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présente :

Internet Gambling : The European legal framework

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Gaming in Europe is regulated, and even criminalized, to differing degrees by individual states..

In an interconnected world, the disparate treatment of gaming activities means that gaming operators, Internet service providers, banks and financial intermediaries are increasingly caught between conflicting legal obligations and jurisdictions.

However, the advent of the Internet threatens the ability of each European State to restrict and regulate gambling by its people as this new method of communication transcends national boundaries.

Indeed, anyone can start an offshore casino on a small island and offer gaming worldwide taking advantage of the absence of effective regulation or toleration of the local authorities.

Therefore, the issues debated in Europe are the same as elsewhere in the world. Some fear that interactive gaming has the potential to facilitate money laundering and to lead to significant losses of money and tax revenues for individual states.

The question of the protection of the so called compulsive gambler is also a source of concern on the Internet.

Likewise, a need exists in most European countries to prevent children from accessing and being exposed to the possible harm of gaming sites.

Individual gamblers may also be concerned as to the reliability of the virtual casino when it comes to paying out winnings.

Much thought has also been given to the issue of the gambler's privacy. How is it possible to be sure that someone else is not using the gambler's identity when visiting a virtual casino.

And of course the reverse also applies. How can the gamblers be certain that they are visiting the site they intended to (such as an official National Lottery site) rather than a site which has been copied.

In this respect, the use of digital signatures and certification authorities should be encouraged as these techniques guarantee the identity of both the gambler and the site operator.

It is to be noted that a European directive has been adopted in December 1999 which grants a legal status to certified digital signatures.

The directive must be implemented by the member States in July 2001 at the latest.

I will now address three key issues

First : as an illustration of the difficult application of traditional laws to new technologies, I will discuss the potential criminal liability, under Belgian and French laws, of the operators of virtual casinos and lotteries, as well as of other actors in the network who may be involved in the operation of the site.

It is to be noted that the political and legal authorities of the two countries have not yet fully woken up to the implications of the Internet gambling phenomenon. However, they should soon come to realize its importance, given the exponential development of the network in Europe.

Secondly, I will address the EU cross border application of the member States laws to Internet gambling, with a special focus on recent European case law.

Finally, just a word on the self regulatory approach of Internet gambling.

VIRTUAL LOTTERIES

French and Belgian laws ban the lotteries that are not legally authorized. According to this legal definition, online lotteries are certainly concerned by this restriction. Indeed, the infringement requires three elements:

- Fisrt an offer made to the public. Placing on the Internet a lottery that is accessible to all, even in the case where a password is necessary to enter the site, certainly covers the publicity required by law.
- Second the intention to make a profit
- Third the involvement of winning randomly

Games of Chance

In Belgium, people who operate "in *any place and in any form whatsoever*" games of chance insofar as they procure any direct or indirect profit from these games are carrying out illegal activities.

However, contrary to some countries, such as Germany, gamblers themselves are not criminally liable.

Assuming that virtual games are classified as "games of chance, meaning games in which chance prevails over skill and combinations of intelligence, the applicability of the Belgian prohibition to cyberspace will therefore pose no problem.

In France, a similar law exists but it is limited to betting on horseraces that are not legally authorized. In Belgium, however, all betting on horseraces is legal.

As to the ban on games of chance other than betting on unauthorized horseraces, the application of the French law to web sites is more vague.[1]

Indeed, the establishment of a gaming house ("*maison de jeux de hasard*") to which the public is freely admitted is illegal.

Three legal conditions are required:

- First that it is an established gaming house
- Second open to the public
- Third that games of chance take place on the premises

When applied to virtual casinos, the two latter conditions do not pose any particular problem.

This is not at all the case for the notion of "the establishment of a gaming house."

A server that offers virtual gambling facilities via the Internet to computers does not in any way meet the definition of a "gaming house" in the physical acceptation of the term as it was initially conceived by the legislators.

Belgian and French judges, however, sometimes adopt an "evolutive" interpretation of the criminal law when they are called upon to pass judgment on acts that the legislator could not possibly have imagined at the time when he issued the text of the criminal law, in particular in the field of information technology and the new technologies.

Insofar as the criminal law has a "restrictive" application, the Supreme Courts (Cours de Cassation) of France and Belgium only permit such an evolutive interpretation within very strict limits.

The judge must first seek to establish the actual intention of the legislator, which is the "purpose" of the legislation.

If he concludes that the legislator would no doubt have intended to ban the act if he could have imagined its existence, he must then ensure that it can be reasonably understood in the legal definition.[2]

1 In France, casinos must be authorised by the Home Office (law of 15 June 1907), while in Belgium they must be authorised by the Ministry of Justice (law of 7 May 1999).

2 Court of Cassation, France, 01.21.1969, Bull. crim., n° 38; Court of Cassation, Belgium, 11.18.1992, Pas., 199, I, p.1269.

Under these conditions, it is reasonable to believe that, if the legislator could have imagined the existence of cyber-casinos that offer exactly the same gambling possibilities, he would have intended to ban this operation or "establishment" by the same token.

With regard to the second condition, *that's to say* whether virtual casinos fall within the legal definition, as has already been explained, an Internet server cannot be assimilated to a "house".

But, the analysis of the initial objectives of the law could lead to a different conclusion.

The notion of a "gaming house" has always been interpreted by French doctrine and jurisprudence as being any "*fixed establishment where gambling is practised with the three-fold character of habit, continuity and permanence.*"[3]

According to this definition, a virtual casino could be classed as a "gaming house " which, in a permanent and habitual manner and from a fixed "establishment"(the Internet server), organizes games of chance.

INTERNET SERVICE PROVIDERS

The question is : could an ISP, such as an access or a web hosting provider, be held liable for having allowed the access to an illegal virtual casino or lottery or for having hosted a prohibited gaming site.

In my view, by virtue of the rules governing criminal complicity in France and Belgium[4], the provider, unless the situation is brought to his knowledge by a third party and he does not act to end it, should in principle evade all prosecution insofar as it is impossible for him to control the enormous and constant flow of information through his installation.

It is to be noted, however, that in the now famous *Estelle case*, the Court of Appeal of Paris, in a preliminary injunction**,** condemned a French web hosting provider to pay "provisional" damages, for having accepted to host in an anonymous manner a site which had published on line photos showing the top model Hallyday in the nude[5].

In a more recent case, *Lacoste v. Multimania*,

3 P. Bouzat, Rev. Sc. Crim., 1974, 114 under Cass. crim., 28 June 1973.

4 "Penal complicity" is governed by article 67 of the Belgian Penal Code and by article 121-7 of the French Penal Code. The principle is identical in both laws : only those who have knowingly assisted, or have helped in any way in the commission of a legal infraction, can be charged as accomplices.

5 http://altern.org/defense/jugement.html or http://www.legalis.net

the County Court of Nanterre, condemned other French web hosting providers in that they failed to monitor the sites they host for potentially illegal material[6].

It is important to note to in these cases, only the civil liability of the hosting providers has been brought into question and not their penal liability, which would require more than a simple fault or negligence.

In addition, such rulings are completely in contradiction with the system of responsibilities currently endorsed by the European authorities within the framework of the modified proposal for a directive on the electronic commerce[7].

Indeed, this proposal institutes a system of conditional immunity for access and hosting providers when they do not have an actual knowledge of illegal material.

In particular, the directive proposal expressly exonerates access and hosting providers of all obligations in the matter of surveillance, or active search for infringements.

In Belgium, fortunately, in a recent case, the Commercial Court of Brussels followed the proposal for a directive on electronic commerce, ruling the an ISP may be held liable only if, after having had its attention drawn to the dubious activities, it does not remove the illegal material from its computer system. You might like to know that here in the Netherlands, a Court ruled the same way.

SEARCH ENGINES

Search engines use automatic listing techniques, without human intervention.

In order to illustrate the problem, let us take the following example : a person introduces the keywords “Internet casino” in a search engine.

This lists titles and hyperlinks of sites offering online games.

Could the Belgian or French judiciary consider that it is a case ofcomplicity in the area of infractions prohibiting unauthorised gaming activities.

In this case, the search engine will certainly be held liable if, having been duly informed of the situation, it abstains from suppressing the illegal sites of its database.

However, a question remains unanswered : could the search engine find itself blamed for having listed illegal sites by using words as explicit as “Internet casinos” ?

[6] http://www.juriscom.net/jurisfr/image.htm#Lacoste

[7] Text of the proposal available at : http://europa.eu.int/comm/dg15/fr/media/eleccomm/eleccomm.htm

Could one not consider that the search engine has the possibility, as has any user of the Net, to carry out by itself a preventive search using these keywords in order to check to what extend they correspond to illegal sites?

If the jurisprudence initiated in France by the previously mentioned *Estelle Hallyday v.Valentin Lacambre* and *Lacoste v. Multimania* cases should be emulated, it would be reasonable to think that it would be difficult for search engines to claim their ignorance to escape liability.

In Belgium, however, as previously stated, recent case law in matter of ISP's liability should lead to the opposite conclusion.

At the European level, the previously mentioned proposal for a directive on electronic commerce includes a chapter on the liability of ISP's.

The Commission has been directly inspired by the Digital Millenium Copyright Act, of which a chapter provides conditional immunity of service providers in matters of copyright infringement.

This exonerates service providers of all obligations in the matter of surveillance, or active search for infringements.

By service providers, American law means access and hosting service providers**,** as well as providers of other services, such as providers of "*information location tools, directories, listing and hypertext links*". Search tools are therefore affected.

However, in the directive proposal, only the access and hosting providers are concerned. The other service providers such as search tools are excluded

If the proposal becomes a directive, it would be, in our view, unjustified, even discriminatory, to more severely treat the providers of search engines, who objectively, have no more control over the information they list and index, than the web hosting providers have on the site they host**.**

SITES OFFERING HYPERLINKS OR ADVERTISING RELATING TO VIRTUAL CASINOS

If, knowingly, a site advertises on behalf of an unauthorised cyber-casino or an online lottery, or is linked to it by hypertext, it could be prosecuted.

See altavista

FINANCIAL INSTITUTIONS PROVIDING ON-LINE PAYMENT FACILITIES

Any financial institution involved in the payment of bets and winnings, whether it be through a fully electronic system ("*E-money*") or by credit card, may be considered as the accomplice of unlawful activities relating to games of chance and lotteries, in as much as it wittingly lends its assistance to the operation of the site.

Application of the Belgian and French laws on virtual casinos and lotteries established abroad

In France, the foreign lotteries are expressly covered by law, but this is not the case in Belgium. However, the Belgian courts, like the French courts, declare themselves to be competent as soon as a constituent element of the infringement has been committed on national territory, without the need to establish whether the infringement was committed in full.

Consequently, a Belgian judge should have no problem being declared competent in the case of a lottery on the Internet that operates from abroad and offers its "virtual tickets" in Belgium.

By the same token, in theory the persons responsible for foreign cyber-casinos located, for example, in the Caribbean, may fall within the scope of the criminal law, in France or in Belgium.

Indeed, in this case the infringement may be deemed to have been committed on national soil implicating the participation of a French or Belgian player. It is to be noted that, the County Court of Paris applied this principle, ruling it was competent to exercise its jurisdiction on a racist site despite the fact the server hosting the site was American.

Does the European law prevent a member State from restricting online gaming or lottery activity on its territory when offered by a site established in another member State where such activities are legal ?

The question is of paramount importance for the online gaming industry.

The European Commission last looked at the issue of gambling in 1991 and found no need for EU wide regulation.

Most European states view gaming, including Internet gambling, as an issue for the sovereign state. Some states are slowly coming round to the idea of interactive gaming.

For example, the Dutch government only recently allowed telephone betting. Certain European states, notably Finland and Sweden, are allowing providers to offer Internet gambling but only to their own respective residents.

Great Britain recently set up an independent review body to study the possibility to license national online casinos.

The British government is indeed known to be concerned about the potential loss of tax revenue from the establishment of unregulated internet gambling and from the move offshore by bookmakers.

The review body will have to report within 12 months on a new regulatory structure for the gambling industry and to tackle the thorny issue of how to regulate internet gambling.

The outcome of the review is expected by mid-2001 and will then be put to consultation.

.So far, the only European states to offer Internet gambling are small tax havens such as Gibraltar, Liechtenstein and the isle of Alderney.

Questions have arisen concerning the compatibility of member state legislations imposing restrictions on interstate gaming, betting or lotteries with the European principle of freedom to provide services (article 59 of the Rome Treaty).

The European Court of Justice in the case of Schindler held that overriding public interest and consumer protection justifies restrictions on being able to offer lottery tickets from one member state to nationals of another despite that it infringes the freedom to provide services.

The logical extension is for prohibitions on cross EU border Internet gambling not to infringe EU law. In Great Britain, the High Court of Justice followed the European Court of Justice in the Million2000 case involving an online lottery.

The International Lottery in Liechtenstein Foundation run an Internet lottery which marketed tickets notably in Great Britain. This activity was prohibited by virtue of the British Lotteries and Amusement Act.

The Liechtenstein lottery alleged that this prohibition was inconsistent with article 59 of the Rome Treaty.

The High Court ruled that the prohibition was justified by the need to protect the British nationals against foreign lotteries which are not submitted to controls equivalent to those exercised on the National Lottery by the authorities.

Very recenty, in december 1999, in the Zenatti case, the European Court of justice confirmed its jurisprudence.

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It ruled that national rules which grant special rights to certain undertakings to take bets on sporting events and consequently restrict the freedom to provide bookmaking services are not incompatible with the freedom to provide services.

This is valid if imposed as part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting.

Here I would like to stress that the will of the European institutions to exclude the gaming activities from the scope of the principle of freedom to provide services has been confirmed and emphasized in the proposal for a directive on the electronic commerce which is explicitly not applicable to online betting, gaming and lottery activities.

What future for self regulation ?

While in the US, the regulatory efforts to prohibit Internet gambling activities continue to grow, and in the absence of international regulation and enforcement, self regulation appears to be an alternative solution.

In May 1997, the Interactive Gaming Council (IGC), which operates under the umbrella of the Interactive Services Association, promulgated a Code of Conduct.

This Code is the first trade guideline governing fair and responsible industry practises created by the emerging interactive gaming industries.

The Code has several major provisions, such as the obligation of all IGC members to abide by the law and regulations of the jurisdiction where they propose to do business.

It also covers their commitment to make their systems and practises available for inspection by any legitimate gaming commission or governmental authority or by any independent authority recognised by the IGC.

This initiative complies with the self regulatory approach currently supported by the European institutions, notably within the framework of the proposal of a directive on the electronic commerce which encourages adoption of professional codes of conduct for online activities at national and European levels.