

THE GAMBLING LAW
REVIEW

THIRD EDITION

Editor
Carl Rohsler

THE LAWREVIEWS

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PREFACE

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

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

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

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

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

New jurisdictions

More and more governments are turning their minds to the regulation of gambling. The most obvious shift is in the United States, where the Supreme Court has just been considering the constitutional implications of a ban on gambling. During the preparation of this Preface, we have heard that the US Supreme Court has ruled 6:3 that the Professional and Amateur

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

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

Regulators keep getting tougher

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

Traditional barriers are dissolving (again)

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

terms of ensuring provenance and traceability of funds and even that the tokens can only be used by those over the age of 18.

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

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

Carl Rohsler

Memery Crystal

London

May 2018

IRELAND

Alan Heuston and Seán Dowling¹

I OVERVIEW

i Definitions

Many forms of gambling have been regulated in Ireland for centuries. Irish law distinguishes primarily between three main forms of gambling: betting, gaming and lotteries.

Betting

Betting is governed by the Betting Act 1931, as amended by the Betting (Amendment) Act 2015 (the Betting Acts).

The word 'bet' is not defined in Irish law. Instead, the Betting Acts state that '... the word bet includes wager...'. The scope of what constitutes a bet has fallen to be determined at common law by the courts, although case law is rare. In *Mulvaney v. The Sporting Exchange Ltd trading as Betfair*,² Clarke J stated that:

While bookmaking is not defined in that legislation it seems to me that the term bookmaker derives from a person or body 'making a book' on an event. In other words, the person or body concerned offers odds on all or a significant number of eventualities arising in respect of the same event (for example, offers odds on each horse winning or offers odds on either team winning a football game, or, indeed that game resulting in a draw). Thus, a person carrying on the business of bookmaking is someone who habitually offers to cover a range of possible eventualities on future uncertain events. Two private individuals entering into a wager on the same future uncertain event could not remotely be said to be engaged in the business of bookmaking.

Accordingly, the general consensus arising from case law is that betting encompasses a bookmaker setting fixed odds against a future event, taking bets on that event and paying out winnings.

Gaming

Gaming is governed primarily by the Gaming and Lotteries Acts 1956-2013 (the Gaming and Lotteries Acts).

Gaming is defined in the Gaming and Lotteries Acts as 'playing a game (whether of skill or chance or partly of skill and partly of chance) for stakes hazarded by the players'.³ A stake is

1 Alan Heuston is a partner and Seán Dowling is an associate at McCann FitzGerald.

2 [2009] IEHC 133.

3 Gaming and Lotteries Act 1956 Section 2.

defined as including ‘any payment for the right to take part in a game and any other form of payment required to be made as a condition of taking part in the game but does not include a payment made solely for facilities provided for the playing of the game’.⁴

Lotteries

Lotteries are permitted by the Gaming and Lotteries Acts, but are heavily regulated and there are restrictions on their operation. As per the Gaming and Lotteries Acts, a lottery ‘includes all competitions for money or money’s worth involving guesses or estimates of future events or of past events the results of which are not yet ascertained or not yet generally known’.⁵

The Irish National Lottery falls outside the scope of the Gaming and Lotteries Acts and, instead, is regulated by the National Lottery Act 2013 (the 2013 Act), which repealed and replaced the terms of the National Lottery Act 1986. In 2013, following a competitive tender process, the Irish government awarded a 20-year licence to operate the Irish National Lottery to a consortium involving An Post (the Irish post office) and led by the UK national lottery operator, Camelot. The most notable feature of the 2013 Act is the establishment of a new office, the Regulator of the National Lottery, whose primary functions are to ensure that the Irish National Lottery is run with all due propriety, to ensure that participants’ interests are protected and to ensure that the long-term sustainability of the Irish National Lottery is safeguarded.

Tote/pari-mutuel betting

The Totalisator Act 1929 provides for the establishment and regulation of the Totalisator⁶ by the Irish Revenue Commissioners. The Irish Horse Racing Industry Act 1994 provided that the Irish Horse Racing Authority could apply for and hold a totalisator licence. This was later transferred to Horse Racing Ireland by the Horse and Greyhound Racing Act 2001, and the licence is currently held by a subsidiary of Horse Racing Ireland called Tote Ireland. Tote Ireland’s current licence is due to expire in 2021. Bord na gCon (the national greyhound board) is licensed to operate a totalisator at greyhound tracks.

Financial spread betting

Spread betting on financial instruments is governed by the Markets in Financial Instruments Directive (2004/39/EC) and regulated by the Central Bank of Ireland.

Prize bonds

Irish Government Prize Bonds are regulated separately from other forms of gaming and lotteries. They are described in the Finance (Miscellaneous Provisions) Act 1956 as non-interest

4 Ibid.

5 Ibid.

6 Defined in the Totalisator Act 1929 as ‘an apparatus or organisation by means of which an unlimited number of persons can each stake money in respect of a future event on the terms that the amount to be won by the successful stakers is dependent on or to be calculated with reference to the total amount staked by means of the apparatus or organisation in relation to that event but not necessarily on the same contingency, and the said word includes all offices, tickets, recorders, and other things ancillary or incidental to the working of the apparatus or organisation’.

bearing securities that are 'subject to such conditions as to repayment, redemption or otherwise as [the Minister] thinks fit and in relation to which chance may be used to select particular securities for prizes'.

Pool betting

There is no equivalent in Ireland to the types of pool betting licences (non-remote and remote pool betting licences) that can be obtained from the UK Gambling Commission and that can be used by operators to provide pool betting or fantasy sports products. Instead, if an operator in Ireland wishes to provide a pool betting or fantasy sports product in which the amount of money won by the successful customers is calculated by dividing the total pool (minus commission) by the number of winners, it would be necessary to analyse the characteristics of the product to determine whether it could be characterised as a bet or a game under Irish law.

ii Gambling policy

Although gambling has a long history in Ireland, the Irish authorities have recognised that the legislation governing gambling requires modernisation.⁷ As currently drafted, betting (remote, non-remote and intermediary) is permitted where a licence has been issued under the Betting Acts. Gaming and lotteries (except for the National Lottery) are primarily governed by the Gaming and Lotteries Acts. However, under the Gaming and Lotteries Acts, gaming is prohibited unless it falls under one of the exemptions contained in the Acts.

Those exemptions broadly relate to gaming that takes place in circuses, carnivals and amusement halls, and gaming that is operated in a certain way. The Gaming and Lotteries Acts have not been updated to take account of internet gaming. It is, however, common for operators that are lawfully licensed overseas to offer online gaming services to Irish customers provided that the gaming contracts are not governed by Irish law.

There is a political desire to modernise Irish gambling law. On 15 July 2013, the government published the heads of the Gambling Control Bill 2013 (the Scheme), which, if enacted, would have modernised Ireland's legislative framework for all types of online and land-based gambling. However, in early 2018, media reports indicated that there are plans to scrap the Scheme and prepare and publish a new, updated Scheme, on the basis that the original Scheme is now considered outdated and no longer fit for purpose. See Section VIII, below, for further information.

The Irish National Lottery is designed to raise money for charities and good causes.

iii State control and private enterprise

For the most part, gambling in Ireland is the subject of private enterprise and the normal principles of free competition apply. Private citizens and companies, whether based in Ireland or abroad, are entitled to apply for a betting licence subject to fulfilling the various requirements to obtain a licence. The main exception to this policy is the Irish National Lottery, which is the subject of the 2013 Act, under which a single licensee is chosen to operate the Irish National Lottery following a competitive tender.

⁷ Department of Justice and Law Reform, *Options for Regulating Gambling* (December 2010) 3.

iv Territorial issues

Where regulated, gambling is generally regulated nationally. There are generally no special states, municipalities or localities in Ireland that have separate gambling legislation. Northern Ireland is part of the United Kingdom and its gambling laws are separate to those of the Republic of Ireland.

v Offshore gambling

Offshore gambling operators who offer betting services or betting intermediary services by remote means to Irish citizens are required to obtain either a remote bookmaker's licence or remote betting intermediary's licence from the Irish authorities under the Betting Acts. Remote in this context is described as meaning, in relation to a communication, any electronic means including the internet, telephone and telegraphy (whether wireless or not).⁸ It is clear from the list of operators who have obtained the necessary licences⁹ that there is a significant number of offshore gambling operators offering betting products to Irish citizens.

Online gaming products (e.g., casino, slots, bingo) are governed by the Gaming and Lotteries Acts, although the legislation has not been updated to take account of online internet gaming. The focus of the Gaming and Lotteries Acts is on gaming carried out in amusement halls, arcades, funfairs, carnivals, travelling circuses and slot machines and therefore quite how it is to be applied to the type of games offered online is unclear. However, it is common for operators who are licensed in other jurisdictions to offer online products to Irish customers. It is important in such circumstances that the contract between the operator and the Irish customer is not governed by Irish law. Operators should also be aware that the Gaming and Lotteries Acts prohibit the promotion, advertising and the provision of unlawful gaming products so it is important that operators are familiar with these provisions.

The Irish Revenue Commissioners actively monitor compliance by remote operators with the licensing regime that applies for remote bookmakers and remote betting intermediaries. We are aware that the Irish Revenue Commissioners have actively pursued operators who have not registered as remote bookmakers and remote betting intermediaries. In addition, we are also aware that the Irish Revenue Commissioners actively follow up with operators if they are not registered and paying remote betting tax, remote intermediary duty and VAT on e-gaming activities, and have wide-ranging powers in order to ensure compliance.

Under the Betting Acts, the Irish Revenue Commissioners have the power to issue compliance notices to third parties who provide facilities or services (e.g., advertising, internet service provider (ISP), telecommunications, payment services) to unlicensed remote betting and betting intermediary operators requesting them to cease supplying such services to unlicensed operators. Failure to comply with a compliance notice is an offence and can lead to a fine of up to €50,000. In addition, various civil and criminal sanctions may also apply.

8 Betting Act 1931 Sections 1 and 7C.

9 Available from the website of the Irish Revenue Commissioners.

II LEGAL AND REGULATORY FRAMEWORK

i Legislation and jurisprudence

There are a number of different, parallel legislative regimes that control and regulate gambling in Ireland:

- a* the Betting Acts, which govern betting in Ireland;
- b* the Gaming and Lotteries Acts, which govern gaming, lotteries and other similar activities;
- c* the National Lottery Act 2013, which governs the Irish National Lottery; and
- d* the Totalisator Act 1929, which governs the Totalisator.

These legislative regimes are currently under review by the Irish legislature and reform is expected in 2018 and 2019 (see Section VIII, below).

ii The regulator

There is no Irish equivalent to the UK Gambling Commission, although it is proposed under the Scheme that almost all forms of betting, gaming and lotteries would be brought under a single legislative and regulatory umbrella, the Office of Gambling Control Ireland (OGCI), which it is proposed will be funded from licensing fees.

The bookmaker, remote bookmaker and remote betting intermediary licences are granted by the Irish Revenue Commissioners, who administer the licensing process and maintain public registers of those who have been granted a licence. As part of the process of obtaining a licence, the applicant (or the relevant officers of the applicant where the applicant is a company) must first obtain certificates of personal fitness. The Department of Justice and Equality is charged with awarding certificates of personal fitness to overseas applicants. Applicants who are based in Ireland may apply for a certificate of personal fitness from a superintendent of the Irish police.

The Irish National Lottery is regulated by the Regulator of the National Lottery, whose primary functions are to ensure that the Irish National Lottery is run with all due propriety, to ensure that participants' interests are protected and to ensure that the long-term sustainability of the Irish National Lottery is safeguarded. Small lotteries (which must be carried out for a charitable purpose) may be carried out under a permit granted by a superintendent of the Irish police or a licence granted by a district court.

The licensing of amusement halls and funfairs may be determined by a local authority or local district court. Certain very limited (and low-stakes) gaming may take place in these venues with the appropriate licence. The Irish Revenue Commissioners also licenses low-stakes gaming machines.

The Totalisator is governed by the Totalisator Act 1929, which provides that the Minister for Finance awards the relevant licence to operate the tote.

Spread betting on financial instruments is governed by the Markets in Financial Instruments Directive (2004/39/EC) and regulated by the Central Bank of Ireland.

iii Remote and land-based gambling

The Betting (Amendment) Act 2015 (the 2015 Act) brought remote bookmakers (e.g., internet and mobile betting providers) and remote betting intermediaries (e.g., betting exchanges) within the scope of the existing licensing regime that applied to bricks-and-mortar betting shops in Ireland. The 2015 Act extended the existing 1 per cent turnover on a bookmaker's

activities to online and mobile operators and introduced a 15 per cent commission tax on betting exchanges. 'Commission charges' are defined in the Finance Act 2002 (as amended) as 'the amounts that parties in the State to bets made using the facilities of a remote betting intermediary are charged, whether by deduction from winnings or otherwise, for using those facilities'.

Under the 2015 Act, a traditional land-based bookmaker's licence permits a limited amount of remote betting without the need to obtain an additional remote bookmaker's licence. The value of remote betting on a standard bookmaker's licence may not exceed the lower of €200,000 or 10 per cent of that bookmaker's yearly turnover.

The Gaming and Lotteries Acts apply to all forms of gaming, but have not been updated since the introduction of remote gaming. See Section VIII, below, for details of the reform that is anticipated in this area.

iv Land-based gambling

While the Betting Acts envisage the business of bookmaking being carried out in registered bookmaker's premises,¹⁰ the Gaming and Lotteries Acts provide for a number of different locations in which forms of gaming can take place (e.g., amusement halls,¹¹ carnivals,¹² and circuses¹³). Depending on the type of gambling to be performed, there are a range of restrictions. There is no formal limit on the number of gambling premises of a particular type that can be granted.

Casinos are illegal in Ireland if they promote or provide facilities for any kind of gaming that is deemed 'unlawful gaming' for the purposes of the Gaming and Lotteries Acts. This includes gaming in which, by reason of the nature of the game, the chances of all the players, including the banker, are not equal, or gaming in which any portion of the stakes is retained by the promoter or is retained by the banker other than as winnings on the result of the play. Private arrangements are excluded from the scope of the Gaming and Lotteries Acts. This has given rise to the operation of private members' clubs as casinos and card clubs, which it may be argued fall outside the prohibitions on gaming contained in the Gaming and Lotteries Acts. Aside from the requirement to become a member, a process that is not standardised, the opening hours, age restrictions and general operation of such clubs are not regulated.

The Totalisator Act 1929 provides for the establishment and regulation of the Totalisator¹⁴ by the Irish Revenue Commissioners. The Irish Horse Racing Industry Act 1994 provided that the Irish Horse Racing Authority could apply for and hold a totalisator licence. This was later transferred to Horse Racing Ireland by the Horse and Greyhound Racing Act

10 Defined in Section 1 Betting Act 1931 as 'premises for the time being registered in the register of bookmaking offices kept by the Revenue Commissioners under this Act'.

11 Gaming and Lotteries Act 1956 Section 14.

12 Gaming and Lotteries Act 1956 Section 7.

13 Gaming and Lotteries Act 1956 Section 6.

14 Defined in the Totalisator Act 1929 as 'an apparatus or organisation by means of which an unlimited number of persons can each stake money in respect of a future event on the terms that the amount to be won by the successful stakers is dependent on or to be calculated with reference to the total amount staked by means of the apparatus or organisation in relation to that event but not necessarily on the same contingency, and the said word includes all offices, tickets, recorders, and other things ancillary or incidental to the working of the apparatus or organisation'.

2001 and the licence is currently held by Tote Ireland. As stated in Section I, above, Tote Ireland's current licence is due to expire in 2021. Bord na gCon is licensed to operate a totalisator at greyhound tracks.

v Remote gambling

Remote betting and the provision of remote betting intermediary services are generally permitted in Ireland, meaning that an operator that is licensed by the Irish Revenue Commissioners in Ireland may provide betting services to Irish citizens in Ireland by remote means¹⁵ using equipment which may be located in Ireland or abroad.

As stated in Section I.v, above, online gaming products such as casino, slots and bingo are governed by the Gaming and Lotteries Acts, although that legislative regime has not been updated to take account of online internet gaming. The focus of the Gaming and Lotteries Acts is on gaming carried out in amusement halls, arcades, funfairs, carnivals, travelling circuses and slot machines, and therefore it is unclear how it is to be applied to the type of games offered online. It is common, however, for operators who are licensed in other jurisdictions to offer online products to Irish customers. It is important in such circumstances that the contract between the operator and the Irish customer is not governed by Irish law. Operators should also be aware that the Gaming and Lotteries Acts prohibit the promotion, advertising and the provision of unlawful gaming products so it is important that operators are familiar with these provisions.

vi Ancillary matters

Suppliers of key equipment (e.g., manufacturers of gambling equipment or software suppliers) are not currently required to obtain licences in order to supply to operators. This is set to change when the Scheme is enacted (see Section VIII, below).

III THE LICENSING PROCESS

i Applications

The Betting Acts make provision for three types of betting licences:

- a* a bookmaker's licence;
- b* a remote bookmaker's licence; and
- c* a remote betting intermediary's licence.

A licensed bookmaker may accept bets by remote means without a remote bookmaker's licence, provided that the total value of the remote bets accepted is less than €250,000 or 10 per cent of the turnover derived from the operations covered by the bookmaker's licence for the year concerned.¹⁶

15 Defined in Section 1, Betting (Amendment) Act 2015 as meaning 'in relation to a communication, any electronic means, and includes (a) the internet, (b) telephone and (c) telegraphy (whether or not wireless telegraphy)'.

16 Revenue Commissioners, 'Remote bookmaker's Licence and Remote Betting Intermediary's Licence', www.revenue.ie/en/tax/excise/excise-licensing/remote-bookmakers-licences.html.

Under the 2015 Act, a licence can now be taken out by a body corporate as well as an individual.¹⁷ The application process for the three types of licences essentially involves two stages. The applicant (or in the case of an application by a body corporate, each ‘relevant officer’¹⁸ of the body corporate) must first obtain a certificate of personal fitness (COPF). Applications for COPFs from remote operators must be made to the Minister for Justice and Equality, following the placement of an advertisement in two daily, national newspapers.¹⁹ Applications for COPFs from terrestrial bookmakers ordinarily resident in the state must be made to a superintendent of the Irish police.²⁰ The superintendent or Minister for Justice has up to 56 days to either grant or refuse an application.²¹

Once COPFs have been obtained, the operator has a 21-day window within which their licence application form must be submitted to the Irish Revenue Commissioners.²² The fully completed application form must be accompanied by the COPE, a valid tax clearance certificate and payment of the licence duty.²³ A licence will be issued by the Irish Revenue Commissioners where the application meets all requirements and on payment of the appropriate licence duty.²⁴ The licence duty payable on the first application and renewal of a bookmaker’s licence is €500. The licence duty payable on the first application for a remote bookmaker’s licence and remote betting intermediary’s licence is €10,000, and the duty payable on renewal is based on turnover and commission charges.²⁵ The licence may be paid in full at the time of application or renewal or in two equal instalments.²⁶

Application forms must be completed online using the Revenue Online Service (ROS). Not all ROS services are available automatically so it may be necessary to first register for ROS with the Irish Revenue Commissioners. As a practical point for operators, this process of registering for ROS can take a number of weeks.

The standard duration of a licence is two years.²⁷ Bookmakers’ licences will expire on 30 November of every second year.²⁸ Remote bookmakers’ licences and remote betting intermediaries’ licences will expire on 30 June of every second year.²⁹ The requirements and processes that apply to the first licence application also apply to applications for licence renewal.³⁰

17 Revenue Commissioners, ‘Bookmaker’s Licence’, www.revenue.ie/en/tax/excise/excise-licensing/bookmakers-licences-betting.html.

18 The Department of Justice will generally require Certificates of Personal Fitness for at least two Relevant Officers with one of the those Relevant Officers having to come within Section 1(a) Betting (Amendment) Act 2015.

19 Department of Justice and Equality, ‘Gambling’ www.justice.ie/en/JELR/Pages/WP15000254.

20 Ibid.

21 Betting Act 1931 Sections 4(6), 5(5) and 5A(5).

22 McCann FitzGerald Briefing ‘Betting & Gaming Update. Licence renewal date fast approaching. Are you ready?’ (April 2017).

23 Revenue Commissioners, ‘Bookmaker’s Licence’ www.revenue.ie/en/tax/excise/excise-licensing/bookmakers-licences-betting.html.

24 Ibid.

25 Ibid, footnote 23.

26 Ibid, footnote 23.

27 Ibid, footnote 23.

28 Ibid, footnote 23.

29 Irish Revenue Commissioners, ‘Remote bookmaker’s Licence and Remote Betting Intermediary’s Licence’ www.revenue.ie/en/tax/excise/excise-licensing/remote-bookmakers-licences.html.

30 Ibid.

For retail bookmakers, if the bookmaking business is only being conducted on-course, the holder of the licence must apply for a separate authorisation to accept bets on-course. If the bookmaking is being conducted from a premises, a certificate of registration of premises is required.

There is no licensing regime contained in the Gaming and Lotteries Acts.

ii Sanctions for non-compliance

It is an offence to act as a bookmaker, a remote bookmaker or as a remote betting intermediary without a licence.³¹ The penalty for acting without a licence is a class A fine (maximum fine of €5,000) on summary conviction or, on conviction on indictment, a maximum fine of €150,000 or imprisonment for up to five years, or both.³² Where a further offence is committed, conviction on indictment carries a maximum fine of €300,000 or imprisonment for up to five years, or both.³³

It is an offence to represent oneself as a bookmaker, a remote bookmaker or as a remote betting intermediary without a licence.³⁴ The penalty for this offence is a class A fine on summary conviction or, on conviction on indictment, a maximum fine of €100,000.³⁵ Where a further offence is committed, conviction on indictment carries a maximum fine of €250,000.³⁶

The 2015 Act allows the Irish Revenue Commissioners to serve a 'compliance notice' on persons who provide unlicensed operators with certain services and facilities, for example, providing internet services for the purpose of carrying on a remote bookmaking operation or advertising a remote bookmaking operation carried on by an unlicensed operator.³⁷ In addition, payment services or advertising could potentially be the subject of a compliance notice. It is an offence to fail to comply with a compliance notice. The penalty for failure to comply is, on summary conviction, a class A fine or imprisonment for up to six months or both, or, on conviction on indictment, a maximum fine of €50,000 or imprisonment for up to two years or both.³⁸

It is an offence to make a bet or engage in a betting transaction with a person under the age of 18 years.³⁹ The offence carries a penalty of a class A fine or imprisonment for up to six months on summary conviction, or, on conviction on indictment, a maximum fine of €50,000 or imprisonment for up to two years, or both.⁴⁰

There is also a range of sanctions for non-compliance with the Gaming and Lotteries Acts. In practice, the most potentially serious of these sanctions is that any gaming instruments used in the commission of an offence under the Gaming and Lotteries Acts can be the subject of a forfeiture order. It has been publicly acknowledged by the Department of Justice that 'there are serious problems with the enforcement of laws governing gaming'.⁴¹

31 Betting Act 1931 Section 2(1).

32 Betting Act 1931 Section 2(6).

33 Betting Act 1931 Section 2(7).

34 Betting Act 1931 Section 2A(1).

35 Betting Act 1931 Section 2A(2).

36 Betting Act 1931 Section 2A(3).

37 Betting Act 1931 Section 32B(1).

38 Betting Act 1931 Section 32B(10).

39 Betting Act 1931 Section 23(1).

40 Betting Act 1931 Section 23(3).

41 Report of the Interdepartmental Group 'Review of Gaming and Lotteries Acts 1956-86' at p. 2.

IV WRONGDOING

The Fourth Anti-Money Laundering Directive (AMLD4) was due to be implemented in Ireland on 26 June 2017, with the aim of further strengthening the EU's defences against money laundering and terrorist financing, and ensuring the soundness, integrity and stability, and confidence in the financial system as a whole.

However, it has not yet been implemented at the time of writing, and as a consequence, the European Commission instigated infringement proceedings against Ireland and 17 other European Union Member States for their inaction at the end of last year.

The European Parliament recently confirmed that inter-institutional negotiations held in January 2018 resulted in an agreement among Member States to progress with a Fifth Anti-Money Laundering Directive (AMLD5), which would amend the preceding directive. A final text was adopted at plenary level on 19 April 2018.

The stated aim of AMLD5 is 'to extend the scope of the Fourth Directive so as to include providers of gambling services engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers'. In essence, the objective is to modernise the anti-money laundering and terrorist-financing provisions in AMLD4 to prevent such criminal activity in light of the advent of new, intangible forms of currency, for example, Bitcoin, which could be exploited for fraudulent gains in any financial system, including gambling entities. It appears that Section 16 of AMLD5 will amend Article 47 of the AMLD4 to require Member States to take steps to ensure that gambling service providers who offer virtual currencies as means of payment are regulated.

V TAXATION

Bookmakers in Ireland are subject to betting duty at 1 per cent of turnover. Remote bookmakers must also pay this duty on bets entered into with persons resident in Ireland.

Remote betting intermediaries are subject to a betting intermediary duty that is currently 15 per cent of their commission charges. 'Commission charges' are defined in the Finance Act 2002 (as amended) as 'the amount that parties in the State to bets made using the facilities of a remote betting intermediary are charged, whether by deduction from winnings or otherwise, for using those facilities'.

Unlike most other European jurisdictions, gaming services are not specifically exempted from VAT in Ireland. As a result, online providers who are licensed overseas but who are providing e-gaming services to Irish customers should be registered and charging Irish VAT at 23 per cent on play from Irish customers. Generally speaking, the amount on which VAT is charged is the consideration actually received by the operator from Irish customers. For non-pooled gaming (e.g., slots, casino), this will typically be the net revenue (i.e., after free bets or plays) that the operator receives. For pooled gaming (e.g., poker), the consideration that will be subject to VAT is the rate that the e-gaming operator receives, which is applicable to Irish customers.

Casinos that operate in Ireland as private members' clubs must all register and charge VAT on customers' winnings.

VI ADVERTISING AND MARKETING

For retail bookmakers, Section 20(1) of the 1931 Act prohibits a retail bookmaker from setting up or maintaining in or outside his or her shop:

any attraction (other than the mere carrying on of his business of bookmaking) which causes or encourages or is likely to cause or encourage persons to congregate in or outside such premises.

Section 20(3) contains a prohibition on a bookmaker from:

proclaim[ing] or announc[ing] or permitt[ing] any other person to proclaim or announce in such premises to the persons there present the terms or odds on or at which he is willing to take bets in relation to any particular race, match, or other contest, or in respect of any competitor in any such contest.

Section 20(4) prohibits a retail bookmaker from exhibiting (or permitting to be exhibited) in or outside his or her shop (or that is visible from the street):

any lists or statements of the terms or odds on or at which he is willing to take bets in relation to any particular race, match, or other contest, or in respect of any competitor in any such contest, or lists or statements of the competitors entered for or withdrawn from or taking or likely to take part in any such contest, or statements of facts, news, or forecasts in respect of any such contest, or any other incitement or inducement to bet.

The Broadcasting Commission of Ireland is an independent statutory organisation responsible for some of the key aspects of television and radio services in Ireland. Its General Commercial Communications Code (the Code) addresses standards with regard to all forms of commercial communication, including advertising, sponsorship and teleshopping. Section 8.8 of the Code covers gambling and provides that commercial communications that seek to promote services to those who want to bet are acceptable.

Section 8.8 of the Code also provides that such communications may contain the address of the service provider and factual descriptions of the services available but may not contain anything that could be deemed to be an 'encouragement to bet'. Information detailing special offers, discounts, inducements to visit any betting establishment (including online), references to betting odds available or any promotional offer intended to encourage the use of services of this nature are not permitted.

A revised version of the Code that governs commercial communications such as advertising, sponsorship and product placement on Irish licensed television and radio stations, which took effect from 1 June 2017, includes enhanced provisions, such as prohibitions on advertising of remote bookmaking operations without a remote bookmaker's licence, and certain portrayals of gambling (e.g., children gambling or that gambling can be a solution to personal or professional problems, or financial concerns).

In addition, recent decisions of the Advertising Standards Authority of Ireland (ASAI) provide useful guidance for the betting and gaming industry as to where the lines between permitted and non-permitted advertising of promotions are drawn. In particular, care should be taken if using phrases such as 'risk-free bet' or 'money-back special'. In addition, advertised headline offers must be consistent with any restrictions or clarifications in the applicable terms and conditions.

i Risk-free bet

In 2016, the ASAI considered an email sent by a bookmaker advertising a risk-free bet⁴² for customers who downloaded a new app. A recipient of the email complained to the ASAI that he did not think the offer was risk-free. It required punters to place a bet for £5; if they lost this bet they could then receive another free £5 bet. The complainant argued that the label ‘risk-free bet’ implied that his initial £5 would be returned if he was unsuccessful.

In its response to the ASAI denying the complaint, the advertiser claimed that risk-free bet was a term frequently used in the sector and commonly understood to have the meaning given to it (i.e., that a punter who lost would receive another bet, rather than be refunded their stake). The advertiser highlighted that the offer was described in three steps in the body of the email and the details were not hidden in the terms and conditions. It also stated that as the customer had chosen to receive its marketing emails, he would be familiar with the language used in the gaming industry.

Upholding the complaint, the ASAI determined that ‘risk-free’ could be understood by some consumers to mean that if they lost their initial bet, their stake would be refunded to them. While the ASAI acknowledged that the body of the email explained the terms of the offer clearly, it still found the advertisement to be in breach of three sections of the ASAI Code relating to honesty, misleading advertising and misleading promotions.

ii Consistency with terms and conditions

In other recent decisions involving the gambling sector, the ASAI has emphasised the need for headlines or text in promotional offers to be consistent with the terms and conditions. For example, in a decision delivered in January 2016,⁴³ the ASAI held that an advertisement that contained headline text that was subject to an important clarification contained in a footnote was not compliant as there was no asterisk in the headline to draw attention to the footnote. In a previous decision given in 2015⁴⁴ advertisers were reminded that that it was not compliant to make a headline offer if it was subsequently meaningfully restricted by the terms and conditions.

The ASAI is a self-regulatory body set up by the advertising industry in Ireland to promote standards in commercial advertising in compliance with a Code of Standards for Advertising. While the ASAI Code does not have a legislative basis, commercial marketing communications found to be in contravention of the Code by the ASAI Complaints Committee must be amended or withdrawn by organisations who agree to abide by the Code. In addition, decisions of the ASAI may be taken into account when applicable advertising or consumer protection legislation is being considered. For example, an advertisement that breaches the ASAI Code could, in certain circumstances, also be deemed to constitute a ‘misleading commercial practice’ for the purpose of the Consumer Protection Act 2007 and give rise to civil and criminal liability.

42 ASAI Reference: 26230, www.asai.ie/complaint/leisure-betting-4.

43 ASAI Reference: 24857, www.asai.ie/complaint/leisure-betting-3.

44 ASAI Reference: 22538, www.asai.ie/complaint/leisure-betting-2.

VII THE YEAR IN REVIEW

The Gaelic Athletic Association Congress, which governs the Irish national sports of Gaelic football and hurling, voted on 24 February 2018 to ban gambling and betting companies as sponsors of the national sports.⁴⁵ This decision illustrates the heightened public concern surrounding gambling addiction, and will undoubtedly place further pressure on the government to demonstrate its efforts to combat the negative consequences of gambling.

Separately, unlike in the United Kingdom, gambling debts in Ireland are unenforceable.⁴⁶ This position was challenged in a recent Circuit Court case involving an action brought by a gambler against a small amusement centre. He claimed that it had refused to pay him €11,713 he had won after he placed several bets on an automated roulette machine.

The plaintiff alleged that on 2 and 3 March 2015, he first won about €7,500. When he sought to cash it out, he was given €2,500 in cash and €5,000 worth of chips, before being told to play more and that he would be paid at the end of the night. The court heard that after he won a further €6,713, the plaintiff was told by a manager to cash out. When he went to the cashier counter, he was told the casino had no more cash for the night but that he would be paid the following day. He had also been told that an engineer would later check the roulette machine. The plaintiff claimed the amusement centre refused to pay him despite multiple requests.

In reaching his decision and reaffirming the position in Ireland that gambling debts are unenforceable, the Circuit Court judge stated that he had to rely on the 1956 Act which states that ‘no action shall lie for the recovery of any money or thing which is alleged to be won’. The judge went on to say that ‘[i]f you happen to be too lucky while placing a bet or gambling, the person can simply say “no you’re not entitled to the money”. That is simply the law in Ireland’.⁴⁷

VIII OUTLOOK

The Minister for Justice announced plans in 2011 for new legislation on gambling in Ireland. In presenting his plans, the Minister noted that ‘the present laws are not adequate to deal even with aspects of gambling which they were intended to cover’.⁴⁸

The heads of the Scheme were published on 15 July 2013.⁴⁹ The intent of the Scheme was that it would, if enacted, provide a comprehensive overhaul of Ireland’s outdated gambling laws and would result in most forms of gambling being regulated by a single piece of legislation.

Since the initial publication of the Scheme in 2013, limited progress has been made. However, a number of recent high-profile cases involving prominent sportspeople and

45 <https://www.independent.ie/sport/gaelic-games/betting-companies-booted-out-of-sponsorship-in-the-gaa-36639062.html>.

46 Gaming and Lotteries Act 1956 Section 36.

47 Saurya Cherfi, ‘Casino not compelled to pay €11,000 roulette win under law’ *Irish Times* (20 March 2017) www.irishtimes.com/news/crime-and-law/courts/circuit-court/casino-not-compelled-to-pay-11-000-roulette-win-under-law-1.3017271.

48 Department of Justice And Equality, ‘Minister Shatter announces the preparation of a new Bill on Gambling’ (21 September 2011), www.justice.ie/en/JELR/Pages/PR11000178.

49 Department of Justice And Equality, Gambling Control Bill 2013 – General Scheme (July 2013), www.justice.ie/en/JELR/Pages/PB13000296.

gambling addiction, coupled with increased public concern about children under 18 engaged in gambling activities, has led to an increased political desire to implement legislation to give effect to the Scheme. If legislation is enacted to give effect to the proposals outlined in the Scheme, it will result in a fundamental change in gambling law and regulation in Ireland.

On 10 January 2018, it was widely reported in the media that the government would scrap the Scheme in favour of drafting and publishing an updated Scheme, on the basis that the original Scheme is, on reflection, outdated and no longer fit for purpose. It is anticipated that the revised Scheme will now tackle new developments in the industry, such as social media advertising, crypto-currencies and secondary lottery providers.

It is anticipated that the revised Scheme will be published in 2018 or early 2019.

Outlined below are a number of the anticipated key features of the revised Scheme.

i Independent regulatory authority

In a significant departure from what was originally proposed, it is now anticipated that an independent regulatory authority will be established to regulate the gambling industry in Ireland. In contrast, it was previously envisaged that the Department of Justice would provide regulatory oversight of this area through the creation of the Office of Gambling Control, Ireland (OGCI).

Media reports suggest that the duties of this independent authority will include overseeing advertising, sports sponsorship, access for those under 18, a social fund for access to treatment for addiction, and a research function. It is, as of yet, unclear whether this authority will have responsibility for issuing licensing, ensuring compliance with the Scheme, how the Scheme will be enforced once enacted or how the authority will be funded. It is reasonable to suggest that the new body will assume most of the functions that were expected to be carried out by the OGCI and in this event, the new independent regulator will probably grant licences to promoters who will incur a licensing fee that will go towards funding the independent regulator. Similarly, just as the OGCI was to be the ultimate enforcer of gambling laws in this jurisdiction, it is likely that the independent regulator will also be equipped with similar powers to fulfil this role (e.g., the power to order ISP blocking measures to prevent, disrupt or obstruct access to unlicensed remote services).

ii Online gambling and social media advertising

Media reports also suggest that online gambling and social media advertising will be considered in the revised Scheme. A government spokesperson has been quoted as saying that the Scheme should be updated in order to 'protect consumers and vulnerable people'. It could be argued that the inclusion of advertising restrictions in primary legislation, as suggested by us at the time of the publication of the original Scheme, could render them inflexible, as it would potentially make these rules more difficult to amend as necessary.

iii Licensing system

It is anticipated that the revised Scheme will update the licensing system in Ireland. Following publication of the original Scheme, several submissions were made to the Department of Justice and Equality in relation to the complex licensing system envisaged by the original Scheme. The majority of these submissions sought a more streamlined licensing system. Of particular interest will be whether the revised Scheme will reduce the number of licences

proposed in the original Scheme (43 different licences in total), with a view to minimising potential administrative backlog and simplifying the system for promoters who may find it unduly difficult to determine what licence to apply for.

iv Additional issues

Other issues that are reported to be included in the revised Scheme are the regulation of gaming machines, the regulation of casinos and the protection of children against gambling. Legislation for land-based casinos and casino games was provided for in the original Scheme, in addition to provisions to allow for gaming in betting shops and enhanced player protection measures. No specific mention has been made of these provisions in relation to the revised Scheme.

v Timing

Having received approval at government level, the government will now commence discussions with stakeholders in the gambling industry with a view to gauging key issues to be tackled in the new and improved General Scheme. It is reported in the media that the updated Scheme will be made publicly available at the end of summer 2018.

In addition to the decision to publish a new and updated Scheme, some initial steps were taken in 2017 to modernise the Gaming and Lotteries Acts. The General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017 (the 2017 Bill) was published on 2 August 2017 and, while it has not yet been enacted and accordingly is not yet legally binding in Ireland, it is an indication that the Gaming and Lotteries Acts will be modernised in 2018. The main objective, according to the preamble to the 2017 Bill is to 'provide greater clarity and certainty for all promoters and participants involved and to combat fraudulent behaviour' in the gambling sector.

The key features of the 2017 Bill include the following.

Permit application procedure

Head 70 of the 2017 Bill provides that gaming that is promoted at certain defined events and locations, including licensed premises, requires a permit in order to be lawful. The superintendent of the Irish police in the district in which it is intended to promote the gaming event is charged with issuing gaming permits at their discretion based on a number of specified factors, including the character of the applicant, the number of permits already issued in the locality and the purpose of the proposed gaming event. The 2017 Bill also requires the superintendent to maintain and update a public record of all permits that have been issued, suspended, revoked or surrendered. It is anticipated that this will result in greater transparency in the local Irish gambling scene and ensure that participants in these regulated gaming events can be certain that the promoter does not have a track record of having their licence revoked, in turn reducing the capacity for fraudulent behaviour. Furthermore, the superintendent may grant the permit subject to certain conditions and in the event that these conditions are breached, Head 70 of the 2017 Bill provides that the superintendent shall have the power to investigate possible infringements and enforce penalties. Head 98 of the 2017 Bill provides for more severe punitive sanctions in the form of increased fines and greater terms of imprisonment.

Charitable gambling activities

The 2017 Bill would require any charitable beneficiary of a raffle or lottery to be registered with the Charities Regulatory Authority. This is presumably to provide greater transparency in the sector and to minimise fraudulent activity. Additionally, promoters of raffles or lotteries for charitable or philanthropic purposes will have to state clearly in their application to the superintendent in writing that this is the case in order to avail of an exemption from having to obtain a permit (Head 76 of the Bill).

Stakes and prizes

In order to reflect inflation since 1956, the 2017 Bill has augmented the stakes and prizes that are permissible with maximum rates of stakes and prize money for licensed gambling machines being raised to allow for a stake of up to €10 and a prize of up to €750. The 2017 Bill draws a distinction between stakes and prizes permitted in certain defined gaming and lottery activities where the promoter of the event may personally benefit (allowing a stake of up to €10 and a prize of up to €3000) and those permissible in the context of a charitable or philanthropic event where a maximum prize of €5000 is permissible. In all cases, the promoter is only entitled to recoup up to 5 per cent of the total tickets sales with regard to expenses incurred in promoting the gaming event.

Minimum age requirements

Perhaps because of increased public concern and media reports on the rise of gambling addiction among minors, the 2017 Bill proposes to standardise the age limit for participating in betting and gambling at 18. Under the Gaming and Lotteries Acts, some activities mandate an 18-year limit, while others are open to 16-year olds. Setting the minimum age at 18 would bring the minimum age into line with the limit set by the National Lottery Act 2013 and Betting Acts.

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Alan Heuston is a partner in McCann FitzGerald's tax group, about which *Chambers Europe* recently noted, 'They are accessible, technically strong and commercial with their solutions.' Alan has extensive experience in advising clients on the tax aspects of mergers and acquisitions, reorganisations, restructurings, migrations, capital markets, financial products, banking, and a wide range of other international and domestic tax matters.

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