

# Gaming Law

**Jurisdictional comparisons**

**Second edition 2014**

- Foreword** Julian Harris, Harris Hagan
- Introduction** Philip Graf, Chairman, Gambling Commission, Great Britain
- Alderney** Julian Harris & John Hagan, Harris Hagan
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**Julian Harris, Harris Hagan**



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# Foreword

**Julian Harris**

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In the foreword to the first edition of this book, I touched on the controversy to which the subject of gambling gives rise and the differences in approach across jurisdictions, often according to differing traditions, moral and religious views and its potential for harm. Such questions, and indeed arguments, have been prevalent for as long as gambling has existed, and continue today. Nevertheless, gambling continues to grow as a popular form of adult entertainment and states still see it as an opportunity to raise revenue and create economic growth and jobs.

When the first edition was published in September 2012, much of the western world remained firmly in the grip of economic recession and the newer land-based jurisdictions of Macau and Singapore had overtaken even the casino metropolis of Las Vegas in terms of revenue. Whilst online gambling remained a major growth area, all of the USA was still a closed market to legal, regulated operators, and much of Europe was in the hands of state monopolies. Even in the short time that has elapsed since then, there have been substantial developments and changes that make a new edition timely. Whilst gambling is still the subject of debate, growth continues and more jurisdictions are perceiving and addressing the need for consumers to be protected but enabled to gamble in a properly regulated, legal environment.

In land-based casino gambling, whilst the first true resort casino project proposed by Las Vegas Sands in Spain now appears unlikely, Cyprus looks set to be the first to market in Europe, whilst in Asia, Japan is taking the first tentative steps to legalise casinos. It seems unlikely that these two jurisdictions will be anything other than trailblazer locations for further growth on both continents. Japan has a hitherto untapped substantial market and a rich customer base. They may have been buoyed by the example of Singapore, which is an extraordinary example of how firm, but astute, measured and sophisticated regulation be strict and firm, yet can march hand in hand with extraordinary commercial success. If Cyprus proves that resort casinos can work in Europe, and can form a base for substantial tourist and convention growth, other European jurisdictions may well follow its lead.

The face of online gambling globally changed fundamentally with the grant of online licences, albeit limited ones, in Nevada, New Jersey and Delaware. This was perhaps the inevitable consequence of the *volte face* by the US Department of Justice when, in December 2011, it released an opinion reversing its previous long-held view stating that the Wire Act of 1961 did not apply to casino gaming. Whilst two of the three US states that have issued licences are relatively small, in population at least, there

are already signs that they will quickly be followed by others, and certainly more quickly than it took land-based casino gaming to spread across most of the USA.

This does not mean that the arguments about online gaming in the USA do not continue. The Coalition to Stop Internet Gambling, led and backed by Sheldon Adelson, is calling for Congress to ban online gambling in its entirety, citing it as a threat to US national security. He therefore places himself firmly in opposition to the position taken by the American Gaming Association. It is difficult to envisage his argument succeeding; the remainder of the US casino industry is backing and entering the online market. There is no reason to suppose that the US experience will be any different from that which pertains in Europe, namely, that online gambling creates a new and different market, that it does not therefore damage the casino industry, that further jobs and state revenue can be created, and that online gaming can not only be properly controlled and regulated, but that regulation is easier, given that every single transaction can be recorded for eternity.

Whilst in Europe there has been no fundamental change in online gambling similar to that seen in the USA, the UK has followed the trend set by other member states (Italy, France, Spain and Denmark) of moving to a point-of-consumption licensing regime, as explained in the UK chapter. This trend will continue, with the Netherlands and others coming on line during the coming year. Meanwhile, at the EU level, the European Commission's Action Plan, unveiled in November 2012, set up an expert group of European jurisdictions to forge cooperation between member states with coordinated measures and strategies. Further, in September 2013, the European Parliament adopted a report on online gambling in the internal market by an overwhelming majority and, in November 2013, the European Commission launched formal infringement proceedings against six member states – Belgium, Cyprus, the Czech Republic, Lithuania, Poland and Romania – and two reasoned opinions against Sweden for failing to comply with European law. These are the first series of decisions in relation to the outstanding complaints and infringement cases against more than 20 member states. The European Commission has closed some of the complaints in relation to member states; however, cases against France, Germany, Greece, Hungary and the Netherlands remain open. Whilst a European online gambling licence is likely to remain no more than a dream for years to come, this is a step in the right direction.

It remains a pressing question on both sides of the Atlantic the extent to which the commercial viability of regulated online gambling can be achieved by cooperation between states and between regulators. This has to go much further than the exchange of information, and progress has been made with the multi-jurisdictional business form for applications, which was developed by the International Association of Gaming Regulators. The form seeks to standardise the general information, track record and compliance records that businesses are required to provide to regulators as part of their application for a licence. The aim is to reduce the burden on those that

may apply to multiple jurisdictions as the form will be portable. The UK will be the first state to use this approach. There remains the need for much greater cooperation, not least in relation to pooling of liquidity, where the first tentative steps are being taken by forward-looking jurisdictions, such as Alderney and Denmark. The experience of US states, where poker is the only or main permitted product, is very likely to force the pace. Those with small populations will need to address this issue if their nascent online industry is to survive, let alone prosper.

These developments and others are addressed in this second edition. Once again, my partner, John Hagan, and I have been ably assisted by two of our regulatory specialist solicitors, Melanie Ellis and Bahar Alaeddini, in developing a standard format that can be applied to all of the international jurisdictions covered in this book, in order to aid comparison of particular subjects across jurisdictions.

For the second edition, some new and important jurisdictions have been added, including Alderney, which was an unfortunate and glaring omission from the first edition. This chapter has been contributed by my firm, though I would like to thank Andre Wilsenach, Executive Director, and Philip Taylor, In-house Counsel at the Alderney Gambling Control Commission, for their helpful review and editing.

I am grateful, as ever, for the enormous support we have received throughout from all those at Thomson Reuters, but particularly Emily Kyriacou, Kate Burrington, Nicola Pender and Chris Myers, and of course to our fellow specialist contributors from each jurisdiction, all of whom have worked hard to meet our demanding requirements and tight deadlines.

As before, this book is not intended to be a detailed textbook guide to the often complex licensing regime relating to gaming. Instead, and I hope more realistically, our aim has been to provide a useful broad guide to the legal and regulatory framework for gaming and a comparison of the varied approaches to this fascinating area of law between jurisdictions throughout the world. In drawing on the knowledge and expertise of the principal gaming lawyers from each jurisdiction, readers also have a useful directory of firms in important jurisdictions, all of whom will I know be willing to provide further guidance where necessary.

Julian Harris, Partner  
June 2014





# Introduction

## **Philip Graf, Chairman, Gambling Commission, Great Britain**

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Even in the twenty-first century, different societies and cultures take different views on gambling and the balance to be struck in terms of protecting individuals – from prohibition to one of *caveat emptor* and the right of adults to decide how dangerously to live. There are differences, too, in how societies handle market forces and any failures or adverse external impacts, such as problem gambling or money laundering. Some societies adopt a ‘polluter pays’ approach, and expect the industry to fund both regulation and the costs of preventing or treating problem gambling, as we do in Great Britain. Some use tax to compensate or mitigate effects, as do France and Norway. Some use controls or restrictions and others try prohibition – although it is fair to say that prohibition is very much on the retreat in a world of internet and smart phone access.

Some see competition as a powerful force to help the consumer – resulting in lower prices and helping to foster innovation. Others fear competition as a pressure on operators to cut corners and consider that limiting market access, whether to state monopolies or to a limited number of well-established companies, is the way to ensure responsible gambling. Protection of domestic suppliers may also play a part. Whatever the approach, regulation is a trade-off between the perceived costs and benefits, and it inevitably has a cost that eventually falls on the consumer and/or the tax payer as well as shareholders.

Broadly speaking, regulatory policy across the world has moved from seeing gambling as a sin which had to be prohibited, through accepting it as vice that needed to be controlled and to some extent exploited for the employment and revenue it could generate, to – in some countries, but by no means all – seeing gambling as a legitimate but risky leisure activity for adults. However, even in countries with a long tradition of sports betting and casino gaming, such as Great Britain, there is considerable ambivalence about whether gambling can in fact be provided safely and unease about the possible implications of technological innovation and widespread availability of high stake/high reward gambling – whether in a casino or at a bookmaker’s, on the pc at home or in your pocket in the form of a smart phone, or on easily accessible gambling machines on the high street.

The exact nature of gambling law and regulation in any jurisdiction reflects its own specific cultural and political history, and the balance currently struck between that state’s interest in the commercial and fiscal contribution of the industry, its concern to protect those who might come to harm and how far it considers that it should abrogate individuals’ right to risk harm in the pursuit of entertainment. This second edition of *Gaming*

*Law* details the similarities and differences in the ways jurisdictions have struck the balance, while the changes since the last edition indicate that the combination of financial pressures, technological development and the increasingly international nature of commerce and media is leading gambling provision in different countries to converge. There is increasing recognition that the internet and the development of high-speed broadband and smart phones and tablets fundamentally change the context in which jurisdictions approach gambling regulation. Across the world, jurisdictions are responding to these challenges by moves towards legalising and regulating remote gambling (ie via the internet), but the way in which this is done varies hugely from place to place – as does the speed of change.

The European Commission has been active in encouraging collaboration between regulators in Europe, but harmonisation appears some way off. While there is consensus on many practical aspects of regulation, member states are not yet close enough in terms of their social, economic and fiscal objectives in relation to gambling for mutual recognition of regulatory regimes or agreement on tax rates. Countries in Europe, and now in the United States and elsewhere, are adopting domestic licensing or point-of-consumption regimes that enable the jurisdiction to provide a consistent approach to consumer protection within its boundaries and to tax the revenues generated by its consumers. While this undoubtedly imposes additional costs on the multinational operator obliged to seek licences in each jurisdiction, it enables the domestic regulator to support and enforce consistent high standards from its licensees – and to do so with less risk of those standards being undermined by rival attractions of other jurisdictions with less stringent fiscal or regulatory demands.

Great Britain's own very recent conversion to domestic licensing is already adding to the pressure on those software operators who have supplied software or operating platforms to those competing with licensed operators to choose whether to supply the legal or illegal market. Similarly, the requirement for B2B operators to obtain a Commission licence if they wish to continue to provide facilities for gambling to those in Britain, for example by providing a poker platform, is helping to reinforce player protection measures. Domestic licensing provides the access and relationship needed if regulators and law enforcement bodies in different jurisdictions are to be able to collaborate in detecting suspicious activities and maintaining and developing good player protection measures. Ironically, the move to domestic licensing by helping enforce national licensing regimes and making undercutting by less responsible competitors more difficult may provide some additional impetus to efforts to agree international standards for responsible gambling and for combating money laundering and sports betting corruption.

Alongside the trend to a more liberal approach to gambling provision and the growing acceptance that the criminal and societal risks from remote gambling are better tackled by control and regulation than by prohibition, there is also a move away from the highly prescriptive, heavily policed regulatory framework put in place decades ago to drive organised

crime out of gambling. Some countries with a developed consumer protection and financial services infrastructure are moving towards a more principles and risk-based regulatory structure that focuses regulation and the associated compliance and enforcement effort on those higher impact issues and operators potentially posing the greatest potential threat to the public interest. By using the general legal framework for law enforcement and consumer protections so far as possible and making the gambling-specific regulatory regime one that minimises regulatory burdens so far as is consistent with the need to keep gambling fair and safe, responsible operators can be given more scope to develop and market their products; this, in turn, leaves much less opportunity for illegal competitors to gain market share.

In Great Britain the reforming gambling legislation of 2005 and 2014 (the Gambling Act 2005 and the Gambling (Advertising and Licensing) Act 2014, respectively) assumed what came to be called the Hampton principles of good regulation: proportionality, accountability, consistency, transparency and targeting. These principles were established as the basic tests of whether any regulation is fit for purpose in the UK following a review by Sir Philip Hampton in 2005 on how to reduce unnecessary administration in business without compromising the UK's regulatory regime. In applying these principles to gambling, the Gambling Commission seeks to work with the gambling industry and other stakeholders in a partnership in which the Commission, on behalf of the public, sets the standards that operators should secure in terms of public protection, but so far as possible leaves it for the operator to decide how best to achieve those standards.

Operators are better placed than regulators both to identify current and emerging risks to the safe and crime-free provision of gambling and to work out the most effective ways to mitigate those risks. For this reason, we license both operators and key individuals within an organisation. It is people that make policies and processes work effectively. We hold those key individuals personally accountable for what their organisation does and who they employ to do it – not just or even primarily the compliance director – and we expect boards to put responsible gambling policies, whether keeping crime out or protecting players, at the heart of their commercial and strategic decision making, and make them key to the acceptability and long-term sustainability of their business.

However, in Britain, as in most jurisdictions, much of the current regulatory framework contains hard-wired, highly prescriptive provisions which severely constrain innovation, eg controlling electronic gaming machines or data provision. Such controls tend to focus operators' attention more on tick box legal compliance and pushing regulatory boundaries than on developing more responsible gambling provision. Further, the greater visibility of gambling that comes with liberalisation and treating it as a normal leisure activity has led to renewed concern in Britain, and in a number of other countries, about the potential risks from gambling and its longer term impact on society, and to concomitant calls for tighter regulation. Such calls reflect widespread concern at the potential harm

players can come to on the higher stake/higher prize machines, especially if easily accessible, despite the little evidence so far of any increase in harm from gambling. The regulatory requirements on gaming machines, deriving as they typically do from experience in the mid- to late twentieth century, contrast with the approach usually adopted to regulating remote gambling offering similar virtual gaming products. The result is a continuing tension between the remote and non-remote regulatory framework in most countries. However, the technological developments that are putting pressure on traditional bricks and mortar regulation also offer opportunities for more effective risk mitigation across the board. The complete audit trail available in remote gambling and the increasing power of data analytics enable law enforcement, regulators and operators to develop more effective ways of combating money laundering and sports betting corruption and better ways of reducing gambling-related harm.

With some notable exceptions, the industry has been slow to develop their capacity to use the data and computing power now available to them except for narrow commercial purposes. Growing revenues from an industry apparently focused on profits, no matter whether from recreational or problem gamblers, reinforces both public scepticism about the gambling industry and government nervousness about replacing controls aimed at nineteenth- and twentieth-century problems with those more suited to a digital, mobile twenty-first-century world.

We are now challenging the whole industry – both land-based and remote operators – through their boards to consider player protection on a par with commercial development. I see other regulators making the same challenge. Amongst other things, this means utilising the same tools and analytical approach that operators use to manage commercial opportunities and risks, to understand the risk to players or, in some cases, to understand the money laundering risk. This will help identify which players are more likely to be engaged in harmful gambling behaviour and help find ways of targeting player protection and assistance measures. If operators actively develop and market such player protection and crime prevention measures, regulators can then support the measures by incorporating them into regulatory expectations and help by fostering pan-industry collaboration on research and the development of best practice.

If the industry can demonstrate to opinion formers and to a sceptical and sometimes antagonistic public that innovation is being used to improve player protection and combat crime and not to exploit the consumer, then further editions of this volume should show regulation moving towards a more player-focused and data-driven approach reflecting the technological world we live in, less hamstrung by regulations tackling the last century's problems.

# Luxembourg

**Bonn Steichen & Partners** Michaël Kitai

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## 1. OBJECTIVES AND STRUCTURE OF LEGISLATION

Despite the conclusions reached by a European Parliament study issued in November 2008 according to which Luxembourg is the holder of the third highest gross gaming revenue per capital in the EU (UK ranked fourth), the country mainly has only two historical providers of gambling: (i) the 'Loterie Nationale' (the Loterie) organised by the *Oeuvre Nationale de Secours Grande-duchesse Charlotte* (the Oeuvre), a non-profit public institution under the supervision of the Prime Minister and State Minister; and (ii) one casino (the Casino '2000' Montdorf).

### The Loterie Nationale

The Oeuvre, created by a Grand Ducal decree dated 25 December 1944 and the Loterie Nationale created by a Grand Ducal decree dated 13 July 1945, have played a leading role in organising solidarity in the Grand Duchy of Luxembourg. The initial objective of the Oeuvre was to help victims of the Second World War so that the net proceeds resulting from the organisation of lotteries, scratch tickets and other activities performed by the Loterie Nationale was shared between the Oeuvre on the one hand and other welfare offices on the other hand.

Considering that the initial purpose became a marginal activity over the passage of time and allied to the emergence of worthy new charitable needs in the country, the scope of the beneficiaries has been extended (lately by the Grand Duchy regulation dated 26 August 2005) so that the net proceeds resulting from the activities of the Loterie Nationale are currently distributed as follows:

- 30/72 – to the Oeuvre (redistributed to charitable institutions);
- 15/72 – to the *Oeuvres Sociales des Communes*;
- 12/72 – to the *Fonds National de Solidarité*;
- 5/72 – to the Luxembourg Red Cross;
- 5/72 – to the *Ligue Luxembourgeoise de Prévention et d'Action Médico-Sociales*;
- 5/72 – to the *Fondation Caritas*.

From an exclusive and enlarged competence (acting at the same time as organiser and regulator) at its creation, the Oeuvre has gradually seen its control diminished in relation to lotteries services:

- until 2005, any other private lotteries provider (exceeding EUR 15,000) had to, prior to the Ministry of Justice's authorisation, be granted a binding consent from the Oeuvre acting as a lottery regulator (in addition to its ordinary role of national lottery public provider);
- from 2005 to 2009, any private lotteries provider (exceeding EUR 15,000) had to, prior to the Ministry of Justice's authorisation, be granted

a simple consulting advice from the Oeuvre acting as a lottery regulator (in addition to its ordinary role of national lottery public provider);

- from 2009, private lotteries providers (exceeding EUR 15,000) need only ask for authorisation from the Ministry of Justice; the Oeuvre only has exclusivity in respect of the organisation of the national lottery, ie the Loterie Nationale.

Today, the exclusive right of the Loterie Nationale to operate its commercial channel of distribution of any forms of lotteries and sports betting products, including online, is regulated by the Law dated 22 May 2009 related to the Oeuvre and the Loterie Nationale (the 2009 Law).

### **The Casino '2000' Montdorf**

Luxembourg has an old gambling history which began in the early 1880s when the Casino Bourgeois was built in the centre of the capital Luxembourg City.

Today, Casino '2000' Montdorf is the sole holder of authorisation, granted on 19 December 1980, and extended for a period of 20 years by decision of the Ministry of Finance taken on 8 June 1999. Such authorisation was given by virtue of Article 5 of the Law dated 20 April 1977 on the operation of a business of 'games of chance' (the 1977 Law) which states that '*notwithstanding legal prohibitions, it may be granted to casinos and similar establishments, installed in the interests of tourism, authorisation, to open to the public, special, separate and distinct premises, where some gambling will be practiced*'. The conditions related to this authorisation as well as the nature and listing of authorised games are defined in a Grand-Ducal regulation dated 12 February 1979, as modified from time to time.

In the parliamentary works of the 1977 Law, the legislature opined that '*by the installation of a casino in Luxembourg, there will be no more gamblers. Official casinos will prevent illegal and uncontrollable gambling joints*'. The legislature has therefore decided to implement one single casino in Mondorf-les-Bains for mainly two reasons: (i) this will augment local government financing and allow other town landmarks such as the spa to attract those tourists who have come primarily for the Casino '2000' Montdorf; and (ii) the size of the country does not justify more than one casino. Other casinos are today negotiating their access to Luxembourg market.

### **Current legal status**

Article 1 of the 1977 Law perfectly describes the current legal status of gambling: '*the operation of a business of 'games of chance' is prohibited*'. Such principle of prohibition is based on the fact that the desire to gamble is understood in Luxembourg as creating a danger of irrational and destructive behaviour (Trib. Arr. Lux., 26 July 2000, Nationale Postcode Loterij, n°10605). Therefore, the exceptions to such prohibition (ie the granting of authorisation to suppliers who fulfil the conditions set forth by the laws) are limited in order to channel such desire to gamble.

The co-existence of the two historical providers and the restricted opportunities for other private gambling providers are the only exceptions to the principle of prohibition.

Luxembourg still needs a consistent legal system in relation to land-based and online gambling which should take into account the greater mobility of local

residents and neighbouring populations, the increased market and demand due to new games and the cross-border nature of virtual games available.

## 2. FRAMEWORK OF LEGISLATION

### 2.1 What is the legal definition of gambling and what falls within this definition?

Neither the 1977 Law, nor any other laws or regulations, provides a legal definition of gambling.

However, ‘gambling’ or ‘game of chance’ is defined by a Luxembourg ruling as *‘the game which, either by itself or by the conditions according to which it is performed, is characterised by a chance prevailing the physical or intellectual skills of the players ...’* (Lux.13 November 1958, P. 17, 390). The aforementioned conditions are fulfilled ‘when the gain is the result of chance and chance is the main factor of the game’.

Such definition of ‘gambling’ or ‘game of chance’ in Luxembourg as ‘chance component prevailing skills’ should be analysed at the level of the generality of the players. As a result, a game does not lose its character of ‘game of chance’ if skills can ensure gains to persons specially trained. Indeed, the special skills or ability acquired by a few should not be taken into account.

Lottery, sports betting, casino games, slot machines and poker (under some conditions) fall within this definition under some conditions as set forth by Luxembourg laws, especially the 1977 Law.

Mere competition games, free lotteries and raffles exclusively organised for marketing purpose are not considered to be ‘gambling’ and do not require any prior authorisation to be offered to Luxembourg residents.

### 2.2 What is the legal definition of online gambling and what falls within this definition?

‘Online gambling’ is indirectly defined in the 2009 Law as *‘any form of lotteries and sports betting organised by the information society services/tools’*.

This 2009 Law only applies to online gambling organised by the Loterie Nationale.

However, the concept of ‘information society tools/services’ should apply mutatis mutandis to all online games which might be offered by any other authorised operators.

As a result, online gambling covers:

- any game which may be authorised according to the 1977 Law (subject to some restrictions in respect to sports betting);
- provided by the Loterie Nationale or Casino ‘2000’ Montdorf or any authorised operator;
- for remuneration;
- at a distance (ie without the parties being simultaneously present);
- by electronic means (ie initially sent and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means);
- at the individual request of the gambler.



## **2.3 Please set out the different gambling products identified by legislation.**

### **Poker**

Luxembourg authorises two ways to organise poker games: (i) small stakes poker; and (ii) stud poker in casinos.

Since poker might result in addiction and in money laundering, the Luxembourg public prosecutor's department announced in 2007 a 'gentleman's agreement' agreed with the Ministry of Justice and poker organisers (in particular bars) enabling organisation of poker 'events' (any forms) if stakes paid in by players are low and under some conditions (approximately EUR 20 to 50 per player according to organisation's expenses).

### **Betting (other than sports betting)**

Pure betting (other than sports betting and other than that organised as part of lotteries) is prohibited.

### **Sports betting**

Article 4 of the 1977 Law empowers the Ministry of Justice to legally authorise sports betting. The conditions of the authorisation, the terms and conditions of the betting and applicable taxes are set forth by the Grand-Ducal regulation of 7 September 1987 on sports betting.

Neither the 1977 Law nor the Grand-Ducal regulation of 7 September 1987 take into consideration the differences between fixed-odds betting and pool betting; there are no restrictions as to the forms and types of sports betting: 'live betting', betting on the results or the winner etc.

### **Casino games**

The only existing holder of a licence – Casino '2000' Montdorf – may offer the following casino games – as listed pursuant to the Grand-Ducal regulation dated 12 February 1979 (modified by the Grand-Ducal regulation dated 8 March 2002) by execution of Article 6 of the 1977 Law: roulette; 'American' roulette; 'English' roulette; trente-et-quarante; blackjack; craps; punto banco, and stud poker and pure table games, ie baccara chemins de fer, baccara à deux tableaux à banque limitée et l'écarté, baccara à deux tableaux à banque ouverte.

Authorisation for further casinos should only be granted by a decision taken by the Government Council after investigation and in accordance with specifications put in place by the Ministry of Finance and after the advice of the Council of State. The authorisation order fixes the duration of the licence and determines the nature of authorised games, the operation, monitoring and control measures of agents, conditions related to access into the gambling area, the opening and closing hours as well as the tax levy.

### **Slot and other machine gaming**

Article 3 of the 1977 Law prohibits the organisation of slot and other machine gaming on the public highway and in public places and in particular in bars (outside casinos).

Authorised machines provided by the Casino '2000' Montdorf are defined in Articles 16 to 20 of the Grand-Ducal regulation dated 12 February 1979 (as modified by the Grand-Ducal regulation dated 8 March 2002) by execution of Article 6 of the 1977 Law.

The only agreed machine gaming are 'machines à rouleaux' and 'video games' and these devices should be previously agreed by the Ministry of Finance. A system of electronic gaming cards for slot machines was recently allowed by the Grand-Ducal regulation dated 22 January 2014.

### **Bingo**

The legal regime of lottery applies to bingo. Otherwise, there is no specific regime for this game.

### **Lottery**

Lotteries are defined in Article 301 of the Luxembourg criminal code as '*all operations offered to the public and intended to provide a gain by way of fate*'.

Lotteries are provided either by the Loterie Nationale by virtue of the 2009 Law (which has repealed the Grand-Ducal decree dated 13 July 1945), or by other providers by virtue of new Article 2 of the 1977 Law as amended by 2009 Law (which has repealed the Law dated 15 February 1882 on lotteries).

The organisation of lotteries is subject to authorisation from the Minister of Justice when the value of the tickets to be issued exceeds the amount of EUR 12,500. When the value of the tickets to be issued is equal to or less than this amount, the authorisation should be granted by the Board of Mayor and Aldermen (*Collège des Bourgmestre et Echevins*) of the municipality's principal place of ticketing.

Authorisation is granted to such lotteries only for – full or partial – purposes of general interest or public utility related to philanthropic, religious, scientific, artistic, educational, social, sport or tourism.

However, mere competition games, free lotteries and raffles exclusively organised for marketing purposes are deemed lawful and, as such, do not require authorisation from the Minister of Justice.

### **2.4 Please list the different requirements for each gambling product, including legal classifications for each; for example, is poker a game of skill or game of chance?**

See section 2.3.

### **2.5 Explain the system of regulation of gambling; which regulatory or governmental body is responsible for the supervision of gambling? Which body issues licences? Which body examines enforcement powers? Is there any limit on the number or duration of available licences?**

The 1977 Law (Articles 4 to 8) empowers the Ministry of Justice to authorise sports betting, casinos and lotteries. It is the sole authority in charge of delivering the required authorisation to private operators willing to offer gambling.

Terms and conditions of offered games – either by private operators or by the Loterie Nationale – should be previously agreed and controlled by several public bodies (Ministry of Justice, Ministry of Finance, the Police and Tax Administration) whose representatives may demand to be provided with all documents related to gambling and shall have access to all commercial premises.

Furthermore, by virtue of title IV of the Grand-Ducal regulation dated 12 February 1979 in execution of Articles 6 and 12 of the 1977 Law, the casinos are subject to a monitoring and a permanent control executed by officials of a special service from the *Gendarmerie* as well as by officials and agents of the tax administration designated by the Director of the Administration or any other officer appointed by a special decision taken by the Minister of Justice and the Minister of Finance.

Licences to private operators have a limited duration.

### **3. ONLINE GAMBLING**

**3.1 To what extent can online gambling be offered in your jurisdiction? Are licences available and, if so, for which gambling products? Please describe briefly the licensing process, who may apply, whether licences are limited in number and, if no licences are available, whether it is legal for online gambling to be offered. In the case of EU jurisdictions, please state whether there are any issues as to the legality of the local law at EU level. Please refer to any relevant cases at ECJ level and explain any measures taken or pending by the European Commission.**

Currently, Luxembourg laws and regulations are not clear as to the regime applicable to online gambling.

#### **Theoretical statements**

It is worth noting that, unless otherwise foreseen in upcoming draft laws in respect of online gambling status, current Luxembourg laws do not distinguish between games offered 'online' or 'offline'. Consequently '*given the lack of precision in the 1977 Law, the Ministry of Justice could authorise online gambling activities ... provided that some qualitative conditions are met by the gambling operator ... within the limits of what is set by the current laws including the 1977 Law*' (taken from a Ministry of Justice joint statement with the author Michaël Kitai).

As a result, the application should theoretically include the criteria as specified under section 4.1 in line with the Ministry's practice with respect to land-based gambling. The Ministry should then check whether the introduction of the new game will not jeopardise the balance supplies/ demands currently existing in the market.

#### **Effective situations**

Despite the above theoretical statement, the effective situation of online gambling shows that there are no online gambling companies which are operating in Luxembourg with the aforementioned authorisation, except the Loterie Nationale which is the sole organisation directly regulated by virtue of Article 9(1)2 of the 2009 Law. The Loterie Nationale is also entitled to

operate its commercial channel of distribution of any forms of lotteries and sports betting products, including online.

### Questions raised from our analysis

This raised a number of questions: has no operator been interested in offering online gambling in Luxembourg? Can no operator fulfil the aforementioned qualitative conditions to be authorised by the Ministry of Justice? Does that mean that Luxembourg implicitly establishes a monopoly in favour of the Loterie Nationale? Should this be taken to mean that the Ministry of Justice considers that its main objective *vis-à-vis* gambling law consists of maintaining moral controls over Luxembourg residents? If this is the case, is such a moral imperative incompatible with any supply of online gambling other than the one offered by the Loterie Nationale?

### Compliance of Luxembourg law with EU gambling legislation

As to the legality of the current legal framework at EU level, there are three potential issues:

- Firstly, it is worth noting that Luxembourg is the only EU member state not to have notified any draft law or regulation relating to gambling to the European Commission by virtue of Directive 1998/34/EC, as amended by Directive 98/48/EC. Even if the 1977 Law does not expressly mention any rule applicable to online gambling services, it is clear that the 2009 Law contains one explicit provision related to online gambling services. Indeed, although Article 9(1)2 of the 2009 Law states that the Loterie Nationale is entitled to ‘operate a commercial network of distribution of any form of lotteries and sports betting products, including through the information society services/tools’, the legislature did not raise such draft provision to the European Commission.

To our knowledge, the parliamentary works of the law (draft law n°5955) do not even mention any urgent reason or any serious and unforeseeable circumstances justifying the obligation for the country to enact and introduce such law without any consultation/notification being possible.

Yet, it seems that such provision meets the requirements to be qualified as information society services by virtue of Directive 1998/34/EC, as amended by Directive 98/48/EC since it refers to a service normally provided by the Loterie Nationale for remuneration, at a distance, by electronic means and at the individual request of a recipient of services, ie the gambler.

The European Commission has not received any complaints about the Luxembourg gambling law and has thus never investigated any potential doubt concerning the compliance of the national rules with EU law.

- Secondly, the European Commission condemned the former version of Article 2§5 of the law dated 14 August 2000 relating to electronic commerce (the 2000 Law). Indeed, such version stated that ‘*whenever the location of the providers of online services may be, Luxembourg law is applicable for gambling*

*activities involving money (...)*'. The European Commission considered that an automatic and systematic application of Luxembourg law may lead to an unjustified restriction on the principle of freedom of provision of services, putting it at odds with Article 49 of the EC Treaty. Such wording was replaced by the Law dated 5 July 2004 which now excludes gambling activities from the scope of the Luxembourg law relating to electronic commerce. Consequently, it is now difficult to assess whether Luxembourg courts will apply its own laws including the well-known prohibition on cross-border gambling activities deployed in Luxembourg. Luxembourg administrations consider that, being a criminal law, the 1977 Law should apply to gambling activities offered by a Luxembourg operator and should also apply when these activities are performed from abroad but targeting Luxembourg residents. However, the country's adopted policy of fair tolerance results in a lack of prosecutions.

- Thirdly, while assessing the legality of the monopolistic position of the Loterie Nationale over non-casino gambling, one should be careful because – apart from: (i) the Ministry of Justice current practice; and (ii) terms of Article 9.2 of the 2009 Law – there is no law which precisely allows/forbids private operators from offering online gambling to Luxembourg residents. The Court of Justice (located in Luxembourg) recently recalled that, although a monopoly over games of chance constitutes a restriction on the freedom to provide services, such a restriction can, however, be justified by overriding reasons in the public interest such as the objective of ensuring a particularly high level of consumer protection, this being a question for the national court.

In accordance with judgement dated 15 September 2011, Case C-347/09 *Dickinger and Ömer*, to be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly over games of chance should:

- be based on a finding that the crime and fraud linked to gambling and addiction to gambling are a problem in the member state concerned which could be remedied by expanding authorised regulated activities. *In specie*, it is necessary to assess whether unlawful gambling activities may constitute a problem in Luxembourg and whether the expansion of authorised (eg casino games solely in favour of casinos) and regulated (lotteries and sports betting solely in favour of the Loterie Nationale) activities would be likely to solve such a problem:
  - (a) in order to limit the problem of unlawful activities, potential fraud and addictions, the Ministry of Justice currently restricts the suppliers to the existing need. However, several non-regulated games (such as poker) correspond to an existing need and may not be offered by any authorised provider so far (except (i) small stakes poker and (ii) stud poker by casinos);
  - (b) the authorised and regulated gambling operators on Luxembourg gambling market have voluntarily adopted and implemented appropriate measures for the prevention of gambling addiction so that public authorities have considered that no further action

- is justified. Furthermore, Article 9(2) of the 2009 Law states that, alongside the development of commercial methods to promote lotteries and sports betting, the Loterie Nationale shall: (i) clearly inform the public of the real winning odds for each type of product; (ii) organise information campaigns on the economic, social and psychological risks in relation to gambling; and (iii) cooperate with the competent authorities and various associations specialised in the sector to an active and coordinated policy of prevention and assistance related to gambling addiction;
- allow only moderate advertising limited strictly to what is necessary for channelling consumers towards monitored gambling networks. In order for that objective of channelling into controlled circuits to be achieved, the Loterie Nationale aims to provide an alternative to non-authorised gambling providers, notably through the use of new distribution techniques according to Article 9(1)2 of the 2009 Law. Furthermore, although not foreseen in any laws, the Loterie Nationale states that the advertising of its products remains strictly limited to what is necessary and does not aim to encourage consumers' natural propensity to gamble which is understood in Luxembourg to create a danger of irrational and destructive behaviour. In addition, unlike in the cases C-72/10 *Marcello Costa* and C-77/10 *Ugo Cifone*, Luxembourg argues that its gambling and sports betting sectors have not been marked by a policy of expanding activity with the aim of increasing tax revenue. Indeed, since its statement issued on 20 October 1997, the Oeuvre emphasises that its main objective is to channel the desire to gamble and not to maximise profits for charity institutions. The monopolistic authority also asserted that it will refuse to exceed a turnover of EUR 100,000,000 unless additional forms of lotteries or gambling products are introduced.

As a result of the above, Luxembourg adopts a policy of fair tolerance towards EU operators performing cross-border gambling services since the country does not have the same technical means for controlling online gambling, nor the desire to implement a regulatory body in charge of monitoring such activities (for more information, see section 3.4). As things stand at the present, Luxembourg may not legitimately wish to monitor such economic online gambling activity which is carried on in its territory since the regulatory systems used in most of the other EU member states are determined by a level of protection with more sophisticated technical means.

### **3.2 Is there a distinction between the law applicable to B2B operations and that applicable to B2C operations?**

Although the legal status and responsibility of online operators are generally different depending on whether they are performing B2C operations or B2B operations, the main laws excludes gambling activities from the scope of their application:

- The Consumer Code as introduced by a Law dated 8 April 2011 strictly regulates the agreements entered into between a professional and a

consumer. However, chapter 2 related to distance agreements (i) excludes at Article 222.2 (e) from its scope the agreements concluded in relation to online betting services and (ii) prevents – at article 222-5 (f) – the consumer from exercising his right of withdrawal of seven working days concerning the service agreements related to betting and lotteries (unless otherwise agreed).

- The 2000 Law in relation to e-commerce, as modified by the Law dated 5 July 2004 excludes from its scope, the gambling activities which involve wagering with monetary value including lotteries and transactions on betting.

Luxembourg laws, however, impose some conditions on B2C operators, including: (i) the prohibition to assert that a product increases the chances of winning in games of chance (Article 122-4 of the Consumer Code) which is deemed to be an unfair deceptive marketing practice in all circumstances; and (ii) the obligations of the advertiser prior to the broadcast of the advertisement of lotteries, mere competitions games and free advertising raffles exclusively organised for marketing purpose (Article 21 of the law of 30 July 2002 regulating certain trade practices and penalising unfair competition).

The question related to the responsibility of gambling providers with respect to the processing and use of personal data is regulated by the data protection law dated 2 August 2002 as amended by the Laws of 31 July 2006, 22 December 2006, and 27 July 2007.

A B2C operator involved in gambling is likely acting as data controller whereas a B2B operator involved in gambling is deemed either as a data controller or as a data processor as appropriate under the data protection law. Indeed, in cases where a B2B operator has outsourced a particular function to a service operator (such as white labels), such B2B operator is likely to qualify as: (i) a data processor if the white label provider processes personal data on behalf of the B2B operator; or as (ii) data controller if the white label determines itself the purposes and methods of processing personal data.

Although the 2000 Law is not applicable to gambling services, one should advise B2C operators who provide (i) online services (ii) host the information (iii) to the consumer-gambler, to promptly remove illegal information or to disable the access to such illegal service. However, in any case, such operators are not obliged to monitor the information they host or transmit, nor seek facts or circumstances indicating illegal activity.

Furthermore, Luxembourg offers excellent incentives from a VAT perspective for non-EU internet service providers to establish B2C e-business companies within the European Union. Indeed, such non-EU internet service providers offering services to EU individuals must register and account for European VAT. VAT will be charged to their customers at the rate of their country of residence ranging from 15 to 25 per cent. Therefore, setting up a B2C sales company in Luxembourg can make non-EU providers benefit from the advantage of charging VAT to their EU customers at 15 per cent, the lowest VAT rate in the EU. As a result, to benefit from the competitive edge provided from a lower VAT rate, major US and other international entities such as Amazon, AOL, Microsoft, Apple I-tunes, eBay, PayPal, Vodafone, RealNetworks, Rakuten, Skype, have decided to establish their EU B2C e-business platform in Luxembourg. To



be considered as established in Luxembourg a company needs to ensure that the effective place of management is located in Luxembourg and needs to have a minimum substance in terms of human and technical resources. One should further note that, from 1 January 2015, the so-called VAT place-of-supply rules will change for B2C telecommunications, broadcasting and e-services, including online gambling. Consequently, the place of supply for VAT purposes will be where the online player resides instead of the place of establishment of the Luxembourg gaming provider.

**3.3 What are the consequences for B2C or B2B operators who are active in your jurisdiction without having obtained or applied for the required permits, licences and approvals? What penalties and enforcement powers are available in respect of the illegal operators? Please outline any significant domestic decisions or enforcement actions that have been taken by the relevant authorities in recent years.**

According to Article 14 of the 1977 Law and Article 305 of the Luxembourg Criminal Code, the operators who illegally operate a business of ‘games of chance’ with a profit objective (the legislature aimed to punish the beneficiary of gambling’s passion and not the player himself) are punished as follows: *‘Persons who operate (either directly or by intermediary), in whatever place and whatever form, a business of ‘games of chance’ without legal authorisation either while taking part in it by themselves or through their employees, or by receiving people entitled to take part in a pecuniary payment or by operating a taking away on the stakes, or by getting directly or indirectly some other profit by means of these games, will be punished by imprisonment from eight days to six months and by a fine from EUR 251 to 25,000’.*

**3.4 What technical measures are in place (if any) to protect consumers from unlicensed operators, such as ISP blocking and payment blocking?**

Luxembourg applies:

- a no control policy on websites or blocking systems requiring internet service providers (ISPs) to block access to non-authorised gambling websites because, at the moment, the country does not intend to impede the activities of a service provider established in another member state where it is authorised to provide such service; and
- no blocking system of financial transactions related to betting or gambling.

**3.5 Has the legal status of online gambling changed significantly in recent years, and if so how?**

Luxembourg still needs to adopt a law on online gambling. Some informal discussions have taken place, but no formal draft law has been circulated mainly due to the policy of fair tolerance towards foreign operators, the small size of the country and lack of reaction of the European authorities.



**3.6 Whilst acknowledging the inherent difficulty in predicting developments in gambling law, what are the likely developments in online gambling in your jurisdiction, both short term and long term? Are any specific amendments under consideration? Have there been any recent political developments, or do you envisage any in the near future? Are any specific amendments under consideration? Are they likely to be adopted and, if so, what is the time scale?**

From the beginning of 2012 until the end of 2013, the Government Council held meetings, notably with the Ministry of Justice and under the chairmanship of former Prime Minister Jean-Claude Juncker, in order to adopt a consistent and systematic position in relation to online gambling.

Since the recent election (at the end of 2013), the newly appointed Minister of Justice (from the Green party) seems to consider the development of online gambling regulation as a non-priority matter.

**3.7 Is the law the same in relation to mobile gambling and interactive gambling on television? If not, are there any headline differences?**

There is no specific law regulating gambling on mobiles or interactive gambling on television.

The 1977 Law applies regardless of the medium used, be it television, mobile communications or otherwise. Being a criminal law, Luxembourg administrations consider that it should apply to media gambling services that are (i) operated by a mobile or TV provider situated in Luxembourg, as well as for such services when (ii) targeting Luxembourg residents wherever the TV or mobile provider is operating from.

Such interpretation of the scope of the 1977 Law with respect to mobile and TV gambling services results from the scope of the new version of the 2000 Law, as well as the scope of the law dated 27 July 1991 on electronic media as modified (the Media Law), which has implemented the 'Television without Frontiers Directive' as well as the 'Audiovisual Media Services Directive'. Indeed, such law and corresponding directives exclude gambling services from their scope so that the principle contained therein of freedom to provide media services from one authorised member state should not apply to such gambling services when targeting Luxembourg residents.

## **4. LAND-BASED GAMING**

**4.1 Please describe the licensing regime (if any) for land-based gaming, and what products are included. Please set out what licences are available, and the licensing regime for them.**

Land-based gambling activities are prohibited except by authorisation pursuant to Articles 4 to 8 of the 1977 Law.

The 1977 Law does not provide a full list of necessary conditions to be met by the operator in order to be able to operate a land-based gambling business. Practically, it results from the Ministry's practice that the submitted application should inter alia include: (i) the nature and description of intended gambling activities to be exercised in Luxembourg; (ii) the integrity of the gambling operator; (iii) shareholder information of the operating company; (iv) description

of the allocated parts of hazard/skill in the game; and (v) explanation of the utility of the proposed gambling supply (which may not jeopardise the balance supplies/demands currently existing in the Luxembourg gambling industry). The authorised suppliers are then limited in order to channel the desire to gamble. Furthermore, the Ministry of Justice restricts the suppliers to the existing need, which rejects the pure lure of money as the sole basis for application.

The Ministry underlines that: (i) it applies a policy of no discrimination based on nationality of applicants; and (ii) it takes into account the licences which have already been issued by other member state bodies in compliance with the principle of conditional mutual recognition.

In practice, regardless of the competence of the Loterie Nationale on lottery, scratch games and sports betting:

- according to the 2009 Law, an exclusive right is granted to the Loterie Nationale to operate its commercial channel of distribution of any forms of lotteries and sports betting products. In that respect, the Loterie Nationale recently entered into a commercial agreement with the French *Pari Mutuel Urbain* (PMU) in order to offer land-based betting on horse racing. According to this legal regime, the gambling product related to horse race betting remains in the ownership of the Loterie Nationale and the net proceeds generated by these products are solely (after repayment of PMU fees resulting from the agreement's terms and conditions) allocated to charity organisations; and
- according to the 1977 Law, two sorts of authorisations have been delivered so far: (i) a specific authorisation to Casino '2000' Montdorf (see above); and (ii) authorisations given by the Ministry of Justice since the early 1980s to German gambling companies providing German lotteries and sports betting in Luxembourg. Except where related to the Loterie Nationale, the 'German' authorisations expired in 2013–2014 and authorisation shall not be extended beyond their current term of validity (the appointment of a general agent domiciled in Luxembourg jointly liable for paying taxes and levies is still required for any authorised operator).

#### **4.2 Please set out any particular limitations or requirements for (eg casino) operators, such as a ban on local residents gambling.**

There are no particular limitations or requirements obliging the gambling providers to place a ban on local residents gambling. The only restrictions are those provided by laws and regulations, including the limitation and prohibition on employees of casinos to have: (i) part or interest in gambling products; (ii) for any reason whatsoever to have any discount on the gambling proceeds; and (iii) to participate in the game, either directly or through an intermediary. Minimum age for entrance is 18. Gambling providers and their employees shall not be entitled to grant credit or lend money for gambling or to pay gambling debts.

It is also required for casinos to reserve a special room, separate and distinct, for the installation of slot machines.

### **4.3 Please address the questions in 3.5 above, but in relation to land-based gaming.**

A legal framework in relation to land-based gaming should be facilitated in the coming years. It is still uncertain whether this should be performed as part of the online introduction or independently.

## **5. TAX**

### **5.1 Please summarise briefly the tax regime applicable both to land-based and online gaming.**

The tax regime applicable to gambling is the same whether operated online or land-based.

The tax base applies to gambling proceeds as detailed in each following games:

#### **Casino games**

Gaming proceeds comprises:

- as to 'banking games' (which are defined as 'games where one player, the banker, competes against each of the other players individually' and listed as follows: roulette, trente et quarante, etc): the difference between the initial stake (together with any complementary stakes from time to time) put by the casino and the proceeds realised at the end of the game, such difference being diminished by the following deductions (25 per cent for the expenses and 10 per cent for the loss in relation to the artistic events organised by the casino);
- as to 'commerce games' (ie bridge, etc) and 'circle games' (ie baccarat, écarté, etc): the aggregate amount of charges or rakes withheld by the casino during the games.

#### **'Sports betting' games and lotto**

The tax base is the gross amount committed in the betting.

As to the tax rate, Luxembourg laws also distinguish according to the category of games:

#### **Casino games**

Withholding tax on the gross amount is 10 per cent up to EUR 45,000; 20 per cent from EUR 45,000.01 to 90,000; 30 per cent from EUR 90,000.01 to 270,000; 40 per cent from EUR 270,000.01 to 540,000; 45 per cent from 540,000.01 to 1,080,000; 50 per cent from 1,080,000.01 to 2,700,000; 55 per cent from 2,700,000.01 to 4,500,000; 65 per cent from EUR 4,500,000.01 to 6,300,000; 75 per cent from EUR 6,300,000.01 to 8,100,000; 80 per cent above EUR 8,100,000.

#### **Sports betting and lotto**

Tax rate: 15 per cent.

#### **Tax exemptions**

- Gambling proceeds are exempted from income tax, wealth tax and VAT.
- Special status of gambling products offered by the Loterie Nationale: since 100 per cent of the gains realised by the Loterie Nationale shall be

redistributed to charitable organisations, there is no tax on lotteries and no tax on sports betting products offered by the Loterie Nationale either.

## **6. ADVERTISING**

### **6.1 To what extent is the advertising of gambling permitted in your jurisdiction? Again, this should cover both land-based and online gaming. To the extent that advertising is permitted, how is it regulated?**

Advertising of gambling is generally allowed with one specific restriction set forth by law which concerns minors who shall not be targeted by advertisement. Other than that, advertisement of land-based and online gaming is not specifically restricted or regulated in Luxembourg. However, the general regulations regarding faithful, trustworthy and honest commercial advertisements are applicable to gambling.

Furthermore, the law of 30 July 2002 regulating certain trade practices and penalising unfair competition provides a list of conditions to be met by the advertiser-organiser of online and land-based lotteries, mere competition games and free advertising raffles exclusively organised for marketing purposes:

- prior to any broadcast of the advertisement, such advertiser-organiser should draw up a regulation stating the conditions and operation of the business transaction. This regulation and a copy of documents to be addressed to the consumers should be submitted to a ministerial officer who is in charge of ensuring their regularity. The full text of the regulation should also be sent, free of charge, by the advertiser to anyone who requests it;
- the advertising documents shall not cause confusion of any kind in the mind of their recipients or be misleading as to the number and value of prizes as well as on the conditions of their allocation;
- the entry form shall be separate from the order form of the product or the provision of the service;
- participation in the draw, whatever the conditions are, shall not be subject to any compensation of any kind or any necessary purchase;
- the advertiser-organiser who has created, through the design or layout of the communication, the impression that the consumer has won a prize, must provide this prize to the consumer.

## **7. SOCIAL GAMING**

### **7.1 We believe this to be a growing area. Please decide under what criteria social gaming is permitted in your jurisdiction. If games are free to play or if there is no prize, are they legal without a licence? Please address circumstances where virtual currency is used and can be won: ie currency which is of no monetary or other value, save for as credits to take part in games. The answer should address the question whether game credits or virtual money can be exchanged for other prizes. Is any change to regulation in the area proposed or envisaged?**

Located in the heart of Europe, Luxembourg is hosting some of the biggest ITC companies (Amazon, iTunes, eBay, PayPal, Vodafone, RealNetworks, Rakuten,

Skype, etc) and leading fast growing online cloud and social gaming companies (Innova, OnLive Inc, Zynga, Big Fish Games, Kabam, Nexon, Bigpoint and Mgame) that have elected the country as their European distribution platform.

These companies have chosen Luxembourg to install the technology centre of their European operations (eg OnLive Inc., Innova, Zynga or Mgame) and/or manage their operational activities for development, marketing and public relations for the European market (eg Nexon) and/or organise through Luxembourg their language customer support, marketing and business development (eg Kabam) and/or organise their accounting and marketing activities (eg Bigpoint).

Such financial, management and accounting activities, even if related to gambling, are not considered by the Ministry of Justice to be operating a gambling activity so that no prior authorisation is needed pursuant to the 1977 Law.

However, the operational or commercial activities performed in relation to social gaming are subject to receiving a right of establishment before setting up a business. The requested authorisation for establishing a business is issued by a decision of the Minister of the Middle Classes after an administrative investigation and after a reasoned opinion of a commission (Article 2 of the Law on business establishment of 1988). The right of establishment is granted to any individual who fulfils the double condition of honour and professional qualification.

As part of social gaming:

- if concerned games are free to play or if there is no prize, such games do not require prior authorisation or licence in order to be properly offered to residents of Luxembourg other than the aforementioned authorisation for business establishment if the case may be. Applying the same reasoning than the one with respect to slot machines by virtue of Article 3 al.2 of the 1977 Law, such social games shall not be prohibited if no 'chance of enrichment' or material advantage – other than the right to take part in further games – is given to the player;
- if virtual money involved in social games – where the concept of 'hazard' is present – can be exchanged for other prizes, one should analyse whether the gaming operator is operating and taking advantage of the player's passion or is simply offering an 'entertainment' game such as snooker or electronic flipper, in which case, no prior authorisation or licence from the Ministry of Justice is required. Such social games are deemed to be gambling activities requiring the prior authorisation from the said Ministry only if: (i) the game, either by itself or because of the conditions under which it is performed, is such that 'hazard' prevails over the intellectual or physical address of the players; (ii) the game requires real money from the players (considerable 'buy-in' exceeding the gaming operator's management and acquisition costs/expenses plus normal profits); and (iii) the game creates a risk of losing the buy-in and the hope of winning a prize or any direct/indirect financial consideration for the player or other material advantage (other than the right to play again).

Particular attention should be drawn to the organisation of social games in the form of lotteries, mere competition games and free advertising raffles organised exclusively for marketing purposes which should meet the conditions set forth by Article 21 of the law of 30 July 2002 regulating certain trade practices and penalizing unfair competition (see section 6 above).

### **The attractiveness of Luxembourg**

The attractiveness of Luxembourg for ICT and ‘social gaming’ companies as an ideal distribution platform to access worldwide markets is a combination of its:

- ideal location in Europe;
- first class data centre infrastructure (Tier IV certification);
- pan-European connectivity and ultrahigh bandwidth;
- installed client base;
- cutting-edge pro-technology financial and IP structures;
- very business friendly tax environment, notably: (i) the lowest VAT rates in the EU – 15 per cent (see above section 3.2); and (ii) exemption for IP rights introduced by the Law dated 21 December 2007 which provides for an 80 per cent tax exemption on income derived from IP as well as on capital gains realised on the disposal of such IP (attractive for brands having integrated social games into their marketing strategies);
- public incentives and financial assistance, notably through the law of 5 June 2009 relating to the promotion of research, development and innovation;
- tailor-made network provided by the Luxembourg administration agency supporting the various ‘social games’ actors in the field of information and communication technology and fostering business opportunities; and
- attractive corporate structures: (i) regulated investment vehicles (eg Undertakings for Collective Investment, SICAV, SICAF, FCP); (ii) semi-regulated investment vehicles (eg SICAR, SIF); and (iii) unregulated Luxembourg holding company (SOPARFI) which may benefit, under certain conditions, from full tax exemptions of dividends received, and of capital gains, realised on shareholdings held by the SOPARFI.

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