

Online Gambling in the European Union: A Compared Analysis of the Current Legal Framework in Some EU Member States

ALESSANDRO DEL NINNO

THIS ARTICLE OFFERS: (1) an analysis of the general gambling laws in some EU Member States of the European Union, pointing out the cases in which there is a state monopoly or any restriction to legally carry out related activities by interested subjects; (2) an illustration of the legal framework regarding on-line gambling in the EU Member States; (3) an illustration of the liability of Internet service providers who offer hosting or provide access to illegal (national or foreign) gambling websites; (4) national jurisdiction; (5) taxation; and (6) current developments.

GENERAL LAWS

In France, all "games of chance" are prohibited, unless the game is entirely free.¹ Gambling is considered a game of chance because winnings depend on chance.² There are however exceptions to this prohibition for non-profit organizations and casinos in thermal and seaside resorts. Casinos need prior authorization of the Minister of Interior Department. Gambling on horse races is also prohibited,³ except when organized by PMU, "Paris Mutuel Urbain," which is a Racing Association authorized to

take bets outside racetracks.⁴ Lotteries are a monopoly of the "Française des Jeux," a state owned company.

In Italy, there is a general prohibition of casino-type games. Case law has prohibited illicit poker, slot machines, roulette, etc. However, there are some special laws which allow gambling only in authorized casinos. At present, authorized casinos are located in four Italian cities. Sport betting is legal on the condition that the organizers of the bets are licensed by the Ministry of Finance. There are criminal sanctions against those who conduct bets without the required public license.

In Germany, gambling is covered by the legislation of the 16 Länder. So every state has its own laws which are generally very similar. Every law requires a license.

Licenses for casinos are granted in a restricted number of cases (e.g., the law of Berlin restricts the number of casinos to 2).

Licenses for lotteries (and for betting as well at least in Northrhine-Westfalia) are only granted to public bodies or private enterprises where the majority of shares are held by public bodies. However, there are no restrictions as to the number of lotteries or market players.

In Spain, beginning in 1977, the Royal Decree Law 16/1977 authorized gambling activities subject to certain conditions. The responsi-

Alessandro del Ninno is an attorney at the international law firm Studio Legale Tonucci (www.tonucci.it), working out of the firm's Rome Office. He works in the firm's Intellectual Property and Information Technology & Internet Law departments, providing legal assistance on all issues related to Information and Communication Law. Mr. del Ninno can be reached at adelnino@tonucci.it. Many thanks to Cullen International SA for the sources and materials provided.

¹ Law of May 21, 1836 on lotteries, law n°63-628 July 12, 1983 about games of chance.

² Supreme Court, Criminal Chamber, May 22, 1997 about an English bookmaker.

³ Law n°51-681 of May 24, 1951.

⁴ Ministerial decree of September 13, 1985.

bility of the Central Administration is restricted to coordination tasks.

The development of gambling activities in Spain requires a prior administrative license (authorization) from the competent entities, which are:

The Central Administration, for the games managed by the Public Entity "Loterías y apuestas del Estado" (LAE) and by the National Organization of Blind People (ONCE); and

The different regional administrations, for the public or private gambling activities carried out in their territories. These activities must be carried out in the appropriate establishments, such as casinos, bingos, and hotels.

Private entities usually have a license to manage gambling activities with immediate winnings and where there is a certain active participation of the player/gambler. On the contrary, the public central or regional administration manages games where winnings are paid at various times and the participation of the player is limited to the acquisition of a ticket. In Spain, the Ministry of Home Affairs and the corresponding Administrations in each Spanish "Comunidad Autónoma" (region) are in charge of the regulation of gambling. The Ministry of Home Affairs has set up a special commission dealing with these matters: the National Commission of Gambling.

In **Belgium**, it is forbidden to conduct "games of chance" or to set-up "houses of games of chance" other than as specifically authorized under the provisions of the Law of May 7, 1999. A written license must also be granted by the "Games of Chance Commission," under the Ministry of Justice. Gamblers participating in illegal games of chance cannot be held liable. The organization of lotteries and horse betting is also subject to strict rules and authorizations under the Law of June 26, 1963.

In **Sweden**, the Lotteries Act⁵ regulates gaming activities. According to this Act, a license is needed to organize lotteries, except for very small lotteries. Only Swedish non-profit associations may be licensed.

There are six legal monopolies in the **Netherlands**: state lottery, instant lottery, sports-betting, horse betting, lotto, and casino games; plus three charitable lotteries with exclusive rights: bank giro lottery, postal code lottery, and sponsor lottery.

Various government institutions in the Netherlands are involved in the licensing and control of gambling. At the national level, five departments: Justice, Economic Affairs, Finance, Public Health, Welfare and Sports, and Agriculture, are involved in licensing the gambling monopolies. The Netherlands Gaming Control Board (College van toezicht op de kansspelen) was established as an independent advisory body with respect to the national Gaming monopolies.

ONLINE GAMBLING

After the general considerations above, an illustration of the legal framework regarding online gambling in the EU Member States can be useful.

In **France**, the law provides:

Casinos and other games of chance. As games of chance are prohibited, licensing of online gambling is not possible under French law except for the "Française des Jeux" (lotteries), the PMU (horse races), and casinos "in the real world" (in seaside and thermal resorts).

Gaming on horse races. The PMU already organizes gambling on horse races by satellite TV. It is likely that it could also organize online gambling on horse races.

Lotteries. The "Française des Jeux" already organizes lotteries online. It cannot license this right to third parties.

In **Italy** there are no laws restricting gambling activities on the Internet. The literal interpretation of Italian law on the prohibition of betting games and gambling activities would suggest that betting games on the Internet are not covered. However, there is no case law on this and courts could always decide differently. In any case, the recent Ministerial Decree of February 15, 2001, No. 156, *Regulation contain-*

⁵ SFS 1994:1000.

ing provisions related to the telephonic or on-line gathering of bets, games and prize contests, enacted by the Ministry of Economy (and published in the Italian official Journal of May 5, 2001, No. 100, in force since May 17, 2001) must be analysed as an additional and important set of rules within the Italian legal framework on on-line gambling.

This recent Ministerial Decree allows new kinds of games, other than horse races bets and wagering linked to the sports events organized by the Italian National Olympic Committee, which can be carried out by means of a telephone connection or via the Internet.

The specific object of the Ministerial Decree 156/2001 will be detailed in a successive act. In this act, the specific procedures related to the acquisition, recording, and documentation of the telephonic or telematic bets will be set up as well. In any case, the Ministry of Finance establishes two essential requirements necessary to obtain the requisite ministerial authorization (given to service centers and to telecommunications operators):

- a) service centers and telecommunications operators must use only ordinary telephonic lines or networks; and
- b) these subjects must put their automated systems at the disposal of any operators interested in the new modalities of games' gathering.

Further, the Decree confirms that specific principles must be able to guarantee:

- a) the certainty and transparency of the relationships between the concessionaire and the bettor;
- b) the security and transparency of the telephonic or online games;
- c) users' good faith;
- d) proper computerized methods for the safeguard of the aims sub-letters a), b), and c);
- e) proper systems for the statements of account.

In **Germany** the legal situation is not clear. According to certain interpretations of the law, it is probable that offline licenses for casinos do

not cover online gambling. For bets and lotteries, it is more probable than not that the licenses do cover online gambling.

Online gambling is not regulated in **Spain**. Therefore, an authorization cannot be granted and the prevailing opinion is that online gambling is not permitted. Offline gambling licenses do not cover online gambling activities.

In **Belgium** there is no legal provision or case law on the subject of online gambling. It is thought however, that online gambling is prohibited because of its incompatibility with the current laws.

There are no laws covering online gambling in **Sweden**. At present, it is forbidden to organize lotteries on the Internet. Currently, however, three test licenses have been granted—in derogation to the Swedish lottery law—directly by the Swedish government for online betting/lotteries. These licenses will expire in June 2002. The names of the licensees are AB Trav och Galopp (horsebetting), AB Svenska Spel (sportsbetting), and A-lotterierna (lotteries).

Online gambling is not regulated in the **Netherlands** and according to the declarations made by the National Gaming Control Board, the licenses granted for offline gambling activities do not cover online activities.

LIABILITY OF INTERNET SERVICE PROVIDERS

But what is the liability of Internet service providers who offer hosting or provide access to illegal (national or foreign) gambling websites?

In France, the law provides:

Liability of ISPs for hosting on-line gambling sites. Because online gambling is prohibited, hosting such services is also prohibited.

Liability of ISPs when providing access to online gambling sites hosted outside France. In one case,⁶ a judge applied French law to a foreign website and required the Internet service provider to render the site inaccessible to Internet users based in France. As to whether a French judge can require access providers to

⁶ TGI of Paris of May 22, 2000, August 11, 2000 and November 20, 2000 (Yahoo Case).

filter access to an American website containing content which is illegal under French legislation, a ruling of October 30, 2001 has denied that possibility.

There is no case law in Italy concerning the liability of Internet service providers. According to general principles however, hosting service providers would be liable if, once aware of an illegality, they do not disable access to the information.

In any case, the "European Community Law for 2001," (EC Law 2001)⁷ recently adopted by the Italian Parliament provides the general principles to be followed by the Italian Government in the implementation—by means of a successive legislative decree to be adopted within one year starting from the entering into force of the EC Law 2001—of the EU Directive 2000/31 on electronic commerce. Some are specifically aimed at introducing rules on the liability of Internet service providers so as to:

- introduce specific rules about the liability of intermediary service providers with regard to "mere conduit" activities; in particular the service provider shall not be liable for the information transmitted, on condition that the provider:
 - a) does not initiate the transmission;
 - b) does not select the receiver of the transmission; and
 - c) does not select or modify the information contained in the transmission.
- introduce specific rules about the liability of intermediary service providers with regard to the temporary storage called "caching"; in particular the service provider shall not be liable for the automatic, intermediate, and temporary storage of the information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
 - a) the provider does not modify the information;
 - b) the provider complies with conditions upon access to the information;
 - c) the provider complies with rules re-

garding the updating of the information;

d) the provider posts the information in a manner widely recognized and used by the related industrial sector;

e) the provider does not interfere with the lawful use of technologies, widely recognized and used by the related industrial sector, to obtain data on the use of the information; and

f) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

- introduce specific rules about the liability of intermediary service providers with regard to "hosting" activities; in particular the service provider will not be liable for the information stored or transmitted at the request of a recipient of the service, on condition that:
 - a) the provider does not have actual knowledge of illegal activity or information and, with regard to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
 - b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
- introduce specific rules about the modalities according to which Internet service providers will have to act expeditiously to inform the competent public authorities about alleged illegal activities undertaken or information provided by recipients of their service and to communicate to the competent authorities, at their request, information enabling the identification of recipients

⁷ Law 39/2002, art. 31.

of their service with whom they have storage agreements.

- favor the drafting of codes of conduct by trade, professional, and consumer associations or organisations, in order to:
 - a) prevent the violation of rights;
 - b) guarantee the protection of minors; and
 - c) protect human dignity.
- introduce effective, proportionate, and discouraging sanctions against the above mentioned violations.

A German court held that the owner of a domain name server of a foreign gambling website is liable.⁸ This case probably means that an Internet service provider could also be liable.

There is no specific case law covering the liability of Internet service providers in Sweden and Spain. With regard to Spain, it looks as if at the moment there have been no requests from law enforcement authorities to Internet service providers to disable access to such websites. However, some major hosting service providers such as TERRA are hosting gambling websites. Others, such as Yahoo Espana, have decided not to advertise illegal gambling activities because this is prohibited and could even be considered a criminal offense.

In Belgium there has been no court decision on this issue because Internet service providers have always disabled access to illegal websites as soon as the "Games of Chance Commission" has requested them to do so. An Internet service provider cannot be held liable unless the situation is brought to his knowledge by a third party and it does not disable access).

There is no case law addressing this matter in the Netherlands but it is probable that Internet service providers would be held liable for providing access to or for hosting illegal gambling websites.

In France, the law on lotteries has been applied to an English bookmaker who had proposed games of chance on the "Tour de France" to French residents. 900,000 bulletins of participations had been distributed in France. The highest court has considered that French law applies even if the game was not organized in France. According to Article 113-2 of the Criminal Code, French law applies to an offense whenever one of acts leading up to the offense took place on French territory. French law was applicable because offers had been made to French players.⁹

There is no specific case law on this issue in Italy, however, on November 17, 2000 the Court of Cassation¹⁰ ruled that Italian courts were competent in a case involving defamatory material posted on a foreign website by non-Italian citizens which libelled an Italian citizen. The court held that Italian judges are competent because the criminal effects of the offense are perceived in Italy. Accordingly, it is possible to infer from this that the Italian prohibition could be applied to counter foreign online gambling activities carried out on the Internet.

In Germany there has been no attempt so far by German courts or legislation to apply German laws to foreign websites containing illegal gambling.

In Spain, there is no law or bill by which Spain could extend its jurisdiction to cover online gambling sites hosted in other countries. The applicable jurisdiction is considered to be the country where the server is located.

In Belgium, Belgian courts are deemed competent as soon as an act of infringement is committed on Belgian territory. Thus a Belgian court could close or disable access to a gambling website operating from abroad and offering services in Belgium. However, such a decision would not be very easy to enforce abroad.

In Sweden, gambling is regulated by the Lotteries Act which is an administrative law.

NATIONAL JURISDICTION

With regard to the applicable jurisdiction on matters concerning online gambling, the following rules apply.

⁸ See goldenjackpot.com' Provincial High Court and Court of Appeal of Hamburg, ruling of November 11, 1999 - 3 U 274/98.

⁹ Crim. May 22, 1997, Bull. Crim. N° 198.

¹⁰ Ruling of 17 November - 27 December 2000, No. 4741.

Swedish administrative law can only be applied in Sweden.

In the **Netherlands** there is no law or bill according to which the country could extend its jurisdiction to cover online gambling sites hosted in other countries.

TAXATION

With regard to taxation the following rules must be noted.

France is not an attractive country for online gambling since it is, in principle, prohibited. There is no favorable tax structure only criminal penalties: two years imprisonment and a fine of 200,000 FF, according to the 1983 Law.

In **Italy** there is no favorable tax structure, as well as in **Germany**, where there is currently no particularly favorable tax regime because the majority of the revenue must be transferred to public bodies. Only small lotteries organized by voluntary organizations for charitable purposes are excluded from taxation.

In **Spain**, beginning in 1996, the ability establish a tax for gambling activities was transferred from the central state to each Spanish "Comunidad Autónoma" (region). Each "Comunidad" is responsible for establishing and managing a tax structure for all gambling activities taking place in its territory. The laws vary across the 19 different "Comunidades" and are not particularly favorable. The general regime applies to what is not regulated by a regional law.

The current tax laws in **Belgium** are not particularly favorable. The tax regime applicable to gaming houses is the responsibility of the Belgian Regions (Wallonia, Brussels, and Flanders). A bill, which is currently being discussed, provides that the taxes in Wallonia (at least) for gambling websites would be similar to those applicable to offline gaming houses, i.e., 60-61% of the profit must be returned to the Walloon Region.

In **Sweden**, non-profit associations do not pay any tax on lottery income. AB Svenska Spel (which is 100% state owned) does not pay any taxes either. For others, the tax is 30%.

The existing tax on lotteries in the **Netherlands** is 25% of winnings. This will probably

be replaced by a new tax upon the turnover of the licensee. There is a 33.3% tax on the gross gaming revenues of casinos, and this will probably remain in the future.

CURRENT DEVELOPMENTS

In conclusion, a detailed analysis of current developments, including pending proposals and policy, must be made.

According to the bill on the information society, in **France** online gambling will remain a non viable business in France, except for the "Française des Jeux".

In **Germany** there is no pending legislation on this issue, as well as in **Italy**. During the previous Italian Legislature, however, a number of bills on Internet gambling were discussed. Some tried to introduce a less restrictive regulation, but mostly these bills aimed to increase the prohibition, and even explicitly considered the possibility of prosecuting illicit activities carried out abroad (i.e., web servers located in other countries). None of these bills has yet been reintroduced before the new Parliament.

In **Spain**, the National Commission of Gambling (Ministry of Home Affairs) has drafted a proposal to regulate gambling activities in "CyberCafes." The purpose of this draft regulation is to avoid unfair competition between traditional gambling establishments (salones recreativos) and the new establishments (in this case cybercafes) in which gambling activities are developed without being subject to gambling regulations. This draft regulation is mainly based on the regulation of game machines.¹¹

The draft aims to regulate gambling activities developed through a computer in authorized gambling establishments and saloons. The draft is only applicable to game machines (i.e., recreational activity through which the player cannot win money but only the right to continue playing the game). Its main provisions are as follows:

Registry of firms. The regulation sets up a registry in which any firms that produce,

¹¹ Royal Decree Law 2110/1998.

export, import, distribute, etc. recreational games software for computers must be registered. The registry is public and is carried out by the competent administration.

Registry of software programs. Every game software must be identified to the appropriate authority and, when the program complies with the requirements set forth in the draft regulation, it must be registered in a special registry. Art 3.2 of the draft states that the software programs can be located on the computer hardware memory or on the corresponding Intranet server, which seems to indicate that it is forbidden to locate gambling programs on the Internet.

Location. Computers aimed at running gambling activities must be located in the authorized locations (gambling saloons, etc.), in conformity with the Royal Decree Law 2110/1998.

In Belgium, a draft law on online gambling is being discussed in the Council of Ministers this month. It should then be sent to the Parliament and adopted in 2002. This law would set up a licensing system for anyone wishing to operate gambling websites. The "Games of

Chance Commission" is in favor of this law while the Ministry of Justice would rather support a full ban of online gambling.

In Sweden, the government presented a draft bill on online gambling on October 26, 2001 to the Riksdag (the Swedish parliament). It does not contain any provision on fiscal matters.

The government of **Netherlands** has adopted a decision on changes in the Netherlands gaming regulation following a report by a Commission to review the gaming legislation in the country. The main proposals of this Commission, aiming at an overall liberalization of gaming regulation in the Netherlands, have not been adopted by the government. Nevertheless, the government has decided to pursue some major changes in gaming regulation.

These changes are generally subject to approval by Parliament, and include the following:

Gaming on the Internet would be allowed on a limited, national scale. Other restrictions would also apply. All the profits would be destined to good causes; and

Existing lotteries tax of 25% on the prices of the winners would be replaced by a new tax upon the turnover of the licensee. The 33.33% tax on the gross revenue of casino gaming will, however, remain.