

## Italy's New Rules Enforce the Prohibition of Online Casino Games

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**I**N ITALY, there are some special laws that allow gambling only in expressly authorized casinos. At present, authorized casinos are located in four Italian cities and are managed by the government. Italy's criminal laws prohibit all other casino games. The judiciary has deemed poker, slot machines, roulette, and other games to be illicit if they occur in places other than the authorized casinos.

Article 718 of the Italian Criminal Code ("Casino Games") provides that whoever—in public places or in places open to the public or in private places—carries out a casino game or favors the carrying out of casino games is sanctioned with imprisonment from three months up to one year and a fine of not less than 206 euros. The sanctions are doubled if 1.) the organizer has set up or managed an organization for casino games, 2.) the game occurs in a public structure, 3.) if in the casino games high stakes are provided, or 4.) if participants in the casino games are under legal age (18).

Article 720 sanctions anyone who simply takes part in casino games organized by others. (The penalty is imprisonment up to six months and a fine of 516 euros).

Italian laws define hazardous casino games as those characterized by the aim of profit and by the fact that winning or losing is completely aleatory.

### ONLINE GAMING UNDER ITALY'S CRIMINAL LAWS

Of course, in an effort to avoid criminal sanctions, it could be argued that the Internet is not a public place or open to the public. A public place is a road or any other place whose access is possible to anyone. A place "open to the public" is one such as a cinema, a theater, a stadium, or any other place whose access is allowed to a certain category of people, or under certain circumstances and/or limits.

But Italian courts consider the Internet to be a (virtual) public and/or open-to-the-public place. Moreover, gambling through the Internet is considered to be an illicit use of machines for casino games.

It should be noted that the choice of using foreign servers is not a valid way to get round the law. In fact, the Italian Court of Cassation (the most important judiciary body) has issued an important ruling on Internet regulation,<sup>1</sup> stating that crimes committed on or through the Internet are subject to Italian jurisdiction pursuant to Article 6 of the Italian Criminal Code (even if the conduct has been initiated outside of Italy) provided that the conduct took place wholly or partly in Italy and/or the event occurred in Italy. (This is the so-called "ubiquity theory.")

Given that casino games and related organizational or managing activities are forbidden in Italy unless specifically authorized by law,

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<sup>1</sup> Cass., Sentence of Nov. 17–Dec. 27, 2000, No. 4741.

the organization of betting games or casino games by means of a Web site, even if located on servers abroad (but which can be browsed in Italy), may be considered an illicit activity in Italy, as the conduct is partly taken in Italy. (There is no way to apply for authorization of casino games: Only a specific law enacted for a single subject by the Italian Parliament could authorize the activity.)

Pursuant to Italian criminal law, casino crimes are "pure conduct" crimes: The crime is committed once an activity that makes the illicit game available to players has been realized.

Even more ominously, the Italian Constitutional Court has ruled that the prohibition set forth in Article 718 of the Criminal Code is "strictly unbreakable."

The same restrictions also apply to marketing activities, considering that Article 718 of the Italian Criminal Code sanctions also "whoever favors" illicit casino games, and marketing can be considered to be aimed at "favoring" a forbidden activity.

#### DE FACTO AVAILABILITY OF ONLINE GAMING

According to recent studies carried out by multinational companies providing casino games and services, Italy is a country where people have the highest willingness to pay for such services. Maybe this is the reason justifying the strictness of Italy's gaming laws.

Recently, there have been strong disputes and polemics in Italy about the authorization given to public places like bars or clubs to install video poker machines. Since people spent a lot of money and entire families got ruined, the general atmosphere is one of agreeing with strict rules prohibiting casino games. Bills actually under discussion before the Parliament, while geared toward liberalization of the laws, nevertheless prohibit casino services from being offered on the Internet. (Of course, in prior years, proposed bills had been discussed but were never enacted, and that result is expected with pending bills as well.)

As a practical matter, online casino games are in fact accessible and allow Italians to play

from Italy. Gaming Web sites are mostly provided by foreign organizations located in countries where such games are allowed. There is a legislative uncertainty about how to repress such activities given that Italy's general criminal law framework is not geared toward punishment of activities located in countries from which it would be very difficult to obtain international collaboration. In the last year, though, police authorities have paid far greater attention to the online gaming phenomenon, and their monitoring of Web sites providing casino services online has highly increased. It seems that both the police and the judiciary are interested in strict prohibitions of casino games except at already-authorized locations.

#### A STATUTORY CRACKDOWN

The recent Italian Budget Law for 2006<sup>2</sup> has introduced in the Italian gaming law framework new strict rules aimed at strengthening, among other things, the means for combating illicit Web sites providing casino games in breach of Italian laws. The adoption of these new provisions show that the Italian authorities are willing—despite years of de facto tolerance—to firmly stem the phenomenon of Web sites offering casino games formally prohibited by law.

A distinction between the type of game involved has to be made. Italian gaming laws distinguish "illicit games" ("hazardous" games such as poker, including virtual poker tables and tournaments, roulette, blackjack, and chemin de fer), which are totally prohibited, from "authorized games" (such as sports betting, and lotto games) whose providers have to be properly authorized by means of an administrative procedure. In few words, while the illicit games are subject to an absolute prohibition except for the four Italian casinos and nobody can offer in any form such services, the authorized games are subject to a previous administrative permit (which has the effect of removing a general prohibition, which remains applicable to the subjects not holding such permit).

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<sup>2</sup> Law of Dec. 23, 2005, no. 266.

Actually, on the Web or on other electronic networks (mobile networks, digital TV, and so forth), illicit games and games not authorized are widely offered by several Internet sites (Italian or foreign) accessible from Italy. Consequently, the Italian legislature, with the aim of combating the fast-growing offer of illegal casino games with awards in money and related illicit activities (in particular, cases of fraud), has enacted stricter rules.

Paragraph 538 of the Italian Budget Law for 2006 provides that the National Agency for Monopolies and Games has to communicate with

- the providers of Internet access and connectivity services,
- the managers of telematic or telecommunications networks, or
- operators providing telematic or telecommunications services with regard to such networks that offer access to unauthorized, unlicensed or, in any case, prohibited games, bets, prize contests with awards in money.

Paragraph 536 of the Italian Budget Law for 2006 specifies that the addressees of this communication from the National Agency for Monopolies and Games are obliged to generally prevent users from accessing or utilizing prohibited or unauthorized games. To this end, specific technical measures will have to be undertaken by the providers, managers, and operators specified above. Fines for violating Paragraph 536 range from 30,000 euros to 180,000 euros *for each violation*.

In any case, Italian financial police and the telecommunications police already have inquiry power to prevent or to punish criminal activities related to illicit casino games.<sup>3</sup> Their powers are not affected by the new monitoring tasks given to the National Agency for Monopolies and Games.<sup>4</sup>

### A NEW DECREE

On Feb. 13, the National Agency for Monopolies and Games issued a decree implementing the provisions of the Italian Budget Law for 2006. The decree is aimed at “remov-

ing cases of offer by means of a telematic network of games, lotteries, bets, prize contests with awards in money not based on administrative permits or—in any case—in breach of the Italian rules prohibiting casino games or other hazardous games.”

While the decree is applicable to the providers of Internet access and connectivity services, to the managers of other telematic or telecommunications networks, and to operators providing telematic or telecommunications services with regard to such networks, its applicability to foreign operators using servers located abroad is a bit uncertain.

The decree identifies three different categories of “network service providers”:

- “Providers of connectivity services (access providers)” shall mean any subject *enabling users* to connect to the Internet or to other telematic or telecommunications networks or *enabling operators to provide telematic or telecommunications services with regard to such networks*. “Access provider” shall also mean any subject who put at the clients’ disposal an electronic space to be autonomously managed by the client on the hard disk of his PC.
- “Service providers” shall mean any subject who—once access to the Internet or to other telematic or telecommunications networks has been enabled by the provider—enables users to carry out certain operations on the web, such as the use of e-mail, the storing of information, the transmission of information to specific addressees, and so forth.
- “Content providers” shall mean any operator putting at the disposal of the public information and works of any kind uploading them on his servers and connecting such servers to the Internet or to other telematic or telecommunications networks. “Content providers” shall also mean any subject who is in charge of organizing and managing the Web pages accessible on the Internet on behalf of its client.

<sup>3</sup> See Italian Criminal Code 718.

<sup>4</sup> Italian Budget Law for 2006 538.

Interestingly, prohibited acts apply to access providers, service providers, and to contents providers—but no distinction about the nationality of these entities is made by the decree. These operators have already received from the National Agency for Monopolies and Games an official list of the Web sites deemed in breach of the Italian gaming laws and whose technical disabling had to be guaranteed by these operators by Feb. 24, 2006. This time limit (made public on Feb. 13, 2006) has been deemed proper in order to guarantee all the players from the foreseeable effects deriving from the decree, such as the difficulty related to the withdrawal of amounts paid (or pre-paid) by each single player still deposited on accounts at the prohibited web sites. Should the decree not be complied with by access providers, service providers, and content providers, they may be fined 30,000 euros to 180,000 euros for each violation.

To strengthen the enforceability of the rules applicable to operators, the decree further provides that:

- Access providers transmitting, on a communication network, information provided by a not authorized operator or enabling such operator to access the Internet shall be directly liable for the information transmitted or for the access enabled should the order of technical disabling not be complied with.
- Service providers transmitting information provided by a not authorized operator or electronically storing such information or managing the transmission of such information to other addressees shall be directly liable for the information should the order of technical disabling be not complied with.
- Content providers electronically storing information provided by a not authorized operator shall be directly liable for the information should the order of technical disabling be not complied with.

This liability adds to the administrative violations (fines) and also includes direct criminal liability.<sup>5</sup>

In any case,<sup>6</sup> access providers, service providers, and content providers are not sub-

ject to a general monitoring obligation on the information they electronically store or transmit nor to a general obligation to actively search facts or other elements proving not authorized or illicit activities carried out by third parties on the Web. Nevertheless, access providers, service providers, and content providers shall have to:

- inform in good time the National Agency for Monopolies and Games knowledge of presumed illicit or not authorized activities carried out on the Web by third parties to whom they provide services; and
- provide in good time to the National Agency for Monopolies and Games any information they have aimed at identifying the not authorized operator with whom they have contractual agreements for electronically storing data, in order to locate and punish the illegal activities.

Access providers, service providers, and content providers shall be deemed liable on civil grounds to any third party (such as players) for any content of the services (and related proven damages) made available, where such operators did not act in compliance with the order of the National Agency for Monopolies and Games to prevent access to content or where, being aware of the illicit or harmful character of the service to which they grant access, the operators did not inform the agency.

## PRACTICAL EFFECTS

The practical consequences of the new rules for current and future activities of operators interested in organizing online casino services accessible from Italy must be considered.

### *Applicability of the new rules to foreign operators*

This critical point has to be clarified: Neither the Italian Budget Law for 2006 nor the decree

<sup>5</sup> Italian Criminal Code arts. 718 *et seq.*

<sup>6</sup> As provided by other laws and in particular by the legislative decree of Apr. 9, 2003, no. 70, implementing the EU Directive 2000/31/EC on electronic commerce.

make any distinction about the nationality of access providers, service providers, and content providers. Even if the rules were considered applicable only to Italian operators, there is no doubt that the practical effects involve the activities of foreign operators managing online casino services available in Italy from abroad, by means of servers located in foreign countries.

This consideration is based, above all, on the definition of "access provider" set forth in the decree. As discussed earlier, the access provider is the *provider of connectivity services*, enabling users to connect to the Internet or to other telematic or telecommunications networks or enabling operators to provide telematic or telecommunications services with regard to such networks. In other words, the Italian legislation refers to the entity managing telecommunications infrastructures (e.g., Telecom Italia S.p.A.) whose network (telephonic connection, electronic communication infrastructures, etc.) is in any case used by foreign operators providing the services even if from abroad or by means of foreign servers. In fact, the accessibility from Italy of the Web sites concerned (even if hosted on foreign servers) is based on the *routing* of the related data packages in the Italian networks managed by entities falling within the scope of the decree.

A look at the official list of Web sites that had to be disconnected by Feb. 24, 2006, reaffirms this conclusion. The Web sites mentioned as illegal are mostly foreign (United States, United Kingdom, Germany, Israel, and others), and it is highly probable that these operators have previously organized their offers accessible from Italy by adopting technical choices (such as servers located abroad) aimed at making enforcement more difficult (in light of the earlier Italian legal framework) by Italian authorities. Since the Italian Legislature has decided (after years of "tolerance") to firmly combat the phenomenon of casino Web sites that are formally prohibited by law, it would have been highly inconsistent to issue strict rules that are easily evaded by simple technical choices such as locating servers abroad. Instead, the Italian Legislature has chosen to place a burden on

providers who enable foreign operators to offer illegal services in Italy.

*Withdrawal of amounts paid or pre-paid by single players*

Whether Italian players who had paid or pre-paid accounts on the Web sites to be disconnected on Feb. 24 will be able to get their money back depends on two things.

First, the general provisions of Article 1933 of the Italian Civil Code must be recalled. Article 1933 states that, in any case of betting games or gambling not licensed by law (and, a fortiori, in case of illicit casino games), the losing player who has not already fulfilled its obligation, has the legal right to refuse the payment and the provider is not entitled to enforce his right for the payment. However, if the player has already spontaneously paid (without fraud), he cannot claim a refund.

The principle of this rule is based upon the fact that the obligation of payment of a bet/game is not a legal obligation protected by the law but it is only a moral obligation, and the player is free to comply or not with the obligation.

In most online casino games, a player has to make a deposit before starting the game. The payment of the deposit can be done through credit card, Western Union, or wire transfer. In the last two cases, the deposit will be activated only when the remittances will be received by the operator's bank. In case of payment with credit card, the bankroll will be credited after two or three minutes.

However, the authorization given by the player cannot be considered to be a payment, because the material payment will be made to the operator by the company that is providing the credit card's services at the scheduled deadline. In this case, there might be the risk that the player, after having lost all its deposit paid with credit cards, will order the credit card company to refuse to make the payment because the concerned operator does not have any legal right to ask for the deposit, according to Article 1933 of the Italian Civil Code. It cannot be predicted whether the credit card company will prudentially comply with the client's order and deny

payment, but this potential risk must be taken into proper consideration.

Second, the general terms and conditions that players, before being able to participate in online games, have to accept should be considered. If such terms and conditions specifically exclude the possibility of players withdrawing and a specific acceptance of this requirement can be proven, it should be more difficult for the player to ask for the return of the payment. But it has to be taken into account that if the amounts required of players are qual-

ified as direct and an advance payment of the funds successively used for the bets/games (and not, for example, as payments for services offered by the Web site and not directly linked to the bets/games), the player could claim (in light of the Article 1993 of the Italian Civil Code) that the general terms and conditions regulating the participation in the games are void, since such terms would be related to illegal activities under Italian laws.

In sum, Italian players may legitimately ask for their money back.