is included in Section II.v, below.

Furthermore, because the Russian Advertising Law\(^{11}\) prohibits the advertising of any illegal services, and of licensable services without the relevant licence or permit, advertising the services of an offshore gambling operator is illegal in Russia.

Starting 27 May 2018, Russian credit institutions and payment agents can no longer facilitate payments between individuals and operators included in the ‘illegal gambling operators register’, to be maintained by the Federal Tax Service.

II  LEGAL AND REGULATORY FRAMEWORK

i  Legislation and jurisprudence

The Civil Code includes only cursory regulation of gambling activities, setting out basic principles within several articles of its Chapter 58. Instead, the principal regulations are contained in the Gambling Law and the Lotteries Law. The government has adopted a variety of ancillary acts to both the Gambling Law and the Lotteries Law, dealing with such matters as licensing, operator requirements and reporting requirements. At the regional level, the legislatures of each region where a gambling zone is located may adopt acts within their competence in relation to the operation of that particular gambling zone.

Various other provisions relevant to the regulation of gambling (such as advertising regulations, anti-money laundering (AML) requirements, penalties for breach of relevant laws, and so forth) can be found across a range of Russian laws.

ii  The regulator

Nationwide, regulation and supervision of both gambling and lotteries are undertaken by the Federal Tax Service. In addition, a separate regional authority is empowered to regulate each of the gambling zones specifically, including with respect to the issuance of the relevant

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\(^{10}\) The official name of this register is the Unified Register of Domain Names, Website Page URLs on the Internet Data and Telecommunications Network, and Network Addresses Enabling the Identification of Websites on the Internet Data and Telecommunications Network Containing Information Prohibited for Dissemination in the Russian Federation, which was established pursuant to Government Resolution No. 1101 of 26 October 2012.

operating permits (the gambling zone authority). For example, the Department of Tourism, Resorts and External Communications of the Altai Region is currently the gambling zone authority for the Sibirskaya Moneta gambling zone.

iii Remote and land-based gambling

As explained in Section I.iv, above, land-based gambling is only permissible in five dedicated gambling zones, none of which is significantly developed. The only exceptions are totalisator and bookmaking shops, which can operate nationwide. Lotteries, which are not treated as a form of gambling and must be state-run, also function nationwide.

Remote gambling (with the exception of totalisator and bookmaking) is prohibited, but online lotteries are permitted (subject to general restrictions applicable to lotteries) and operate with the use of electronic lottery tickets.

iv Land-based gambling

The following types of gambling venues may be established only in gambling zones:

a general gambling venue: premises dedicated solely to providing gambling services and ancillary services (which may include entertainment, hospitality, catering services, etc.);

b casino: a gambling venue where gambling is organised with the use of gaming tables or other gambling equipment; and

c slot machine hall: a gambling venue where gambling is organised with the use of slot machines or other gambling equipment (except gaming tables).

The following types of gambling venues may be located nationwide:

a bookmaking shop: a gambling venue where bets are made between the gambling operator and the players; and

b totalisator: a gambling venue in which a gambling operator organises bets between players and pays winnings out of the amount of accepted bets after deducting the gambling operator’s fee.

There is a broad range of requirements as to the location, size, outfitting and other parameters of gambling venues, including some that are specific to particular types of gambling venues.

v Remote gambling

Remote gambling is expressly prohibited by law. In addition to levying administrative fines on entities breaking this rule, Russian authorities block the relevant websites. Specifically, the Federal Tax Service may decide to block websites that violate gambling and lottery regulations. On the basis of such decisions, Russia’s key media authority, Roskomnadzor, includes the sites in the ‘prohibited websites register’. Upon receiving notice from Roskomnadzor, the owner of the website or the hosting provider has three days to remove the content that caused the site to be included in the register or restrict access to the site. Otherwise, upon expiration of such deadline Roskomnadzor updates the register with information on specific web page addresses of ‘prohibited websites’ (the register updates daily at 9am and 9pm). Within 24 hours from such update all Russian internet service providers must block the websites.

12 Gambling Law, Article 5.
Websites need not directly offer gambling opportunities to be included in the register; rather, any page that ‘provides information’ breaching gambling laws may be blocked. In practice, this may include advertising and news sites, among others. One of the best known examples occurred on 14 July 2016, when the websites of the payment systems Qiwi and Skrill were included in the prohibited websites register for containing references to remote gambling and describing and implementing electronic payment capabilities in favour of remote gambling operators. The sites quickly deleted the prohibited comment and were removed from the prohibited websites register.

Online totalisator betting and virtual bookmaking shops are permissible provided operators have the required licence. Online bets are in this case recorded and transferred by a special credit institution – a ‘centre for recording transfers of online bets with bookmaking shops and totalisators’. As the Gambling Law was initially written with offline gambling in mind, as at the time of writing this chapter there is no way to lawfully conduct exclusively online gambling business in Russia. Several recent changes have been introduced to the Gambling Law to support activities of online totalisators and bookmakers; however, regulations still require having at least one offline betting counter.

As noted in subsection iii, above, lotteries may operate online, with the use of ‘electronic lottery tickets’.

vi Ancillary matters
Gambling operators must maintain their licences and permits, and to that end must satisfy a variety of requirements such as possessing certain equipment, having rights to appropriately located and outfitted venues, and demonstrating satisfactory financial capabilities. However, their suppliers, counterparties and employees are not currently obligated to acquire a personal licence or permit solely in connection with their participation in the gambling industry. Quality certifications and similar selective requirements as to specific equipment or specific professions may apply, however.

Certain persons, in particular those with outstanding convictions for premeditated crimes of medium gravity, or grave or especially grave crimes (being categories of severity under Russian criminal law) or for economic crimes cannot be shareholders of gambling operators.

III THE LICENSING PROCESS
i Application and renewal
The Gambling Law and ancillary laws and regulations impose a variety of licensing requirements on gambling operators. The list of such requirements for operators seeking a totalisator or bookmaking shop licence includes:

- having processing centres and betting locations meeting legal requirements;
- having rights to venues located and outfitted in accordance with legal requirements;
- having the minimum required net assets (1 billion roubles) and charter capital (100 million roubles), paid up in own (i.e., not loaned) cash funds;
- employing necessary staff, including security staff (or a third-party security company);
- having a standing bank guarantee covering the bookmaking shop’s obligations for at least five years (this requirement does not apply to totalisators); and
Totalisator and bookmaking shop licences are granted by the Federal Tax Service. Along with the application, a prospective operator must submit information on its employees; a calculation of its net assets and information on its charter capital with the required evidence of sources of funding; copies of documents demonstrating that it owns the necessary equipment; and the plans of venues meeting the legal requirements. The formal period for consideration of a licence application is 45 business days, but an applicant should budget additional time for the Federal Tax Service to request additional documents and make other queries, with the expectation that the process may be drawn out because of bureaucracy. In practice, obtaining a licence can take several months from the moment of application.

The initial licence fee is 30,000 roubles, while licence reissuance (e.g., because of change of address of the gambling venue) or issuance of a duplicate costs 10,000 roubles. Licences do not have an expiry date. The operator must become a member of the relevant self-regulating organisation (of totalisator or bookmaking shop operators) within 30 days after acquiring the licence.

Obtaining a permit to organise gambling in gambling zones is governed by acts of the region where the gambling zone is located. The procedures are more or less similar from one region to another as well as to the procedure described above for obtaining a totalisator or bookmaking shop licence. The operator applies to the relevant gambling zone authority and provides documents evidencing that it meets the applicable requirements. There are some differences between the requirements for a gambling operator as opposed to a totalisator or bookmaking shop operator, most notably, perhaps, being that for gambling operators there is no minimum required charter capital threshold and the minimum required net asset value is 600 million roubles instead of 1 billion roubles.

The gambling zone authority is supposed to decide whether to issue a permit within 30 days, although here too delays because of requests for additional documents and bureaucracy may be expected. No fee is payable for issuing a permit. Permits do not have an expiry date but may be voided if, inter alia, a recipient does not begin operating within three years after receiving the permit. 15 Obviously, a permit will no longer be valid if the gambling zone itself is closed.

Lotteries, as aforementioned, are exclusively state-organised. At the decision of the government, the relevant ministry will start a tender to engage a private entity as the lottery operator. Essential requirements for such entities are set out in the Lotteries Law.

ii Sanctions for non-compliance

Russian law contemplates various sanctions for breach of gambling and lottery regulations, including in particular as follows.

Organising gambling outside of a gambling zone, including remote gambling, may incur an administrative fine of 700,000 to 1 million roubles for companies, as well as entail confiscation of gambling equipment. For the same transgression, individuals may face criminal penalties in the form of a fine of 500,000 to 1.5 million roubles or the equivalent

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14 Government Resolution on licensing of gambling activities of bookmaking shops and totalisators (No. 1130 dated 26 December 2011).
15 Gambling Law, Article 13(5).

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of their aggregate salary for three to five years; mandatory labour for a period of 180 to 240 hours; various limitations of freedom of movement and travel for up to four years; and incarceration for up to six years, depending on the gravity of the crime.16

Organising totalisator betting or a bookmaking shop without a relevant licence may incur an administrative fine of 2,000 to 4,000 roubles for individuals, 30,000 to 50,000 roubles for officers, and 500,000 to 1 million roubles for companies, as well as entail confiscation of gambling equipment.

Violations of gambling regulations by gambling operators may result in fines of 300,000 to 1 million roubles or, in the most severe cases, cessation of all business activity for up to 90 days.

Organising a lottery other than in accordance with a decision of the government may incur fines of up to 350,000 roubles for companies, and in lesser amounts for officers and individuals, together with confiscation of lottery equipment.

Violation of lottery regulations may lead to fines between 40,000 roubles and 250,000 roubles.17

There is no personal liability for gamblers who participate in illegally organised gambling, although draft laws to address this are proposed from time to time. Internet service providers that fail to block gambling-related websites on the prohibited websites register and advertisers that violate gambling advertisement regulations may also face penalties.

IV WROGDOI NG

Gambling operators (including totalisator and bookmaking shops and lottery operators) are, alongside banks, insurance companies and others, considered ‘entities dealing in cash funds and property’ within the meaning of the Russian AML Law.18 Therefore they must undertake certain AML procedures, including mandatory review of payouts of more than 600,000 roubles in value and the filing of reports with the Russian AML watchdog, Rosfinmonitoring.

Totalisator and bookmaking shops are required by the Gambling Law to undertake additional reporting and other countermeasures to minimise the risk of sports events being fixed.19

V TAXATION

i Corporate taxation

For tax purposes, gambling business is defined as ‘entrepreneurial activities involving the organisation and conduct of games of chance through which organisations receive income in the form of winnings or charges (or both) for the conduct of games of chance’.20 Income and expenses relating to gambling activities are disregarded for the purposes of calculation of the

16 Criminal Code, Article 171.2.
19 Gambling Law, Article 6.1.
20 Article 364 of the Tax Code.
corporate income tax base. Furthermore, services involving the organisation and conduct of games of chance are exempt from Russian VAT, with no right to recover (or deduct) input VAT.

Instead, companies involved in the gambling business are subject to a gambling tax. As this is a regional tax, the rates of gambling tax are established by the laws of the constituent entities of Russia, but must be within the following ranges:\(^{21}\)

<table>
<thead>
<tr>
<th>Taxable item</th>
<th>Tax rate per item (roubles)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gaming table</td>
<td>50,000–250,000</td>
</tr>
<tr>
<td>Gaming machine</td>
<td>3,000–15,000</td>
</tr>
<tr>
<td>Totalisator processing centre</td>
<td>50,000–250,000</td>
</tr>
<tr>
<td>Bookmaking shop processing centre</td>
<td>50,000–250,000</td>
</tr>
<tr>
<td>Totalisator shop processing centre for interactive bets</td>
<td>2.5 million–3 million</td>
</tr>
<tr>
<td>Bookmaking shop processing centre for interactive bets</td>
<td>2.5 million–3 million</td>
</tr>
<tr>
<td>Totalisator counter</td>
<td>10,000–14,000</td>
</tr>
<tr>
<td>Bookmaking shop betting counter</td>
<td>10,000–14,000</td>
</tr>
</tbody>
</table>

For example, authorities in Moscow (where many bookmaking and totalisator shops are located) have recently increased gambling tax rates to the maximum level and introduced tax rates on processing centres for interactive bets in the maximum amount of 3 million roubles.

If there is no law on gambling tax rates in a particular region of Russia, minimum tax rates still apply. Gambling tax is calculated and paid to the local tax authorities on a monthly basis.

Lottery operators do not pay gambling tax. Their activities are subject to 20 per cent corporate income tax, where the tax base is the sales proceeds from the distribution of lottery tickets less obligatory payments (to the lottery organiser and winners) and overhead expenses. These activities are also VAT-exempt.

This special taxation regime applies to companies conducting their gambling business in Russia within the local regulatory framework. The situation with offshore gambling providers is more complicated.

On the one hand, the Ministry of Finance has opined that since online gambling activities are prohibited by law, the income derived from such activities is not subject to taxation in Russia. However, this opinion was expressed in a letter that is not, in practice, binding on the Federal Tax Service. The risk cannot be excluded that bets paid by Russian gamblers for remote gambling, or a tax base calculated in some other way, might be subject to 15.25 per cent Russian VAT in the light of Russia’s ‘Google Tax Law’,\(^{22}\) which establishes a new VAT regime for e-services to Russian customers. This law entered into force in 2017, and it is unclear whether the tax authorities will attempt to apply it to gambling providers. Generally, given that there is no precedent for applying these new legislative provisions to gambling operators, it is hard for the time being to assess the likelihood of this risk materialising. At any rate, the likelihood of practical enforcement of this tax against offshore providers remains questionable, especially in the view of the latest amendments to the Tax Code, which exclude most Russian payment operators and communication network operators from the list of tax agents.\(^{23}\)

\(^{21}\) Article 369 of the Tax Code.

\(^{22}\) Federal Law on Amendments to Parts I and II of the Tax Code (No. 244-FZ dated 3 July 2016).

## Personal taxation

Gamblers who are Russian tax residents are required to pay 13 per cent personal income tax on their winnings, while the winnings of those who are not Russian tax residents are taxable at a rate of 30 per cent.

Starting from 2018, the procedure for tax base calculation varies depending on the amount of income; in other words, winnings may be (1) tax free, (2) subject to self-tax assessment and payment by the player, or (3) subject to withholding by the tax agents depending on the amount.

The amendments to the Tax Code also specifically provide that operators of bookmaking or totalisator shops acting as tax agents should assess tax on individual games of chance by subtracting the relevant bet from the winnings. Unfortunately, the amendments do not take into account the conflict between the existing rules, which by default link the moment of withholding personal income tax by tax agents to the moment of actual payment of income, and the nature of online gambling, where winning is not necessarily followed by a cash-out. Clarifications from authorities are expected.

## VI ADVERTISING AND MARKETING

Advertising of gambling is legal only for operators holding the relevant licence or permit.

A range of restrictions apply to advertising of gambling. Such advertising cannot, for example:

- be addressed to minors;
- use images of humans or animals (except for advertising within a gambling zone);
- create an impression of gambling being a source of income; or
- create an impression of guaranteed winning.

Gambling advertising is permitted only if it occurs on TV and radio between 10pm and 7am, within gambling venues, in specialised advertising print media or in gambling zone print media. Bookmaking activities can also be advertised during sports broadcasts, provided that it constitutes no more than 20 per cent of all advertising during the broadcast, and in some other sports-related cases.

Breach of advertising laws can give rise to administrative sanctions in the form of an administrative fine of 100,000 to 500,000 roubles for companies and lesser fines for individuals and officers.

## VII THE YEAR IN REVIEW

A few laws adopted in the past year carry a significant impact for the gambling industry. For example, Federal Law No. 358-FZ dated 27 November 2017 amended the existing gambling regulations to:

- introduce certain concepts relevant for online bookmaking and totalisators; and

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24 Ibid.
25 Article 214.7 of the Tax Code.
26 Advertising Law, Article 27.
27 Code of Administrative Offences, Article 14.3.
b  prohibit facilitation of transfers between individuals and illegal gambling operators (included in the relevant register) by credit institutions and payment agents.

The adoption of laws that will increase the tax burden on bookmaking companies also took place in 2017. Federal Law No. 354-FZ dated 27 November 2017 raised potential ranges for gambling tax, as well as adding a new tax, targeting operators of online bookmaking and totalisators, which now have to pay 2.5 million to 3 million roubles per processing centre. New tax agent rules for gambling operators have come into force, and are particularly hard to apply for online operators.

VIII OUTLOOK

A variety of bills prepared by the Ministry of Finance may affect Russian gambling regulations. Among those, perhaps the most notable is a draft bill that will allow bookmakers and totalisators to delegate the responsibility for AML identification of the players. Currently, based on a formalistic reading of the law supported by recent legal practice, bookmakers and totalisators need to identify players in their offices before accepting any bets. Complying with this requirement is extremely unrealistic for most bookmakers and especially those focused on online business.

In October 2017, the Russian government signed a plan for complying with the Convention on the Manipulation of Sports Competitions. As such, stricter regulations are expected with regard to betting on sports competitions, including regulations on reporting unusual and suspicious bets and a prohibition on betting on youth competitions. Such regulations are currently in development or under consideration by the legislature.

Generally, Russian legislature is quite prolific, and while many proposed bills are either rejected or ignored, investors would be wise to monitor developments closely.
I OVERVIEW

i Definitions
The generally accepted legal definitions of gambling concepts in Spain are set out in Law 13/2011 on gambling, as amended (the Gambling Act), which is the primary piece of legislation governing the state-wide gambling sector in Spain.

Gambling is defined as any activity in which money or economically valuable goods are at stake over future and uncertain results that to some degree depend on chance and that allow the sums to be transferred between the participants, regardless of whether the level of skill of the players is decisive in the results or they depend wholly or fundamentally on luck, stakes or chance. The results must be ‘future’ (thus excluding past facts) and no minimum degree of chance is required (as a result, to the extent that there exists any chance, an activity is considered gambling even if there is a significant skill component).

As regards the main actors of the gambling market, ‘operators’ and ‘participants’, are defined as follows.

Operators
‘Operators’ may be legal or natural persons, as the case may be, of Spanish nationality or of a nationality of any European Economic Area (EEA) Member State with a permanent representative in Spain. However, only limited liability companies are allowed to participate in the public tender for the awarding of general licences for the operation of non-occasional games. The corporate purpose of such entities is limited to the organisation, marketing and operation of games.

The Gambling Act limits the possibility of providing occasional and non-occasional gambling activities to legal and natural persons who fall within the prohibitions set forth in the Gambling Act or the laws of the autonomous communities governing these matters. The Gambling Act imposes obligations on gambling operators to deposit bank bonds or another type of security in order to guarantee compliance with the obligations established in the Gambling Act. In order to protect consumers and guarantee responsible gambling, operators are not allowed to grant loans or any other credit or financial assistance to participants in gambling activities.
**Participants**

The Gambling Act does not define the concept of a 'participant', but nevertheless identifies the rights and obligations of participants in gambling activities. The Gambling Act confirms that the relationship between gambling operators and participants is subject to private law; therefore, any dispute between operators and participants must be resolved through civil courts, notwithstanding the regulator's sanctioning powers and arbitration functions.

The Gambling Act defines four specific types of game (lotteries, betting, raffles and contests) and one general category ('other games') that serves as a catch-all for activities that fall under the general definition of gambling but not under any of the four specific games definitions.

**Betting**

Betting is a gambling activity in which money is at stake over results of a previously determined event with an outcome that is uncertain and alien to the betters. The following types of betting are regulated and permitted in Spain:

a. 'pool betting' or 'mutual betting', where a percentage of the bets placed is distributed among the winners;

b. 'fixed-odds betting', where the better bets against the gambling operator and the prize is the result of multiplying the amount bet for the odds previously fixed by the operator; and

c. 'exchange betting', where the operator acts as a broker and guarantor ensuring that the bets placed between betters are duly performed, and subtracts the fee previously set by the operator for its services.

**Contests**

Contests are games, the offer, development and resolution of which are carried out via telecommunications media (e.g., television, radio, internet). In this type of game, the right to win the prize requires any form of payment by the participant, which may consist of telephone calls, sending text messages or any other electronic procedure. If there is no payment by the participant, the activity is not regarded as a contest. The fact that a skill component is involved in addition to chance is irrelevant; the activity would still be considered a contest.

**Lotteries**

Lotteries are a gambling activity in which prizes are awarded in cases in which the number or combination of numbers or signs stated on a ticket, coupon or electronic equivalent coincides in whole or in part with that produced by way of a draw or event held on a previously determined date or, in the case of instant or pre-sorted lotteries, at a prior time.

**Raffles**

Raffles are games consisting of the award of a prize upon holding a draw or selection by choice between the acquirers of tickets, coupons or electronic equivalents, the acquisition of which is made upon payment of a price. The prize cannot consist of money.
Other games

Other games are defined as any games that do not fall under the definitions of lottery, betting, raffles or contests, such as poker or roulette, where there is a chance component and money or goods are at stake.

Spanish law does not recognise the concept of ‘skill games’. If games involve any degree of chance, they are deemed ‘contests’ or ‘other games’, as explained above, and their operation would require an administrative licence.

Although there is no express legal definition or reference made in connection with fantasy leagues, they are considered as contests and fantasy operators require an administrative licence to offer fantasy league services in Spain.

Additionally, free prize draws in Spain are categorised as ‘random combinations with advertising or promotional aims’ and defined as raffles aimed exclusively at advertising or promoting a product or service for which participation there is no payment whatsoever by the participant, other than the price that, as the case may be, the participant paid for the acquisition of the promoted product or service. No licence is required for performing these activities, although gambling tax is levied as explained in Section V, below.

The Gambling Act does not expressly exclude speculative and hedging financial products from its scope. However, the offering of these products is generally subject to licences from other regulatory authorities in Spain and there have been no public or significant cases or controversies as to whether the provision of these financial products could be construed as gambling.

ii Gambling policy

At a national level in Spain, any sort of game within the scope of the Gambling Act that is not specifically regulated by the Ministry of Finance and Taxation is prohibited. The fact that a game is defined under the Gambling Act is not sufficient for it to be considered permitted, and specific regulations are required for each particular game by the Ministry of Finance and Taxation. In addition to these regulations, each operator must obtain a 10-year general licence for the general category of game (betting, contests or other games) and one- to four-year special licences for the operation of a specific game, as detailed below.

At a regional level, the policy is similar. Each of Spain’s 17 autonomous communities is free to set its gambling policy. The general default rule is that gambling is forbidden unless previously authorised by the regional government of the specific autonomous community.

iii State control and private enterprise

Until 2010, state-wide gambling was reserved to state-owned operators. Other locally-based games, for which participation physical presence was required (e.g., casinos, bingo, slot machines) could be carried out by privately licensed operators pursuant to the regulations of autonomous communities. Lottery activities were reserved to the state-owned operator Loterías y Apuestas del Estado (LAE), which held a monopoly on state-wide sports and horse betting, and to the National Organisation of the Blind in Spain (ONCE), a Spanish foundation aimed at supporting people with serious visual impairment that operated its own lottery. LAE acted as an operator and regulator. Nonetheless, de facto unlicensed online operators abroad offered games to people participating in Spain.

A comprehensive reform was carried out in 2010 and 2011. Considering the Court of Justice of the European Union’s (CJEU) case law on market transparency and establishing that the entity regulating the market cannot be the entity operating games, state-owned operators
were required to surrender those functions, which were then entrusted to the Directorate General for Gambling Regulation (DGOJ). Following the approval of Royal Decree-Law 13/2010, Spain’s regulatory framework now separates those activities. Private operation of games other than lotteries was authorised upon implementation and development of the Gambling Act.

With respect to non-occasional lottery games, however, the Gambling Act maintained the statu quo ante. LAE and ONCE are designated as the entities exclusively authorised to operate such games on a national basis in Spain. The Gambling Act justifies the maintenance of this reserved market for LAE and ONCE on the basis of the significant amount of business generated by lottery games and because lottery tickets are instruments payable to the bearer and, therefore, carry the risk that they may be used for money laundering purposes. Because of these circumstances, operators acting in the reserved lottery market are subject to state control. The reserved framework under the Gambling Act for LAE and ONCE addresses the need to subject the games to strict state control to secure the state’s interest in preventing fraud, crime and incitement to squander money on gambling and to avoid the negative effect that gambling may have on Spanish consumers.

With respect to other games, a wide range of private companies entered the market. There are currently over 50 licensed gambling operators state-wide in Spain.

iv Territorial issues

The Spanish Constitution does not list gambling among the matters over which the state has exclusive authority. As a result, pursuant to constitutional rules, the autonomous communities may assume exclusive responsibility in regulating gambling, as most of them have. The scope of this responsibility is limited to the territory of the corresponding autonomous community.

In light of this vertical distribution of authority, autonomous communities have issued regulations for the provision of gambling services at the regional level and, under this authority, casinos and other physical gambling sites in general are operated. The autonomous communities also have the power to regulate gambling activities, including lotteries (except for charitable sports betting games) within the scope of their respective territories, insofar as they do not infringe on the powers reserved to the state.

With regard to state-wide gambling, prior to 2011 only lotteries and sports, including horse race betting games, were regulated and reserved to certain specific operators in a closed market (see Section I.iii, above). As of 2011, the applicable legislation, including with respect to online gambling, is the Gambling Act.

v Offshore gambling

Prior to the 2011 reform implemented by the Gambling Act, offshore gambling (i.e., gambling services offered to Spanish customers from operators located in foreign countries) was considered a crime. This was deemed to be conduct amounting to smuggling. However, the ability of the Spanish authorities to prosecute those operators was limited and not enforced in practice.

The situation changed dramatically following the ratification of the Gambling Act. Any private gambling operator could apply for licences to offer gambling services legally in Spain and the Spanish authorities took action to ensure that gambling services could not be offered by unlicensed offshore operators. Likewise, unauthorised offshore operators may not advertise, sponsor or promote, in any way, games of luck or chance, or advertise or promote gambling operators, if they lack the necessary authorisation for advertising actions.
The powers of the DGOJ, a body within the government, include the ability to prosecute unauthorised gambling. To prosecute illegal gambling, the DGOJ monitors the market from time to time and has created a blacklist of possible unauthorised operators based on in-house investigations, user reports and complaints received.

It is also important to note that, under the Gambling Act, licences and authorisations issued by foreign countries (including EU and EEA Member States) are not valid or recognised in Spain. Operators licenced in EEA Member States may apply for recognition of their licences in Spain through the issuance of a Spanish licence, but the original foreign licence is not the valid title *per se*. There are no restrictions on direct and indirect non-EU investments in gambling operators.

**II LEGAL AND REGULATORY FRAMEWORK**

**i Legislation and jurisprudence**

As mentioned in Section I.i, above, the Gambling Act is the primary piece of legislation governing Spain’s state-wide gambling sector.

Among other aspects, the Gambling Act establishes:

- the legal definition for specific games;
- the games that are forbidden;
- the persons who are not entitled to participate in games governed by the Act;
- rules on the advertisement, sponsorship and promotion of gambling activities;
- rules on consumer protection and responsible policies on gambling;
- the licensing framework for state-wide gambling activities conducted through means of electronic communications (including online games) other than lotteries;
- the authorisation framework for lotteries;
- monitoring measures applicable to operators and participants;
- standardisation of gambling technical systems;
- a sanctioning framework;
- a tax framework; and
- the entities in the reserved market that are authorised to operate national non-occasional lottery games in Spain and the corresponding framework.

The Gambling Act was developed and implemented through the following regulations:

- Royal Decree 1613/2011 of 14 November, which develops the Gambling Act with regard to the technical requirements of gambling activities;
- Royal Decree 1614/2011 of 14 November, which develops the Gambling Act with respect to licences, authorisations and gambling registers; and
- Order EHA 2528/2011 of 20 September sets out the requirements and procedures for appointing independent entities in charge of certifying gambling software and gambling operator security assessments.

The regulations of each of the authorised games in Spain have been issued through 14 ministerial orders.²

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² Order HAP/1370/2014 of 25 July, establishing the basic regulations on slot machines; Order EHA 3085/2011 of 8 November, approving the basic regulations on roulette; Order EHA 3086/2011 of 8 November, approving the basic regulations on baccarat; Order EHA 3087/2011 of 8 November, approving...
Each of the 17 autonomous communities has ratified gambling legislation setting out the requirements to operate games (e.g., casinos, bingo locales, betting houses).

There is no significant case law on gambling matters in Spain other than the judgments issued by the CJEU, none of which refers to specific Spanish operators or matters.

ii The regulator

The Gambling Act provided for the creation of a new regulatory body in Spain, the National Gambling Commission (CNJ). However, at the time of writing, nearly seven years after the enactment of the Gambling Act, the CNJ has yet to be formally set up and there are no expectations that this will happen in the short or medium term. Until the CNJ is formally set up, the DGOJ will hold the corresponding powers.

The DGOJ will, therefore, supervise the correct functioning of the gambling sector and safeguard the effective availability and provision of competitive gambling services for the benefit of users.

The powers of the DGOJ include, among others, the ability to:

- grant gambling licences;
- run the registries created by the Gambling Act;
- resolve claims filed by participants against gambling operators;
- prosecute unauthorised gambling;
- arbitrate disputes among gambling operators at the request of the parties;
- implement basic gambling regulations;
- establish technical and functioning requirements for the games;
- monitor, inspect and sanction, as the case may be, gambling activities, especially those related to games exclusively assigned to LAE and ONCE under the Gambling Act, without prejudice to the faculties of the relevant Spanish antitrust authorities;
- approve regulations in the terms developing the Gambling Act;
- safeguard compliance with money laundering, and terrorism financing legislation; and
- manage and collect gambling tax.

Finally, the autonomous communities have their own gambling authorities, regulating, supervising and controlling gambling activities within their respective territories.

iii Remote and land-based gambling

Spanish law distinguishes remote and land-based gambling. The state has the authority to regulate the former while, as a general rule, autonomous communities regulate the latter.

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the basic regulations on bingo; Order EHA 3088/2011 of 8 November, approving the basic regulations on blackjack; Order EHA 3089/2011 of 8 November, approving the basic regulations on poker; Order EHA 3090/2011 of 8 November, approving the basic regulations on complementary games; Order HAP/1369/2014 of 25 July, approving the basic regulations on betting exchanges and amending several orders; Order EHA 3079/2011 of 8 November approving the basic regulations on fixed-odds betting; Order EHA 3080/2011 of 8 November, approving the basic regulations on fixed-odds sports betting; Order EHA 3081/2011 of 8 November, approving the basic regulations on sports pools betting; Order EHA 3082/2011 of 8 November, approving the basic regulations on fixed-odds horse betting; Order EHA 3083/2011 of 8 November, approving the basic regulations on horse pool betting; and Order EHA 3084/2011 of 8 November, approving the basic regulations on contests.
As a result, the requirements to operate remote games are identical across Spain while the requirements to set up land-based gambling premises vary in each autonomous community, including the requirements to install machines for the general public to participate in online games.

iv Land-based gambling

In terms of revenue, in 2016 (the most recent data available) land-based gambling represented over 93 per cent of the gambling sector in Spain.3 There are 53 casinos, 309 bingo venues and over 199,000 installed slot machines, which need not be installed in gambling venues and can be placed in bars, pubs and other venues not specialising in gambling activities.

The number of casinos is generally limited by each autonomous community, although a plurality of casinos is located in several autonomous communities (e.g., Madrid). Since 2012, several proposals have been discussed to build a major gambling resort in Madrid known as ‘Eurovegas’. The execution of the project requires several amendments in the applicable law and, to date, none of the potential operators have reached an agreement with the public authorities to build the gambling resort.

Betting shops are authorised in all 17 autonomous communities, subject to the granting of the corresponding licences.

Although lottery tickets can be acquired online (both from LAE and ONCE), they are mainly sold at physical points of sale throughout Spain. LAE and ONCE are responsible for setting up their sales network. LAE has over 10,500 points of sale4 (including dedicated points of sale, businesses that are exclusively devoted to selling LAE games; and mixed points of sale, businesses that carry out other businesses and the selling of LAE games is ancillary to their main purpose, e.g., bars, bookstores, tobacco shops). ONCE has over 19,800 points of sale and itinerant sellers.5

Amusement arcades are not considered as gambling or gambling machines from a legal standpoint, as the player has no expectation of winning any prize if successful in the game.

v Remote gambling

The operation of remote gambling activities other than nationwide non-occasional lottery games is subject to the granting of licences pursuant to the Gambling Act. The Gambling Act distinguishes between two types of licences:

a general licences – any operator interested in the provision of non-occasional games must obtain a general licence for the relevant general category of game identified by the Gambling Act it intends to offer: bets, contests, or other games; and

b specific licences – the exploitation of each of the specific games within the scope of a general licence is subject to the granting of a specific licence. The granting of the specific licence and its renewal is subject to the conditions and requirements to be determined by the DGOJ for each regulated game.

3 www.ordenacionjuego.es/cmis/browser?id=workspace://SpacesStore/7d632c77-91ae-47a7-bd74-235922780c84.
General and specific licences may not be transferred or assigned to third parties except in the event of merger, spin-off or contribution of assets in the context of a group restructuring, provided that prior authorisation from the DGOJ is obtained.

The installation of equipment and the opening of premises to the public for the operation of games (where the physical presence of players is required, although ancillary to the game) is subject to prior administrative authorisation by the autonomous communities, where applicable, in addition to the general and specific gambling licences.

A gambling licence granted in another jurisdiction will not be valid in Spain, but documentation filed by an operator authorised in an EEA Member State can be validated by the DGOJ in order for the potential operator to be granted the corresponding licence in Spain.

vi Ancillary matters

Gambling operators must have the approved software, equipment, systems, terminals and tools generally required to carry out their activity. Gambling regulations set out the technical requirements for operators’ systems. The DGOJ monitors compliance with technical requirements at different stages:

a Before obtaining the licence, the technical projects and preliminary certification reports are reviewed. In that regard, operators must provide their technical project along with a preliminary certification report of compliance with the technical requirements. If a general licence is requested, an internal monitoring system certification report must also be provided.

b Final approval is awarded within six months of obtaining the licence. General licences are subject to final approval, while single licences remain valid until final approval is obtained.

c Any changes made to the approved system must be reviewed.

d Technical systems must be audited every two years.

e Operators must send a quarterly report to the DGOJ describing the changes made in the period and providing an updated description of the technical system.

f According to proportionality criteria, any substantial changes affecting critical components require the DGOJ’s prior authorisation.

g In the case of special emergencies affecting a system’s security, operators may make substantial changes to critical components and obtain permission afterwards.

On another score, under Spanish gambling regulations, individuals linked to operators must be registered with a special registry run by the DGOJ that records data corresponding to shareholders, directors and employees directly involved in the development of the games, spouses or people with whom gambling operators live, and first-degree ancestors and descendants.

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6 Royal Decree 1613/2011 of 14 November, developing the Gambling Act with regard to the technical requirements of gambling activities, and Order EHA 2528/2011 of 20 September, setting out the requirements and procedures for appointing independent entities in charge of certifying gambling software and gambling operator security assessments.
III  THE LICENSING PROCESS

i  Application and renewal

The DGOJ is authorised to award general licences by calling a public tender according to
the principles of publicity, concurrence, transparency, non-discrimination, objectivity and
equality. The process intended to award general licences through a public tender may be
initiated by the DGOJ directly or in response to a third-party request. Once a public tender
is called for the granting of general licences for a given category of game, no further public
tenders may be called until 18 months have lapsed from the previous tender for the same
category of game.

The third ‘application window’ for general licences is currently opened and will expire
in December 2018.

The terms of the tender cannot limit the number of licences to be awarded unless the
DGOJ concludes, prior to carrying out the corresponding procedure, that it is necessary to
limit the game that is subject of the tender and limit the number of operators entitled to
provide it. This limitation may be only based on reasons of public interest, protection of
youths or the prevention of gambling addiction.

The final resolution awarding a general licence will establish, among other things, the
following aspects of the licence:

a  nature and types of gambling activities to be undertaken within the scope of the general
licence;
b  events that will be taken into account for gambling purposes;
c  authorisation to carry out advertising, sponsorship or promotion activities;
d  mechanisms to prevent fraud, money laundering and terrorism financing;
e  territorial scope of the gambling activity;
f  prize conditions and amount, which may not exceed the percentage established in the
terms and conditions governing the public bidding process; and
g  term, renewal and causes of termination.

In addition, the resolution will establish the obligation to host a specific website with the ‘.es’
country code top-level domain, and to redirect to that website all connections from within
Spanish territory or from Spanish user accounts to non-.es’ websites whose domain is owned
or controlled by the gambling operator, its parent company or its subsidiaries.

Holders of a general licence must provide a guarantee linked to the general licence to
secure compliance with the Gambling Act and its implementing regulations. The amount
of the guarantee is €2 million for betting or other games general licences and €500,000 for
general contest licences. The guarantee may consist of: (1) cash deposited in escrow with
the DGOJ; (2) a mortgage over real estate located in Spain; (3) guarantees issued by banks
licensed in Spain; or (4) a surety bond issued by an insurance company licensed in Spain.

General licences may be granted for a 10-year period with the possibility for renewal
for a subsequent 10-year period, except for cases in which the number of general licences
awarded was limited and certain circumstances set forth in the Gambling Act occur that
justify the need to call a new public tender after the initial term elapsed.

Operators holding a general licence are entitled to apply for specific licences. Prior
regulation of the relevant specific game is mandatory in order to apply for the corresponding
specific licence. Any gambling activity carried out without holding the appropriate licence is
forbidden. This was the case with exchange betting until 2014: the game was defined under

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the Gambling Act; however, unlike other specific games, it was unregulated and, therefore, exchange betting was not allowed. To date, two operators hold a specific licence for exchange betting.7

Specific licences are granted for a term of between one and five years, with the possibility of renewal for subsequent terms of the same period. The regulations governing each type of game establish the term of the corresponding specific licences and the conditions for renewal.

Guarantees linked to specific licences to secure compliance with the Gambling Act and its implementing regulations are also required. The form of the guarantee may consist of any of the alternatives set out for the general licences’ guarantees. The amount depends on the specific game for which the specific licence is granted.8

General and specific licences may be terminated upon occurrence of any of the following circumstances:

- written waiver;
- expiration of term;
- a resolution by the DGOJ evidencing the existence of any of the following circumstances: loss of all or any of the conditions that justified the granting of the licence; incapacity of the licence holder (owing to death or sudden legal incapacity in connection with natural persons, or winding-up in the event of legal persons, cessation of activities or failure to carry out the activity underlying the purpose of the licence for at least one year); declaration of insolvency; failure to comply with specific conditions set forth in the relevant licence document; assignment or transfer of the licence through merger, split-up or contribution of assets without prior authorisation; or if the licence was obtained by using false statements or altering the conditions that justified its awarding; and
- sanction for very serious violations of the Gambling Act.

Termination of a general licence will result in the termination of the specific licences tied to the general licence.

ii Sanctions for non-compliance

The Gambling Act establishes a sanctioning framework that designates minor, serious and very serious violations of the Gambling Act, as set out below:

- very serious violations include the organised performance or advertisement of gambling activities without the required licences; the unauthorised assignment of licences; repeated default in the payment of prizes without justification; the alteration of previously certified technical systems; and the breach of the obligation to redirect gambling from Spanish participants to a ‘.es’ site;

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7 Betfair International, PLC and Plataforma de Apuestas Cruzadas, SA.
8 Pool sports betting: 1.5 per cent of the gross income; pool horse betting: 1.5 per cent of the gross income; fixed-odds sports betting: 6.5 per cent of net income; fixed-odds horse betting: 7.5 per cent of net income; other fixed-odds betting: 6.5 per cent of net income; exchange betting: 7.5 per cent of net income; bingo: 6.5 per cent of net income; contests: 2 per cent of gross income; roulette: 8 per cent of net income; poker: 8 per cent of net income; blackjack: 8 per cent of net income; baccarat: 8 per cent of net income; slot machines: 8 per cent of net income; complementary games: 6.5 per cent of net income.
serious violations include non-compliance with the terms and conditions of the licences; allowing forbidden players to participate in games; financing participants; and using of uncertified systems; and

minor violations include lack of cooperation with inspectors or agents; failure to inform the public of the prohibition for minors and forbidden players to participate in games and any breach not defined as serious or very serious.

The sanctions for the different categories of violations are the following:

a for minor violations, a fine of up to €100,000 and a written warning;

b for serious violations, a fine ranging from €100,001 to €1 million and the temporary suspension of the activity for up to six months; and

c for very serious violations, a fine ranging from €1,000,001 to €50 million. The following sanctions may also be imposed: loss of general or specific licence (or both), a ban on providing gambling activities under the Gambling Act for up to a maximum four-year term or closure of means used to provide information society services supporting gambling activities. In addition to the above sanctions, in those cases in which the violating entity lacks the relevant licence, the sanctioning authority may also impose the seizure or destruction of any element related to the gambling activity illegally carried out.

The Gambling Act identifies who will be deemed the infringer: legal or natural persons breaching the provisions of the Gambling Act; or legal or natural persons supporting, advertising, promoting or benefiting from such breaches.

IV WRONGDOING

Money laundering, organised crime and match-fixing are dealt with by other law enforcement bodies. Money laundering and organised crime are monitored and prosecuted by SEPBLAC, Spain’s financial intelligence unit, and anti-money laundering and counterterrorist financing supervisory authority.

As far as operators are concerned, any entity responsible for the management, exploitation and marketing of lotteries and other games of chance is subject to Law 10/2010 on the prevention of money laundering and terrorism financing with respect to transactions related to the payment of prizes. Operators must comply with the due diligence measures, internal control measures and the reporting obligations set forth in Law 10/2010.

Since 2010, match-fixing is considered a criminal offence in the Spanish Criminal Code (as a type of business corruption) and is prosecuted by the police with the cooperation of leagues, federations and betting operators.

V TAXATION

The authorisation and organisations of games, raffles, contests, bets, games and other gambling activities provided on a national basis in Spain is subject to the gambling tax, which was created by the Gambling Act.
In general, the gambling tax is based on applying fixed tax rates ranging from 15 to 25 per cent, depending on the gambling activity, to the game’s gross revenue (in the case of mutual bets, raffles and contests) or the game’s net revenue (in the case of bets with consideration or other games).

The reserved non-occasional lottery games are not subject to the gambling tax.

In addition to the gambling tax, the Gambling Act also establishes a gambling duty, the aim of which, among other things, is to cover costs of regulatory activities over the gambling activities undertaken by gambling operators. As a general rule, the gambling duty is equal to 0.075 per cent of the gross revenue of the corresponding game and is payable annually on 31 December.

The following applies to other taxes:

a Personal income tax – winners of prizes from LAE, ONCE and other public entities are subject to special taxation rules pursuant to personal income tax regulations that establish a reduced tax rate and several exemptions (prior to 2013, all prizes derived from LAE games were fully tax-exempt), while winners of prizes from other gambling operators are subject to general taxation rules.

b Corporate tax – with regard to companies, operators are subject to the general framework established in corporate income tax regulations, as well as legal persons winning prizes in games, with the sole exception that losses incurred as a consequence of gambling are non-deductible.

c Indirect taxation – games subject to the gambling tax are exempt from value added tax in Spain. The exemption does not cover management or other ancillary services that may be provided by gambling operators, with the exception of bingo management services, which are also exempt.

VI ADVERTISING AND MARKETING

Any sort of advertising, sponsorship or promotional activities related to any of the gambling activities subject to the Gambling Act or to gambling operators is forbidden unless authorised in the corresponding general and specific licence documents. Should the gambling operator intend to undertake gambling activities through programmes broadcasted by any audiovisual means, whether published in the media or on websites, including those cases where the means to access the prize is the use of premium telephony services or SMS, the corresponding general and specific licences must cover and authorise these possibilities.

Any entity, publicity agency, electronic communication operator, audiovisual operator or information society service directly or indirectly broadcasting or publishing advertisements and promoting gambling activities or gambling operators is obliged to verify that the entity requesting the advertising and promotional activities holds the appropriate gambling licence, and that the licence allows the type of publicity or promotion requested. Otherwise, it must deny the request. The DGOJ, through its website, maintains an updated list of licensed operators. Should the DGOJ identify unauthorised publicity or promotion of gambling activities or gambling operators by any entity, publicity agency, electronic communication operator, audiovisual operator or information society service, it is entitled to instruct them to stop broadcasting or publishing the unauthorised advertisement, or promotion of gambling activities or gambling operators.

The Gambling Act referred to a future regulation to establish the conditions that may be included in the authorisation allowing the advertisement, sponsorship and promotion of
gambling activities that will be included in the general and specific licence documents. To date, this regulation has not been approved, although the DGOJ issued draft regulations in February 2018 and opened public information procedures in order for any interested party to provide allegations and assessments for drafting the regulations.

Additionally, Law 7/2010 on audiovisual communications, as amended, establishes that programmes intended to offer games of chance and betting can only be broadcast from 1am to 5am, except draws and other gambling products with a public purpose. Under these exceptions, draws of LAE and ONCE’s lottery games can be broadcast by Spanish television operators outside that time frame. Providers of the corresponding audiovisual communication services have secondary liability for fraud committed through such programmes.

Moreover, the provision by audiovisual communication operators of any type of promotion of gambling activities is subject to the general rules on promotion of economic activities under Law 7/2010.

VII THE YEAR IN REVIEW

No material changes were implemented on the general regulatory framework. The most significant regulatory innovation was the authorisation to offer prizes arising from amounts wagered by foreign participants (forming a common pool between Spain, France, Italy and Portugal) for online poker, implemented in December 2017.

No significant case law was handed down in 2017.

VIII OUTLOOK

The Spanish media is starting to focus on the harm that gambling activities may be causing in lower-income areas, where many gambling halls have been opened recently. There are also voices challenging the allegedly high volume of online gambling advertisements on Spanish TV and radio. As a result of these concerns, the draft regulations on advertisement restrict gambling advertising to certain hours of the day. These limitations are expected to essentially affect online gambling, as casinos, bingos and slot machine halls are not usually advertised or cannot be advertised on TV and radio in Spain. The main purpose of the draft regulations is to restrict the type of messages that may be sent to potential participants (responsible gambling) and the public to which the messages can be directed. In particular, advertising cannot be directed to minors and, for such purposes, TV fixed-odds sports betting advertising will be restricted to between 10pm and 6am, with certain exceptions with respect to sports events that are being broadcasted.

In addition, a public allegations process window is opened in order for any interested party to request changes to current online games regulations. Applicable regulations to ‘grey gaming/gambling areas’, such as online fantasy sports, are expected to be approved in 2018.
I OVERVIEW

i Definitions

Section 3 Paragraph 1 of the Swedish Lotteries Act (LA) provides a broad definition of lottery:

*an activity where one or several participants, with or without a stake, can obtain prizes of a higher value than each one of the other participants may obtain.*

Lotteries shall include:

- drawing of lots, guessing, betting and similar procedures;
- amusement at fairs and amusement parks; and
- 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.

All games and gambling where a winner is decided primarily by chance will fall within the scope of the LA. The element of chance is, however, not the sole criterion – the general nature of the activity must also be considered. Consequently, chance-based prize draws, sweepstakes and games as well as betting in various forms will all be considered lotteries under the LA. In addition, activities ‘without a stake’ may be considered a lottery, which may not be the case in other jurisdictions.

On the other hand, skill-based contests and games fall outside the scope of the LA, as long as there is no degree of chance in the activity.

In this context, the Swedish Supreme Court has found that certain games of Texas Hold’em during a poker tournament did not constitute a game of chance. The court established that a prominent Texas Hold’em player must have certain mathematical and strategic skills, and evidently skill is not an insignificant factor when the outcome of a game is determined.  

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1 Erik Ullberg and Christel Rockström are partners, and John Olsson is a senior associate, at Wistrand Advokatbyrå.
ii Gambling policy

The objective of the Swedish gambling policy is ‘to meet key public imperatives, such as combating criminality, countering the harmful social and economic effects of gambling addiction, and protecting consumers’.³

Accordingly, the Swedish gambling market is highly regulated. In principle, the only actors allowed on the market are non-profit non-governmental organisations, and state-owned or state-controlled companies. Thus, commercial actors are more or less barred from entering the market with only a few exceptions, chiefly that there must be a certain level of entertainment gambling (i.e., gambling with low-value bets and low-value prizes).

In addition to the prohibition of arranging gambling activities in Sweden without a permit, it is also prohibited to promote the participation in unlawfully arranged gambling activities or gambling activities arranged outside of Sweden.

Nonetheless, it should be mentioned that a large number of gambling companies are promoting participation in gambling arranged outside of Sweden through the internet (e.g., by means of their own websites, newspapers and other websites) directed at the Swedish market. Competition does, therefore, exist as a result of this.

The profit from lotteries and gambling arranged under a permit in Sweden must, in principle, be used for the public benefit. Surplus profits from lotteries and gambling are to finance undertakings of public utility.

The net turnover (after paid winnings) for the Swedish gambling market in 2017 amounted to approximately 22.6 billion kronor, of which 58 per cent was attributed to state-owned company Svenska Spel AB (Svenska Spel) and partially state-controlled AB Trav och Galopp (ATG).⁴ In 2017, the state’s profits from gambling activities amounted to 6.4 billion kronor; consequently, gambling is an extremely lucrative business for the Swedish state.⁵

As further explained in Section VIII below, the Swedish gambling regulation is set to be reformed by 1 January 2019, when a licensing system will most likely be introduced in parts of the gambling market.

iii State control and private enterprise

State-owned Svenska Spel and partially state-controlled ATG, which is owned by the horse racing industry, more or less enjoy a de facto monopoly of the Swedish gambling market operating under permits of the government.

Svenska Spel has the exclusive right to arrange sports betting and lotteries (with a few exceptions for local events) and to operate gaming machines and land based casinos, and ATG has the exclusive right to arrange betting on horse racing.

iv Territorial issues

Gambling is regulated nationally. No localities have any favoured status for gambling.

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v Offshore gambling

As mentioned in subsection i, above, a large number of gambling companies are promoting participation in gambling arranged outside of Sweden towards Swedish citizens. As the authorities do not have jurisdiction over the offshore gambling operators, they have instead focused on those in Sweden who carry advertisements for such companies. Every year, the offshore gambling companies invest around 2.3 billion kronor in advertisements in Sweden, a large part of which is invested in newspapers and TV. As a consequence, the authorities have issued a number of injunctions against media companies over the years. However, injunctions have also been aimed at billboard advertisers, sports teams and webpages with banners linking to foreign gambling companies.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The Swedish gambling market is mainly regulated by two acts: the LA and the Swedish Casino Act (SCA).

Additionally, the Swedish Marketing Practices Act (MPA), which has a general application covering 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 the scope of its parameters.

The LA is a prohibitory act regulating lotteries. It only applies to lotteries arranged for the general public.

The LA preparatory works state that a lottery is not considered arranged for the general public if the lottery in question is aimed at a small and closed group of people who also share a provable mutual relationship. Additionally, it is argued that the more people who participate in the lottery, the higher the requirement for a mutual relationship and closeness is required in order to avoid to be considered as general public.

Furthermore, a lottery is ‘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 regard its extent or the conditions for participation be equivalent to a lottery arranged for the general public’.

In order for the LA to apply on the arrangement of a lottery, it must be arranged within Sweden. Normally, a lottery is considered to have been ‘arranged’ as soon as it is marketed to the general public. The arranging of a lottery should be deemed to have taken place where the activities are organised and managed, and where the power over the activities is

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7 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).
8 Section 1, Paragraph 1 of the LA.
10 Schwalbe, Lotterilagen, p. 54.
11 Section 1, Paragraph 2 of the LA.
12 See, e.g., SOU 2006:11 p. 270.
exercised. This means that it could be argued that a lottery provided from abroad, with the opportunity to participate in Sweden, is not arranged in Sweden according to the LA. On the other hand, under such circumstances, the prohibition to promote participation in lotteries arranged outside of Sweden must also be considered.

ii The regulator

The Swedish Gambling Authority (the Authority) has overall responsibility for granting permits and supervising the Swedish gambling market (the government grants some permits). The Authority is charged with issuing permits for:

a lotteries that are distributed online;
b lotteries that are to be arranged in more than one county;
c gaming machines; and
d games of roulette, dice and card arranged pursuant to the LA.

The Authority is also charged with the centralised monitoring of compliance with the LA and the SCA, and the more detailed supervision of those lotteries that are arranged under a permit from the Authority or the government.

Furthermore, the Swedish Consumer Ombudsmen has the general responsibility of supervising all marketing activities and of protecting consumers’ interests, inter alia under the MPA.

iii Remote and land-based gambling

The Swedish legislation does not distinguish between remote gambling and bricks-and-mortar gambling in general. However, permits for arranging roulette, dice games and card games can be granted to for-profit entities in some premises, namely in restaurants and hotels that are licensed to sell alcohol, in amusement parks and on ships in international traffic. These ‘restaurant casinos’ are severely limited as to bets and potential winnings, and should only be used to complement the restaurant business.

Svenska Spel’s right to operate land-based casinos is regulated in the SCA. Svenska Spel has applied for, but has not yet been granted, the right to provide online casinos.

iv Land-based gambling

There are only four land-based casinos in Sweden, in Stockholm, Gothenburg, Malmö and Sundsvall. The casinos are established and operated by Svenska Spel’s wholly owned subsidiary Casino Cosmopol AB, under a permit granted by the Swedish government.

The restaurant casinos, operated by hotels and restaurants, consist of around 600 tables in 500 different locations.

Bingo halls are operated by public interest associations, under licences issued from the county administrative board.

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18 SFS 1994:1000, as amended.
Gambling machines can be found in both restaurants and bingo halls and are operated by Svenska Spel, who has a permit for a maximum of 7,000 gambling machines in restaurants and hotels, and 500 machines in bingo halls.

Lottery tickets are sold in a number of venues, from local sport events and fairs, to grocery stores and betting shops. Many grocery stores and betting shops also offer sports betting via Svenska Spel and betting on horse racing via ATG.

v Remote gambling
Permits for remote gambling can only be applied for by Svenska Spel, ATG and public interest associations.

Svenska Spel has been granted permits to arrange online betting and poker. In 2014, Svenska Spel also applied for a permit to arrange online casinos, however, no decision on the matter has been taken so far.

ATG has a permit to arrange online horse race betting.

vi Ancillary matters
No specific licence is needed for manufacturing equipment for the gambling industry.

III THE LICENSING PROCESS
i Application and renewal
The LA is based on the general principle that all arrangement of lotteries requires a permit, and all permits are to be supervised by the state of Sweden (Section 9 of the LA). A licence may only be granted if it can be presumed that the activity will be executed in a suitable manner, from the general public’s perspective.

Permits may, in principle, only be granted to a non-profit organisation that (1) has as its main purpose to promote an undertaking of public utility, (2) carries out its operations so as to achieve that purpose, (3) does not refuse anyone membership in the organisation unless there is a particular reason to do so, and (4) needs the income from lotteries to support its activities.

Permits are granted on a local, regional or state level, depending on the geographical scope of the lottery in question. On the local level it is generally the relevant municipal committee that grants licences, on the regional level it is usually the county administrative board and on the national level it is the Authority or the government that grants permits. The Authority has the central supervisory responsibility regarding the adherence to the LA and decisions based on the LA.

In addition to permits for certain non-profit organisations, as set out above, the government may grant special lottery permits in other cases. Svenska Spel and ATG operate under such permits.

21 In some situations, a permit is not needed, but this is only under specific circumstances and is very restricted (Section 19-21 of the LA).
22 Sw. Kommunstyrelsen.
23 Sw. Länsstyrelsen.
24 Section 45 of the LA.
The LA stipulates a minimum age of 18 years for the participation in gambling on horse races, gambling machines, roulette, games of dice or card games. The organiser of the activity has to ensure that no one under the minimum age can participate. Moreover, an organiser of a lottery is prohibited from granting credit for wagers in the lottery.

ii Sanctions for non-compliance
Arrangement of a lottery without a permit is a criminal offence subject to a fine, or imprisonment for a maximum of up to six months in severe cases.

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. However, following a Supreme Court ruling in 2012, this provision has been rendered practically unenforceable against lotteries arranged in other EU Member States. Since promotion of Swedish lotteries arranged without a permit is not criminalised in a corresponding manner, the provision constitutes discrimination contrary to EU law. This issue has, however, been covered in a Swedish government official report and is expected to be implemented in Swedish legislation in due course.

The Authority has the power to issue injunctions and prohibitions required to ensure compliance with the LA. Injunctions or prohibitions may be combined with fines.

IV WRONGDOING
The new Swedish Act on Measures against Money Laundering (AML), implemented in 2017, imposes obligations for most of the gambling sector to take risk-based measures to prevent gambling being used for money laundering or funding of terrorism, for example customers would have to be identified.

Participation in match-fixing is penalised under the Swedish Penal Code.

V TAXATION
Winnings from lotteries, which also includes poker games, are exempt from taxation if the lotteries are arranged within the EU. For lotteries arranged outside the EU, any winnings are taxed as income from capital, at a tax rate of 30 per cent.

Companies arranging lotteries in Sweden are subject to regular corporate income tax (at present, 22 per cent) and must also pay lottery tax. The lottery tax is 35 per cent of bets less paid winnings and is deductible for income tax purposes. Non-profit organisations and Svenska Spel AB are exempt from lottery tax. Restaurant casinos are also exempt from lottery tax, but must pay gambling tax based on the number of tables they run.

25 Section 35 of the LA.
26 Section 37 of the LA.
27 Section 54 of the LA.
28 Section 54 of the LA.
29 Judgment of the Supreme Court of 21 December 2012 in case No. B 3559-11 (NJA 2012 p. 1073). See also judgment of the Court of Justice of the European Union of 8 July 2010 in joint cases C-447/08 and C-448/08.
30 SOU 2015:30.
31 Chapter 10, Sections 5 (a) and (b) of the Swedish Penal Code.
Gambling is not subject to VAT. Winnings from skill-based contests or games are subject to regular income taxation.

VI ADVERTISING AND MARKETING

Generally, the LA prohibits the promotion of participation in lotteries organised without a permit or lotteries organised from abroad within Swedish territory in commercial operations, or otherwise for the purpose of profit. For the same purposes a person is also not allowed, without having the organiser’s consent, to sell lottery tickets or distribute profits in an allowed lottery.

According to the LA preparatory works, examples of promotion of the participation in a lottery include offering, selling or supplying lottery tickets or certificates for participation in a lottery, as well as collecting or mediating stakes or winnings. Moreover, the distribution of notices relating to the lottery in question (e.g., invitation or register of winners) may constitute a promotion of participation in a lottery under the LA.

It is not entirely clear how far the territorial scope of the LA reaches. As far as lotteries organised from abroad are concerned, the LA will likely not apply only based on the fact that Swedish subjects may participate in the lottery through a website or similar medium. An additional circumstance would have to be present in order to trigger Swedish jurisdiction. In this context a banner on a Swedish website linking to gambling activities provided by a foreign gambling company has been found to be a promotion of participation in a foreign lottery.

It is not uncommon for television channels, broadcasted from abroad under a foreign broadcasting licence, to promote gambling services. And as far as we are aware such promotions have not been challenged under the LA. However, the Authority ordered a Swedish television channel to cease broadcasting sponsorship messages and odds of a foreign gambling company (Unibet) in connection with a sporting event. The Authority’s decision was eventually overruled by the Supreme Administrative Court who found that the order regarding sponsorship messages was in conflict with, among other things, the purpose of the Fundamental Law on Freedom of Expression, and that the odds were to be considered as editorial content and not advertising. The marketing measures were thus allowed.

In another case, a subsidiary of Betsson AB (publ) (Betsson), which organised lotteries from abroad under a Maltese licence, acted in a provocative manner by establishing a betting shop in central Stockholm, which led to interventions from the Authority. The betting shop provided computers connected to the internet within the shop, whereby it was possible for customers to place various bets with the company. The Authority held that this setup was in breach of the LA and ordered Betsson to cease its activities subject to a conditional fine. The injunction was appealed by Betsson, who relied on EU law for their appeal, but it was finally upheld by the administrative courts.

32 Section 38 of the LA.
33 Ibid.
36 Judgment of the Supreme Administrative Court case No. 7800-07 (HFD 2011 ref. 46).
37 Judgment of the Stockholm Administrative Court of Appeal of 7 December 2009 in case No. 8900-08; leave for appeal to the Supreme Administrative Court was not granted.
If participation in a lottery is promoted in breach of the LA, then the Authority may issue orders and prohibitions subject to a conditional fine.

As mentioned above, the criminalisation of promotion of participation in lotteries is rendered practically unenforceable against lotteries arranged in other EU Member States. As many gambling companies who target the Swedish market operate under a British or Maltese licence, the promotion of participation in these companies’ lotteries cannot, for the time being, be subject to criminal prosecution. A report to amend this gap in the legislation has been proposed to the government, but it has so far not been implemented. It should be noted, however, that orders and prohibitions subject to conditional fines can still be used against such promotion.

VII THE YEAR IN REVIEW

In the past few years, several newspapers and other companies have appealed injunctions issued against them by the Authority regarding advertisements for gambling companies who are based outside Sweden. In the court proceedings that have followed, the appellants have invoked that the LA is not compliant with EU law and have argued, inter alia, that the restrictions on gambling are not carried out in a consistent and systematic manner, as required by the case law of the Court of Justice of the European Union (CJEU), and that the LA’s main purpose is to provide revenue to the state.

The European Commission has previously directed several questions to the Swedish government regarding the LA, and in October 2014 it issued a press release, in which it was announced that Sweden would be referred to the CJEU for lack of compliance with EU law in the areas of online betting services and online poker services. No such referral did, however, take place, and the European Commission has since decided to close all infringement procedures and complaints in the area of gambling.38

In addition, arguments that the LA is in conflict with EU law have not been successful in court proceedings before the Administrative Court and Administrative Court of Appeal, which, in a series of recent judgments, have held that the LA conforms with EU law.39 In a decision in October 2017, the Supreme Administrative Court (SAC) decided not to grant a review permit in two such cases, whereby the SAC confirmed the lower courts’ standpoint.40 Following the SAC’s decision, the Authority has issued a large number of injunctions against mainly newspapers, but also other entities that carry advertisements for foreign gambling companies.

The gambling market has been expecting a proposed licence system for the Swedish market for a while, and has tried to prepare and position themselves for such a system.

VIII OUTLOOK

Reviews of the Swedish gambling regulation have been considered several times over the past decade, but have historically not led to any real changes.

40 Decision of the Supreme Administrative Court of 18 October 2017 in case No. 4268-16.
However, immediately following the European Commission’s press release in October 2014 that it would be referring Sweden to the CJEU for lack of compliance with EU law in the areas of online betting services and online poker services (as mentioned above), the Swedish government announced that they were going to initiate a reform of the gambling regulation and introduce a licensing system.41

A government-appointed committee with the explicit assignment to lay forward a proposal for a new gambling regulation submitted its report in March 2017.42 The report has since been circulated for formal consultation and a bill proposing the new gambling regulation was presented in April 2018.43

The bill proposes, inter alia, a division of the gambling market into two sectors: one competitive sector and one exclusive. The competitive sector would include online casinos, betting, poker and bingo, as well as land-based sports and horse race betting, while the sectors of gaming machines, land-based casinos and bingo, as well as online and land-based lotteries, will continue to be reserved for government-controlled companies and non-profit organisations.

The same legal person will not be allowed to act within both the competitive and exclusive sectors. As Svenska Spel currently operates within both sectors, it will therefore have to adapt its business if it wishes to continue to do so. It has been proposed that the company should be divided into two, but it is up to Svenska Spel’s board to decide how the adaptation should be done. It has also been suggested that, if Svenska Spel is divided into two companies, the company acting in the competitive section should be sold, but so far the Swedish government seems to have no such plans.

State-owned companies would have a continued monopoly on gaming machines and land-based casinos, currently offered by Svenska Spel, and would compete with public interest associations with respect to online and land-based lotteries. The non-profit sector would continue to have exclusivity with regard to land-based bingo.

If Svenska Spel continues to offer online casinos, online betting, online poker, online bingo, land-based sports betting and land-based horse racing, it will thus compete with ATG and online gambling companies, which will be allowed to operate under licences for these markets. Since land-based horse-racing betting is included in the competitive sector a reformation in line with the proposed legislation means that ATG will lose its current monopoly in this sector.

In order to obtain a licence to provide gambling activities it is proposed, inter alia, that the applicant must meet the requirements of insight, experience and organisation needed to operate the planned activities; there should be reason to assume that the activities will be operated in accordance with the law and other statutes; and the applicant must be deemed suitable, taking into account its reputation and financial strength. The requirements shall also apply to the applicant company’s board, management, shareholders who hold more than 10 per cent of the share capital or voting rights, or otherwise can exercise a significant influence over the company’s management, as well as certain other categories of employees.

42 SOU 2017:30.
Licences will be valid for a period of up to five years and can be awarded to persons living in or companies established in the EU, or to persons or companies outside the EU, if the applicant has appointed a representative who lives in Sweden and meets the aforementioned requirements.

Licences would be issued by the Authority, and it has been suggested that licence fees and supervision fees would be based on turnover, ranging from 60,000–400,000 kronor and 30,000–1 million kronor respectively.

The bill also suggests a tax rate of 18 per cent based on the gambling revenue. Licensed gambling companies will also, like any other company, pay 22 per cent corporate tax on profits. However, licence and supervision fee, and gambling tax are deductible.

Unlike the committee report, the bill does not suggest a licence requirement for possessing or manufacturing gambling equipment, or to manufacture, provide, install or modify software for games in connection with online gambling.

In order to maintain the new gambling regulation, the bill contains a strengthening of both the regulation regarding advertising of licensed gambling, as well as sanctions against providing and promoting unlicensed gambling companies, including harsher penal provisions and raised fines compared to the current legislation. In addition, it is proposed that the provision of payment solutions aimed at unlicensed gambling activities will be held illegal and that accounts used to transfer bets and winnings to unlicensed operators could be blocked.

No internet service provider (ISP) bans are proposed, but the proposition suggests that ISPs should be required to display a warning message when a user attempts to gamble on illegal sites.

The new legislation is proposed to enter into force on 1 January 2019, while licences can be applied for from 1 August 2018. The bill has, at the time of writing, not yet been voted on by the Swedish parliament, but seeing as there is a broad political support for a re-regulated gambling market, there is a strong likelihood that a licence-based gambling market will be introduced in Sweden on 1 January 2019.
Chapter 29

UNITED KINGDOM

Carl Rohsler¹

I OVERVIEW

Definitions

Gambling is an activity that encompasses a number of different activities. As a general description, however, all such activities can be said to be forms of entertainment involving gain and loss based upon risk. As such, gambling exists within a wider landscape of activities including financial transactions, contracts, pure entertainment, sports and other activities. Some of these interfaces are discussed below. However, at its simplest, English law distinguishes between three forms of regulated gambling: betting, gaming and lotteries. For many years, these terms were part of common law, but over the centuries their definitions have been increasingly based in statute. The current legislation, the Gambling Act 2005 (GA), contains definitions of each of the forms of gambling.² These definitions are not exhaustive – in the sense that, for example, the terms ‘gaming’ and ‘betting’ are both defined but the underlying concepts of ‘game’ and ‘bet’ are not. This, it has been said,³ is deliberately intended to create a measure of flexibility allowing judges to categorise new products and schemes as they arise. However, a summary of terms is given below.

‘Gaming’ is the playing of a game (being a game of chance or a game that combines skill and chance) for a prize. (‘Sport’ is specifically excluded from the definition, which gives rise to certain issues in its own right.)⁴ As to the issue of skill or chance, the amount of chance required to fulfil the test is not defined and there is no formal \textit{de minimis} level, (and certainly not a ‘balancing act’ to see which of the two factors predominates in the outcome, as is the case in some legal systems). Any amount of chance in the game will satisfy the definition. Having said this, tiny amounts of chance, such as the toss of a coin to see who will start a game of chess, are not considered to have the necessary impact on the result and are discounted. The concept of a ‘prize’⁵ is widely drawn, to mean essentially anything of value. However, there are, for example, specific exclusions from the definition of gaming machines in relation to returns to the player in the form of an extended playing experience⁶ – that are not sufficient to be characterised as a prize. This is an important consideration when considering ‘social gaming’, which is generally not regulated as a form of gambling under English law.

1 Carl Rohsler is a partner at Memery Crystal LLP.
2 Gambling Act 2005 Chapter 19 Sections 6, 9 and 14.
5 GA 2005 Section 6(5).
6 GA 2005 Section 239.
In practical terms, ‘gaming’ includes casino games such as roulette, blackjack and poker, dice games, slot machines and games such as bingo.

‘Betting’ can be summarised as the making of a bet (normally considered a hazarding of value on a future uncertain event, or a past event or fact that is not generally known). Various species of bet are distinguished under English law. First, one may consider ‘pool betting’ – also known as a pari-mutuel – in which the organiser takes in the stakes from the participants and then, from that ‘pool’, returns a portion of those funds to those who were successful, keeping a profit for himself or herself. Pool betting also covers betting where the prize is non-monetary. ‘Fixed-odds’ betting is where the operator (bookmaker) offers odds to potential punters that are calculated to deliver an ‘over round’ profit, and that are then adjusted as volumes of bets on a particular outcome are received. A further species of betting is ‘spread betting’, where the bookmaker offers a ‘spread’ of results, and the participant decides whether the actual result will be above or below the upper or lower limit of the spread. The amount to be won (or lost) is a multiple of the staked amount, depending upon the extent to which the actual result exceeds the spread. Such betting carries with it greater risk to both the bookmaker and the participant, and advertising of spread betting is therefore subject to stricter controls. Finally, it is worth considering two forms of betting that created legal uncertainty under the former regime and that were specifically legislated for under the GA. The first of these is ‘betting prize competitions’, which is a definition essentially designed to cover the playing of ‘fantasy league’-style contests. The second is the regulation of those who organise peer-to-peer betting networks, in which the bet is struck directly between two end parties, but the organisation of the market place of ‘bids and offers’ is regulated by an operator who takes a small commission from the winner. Such operators are classed as ‘betting intermediaries’, although the open-textured nature of the definition means that it also catches betting agents and brokers.

A ‘lottery’ is a division of prizes by chance event, where the participants pay for the chance to win the prize. Both pre-drawn lotteries (e.g., scratch cards) and post-drawn lotteries are encompassed in the definition. One other term that is frequently used by the public is ‘raffle’. Technically, the term ‘raffle’ has no legal meaning and raffles are merely a species of lottery. However, for practical purposes they are normally defined by the characteristic of having a guaranteed winner – unlike a lottery where players select numbers and it is a matter of chance as to whether there is a match between numbers selected and a winning ticket. Lottery-style schemes that do not involve the necessary payment, or that rely to a substantial extent on skill, are excluded from the definition of being a lottery and are unregulated in English law, being considered ‘free prize draws’ or ‘skill contests’. Consequently, there are countless consumer contests that avoid characterisation as a lottery by involving skill or avoiding a

7 GA Section 9.
8 GA Section 12.
9 GA Section 10.
10 GA Section 11.
11 GA Section 13.
12 GA Section 14.
13 GA Schedule 2.
14 GA Section 14(5).
15 GA Schedule 2.
requirement to pay in order to enter. For the avoidance of doubt, a requirement to pay for goods at their normal price in order to obtain a chance of winning a prize, does not constitute a payment for lottery purposes.16

Some activities fit within more than one of the statutory definitions above, and the legislation contains a number of extra tests to determine whether such an activity is to be treated as one or the other form of regulated activity.17 For example, roulette is a form of gaming that shares many of the characteristics of a bet on a future uncertain outcome, and also has the features of a division of prizes by chance – but it is ultimately treated as gaming by virtue of these rules of disambiguation.

Any form of contest for a prize that does not conform to the definition of either betting, gaming or a lottery is defined as a ‘prize competition’18 and is not regulated as gambling, though it may nonetheless be subject to some forms of legal control under the general law of contract and some consumer protection legislation.

Finally, some forms of speculative investment, contracts for difference or insurance are taken outside the definition of gambling but are regulated under financial services legislation.19 Spread betting and binary betting are both now treated as a form of betting but are regulated by the Financial Conduct Authority and not the Gambling Commission.

ii Gambling policy
Gambling has a long history in Great Britain. In past centuries, many forms of gambling were heavily restricted in terms of the places where they may take place or the nature of the participants. However, it is fair to say that gambling has never been the subject of an outright ban and, indeed, lotteries have a long history as tools of government to raise funds.20 In the past 50 years, Great Britain has experienced a significant liberalisation of its gambling market, and now it is generally considered one of the most progressive and liberal jurisdictions in the world (and, as a consequence, is the largest gambling market in Europe). The current legislation permits the existence of casinos, adult gaming centres, high-street bookmakers and bingo halls as well as the location of gaming machines in venues licensed to serve alcohol. Great Britain has both a National Lottery and a range of private lotteries designed to raise money for charities and good causes. The current legislation permits the operation of gambling through remote communication (online, by telephone, etc.) and also permits foreign operators to offer those services to British citizens provided that they are licensed and pay tax. In short, almost all forms of gambling are permitted for those of 18 years and over, and some minor forms of gambling (lotteries and some minor amusement machines) for those over 16. Since 2005, contracts in relation to gambling (e.g., a bet or a gaming contract, or credit given to permit gambling) are enforceable at law just as any other form of contract.21

The guiding principle of gambling regulation is that individuals should have the freedom to partake in gambling as part of normal adult leisure activity and that, provided that there

16 GA Schedule 2 Paragraph 2(c).
17 GA Sections 16–18.
18 GA Section 339.
19 GA Section 10.
20 Lotteries were traditionally used, even as far back as the 16th century as a way of raising finance for military campaigns, and the buildings of the British Museum were financed in this way.
21 GA Section 335.
are adequate protections to ensure that those who operate gambling are fit and proper to do so and operate in a way that ensures fairness for the general public and protections for the vulnerable and children, then gambling should generally be permitted.22

iii  State control and private enterprise
Gambling in the UK is the subject of private enterprise and principles of free competition rather than being state controlled. Private citizens and companies (whether foreign or UK-based) are all entitled to apply for a licence to operate gambling, and the number of licences are not limited provided that the operator fulfils the tests of being fit and proper to operate gambling set out in legislation and within the discretion of the regulator. There is one slight exception to this policy of free competition, which is the National Lottery. The National Lottery was established in 1993 and is the subject of a separate regime.23 Under that legislation, a single licensee is chosen to operate the National Lottery following a competitive tender. Once appointed, the licensee enjoys a monopoly right that was initially set at 10 years and most recently extended to 14 years with the possibility of sub-licences for some aspects of the overall scheme. The National Lottery is protected from competition from other lotteries by virtue of its unique status and government backing, and also because of limits on the prizes available in private lotteries. Betting on the National Lottery (and following a recent change in the law, on EuroMillions) is prohibited under a UK licence. For the avoidance of doubt, EuroMillions is not itself a ‘pan-European lottery’ (since no legislation exists that could permit such a scheme). Instead, it is a collaboration of several national lotteries, based upon a single draw number and an effective (though not actual) pooling of proceeds.

iv  Territorial issues
There is often (even among English lawyers) a good deal of confusion about the British Isles and its various legal subdivisions. The largest concept is that of the British Isles itself, which is a geographical rather than a legal concept and comprises England, the Republic of Ireland, Northern Ireland, Scotland, Wales and a number of islands that have an historical attachment to Britain, including the Channel Islands of Guernsey, Jersey, Sark and Alderney, and the Isle of Man. It should be noted that each of Jersey, Alderney and the Isle of Man are separate legal jurisdictions (being technically crown dependencies) and with completely different gambling law regimes. The same is true of Gibraltar.

Descending to the next level is the United Kingdom, which is comprised of England, Wales, Scotland and Northern Ireland. The Republic of Ireland is a separate sovereign state, with its own gambling laws. Northern Ireland shares many statutes and legal principles with England and Wales, but its gambling law is separate (and currently the subject of change). In fact, two sections of the GA (Sections 43 and 340) apply directly in Northern Ireland, and in 2013 the government of Northern Ireland announced its intention to reform the existing law24 to create a more up-to-date legislative framework, but those changes remain at the stage of proposals and, for the present, Northern Irish rules somewhat resemble the legislative framework existing in England prior to the enactment of the GA in 2005.

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22 GA Sections 1 and 22.
23 The National Lottery etc Act 1993 (and subsequent modifying legislation).
The next level is the concept of ‘Great Britain’, a term that covers England, Wales and Scotland. The GA generally applies to the whole of this territory, although there are some modifications to language and penalties in relation to offences and procedures that take place in Scotland.25

Within England, Wales and Scotland, there are no further special divisions or territories that affect the application of gambling law, with one exception: the policy in relation to the licensing of gambling premises is, within an overall framework, a matter for local authorities and local licensing committees (which also deal with the licensing of establishments serving alcohol or providing late night entertainment). Technically, the airspace above and territorial waters around Great Britain are also within the jurisdiction for the purposes of gambling, and rules cover vessels, aircraft and vehicles in that territory.26

v Offshore gambling

The legal treatment of offshore gambling in Great Britain changed in 2014. Prior to the GA, the position was that all gambling that was physically located outside Great Britain was not justiciable under the English courts. The basic legal principle governing legal culpability in relation to offences such as unlicensed gambling laid down a test by which, if the last act in the actus reus27 took place outside Great Britain, that conduct was not justiciable under the British courts.28 So someone offering online gambling services from London would have triggered an offence, but someone offering gambling services to British citizens from a location outside Britain would not. The only types of offences that could be tried before the English courts would be, for example, the advertising of gambling, which was completed at the point of the advertisement being published or available to British citizens.

The Gambling Act created a regime that for the first time permitted online gambling within Great Britain. The following question therefore arose: would the new law seek to criminalise those who offered gambling to British citizens from abroad? The answer was a rather generous compromise. First, in deference to principles of freedom of movement of services and freedom of establishment of businesses under the European Treaty,29 any operator established in the European Economic Area30 would be permitted to advertise and offer those services in Great Britain. Further, operators in certain other states who had been approved by the Secretary of State as having regimes that offered an equivalent degree of regulatory protection could also offer and advertise their services (‘whitelisted’ states).31 Operators in other states could still provide gambling services, but could not advertise those services (based upon the approach to criminal justiciability discussed above and that had remained fundamentally unchanged, the act of gambling would be taking place outside the reach of the English criminal jurisdiction).

25 These definitions have endured for many years, but in recent months have been the subject of speculation given calls for some form of independence for Scotland, and perhaps a rethink of the whole of devolved government following Britain's decision to leave the EU.
26 GA Section 211.
27 ‘The evil act’: meaning the collection of acts required to make up the offence.
28 See, for example, R v. Harden [1963] 1 QB 8.
29 Articles 26 and 28–37 of the Treaty on the Functioning of the European Union.
30 Being the 28 Member States of the EU and Norway, Lichtenstein and Iceland.
31 At its maximum, the whitelist comprised the Isle of Man, Alderney, Gibraltar, Antigua and Barbuda, and Tasmania.
That regime was swept away in 2014. By that time, it had become increasingly apparent, as a result of developments in EU case law, that Member States were legally able to restrict gambling services to those who were licensed within that particular Member State (France and Italy are good examples of this more conservative approach). There were also pressures for change from those licensed within the British regime, who argued that the then current approach created competitive disadvantages from a fiscal point of view compared with operators in whitelist states. The law changed with the introduction of the Gambling (Licensing and Advertising) Act 2014. This provided that any operator that either had gambling equipment located in the UK, or knew or ought to know that British citizens were using those services (wherever that equipment was located) would require an operating licence (and would have to pay gambling duty on profits generated from business in Great Britain). Thus, the current position is that all such operators must seek an operating licence.

The old offence of ‘advertising foreign gambling’ was repealed, because the strictures of the new regime render it otiose.

It is uncertain how many operators from overseas continue to take business from British citizens. The British regulator, the Gambling Commission (the Commission), has indicated that it believes that the new regime is being complied with and policed effectively. However, we are not aware of any proceedings or enforcement actions that have been brought since the change in the law and, since gambling offences are not of a type or severity that permit a claim for extradition, it is difficult to see in practical terms how such enforcement could be effected in relation to an operator who ignored the law, but did not have a presence or assets within Great Britain. For the avoidance of doubt, it is not an offence for a UK citizen to gamble with a foreign operator, even if that operator is not licensed under the UK regime.

For those licensed under the British regime, the Commission has recently imposed, as part of the licensing criteria, an obligation that licensees must be able to demonstrate on objective grounds (presumably, at least, a legal opinion from a specialist lawyer) that their operations are legal in all the states in which they operate or do business. Apart from that protection, however, there is no explicit prohibition or control on a British licensed operator from taking business in any jurisdiction in the world, although the power to create such a ban remains in the hands of the Secretary of State.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

The law on gambling in Great Britain is set out in the GA (as amended) and, for the National Lottery, under the National Lottery etc. Act 1993. Taxation of gambling is dealt with under the annual Finance Act, which makes amendments to the Betting and Gaming Duties Act 1981. There are more than 70 statutory instruments that inform the detailed implementation of the basic regime set out in the GA.

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32 Cases such as C-243/01 Gambelli, C-67/98 Zenatti and others led to shifts in national law in a number of EU states.
33 GLA Section 1.
34 There exists a power under GA Section 44 to create such a bar on gambling with a particular state.
ii The regulator

The GA created a single regulator for all forms of gambling (now including the National Lottery) in the form of the Commission. The Commission is a statutory corporation with its offices in Birmingham.\(^{35}\) The main officers of the Commission are the commissioners, aided by a staff including enforcement officers and licensing officers responsible for dealing with the day-to-day functions of the regulator. Responsibility for spread betting and binary betting has been assigned to the Financial Conduct Authority.\(^{36}\)

iii Remote and land-based gambling

The GA distinguishes between remote gambling and non-remote gambling.\(^ {37}\) Remote gambling includes gambling through any form of remote communication (telephone, internet, etc.) but not gambling conducted through postal services (e.g., sale of lottery tickets). Non-remote gambling is generally confined to specific licensed premises, such as betting shops, race courses, casinos and adult gaming centres (and requires a further licence covering the premises themselves, which is issued by the local authority responsible for the area in which the premises are located). There are provisions for temporary licences for certain premises that allow gambling to be conducted for a limited number of days each year. An operator may provide both remote and non-remote gambling under a ‘combined licence’. To give a practical example, a large bookmaker may offer betting through a chain of betting shops, through telephone betting with those shops, and through a website that might offer both betting and gaming products. In such circumstances, it would require a betting operating licence (non-remote and remote), a gaming licence (remote only) and premises licences for each of the shops. As far as telephone betting is concerned, this would be covered either by a full remote licence or, in some circumstances, through an ancillary or linked licence permitting certain remote gambling as part of a general non-remote licence.

iv Land-based gambling

The GA defines a number of different locations in which forms of gambling can take place, with different restrictions based upon the type of gambling to be performed and conditions imposed by a premises licensing regime.\(^ {38}\) There is no formal limit on the number of gambling premises of a particular type that can be granted.

Casinos\(^ {39}\) are designed primarily for gaming, in the form of table games and slot machines, but are also permitted to offer ring games such as poker, and also betting and bingo. Different sizes of casino are defined by the number of table games and the floor area. There are approximately 150 casinos in Great Britain.

Betting shops (sometimes referred to as ‘licensed bookmaking offices’ (LBOs)) are entitled to offer fixed-odds and pool betting, and to install a certain number of gaming machines (including, usually, certain ‘fixed-odds betting terminals’). Apart from bookmaker premises, betting is also offered on tracks and at courses during sporting events. In total, there are just under 10,000 such establishments in Britain.

\(^ {35}\) www.gamblingcommission.gov.uk.

\(^ {36}\) www.fca.org.uk.

\(^ {37}\) See, for example, GA Sections 4 and 67.

\(^ {38}\) Using premises without a licence being an offence under GA Section 37.

\(^ {39}\) GA Section 7.
Bingo halls are entitled to offer bingo (main stage and cash-prize mechanised bingo) as well as some forms of gaming machines. Although the playing of organised bingo has diminished over recent years (especially following the introduction of the ban on smoking in public places), there is still a large number of regular attendees at bingo halls in the UK.

In addition to the above forms of gambling establishment, there are a number of locations that permit the installation of gaming machines or the operation of equal chance gaming (i.e., gaming where there is no ‘house advantage’). These range from adult gaming centres (a form of ‘mini casino’ offering only machine gaming rather than table games), licensed family entertainment centres (which provide amusements like ‘toy grabbers’ and ‘penny pushers’ mostly of interest to children but that may include some very low-value machine gaming), venues licensed for the sale of alcohol on the premises without food (essentially ‘pubs’) and private members’ clubs and travelling fairs.

The grant and administration of premises licence is a matter for local planning authorities rather than the Commission (it being thought that it is a matter of local policy how venues such as clubs, theatres, pubs, restaurants, cinemas, night clubs and gambling premises are located and managed). The detail of the application process is outside the scope of this chapter but has considerable similarity to applications for alcohol licensing – having regard to issues such as the nature of the neighbourhood, proximity of schools and churches, potential for public nuisance, and so on.

v Remote gambling

Remote gambling is generally permitted. That means that an operator that is licensed by the Commission may provide gambling services to British citizens in the UK via all forms of remote communication (and using equipment that may be located in the UK or abroad). Equally, a remote operator may be licensed by the Commission to offer gambling services to citizens in any jurisdiction in the world using equipment located in the UK. The Act provides that, for each type of gambling (betting, gaming, etc.), there will be two forms of licence available: remote and non-remote forms. Normally, a single licence may only permit either remote or non-remote gambling. However, there are also ‘ancillary licences’ that permit non-remote operators to offer a modicum of remote services (e.g., permitting a bookmaker to offer a telephone betting service) without the full requirements of a remote operating licence.

Nowadays, with widely distributed hardware deployment, care needs to be taken about which types of equipment are physically present in the British jurisdiction and whether the location of particular resources will trigger a licensing requirement.

The legislative rules that apply to remote and non-remote operators are generally the same, although there are differences to take into account in matters such as fairness of random number generators, protection against underage gambling and social responsibility issues that arise more in remote gambling given that the player will not be in the presence of the operator when the gambling takes place.

vi Ancillary matters

In addition to the licensing of operators, the legislation provides for the licensing of a number of other activities, outlined in this subsection.

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40 Defined in GA Section 4.
41 GA Section 67.
**Personal licences**

First, there is the concept of the ‘personal licence’, which can apply to individuals in gambling organisations who either perform a particular management function or a particular function (e.g., being a croupier). Personal licences are a guarantee that those occupying a position of trust within an operator are fit and proper individuals, and are personally accountable to the Commission, having specific reporting requirements in relation to ‘key events’ within the operator. As such, the granting of a personal licence not only represents a badge of quality, but also gives the Commission ‘eyes and ears’ within an organisation. The procedure for applying for a personal licence is the same as for an operating licence.

**Gaming machine manufacture**

The GA recognises that, although they do not operate the machines, those who make, repair or install gaming machines have a special responsibility because they can influence the outcome of gaming. Consequently those who operate in this part of the industry also must apply for an operator licence and ensure that all machines that they make comply with technical standards imposed by the Commission.

**Software**

One potentially difficult area of licensing relates to gambling software. Those who produce gambling software on equipment based in the UK or who propose to supply such software to operators licensed by the Commission require a licence. The definition of gambling software is limited to software for remote gambling, but otherwise the scope of the term is broad. There are sometimes difficulties in determining whether a provider of software (particularly one who provides third-party operators with access to equipment on which the software is hosted) has become so involved in the delivery of the overall gambling process that it should be reclassified as a full operator. There are also difficult distinctions as to whether software that is essentially ancillary to the gambling process (e.g., back-office accounting) should require licensing at all.

**Unlicensed gambling**

Finally, certain very common forms of gambling do not require premises licences. The sale of lottery tickets can take place at normal retail premises or even on the street. Pools coupons can be collected and distributed through normal newsagents and, of course, private betting and gaming is permitted on domestic premises without a licence of any sort.

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42 GA Part 6.
43 GA Section 128.
44 GA Section 65(2)(f).
45 GA Section 41.
46 GA Section 65(2)(i).
47 GA Sections 295–300 and Schedule 15.
III THE LICENSING PROCESS

i Applications
Applications for gambling licences are normally made online through the Commission’s e-filing system. The application consists of a series of questions seeking information on an applicant in order to verify its identity and beneficial ownership, its suitability and expertise to hold a licence, the source of funds for the business and essentially a business plan, and details of how the applicant will comply with the various policies and procedures. Checks will extend to understanding the identity of all officers as well as owners with more than a 3 per cent beneficial entitlement (full checks for those with more than 10 per cent ownership).

Some applications pass through the process (normally expected to take between six and 10 weeks) without difficulty. However, more complex applications can be expected to take longer – in some cases many months. The process usually involves a degree of individual investigation and due diligence by the Commission. Sometimes the decision will be taken by a licensing officer, but in complex cases the decision-making power of the Regulatory Panel and the Commissioners themselves may be utilised.

The Commission will consider the application based upon statutory criteria, but with a large degree of discretion as to suitability and likely compliance with the licensing objectives. At the end of the process, the Commission may grant the licence, refuse the licence or grant it subject to conditions that are attached to the licence. A number of licence conditions are imposed directly by statute, another group are contained in the standard Licence Conditions and Codes of Practice and a third level may be imposed individually on licensees.

Licences are granted without time limit and can last indefinitely, but are always subject to annual fees. The Commission also has the power to review a licence and, if it finds that an operator has breached a licence condition, has the power to impose a range of sanctions including revocation of the licence (see subsection ii, infra). Each form of licence has a different application fee based upon the complexity of the application, and the likely turnover of the business in question. Licences may be surrendered or a variation of the scope of the licence sought at any time by notice to the Commission. A change in corporate control of a licence holder will trigger the requirement for the new owners to be investigated and approved or the licence will be deemed surrendered.
ii Sanctions for non-compliance

The basic compliance or sanction regime is set out in Sections 33–36 of the GA. It states that those who provide ‘facilities for gambling’ will commit a criminal offence unless they are properly licensed. Thus, operating without a licence (or with a licence but in breach of its conditions) constitutes the primary offence under the GA, carrying a maximum sentence of 51 weeks’ imprisonment and a fine of up to £5,000, as well as the revocation of any licence. The most serious offence under the GA, however, is that of cheating at gambling, which carries a sentence of up to two years’ imprisonment. There are a host of other offences including, for example, inviting someone underage to gamble, illegal advertising of gambling and the promotion of an unlicensed lottery. Prosecutions may be brought either by the police or by the Commission itself. Criminal prosecutions are generally reserved for serious matters and, in particular, circumstances in which gambling activity has taken place without a licence.

In addition to criminal sanctions, the Commission has a range of regulatory penalties that range from a simple warning letter to a financial penalty, to the imposition of further conditions on the licence and to the revocation of the licence.

Apart from operators, it is technically possible for those who provide funds for gambling or advertise gambling to commit some of the ancillary offences. However, in practice, it is unlikely that the Commission would initiate a prosecution in relation to these or related inchoate offences, where a licensee was identifiable as a target for prosecution.

IV WRONGDOING

The cornerstone of the GA is its licensing objectives. These involve ensuring that gambling is conducted fairly and only by those who are suitable, with due protections for children and the vulnerable, and with the aim of keeping gambling free of crime. The Commission has a number of investigating officers with powers to enter and inspect premises and investigate suspected wrongdoing. It is also a criminal offence to supply false information to the Commission.

Over the past years there has been an increasing focus on issues of money laundering and betting integrity issues. Although the Commission has a power to initiate prosecutions, it would normally simply play the part of collecting information for the benefit both of sporting organisations (in the case of betting integrity matters) and police authorities in the case of criminal matters such as money laundering or dealings in the proceeds of crime.

V TAXATION

The provision of gambling services is considered to be a trade or profession like any other. Therefore, companies that operate as bookmakers or casinos will expect to pay corporation tax at normal rates. Those who operate businesses as sole traders will be liable for personal income tax.

59 GA Section 42.
60 GA Section 121.
61 GA Section 1.
62 GA Part 15.
63 GA Section 342.
Gambling services are generally subject to a form of gambling duty, which generally operates at a rate of 15 per cent on net profits.\textsuperscript{64} In the case of UK operators, this rate applies to all profits generated under the operating licence (no matter where the customer is located) but, for foreign operators, the duty is of course limited to business conducted with UK citizens. There are slightly different rules for the calculation of duty in relation to betting and gaming, and separate duties for amusement machines and gaming machines. Taxation of betting exchanges and intermediaries is calculated at the same rate, but in relation to commission earned by the operator.

Lotteries are theoretically liable to pay lottery duty but, in deference of the fact that lotteries are primarily designed as a mechanism for raising funds for good causes (and must use at least 20 per cent of the proceeds for such purposes), the only lottery that is currently obliged to pay lottery duty is the National Lottery.

Gambling services are generally exempt from value added tax (VAT), which can cause a difficulty for operators since they will be liable for input VAT, but will often be unable to set such a liability off against the majority of their (exempt) output services.

Finally, there must be a distinction between operators and customers. Customers (i.e., individual gamblers) will not be liable for income tax on gambling winnings. The philosophical basis for such a policy is that the majority of customers will be net losers and therefore a liability to taxation on winnings might give rise to compelling arguments that gambling losses are tax deductible. In the modern gambling environment of online gambling, ‘professional’ poker players and the use of betting exchanges, it is sometimes difficult to tell a customer from an operator, and careful assessments need to be made in judging liability for tax.

\section*{VI ADVERTISING AND MARKETING}

The current regime for advertising and marketing of gambling services is often misunderstood or misstated. Advertising of gambling is generally permitted in Great Britain. There remains an offence of advertising ‘illegal gambling’\textsuperscript{65} (which will apply, for example, if gambling services that are not correctly licensed are advertised). However, the former offence of ‘advertising foreign gambling’ has been repealed\textsuperscript{66} and replaced by a modified offence, which can best be described by the following summary:

\begin{quote}
\textit{it is an offence to advertise remote gambling services (i) capable of being used by British citizens or (ii) where the relevant equipment is located in Britain and where no relevant licence is held.}\textsuperscript{67}
\end{quote}

Technically speaking, that offence does not prevent the advertising of gambling taking place in the UK, provided that the services are not made available to UK citizens. This has been a source of controversy since many foreign operators found it commercially useful to advertise gambling services on the shirts of football teams whose matches were widely viewed on television (e.g., across Asia) and that could therefore penetrate markets where there were explicit bans on such advertising (and indeed such gambling). The legislative regime does

\begin{footnotes}
\item[64] Different rates apply for spread betting.
\item[65] GA Section 330.
\item[66] Offence, previously Section 331 GA repealed by GLAA Section 3.
\item[67] GLAA Section 4.
\end{footnotes}
not specifically prevent such advertising, provided that the operators effectively prohibit British citizens from using them, and it is also possible to obtain a UK licence that permits advertising, notwithstanding that the British public is not being heavily targeted as a matter of practice. Generally, despite the lack of a legal ban, the Commission has suggested that it believes that all advertising in the UK must be by those who hold a licence, and it has made strong representations to relevant sporting bodies not to accept sponsorship from unlicensed operators.

As regards the content and style of advertising, there are no statutory rules or criminal sanctions, with regulation being effected through a series of voluntary codes to which all operators subscribe. The first of these is a voluntary code for gambling operators, but this is supplemented both by general and industry specific rules, which are dictated by rules on advertising in the broadcast and non-broadcast media by the Commission on Advertising Practice and policed by the Advertising Standards Authority. The rules seek to prevent gambling from being attractive to those under 18 or being seen as more than an entertaining past-time.

VII THE YEAR IN REVIEW

Politically speaking, the year has been dominated by the UK’s continued travails over its future relationship with the EU and by a general election that no one expected, with a result that no one predicted. In that context, there has been so much political turmoil and speculation that changes to the laws on gambling have been fairly muted as the legislature grapples with larger constitutional issues. In that context, changes to law and regulation have included a move to prohibit betting on the EuroMillions draw and, following consultation, the regulation of binary bets has been passed to the Financial Conduct Authority. Following the implementation of the Fourth Money Laundering Directive, casinos have been brought within the stricter money laundering regime applicable to financial institutions. We have also seen changes to the Licence Conditions and Codes of Practice coming into effect from 4 April 2018 and making a number of small changes to the rules, on reporting of key incidents and also a number of changes to society lotteries to give the public more information about the amount of sums going to good causes.

Legal changes aside, a more significant development has been the announcement of a new strategy by the Commission, published in November 2017 and looking to cover the period from 2018 to 2021. Key to the strategy is the concept of raising standards of regulation and greater consumer protection and transparency. There have been various initiatives to date, including an investigation of consumer terms and conditions used by operators conducted jointly by the Commission and the Competition and Markets Authority, which has focused in particular on perceived unfair terms that give operators wide powers to decide whether they will take bets from consumers and exclude particular customers. The CMA review has also clamped down on the rules relating to customer incentives and bonuses. Further, the Commission has sought to be given wider powers to fine operators for advertising that breaks the various codes. Most significant of all, the Commission has changed its position in relation to regulatory fines. Until a couple of years ago, financial penalties on operators were seen as measures of last resort, with voluntary settlements being encouraged for disciplinary matters.

Where fines were levied, they were generally no more than a few thousand pounds. Over the past 12 months, however, very substantial fines and penalty packages have been levied against operators, with the highest being more than £7 million. The size and number of these penalty packages has surprised the industry and commentators. Disciplinary proceedings have been brought against some of the UK’s largest operators, including William Hill, 888.com and Camelot. Most have related to failures in relation to social responsibility policies and, in particular, ineffective self-exclusion procedures. In addition, the Commission is currently investigating 17 remote casinos for potential breaches of anti-money laundering and social responsibility policies.

October 2017 also saw the publication of the much-delayed Triennial Review of gambling. The review looked at a number of social issues such as what is seen as excessive gambling on Category B2 machines (also known as ‘fixed odds betting terminals). The current maximum frequency of such games is that they can be played once every 20 seconds with a maximum stake of £100. It seems very likely that the maximum stake will be cut to a figure somewhere between £50 and £2, probably being £20. The outcome of the review in terms of government policy is extremely important for the industry because there are currently 34,000 such machines in the UK and they generate a very significant amount of revenue for bookmakers – so much so that a significant reduction in the stakes playable on these machines may well lead to LBO closures and job losses.

Finally, 2017 has also seen a significant change in the policies of many banks and payment providers, brought about not only by a sense of financial prudence in the years after the banking scandals that have occurred over the past 10 years, but also because of the new focus on money laundering issues. The result has been that many gambling organisations have found it increasingly difficult to find providers of payment facilities, as account facilities have been closed or restricted for all but the largest and longest established operators. This is a systemic problem that will need to be addressed, because if banks are not willing to engage with the gambling industry, then there is a danger that they will turn to forms of payment provision that are less well regulated and where oversight is not of the same standard. There is much that both banks and the industry need to do to re-engage with the realities of the gambling industry.

VIII OUTLOOK

It is now less than a year until the UK leaves the EU. Speculation about whether this will be a ‘hard’ or ‘soft’ Brexit continues, but in general the weakness of the current minority Conservative government and the amount of data showing the long-term harm to the British economy that would come from a ‘hard’ Brexit seem to be moving the tide towards a longer transition and a softer exit than first imagined.

What will Brexit mean for the UK gambling industry? Gambling is essentially a matter of national rather than EU policy, and will be generally unaffected by Brexit. In fields of law that are important for gambling operators, such as data protection and anti-money laundering law, it is theoretically possible that there will be divergence between the UK and EU position. However, it is much more likely, in our view, that these laws will remain essentially identical to the wider European position – because to create any significant divergence would make it more likely that cross-border trade or data flows would become restricted, which would be extremely counterproductive to the UK’s position as a major trading nation. Furthermore, the UK is a party to the Cooperation Arrangement between the gambling regulatory authorities.
of the EEA Member States signed in November 2015. Once the UK is no longer a part of the EU or EEA, then its membership of this arrangement will no longer be guaranteed but, provided that the UK regulatory regime continues to maintain the same standards, there seems little reason why its continued participation in the arrangement should be called into question.

From 25 May 2018, the new General Data Protection Regulation will come into force. This legislation will, of course, have a significant impact on many different businesses and sectors, but the gambling sector will be among the most significantly affected because of the amount of personal data that is retained and used, the sensitivity of that data, and the amount of profiling for marketing purposes is high. Many businesses still have a great deal to do to reorganise their businesses to take account of the changes, and the position is made more difficult because some of the obligations on data controllers and data processors are very broad and the extent of enforcement is difficult to ascertain – particularly as changes have to be effected to customer data that will often have been collected under the old regime. We can, therefore, expect a number of high-profile enforcement actions by the Information Commissioner as companies get to grips with the implementation of the new regime.

Another problem that the industry is likely to be faced with is the mismatch between the levels of social responsibility being exercised by many operators in combating underage and problem gambling, and the perception among the popular press that there is some kind of pandemic of social harm caused by gambling. As one example of this divergence, we have recently seen in the UK widespread press criticism that the gambling industry is making gambling attractive to children. In fact, the empirical data taken from the latest Commission survey of the prevalence of gambling among children shows that the number of children who have engaged in gambling has fallen by nearly half over the past six years. Had those statistics been applied to alcohol consumption or smoking, it would surely have been hailed as a major success. We can expect a continued focus on social responsibility issues, and it is to be hoped that the Commission and operators will be able to reach a position where each accepts and understands the difficulties and challenges facing the other. But for the moment, the industry feels under considerable pressure to remain attractive and competitive while maintaining the standards of social responsibility that are now expected of it.
Appendix 1

ABOUT THE AUTHORS

DUARTE ABECASIS

_Cuatrecasas_

Duarte Abecasis is a partner at Cuatrecasas and heads the public law department. He joined the firm in 2005.

His practice in recent years has included, in particular, advising central and local public bodies, and natural persons, on tendering procedures for the granting of public works concessions (motorways); electricity production from alternative forms of energy; the management and operation of port terminals; upstream and downstream abstraction, purification and distribution of water and solid waste; tourism projects in Portugal; and the restructuring of automotive groups.

He has been also a legal adviser on matters concerning the concession contracts of casino games of chance in Portugal.

Duarte has a law degree from the University of Lisbon Law School (1980) and is a member of the Portuguese Bar Association since 1982.

He has been an auditor of the National Defence Institute, vice chairman of the board of directors of Advoc Europe (International Network of Independent Law Firms), and deputy and adviser to the State Department for the Budget between 1981 and 1985.

Duarte has been assistant professor of property law at the University of Lisbon Law School between 1978 and 1980, lecturer in the summer courses on the deregulation of telecommunications in the European Union, organised by the Complutense University of Madrid and lecturer in public law subjects at Nova University of Lisbon, and in courses on energy and on tendering procedures at the University of Lisbon Law School.

YASMINE AQUILINA

_GVZH Advocates_

Yasmine joined GVZH Advocates in 2015 and is mainly involved in data protection law, IT law, technology, media and telecommunications law, and iGaming law. She was conferred a Bachelor of Laws with European Studies together with a Diploma of Legal Procurator in 2014, and in 2015 she obtained a Diploma of Notary Public. Yasmine was called to the bar in 2018 after having obtained her doctor of laws in 2017 and having submitted a thesis entitled: ‘Net Neutrality: a Critical Analysis of the European Legal Position’. Yasmine also spent a semester furthering her studies in Perugia, Italy as part of the Erasmus Programme, where she read European constitutional law at the Università degli Studi di Perugia.
WAYNE ATKINSON

Collas Crill

Wayne Atkinson is one of the leaders of Collas Crill’s risk and regulatory team and his experience is focused on providing advice on regulatory, compliance and licensing issues. Wayne regularly advises a range of regulated businesses (including e-gaming businesses) on risk and regulatory matters, as well as related transaction and investment structuring, commercial contract, and mergers and acquisition issues.

Wayne regularly speaks at seminars and conferences in relation to company and regulatory law matters, and is known for his down-to-earth plain-speaking approach to explaining complex legal and regulatory issues.

Prior to joining Collas Crill in 2009, Wayne trained and qualified as a corporate lawyer with Herbert Smith Freehills in London working primarily in the firm’s investment funds and regulatory team. Following this he moved to the British Virgin Islands, where he worked for Walkers on a range of investment funds and general corporate transactions.

NICOLE ATTARD

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Nicole read law at the University of Malta and completed a bachelor’s degree in law with European studies in 2013, and received a diploma of notary public in 2014. She became a Doctor of Laws in 2016 after having submitted her thesis entitled, ‘Private Enforcement of EU Competition Law: The Way Forward’. She is currently reading for a master of laws degree (LLM) with a specialisation in computer and communications law with the University of London International Programmes. As from November 2013, Nicole joined GVZH Advocates as a legal trainee and in December 2016 she became an associate. Her main areas of practice are real estate, data protection and technology, and media and telecommunications.

NICOLA AUSTIN

Addisons Lawyers

As a solicitor in Addisons’ gambling law practice, Nicola works closely with both local and international companies in the gambling sector on all regulatory and compliance matters relating to their business.

Nicola’s experience lies in providing advice regarding licensing and regulatory issues, consumer issues such as advertising and privacy law, as well as commercial and corporate issues. She also assists foreign companies seeking to enter the Australian market in understanding the legal and regulatory constraints on conducting a gambling business in Australia.

Nicola advises a diverse client base, ranging from established gambling operators to start-up companies, as well as companies providing a range of services within the gambling space.

ANA-MARIA BACIU

Nestor Nestor Diculescu Kingston Petersen

Partner Ana-Maria Baciu co-heads Nestor Nestor Diculescu Kingston Petersen’s gaming practice. She has over 19 years of professional expertise, including 12 years of experience in
assisting clients in the gaming sector. She also coordinates the firm’s IP practice and co-heads the consumer protection and advertising practice.

Ana-Maria is highly specialised in all legal aspects related to the organisation and operation of gambling activities. She has participated in the process of drafting both primary and secondary Romanian gaming legislation. She is a general member of the International Masters of Gaming Law, a regular contributor to specialised publications and a speaker at events on gaming matters.

LEONOR CATELA

Cuatrecasas

Leonor Catela is a trainee lawyer at Cuatrecasas. She joined the firm in 2017, and has since then been conducting her traineeship in the firm’s public law department.

Leonor had previously worked at the Cuatrecasas public law department as a summer trainee (2016). She also undertook a summer traineeship at the sports law department at the Llinks Law Offices in Shanghai (2017).

Leonor holds a law degree from the University of Lisbon, School of Law (2017). While attending law school, Leonor participated in the International Legal Research Group on Freedom of Expression and the Protection of Journalistic Sources organised by ELSA International, in cooperation with the Council of Europe, as well as several international law competitions, such as the the Phillip C Jessup International Law Moot Court Competition (2015), as part of the Portuguese National Champion Team, going on to participate in the White & Case LLP international rounds in Washington, DC; the 28th Edition of the European Law Moot Court (2016); and the 24th Willem C Vis International Commercial Arbitration Moot in Vienna (2017).

Leonor has also been published in the Civil Law Review of the University of Lisbon, School of Law (2016).

VOJTĚCH CHLOUPEK

Bird & Bird sro advokátní kancelář

Vojtěch is a partner in the Czech Bird & Bird office and is head of the intellectual property, technology and communications and media groups in the Czech Republic and Slovakia.

His expertise covers intellectual property and IT law, gaming and media law. He also regularly assists clients in connection with various data protection and related compliance matters, antitrust matters, including anticompetitive practices, abuse of dominance, merger clearances and state aid.

For the past five years Vojtěch has been actively involved in advising gaming companies from market leading national lottery to a small peer-to-peer gambling start-ups.

Vojtěch has been repeatedly recognised and awarded as a leader in his field of expertise (intellectual property and technology, media and telecommunications). He received an ILO Client Choices Award 2014-2015, WIPR Czech Republic 2016 and named the MIP Star 2016–2017.

He is a member of the International Masters of Gaming Law.
MIA CORBETT
Addisons Lawyers

Working in the gambling law practice at Addisons, Mia advises operators, regulators, affiliates and media groups. Her clients range from established international operators to new start-ups in the Australian market.

Mia advises primarily on advertising and marketing, anti-money laundering and counterterrorism financing, licensing, compliance, and sports and racing integrity issues. She has previous experience working in-house with one of Australia’s biggest corporate wagering operators. This allows her a unique perspective from which she can offer clients advice that is both practical and commercially viable.

PEDRO CORTÉS
Rato, Ling, Lei & Cortés – Advogados

Pedro joined Rato, Ling, Lei & Cortés – Advogados in 2003 and is a senior partner. He holds the same position in ZLF Law Office.

His main areas of practice are: gaming, banking and financial, capital markets, real estate, commercial and corporate, intellectual property, and ADR. He is a member of the Macao Lawyers Association, Portuguese Bar Association, Brazilian Bar Association (OAB São Paulo), Justice Department of Guangdong (as a cross-border Macao lawyer), International Association of Gaming Advisors (IAGA) and the International Bar Association (IBA), and is also qualified to work as a lawyer in East Timor. He is member of the Chartered Institute of Arbitrators (CI Arb), of the Hong Kong Institute of Arbitrators (HKIA) and of the Hong Kong Institute of Directors (HKIoD). He was lecturer for the master’s programme on social sciences – global economic politics at the Chinese University of Hong Kong and is a regular speaker on gaming and non-gaming matters. He also contributes to several legal and non-legal publications.

BEHNMAM DAYANIM
Paul Hastings LLP

Behnam Dayanim chairs Paul Hastings’ global advertising, gaming and promotions practice. He has advised gaming companies and service providers, including payments processors, banks, advertisers and other media and content companies, on gaming issues for 20 years and is globally recognised for his expertise in internet gambling, fantasy sports, social casino games and skill gaming. Mr Dayanim is ranked by Chambers USA and Chambers Global as a top gaming lawyer and was named Best Lawyers’ 2014–2015 gaming law ‘Lawyer of the Year’ in Washington, DC.

SEÁN DOWLING
McCann FitzGerald

Seán is an associate in McCann FitzGerald’s corporate group and advises indigenous and multinational corporates in relation to private company law matters, including mergers and acquisitions, contractual drafting and negotiation, private equity transactions, corporate reorganisations, joint ventures, and general Irish company law and corporate governance issues.
Seán is a member of the firm’s betting and gaming group. As part of that role, he maintains an overview of legal and regulatory developments in the betting and gaming sector. With others in the group, Seán has co-written client briefings on relevant topics including the Gambling Control Bill 2013 and an update on the implications of the pending expiry of remote bookmaker and remote betting intermediary licences. Sean spent a period on secondment in 2016 with one of the world’s largest betting and gaming operators.

PIOTR DYNOWSKI
Bird & Bird Szepietowski i wspólnicy spk

Piotr Dynowski is a partner and head of the IP, media, tech and comms practice at Bird & Bird’s Warsaw office. He is an attorney-at-law (radca prawny).

Piotr is one of the leading intellectual property experts in Poland. He advises on a wide range of contentious, commercial and regulatory matters in the most innovative sectors of the economy, such as pharmaceuticals, electronics, media, entertainment, sports, advertising, IT and telecommunications.

In particular, Piotr supports clients in developing and implementing comprehensive pretrial and litigation strategies for the protection of intellectual property, and represents clients at all levels of proceedings before common courts, administrative courts and the Polish Patent Office. He has represented clients in many multimillion-euro and precedent-setting disputes.

He supports clients in business transactions related to transfer and acquisition of intellectual property rights, as well as in matters related to media rights, image rights, sponsorship, merchandising and licensing. Piotr’s clients include broadcasters, advertising and media agencies, publishers, organisers of mass events, sports federations and athletes.

He also advises on all aspects of gaming law, in particular online gambling and betting, social gaming and e-sports. His expertise covers licensing regimes, regulatory issues, as well as advertising and provision of B2B services to gambling operators. As an expert in Polish gambling law, Piotr frequently speaks at events such as World Gambling Briefing or ICE Totally Gaming.

Piotr is a lecturer at the Hugo Grotius Intellectual Property Rights Centre in Warsaw, and at the Jagiellonian University in Cracow.


He is a legal expert to the Polish Chamber of Commerce and the Polish Chamber of Information Technologies and Telecommunications, and a member of INTA, AIPPI, ECTA, PTMG, Marques and IMGL.

ERIN ELLIOTT
Brownstein Hyatt Farber Schreck LLP

As an associate attorney in Brownstein’s gaming law group, Erin Elliott assists on a broad range of gaming and licensing matters. Before attending law school, Erin worked at International Game Technology in Reno, Nevada.
EDWARD J GEORGE
Paul Hastings LLP
Edward George is an associate in the advertising, gaming and promotions practice.

PABLO GONZÁLEZ-ESPEJO
Uría Menéndez
Pablo González-Espejo is a lawyer based in the Madrid office of Uría Menéndez. He joined the firm in 1994 and was made partner in 2004. In 1999, he opened Uría Menéndez’s São Paulo office, which he headed until September 2003. There, he advised foreign investors in Brazil and was one of the first foreign lawyers to be registered with the Brazilian Bar. In October 2003, Pablo returned to the firm’s Madrid office. Since then, he has focused his practice on commercial and company law in the audiovisual, telecommunications, sports, gambling and IT sectors, and continues to manage relations with the firm’s Brazilian clients. In relation to gambling matters, Pablo advised national and foreign operators for their licensing process, the state-wide regulator and a state-owned operator in a variety of matters. Pablo is considered a leading practitioner in M&A, new technologies, telecommunications, media, gambling and sports by the most prestigious legal directories, such as Chambers, PLC Which Lawyer? and Best Lawyers.

IVÁN GUERRERO SÁNCHEZ
Portilla, Ray-Díaz y Aguilar SC
Mr Guerrero focuses primarily on corporate, gaming, commercial, real estate, foreign investment, intellectual property and M&A transactions in Mexico. His practice includes representing domestic and international clients in complex mergers and acquisitions, commercial, residential and industrial real estate transactions, share and asset purchases, corporate reorganisations and secured transactions throughout Mexico. In addition, he regularly advises domestic and international clients in intellectual property and data protection matters. His clients include large corporations, independently owned businesses, and high net worth individuals. Throughout his career, Mr Guerrero has advised clients from a wide range of industries including gambling, automotive, hospitality, real estate, entertainment, pharmaceutical, chemical, finance, construction, retail and food services.

He is a member of the American Bar Association, and member of the International Chamber of Commerce (Mexican Chapter). Mr Guerrero lectures on corporate law, intellectual property and commercial contracts at several law schools throughout Mexico.

His languages are Spanish and English.

YEHOSHUA SHOHAT GURTLER
Herzog Fox & Neeman Law Office
Yehoshua Shohat Gurtler is a member of HFN’s e-commerce and gaming law department, advising clients on a range of issues related to the laws of online gaming, concentrating primarily on matters pertaining to regulation, licensing and litigation. In addition, Yehoshua advises clients on the regulation and licensing of e-commerce and fintech, with a specific focus on Forex and derivatives trading.
Following extensive service in the IDF’s Military Advocate General’s Corp (MAG), Yehoshua also advises and represents clients on homeland security and defence-related issues, including issues pertaining to public international law.

Yehoshua has repeatedly been ranked as a notable practitioner in Chambers and Partners’ global gaming and gambling rankings.

NADYA HAMBACH

Velchev & Co Law Offices

Nadya Hambach is of counsel at Velchev & Co Law Offices and a legal adviser with over 14 years of experience advising multinational technology businesses – eight years as in-house legal counsel and head of legal and compliance, as well as six years as of counsel in a boutique law firm. In her capacity as a member of the management board of the Bulgarian Association of the manufacturers and operators in the gaming industry (BTAGI), a position she held until 2012, she participated actively in the consultation process for adopting the new gambling regulation in Bulgaria.

Since June 2012, she has been an of counsel and head of the entertainment and gaming department of Velchev & Co, a boutique law firm advising technology businesses. In October 2012, she was elected as a general member of IMGL (International Masters of Gaming Law) as the only Bulgarian lawyer in the association.

She has been awarded with three LLM degrees from the Universities of Munich (2016), London (2012) and Sofia (2004).

Nadya is an internationally recognised conference speaker in topics about media and entertainment, virtual currencies, data protection, e-commerce and regular contributor to key business editions worldwide.

ALAN HEUSTON

McCann FitzGerald

Alan Heuston is a partner in McCann FitzGerald’s tax group, about which Chambers Europe recently noted, ‘They are accessible, technically strong and commercial with their solutions.’ Alan has extensive experience in advising clients on the tax aspects of mergers and acquisitions, reorganisations, restructurings, migrations, capital markets, financial products, banking, and a wide range of other international and domestic tax matters.

He maintains a particular focus in the area of intellectual property and has advised a wide range of domestic and international clients on the tax aspects of setting up operations in Ireland to exploit and develop intellectual property.

Alan leads the firm’s betting and gaming group. Prior to joining McCann FitzGerald, Alan spent a number of years as Director of Tax in Paddy Power Betfair Plc, with responsibility for managing the group’s tax affairs across multiple jurisdictions. As such, he has significant first-hand experience of the regulatory and taxation aspects of the betting and gaming sector.

Alan writes and lectures on all topics relating to his practice and is a frequent contributor to client briefings, including recent publications on licensing and advertising issues as they arise in the betting and gaming sector.
HENRIK NORSK HOFFMANN  
*Nordic Gambling ApS*  
Henrik Norsk Hoffmann is a licensed and practising Danish attorney, specialised in gambling law and international transactions.

Henrik has worked with and for the international gambling industry since 2002, and is a general member of the International Masters of Gaming Law organisation.

As the legal representative of a large number of operators in Denmark, Henrik is one of Denmark’s leading gambling attorneys, and has been actively involved in the drafting of the Poker Act, which allowed the offering of land-based poker tournaments. Henrik also played an active role in developing the current Danish gambling legislation and is often asked to sit on committees with the Danish Gambling Authority to help shape the guidelines regarding the interpretation of Danish gambling law.

In connection with Schleswig-Holstein’s enactment of a liberalised gambling market in 2011 and 2012, Henrik was invited as a special adviser to the government.

JOERG HOFMANN  
*Melchers Rechtsanwälte Partnerschaftsgesellschaft mbB*  
Dr Joerg Hofmann is the past president of the International Masters of Gaming Law (IMGL) and head of the gaming and betting law practice group of Melchers Law Firm. He has been practising gaming law since the mid-1990s and Melchers’ legal advice is highly valued by global market leaders in all sectors of the gaming industry. A highly recognised expert in the field, Joerg has been consistently ranked as a ‘Leading Individual’ in Gaming and Gambling by *Chambers Global* since 2011, and as one of ‘Germany’s Best Lawyers’ in the category ‘Gaming Law’ by *BestLawyers* and *Handelsblatt*. He has also repeatedly been listed in *Who’s Who Legal* for sport and entertainment in Germany.

HITOSHI ISHIHARA  
*Anderson Mōri & Tomotsune*  
Hitoshi Ishihara is a partner at Anderson Mōri & Tomotsune. As the sole Japanese attorney admitted to the International Masters of Gaming Law (IMGL), Mr Ishihara has extensive focus and knowledge concerning Japanese gaming law, including the anticipated law change to legalise casino operations in Japan, and has been recognised as the Japanese Gaming Lawyer of the Year by multiple sources in recent years.

Mr Ishihara also provides a variety of legal services to his clients establishing and doing business in Japan, with an exceptional focus on cross-border transactions. Also, in the intellectual property field, Mr Ishihara has extensive experience in IP licensing and transactions, and also provides advice on regulatory issues.

His distinctive English skill, backed by over seven years’ experience in the United States, enables him to effectively bridge the linguistic and cultural gap faced by his clients.

He is admitted in both Japan and California (United States).

READE JACOB  
*Paul Hastings LLP*  
Reade Jacob is an associate in the advertising, gaming and promotions practice.
CATHIE-ROSALIE JOLY

*Bird & Bird AARPI*

Cathie-Rosalie is a partner in the tech and comms, and banking and finance groups of the Paris office of Bird & Bird. She is registered with the Paris, Brussels (List E) and Luxembourg (List IV) bars.

She has developed a solid experience in regulatory and prudential matters in the financial sector (licensing or exemption procedures, freedom to provide services or freedom of establishment regime, compliance, anti-money laundering, payment services and electronic money, bitcoin, etc.).

Cathie-Rosalie also has expertise in other regulated areas such as online gambling and entertainment. In addition to regulatory and licensing advice in France, Belgium and Luxembourg, she has also assisted some clients during controls and prosecution launched by the gambling regulatory authority.

With a leading position in supporting projects linked to new technologies, Cathie-Rosalie draws from more than 10 years’ experience, representing players operating in gambling and gaming, fintech and regtech. She also assists clients with the implementation of dematerialisation projects, electronic and biometric signatures, cybersecurity, data protection, cloud computing, blockchain and artificial intelligence.

RAMI KAWKABANI

*Bird & Bird AARPI*

Rami is an associate in the tech and comms, and international commercial groups of the Paris office of Bird & Bird.

He mainly focuses on clients’ commercial practices with regard to consumers, notably in the entertainment and e-commerce sectors. He has developed specific expertise in regulatory issues related to remote gambling, therefore covering questions concerning the ability to operate such business and subsequent marketing and advertising issues.

He also advises clients on their B2B relationships (distribution, franchise and affiliation contracts), notably in the information technology and media sectors.

Rami has both French and English postgraduate qualifications in commercial and new technologies law and is a member of the Paris Bar Association.

ALAN LITTLER

*Kalf Katz & Fransen Attorneys at law*

Dr Alan Littler advises the national and international gambling industry as a member of the gaming practice. The focus of Alan’s work is for remote gambling operators and adjacent activities, such as social gaming. He also advises those providing services to the sector (e.g., payment services providers) and covers regulatory developments in the lottery and casino markets. Current interests include issues concerning data protection and privacy around gambling.

Alan has a strong academic background in European law having been awarded his PhD from Tilburg University for research on the regulation of gambling and EU law. His research was published in ‘Member States versus the European Union: The Regulation of Gambling’ by Martinus Nijhoff in 2011.
In keeping with his academic background, Alan contributes to both academic conferences and publications, as well as industry outlets. He also convenes the module on the regulation of online gambling in Queen Mary University of London’s LLM in computer and communications law by distance learning. He also undertakes research about gambling regulation with QMUL. Alan also served on the advisory board of The Bingo Project at Kent Law School (2013–2016).

Alan is an Extramural Fellow of the Tilburg Law and Economics Center (TILEC), Tilburg University and a member of the International Association of Gaming Advisors.

DAVID LÓPEZ VELÁZQUEZ
Uría Menéndez

David López Velázquez is a senior associate of Uría Menéndez. He joined the firm in 2006. From September 2012 to September 2014 he headed up the Mexico City office, where he provided advice and guidance to clients with businesses in Mexico. David focuses his practice on commercial law, mainly advising clients in the media, IT and e-commerce sectors. He also specialises in banking and finance law, and has been involved in major M&A and financing transactions. In relation to gambling matters, David advised national and foreign operators for their licensing process, the state-wide regulator and a state-owned operator in a variety of matters.

LOUISE LUGARO
Hassans International Law Firm

Louise is an associate within the corporate and commercial department in the firm’s online gaming team.

Louise’s practice consists primarily of corporate and commercial work and she is also regularly involved in private client work. She advises various gambling operators in Gibraltar in relation to licensing and regulatory matters and has been involved with the establishment of numerous operators in Gibraltar.

Louise graduated from the University of Leeds with a 2.1 LLB (Hons) degree in law and accounting. She completed her LPC at the University of Law, London and attained the Professional Certificate of Competence in Gibraltar Law from the University of Gibraltar in 2016. She qualified as a solicitor in March 2017 and is a member of both the Law Society of England and Wales, and the Gibraltar Roll of Solicitors.

MICHAEL LYNER
Collas Crill

Michael Lyner advises institutional clients and private businesses in general corporate and finance matters, also assisting Collas Crill’s leading risk and regulatory team. Having previous experience in M&A transactions, restructuring and financing a wide range of businesses, with a particular focus on family businesses and professionals, after moving to Collas Crill, Michael regularly advises financial institutions, public and private businesses, individuals and funds on all aspects of corporate, commercial and finance law.

Prior to joining Collas Crill in 2017, Michael trained and qualified as a solicitor with Wright, Johnston and Mackenzie in Glasgow, working primarily in the firm’s corporate and commercial team.
ÓSCAR ALBERTO MADUREIRA  
*Rato, Ling, Lei & Cortés – Advogados*

Óscar is a senior associate at Rato, Ling, Lei & Cortés in charge of the Portuguese desk, and is a member of the Macao Lawyers Association, the Portuguese Bar Association and the Hong Kong Institute of Arbitrators (HKIA).

Before joining the firm, he was senior legal counsel for Melco Entertainment and other law firms in Macao. He was also a legal consultant for the Porto City Hall, for the Portuguese National Traffic and Transportation Department, and for the Honorary Consulate of the Republic of Guinea Bissau in Portugal.

He is a member of the Scientific Counsel of the Rui Cunha Foundation, a lecturer and consultant at CRED-MD – Center for Reflection, Study and Dissemination of Macao Law, and a visiting lecturer at the University of Saint Joseph, Macao.

Óscar is also a frequent speaker at gaming and non-gaming conferences around the world and is the author of several legal publications on gaming and non-gaming law.

LUIZ FELIPE MAIA  
*FYMSA Advogados*

Luiz Felipe Maia is a founding partner of FYMSA Advogados, and is head of the internet and technology, and gaming teams. Luiz Felipe mainly counsels clients in corporate, contracts and regulatory matters, including mergers and acquisitions, joint ventures, internet law, gaming law and strategic negotiations in related fields. Luiz Felipe has worked as legal counsel for energy and IT companies, and has practised as an attorney in renowned law firms. Luiz Felipe has a bachelor of laws degree from the University of São Paulo, specialising in business law with a focus on contracts from Getúlio Vargas Foundation, and a master of laws degree from Federal University of Pernambuco in civil law. He is also an experienced negotiator and mediator, certified by the Harvard Law School Programme on negotiation, and teaches negotiation courses in business school. Luiz Felipe Maia is member of the International Association of Gaming Advisors and a general member of International Masters of Gaming Law. Luiz Felipe is a frequent speaker at international gaming events and was awarded for Corporate Livewire Excellence at the Gaming Awards 2016 and by *Lawyer Monthly* as one of the Top 100 lawyers in Brazil.

JESSICA MAIER  
*Melchers Rechtsanwälte Partnerschaftsgesellschaft mbB*

Jessica Maier advises clients on all aspects of gambling law with a focus on regulation, licensing and compliance. She has been involved in regulatory due diligence reviews in the context of corporate acquisitions and also supports clients in competition- and antitrust-related issues, administrative court proceedings, and out-of-court negotiations and interactions. She has provided guidance to clients in various licensing proceedings, and advises clients on the regulatory developments in Germany that impact their business. This includes developing strategies for the implementation of new products on the German market and marketing thereof. Jessica is experienced in lobbying and regularly contributes to gambling law and industry publications. She is a member of the International Association of Gaming Advisors (IAGA) and Global Gaming Women (GGW).
EKATERINA MERABISHVILI

Dentons

Ekaterina focuses on banking and commercial issues. She has been part of Dentons’ teams advising on cross-border finance projects, operation of payment systems and e-payment processes, and on structuring elaborate financial products. She has experience leading and advising on various gambling projects, with focus on regulatory compliance, as well as coordinating Dentons’ teams worldwide providing similar advice in relation to a wide range of jurisdictions.

ANDREW MONTEGRIFFO

Hassans International Law Firm

Andrew joined Hassans in 2011 and is an associate in the corporate and commercial department. After graduating from the University of Nottingham with an LLB (Hons) degree, he went on to obtain an LLM in commercial law before undertaking the Bar Professional Training Course. He is a member of the Honorable Society of The Middle Temple and has been called to the Bars of England and Wales, and Gibraltar.

Andrew’s practice consists primarily of corporate and commercial work. He regularly advises various gambling operators in Gibraltar (both in the remote and land-based sectors) in relation to a broad spectrum of matters including corporate governance, operational and regulatory issues and has been closely involved with the establishment of numerous licensees in the jurisdiction. He has contributed to various gambling law journals and industry publications and closely follows developments in the industry.

JAMIE NETTLETON

Addisons Lawyers

Jamie Nettleton is a partner at Addisons and heads the firm’s gambling law practice. Both Australian and international gambling operators rely on Jamie’s advice on all aspects of gambling operations, as well as their investments in gambling businesses inbound to Australia and outbound from Australia.

It is Jamie’s global reputation in his field that sees him strongly sought after to advise gaming machine manufacturers, wagering operators, casinos, social media, online gambling and other various forms of gambling service providers. Jamie’s advice to these clients includes licensing, regulatory and compliance issues, sports and racing integrity, consumer, advertising and privacy law issues.

Jamie’s advice to international gambling operators setting up business in Australia extends to preparation of prospectuses and requirements of the Australian Securities and Investments Commission. Jamie works closely with these clients in developing their Australian business strategies, particularly in connection with the use of new technologies.

The results that he has delivered for his clients and his position at the forefront of gambling law have seen Jamie elected as President of the International Masters of Gaming Law, and his role as a senior fellow at the University of Melbourne as a lecturer in Gambling and the Law. He has also been ranked as a leading gambling lawyer by Chambers Global every year since 2008.
JOHN OLSSON
Wistrand Advokatbyrå
John Olsson is senior associate at the firm’s Stockholm office and joined Wistrand in 2016. John focuses mainly on IP, media, marketing and litigation. He has previous experience from other law firms where he has been working on gambling-related issues for several years.

CARLOS F PORTILLA ROBERTSON
Portilla, Ruy-Díaz y Aguilar SC
Carlos F Portilla Robertson was admitted as a lawyer in July 1986, by Universidad La Salle.

He has diplomas in constitutional proceedings and corporate and business law from Universidad Panamericana, and international business in Mexico and international arbitration from Escuela Libre de Derecho.

Mr Portilla’s practice includes gambling and legal expertise in the Mexican gaming industry, compliance and online gaming, civil and commercial litigation, bankruptcy and reorganisation proceedings, banking and insurance disputes, consumer protection law, product liability and recall, international and domestic mediation and arbitration, real estate, and public and private construction disputes.

He is a full member of the International Masters of Gaming Law, a member and legal adviser of the Association of Gaming Equipment Manufacture (AGEM México), a member of the Mediation and Arbitration Center of the ICC, the National Chamber of Commerce of México City (CANACO), the Arbitration Committee of the Centro de Arbitraje de México, the Barra Mexicana Colegio de Abogados, AC and the Spanish Arbitration Society (CEA). He is former president of the Marketing and Advertising Commission of the ICC. He is counsel of the Board of Directors of ICC México, and ex-chair of the National Association of In-house Companies Lawyers, Queretaro Section, ANADE. His languages are Spanish and English.

CHRISTEL ROCKSTRÖM
Wistrand Advokatbyrå
Christel Rockström is partner at the firm’s Stockholm office and joined Wistrand in 2002. Christel focuses mainly on IP, media, marketing and litigation. The clients she represents include international media groups, sports companies and organisations, and gambling companies. She has been working on gambling-related issues and been following the gambling market since 2004.

CARL ROHSLER
Memery Crystal LLP
Carl Rohsler is a solicitor, advocate and partner of Memery Crystal LLP. He specialises in gambling regulation and intellectual property law. Memery Crystal is an independent law firm in the heart of London, focusing on the corporate and commercial needs of technology companies. Carl was educated in England and obtained an MA at Merton College, Oxford before law school at Chester College of Law, qualifying as a lawyer in 1995. He has acted for some of the leading gambling companies in the world, advising on a spectrum of regulatory issues, commercial arrangements and disputes. He is the author of a number of works on
Carl is on the editorial board of World Online Gambling Law Report, and is a guest lecturer at the University of Montpellier, France. Carl acts for a number of the leading remote and bricks-and-mortar gambling organisations in the world, and has been recognised as a leading practitioner by both Chambers Guide to the Legal Profession and The Legal 500.

MICHAL SAŁAJCZYK
Bird & Bird Szepietowski i wspólnicy spk
Michał Sałajczyk is an associate in the intellectual property and data protection team at Bird & Bird’s Warsaw office. He is an attorney-at-law (adwokat).

He specialises in intellectual property, media and entertainment, advertising, sports and gambling law. He also advises on various IP aspects, in particular, in relation to software licensing contracts and on matters concerning e-commerce and unfair competition.

Michał’s clients include individuals and businesses from the creative industries, such as advertising, interactive and media agencies and film production companies. He also has extensive experience in providing comprehensive legal services regarding film and TV production.

His practice includes preparing contracts concerning rights to intangible goods and the entertainment sector, as well as preparing terms and conditions for e-commerce services, regulations for contests and promotions, and advising on aspects of their organisation. Michał’s experience includes advice on athletes’ image rights, as well as drafting and negotiating sports sponsorship agreements, including the agreement between a leading Polish football club and its main sponsor – a sports betting company.

He completed postgraduate studies in new technology law at the Institute of Law Studies of the Polish Academy of Sciences.

COSMINA SIMION
Nestor Nestor Diculescu Kingston Petersen
Partner Cosmina Simion co-heads Nestor Nestor Diculescu Kingston Petersen’s gaming practice. In addition to the gambling industry, her practice focuses on IPT, and the media and entertainment and online industries, having acquired strong expertise in these fields in over 19 years of professional activity. She also co-heads the firm’s consumer protection and advertising practice.

In the gaming field, her experience encompasses the full range of regulatory and operational gaming aspects. Cosmina has also been actively involved in the review and drafting of the Romanian primary and secondary gaming legislation. She is a general member of the International Masters of Gaming Law, a regular contributor to specialised publications and a speaker at events on gaming matters.

VIDUSHPAT SINGHANIA
Krida Legal
Vidushpat is an advocate registered with the Delhi Bar Council. He has been a member of the British Association of Sport and Law, the International Association of Sports Lawyers, the International Association of Gaming Advisors, secretary of the Indian Premier League
Vidushpat advises on issues pertaining to betting and gambling laws, sports’ league formulation and rights structuring, government policies, TV and broadcasting rights, sponsorship and merchandising contracts, tendering procedure, anti-doping, ticketing, venue hire and brand protection.

Vidushpat is co-author of the book *Law and Sports in India* and has written articles for the *International Sports Law Journal*, *World Sports Law Report*, online sport portals and various national dailies. He was involved in drafting the National Sports Development Bill, the Prevention of Sporting Fraud Bill and the National Sports Development Code for Ministry of Youth Affairs and Sports, and has assisted the Justice Mudgal Doping Probe Committee. He was a member of the committee established by the Ministry of Human Resource Development considering the integration of sports within the higher education system. He also advised on the Right to Play Bill (Haryana), Slum Dwellers Model Act and the Rickshaw Pullers Act.

He has previously worked with the firm Lakshmi Kumaran and Sridharan attorneys, the OC CWG Delhi 2010 and the chambers of senior advocate Mr Dushyant Dave. He has also seconded in the sports law department at Squire Sanders LLP, London.

He has completed an LLM in Sports Law from the DeMontfort University, Leicester; an MBA specialising in Human Resources and an LLB from the Government Law College, Mumbai. He holds a certificate in sports law from the University of Pretoria, South Africa.

ALEXANDER SKOBLO
*Dentons*

Alex has been advising on gambling-related issues in Russia since the inception of current Russian gambling laws, including advising on regulatory governance and negotiating with government authorities.

Alex has represented and advised multinational corporations, international financial institutions and government agencies, both domestic and foreign, on a wide variety of corporate and commercial, real estate, banking and securities issues, including mergers, acquisitions, public and private placements, divestitures, privatisations, and matters of corporate governance. He has also assisted numerous foreign companies and private equity funds in direct and portfolio investments, including investments through Russian joint ventures, offshore structures and companies of various types.

Alex is a seasoned negotiator and has successfully negotiated transactions with government authorities at the municipal, regional and federal levels. He was also the founder of Dentons’ gaming, hotel and hospitality practice for Russia, the CIS and Central Europe, and has developed a reputation as one of the leading experts in this field in the region.

SAMY SMAOUI
*Bird & Bird AARPI*

Samy is an associate in the commercial, tech and comms, and fintech groups based in Paris, and assists both French and international clients on the drafting and negotiation of all kinds of contractual agreements.
He has worked as a web developer, as a translator and as a law teacher prior to becoming a lawyer and he capitalises on these past professional experiences to provide customers with comprehensive services.

Before joining Bird & Bird, Samy worked as a counsel for several IT-specialised law firms and has had in-house experiences with a leading provider of datacentre services and the largest French gambling company.

He has also acquired an expertise in the automation of documents and develops user-forms and tools that enable the adjustment of the most complex agreements in a few clicks.

**MATTHIAS SPITZ**
*Melchers Rechtsanwälte Partnerschaftsgesellschaft mbB*

Dr Matthias Spitz is a senior partner with Melchers and specialises in the area of gaming law with a focus on European law and administrative matters. Since 2013, he has been a member of the International Masters of Gaming Law (IMGL). He advises clients on the legal developments in online gambling and sports betting in Germany and, specifically, on the implementation of new gambling products on the German market, as well as on the development of advertising strategies for operators of online gaming. His areas of practice further cover administrative proceedings against regulatory measures. Matthias frequently publishes articles on regulatory developments in leading industry journals.

**MARTINA BORG STEVENS**
*GVZH Advocates*

Martina is a lawyer by profession. She joined GVZH Advocates as an associate in 2015 and focuses on financial services regulation, and corporate and M&A law, where she assists both local and overseas clients across a mixed spectrum of cross-border transactions. Martina read law at the University of Malta and completed a bachelor’s degree in law with philosophy in 2012, and received a diploma of notary public in 2013. She became a Doctor of Laws in 2015 after having submitted her thesis entitled, ‘Does the Disclosure of Evidence in Maltese Criminal Proceedings Fulfil the Requirements of the Fundamental Right to a Fair Trial under Article 6 of the European Convention on Human Rights?’ Martina is currently reading for a master’s in financial services at the University of Malta.

**ERIK ULLBERG**
*Wistrand Advokatbyrå*

Erik Ullberg is a partner at the firm’s Gothenburg office and joined the firm in 2004. He works primarily in advising Swedish and international clients in matters related to advertising, marketing, media, IP and technology. He has extensive experience from matters concerning contentious and non-contentious IP, data protection, social media and other marketing matters related to lotteries and gambling. Erik Ullberg is also the Swedish representative to the Global Advertising Lawyers Alliance (GALA), the leading global network of advertising lawyers.
JUSTINE VAN DEN BON  
*Pharumlegal*

Justine Van den Bon is an associate at Pharumlegal. She holds a master’s degree in law from the University of Leuven and an LLM in European law from the College of Europe in Bruges. During her studies she did an Erasmus programme at the Stockholm University in Sweden. Justine joined the Pharumlegal team in August 2016 and works on questions pertaining to all aspects of European law, with a particular focus on the internal market perspective. She also works on general commercial law issues and data protection law-related matters.

ROBBE VERBEKE  
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Robbe Verbeke is a senior associate at Pharumlegal. Over the past nine years of legal practice as a gambling lawyer, Robbe has acquired in-depth expertise in all things lotteries and gambling. He regularly acts as counsel for the government, for private operators and for public operators. In this capacity he advises on various matters, drafts contracts, and litigates before national and EU courts, including the CJEU and the EFTA Court.

SONIA CHURCH VERMEYS  
*Brownstein Hyatt Farber Schreck LLP*

Sonia Church Vermeys is a shareholder in the Nevada office of BHFS, where she helps clients navigate Nevada’s complex regulatory requirements related to commercial development and liquor and gaming licensing. Her practice primarily focuses on commercial transactions with an emphasis on gaming, liquor, real estate and land-use matters.

PHILIPPE VLAEMMINCK  
*Pharumlegal*

Philippe Vlaemminck is a partner at Pharumlegal. He has more than 30 years’ specialist experience in EU law (regulatory and litigation) and trade law (WTO and anti-dumping). Philippe has considerate litigation experience before the CJEU and the EFTA Court (a total of more than 89 cases). He is widely regarded as a leading player in the current debate on state lotteries and gambling in the EU and WTO, and has been involved as a Member State representative in every gambling case before the CJEU and the EFTA Court (more than 40 cases). He also acts as a legal adviser to various EU Member States on EU law, and is regularly invited as a speaker to lottery and gambling conferences and seminars or to chair panels throughout the EU. He regularly publishes articles on any topics impacting the lottery sector. Moreover, Philippe was awarded the IMGL President’s Cup and is one of the few individuals who have received the Public Gaming World Lottery Hall of Fame award, as a recognition of its outstanding knowledge of the lottery and gambling sector. He is mentioned in *Chambers Global – Gaming & Gambling* in Band 1 and is ‘widely praised by peers for having his eye on current trends in the industry’.
ALEXANDRE VUCHOT

*Bird & Bird AARPI*

Alexandre is a partner in the international commercial group in France and managing partner of Bird & Bird’s Paris office. He is registered with the Paris Bar.

With both French and English postgraduate qualifications in commercial and corporate law, Alexandre has extensive experience of transactional matters.

He is able to offer comprehensive advice on all aspects of general business and consumer law. He assists on commercial contracts covering distribution franchise, sales, agency, cooperation and procurement arrangements, acting for suppliers and customers particularly in the tech and comms, and retail sectors.

Alexandre has a specific expertise in the field of online business-to-consumer matters and he advises clients on all aspects of trading practices, marketing and advertising, with a particular focus on advertising and sales promotion schemes.

Alexandre has been representing operators of games for more than 15 years and he is experienced in negotiating and securing gaming licences from the French regulators.

ANDREW J ZAMMIT

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Andrew J Zammit is managing partner at GVZH and was previously managing partner at CSB Advocates. Andrew is certified by the Institute of Financial Services Practitioners in Malta as a trust law and administration practitioner, and is a member of the Malta Chamber of Advocates, International Bar Association, International Tax Practitioners Association, International Fiscal Association, Malta Maritime Law Association, International Master of Gaming Law, Institute for Financial Services Practitioners (IFSP) and FinanceMalta.
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