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Strong feelings over regulation of US e-gaming

US Senators Harry Reid (D-NV) and Jon Kyl (R-AZ), both politicians who have previously addressed US e-gaming issues have asked the Department of Justice (DoJ) to clarify its position on the matter. In a 16 July letter to the US Attorney General, they pointed to '[a] lack of activity from law enforcement [which] led to a significant and growing perception that operating Internet poker and other Internet gambling did not violate US laws,' and urged authorities to 'pursue aggressively and consistently those offering illegal internet gambling in the US'.

This aggressive stance comes as a surprise in the context of several state-level e-gaming proposals introduced in the past few months, notably in California. However, gaming Attorney Stuart Hoegner, believes that "the letter is meant to remind the DoJ that Congress has control of US e-gaming policy. The Senators only want to discourage intra-state regulation attempts - i.e. efforts by individual states - and leave the door open for Congress to regulate. They do not believe the DoJ's position on e-gaming has changed, because it has not changed."

IN THIS ISSUE

UK outlines licence scheme for foreign-based operators

Offshore gambling operators selling or advertising online gambling products in the UK should be regulated, the UK Government announced on 14 July. The Minister for Tourism and Heritage at the Department for Culture, Media and Sport (DCMS), John Penrose MP, said in the House of Commons that 'the Gambling Act should be amended so that remote gambling is regulated...[and remote gambling operators] will be required to hold a Gambling Commission licence'. Penrose said that the current regime provides 'very little consumer protection' when playing on an offshore-based website.

Carl Rohsler, Partner at Squire Sanders Hammonds, welcomes the move since the current regime "has an inherent flaw because it creates an incentive for UK operators to move offshore," but he believes "the Commons statement is absolute nonsense. This is nothing about consumer protection and all about tax".

David Clifton, Managing Partner of Joelson Wilson LLP, shares that thought: "HM Treasury will be the major beneficiary. A further announcement in relation to their review of remote gambling taxation is eagerly awaited".

Rohsler expects that offshore operators will be prepared to pay the same 15% gross profits tax as paid by UK-based businesses since "it is a tax on profits, not on revenue, and is therefore more easily bearable," he said. "Operators will accept this because the UK market is still the largest in the EU."

According to John Hagan, Partner at Harris Hagan, the proposed tax is "quite reasonable by recent European online standards". Clifton thinks that offshore operators will "have little choice [than to pay the tax] if they want to target British customers". He adds, however, that "the key question is how the new law will be enforced. Every indication to date has been that there will be no ISP or financial blocking, and that the route to enforcement will go down the path of regulatory cooperation between jurisdictions and the prohibition of foreign advertising".

Hagan predicts that the cost of doing business in the UK "will increase substantially. In addition to the tax there will be the higher licensing and regulatory costs," he said. "These are much more likely to be felt by UK gamblers than any marginal improvements in consumer protection. Sectors of the UK land-based industry will, I am sure, be delighted to welcome online operators to their world."

Michiel Willems

EU takes stance against several national gaming draft provisions

The EU has recently expressed doubts regarding the compatibility of several draft Member States gaming laws with EU legal principles, rejecting their potentially discriminatory character.

In Germany, the EU Commission issued an 18 July Opinion detailing the deficiencies of the new draft Interstate Treaty on Gambling, and, according to Joerg Hofmann, Partner at Melchers, "criticising a significant lack of justification for restrictions and unequal treatment of private operators that might be regarded as discriminatory". This Opinion comes as a confirmation of the views taken by several operators, including Betfair, which deemed the proposed regime "anti-competitive" and have been vocal in their criticism of its protectionist character.

In Greece, the EU Commission took a similar stance in its 8 July Opinion, and singled out the licensing and tender requirements the draft text proposes, which the EU Gaming and Betting Association calls 'highly questionable'. However, there are still questions the draft text does not answer, especially, says Krystallia Iatridou, Attorney at Karageorgiou & Associates Law Firm, "the eligibility conditions to the public tender for gaming machines (to be defined by ministerial decisions) and the subsequent role of the incumbent, OPAP - issues the EU Commission is concerned about".

The standstill period for both draft gaming laws still runs, giving more time for commentators to voice their opinions.

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THE DOMINO EFFECT

It seems that the aftermath of the Black Friday events, in the US, which saw the indictments of several poker platforms for fraud, money laundering and illegal gambling is never-ending. Alderney and France, two jurisdictions that authorise the provision of online gambling services in the EU, have suspended FullTilt Poker's operating licence in their respective territories. In the words of Andre Wilsenach, CEO of the Alderney Gambling Control Commission, "the decision to suspend the e-gambling licence was in the public interest...because of the seriousness and urgency of the matter".

The influence US events has had on the world of online poker seems extraordinary, if one bears in mind that the US Department of Justice is investigating events in the US and has authority only in that specific geographic area. The dimension that makes those events truly international and global in scope is the payments matter, which, interestingly, is the main feature in the indictments. Gambling and paying for gambling should be two indissociable activities, at least from a land-based point of view - if you outlaw one (usually gambling) then the other should stop naturally. However, in the online world, things are not so simple because everything is remote: you might be playing with a Malta-based operator but the people playing around with your money could very well be in the Bahamas and or in the Cayman Islands. You can always shop around to find a jurisdiction that offers you the ability to play - realistically, it is difficult to prevent people from gambling online if they are really set on doing so. However, it is a lot easier to stop people from financing this activity if card payments, transfers etc are banned centrally at the point of processing. So, even though many might not see the logic behind payments being banned in the US in the midst of a total lack of clarity as to the status of internet gambling itself, there is, at least, some method in their madness.

AT A GLANCE

Poland On 16 June, the Polish President signed the new Act on Gambling Games into law. This new piece of legislation has been highly criticised, as it prohibits foreign companies from operating in the country.

Germany The German State of Schleswig-Holstein has amended its draft gambling legislation following discussions with gambling support groups.

Turkey The start of the Turkish football season has been postponed, pending an investigation into alleged football match fixing involving the chairman of a top club and the former head of the country's football federation.

Sweden The Supreme Administrative Court ruled on 30 June that foreign operators sponsoring TV programmes is allowed under the Lottery Act. It also held that the publication of betting odds from unlicensed operators is a manifestation of freedom of speech.

USA The American Gaming Association will support new internet gaming legislation in the next few months, backing Nevada and New Jersey as the main licensing authorities in a future US online gambling market.

France – The French online gaming regulator, ARJEL, has expressed concerns over the legality of automatic rebuys on licensed online poker websites in France.

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The EU responds to Germany's draft legislation

On 18 July, the EU Commission rejected the draft legislation for a new gambling regime in Germany, the New State Treaty, as proposed by most German Federal States in April. Despite the EU Commission's Opinion not having been made public, there has been much speculation and criticism of some of the measures the draft text proposes, notably regarding the treatment of private operators. Barbara Ploekl, Principal Associate at Freshfields Bruckhaus Deringer LLP, discusses the EU Commission's detailed Opinion, the current state of play and what can be expected in the months to come.

The German gambling regime for lotteries and sports betting is currently under revision. New legislation - taking into account the rulings of the Court of Justice of the European Union (CJEU) of 8 September 2010[1] - will enter into force on 1 January 2012.

On 15 April 2011, the German Government notified the draft of the German Treaty amending the State Treaty on Games of Chance ('the New State Treaty') to the EU Commission, pursuant to Directive 98/34/EC[2]. The notified draft was neither accompanied by an introductory statement nor by any explanatory comments. On 18 July 2011, the EU Commission issued a detailed Opinion and some comments, and criticised the notified New State Treaty for not complying - to a large extent - with EU law. The Federal Republic of Germany has been asked to provide further details and explanations to justify the draft with regard to the purpose, proportionality and coherence of its provisions. As a consequence, the New State Treaty will not be adopted before 18 August 2011, which gives room for a dialogue with the *Laender*, the Federal States. Meanwhile, the state of Schleswig-Holstein's draft Gaming Act, to which the EU Commission already consented by letter of 9 May 2011, could potentially be an inspiration for the whole of Germany.

The EU Commission's 'detailed Opinion'

In its detailed Opinion, the EU Commission expresses doubts as to whether the New State Treaty complies with EU law. As the German authorities notified the New State Treaty without any reasoning, the EU Commission is now requesting the *Laender* to finish their work, and present reasons and justifications in the light of EU law requirements for the proposed measures. As far as the limitation of the number of licences for sports betting is concerned, the EU Commission is requesting the submission of a study on the appropriateness and proportionality of such a restriction with regard to the aim of channelling customers to licensed operators and combatting crime and fraud.

The EU Commission's detailed Opinion addresses the proposed limited offer of (online) sports bets as well as the offer of online casino games and poker.

The proposed limited offer of (online) sports betting

Regarding the licensing system for (online) sports betting[3], the EU Commission raises a number of concerns. In particular, it cannot see evidence as to the suitability and proportionality of the limitation of the number of licences to achieve the aims of the New State Treaty. Restrictions on the allocation of licences, the limits on stakes, the restrictions on the form of bets and advertising, the fees and the relatively small number of operators eligible for a licence measured against the total size of the market seem to render impossible any competitive, attractive and stable offer of online sporting bets. In addition, the EU Commission points out that there are no similar restrictions for online casino games, and has asked the Federal Republic of Germany to provide further details to justify the proposed measures. Online casino games are judged by the EU Commission to present an even higher risk of addiction than the less dangerous but nonetheless more strictly regulated, sports bets.

Casino games and poker

With regard to the organising (*veranstalten*) and arranging

(*vermitteln*) of (online) casino games and poker[4], the EU Commission in particular emphasises that the provisions would *de facto* force the operator of online casino games of chance to have a permanent infrastructure in Germany. However, according to CJEU case law, this cannot be justified. Again, the EU Commission has asked the German authorities for a detailed reasoning regarding the proposed provisions.

As a result, the EU Commission takes the view that Section 4a Paragraph 3, 10a of the New State Treaty - the 'experimentation clause' providing for the granting of seven sports betting licences for a period of seven years as of the entering into force of the New State Treaty - as well as Section 20 Paragraph 3, regulating online poker and casino games, infringe upon the freedom of services guaranteed in Article 56 TFEU. Unless German authorities amend the proposed New State Treaty considering the substantial doubts expressed, the EU Commission will consider initiating infringement proceedings by delivering a reasoned opinion according to Article 258 TFEU.

The EU Commission's comments

In addition, the EU Commission commented on the following further provisions of the New State Treaty:

- Requirements of the procedure for the granting of licences for sports bets[5] are not transparent and give rise to the assumption that the national authorities will use their discretion conceded by the CJEU jurisprudence to the Member States in the field of gaming legislation arbitrarily. The fact that, in most cases, online operators hold licences from other EU Member States is also not sufficiently considered in this context. At this point, the EU Commission expressly refers to the CJEU's decision in the 'Webb' case[6], in which it ruled that the requirement of an additional licence 'would be excessive in relation to the aim pursued, however, if the requirements to which the issue of a licence is subject coincided with the proofs and guarantees required in the state of establishment'. Conditions and prerequisites already approved by the competent authorities in another Member State in the context of the granting of a gambling licence are thus to be taken into consideration by German gambling authorities.
- The provision to set up a sales network of up to 350 bet brokering locations[7] is, in the EU Commission's view, not a legal obligation for private operators of games of chance, which would include the permanent establishment in the Member State in which they intend to offer their services, but a mere option. The requirement to set up a permanent establishment in Germany in order to be able to provide services in another Member State would infringe upon EU law.
- The licensing prerequisites for state operators require further clarification as to whether the existing state operators will have to fulfil the same licensing requirements as private operators. The EU Commission here detects the risk of unequal treatment without justification.
- The EU Commission criticises the fact that a commercial gambling provider (*gewerblicher Spielvermittler*) intending to act as an agent for operators of games of chance on the entire German territory requires up to 32 single licences to be issued by the authorities of the 16 federal states. Unlike for the organising of lotteries (run be state-owned companies), there is no nationwide licence for commercial gambling provider.
- The German authorities should - with regard to the limits on stakes amounting to €750 per participant and month[8] - provide evidence as to the suitability of such a measure to achieve the aim of consumer protection.
- Online advertising for sports bets[9] also requires more clarifications. In particular, the term 'around sports events' in Paragraph 3 of Section 5 of the New State Treaty is unclear and does not clearly indicate the scope of application of the provision.
- There is uncertainty as to how the concession fees amounting to €250,000 for the first year after the granting of the licence and to €175,000 for each following year are calculated and whether they are proportionate with regard to the administrative efforts triggered.
- With regard to the payment blocking and website blocking methods[10], German authorities should provide evidence as to the suitability and proportionality.
- There is no justification for the privilege of the existing state operators of lotteries and sports bets by the transitional provisions[11].

The EU Commission made clear that the question as to whether there is a systematic and coherent regulation of the German market can only be answered once the regime of further types of games, in particular that of slot machines and horserace betting, are amended

Impact and current state of play

The EU Commission has announced it will now enter into a dialogue with the German *Laender*. The standstill period pursuant to Directive 98/34/EC ends on 18 August 2011.

The German authorities have a month to amend the New State Treaty in accordance with the detailed Opinion and comments, and will have to notify the EU Commission of the new wording of the provisions as well as of a written reasoning for the New State

Treaty. This obligation to notify also comprises notification of eventual amendments to existing legislation on slot machines and horse race bets (that are not covered by the New State Treaty). In addition to its Opinion and the comments, the EU Commission made very clear that the question whether there is a systematic and coherent regulation of the German market can only be assessed once the regime of further types of games, in particular that of slot machines and horserace betting, will also be amended as demanded by the CJEU in its decisions of 8 September 2010[12]. Thus, as a result, the entire relevant German gambling legislation is to be notified under Directive 98/34/EC to the EU Commission as well as any further future by-laws in execution of the New State Treaty that deal with electronic gambling activities. If Germany failed to fulfil its obligations, the EU Commission is entitled to initiate infringement proceedings pursuant to Article 258 TFEU by issuing a formal letter of notice to the German Government.

Although it seems, at first glance, that in many aspects all the EU Commission requests is that the Federal Republic of Germany provides reasons und justification for the limitation on the free movement of services, it is quite clear that this task will be very difficult if not impossible, as the intended regulations provided for in the New State Treaty are not likely to be applied in practice in such a way that European law is respected. This is, in particular, obvious as regards the limitation of the number of licences in respect of which the EU Commission states that it cannot see any reason how such a limitation is even suitable to reach the aims of the New State Treaty as well as when it comes to asking for a further explanation on how real-time online poker can be offered by way of transmission from offline casinos.

Thus, the detailed Opinion can be regarded as a great success for private operators. It will now be very difficult for the *Laender* to come up with amendments to the New State Treaty taking into due consideration all the comments of the EU Commission. It rather seems that the *Laender* will need to rethink their concept of regulating the gambling sector in Germany from scratch. An option might be extending the territorial scope of the draft Bill proposed by the Federal State of Schleswig-Holstein, which was approved by letter of 9 May 2011 to all of the *Laender*[13].

The draft Bill of Schleswig-Holstein already is in line with EU law. It complies with EU law in exactly those areas and aspects which are now being criticised by the EU Commission in its detailed Opinion of 18 July 2011. These aspects are, in particular, a more liberal regulation of sports bets (without limitation of the number of licences and without disproportionate requirements in application proceedings etc) and the admittance of private operators of online casino games and poker on a regulated basis. The Schleswig-Holstein draft Gaming Act features the correct approach from a regulatory point of view: it ensures a high level of protection for the players by providing a framework for the offering of attractive gaming products to the customers instead of attempting to seal off the market by means of restriction and prohibition. The draft Bill is scheduled to be adopted by the Parliament in Schleswig-Holstein after the third reading at the end of August.

Meanwhile, the New State Treaty remains under discussion until 18 August 2011 and should be subject to amendments in line with the EU Commission's Opinion - otherwise the German Government risks the initiating of infringement proceedings for non-compliance with EU law.

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1. Cases C-46/08 (Carmen Media) and C-316/07 (Markus Stoß u.a.).
2. OJ L 24, 21 July 1998, p. 37.
3. Sections 4a and 10a of the New State Treaty (so-called experimentation clause).
4. Section 20 paragraph 3 of the New State Treaty.
5. Section 4a, 4b of the New State Treaty.
6. Case C-279/80 (Webb).
7. Section 10a paragraph 5 of the New State Treaty.
8. Section 4 paragraph 5 of the New State Treaty.
9. Section 5 of the New State Treaty.
10. Section 9 paragraph 1 no 4 and 5 of the New State Treaty.
11. Section 29 of the New State Treaty.
12. Cases C-46/08 (Carmen Media) and C-316/07 (Markus Stoß u.a.).
13. See *World Online Gambling Law Report*, Volume 10 Issue 5 May 2011, p. 01.

Time for change: the industry's approach to self-exclusion

The UK is the world's most mature online gambling market and is continuing to grow as more people switch from land-based to online gambling. However, as the industry grows, there are also public health concerns that an increasing prevalence of gambling could have negative impacts on young and other vulnerable people. The 2011 British Gambling Prevalence Survey reported a problem gambling rate of 0.9%, up from 0.6% reported in 2007[1]. Whilst these figures and gambling prevalence surveys globally indicate that the majority of people gamble responsibly, the absolute numbers of problem gamblers are large in public health terms. One of the key features in place to protect vulnerable gamblers is self-exclusion - a system in place whereby the player requests from the operator to be excluded from playing on a platform for a certain amount of time. However, self-exclusion processes suffer from major weaknesses, and given the UK Government's recent announcement to reform the UK's gambling laws, now is the right time for the industry to re-think its approach to self-exclusion, as Simo Dragicevic, CEO of Bet-Buddy, discusses.

Online player protection

Back in 2004, a study of UK online operators found that 97% offered no self-exclusion, 77% had no reference to controlled gambling, and 37% had no age verification at registration[2]. Since then, the industry has progressed significantly, partly due to the implementation of the UK Gambling Act in 2005, which required UK-licenced online operators to offer self-exclusion and age verification protection. Today, jurisdictions and operators are using new technologies to innovate and offer even more advanced player protection features. These include the use of behavioural analytics to identify problem gambling behaviour by analysing online player data, technology that has previously been used primarily for online marketing and fraud detection. Land-based operators, such as the Ontario Lottery and Gaming Corporation, are implementing innovative new player protection features such as facial recognition technology to strengthen self-exclusion processes. The Australian Government is also considering controversial proposals to implement pre-commitment technology across all Video Lottery Terminals.

Self-exclusion

It is estimated that there were no fewer than 65,000 self-exclusions in the UK in 2008/09, 45,000 in connection with remote and 20,000 with non-remote gambling[3]. A major weakness in the current self-exclusion process is that operators have no means of knowing whether their players have self-excluded from other operators. It is certainly true that it should ultimately remain the personal responsibility of individuals to stop themselves from gambling should they need to. However, gamblers can be their own worst enemy due to the nature of addiction, for example, by excluding from one betting operator and then gambling with another. Therefore, the idea of providing the opportunity for a gambler to self-exclude from more than one operator is beneficial to the gambler and supports the notion of the gambling operator providing a duty of care to vulnerable customers.

During a series of interviews with senior industry stakeholders for a research project at Cass Business School, City University London in 2010[4], stakeholders stressed a need for a more centralised approach to online self-exclusion. For example, Tim Phillips, then Director of European Corporate Affairs at Betfair, said that 'adopting a pan-European approach makes sense [for self-exclusion], such as a common database where operators share relevant data'. However, the industry raised a number of legitimate implementation challenges that have held-up progress in adopting a centralised self-exclusion service, including data privacy, cost, trust and assurance and technology standards.

Self-exclusion - UK licence conditions and codes of practice for remote gambling

An assessment of the UK's self-exclusion social responsibility code provisions and ordinary code provisions[5] suggests that the pace of technology change is rendering some provisions out of date and that more could be done to strengthen self-exclusion processes. Social responsibility code provisions, which are conditions of licensing, stipulate that 'licencees must have and put into effect procedures for self-exclusion and take all reasonable steps to refuse service or to otherwise prevent an

individual who has entered a self-exclusion agreement from participating in gambling'. Does this provision mean that the online operator must take all reasonable steps to prevent a self-excluded gambler from gambling on any gambling website? Whilst this is a matter of interpretation, previous case law suggests not. In the UK, the most high-profile self-exclusion case is William Hill v Calvert[6]. The court ruled that despite Calvert running up debts of £2.1 million having self-excluded from his William Hill accounts, there was no causation in this case as Calvert would have accrued the gambling loss anyway given his addiction. The judge stated 'the conclusion flows in my judgment naturally from the inherently limited effectiveness of self-exclusion as a remedy for the underlying problem'.

The nature of online gambling allows for much easier data capture and sharing amongst gambling operators compared with land-based gambling. The industry is therefore well placed to support more innovative self-exclusion approaches, such as using cross-operator self-exclusion service. The data is certainly available to share as it is a UK licensing condition to maintain a register of self-excluders, including data such as appropriate records (name, address, other details), and a record of any payment cards, for example. Whilst some raise legitimate data privacy concerns to sharing player data, data encryption technology can be implemented in a manner that deters even the cleverest of hackers, and even in the unlikely event that an encrypted record could be reversed, when combined with anonymised player records, means that they cannot be linked to personal details. Ordinary codes do not hold the same status as social responsibility codes but are still admissible as evidence in criminal or civil proceedings. They stipulate that 'licencees should encourage the customer to consider extending their self exclusion to other remote gambling operators'. The code suggests that 'the licencee should provide a statement to explain that software is available to prevent an individual computer from accessing gambling internet sites'. However, given the pace of technological change, such approaches cannot effectively solve the problem. Not only are there different operating systems (e.g. PC, Mac, Linux), more importantly, with betting increasingly taking place via texting, smartphones, tablets and interactive TV, PC-blocking solutions are becoming obsolete. In addition, many online operators are now offering self-exclusion via gaming vertical, an industry innovation which effectively renders PC blocking software redundant given it can only support blanket self-exclusion.

Does this provision mean that the online operator must take all reasonable steps to prevent a self-excluded gambler from gambling on any gambling website? Whilst this is a matter of interpretation, previous case law suggests not

Cross-operator self-exclusion

Given these weaknesses, in the current self-exclusion process, Bet Buddy has been consulting with charities such as GamCare and industry associations to launch a pilot of VeriPlay.org, a service that has been developed that allows safe and secure exchange of operator data to better protect vulnerable gamblers. VeriPlay.org maintains a central database of self-excluded players. Operators can upload anonymised player records, meaning data always remains anonymous and meaningless to anyone except the operators sending and receiving the data. The VeriPlay.org algorithm encrypts the data and then matches player data across a number of data attributes that are uploaded daily, weekly or monthly, depending on the needs of the regulator and industry. Operators can check whether one, ten, or all of their players are on the central list of self-excluded players, which can be accessed either via secure web services or via a web portal. The solution can support both blanket self-exclusion and self-exclusion via gaming vertical. It is envisaged that the majority of operators would use web services to integrate such a service, since it enables low-touch straight trough processing, like geo-filtering and age verification. A benefit of the web portal is that it allows for easy access for both land-based and online operators to share encrypted data.

Incentives for sharing data

Whilst credit should be given to the industry for its efforts to share data to identify suspicious sports betting transactions now is the time for operators to start sharing their data and collaborating to better protect vulnerable gamblers. In today's digital economy, one of the most important enablers of value creation is combining data from multiple sources. However, market failures still exist for the sharing of data because of a lack of incentives for stakeholders[7]. Policy makers may therefore have to apply regulation to ensure that data is shared in industries where there is a clear public benefit to do so, for example, doctor or pilot errors. In such cases, government has a clear interest in making this type of data available as it benefits society. It comes as no surprise that Representative Joe Barton's recent Bill to licence and regulate online poker in the United States stressed the need for a centralised self-exclusion list that all operators can access[8].

Conclusion

Across all industries, regulators have always struggled to keep pace

with technological innovation and the gambling industry is no different. Whilst challenges exist to implementing collaborative industry technology solutions, the use of secure data encryption algorithms, anonymised player records, and cloud-hosted architectures make not only such solutions now incredibly secure but also on demand and affordable. The recent Sony Playstation customer data failure[9] demonstrates that whilst it is right that the industry is focused on protecting customer data, the focus should now shift to using data to better protect the customer. The experience of the UK in 2007 following the implementation of age verification and self-exclusion protection demonstrates that online operators can and will quickly implement new safety features when required to do so. Importantly, the implementation of these necessary features has not negatively impacted industry growth.

At a recent industry debate[10], in London, on the future of gambling, leading industry figures from the business-to-consumer and business-to-business online gambling sectors stressed the importance of innovation in developing richer and more varied gambling experiences across multiple channels. Whilst innovation cannot be halted and should be encouraged, it must also focus on leveraging advances in academic and scientific research and technology to better protect vulnerable customers.

John Penrose, the UK Minister responsible for gambling policy and regulation, announced in July 2011 reforms to how the UK regulates remote gambling, stating that 'the current system for regulating remote gambling doesn't work' and that 'British consumers who gamble online may have little or no protection depending on where the operator they deal with happens to be based'[11]. By announcing these reforms, the UK Government has created a fantastic opportunity to demonstrate leadership and a progressive approach to player protection by addressing the weaknesses in the current self-exclusion provisions.

The industry is also well-placed to enhance existing player protection regulations by driving the responsible gambling agenda on the front foot and demonstrating to regulators and policy makers that it is doing everything it can to protect vulnerable customers. And the best way to influence policy makers is by framing the consumer protection debate in the context of what is best for the consumer rather than what is best for the operator. It is only by championing innovative and new approaches to player protection, such as cross-operator self-exclusion, that the industry can effectively avoid onerous and heavy-handed regulations in the future.

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Comparing the Maryland & NY gaming indictments

Some in the internet gaming industry may feel they barely had time to absorb the magnitude of the indictments made public by the Department of Justice, in Manhattan, in April, before federal authorities in Maryland jumped into the act. On 23 May, the US Attorney's Office for the District of Maryland announced indictments[1] against two enterprises and three individual defendants under the Illegal Gambling Business Act ('the Act')[2] and federal anti-money laundering laws[3] - ten internet domain names were seized along with the contents of several international bank accounts. Stuart Hoegner, Managing Director of the Gaming Counsel Professional Corporation, analyses these indictments in light of similar ones in New York (NY) and discusses their implications.

The Act is a federal statute that requires an underlying state law violation in order to apply. Without a breach of state law, there is no breach of federal law under the Act. Here, the gambling business is alleged to violate Maryland law. The Maryland Code prohibits, among other things, betting and wagering and making or selling 'a book or pool on the result of a race, contest, or contingency'[4]. In the past, the current US Attorney in Maryland has taken the position that Texas Hold 'Em, when played for money on the internet and available to Maryland residents, violates §12-102 of the Maryland Code[5]. He has also used the Act, federal money laundering prohibitions and state law violations to seek and obtain forfeiture of amounts in bank accounts associated with internet gambling[6].

Comparing NY with Maryland

Much can be learned about the Maryland indictments by comparing them with the recently-unveiled indictments in the Southern District of NY[7]. The differences are more striking than the similarities. Start with the development of the cases in each state. The NY indictments are understood to have grown out of prior investigations involving Neteller Plc and Daniel Tzvetkoff, among others.

By contrast, the most damaging information obtained by the US Attorney's Office in Maryland appears to have come by means of an elaborate sting. In an affidavit in support of seizure warrants relating to the domain name and fund seizures[8], a special agent with US Homeland Security Investigations outlines the role of Linwood Payment Solutions in the operation. Linwood was an undercover payment processing business established more than two years ago near Atlantic City. Linwood and the undercover agents behind it 'established a website on the internet, opened bank accounts, and set up a payment processing plant with a number of employees capable of handling thousands of transactions on a daily basis'[9]. The agents then purportedly had dealings with top managers of foreign gaming and betting operators to discuss business and negotiate processing contracts. According to the affiant, Linwood 'processed millions of dollars in transactions during the past two years for a number of internet gambling organizations including Absolute Poker, Ultimate Bet, BetEd, K23 Group Financial Services doing business as BMX Entertainment Limited, and Nemesis Group doing business as Chargestream Ltd'[10].

Interestingly, given the fact that the evidence gathered through Linwood includes materials regarding Absolute Poker and UB, those entities and their alleged principals were not named in the Maryland indictments. As interesting is the fact that the Maryland investigation had been going on for more than two years - far longer, at least, than any information provided by Mr. Tzvetkoff was in the hands of the NY prosecutors - but the Maryland indictments contain fewer counts on lesser charges.

Unlike NY, there are no allegations in the Maryland indictments that the defendants violated the Unlawful internet Gambling Enforcement Act (UIGEA)[11], or conspired to commit wire fraud[12] or bank fraud[13], although the Homeland Security Special Agent does refer to the UIGEA and the Wire Act in the applicable statutes section of her affidavit. The bank and wire fraud conspiracy count against several of the NY defendants is the most serious pending charge; federal law provides for a maximum prison term on conviction of 30 years[14]. Without minimizing the seriousness of the Maryland charges - money laundering and illegal gambling have maximum possible federal prison terms of 20 years and five years, respectively - wire fraud and bank fraud are not on the table *ab initio*. The absence of bank or wire fraud-related counts in Maryland shows that federal prosecutors believe they can continue to make cases against foreign operators without the kind of deceit that is being alleged in NY. After 15 April, observers may have supposed that operators not engaging in bank fraud in the US would not be molested by the Department of Justice or that they

would perhaps see less harassment. Any such hope now appears to be misplaced. Even without wire or bank fraud counts, the Maryland defendants face serious illegal gambling and money laundering charges. This risk extends to many gaming and betting operators currently serving the US market.

State law

What can be said of the respective state law violations? In NY, the alleged criminal act is a class A misdemeanor pursuant to state law. The relevant section provides that '[a] person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity'[15]. A person engages in 'gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome'[16]. NY is a 'material element test' state, i.e., it examines 'the element of chance by determining whether a particular game contains chance as a material element affecting the outcome of the game'[17].

The gambling offences in the Maryland Code are also classified as misdemeanors. Federal prosecutors in Maryland have submitted before that Maryland law 'does not explicitly define gambling or unlawful gambling'[18]. However, Maryland does not appear to be a 'predominance test' state, either[19], that is, it may not be a state in which the question is whether skill or chance predominates in a particular game[20]. Accordingly, it may be ambiguous whether the alleged state law violations in Maryland and NY favor one set of defendants over another. Neither state seems to lean towards the predominance test. Both states appear to accept that a game where chance does not predominate can still be gambling. However, the definition of 'gambling' in the NY penal law might be seen to tie 'gambling' more expressly to 'a contest of chance' than the Maryland Code does. This might not matter for counts tied to sports betting, as in Maryland, but to the extent that the NY indictments deal primarily with an assessment of poker under state law, federal prosecutors in New York may have a harder path ahead with the illegal gambling and the UIGEA counts. Naturally, prosecutors in both jurisdictions will make the case that all of the activities amount to violations pursuant to the laws of each state.

The suspension of Full Tilt Poker's gaming licences by the Alderney Gambling Control Commission on 29 June is likely to have more of an influence on the US regulation debate than the events in Maryland

What is the business of gambling?

One of the indicted individuals in Maryland, David Parchomchuk, has claimed through his representatives that he is not and never has been an owner of ThrillX Systems Limited and that he has only 'provided technical consulting services' to ThrillX, among other clients. However, the indictment against Parchomchuk says nothing about these consulting services; it contains the blanket assertion that ThrillX, Parchomchuk, and Darren Wright, among other things, conducted and owned an illegal gambling business. The US Attorney in Maryland may believe he can establish that Parchomchuk had an enhanced level of involvement in the gambling business. As a factual matter, however, if Parchomchuk was only a software developer and did not conduct, manage, finance, own, or market 'www.beted.com', ThrillX, or affiliated vehicles, then this may represent a new front in the Department of Justice's war against internet gambling. To date, the main targets of federal prosecutors have been operators, processors, marketers, and their principals. According to Jeff Ifrah, Parchomchuk's counsel in the Maryland case, '[b]y indicting a software programmer, Maryland has expanded the definition of who is 'in the business of' gambling. Traditionally, only operators, processors and their owner/directors have been included in this definition'. It remains to be seen how the facts will shape up to support the indictment of Parchomchuk and the other defendants.

Implications

Questions coming out of the 23 May Maryland announcement are:

- How do these indictments, on the heels of NY, affect the timing and form of any regulation of the internet gaming and betting sector in the US?
- What does this mean for the US market and for international operators?
- Will other states follow these examples?

The Maryland indictments may not provide much in the way of answers. In one sense, the May indictments may be another weight tipping the scale away from federal regulation of internet gaming. Irrespective of increasing support from the US land-based casino operators, it will likely be seen as increasingly bad optics to push a federal gaming initiative while major entities in the internet gambling industry are under indictment, including in Maryland. This argument gets more traction the closer we get to next November's US presidential and congressional elections. However, at the time of writing, Rep. Joe Barton (R-TX) has introduced H.R. 2366, the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening

UIGEA of 2011. This measure joins Bills recently introduced by Reps. Campbell (R-CA) and McDermott (D-WA).

In other respects, the cases in Maryland will not affect the debate. At the very least, they (partly) concern sports betting websites. Few people seriously believe that sports betting over the internet will be regulated by Congress and allowed to be offered in the United States any time soon; that was the case both before and after the Maryland indictments were announced. It is also difficult to discern how Maryland will impact the various intra-state gaming initiatives currently under consideration in the US. Several of the state initiatives are confined to online poker and state regulation proponents may not be too swayed by what's happening in Maryland. On the whole, the Maryland cases will not likely have much impact on this debate. (The suspension of Full Tilt Poker's gaming licences by the Alderney Gambling Control Commission on 29 June is likely to have more of an influence on the US regulation debate than the events in Maryland.)

While the actions in Maryland will continue to make things difficult for US-facing operators, and while it may drive some US players and bettors out of the market, it seems trite to say at this point that the prohibition course being pursued by the United States will not succeed in choking off the industry. Certain states might be blocked by some US-facing sites in an attempt to mitigate risk, but there will likely be operators willing to take US action regardless of how bad things get for them there. This will, in turn, continue to drive transactions away from more reputable operators to less reputable ones. European operators dealing in heavily regulated jurisdictions will continue to be loath to have anything to do with this grey market. The Maryland prosecutions should not particularly affect the approach taken by other law enforcement agents in the US. In Maryland itself, these cases are just continuing a trend being pursued by the US Attorney there. It will not be surprising to see new action taken by the Department of Justice elsewhere in the US against participants in the internet gaming and betting sector; this is also part of a pattern and will continue regardless of the Maryland indictments. Observers should also not overlook state-level actions, either. States will not only co-operate with federal investigations; they will launch their own ventures to attack what they see as state law violations.

Even though the broader implications of the Maryland indictments may be limited, the comparisons with the NY prosecutions are instructive. It is perhaps too early to say whether the underlying purported state law violations will be easier to establish in one state or the other, but the use of the sting (Linwood), the absence of a bank fraud count, and the possible expansion to including a software developer as a defendant (if borne out by the facts), may signal that the Department of Justice will be even more aggressive in its internet gaming and betting prosecutions after the Manhattan indictments.

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1. Indictment, United States v ThrillX Systems, Ltd et al, Crim. No. CCB-11-0238 (D. Md., 2011); Indictment, United States v K23 Group Financial Services et al, Crim. No. CCB-11-0239 (D. Md., 2011).
2. 18 U.S.C. § 1955.
3. 18 U.S.C. § 1956.
4. Md. Code Ann., Criminal Law § 12-102 (2011).
5. See Government's Rule 11 Memorandum, United States v Davitt, Crim. No. CCB-10-0751 (D. Md., 2010). This position was the basis for a plea agreement in the Davitt case: Plea Agreement, United States v Davitt, Crim. No. CCB-10-0751 (D. Md., 2010).
6. Complaint for Forfeiture, United States v Contents of Various Bank Accounts (Electracash et al), Civil No. 09-2937 (D. Md., 2010). See also Van Smith, 'Feds in Maryland Seize Six More Bank Accounts Tied to Laundering Gambling Proceeds', *Baltimore City Paper*, 24 September 2009, at http://blogs.citypaper.com/index.php/2009/09/feds-in-maryland-seize-six-more-bank-accounts-tied-to-laundering-gambling-proceeds/
7. Superseding Indictment, United States v Scheinberg et al, 10 Cr. 336 (S.D.N.Y., 2011). See also: Complaint, United States v PokerStars et al, 11 Civ. 2564 (S.D.N.Y., 2011); Post-Indictment Restraining Order, United States v Scheinberg et al, 10 Cr. 336 (S.D.N.Y., 2011); and, Arrest Warrant In Rem, United States v PokerStars et al, 11 Civ. 2564 (S.D.N.Y., 2011).
8. Affidavit in Support of Seizure Warrants, at www.regulatingonline.com/wp-content/uploads/2011/05/56092260-Linwood-SSW-Affidavit.pdf
9. Id. at 8.
10. Id.
11. 31 U.S.C. §§ 5361-5367.
12. 18 U.S.C. § 1343.
13. 18 U.S.C. § 1344.
14 .This is only an expression of the maximum possible prison term under the United States Code. Many factors can affect sentencing.
15. N.Y. Penal Law § 225.05 (Consol. 2011).
16. Id. at 225.00.
17. Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, 'Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Chance and Skill', 57 *Drake L. Rev*. 101, 109 (2009).
18. Government's Rule 11 Memorandum, United States v Davitt, supra note 5 at 4.
19. Brown v State, 210 Md. 301, 307 (Md. 1956). In Brown, the Maryland Court of Appeals considered whether a pinball machine was an illegal gambling device. The Court construed the Maryland Code as follows: 'The insertion of money and the operation of a device by the player in a hope of winning a monetary reward in varying amounts... constitutes a bet or wager, regardless of the element of skill.'
20. See Cabot, Light & Rutledge, supra note 17 at 108.

ARJEL & AAMS: first step towards EU harmonisation?

On 28 June 2011, French and Italian online gaming authorities (the ARJEL and AAMS, respectively) entered into a Cooperation Agreement ('the Agreement') in Rome. The purpose of the Agreement is to organise and implement between the regulators a cooperation and information sharing process to strengthen their control and improve regulation in the field of online gambling. Annabelle Richard and Clément Gautier, of Ichay & Mullenex Avocats, discuss the scope and impact of such an agreement in light of the specificities of the respective national markets.

Cross-border bilateral cooperation agreements between regulators and/or national authorities are quite common tools in sectors involving many cross-border human and financial flows, and wholly or partly governed by supranational rules (banking, customs, tax, competition etc). However, a bilateral cooperation agreement in a field regulated at a national-level is rather an original approach. Could this be considered as a first step towards European harmonisation in the field of online gambling?

Main features of the Agreement

As a preamble, the Agreement reads that online gaming is a field where state intervention is necessary due to issues of public order, such as public security and protection of health, consumers and minors. It further stipulates that national legal frameworks have to take into account the offer of online gambling services on an international scale. The preamble also refers to the Green Paper adopted by the EU Commission on 24 March 2011 in order to define the general framework of the current situation of the European online gambling market and of the various models of national regulations.

Information sharing

The possibility for the regulators to share and exchange information is clearly the main purpose of this Agreement.

Indeed, the regulators will commit to communicate, on request of the other party, any information in support of the control over the operator's activities. In particular, this control may relate to legal and regulatory compliance in the following areas:

- opening, management and closing of players' accounts;
- anti-money laundering and fight against financing of terrorism; and
- advertising and surveillance measures in view of ensuring fairness of sports events and the offer of bets on such events.

The Agreement provides that the information shared cannot exceed the scope of the request and that assistance can be refused if:

- The request of information is likely to raise sovereignty or public order issues.
- The dissemination of the requested information may harm a procedure initiated by the other party against an operator.
- The communication of the information is subject to a prior judicial authorisation which is not granted to the requesting party.

Such a request for information shall be made in writing and can be used only for the purpose stated in the request. All information gathered through this procedure shall remain strictly confidential.

Cooperation process

Under the terms of the Agreement, the regulators have agreed to implement mutual and spontaneous communication with regards to the evolution of online gambling laws and regulations. Furthermore, the regulators will organise working sessions to facilitate the exchange of information and maintain a constant dialogue through regular exchanges between their agents. In addition, each party's staff will be informed of the market evolutions through training seminars or conferences, and the regulators may decide to publish common surveys.

Impact of the Agreement

It appears that, at this point, the regulators have only intended to launch a simple cooperation process without attempting to develop any harmonisation

between their respective regulatory frameworks. In addition, the actual use that will be made of this Agreement is left to the initiative of both regulators - no objectives or targets whatsoever are set out by the Agreement itself.

Moreover, the Agreement does not provide any indication as to how the information obtained from the other regulator will be used in the control of operators. Under French law, it is unclear how information obtained from the Italian AAMS could impact a decision to sanction an operator. As a reminder, such a sanction could go up to the suspension or the withdrawal of the licence. Indeed, in theory, in France, the operator is only bound by French regulation and could hardly be sanctioned for a breach of the Italian regulation in Italy. However, in view of recent events, and in particular the Black Friday, it is clear that the industry can only beneficiate from better communication between regulators.

Clearly, this Agreement has not been designed to create a common online gambling market in France and Italy. Despite similarities in the national regulatory frameworks, there are also major differences such as the scope of the opening of the market to competition (for example, France has only regulated poker, horse betting and sports bets, while Italy has also authorised online casinos).

As a result, should it be considered as a first step towards harmonisation at a European-level, it can only count as a small step. It will be particularly interesting to see, in the coming months, how similar cooperation agreements may be executed between the ARJEL and the regulators from the UK, Denmark or other EU Member States. One can hope that the future cooperation agreement will have an extended scope and that the regulators will make good use of this new regulatory tool.

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M&As in the gambling industry: merger control

The betting and gambling industry is an aggressive market evolving constantly, with mergers and takeovers taking place all the time. Guy Lougher, Partner at Pinsent Masons, discusses the key merger control issues that should be considered before any transaction can be completed.

Jurisdiction

Recently, there has been a noticeable increase in the amount of M&A activity in the betting and gambling sector within the UK. The need to tackle merger control requirements is one of the myriad of issues that merging companies must address, and a failure to do so could have significant adverse consequences. The starting point in any merger notification analysis is to identify the territories that might have jurisdiction to review the transaction. Within the European Union, a merger will be subject to the exclusive jurisdiction of either the EU Commission or national competition authorities, with jurisdiction being determined by the turnover of the parties involved. There are however procedural mechanisms by which mergers can be transferred from the jurisdiction of the EU Commission to national competition authorities, and *vice versa.*

EU merger control

For EU merger control, there are two alternative sets of threshold tests - if either is met then a merger must be pre-notified to the EU Commission:

- The combined worldwide turnover of all the undertakings concerned exceeds €5,000 million and the Community-wide turnover of each of at least two undertakings concerned exceeds €250 million.
- The combined worldwide turnover of all the undertakings concerned exceeds €2,500 million and the Community-wide turnover of each at least two of the undertakings concerned exceeds €100 million and in each of at least three EU Member States, 1) the combined turnover of all the parties exceeds €100 million, and 2) the individual turnover of at least two of the parties concerned exceeds €25 million.

Even if one or both of these sets of thresholds are met, the EU Commission will not be the appropriate body for notification where each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover in one and the same EU Member State.

If, because the relevant turnover thresholds are not satisfied, the EU Commission does not have jurisdiction over a merger, then it is necessary to identify the individual territories in which the merging parties have turnover or activities in order to establish whether national merger control laws may apply, whether in the EU or outside of it. It will also often be necessary to ascertain whether the merger control laws of countries outside the EU will apply and require some form of notification. In some countries, the merger control laws are drafted so as aggressively to assume jurisdiction over transactions that in practice will have very little impact on or connection with the country concerned, potentially with sanctions for a failure to notify.

Impact on timing

The EU's merger control laws and those in most countries within the EU require mergers to be pre-notified for clearance before they can be completed, with sanctions potentially being applied where these obligations are not met by the merging parties.

Even in countries where there is no requirement to pre-notify, it may be advisable for the merging parties to do so if third party complaints (especially if by customers) are likely.

The process of evaluating merger control issues, notifying and awaiting merger control clearance, whether from the EU Commission or from individual countries, can,

even in comparatively uncontroversial transactions, lead to delays in the corporate timetable of at least three months.

In developing any merger timeline, account will need to be taken of the time involved in preparing the merger submission and of dealing with a competition authority once formal notification has occurred. Where a competition authority expects a notifying party to engage beforehand with it in pre-notification discussions, to agree the form of notification and to work through areas where data will be needed by that authority, then the timeline will need to be expanded accordingly.

Before a formal decision is adopted to approve or prohibit a transaction, EU merger control and many national merger control laws require the merging businesses to be run independently of each other. This can create commercial difficulties for the notifying parties, especially if the staff or customers of the merging parties react adversely by transferring their allegiances to competing operations. Completing a merger before receiving formal merger clearance can however lead to fines and in some cases the transaction itself may be void.

Substantive assessment

So how will competition authorities within the EU analyse a proposed transaction in the betting or gambling sectors? The starting point in any merger control analysis will be to try and identify what is the relevant product and geographic market. There have been a number of previous mergers in which competition authorities have defined the market in a 'bricks and mortar' context, but it is less certain how markets would be defined in relation to online operations.

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There have however been mergers in which the UK's competition authorities have previously reached the following market definitions:

- Betting is a separate market from other forms of gambling and leisure activities.
- On- and off-course betting are separate markets.
- Off-course betting through a licensed betting outlet is a different market to telephone betting.
- Online bingo is not in the same product market as licensed bingo clubs.

These previous cases do not convincingly indicate how the UK's competition authorities (and also other competition authorities in the EU) would define product markets for online businesses. For example, would online betting and online gambling be thought to represent separate product markets? Equally, if online gambling is considered to represent a separate product market, then would it be interpreted widely or narrowly - for example, is online poker a separate product market from online bingo? Parties notifying a merger to a competition authority would be expected to advance (and justify by reference to supporting evidence) market definitions on these issues.

The issue of geographic market definition would also need to be considered, even if online operations were considered as a separate market(s). In this context, regulatory issues will be an important factor when deciding what the relevant geographic market may be in any particular case. Having decided the issues of product and geographic market, a competition authority would then review a merger to assess whether it might lead to consumer detriment. For example, in the form of higher prices, or lower levels of service quality, choice or innovation.

Documentation

Merging parties and their advisers need to be careful when preparing background documentation, for example, business plans or Board papers, that considers the potential impact of a proposed transaction on the market. It is not unknown for the individuals involved to produce documentation that exaggerates the potential impact of the transaction on customers and competitors. If those statements come to the attention of a competition authority reviewing a merger (and several authorities require the parties to provide copies of such background papers) then that may complicate, or potentially even undermine, the securing of merger clearance from that authority.

A company contemplating a merger should ensure that the staff involved in the process understands clearly the need to minimise the quantity of written documentation produced and to be careful in the tone and content of such documents as are produced. This need for caution extends to documents prepared for the merging parties by non-lawyers (e.g. accountants or corporate finance advisers) because they are unlikely to benefit from legal privilege. Such documents might be intended to assess the potential impact or benefits of a transaction, or may be an overview of the relevant market before and after the transaction.

Particular care should be taken about describing the possible impact of the proposed transaction on the merging parties' pricing or margins, or about the general impact of the proposed transaction on customers and competitors.

Information exchange

As mentioned above, EU merger control and many national merger control laws prevent the merging

businesses from completing a proposed transaction before merger clearance has been granted by the competition authority that has jurisdiction to review that transaction. In practice, this means that the merging parties should act independently in the market and should not discuss or disclose to each other their commercially sensitive information.

This can give rise to difficulties at two stages: first, when the parties are in negotiations with a view to trying to agree the terms of a transaction; and secondly, in the period between signing an agreement and completion occurring.

In any negotiations before signing an agreement, an acquirer may wish to inspect details of the target's commercially sensitive data, for example, relating to their operating costs, margins, customer details, and future commercial intentions. Where an arrangement is closer in form to a true merger of equals, both sides may wish to exchange such commercially sensitive data with each other.

Before parties engage in such exchanges, they should consider whether providing the data would be likely to reduce the intensity of marketplace competition, or inhibit the parties' ability and incentives to compete with each other (as intensively as they were doing beforehand) in the future if the transaction should fail to proceed. To try and avoid offending this basic principle, some simple steps can help, such as:

- disclosing information where possible in an averaged format, or at a low (i.e. non-granular) level of detail, or disclosing only historical data;
- disclosing information progressively in stages, with more commercially sensitive data only being disclosed as discussions progress and a transaction becomes more likely to be agreed between the parties;
- disclosing data only on a need-to-know basis to a limited number of individuals within the organisation, subject to the terms of confidentiality agreements, and avoiding disclosure to individuals who may use the data in the ordinary course of business; and
- for data that could be regarded as especially confidential or commercially sensitive, the parties may provide data to an independent expert third party such as an accountancy firm, subject to a confidentiality obligation, for review and analysis.

Ultimately, identifying merger control issues and obtaining the necessary clearances is one of many issues that will need to be considered on any transaction, and the potentially tough sanctions for failing to follow the proper formalities emphasise the importance of the issue.

There is a trade-off for the merging parties between undertaking the merger control appraisal process too early in a situation where the deal may not proceed and costs are needlessly incurred and management time wasted, and leaving the appraisal process until such a late stage that the overall progress of the transaction is needlessly delayed or complicated. A properly coordinated merger control strategy can avoid those potential downsides.

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