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## New Data Protection Directive – is money “Sensitive Data”?

The European Commission has announced the start of its consultation on the new Data Protection Directive (DP Directive). The changes to the current DP Directive are mostly triggered by new technologies and the increasing use of personal information on the internet, as well as increasing outsourcing and globalisation. It is well known that the basic principles underlying the current DP Directive are deeply rooted in the German trauma from the Second World War, with modern Germany keen to protect certain personal information as being highly sensitive and worthy of additional protection, such as race, religion and health. The UK on the other hand, does not always share the same emphasis placed by Germany on data protection and regards other information as being equally sensitive, such as financial information. It is therefore no surprise that the UK Information Commissioner’s response to the consultation has taken a new approach to data protection, including:

- questioning the rigid distinction between sensitive and non-sensitive data to a more flexible concept depending on the circumstances;
- introducing new acceptable forms of identification on the internet and questioning the value of “personal data” disclosed through IP addresses;
- arguing that the existing distinction between data controller and data processor is incompatible with evolving technologies and with the increase in outsourcing activities on a global level, which may not only result in equal liabilities for all parties concerned, but shift the current emphasis on country of data destination.

This new UK approach to data protection, if accepted, may indeed shift the emphasis to financial and monetary transactions. This does not mean however, that the standards will be lowered or that the current protections will be removed. In fact, the UK proposal appears to include further restrictions to “fit with modern technologies” while at the same time trying to stay flexible enough to cater for technological developments in the future.

## Justice the Kentucky way

PartyGaming has issued a motion to dismiss the Commonwealth of Kentucky’s lawsuit for monies allegedly lost on PartyGaming’s site between 2005 and 2006, when PartyGaming pulled out of the US market upon passage of the introduction of the Unlawful Internet Gambling Enforcement Act (UIGEA). PartyGaming was added to the lawsuit targeting Poker Kings together with casino supplier Microgaming, based in the Isle of Man. Bizarrely, Kentucky decided to make this move notwithstanding the settlement which had been reached by PartyGaming with the US Department of Justice in 2009.

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## Europe

### Norway

Norway has agreed that the Australian online betting operator Centrebet can be prosecuted in Norway for failing to safeguard a Norwegian resident with physical and mental disabilities from losing €3m. It is claimed that Centrebet failed to intervene despite the claimant's very high levels of betting and encouraged him to continue betting.



Despite Norwegian legislation preventing the "organisation, marketing and mediation" of unauthorised online gambling, Centrebet offered a Norwegian home page, a local telephone number, held a Norwegian bank account and allowed players to make deposits in the Norwegian currency. The outcome of the litigation will set interesting precedents, both in terms of the extent to which gambling operators are responsible for player protection and the extent to which foreign operators targeting local residents can be held liable in the jurisdiction.

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### Denmark

The Danish government has responded to allegations from the slot machine industry, which had made a complaint to the European Commission about the new legislation concerning the different tax rates for land based and online gambling companies. The industry argued that the lower tax rates for online operators placed them at a commercial advantage and amounted to unlawful state aid. The Danish government's response is that the two types of operator are not in direct competition as they work in different markets. The European Commission's decision will be eagerly anticipated by other jurisdictions which also have differing tax rates for online and land based gambling, such as the UK, France and Italy. We understand that Denmark is still hoping to begin issuing licences in January 2011, although this may be optimistic..

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### France

The French National Assembly agreed a temporary amendment which would lower the tax on pari-mutuel horserace betting in France from 5.7% to 4.6%. One would have thought that this move would be welcomed by the industry; however, there are some who speculate that this amounts to an illegal form of state aid due to its clear benefit to the French betting monopoly, Pari-Mutuel Urbain (PMU) with continuing uncertainty whether the tax break only applies to land based horse racing in France. Although French authorities insist that the reduced tax rate would benefit the entire industry, there is little doubt that the European Commission will take an increased interest in these developments.

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## European Parliament - New Advertising Rules

The European parliament recently proposed tough behavioural advertising rules for the internet. Adverts based on web user's activity should carry a sign saying "behavioural advertisement" and display a window explaining what information has been used to select that advertisement. According to the proposal, search engines would not be allowed to sell brand names as advertising keywords based on user's email messages. The report proposes:

- inserting the words 'behavioural advertisement' into the relevant online advertisements, along with a window containing a basic explanation of this practice;
- prohibiting indiscriminate sending of text message advertisements to all mobile phone users without their prior consent;
- prohibiting the content of private e-mails being read by a third party for advertising purposes;
- requiring advertisements sent by e-mail to contain an automatic link enabling the recipient to refuse all further advertising to ensure that users can distinguish advertising tracking cookies, for which free and explicit prior consent is required, from other cookies.

## UK

### Gambling Commission issues clarification over 'Skill Stop Roulette'

In the wake of recent clarification over the boundary between skill machines and gaming machines and a warning issued in September, the Gambling Commission has issued a statement regarding the classification of the game 'Skill Stop Roulette'. Quest Gaming Ltd, the unlicensed supplier of the machine, had placed adverts in industry publications which the Commission say "misrepresented its position".

An advertisement in the *Morning Advertiser* stated "As both the Gambling Commission and HMRC have stated repeatedly, ultimately only the Courts can decide such questions...Quest/Nexus has modified existing games and created new games to fully comply with the list of characteristics. Set out in the Current HMRC and GC guidelines." The advert goes on to state that Quest has received legal opinions from Carl Rohsler of Hammonds LLP and Kevin de Haan QC that Skill Stop Roulette is not

a game of chance. It would be interesting to know on what legal basis they formed that view.

The Commission suspects that the machines may be gaming machines under section 6(2)(a)(iii) of the Gambling Act 2005, which states that 'gaming' includes any game that is presented as involving an element of chance. This section covers games even if they do not, in fact, rely on a random number generator. The Commission takes the view that any machine which presents a casino or bingo style game is a gaming machine by virtue of this section.

The Commission has warned anyone making Skill Stop Roulette machines available for use without the appropriate licences or permissions that they may be liable for prosecution.



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### Gambling Commission consults on changes to money laundering guidance

The Gambling Commission intends to publish a revised edition of its guidance to casino operators on the prevention of money laundering. The revised guidance will incorporate amendments to the Proceeds of Crime Act, changes to the prescribed form for reporting suspicious activity and an agreed procedure for remote casinos under the Money Laundering Regulations. It will also include additional guidance on the list of persons subject to financial restrictions, which has been requested by HM Treasury. It is proposed that the revised guidance will come into effect in February 2011, and any comments on the proposed changes should be made by 12 January 2011.

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### Haringey Council scrutinises "clustering" of betting shops

North London's Haringey Council is investigating the effects of the clustering of betting shops in more deprived areas of the borough, whether this has had an adverse affect on the local communities and, if so, what solutions can be found.

Ladbrokes, William Hill (who together operate 47 of the 66 betting shops in Haringey), GamCare, the Gambling Commission, local residents' associations and the local police made representations at a meeting in the borough on 10 November. In its written submission prior the meeting, William Hill maintained that there is no evidence that betting shops have a detrimental effect on the local community and regrets that the issue has become 'highly politicised'.

Following the meeting, a report is expected which will consider options including lobbying the Government to make betting shops 'sui generis' so that planning permission would always be required before a betting premises licence application may be made.

The Gambling Act 2005 states that licensing authorities must 'aim to permit' the use of premises for gambling, but the authority does have a discretion where the use of premises would not be in accordance with the licensing objectives, the Commission's Guidance, the DCMS Code of Practice or the authority's own licensing statement. The contents of the licensing authority's own statement are to a large extent prescribed, however, and the licensing authority may not have regard to the expected demand for the facilities.

**Harris Hagan** is the only City law firm dedicated exclusively to the provision of legal services to all sectors of the gambling and leisure industry in the UK and internationally.

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We have advised many of the world's largest gambling and leisure operators. We also advise UK companies in all areas of land-based and online gambling. Our clients include governmental organisations, casinos, hotels, bars, restaurants, event venues, bookmakers, online gambling operators, start up ventures and manufacturers of gambling equipment.

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## Intellectual Property

### Digital Economy Act under review

The Digital Economy Act will undergo a judicial review and a Parliamentary Inquiry to see if it is in conflict with EU laws on privacy and ISPs' liabilities for users' behaviour. The review was demanded by BT and TalkTalk, who said that they wanted clarity and certainty on the law before spending the massive sums required to amend their technologies and systems to make them compliant with the Act.

The Digital Economy Act (DEA) allows for the passing of regulations which could, for the first time, force ISPs to disconnect users if rights holders believe that the account was used for copyright violating activity. The obligations imposed by the Act may not be compatible with European rules that are designed to ensure that national laws are proportionate, protect users' privacy and restrict the role of ISPs. ISPs generally are not responsible for the actions of their users unless they are informed about them and fail to take action quickly to stop illegal activity. However, the DEA would involve ISPs more closely with copyright protection and infringement, making them partly responsible.

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### New IP law review

The Government will review the UK's intellectual property laws to examine the costs of IP licences and of rights enforcement and the interaction between IP and competition law. The review will look into whether the UK should allow more use of copyrighted material without copyright holders' permission, a move which will trigger copyright based businesses onto the barricades. The review is necessitated by the increasing use of copyright protected materials online and may result in further changes affecting not only the UK but also European IP law. The review will examine what barriers IP law places in internet-based businesses; as well as costs involved in IP enforcement and the interaction between IP and competition law on the internet.

