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HARRIS HAGAN

Specialists in Gambling and Leisure Law

Newsletter

- European Union Law
- Information Technology
- Data Protection
- Intellectual Property
- Advertising
- Gambling Regulatory Update

Bwin can be blocked by Portuguese Monopoly

The European Court of Justice (ECJ) recently ruled that restricting online gambling operators from providing their services across member states **is** compatible with fundamental EU principles of freedom of services, if the restriction is designed "to combat fraud and other crimes."

The case was referred to the ECJ after a sponsorship deal between online gambling operator Bwin and the Portuguese football federation was found to be in breach of national laws. Although the ECJ agreed that Portuguese laws are in contradiction to the European principle of freedom of services, it found that such restrictions "may be justified by over-riding reasons relating to the public interest." The ECJ commented also that betting companies which sponsor sports competitions, along with some of the participants, "may be in a position to influence the outcome" of events "and thus increase their profits." According to Bwin, its anti-fraud and corruption measures are more extensive than those set by some countries, which raises the following questions: how will this decision affect the gambling industry in general and how relevant are the high standards that some operators set for themselves?

Online operators with sports sponsorship agreements in countries with continuing state monopolies will have to consider additional national restrictions that (at least) resemble and (possibly) exceed those that have effectively been sanctioned in Portugal, bearing in mind that regulators will now be less worried about breaching EC Article 49 on the freedom of services. The ECJ's ruling will also have an impact on the EU Commission's current proceedings against member states regarding their gambling monopolies. Also, quite how the EU will be able to combine protecting state monopolies whilst at the same time requesting the US to drop its protectionist approach towards gambling operators under the terms of the Free Trade Agreement, remains to be seen.

The lack of a joint EU policy on gambling related matters has led to various court proceedings across the EU, with many online gambling operators relying on the freedom to provide services across the EU, whilst member states are attempting to protect monopolies on the grounds of public interest. This decision is therefore not a total surprise when considering these developments and the resulting trend to issue separate gambling licences in each member state. In fact, the decision seems to confirm the underlying "struggle" to exclude gambling from the fundamental EU principles of freedom of services.

ASA stops William Hill advertisements

On 7 October 2009, following a single complaint, the ASA disallowed William Hill Organisation Ltd (William Hill) from continuing two press advertisements and one poster.

The complainant challenged whether the ads were misleading because they did not make clear that any winnings that resulted from the free bets would be settled without the amount of the free stake being returned. William Hill said the customer was being offered a free bet and that it was clear from the advertisement that conditions were attached to that offer.

However this information was not included in the ads and the ASA therefore considered this to be a significant condition likely to affect consumers' decisions to take advantage of the offer in the first instance.

The ASA concluded that the omission of this information from advertisements was likely to mislead and was therefore in breach of the CAP Code. William Hill must therefore ensure that significant conditions were detailed in their ads in the future.

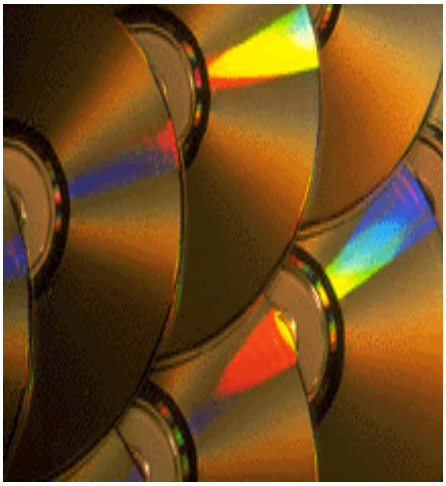
Inside this issue:

Information Technology And Software Agreements

The Basics: technology systems and gambling software are at the heart of online gambling. Negative player experience, including lengthy loading times and repeated systems failures, often lead to the loss of players to competitors, as well as additional costs and loss of time in fixing technological glitches. These pitfalls should be properly addressed from the outset when negotiating core agreements with software providers. Unfortunately these issues are often overlooked at the time, with emphasis being placed in securing a "good deal" instead of reading the small print in the contract which sets out who is liable for what when things go wrong. Below is a brief outline of things to consider before entering into any software agreement:

Be Specific: Set out exactly what you are getting for your money and what the contract actually covers. Do not rely on common sense, but spell it out. If you assume relevant documentation and guidelines are part of the deal, think again, as these will sometimes be sold separately. Make sure that you know what you are paying for and avoid any hidden or unspecified future costs. Ensure that the supplier is required to provide you with upgrades and updates for a specified and agreed fee. If you want to customise the software, make sure to negotiate and to include tailor made and precise specification guidelines as part of the contract, otherwise you may end up with customised software that does not meet your basic requirements and does not work properly on your system. Although it is impractical to agree on all terms of bespoke software (these will often only become apparent during the customisation process) you should still identify and include your key business requirements from the outset. It is not lawyers' talk when advising you to spend more time negotiating software specifications; they are at the core of your deal and your business and make all the difference between success and failure.

Test And Test Again: At the core of any software agreement is the testing phase to assess whether the specified software is working on your system in general and in accordance with your specifications in particular. The testing phase is of particular importance for customised software. You should ensure that there is a proper testing and acceptance protocol in place with specific dates and testing periods that will allow you to test the customised software and remedy any failures or shortcomings. Make time of the essence and ensure that your obligations (i.e. payment) under the contract are not triggered until you are happy with the testing and accept the software. You should also include an early termination clause during the testing phase to allow you to exit the agreement at an early stage without repercussions, should the customised software repeatedly fail to meet your requirements.



Continuing Obligations And Support: Testing and accepting customised software is only the start; you also need to ensure that the software continues to work after you accept it. Ensure that adequate service levels are agreed upon and include "emergency schedules" in case the system breaks down or the software fails to operate. This part is often overlooked and service levels are taken for granted and (because service levels are inconsistent) it is therefore important to have service level support and emergency guidelines and penalties clearly spelled out in the agreement. It should also be emphasised that time in correcting any failures is crucial; otherwise your site may be down or not functioning properly for a long time before the software provider remedies the fault. Minimal response times should therefore be of essence to the performance of the contract. Should the software provider fail to meet the required service level or not remedy the shortfall within the specified timeframe, include your right to terminate the agreement with immediate effect.

Regulatory Technology Standards: The gambling industry is one of the most regulated industries and it is therefore no surprise that many jurisdictions set technological standards for gambling software. You should therefore ensure that you have certified copies of all relevant licences and approvals attached to the agreement. You should also check that the software is approved and licensed by the relevant jurisdiction. If you operate online across multiple jurisdictions you should ensure that the software has been tested by an independent testing facility approved in these jurisdictions.

Players' List: Player information is a valuable asset in the online gambling sector. When you enter into an agreement with a software provider, they will most likely have access to and collect players' data. You should therefore be sure to include a provision for the ownership and return of such data on termination. Bearing in mind the all powerful data protection regulations, additional care should be taken to ensure that both sides have adequate data security arrangement in place.

And Finally: To stay on the safe side; include a general exit clause allowing you to terminate the contract early for no specific reason. This option is rarely accepted by software providers, but there is a lot to be gained by trying and it will be left to you and the skills of your lawyer to include appropriate wording to that effect.

Data Protection: Binding Corporate Rules

Hyatt Hotels has become only the fifth company in the UK to take advantage of the Binding Corporate Rules (BCRs) that allows it to transfer personal data to members of the group around the world. At first sight, the introduction of BCRs appeared to be the perfect solution for multinational companies to facilitate intra group transfer of personal data. Once approved, companies can transfer data freely within the group. The reality however is rather sobering and less attractive. The process is very complex and longwinded, requiring prior approval by regulators in each member state. Although this was stream-lined recently with 9 member states agreeing to reciprocal approval, these changes are considered insufficient to attract a large number of companies to join this scheme.

Consequently most companies still prefer to use the more flexible model contractual clauses, which allow transfer of data within the group and to third parties. The advantages of these contracts are difficult to override by BCRs, bearing in mind the flexibility and low costs involved in model contractual clauses

BCRs are definitely the right way forward in principle, however as long as simple model contracts do the job, many corporates are right to ask the question: why bother?

Intellectual Property and the right to bet: the saga continues

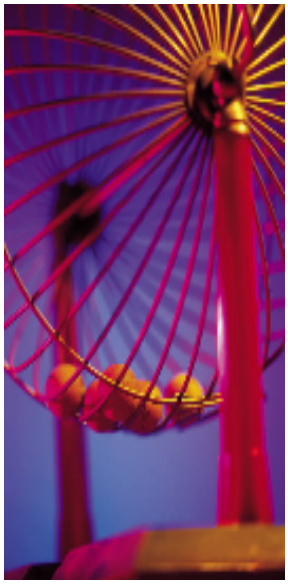
It seems that it is not enough that sports bodies have brought various IP based claims (ranging from trade mark, copyright to database rights) in both national and European courts; they have also attempted to link betting with integrity issues, as well as asserting (without substance) a monopoly over the commercial rights of their events.

With continuous lobbying by the wealthy sports industry, it is no surprise that these requests have been taken up in the new French draft law.

What is even more worrying for bookmakers is the EU Commission's recent stance in favour of the French law. This will encourage sports bodies across Europe to request similar legislation, and possibly the creation of a new right to bet at EU level.

The question remains: When will bookmakers organise themselves and start a similar lobby before it is too late? We would repeatedly submit it is time to put aside differences and short sighted commercial gains and start concentrating on contributing towards the legislative framework before policy makers and sports bodies agree on the sides.

Advertising: ASA warns Camelot on its email Campaign



The operator of the National Lottery has been warned by the Advertising Standards Authority not to repeat an email campaign which included the text: *"The more you play the more likely you are to win. And when you play the Lotto online there's plenty of opportunity to get in the draw. Give yourself even more of a chance by playing multiple lines at once, and playing for the Saturday and Wednesday draws".*

The email had been sent to existing customers who had agreed to receive marketing emails. One recipient complained that the email was irresponsible. The ASA concluded that the reference to the greater chance of winning resulting from multiple entries encouraged repeated and potentially excessive gambling It was held that the email breached section 2.2 of the CAP Code which provides that all marketing communications should be prepared with a sense of responsibility to consumers and to society. Unlike other gambling products, the sections of the CAP Code which specifically relate to gambling advertisements do not apply to the National Lottery.

Other gambling operators may be comforted to learn that despite Camelot's advertisements ostensibly not being subject to the same rules under these specific sections of the Code, the ASA is willing to interpret the broad wording of section 2.2 to impose similar standards on advertisements for the lottery. Operators should take note, however, that just because their own advertisement does not appear to breach any of the specific rules on gambling advertisements does not mean that the ASA might not find them in breach of the more general rule under section 2.2.

Harris Hagan is the only UK law firm specifically dedicated to providing legal advice exclusively to all areas of the gambling and leisure industry in the UK and internationally. We are highly rated by the leading independent directories and were described in Chambers and Partners as *"absolutely the number-one betting and gaming firm".*

We offer unparalleled legal experience, knowledge and commercial understanding of the industry. We understand not only the law associated with betting and gaming and the provision of entertainment facilities, but the business behind it. We aim to provide a full service to the industry, including specialist regulatory, corporate and commercial advice.

We have advised many of the world's largest gambling and leisure operators. We also advise UK companies in all areas of land-based and remote gambling. Our clients include governmental organisations, casinos, hotels, bars, restaurants, event venues, bookmakers, online gambling operators, start up ventures and manufacturers of gambling equipment.

The combined experience of our gaming, entertainment and commercial lawyers provides the gaming industry with a unique and complementary service. We have an understanding of the regulatory, technical and operational issues of our clients and our partner-led approach ensures that our legal advice is both practical and commercial. We provide a level of service that is second to none.

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Gambling Regulatory Update

The UK Gambling Commission recently produced revised guidance notes to clarify the difference between lotteries, free prize draws and prize competitions. The new guidance is seen as a direct response to last year's increasing number of one-off house competitions which appeared as prize competitions and therefore fall outside the scope of the Gambling Act 2005. The changes include:

- Answers to questions that can be found with little effort will be insufficient;
- Free entry following payment after correct answers are submitted does not satisfy the skills test under the Act;
- A direct correlation between the level of skill required and the value of the prize should be made;
- Previous statistics of similar promotions are listed as options to assess whether the questions are difficult enough to discourage a significant proportion of people from participating, or eliminate a significant proportion of participants from winning the prize.

Although the revised guidance is not binding, operators should take into account the spirit of these guidelines and adopt additional steps (i.e. refer to previous statistics) when assessing the legality of their prize competitions.

"True licensing specialists, with in-depth knowledge and the resources to commit to a job"... **the firm is regarded as *"absolutely the number-one betting and gaming firm."***

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