

## I-1.10 : A comparative analysis of Internet gambling regulations

Monday 5 July 2010, by Alex Raiffe, Junior Editor

Online gambling is becoming a worldwide phenomenon. Whether it be card games, lotteries, or betting on sports games and races, more and more customers flock towards websites that operate games of chance online, often without any sort of government control or supervision. Customers are attracted to the facility and privacy of these services, and especially the higher rate of return on their outlay than provided in physical casinos or betting services. However, physical gambling and betting are amongst the most universally regulated sectors: cultural and public policy differences play a very significant role in explaining the differences in regulation found in this sector.

1. Online gambling is becoming a worldwide phenomenon. Whether it be card games, lotteries, or betting on sports games and races, more and more customers flock towards websites that operate games of chance online, often without any sort of government control or supervision.
2. Customers are attracted to the facility and privacy of these services, and especially the higher rate of return on their outlay than provided in physical casinos or betting services.
3. However, physical gambling and betting are amongst the most universally regulated sectors: cultural and public policy differences play a very significant role in explaining the differences in regulation found in this sector.
4. Gambling websites are often operated under shady conditions, and can facilitate fraud, money laundering, terrorism financing, and gambling addictions. They escape government supervision, and are not subject to official controls to prevent illegal activity.

5. Furthermore, gambling is often taxed (either directly, via taxes on gaming operators, or indirectly, via taxes on winnings), and online gambling represents a fiscal loss in a difficult budgetary context for most countries.

6. Nevertheless, the European Commission addressed a “reasoned opinion” to a number of EU member states on 27 June 2007, ordering them to modify national legislation that raised obstacles or forbade access to online gambling services operated in other countries in the European Union.[\[1\]](#)

7. Although there is no coherent European Union legal provision creating a harmonised regime for online games-of-chance regulation, Member States cannot impose a blanket-restriction on access by foreign gaming operators to their national markets, unless this restriction is justified by **public policy concerns** (fraud, money laundering), and **social concerns** (protection of players and fighting addiction). Even if such restrictions are implemented, they have to be proportionate to these goals.

8. In other words, such restrictions have to be: (i) adequate, meaning sufficient and pertinent in obtaining the desired result; (ii) and necessary, which means that they must not contain more restrictive measures than necessary, and the restrictive measures must be the only means of attaining these goals.

9. It is, however, pertinent to examine compare legislation in this domain enacted in European and extra-European countries, in order to understand the context of online gambling from a comparative perspective. Such a comparative perspective is important given that (i) most betting websites are run from other countries inside and outside the European Union, and (ii) the Internet is a place without borders, and despite legislation in this area, it is difficult to implement

timely and effective restrictions on citizens' ability to access unauthorised websites of this type.

10. Furthermore, we should not forget that national access to online gambling is essentially a form of risk regulation. Risk regulation is essentially a political matter, which can only be legitimately decided by a democratically elected government, and not by technical experts. The European Court of Justice has been developing case law in this sense, protecting Member States' prerogatives in such domains as health policy against the European Commission. The *Santa Casa* decision handed down by the European Court of Justice (ECJ) on September 8, 2009, may be an expression of the ECJ's opinion that only democratically elected governments can express a national will on how much risk that nation is willing to be exposed to.

11. We propose to articulate our analysis around two major observations, which are (A) the diverse levels of regulation in different markets; and (B) the difficulties in implementing an effective regulation in this domain.

12. This analysis should permit a better understanding of the stakes at hand in online gambling, and the way different jurisdictions have chosen to deal with them. The heterogeneity of regulation in this sector should allow us to measure how this question is essentially one of risk regulation: different cultures and different appetites for risk lead to different responses to the same question.

#### **A. A typology of the diverse levels of regulation in different markets**

13. Different countries have adopted different responses to online gambling websites.

14. Certain countries are more or less favourable to such sites,

because of cultural reasons (gambling is disapproved), security reasons (fear of money laundering and terrorism financing), public health reasons (combat against gambling addiction), and fiscal reasons (lost taxation revenue).

15. Because of a stronger or weaker combination of these fears in different capitals across the globe, each country has a specific response to such websites.

16. However, we can establish, for the purpose of our comparison, four major approaches to online gambling: (i) countries where online gambling is forbidden (USA, Russia); (ii) countries where online gambling is a legal monopoly granted to one or two websites (Israel, France, Portugal); (iii) countries where online gambling sites are legal but are required to obtain licences and are subject to surveillance; (iv) countries without specific rules concerning this sector, where online gambling is *de facto* legal.

17. The **first set** of countries, such as the United States, completely forbids online gambling.<sup>ii</sup>[2]

18. Indeed, the Federal Wire Act of 1961 specifically forbids electronically sending money between states or between the United States and a foreign country for the purpose of bets or wagers.<sup>iii</sup>[3].

19. Because of this, banks and credit card companies in the United States often blocked credit card transactions towards gambling sites.<sup>iv</sup>[4]

20. However, the Unlawful Internet Gambling Enforcement Act (UIGEA)<sup>v</sup>[5], ratified on 13 October 2006 more specifically forbids any sort of Internet gambling that occurs between states or between any state and a foreign country.

21. This does, however, imply that States are free to enact

legislation permitting online gambling within their state.

22. Concretely, the UIGEA does not implement an individual criminal liability for online betting (bettors are not prosecuted), but rather forbids “acceptance of any financial instrument for unlawful Internet gambling”..<sup>vi</sup>[6]

23. This is similar to the situation in Australia, where it is not illegal for Australians to participate in online gambling, but where it is illegal for online gambling operators to provide such services to people located in Australia..<sup>vii</sup>[7]

24. It is noteworthy that an exception is made in the American law (UIGEA §5362.1.bb.10.D) concerning betting on horse races. Indeed, the Interstate Horseracing Act of 1978 permits such wagers to be legally placed between states.

25. This provision is the subject of a World Trade Organisation dispute between the United States and Antigua, where Antigua contested the United States ban on US residents betting on horse races through servers located in Antigua, for there was a discriminatory treatment between betting within and amongst the United States, and betting between the United States and foreign countries. The WTO twice declared the United States’ law on this subject contrary to its General Agreement on Trade in Services (GATS) obligations..<sup>viii</sup>[8]

26. It is noteworthy that the betting operators located in Antigua were licensed on the London Stock Exchange and complied with all British regulatory requirements for online gambling sites..<sup>ix</sup>[9] Despite a number of propositions to legalise online gambling and instituting a regulatory and tax mechanism to supervise such websites, the US Congress has not yet acted in this direction..<sup>x</sup>[10]

The **second type** of country is a country where online betting is allowed, but conferred on a limited number of state monopolies. Betting on other sites is forbidden. Let us take

France and Portugal as our examples of this type of country.

27. Although France was ordered by the European Union to change its national legislation on 27 June 2007, online gambling is still allowed only by the Française des Jeux (a state-owned company with a monopoly on lotteries), and the PMU (a privately-owned company with a monopoly on betting on races and sports games).

28. Although the French government attempted to prove to the European Union that its system of online and real-life gambling monopoly was the best way to preserve its public policy objectives of health and safety, the European Union was not convinced that France needed to ban access to legally-approved gambling services in other member states in order to fulfil its goals.

29. Indeed, France allows the Française des Jeux and the PMU to advertise its online games, and does not adopt a particularly restrictive policy towards these two organisations as concerns advertising, promotion, and participation by minors.

30. In Portugal, physical and online gambling is forbidden, except by games run by the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (hereafter “Santa Casa”), a state-owned “legal administrative person of public interest”. Santa Casa runs a lottery and football betting in Portugal, both physical and online. In a case opposing private operator Bwin and the Portuguese government in the person of Santa Casa, the European Court of Justice authorised Santa Casa’s monopoly.<sup>[11]</sup>

31. The Portuguese government justified Santa Casa’s monopoly by claiming that it was necessary to prevent criminality and fraud. The ECJ decided that Portugal’s restrictions were necessary and proportional restrictions on the free provision of services within the European Union, and

permitted Santa Casa's monopoly to stand.

32. It is interesting that the European Union upheld Portugal's monopoly and declared France's illegal. It seems that the principal difference between these two systems is that France has a fragmented monopoly, confided to different public and private operators, that allows advertising and is not directly controlled by the State.

33. The **third type** of country allows Internet gambling, but only by registered and licensed operators. This is the case of a majority of European Union countries.

34. Let us take the United Kingdom as an example. The UK, via the Gambling Act 2005, implemented the Gambling Commission to be the regulator for the gambling sector.<sup>.xii</sup>[\[12\]](#)

35. This Commission delivers two sorts of licences: an operating licence and a personal licence. The first type of licence authorises a corporation (legal person) to operate gambling services accessible by British residents. The second type of licence authorises a physical person to run an authorised company, or to occupy a financial, regulatory or strategic position within.

36. However, a major caveat of this system is that any corporation licensed in any other European Union country is "white-listed" in the UK and is authorised to provide gambling services to British residents without applying for a specifically British licence and without being subject to the supervision of the Gambling Commission.

37. This means that many British gambling sites are registered in Malta, where the Maltese authorities facilitate and encourage the establishment of gambling sites, which they have made a priority for economic development, and who are thereby authorised to operate in Britain.<sup>.xiii</sup>[\[13\]](#)

38. This situation strongly discourages operators from requesting British licences, which have more stringent requirements and supervision than Maltese licences, and most websites targeting a British clientele are established in Malta. We shall see in the second part of our comparison the differences in taxation and regulatory requirements in different countries.<sup>xiv</sup>[\[14\]](#)

39. The **last type** of country does not require any sort of registration and does not impose any sort of regulation on online gambling websites. Such jurisdictions include the Netherlands Antilles and Curaçao. These jurisdictions allow the free establishment and operation of online casinos that can provide their services to players anywhere around the globe.

40. The possibility of such “havens” makes it difficult for the three aforementioned types of countries to regulate or forbid online gaming, for even if these countries go so far as to block access from computers located in their countries to these websites, they often cannot identify and take action fast enough for these barriers to be effective.

41. The Internet moves faster than government action. This observation is a perfect transition to the second part of this analysis, which shall present the differences in regulation and taxation in various jurisdictions across the globe.

## **B. Various levels of regulation and taxation facilitate forum shopping and can facilitate illegal activities**

42. There exist four principal, specific areas of regulation for online gambling: (i) taxation, (ii) rate of return management, (iii) what can be bet upon, the types of bets and games that are authorised, the method of financing, (iv) restricting access to



unauthorised sites.<sup>xv</sup>[15]

43. **Taxation of online gambling** varies in level, and also on what is taxed. Indeed, there can be better-side taxes (on winnings); or operator side taxes (players' outlay or profits), or any combination thereof.

44. Countries such as the UK tax gross profits made by companies on the games they run at a rate 15. Other countries tax players' outlay on games they play: in Malta, online games are taxed at 0,5% of players' outlay for betting and 5% for casino games, with a yearly ceiling of 466,000 Euros in tax per operator. In Italy, players' outlay is taxed at a rate of between 3% and 8%.

45. Currently, in France, there is a tax on gross profits for all operators (PMU, Française des Jeux, and Casinos), and the PMU and the Française des Jeux are also taxed on players' outlay, with rates 20–40 times higher than those practiced in the UK and Malta.<sup>xvi</sup>[16]

46. None of these countries directly taxes players or their winnings.<sup>xvii</sup>[17] In fact, countries where online gambling is also illegal do not tax gamblers: Australia and Canada do not tax casino and betting, while the United States is the only country where casino and lottery winnings are treated as unearned income and is thereby subject to federal and state taxes.  
<sup>xviii</sup>[18]

47. It is interesting that in the case of the United States, which prohibits most online gambling, winnings are taxable but there is no regulatory framework to monitor gambling services and to obtain trustworthy reports on the amount of winnings earned by American taxpayers. This may be an argument in favour of regulation in this area.

48. Secondly, countries which authorise online gambling may

choose to **regulate the rate of return on outlays**.

49. In other words, an important policy tool is setting a maximum percentage of outlays returned to gamblers in the form of winnings. Indeed, a low rate of return discourages gambling addiction and money laundering, because it is less likely to win back the amount of money bet on a game.

50. In France, this policy is particularly strict and designed to discourage addiction and fraud: indeed, the rate of return is fixed at around 70%. Most illegal sites have a rate of return of around 95%.<sup>xix</sup> [\[19\]](#)

51. In the UK and Malta, the rate of return is not fixed by the Gambling Commission. Since taxation in the UK is levied on the gross profit earned by operators from game operation, there is a strong incentive to increase the rate of return to players in order to encourage customers to play, while reducing taxable profits.

52. A system of taxation of players' outlay seems to have less adverse effects on a high rate of return. However, in Malta, a country with this type of taxation, there is a ceiling on the amount of tax paid in a year, which means that the mechanism may be less effective for large operators.

53. In sum, regulation of the rate of return is delicately linked to taxation, and is an extremely important tool for modulating the amount of tax collected, and to combat addiction and fraud.

54. Thirdly, **regulation applies to the types of games or bets allowed**, and especially the **mode of financing** of such games.

55. Indeed, in France, horse and sports betting is run through a 'mutual' system. This means that the game is financed by players' outlays, which are redistributed to the winner.

56. Other systems permit betting against the operator. In this second type of system, there are more risks involved, because an insolvent or dishonest operator may be unable to pay the winners.

57. There is also a difference between systems that allow betting against credit, and systems that require prepayment before allowing a bet to be made.

58. Lastly, national regulations must address the question of **limiting access to illegal sites**. There are two possible options for this.

59. The first option involves administrative restrictions on access to certain websites. This implies setting up a system to forbid access to unauthorised sites from within a specific country.

60. Sweden, Italy, and Germany all have legal provisions to block unauthorised websites without obtaining a court order to do so, whereas in France, it is still necessary for the administration to obtain a court order prior to restricting access to a website.<sup>xx</sup>[\[20\]](#)

61. Although this may soon change, there is currently no country in this study actively blocking access to illegal gambling websites.

62. However, the United States, as mentioned above, forbids financial institutions from processing transactions to and from unauthorised gambling websites. This may be an important area for future regulation, because it is less means-intensive and more efficient method for preventing use of illegal gaming websites, for it prevents customers from participating in such games, and especially from receiving winnings from such sites.

63. Typologies such as the one we have established are very common in social science studies. If it is interesting in

understanding major areas and issues of regulation in this domain, it is somewhat limited in usefulness because of the borderless nature of the Internet.

64. It is possible, despite national legislation, for users to access unauthorised online gambling sites.

65. Furthermore, when a site is operated in a country where such sites are legal, the legal reasoning becomes slightly more complicated: the user has to fund his account with money. Legally, then, the money is already present in the country where the site is hosted from, and any betting he does with that money also takes place in that country.

66. Therefore, the interdiction raised by one country cannot necessarily be applied to betting that takes place in another country.

67. Governments cannot move faster than the Internet itself, and restrictions on access to illegal websites will never be implemented as rapidly as such sites can open.

68. There are also major differences in regulation between countries, even within the European Union.

69. The WTO case opposing Antigua and the United States in this area is an illustration of possible future difficulties yet to come in this area, as regards divergent legislation.

70. In any case, whatever usefulness this study may have, it does provide an overview of regulation in this domain, which is growing in economic importance.

71. Regulation in this sector is new and experimental, but the lessons learned from this area will inform future regulatory choices concerning the provision of services on the Internet, and will show us how national regulations and legislation adapt to the borderless nature of the Internet.

---

<sup>i</sup>[1] *Free movement of services : the Commission acts to remove obstacles to the provision of sports betting services in France, Greece and Sweden*. IP/07/909, European Commission, <http://europa.eu/rapid/pressRelease....>

<sup>ii</sup>[2] Keller, Bruce P., 'The Game's the Same : why gambling in cyberspace violates federal law', *The Yale Law Journal*, Vol. 108, N°7, May 1999, pp. 1569–1609.

<sup>iii</sup>[3] 18 USC §1801 (2009)

<sup>iv</sup>[4] Frey, James H. 'Federal involvement in US Gaming Regulation', *Annals of the American Academy of Political and Social Science*, Vol. 556, Gambling : Socioeconomic Impacts and Public Policy, March 1998, pp. 138–152.

<sup>v</sup>[5] US Efforts to Restrict Internet Gambling, *The American Journal of International Law*, Vol. 101, n° 1, Jan. 2007, pp. 203–204.

---

<sup>vi</sup>[6] §H.R. 4954, §5366, cited in Conon, Jonathan, 'Aces and Eights', *The Journal of Criminal Law & Criminology*, Vol. 99, n° 4, 2009, pp. 1157–1193.

<sup>vii</sup>[7] Interactive Gambling Act 2001 (Law n° 84, 2001), <http://www.comlaw.gov.au>, accessed 13 April 2010.

<sup>viii</sup>[8] World Trade Organisation, Case WT/DS285/ARB (21 December 2007) and Case WT/DS285/AB/R and WT/DS285/R (20 April 2005).

<sup>ix</sup>[9] 'U.S. Efforts to Restrict Internet Gambling', *The American Journal of International Law*, Vol. 101. N°1 (Jan., 2007), pp. 203–204.

<sup>x</sup>[10] HR 2267, introduced 6 May 2009, [www.thomas.loc.gov](http://www.thomas.loc.gov), accessed 12 April 2010.

---

<sup>xii</sup>[11] European Court of Justice, case n° C42/07, 8 September 2009.

<sup>xiii</sup>[12] The Gambling Commission,  
[www.gamblingcommission.gov.uk](http://www.gamblingcommission.gov.uk), accessed 13 April 2010

<sup>xiv</sup>[13] DURIEUX, Bruno, *Rapport de mission sur l'ouverture du marché des jeux d'argent et de hasard*, 2008,  
<http://www.ladocumentationfrancaise.fr/rapports-publics/084000253/index.shtml>, accessed 8 April 2010.

<sup>xv</sup>[14] Cf. below, §41 and as follows.

<sup>xvi</sup>[15] Clarke, Roger and Dempsey, Gillian, 'The feasibility of regulating gambling on the Internet', *Managerial and Decision Economics*, Vol. 22, N° 1/3, Jan–May 2001, pp. 125–132.

---

<sup>xvi</sup>[16] Geoffron, Patrice, 'Regulating the gambling market : quality-based versus price-based competition, *The Regulatory Law Review*, [www.regulatorylawreview.com/...](http://www.regulatorylawreview.com/...)

<sup>xvii</sup>[17] L'administration fiscale ([www.impots.gouv.fr](http://www.impots.gouv.fr)); HM Revenue ([www.hmrc.gov.uk](http://www.hmrc.gov.uk)); Inland Revenue Malta ([www.ird.gov.mt](http://www.ird.gov.mt))

<sup>xviii</sup>[18] Commonwealth Grants Commission ([www.cgc.gov.au](http://www.cgc.gov.au)), Canada Revenue Agency ([www.cra-arc.gc.ca](http://www.cra-arc.gc.ca)), the Internal Revenue Service ([www.irs.gov](http://www.irs.gov))

<sup>xix</sup>[19] Durieux, page 8.

<sup>xx</sup>[20] Durieux, page 36.