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IMGL Officers 2018

Jamie Nettleton  
President  
Addisons Lawyers,  
Sydney, Australia  
T: +61 2 8915 1030  
jamie.nettleton@addisonslawyers.com.au

D. Michael McBride III  
First Vice President  
Crowe & Dunlevy, P.C.  
Tulsa, Oklahoma, USA  
T: +1 918 592 9824  
mike.mchride@crowedunlevy.com

Marc H. Ellinger  
Second Vice President  
Blein, Bardgett & Deutsch, L.C.  
Jefferson City, Missouri, USA  
T: +1 573 634 2500  
mellinger@bbdc.com

Quirino Mancini  
Secretary  
Tonucci & Partners,  
Rome, Italy  
T: +39 06 322 1485  
qmancini@tonucci.com

Douglas L. Florence, Sr.  
Vice President,  
Affiliate Members  
3VR  
Las Vegas, Nevada, USA  
T: +1 702 683 6016  
dflorence@3vr.com

Justin Franssen  
Assistant Secretary  
Kalff Katz & Franssen  
Amsterdam, Netherlands  
T: +31 20 676 07 80  
franssen@kalffkatzfranssen.nl

Marc Dunbar  
Assistant Treasurer  
Jones Walker LLP  
Tallahassee, Florida, USA  
T: +1 850 933 8500  
mmdunbar@joneswalker.com

Keith C. Miller  
Vice President, Educator  
Drake University Law School  
Des Moines, Iowa, USA  
T: +1 515 271 2071  
keith.miller@drake.edu

Marc H. Ellinger  
Second Vice President  
Blein, Bardgett & Deutsch, L.C.  
Jefferson City, Missouri, USA  
T: +1 573 634 2500  
mellinger@bbdc.com

Sue McNabb  
Executive Director  
International Masters of Gaming Law,  
Louisiana, USA  
T: +1 702 375 5812  
sue@imgl.org

D. Michael McBride III  
First Vice President  
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T: +1 918 592 9824  
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mellinger@bbdc.com

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Secretary  
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Rome, Italy  
T: +39 06 322 1485  
qmancini@tonucci.com

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Affiliate Members  
3VR  
Las Vegas, Nevada, USA  
T: +1 702 683 6016  
dflorence@3vr.com

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Assistant Secretary  
Kalff Katz & Franssen  
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T: +31 20 676 07 80  
franssen@kalffkatzfranssen.nl

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T: +1 573 634 2500  
mellinger@bbdc.com

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T: +1 702 375 5812  
sue@imgl.org

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T: +1 918 592 9824  
mike.mchride@crowedunlevy.com

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President  
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Sydney, Australia  
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jamie.nettleton@addisonslawyers.com.au

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Crowe & Dunlevy, P.C.  
Tulsa, Oklahoma, USA  
T: +1 918 592 9824  
mike.mchride@crowedunlevy.com

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Second Vice President  
Blein, Bardgett & Deutsch, L.C.  
Jefferson City, Missouri, USA  
T: +1 573 634 2500  
mellinger@bbdc.com

Quirino Mancini  
Secretary  
Tonucci & Partners,  
Rome, Italy  
T: +39 06 322 1485  
qmancini@tonucci.com

Douglas L. Florence, Sr.  
Vice President,  
Affiliate Members  
3VR  
Las Vegas, Nevada, USA  
T: +1 702 683 6016  
dflorence@3vr.com

Justin Franssen  
Assistant Secretary  
Kalff Katz & Franssen  
Amsterdam, Netherlands  
T: +31 20 676 07 80  
franssen@kalffkatzfranssen.nl

Marc Dunbar  
Assistant Treasurer  
Jones Walker LLP  
Tallahassee, Florida, USA  
T: +1 850 933 8500  
mmdunbar@joneswalker.com

Keith C. Miller  
Vice President, Educator  
Drake University Law School  
Des Moines, Iowa, USA  
T: +1 515 271 2071  
keith.miller@drake.edu

Marc H. Ellinger  
Second Vice President  
Blein, Bardgett & Deutsch, L.C.  
Jefferson City, Missouri, USA  
T: +1 573 634 2500  
mellinger@bbdc.com

Sue McNabb  
Executive Director  
International Masters of Gaming Law,  
Louisiana, USA  
T: +1 702 375 5812  
sue@imgl.org
2018 promises to be a very active year for IMGL and its members, and I hope that you are able to participate in one or more of the many IMGL events that will be taking place this year.

IMGL members have been, and will continue to be, at the forefront of all leading developments in the gambling sector globally. This recognises the expertise of those persons who join IMGL and are involved in the IMGL events that take place. The IMGL year comprises a number of events that will be held throughout the world. This will include numerous IMGL Masterclasses - the first for 2018 have already been held in Miami and London, while others will be taking place in locations across the United States, Canada and Europe, as well as in Asia and Australia. We invite you to visit the website at www.imgl.org for further details.

Many members were present at ICE (hosted by Clarion Events) and presented at the full day IMGL Masterclass which took place on Wednesday 7 February at ExCel. We thank Marc Ellinger, Tony Coles and the panelists who made this a successful event.

The 2018 IMGL year was launched at the IMGL function on Tuesday 6 February at Skippers’ Hall in London (co-hosted with the support of Gordon Dadds). Plans are well underway for the IMGL conferences taking place in 2018 in Las Vegas (7-9 March) and Prague (5-7 September). Bob Stocker has arranged with the American Bar Association and the University of Nevada Las Vegas a programme for the IMGL 2018 Spring Conference in Las Vegas covering matters that are extremely topical for all persons interested in the gambling sector.

Steve Kettleley and Robert Skalina and their committee are well advanced in their preparations for the IMGL 2018 Autumn Conference in Prague. This will be focused on issues relevant to developing gambling markets and will provide a forum to discuss pertinent legal and regulatory challenges facing the industry across the globe. Please put these dates in your calendars - we look forward to welcoming you in Las Vegas and Prague.

Thank you to all speakers and committee members for your time and efforts in presenting excellent educational programmes for IMGL’s conferences and Masterclasses.

As the incoming IMGL President, I am honoured to have been elected to assume this position. It’s a particular honour in view of the eminence of the Presidents who have made IMGL the leading gambling lawyer association that it is today. It is also a recognition of the global reach of the IMGL - as the first non-North American and European holder of this position, I appreciate that it is a recognition of the global nature of IMGL. I very much hope to build on the success of IMGL that has been achieved through the efforts of the distinguished IMGL Presidents who have held this position previously and given so much of their time, effort and expertise in developing this organisation.

I would like to particularly thank Mike Zatezalo for his contribution as President to the IMGL as well as his counsel and friendship. He leaves a significant role to follow.

I would also like to welcome, and congratulate, the newly elected Leadership Committee of IMGL for 2018-2019 - Mike McBride, Marc Ellinger, Quirino Mancini, Justin Franssen, Marie Jones and Marc Dunbar - thanks for your support to date and I look forward to working with you in 2018.

Finally, thanks to all of the supporters of IMGL, and particularly our sponsors. Also, thanks to Sue McNabb and Morten Ronde for their continuing efforts on behalf of IMGL.

I look forward to meeting you in Las Vegas.
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eSports –
A matter of perspective

By Dr Matthias Spitz, Jessica Maier, LL.M. and Lieor Koblenz, MELCHERS Law Firm, Germany
Sports stands for “electronic sports” and is playing computer games competitively on a professional level. This definition, however, would only tell part of the story as eSports also stands for a fast-growing, booming industry which has evolved around competitive computer gaming and is proving lucrative – but also (legally) challenging – for game producers/developers, regulators, bookmakers, pro-gamers, sports clubs, event organisers and, essentially, any stake-holder invested in the market.

Although, to a certain extent, the key issues arising and areas of concern will vary depending on the stake-holder in question, it is apparent that, in eSports, interests are also very often closely intertwined and more a matter of perspective.

This article will look at eSports from different angles to provide insight into some of the aspects, which key stakeholders in eSports should have on their agenda when trying to improve their business and make the industry work. It will also include a very personal view on eSports, particularly on the changes and growth of the industry in recent years, from one of our colleagues, who was a pro-gamer before joining MELCHERS.

What a former pro-gamer has to say

It was fifteen years ago. I still vividly remember entering a luxury hotel on a Saturday morning where a uniformed concierge for the first time accommodatingly guided me and two friends through the impressive lobby to the hotel’s own sports bar. On entering said bar, I was immediately struck by the various iconic sports memorabilia hanging on the walls, the rich buffet carefully arranged around the counter and the feeling that the twelve gaming pods placed in the different alleyways of the bar, each equipped with a TV, a PlayStation 2 and two controllers, seemed entirely out of place. It should be the first of many times I took upon myself to travel a considerable distance just to play my favourite video game – and compete in a tournament against likeminded players from all over Germany and, later, the world.

Within less than two years after my first tournament, the number of participants in a single event had already risen from 32 to up to 320, the venues became bigger and more public and the number of the events per year grew from four or six to over 30. Today, countless eSports events take place all over the world, the largest of which have attracted live audiences of more than 173,000 people (plus more than 46 million (!) online viewers).1

Back in the day, offline tournaments provided the only opportunity for me to compete against players I was not personally familiar with. This, of course, changed dramatically shortly after it became possible to play online. All of a sudden, thousands and thousands of players from all over the world were able to connect and play from their homes. Different leagues formed. Teams with internationally renowned sponsors from the industry started to recruit the most successful and promising players and prizes became more and more lucrative. However, when I retired as an active player, eSports was still a “niche” and far from providing a real career opportunity. This has arguably changed. Many professional sports clubs are creating their very own eSports departments and eSports is generally becoming more accessible for the wider public as e.g. demonstrated by the fact that large-scale eSports events are becoming a regular occurrence viewable not only on popular streaming platforms frequented by gamers and eSports enthusiasts, but also on mainstream TV. Also, more and more money is involved. With this increasing professionalism and commercialisation comes the need to protect certain rights and interests more rigorously.

From a pro-gamers perspective, a key goal for athletes will certainly be to ensure that they are well positioned to capitalise on the growth of the industry, which, among other things, will include securing legally sound sponsorship deals.

1 https://www.forbes.com/sites/paularmstrongtech/2017/05/16/46-million-watched-live-esports-event-10-million-more-than-trump-inauguration-broadcast/#28fcaf8f91f4
Looking at eSports from a regulator’s perspective

Monitoring the continued growth in popularity of eSports and noticing established as well as new operators adding betting on eSports to their product portfolio, regulators will, and have, asked themselves whether eSports or betting on eSports is something in need of specific regulation and, if so, what the areas of concern are and how eSports can be regulated properly.

Computer games being associated primarily with children and minors, the potential attraction and risks of eSports and, in particular of course, betting on eSports to those underage, as well as how to ensure that public confidence in the integrity of eSports as an entertainment and betting event is maintained, will naturally be priorities in any such discussions. A further issue which regulators will want to tackle will be how to best deal with potentially concerning by-products of eSports resulting from e.g. open application programming interfaces (APIs) allowing in-game items – most commonly referred to as “skins” – to be traded outside the actual game (and closed-loop environment). Same applies to products, which arguably blur or cross the lines between gambling and non-gambling, loot boxes acting as probably the most prominent example recently in the media and raising concerns among regulators and policy-makers across Europe.

But how to classify eSports in the first place? Are they “just games”, “gambling”, a “sport” or, maybe, something else altogether? Due to it widely being accepted that the skill element required to play the most popular eSports games is a predominant factor, eSports as such will generally not require a specific gaming licence in most jurisdictions. However, as soon as bets are taken on the events, this no longer applies and, depending on the licences available, it will be more or less important to look at eSports as a sport. Germany, where betting on non-sports events so far is not licensable, acts as an example for a jurisdiction where this will be of particular importance.

In relation to recognising eSports as a sport, we have seen more and more federations such as the International e-Sports Federation (IESF) and National eSports Federations, being founded to lobby for (among other things) eSports being recognized as a sport over the years. Acknowledging the growing significance of eSports, the coalition partners of the likely new German government publically announced that they would support any endeavours to have eSports be formally approved and recognised as a sport. The German National Olympic Committee, however, has so far been reluctant to approve eSports, as a sport arguing that is does not involve enough physical interaction. By comparison, other National Olympic Committees and National Sports Authorities, e.g. in Italy, China, South Korea, Sweden and Finland, have been more forthcoming and it is expected that eSports will be approved as a sport eventually; some assume that it may even already be a medal event at the Asian Games 2022 in Hangzhou, China and possibly also in the Olympic Summer Games in 2024 in Paris.

What developers should have in their field of view

Alongside aiming to protect their IP rights, game publishers and developers will have to play particular attention to ensuring they are sufficiently informed and prepared to deal with cases where regulators raise concerns in relation to by-products created by third parties, which may unlawfully exploit open API technology made available by the game publisher. CS:GO and Dota 2 developer Valve’s crackdown on skin gambling in 2016, which followed accusations of Valve knowingly allowing, supported and/or sponsoring illegal gambling raised in an US court case, clearly raised awareness for the matter, yet truly workable solutions are yet to be found.


3 See draft coalition paper dated 7 February 2018, published on the official website of one of the coalition partners, the CDU: https://www.cdub.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1

Dr Matthias Spitz is a Senior Partner at MELCHERS and Member of the IMGL. He can be reached by email: m.spitz@melchers-law.com

Jessica Maier, LL.M. is a gaming attorney with MELCHERS. She can be reached by email: j.maier@melchers-law.com

Lieor Koblenz is an attorney with MELCHERS and a former pro-gamer. He can be reached by email: lkoblenz@melchers-law.com
IMGL wishes to thank the autumn conference co-chairs, committee members, the moderators, and the panelists for the contribution of their time and efforts in putting together the excellent educational opportunities IMGL is proud to provide at the 2018 Spring Conference.

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IMGL would like to recognize our sponsors for their generous contributions to the IMGL Spring Conference held on March 7-9, 2018, at the Aria Resort & Casino in Las Vegas, Nevada.

For more information on the IMGL Spring Conference, visit IMGL.org
Anti Money Laundering briefing for online casino operators

By Niki Stephens and Sam Ruback
In January 2018 the Gambling Commission of Great Britain announced that it had written to all online casino operators to raise concerns about the sector’s approach to anti-money laundering (AML) and social responsibility.

The letter followed months of compliance assessment activity by the Gambling Commission which assessed the casino sector’s management and mitigation of risks to the licensing objectives including: preventing gambling from being a source of crime or disorder, being associated with crime or disorder, or being used to support crime.

As a result of the Gambling Commission’s concerns it indicated that 17 remote operators were being investigated and that it was keeping under consideration whether 5 of those operators would be the subject of a formal licence review.

The letter indicated that some money laundering reporting officers (MLROs) (also referred to as “nominated officers”) were unable to provide suitable explanations as to what constitutes money laundering and had no understanding of the main principles under the Proceeds of Crime Act 2002 (POCA). The Commission also noted, in particular, that there was “little evidence of effective considerations given to Suspicious Activity Reports (SARs) submissions to the National Crime Agency (NCA) or equivalent Financial Intelligence Unit”, that the UK FIU often concludes that SARs submitted by casino operators are usually lacking in information and that there was a lack of understanding as to what would constitute the offence of “tipping off”.

**The main principles under POCA**

POCA establishes a number of money laundering offences including:

- the principal money laundering offences;
- offences of failing to report suspected money laundering; and
- offences of tipping off about a money laundering disclosure, tipping off about a money laundering investigation and prejudicing money laundering investigations.

The principal offences criminalise any involvement in the proceeds of any crime if the person knows or suspects that the property is criminal property. The offences are broad and can be committed by any person, including, for example, the person appointed by a casino operator as MLRO, and any other persons working for a casino operator, who has knowledge or suspicion that a customer is using the proceeds of crime.

Under section 330 of POCA, a person may commit the offence of “failure to disclose” if they know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering and they do not make a required disclosure to the MLRO as soon as practicable. For these purposes, the information must have come to the person in the course of a business in the regulated sector and the “regulated sector” includes those “operating a casino under a casino operating licence” (as per the definition provided in s65(2) of the Gambling Act 2005).

Under section 331 of POCA, the MLRO may also commit an offence if they receive an internal disclosure and fail to submit a SAR to the NCA or other or equivalent FIU.

The general purpose of these offences is to reflect the expectation that individuals carrying out activities in the regulated sector should demonstrate a higher level of diligence in handling transactions than those employed in other businesses.
Internal reports and suspicious activity reports

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the Regulations) also apply to online casinos. The Regulations require online casinos to (amongst other things) conduct due diligence on, and ongoing monitoring of, their customers and to conduct enhanced due diligence and enhanced ongoing monitoring if, taking a risk based approach, they consider the customer to present a higher risk of money laundering.

In the course of conducting CDD, ongoing monitoring, EDD or enhanced ongoing monitoring in accordance with the Regulations, and otherwise, there are various ways in which a person working for a casino may come to know or suspect that a customer is playing with the proceeds of crime. Examples could include a player: making deposits and seeking to withdraw them without any gambling activity taking place; wagering unusually high amounts of money in a short period of time; depositing sums of money that the operator believes may (based on source of funds and source of wealth checks or other sources of information) be beyond their means; or producing fraudulent identification or other documents.

Individuals working for a casino operator have a legal defence if they report to the MLRO where there are grounds for knowledge or suspicion of money laundering or terrorist financing. All persons working for a casino operator must therefore understand the procedure by which reports are to be made to the MLRO and understand the backdrop to, and importance of, making internal reports. On receipt of the internal report, the MLRO must then consider if a disclosure should be made to the NCA.

The preferred way to provide a disclosure to the UK Financial Intelligence Unit within the NCA is in the form of a SAR. SARs can be submitted online, by paper or by encrypted bulk data exchange (usually taken advantage of by high volume reporters). Casino operators should include in each SAR as much information as possible about the customer and their identity (including if a customer has provided debit or credit card details that would identify them), the transaction(s), the relevant activity and the customer’s product preferences. The NCA has published a number of guidance notes to assist with preparing SARs and has issued a glossary of appropriate terms.

Once the SAR has been submitted, the MLRO should submit a key event notification to the Gambling Commission as soon as practicable and in any event within five working days from receipt of the unique reference number issued by the NCA. The casino operator will be required to indicate whether the customer relationship has been discontinued at the time the key event is submitted. We are aware of instances where the Gambling Commission has separately asked casino operators to confirm how many SARs it has submitted over a particular period of time - the inference being that the Gambling Commission expects online casinos that are fully and properly discharging their duties to be submitting SARs more regularly than is currently the case.

Requesting Consent

In making a SAR to the NCA, there is the opportunity to request a defence or, as the mechanism is referred to technically, “appropriate consent.” This arises due to the fact that if a casino operator (as someone in the regulated sector for the purposes of POCA) handles the proceeds of crime, they may commit one of the principal money laundering offences. These include: concealing, disguising, converting transferring or removing criminal property under section 327 of POCA; facilitating the acquisition, retention, use of control of criminal property by or on behalf of another person under section 328 of POCA; or acquisition, use or possession of criminal property under section 329 of POCA. Appropriate consent from the NCA will allow a casino operator to permit a suspect transaction to proceed, without the risk of criminal liability on their part. In the case of a casino operator, this could include: paying winnings out to the player, returning deposited funds or using the money locked in the player’s account to satisfy chargeback requests. Each case should be considered in relation to its facts to assess if it is appropriate for
consent to be sought (as opposed to the transaction and commercial relationship simply being terminated).

Plainly, if repeated SAR submissions are made in relation to the same customer, it may be difficult for an operator to repeatedly seek a defence (and indeed the Gambling Commission has indicated that the reporting defence is not intended to be used repeatedly in relation to the same customer).

If the casino operator wants to terminate the customer relationship at a time when the suspicion of money laundering remains and there are funds to repatriate, the Commission suggests that the operator considers requesting a defence.

To request a defence, the “consent requested” box should be ticked on the SAR form and requests must be for a specified activity and should not be open ended. Examples might include (without limitation): returning funds to the provider of those funds; under instruction from a competent authority (which would not include a bank), transferring funds to any other party; and under instruction from a bank or other financial institution, transferring funds to any other party.

**Tipping off**

Under section 333A of POCA, a person working for an online casino may commit an offence if they reveal that a SAR has been submitted to the NCA and that by sharing such information, they are likely to prejudice any investigation. An offence may also be committed if an individual discloses that an investigation into allegations is being contemplated or carried out, and such disclosure is likely to prejudice the investigation.

After a SAR has been submitted, extreme care should be taken to ensure that a “tipping off” offence is not committed and that any customer enquiries should be conducted in a delicate, and tactful, manner. The Commission has indicated in its guidance to casino operators in relation to the prevention of money laundering and combating the financing of terrorism that “reasonable enquiries of a customer, conducted in a tactful manner, regarding the background to a transaction or activity that is inconsistent with the normal pattern of activity is prudent practice, forms an integral part of CDD measures and should not give rise to tipping off”. The Commission’s guidance also indicates that if the casino operator wants to terminate the customer relationship, provided this is handled sensitively, there “will be a low risk of tipping off or prejudicing an investigation”.

The existence of a SAR must not be revealed to any customer of a casino at any time, whether or not consent has been requested.

**Conclusion**

Recent regulatory activity in Great Britain has brought into sharp focus the importance of the MLRO’s role, the significant responsibility the office carries, and the importance of thorough and regular training for employees in order to ensure that they understand their responsibilities and the framework underpinning them.

Niki Stephens is a Managing Associate and core member of Mishcon de Reya LLP’s Betting & Gaming group. She regularly advises clients in this sector in relation to corporate and commercial matters including acquisitions and intra-group arrangements. Niki also provides gambling licensing, regulatory and compliance advice to regulated gambling clients.

Sam Ruback is an Associate in the Business Crime Group, part of Mishcon de Reya LLP’s Fraud and Dispute Resolution team. He specialises in advising individuals and corporate entities in relation to charges of fraud, bribery, money laundering and corruption brought by bodies such as the SFO and CPS. He is also experienced in bringing Private Prosecutions on behalf of victims of such offences.
n 2012, a revised article concerning the regulation of gaming and gambling was introduced to the Swiss Federal Constitution. In order to implement and specify this new constitutional provision, the Swiss parliament had been drafting a new law on Gaming since 2014. On 29 September 2017, the two chambers of the Swiss parliament eventually agreed on a wording and passed the new Money Gaming Act in the final vote. The planned new law replaces the current framework that regulates casino games and bets/lotteries with a set of two different laws: The Gaming Act and the Lottery Act.

1. Current Swiss gaming legislation

As of today, the Federal Gaming Act (FGA)\(^1\) is the main federal legal basis for any cash games of luck in Switzerland. Any other games, such as lotteries and betting are governed by the Swiss Lottery Act (SLA)\(^2\). Skill games and prize competitions such as tombolas do not fall under these federal laws, but are regulated by cantonal law.

The offering of casino games is subject to a licence, which is issued by the Federal Council. Licences are only granted for the operation of terrestrial casinos; the offering of online casino games is always illegal. The Federal Gaming Board (FGB) supervises casino games. In particular, it supervises the compliance of casinos with the FGA and decides whether a game is considered as a game of skill or a game of luck.

Lotteries of any kind and lottery-like undertakings (such as snowball, hydra, gella, multiplex, house draws, auctions as lottery-like events and internet-based lotteries) are generally prohibited. Not-for-profit lotteries or lotteries for charitable purposes are exempt from this prohibition, provided they are permitted by cantonal law. In this case the permission is subject to a licence. To date, licences have only been granted to Swisslos and Loterie Romande.

The commercial offering, the sale, the acceptance and the advertisement of bets – including sports betting – is generally prohibited. Exceptions only apply based on cantonal law for the provision of betting services with a totalizer (pari-mutuel) at local live sports events with a special licence. The lottery and betting sector is primarily enforced by the Intercantonal Betting Board (Comlot).

2. New Swiss gaming legislation

The new Money Gaming Act aims at replacing this framework with two different laws by one single Act. Under the Money Gaming Act, a concession or licence is still required for the offering of money games. However, the act provides notable changes to the current legislation: It removes the existing ban on online gambling but introduces IP blocking measures for foreign online gambling websites. It legalises poker tournaments outside casinos under certain conditions and provides for a higher non-taxable threshold for wins from money games outside casinos.

2.1 Online gambling

Under the planned Money Gaming Act, holders of terrestrial casino licences can apply for an extension of the licence in order to be able to offer casino games online. For the extension of an existing terrestrial concession to online gambling services, the applicant will have to establish the commercial viability of the planned service. As the possibility to extent the licence only applies to holders of terrestrial licences, foreign providers of online games do not have the possibility to enter into the Swiss gambling market without partnering with a local terrestrial licence holder. There is no licence requirement for suppliers to operators of casino games. However, suppliers can only provide their services to licenced operators and the collaboration is subject to approval of the Swiss
2.4 Taxation of gains from money gaming

Under the current regulation, gains from lottery and sports betting are taxed if they exceed CHF 1’000, while gambling gains in casinos remain untaxed. In its draft of the Money Gaming Act, the Federal Council eliminated this different tax treatment and provided for a tax exemption for all gains from money gaming. The two chambers of the parliament heavily discussed this tax exemption and finally agreed on a compromise. They decided that according to the new Money Gaming Act, gains from lottery and sports betting are taxed if they exceed CHF 1’000’000. Gains from online gaming are subject to income tax.

2.5 Player protection, advertising and manipulations

The Money Gaming Act provides for a stronger protection of players by implementing new requirements for both gaming providers and the cantons. The cantons need to implement strengthened measures to prevent gaming addiction and set up counselling facilities for people suffering from gambling addiction. Casinos and operators of large-scale games are obliged to implement appropriate safeguard measures, depending on the risk potential and the distribution channel of the respective game.

In addition, the Money Gaming Act includes additional provision to guarantee secure and transparent gaming operations including measures against manipulations of sports competitions. It also includes regulations on the advertising for money games.

3. Developments since September 2017

Swiss citizens have the opportunity to launch a public referendum if they oppose a new law. For a referendum to be successful, 50’000 signatures must be collected within 100 days following the publication of the proposed law. If the referendum is successful, the electorate can vote on the disputed law. For the law to enter into force definitely, a (simple) majority of all the votes cast is needed.

After the publication of the Money Gaming Act, multiple non-party committees and several youth wings of political parties have launched the referendum, mainly because of the planned technical blocking measures. On 18 January 2018, 60’000 signatures were submitted to the Federal Chancellery. Consequently, the electorate will vote on the Money Gaming Act and this vote is schedule to take place on 10th June 2018. If the Swiss electorate accepts the new Money Gaming Act, it is currently expected to enter into force beginning 2019. In case the electorate rejects the new act, the parliament will have to pass a revised new Gaming Act which is likely to delay the process of implementation.

Dr. Andreas Glarner looks after internationally oriented technology and industrial companies as well as internet and blockchain companies. He advises and processes in the areas of intellectual property law, unfair competition, advertising law, data protection, licensing, distribution and IT law. He also has extensive experience in compliance issues for casinos, e-payments, fintech and export controls. Andreas Glarner is the author of various publications in his fields of activity.

Alexandra Körner advises domestic and foreign clients on corporate law issues, the drafting of contracts and represents the interests of their clients in court, whereby the disputes she oversees predominantly in the areas of the Code of Obligations (in particular corporate and commercial law) as well as liability and insurance law come. In addition, she has special expertise in compliance matters in casino law.
Is the Gambling affiliate marketing industry at tipping point?

By Cosmina Simion and Alina Dumitru
Alina Dumitru

Taking place in the cradle of the gambling industry, a fast-paced competitive arena where both operators and B2B suppliers must keep up with ongoing regulatory challenges, but also in today’s rapidly growing digital space with people increasingly using the Internet, the gambling affiliate marketing industry is now crossing a climate of concern with awareness being raised more and more on consumer protection and social responsibility, as well as on the long-debated need of specific regulation.

Living in an accelerated era of technological progress, where most of people are never more than a fumble in their pocket away from portable communication devices, which allows affiliate marketers to expose them to targeted messages seamlessly, it cannot be however denied that this is an industry which has a future. Indeed, the ecosystem for gambling affiliates is at present under a dark sky, but despite the current obstacles and uncertainty, affiliates will continue to play a vital role in the online gambling sector.

Being an important source of new players, and therefore an important source of income, marketing affiliates may be perceived as the lifeblood of gambling operators and hard to see them becoming redundant, a known fact to operators and regulators alike throughout all jurisdictions. This does not mean however that such are immune to regulatory compliance. The question of whether or not specific regulation is (or is becoming, in those jurisdictions where it does not exist) an absolute must in order to stay compliant emerges again, as the market forces the affiliate space to mature into a diligent source of business.

Currently, the European space is quite fragmented in terms of regulation, each country having its own rules and licensing regimes, where the most important first step for affiliates is to understand the targeted regulated market and its local requirements. In this context, there are jurisdictions where affiliates are not required to hold a license in order to provide marketing services for remote gambling operators (such as the UK, Malta, Denmark) and jurisdictions where, on the contrary, affiliates can only perform such activity after having obtained a specific license (as required in Romania).

In all jurisdictions, marketing affiliates can only advertise the online gambling operators’ products if staying within the boundaries of the local marketing and data privacy legislation and consumer protection regulations. Nevertheless, identifying affiliates providing their marketing services in breach of such regulations in a market where offering such services is not subject to licensing may often prove to be difficult, which has led the authorities to go after the operators since they were the ones benefiting of such marketing services.

In this context, where the authorities demand that gambling operators must take responsibility for the misdemeanours of their marketing partners, one may say that affiliates do not seem to have any responsibility or liability of their own before the regulators. This is the case in UK, where the Gambling Commission has made quite clear to gambling operators that they are responsible for the actions of their affiliates, where recent cases show that, despite the affiliate acting in breach of its contract with the operator and releasing the unlawful advert without the operator approving or condoning it, the Advertising Standards Authority (ASA) ruled against the operator, rather than the affiliate. Such examples include the ASA rulings against Sky Betting & Gaming, Casumo Services Limited, 888 Holdings and Ladbrokes for “socially irresponsible” promotions (disguised as news articles that “targeted vulnerable people” with claims about a gambler who cleared his debts and funded medical treatment by playing online casino games), which the operators blamed on affiliates.

The same pattern is also seen in Denmark, where the Danish Online Gambling Association has called on regulators to consider stricter affiliate liability rather than focusing on gambling operators as an “easy target.”
Such regulatory pressures bearing down on the gambling industry inevitably has its consequences, with gaming operators starting to act as the regulators’ extended arm in order to avoid their potential liability for offenses committed by their marketing suppliers. For example, in the UK, this has led to operator Sky Betting & Gaming ending its UK affiliate programme, a seismic decision which sent ripples throughout the industry. Other operators followed suit shortly afterwards, Paddy Power Betfair announcing a “one strike policy” whereby a single breach of internal policy by an affiliate will result in its engagement being suspended, and 888 and Ladbrokes also deciding to scale back their affiliate programmes. LeoVegas has also announced it is cutting ties with many of its affiliate partners in the UK with a view to comply with the increasing standards on advertising and consumer protection.

As such, much of the recent tension over the future of affiliates originates from regulators’ increasing persistence that operators are responsible for the actions of their marketing partners. One can’t help but wonder if a system where affiliates are required to hold a license in order to carry out their activity changes anything. In this regard, we can take the example of Romania, a jurisdiction where affiliates are obliged to apply and obtain a specific license in order to be able to legally provide marketing services to remote gambling operators (with operators having in their turn the obligation to only contract with licensed affiliates).

While the licensing procedure is not cumbersome in Romania (but only consists of several corporate and operational documents), the official fee to be paid in order for the license to become effective is rather onerous (amounting to EUR 6,000). Such license fee must be paid annually in order to keep the license valid and continue to carry out the activity. In such a market, the transparency in what regards the affiliates is indeed much greater (and therefore such are easier to be located in case of potential breach of advertising and consumer protection regulations), given that, as part of the licensing file, affiliates are required to provide a list with all the websites they intend to use in providing their marketing services to remote gambling operators. Thereafter, once they have been licensed, the affiliates are bound to update the list of websites regularly and also inform the regulator on such websites which they no longer use. The affiliates have also the obligation to report and submit to the regulator any agreement they conclude with a remote gambling operator (and the gambling operator in its turn has the obligation to inform the regulator of any new supplier – be it affiliate, software provider, payment processor, etc – that it starts working with). Such a system would only lead to the conclusion that, in case of breaching the gambling, advertising and consumer protection legislation and acting against the terms agreed with the gambling operators, the liability stands with the faulty affiliate, or with the faulty affiliate also, depending on the particular case.

Nevertheless, even though Romanian affiliate market is still at its nascent stage (with only 30 affiliates being currently licensed), considering the mandatory license fee in the amount of EUR 6,000, a question arises: is there still room for the smaller affiliates? While the license fee is of no concern to big affiliates which have the necessary resources to penetrate this market, such fee greatly limits the opportunities that exist for smaller affiliates to enter the market and make it more competitive. In the end isn’t such a conservative regulatory regime leading to a general constriction of the market, one wonders?

In addition, the Romanian gambling advertising market now prides itself with a newly published code of ethics on responsible communication in the field of gambling (“Ethics Code”) recently issued (on February 14, 2018) by the Romanian Office for Gambling. Between the draft bill which sits with the Romanian Parliament for more than 2 years now on the TV gambling add total ban and the decision issued in December 2017 by the National Audiovisual Council according to which it may be deemed that gambling ads can be aired on the Romanian TV stations only after 11 PM, it seems that the Romanian Gambling Office had now decided to take attitude. This looks like the first of a series of efforts designed to assess whether gambling advertising can be disciplined and managed through industry self-regulation before or instead legislation being required.

The Ethics Code is not a legally binding document, but a guideline, which seems to be still subject to improvements, as immediately after publication the regulator called on the market for comments and discussion on the text. However, once posted publicly on NOG’s website, it is clearly endorsed by them, hence it may probably serve as basis to evaluate future advertising and apply sanctions. While no transitory period has been mentioned so far, we can only assume that this code will not serve as a stick from day one. In the end, the intent is to set some background rules to ensure the health and stability of the market, viable from a commercial point of view but in the same...
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time ensuring the protection of customers. There are however some rules in the Ethics Code that, in our view, could lead to some major restrictions in what concerns the advertising of gambling products/services. For example, we point out the provision in the Ethics Code which commands that for the advertising to be made in the audiovisual media, regardless of the channel used, the ad must be aired, through the operators’ diligence, “during hourly intervals for which, in the case of that particular channel, assurances can be given that at least 90% of the audience is over 18 years of age or that the channel is intended exclusively for this age group”. In this case, we are to see what channels are the ones corresponding to promoting the gambling services/products within these boundaries, where in what concerns the digital media there are websites that are available for minors as well (for example Facebook) and, in what concerns the audiovisual code, 18+ programs can only be aired on coded non-Romanian channels.

It remains to be seen how the industry will be responding to the compliance requirements newly established as well as what would the consequences be if they choose not to adhere to such rules. It seems unlikely though to believe that operators will remain idle to see how things shake out. In our expectation the industry will respond to the regulator’s invite to comment and propose amendments to the Ethics Code while auditing and adjusting their promotions at the same time.

To conclude: there are ups and downs to every market, and whereas industry-wide regulation and standards are pivotal to safeguard everyone, it is beyond doubt that, in order for any market to mature and develop, it needs to be afforded certain degree of freedom. However, greater freedom brings with it greater and direct responsibilities, where the key to getting the balance right in this affiliates’ story is, in our view, self-regulation. A proactive self-regulation that has anticipated potential pitfalls, that has social responsibility, consumer protection and advertising compliance at its heart and that builds the right synergy in aligning to all the market requirements so that the ultimate goal is achieved: adapting regulation so that it becomes cost-effective for all businesses (operators and affiliates alike) and protects customers at the same time.

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**COSMINA SIMION, PARTNER**

Cosmina Simion co-heads the Gaming and Consumer Protection & Advertising practices of NNDKP, a preeminent business law firm in Romania. In addition to the gambling industry, her practice focuses on IP/IT, media & entertainment and online industries, having acquired a strong expertise in these fields in her over 19 years of professional activity.

In the gaming field, her experience encompasses the full range of regulatory and operational gaming aspects, assisting betting and gaming operators, software & platform suppliers, financial services providers, auditors & certifiers, industry relevant associations or marketing affiliates. Cosmina has also been actively involved in the review and drafting of the Romanian primary and secondary gaming legislation.

Previous coordination roles include heading the IP, media and technology practice of a Tier 1 global law firm, and acting as an in-house counsel at a US media group.

Cosmina is a General Member of IMGL.

**ALINA DUMITRU, ASSOCIATE**

Alina is a passionate Romanian law qualified lawyer currently focusing her practice on gambling law. Thus, during the past years, she has assisted several gambling operators in obtaining their first online licenses in Romania, and provided day-to-day advice on various regulatory issues related to the organization and operation of their gambling activity. On the supply end, Alina has assisted various gambling suppliers to the B2C operators to include software and platform suppliers, payment processor, marketing affiliates as well as testing laboratories in the process of obtaining their first Class 2 licenses in Romania.

Alina also provides assistance in relation to intellectual property law, advising clients in various industries on trademark and design rights, copyright and related rights matters, as well as consumer protection aspects.

She is a member of the Bucharest Bar.
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