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IRELAND - LATEST DEVELOPMENTS IN BETTING AND GAMING REFORM

■ Consultation Phase for Gambling Industry Extended

Introduction

The current public consultation period on gambling control in Ireland has been extended to 30 September 2009. For those with an interest in influencing the future path of the betting and gaming laws in Ireland, now is the time to make a submission.

The Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern (the “**Minister**”), published the report “Regulatory Gaming in Ireland” (the “**Report**”) of the Casino Regulation Committee (the “**CRC**”) on 10 July 2008. On foot of the recommendations of this Report, the Government established the “Casino Gaming Control Section” (the “**CGCS**”) in the Department of Justice as an “interim gaming regulatory authority”.

The Report triggered much debate and opining on the future of gambling in Ireland. The next stage of this legislative process has now been reached. The internal discursive phase is over and the Government has begun a consultation phase (the “**Consultation**”), inviting opinion from interested parties. The Consultation was begun with an eye to creating a new legal framework for the regulation of gambling in the State, most likely by means of new gambling legislation.

The Consultation concerns

The CGCS is undertaking the Consultation to inform its proposals. There are three principal concerns that will guide the CGCS in this process, being:

1. Addiction, minors and the vulnerable;
2. Crime; and
3. Transparency.

It is also particularly concerned with ensuring that any new legislation is not made redundant by new technological advances, as is the case with current betting and gaming legislation (principally the Betting Act 1931 and the Gaming and Lotteries Act 1956).

Specific Issues in the Consultation

Private Members' Clubs

The so-called "Private Members' Club" is operating in a lacuna in current gambling law. Due to the uncertainty in the law, the clubs cannot be sure that their current activities are strictly lawful. Conversely, the likelihood of prosecution seems low. This uncertainty was exemplified in a raid and prosecution in Clonmel, Tipperary, in May of last year where An Garda Síochána raided a Private Members' Club, only to see the subsequent prosecution fail.

While we await future legislation to clarify the law in this area, the recent publication of the Criminal Justice (Money Laundering and Terrorist Financing) Bill, 2009 marks a step in this direction. As discussed below, the Bill obliges all private members' clubs to register with the Department of Justice and subjects private members' clubs to anti-money laundering legislation. This means that money spent (or gambled) in private members' clubs will have to be more closely monitored.

Information Technology

There is likely to be a focus on the interaction between gambling and information technology in general, and remote gambling in particular, during the Consultation. This is because the CGCS wants to promote Ireland as an online gambling destination. It sees this as bringing many of the advantages and few of the disadvantages of liberal gambling laws. Nonetheless there are likely to be sensitivities around regulatory standards so as to avoid detracting from Ireland's reputation as an attractive English speaking, highly educated and technologically literate EU member state.

Online gambling will probably have its own separate regulatory framework. The advantages of attracting online gambling to Ireland are manifest, as it offers employment and revenue as well as attracting investment. The disadvantages of online gambling, as the CGCS sees it, are the

same as those for any type of gambling (i.e. the protection of the vulnerable and minors and the prevention of addiction, crime and corruption). Presuming that the Government does opt to attract online gambling to Ireland, flexible laws would be required to adapt to changes in technology, whilst also ensuring that honesty, transparency and trust are rigorously enforced to engender confidence.

Indeed this desire for flexibility was reflected in Section 53 of the Finance Act (No. 2) 2008 ("2008 Act"), relating to betting duties.

Section 53 of the 2008 Act, which amended Section 67 of the Finance Act 2002, provides that "betting duty...is chargeable on all bets placed by a person with a bookmaker at the bookmaker's registered premises, irrespective of the means by which a bet is placed". During the Dáil debates on the 2008 Act, the Minister for Finance referred to his belief that "some bookmakers intended to install machines which would deem the mere placing of the bet to take place offshore" and he made it clear that he was introducing Section 53 as an anti-avoidance measure, which would ensure that betting duty is payable in all circumstances where a bet is placed at the bookmaker's registered premises. Furthermore, the Minister stated that the anti-avoidance provision contained in Section 53 was designed to "pre-empt the possibility that the server to which a self-service terminal is linked might be offshore and lead to a claim that the bet was not subject to betting duty".

Other Concerns

There were other issues mentioned on the Report's first publication which were not mentioned when the CTGCS invited consultation. These issues are still in the mind of the CGCS and should be considered. For a more detailed review of all issues raised in the Report, please see the Arthur Cox briefing of 12 September 2008, which note can be obtained from your usual contact in Arthur Cox. Particular live issues include:

1. **Licensing:** The Report states that gambling may be allowed, so long as properly licensed. It also recommends that an overseeing body be established that can also enforce the law.
2. **The "gaming" and betting" distinction:** The Report recommends that this distinction be maintained, with separate laws for each.

3. **Liquor Licences:** The Report recommends strict monitoring wherever alcohol and gambling are interacting.
4. **FOBTs and other gambling machines:** The Report recommends that fixed-odds betting terminals (FOBTs) are to be considered “gaming” rather than “betting”, and should not be permitted in bookmakers. It states that FOBTs are particularly susceptible to addiction.
5. **Taxation:** The Report recommends a duty on the revenues of gambling, rather than the current *ad hoc* provisions.
6. **Flexibility:** The Report recommends that any legislation be flexible, with enough discretion to allow the Minister the ability to “move with the times” and a discretion to issue new regulations under the legislation.

Political Temperature

The Irish Government now appears to accept that gambling is a legitimate form of entertainment, and will not seek to criminalise or unnecessarily discourage gambling. The CGCS will consider the current national law in Ireland and similar international provisions (in particular the Gambling Act 2005 in the UK) to assess the effectiveness of current or potential provisions. It will consult with the industry and other interested parties in the promulgation of the new laws. It hopes that agreement can be reached between all parties on the future of gambling in Ireland.

Conclusion

The Consultation changes little in substance but rather shows that the Government is shifting gears to prepare to begin drafting new gambling legislation.

By clarifying what it sees as the most important concerns in drafting the new legislation, the government has indicated that it is open to suggestions as to the best approach to take with respect to the future of gambling. There is an opportunity here for any interested players to have their say and potentially affect the final outcome. Any proposal that addresses CGCS’s concerns would likely be entertained and might help in the creation of a pragmatic and effective law.

■ Private Members Clubs - Into the Money Laundering Net

Criminal Justice (Money Laundering and Terrorist Financing) Bill, 2009

Introduction

The Criminal Justice (Money Laundering and Terrorist Financing) Bill, 2009 (the “Bill”) was published on 28 July 2009. The Bill will give effect to the Third Money Laundering Directive 2005/60/EC and will consolidate existing anti-money laundering legislation. The Bill has significant implications for casinos and private members’ clubs at which gambling activities are carried out, namely anti-money laundering obligations and the obligation to register with the Minister for Justice.

Anti-Money Laundering Obligations

Existing anti-money laundering legislation, as set out in the Criminal Justice Act 1994 (as amended), already applies to casinos, but the Bill will subject private members’ clubs to formal anti-money laundering provisions. For the first time, private members’ clubs are defined as ‘designated persons’ who, along with casinos, will be required to carry out customer due diligence and report suspicious transactions. The inclusion of private members’ clubs is in response to criticism of the failure of the government to subject such clubs to previous anti-money laundering legislation.

The Bill introduces a ‘Customer Due Diligence’ regime, to replace the ‘Know Your Customer’ scheme, and requires designated bodies to identify a customer and verify the customer’s identity on the basis of official documents. The Customer Due Diligence will arise in the following circumstances:

- (a) prior to establishing a business relationship with the customer;
- (b) when carrying out occasional transactions amounting to €15,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;

- (c) where there are any doubts about the accuracy of existing customer identification; or
- (d) where there is a risk of money laundering or terrorist financing. This risk-based approach is a new concept introduced by the Bill and obliges the designated person to obtain client identification information by reference to the risk of money laundering and involves an analysis of the type of customer, the type of service or transaction, the purpose for which the service is sought, the value of the transaction or the source of the funds.

In the event that the designated person cannot comply with the requirements set out above, the casino or private member club must not provide the service sought by that customer, or should discontinue the business relationship with that customer.

Reporting Obligations

The Bill directs that any designated person who knows, suspects or has reasonable grounds to suspect that another person has been engaged in money laundering or terrorist financing report such suspicion to the Garda Síochána and the Revenue Commissioners. Such a report must be made as soon as practicable after acquiring the knowledge or forming the suspicion. The information on which the suspicion is based, the identity of the person allegedly involved in money laundering, the whereabouts of the property or the funds which is the subject of the alleged money laundering and all other relevant information should be disclosed.

In addition, a designated person must avoid the offence of ‘tipping off’ any suspected person that a report has been made. However, the Bill expands the statutory defences available to the offence. For example, it is now a defence if the disclosure was solely to the effect that the defendant or designated person on whose behalf the defendant made the disclosure had been directed by the Gardaí or the District Court not to carry out a service.

Training & Records

Casinos and private members’ clubs should note that pursuant to the Bill they will be required to

adopt policies and procedures to prevent and detect the commission of money laundering and terrorist financing. These policies include an assessment and management of the risks of money laundering and terrorist financing. In addition, an internal reporting procedure should be set up to facilitate reporting obligations under the Bill.

Casinos and private members’ clubs must ensure that all persons involved in the conduct of their business are instructed on the law relating to money laundering and are provided with ongoing training on identifying transactions or activities that may be related to money laundering or terrorist financing.

Casinos and private members’ clubs are also obliged to keep records, for six years, evidencing the procedures applied and the information obtained from each customer.

Registration

The Bill also requires, for the first time, persons who direct private members’ clubs to register with the Minister for Justice, Equality and Law Reform, in accordance with such procedures as may be prescribed or otherwise imposed by the Minister.

The name of the owner of the private members’ club, the name and address of the premises and any other prescribed information will be maintained in the register. The Minister will maintain this register at an office of the Department for Justice.

The Minister also has the responsibility to monitor casinos and private members’ club to ensure they are compliant with their anti-money laundering obligations under the Bill.

Penalties

Casinos and private members’ clubs may be subject to criminal penalties should they fail to comply with any of their obligations set out in the Bill.

Conclusion

It is considered likely that the Bill will be voted on by the Dáil, after the summer recess, in mid-September or October.

The inclusion of private members' clubs and casinos in anti-money laundering procedures and the introduction of a register for private members' clubs are further indications that the government may be close to introducing a more regulated system for this industry. The reality is that many private members' clubs are already adhering to self-regulatory codes of conduct, many of which principles are very much in keeping with the new regime. As such, establishing a more solid legislative base and certainty in the industry will be welcomed by those who have been demanding reform for a number of years.

Further regulation of this area may be introduced upon completion of the consultation process currently being undertaken by the Department of Justice's Casino Gaming Control Section.

■ EU Developments: The Bwin Liga Decision and the Report on the Integrity of Online Gambling

Introduction

The private gambling sector in Europe suffered a second setback in September when the European Court of Justice (the "ECJ") proffered unprecedented discretion to national courts in allowing state-run lotteries to defend themselves from competition in the field of online gambling where over-riding reasons relating to the public interest are deemed to exist. In its press release, the ECJ stated that "the prohibition which Portuguese legislation imposes on operators such as Bwin of offering games of chance via the internet may be regarded as compatible with the freedom to provide services".

Earlier this year, the report of the Committee on the Internal Market and Consumer Protection on the Integrity of Online Gambling (the "Report") indicated that the online gambling market is unlikely to be harmonised under single market criteria any time soon, and while supra-national consultations on regulation of the industry are being actively encouraged by the European Parliament, this will not be predicated on the opening up of the European online gambling

market. The tenet of the Parliament's Report has now been endorsed by the ECJ in its recent decision in the Bwin Liga case.

Specifically exempted from the scope of the "Services Directive" (Directive 2006/123/EC) are "gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions". This is because it is considered to be an economic activity of a very special nature and therefore a pure internal market approach is not suitable. There are more than a dozen cases concerning the provision of online gambling services still pending before the ECJ. However, these cases must be considered in light of the decision in 'Bwin Liga'. That decision grants unprecedented discretion to national courts to decide what can be admitted as justification to restrict the freedom to provide goods and services, enshrined in Article 49 of the EU Treaty. In essence, and following that decision, deviations from Article 49 "may be justified by over-riding reasons relating to the public interest" and it is for national courts to determine where the public interest lies.

Specific Concerns Addressed in the Report and the Bwin Liga Case

Protection of the Public Interest

The special nature of the provision of gambling services is acknowledged in the Report by a desire for each Member State to regulate its own gambling market according to its own traditions and cultures. Added to this are elements of fraud and addiction which feature heavily in the Report and help to drive a protectionist policy. To this end, the Report recommends that online gambling operators should have to comply with the legislation of the Member State in which they provide their services and where the consumer resides. It also calls for closer cooperation between Member States in order to solve what it terms "the social and public order problems arising from cross-border online gambling, such as gambling addiction and misuse of personal data or credit cards".

These concerns are echoed by the ECJ. The ECJ noted that the prohibition imposed on operators of offering games of chance via the internet may be regarded as "justified by the objective of combating fraud and crime". The private operators argue that reserving the sector to state-run monopolies runs counter to efforts to provide

adequate security against the risks of a black market, noting that it is in their, and in the Member States' interests, to run a transparent and properly regulated industry. This debate will continue but the position of private operators has been considerably weakened by the Report and also decision of the ECJ.

The Integrity of Sports Events

The Report notes that certain criminal activities which may be associated with gambling, such as money laundering and match-fixing, can impact on the integrity of sports events and can damage the image of the sport in the eyes of the public. It further notes that these types of activities will become more prevalent with the proliferation of off-shore operators which are more mobile and therefore more difficult to trace. In the Bwin Liga case, the ECJ said that "the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits." Operators will once again point to the fact that they have been willing to engage on the implementation of appropriate security measures, and that by excluding them from the market, there is a greater risk of activities being driven underground.

On a commercial level, many argue that the exploitation of sporting events for financial gain through online betting activities should benefit the sport in question through the profits that are made. Indeed, Ireland has been grappling with this issue from a slightly different angle in terms of the Horse and Greyhound Racing Fund. The issue is all the more pertinent in light of the Bwin Liga decision as many operators and sporting entities will be forced to review lucrative sponsorship arrangements that may fall foul of local regulations.

Consumer Risk Factors

The Report considered that an increased risk of gambling addiction is associated with online services. It makes this connection on the basis of the element of solitude and social isolation which is sometimes involved in internet gambling and the risk factor involved in the use of credit cards rather than cash. The use of mandatory prepaid cards is suggested to decrease the risk of incurring gambling-induced debt. Young people are singled out as a particularly vulnerable group

in this regard, and the Report stresses the need for more effective age-checks. These concerns are echoed in the Bwin Liga decision, with the ECJ noting the lack of direct contact between consumer and operator and the associated higher risk of fraud than traditional gambling activities.

Self-Regulation

The Report has stated that while a Code of Conduct based on industrial self-regulation can be useful in a supplementary capacity, ultimately it is not sufficiently effective and cooperation between the industry and national regulatory authorities is needed. The decision of the ECJ goes further than this, noting that "the mere fact that a private operator...lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime".

Conclusions

The Report emphasised the need for clarification about the regulatory environment concerning online gambling. In its decision in Bwin Liga, however, the ECJ has determined that European law does not automatically preclude Member States from restricting online gaming to state-run monopolies, even where those excluded operators are licensed elsewhere in the EU. On the contrary, the "public interest" discretion as an exception to Article 49 of the Treaty in the context of gambling has now been strengthened. The decision will, no doubt, impact the European Commission's current policy proposals, as well as the cases pending against Member States such as France, Germany and Austria over protective measures towards their domestic monopolies. The Commission's stated policy has always been that this was an area which fell under the competence of national governments, provided that the EU principles were respected. The ECJ has strengthened the hand of national governments and the commercial gambling operators will have to reconsider their own operations and reliance on the freedoms enshrined in the Treaty.

In its press release following the judgement, the Remote Gambling Association (the "RGA") expressed its disappointment at the "ECJ's

reluctance to challenge Portugal's protectionist gambling legislation" and claimed that the decision will allow the Portuguese monopoly to "eliminate competition and limit consumer choice". The RGA noted "the narrow scope of this ruling" which it claims "reduces its significance in the overall legal context as it is not

a departure from previous rulings" (principally the decisions in Gambelli and Placanica). The RGA remains hopeful that the European Commission will pursue its ongoing infringement proceedings against gambling regulations in other Member States, though this remains to be seen.

■ Contacts

For further information on the developments outlined in this bulletin, please contact:



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