



## Sport Update

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### Taxing online betting: what are the odds?

Sports betting and gaming has long been an area which governments have found difficult to legislate. The internet age has compounded those difficulties. Online betting offers endless wagers on who will score the first goal, by what distance a particular horse will win a race, not to mention novelty bets such as who will be the next CEO of Ryanair after Michael O'Leary (Bertie Ahern is 100/1) and how many stupid things can people bet on.

There is no legislative framework for licensing and controlling online betting in Ireland. The fact that the main legislation in this area is the Betting Act 1931 and the Gaming and Lotteries Act 1956 speaks for itself. A 2007 report by the Swiss Institute of Comparative Law for the European Commission highlighted a number of archaic legal justifications in Member States that attempt to rationalise a prohibition on gambling. In relation to Ireland it noted that gambling was prohibited to "*prevent the evil of tempting poor people to part with their limited resources in the remote expectation of gaining substantial rewards*"!

The European Court of Justice (ECJ) recently ruled that Member States can ban online gambling to protect consumers and to prevent fraud. Many Member States, including Italy, Germany and the Netherlands and until recently, France, offer only betting and gaming run by State-owned companies. The European Commission claimed that these countries were illegally discriminating against foreign companies by refusing to allow them offering the same services as State run companies. The ECJ said that bans were justified if they met the objectives of "*consumer protection and the prevention of fraud and the enticement to squander money on gambling, as well as the need to preserve public order*". France has recently opened its betting market to licensed commercial operators, but the ECJ's decision means that other Member States may be entitled to continue to operate State-owned monopolies.

In an Irish context, on 14<sup>th</sup> May 2010, An Taoiseach Brian Cowen announced the Government's intention to tax online betting and introduce legislation that will require overseas betting providers selling products into Ireland to be licensed. Cowen has reportedly said all forms of betting "*including betting offered over the internet, other remote platforms or over the telephone*" should make a contribution to the Exchequer. Taxes raised will be used to support Ireland's horse and greyhound racing industries. It is understood that the draft legislation is currently with the Department of Justice, Equality and Law Reform, but it remains to be seen exactly how the Government intends to legislate the notoriously difficult areas of online betting and gambling.

### Lunging

An Australian case has sent a warning to gyms and sports clubs about their supervision of new participants. Ms Irwin joined a new gym and was required to complete a questionnaire which included questions about previous injuries (the type of questionnaire you don't really read and simply tick no to all the questions). Ms Irwin was more than forthcoming and revealed that she had dislocated her knee five years earlier. When questioned about the injury by an employee of the gym she satisfied him that the injury would not cause a problem during exercise. The programme undertaken by Ms Irwin involved lunging. This is a simple exercise involving putting one leg in front of the other and leaning forward to put the weight on the front leg. Upon her first lunge, she dislocated her knee and collapsed to the floor. The Aussie court found that a lunge is a dangerous exercise for anyone with a pre-existing knee injury and that the gym had breached its duty of care by failing to take adequate steps to ensure that it fully understood the nature of her injury. It should have sought further information when the injury was disclosed.



## Watch out FIFA's about

FIFA intends to treat unauthorised World Cup fantasy football games as ambush marketing. Various newspapers and media groups are running on-line fantasy football competitions during this month's World Cup in South Africa. The rights to fantasy football games involving the FIFA World Cup are owned by EA Sports and FIFA intends to deal with each ambush marketing fantasy football game on a case-by-case basis. Companies attempting to create an unauthorised association with a major sporting event or sporting team is nothing new and the World Cup has seen a proliferation of this type of ambush marketing. Nestle recently pulled a Kit-Kat ad campaign involving the slogan "cross your fingers for 23 English men and 1 Italian". While Nestle claimed not to have infringed any third party rights, the Kit-Kat campaign was withdrawn after an intervention by Mars which is an official sponsor of the England team.

Interestingly, the fantasy football game run by BSkyB is entitled "Sky Sports Fantasy Football South Africa" and explicitly avoids any reference to the World Cup and contains a disclaimer indicating that the competition is not run in association with the FIFA World Cup. This is a very clear example of BSkyB attempting to avoid any accusation of passing off.

Meanwhile, football 'pundit' Robbie Earle has been sacked by ITV after his part in an ambush marketing ploy by Dutch brewer, Bavaria. Thirty-six tickets owned by Earle fell into the hands of the Dutch brewer who gave the tickets to thirty-six women wearing identical orange dresses to promote (you have guessed it) Bavaria. Indicating just how seriously FIFA takes ambush marketing, the women were removed from the ground and a FIFA spokesman went so far as to confirm that there were no arrests! Stop the press - two of the women have been arrested and face criminal charges.

Everyone wants to be part of the action. SureMen is a deodorant owned by Unilever. It has advertised a sweepstake competition which it describes as "the ultimate sweepstake for the ultimate tournament". Cleverly, the ad does not mention the World Cup by name or use any FIFA registered trade marks or team crests. Similarly, Walker Crisps announced the launch of a 'Walkers Flavour Cup' which saw the launch of 15 limited edition international flavours, including Brazilian salsa, English roast beef and Yorkshire pudding and Irish stew. Consumers were invited to vote their favourite flavour on-line with the favourite being announced on the day after the World Cup Final. If FIFA can produce compelling evidence that people were confused in believing that SureMen or Walkers is an official World Cup sponsor, there might be scope for a passing off claim. However, ambush marketing is by its very nature ambiguous and there is a fine line between a successful action for passing off and clever advertising.

## Help the Aged

An English employment tribunal has decided that a retirement age of forty-eight for linesmen (we mean assistant referees) was direct age discrimination. Four assistant referees employed by Professional Game Match Officials Limited (PGMOL) challenged PGMOL's retirement policy. Only if an assistant referee applied to be retained after the age of forty-eight would PGMOL consider allowing the assistant to continue running the line. The tribunal found that a retirement age of forty-eight was direct discrimination and that PGMOL was unable to show that its retirement policy was a proportionate means of achieving its aim of ensuring assistant referees were up to the job. Please insert your own joke about ageism being given the red card or referees' chiefs being caught offside.

## Say no to supplements

The Court of Arbitration for Sports (CAS) has dismissed the appeal by the World Anti-Doping Agency (WADA) against the decision of the American Arbitration Association (AAA) to suspend US swimmer Jessica Hardy for one year. In July 2008 Ms Hardy tested positive for clenbuterol and was subsequently banned by the AAA for one year. WADA sought to have the sanction increased to two years. Anti-doping rules allow for the reduction in a suspension to one-half of the suspension which would otherwise be imposed where an athlete can show "no significant fault or negligence". Ms Hardy admitted to taking food supplements which resulted in the positive test, but claimed to have made significant efforts to investigate the nature of the supplements before taking them. The CAS panel found that she had done all the research and investigation which could reasonably be expected from an informed athlete wishing to avoid risks connected to the use of food supplements. The supplements were not labeled in a manner which would have raised suspicions. Ms Hardy even contacted the manufacturer about the purity of the supplements.

The danger of food supplements, particularly for young athletes, was highlighted recently by Professor Brendan Buckley, the Chair of the Anti-Doping Committee of the Irish Sports Council (ISC), at the launch of the ISC's Anti-Doping Programme Annual Report. The lesson from the Hardy case is that even where an athlete makes every effort to investigate a supplement, a positive test is still likely to lead to a suspension.



## Joueur Espoir

On 16 March 2010 the European Court of Justice (ECJ) ruled that football clubs can seek compensation for training young players, as long as that compensation is directly related to the club's cost in training that player. The Professional Football Charter of the Fédération Française de Football contains rules relating to the employment of football players in France. Under the Charter, 'joueurs espoir', are football players aged between 16 and 22 employed as trainees under a fixed term contract by a professional club. At the end of his training, the Charter obliges a 'joueur espoir' to sign his first professional contract with the club that trained him, if the club requires him to do so.

In 1997, Olivier Bernard signed a 'joueur espoir' contract with Olympique Lyonnais (OL) for three seasons. Before that contract was due to expire, OL offered him a professional contract for one year. He refused to sign it and signed a professional contract with Newcastle United FC. OL sued Mr Bernard and Newcastle United for €53,357.16, which was equivalent to the salary which Bernard would have received if he had signed the OL contract. The ECJ was asked whether the principle of freedom of movement for workers under EU law permitted the training club to prevent or discourage their 'joueurs espoir' from signing a professional contract with a football club in another member state under pain of being sued for damages.

The ECJ acknowledged that a 'joueur espoir' contract is likely to discourage that player from exercising his right of free movement and therefore is a restriction on the freedom of movement of workers. However, as the ECJ had previously held, in view of the considerable social importance of sporting activities, the objective of encouraging the recruitment and training of young players must be accepted as legitimate. It is important however that the scheme is suitable to ensure the attainment of that objective and it does not go beyond what is necessary to attain it. The ECJ noted that the damages in question were not calculated in relation to the training costs incurred by the club, but in relation to the total loss suffered by the club. Accordingly, the ECJ held that the French scheme went beyond what is necessary to encourage recruitment and training of young players and to fund those activities.

## FECC Pepsi

In a recent decision in the world of sponsorship, Pepsi successfully sued in Quebec Superior Court for termination of its sponsorship and supply contract with the Forum Entertainment Centre Company (FECC), which operates the Montreal Forum sports and entertainment facility. Pepsi had entered a 15 year agreement with the FECC which provided that Pepsi would be the sponsor and soft drinks supplier for the Forum in return for a fee and a commission on the sale of Pepsi products at the Forum. Under the agreement, the FECC was obliged to "*operate and maintain*" the Forum as a "*first-class entertainment facility*". When the FECC sued Pepsi for unpaid sponsorship fees and sales commissions, Pepsi counterclaimed for termination of the contract and a substantial reduction in the sponsorship fees for preceding years, claiming that the FECC had not fulfilled its obligation to transform the Forum into a "*first-class entertainment facility*".

The court found that whether or not the Forum could be deemed "*first-class*" is based, at least partly, on the calibre of the lessees in the facility, the nature of the businesses connected to the facility and the physical condition of the facility. In concluding that the Forum was not "*first class*", the court reviewed the statements of the developers in pre-contractual promotional materials, press releases, press conferences and negotiations with Pepsi, expert testimony and marketing surveys.

The court also found that the obligation to operate a "*first-class entertainment facility*" was an obligation of result, meaning that the FECC could only avoid liability for non-performance by establishing an external cause such as force majeure or the fault of Pepsi. A lack of fault was not a defence for the FECC. Having found that the obligation to operate a "*first-class entertainment facility*" was the essence of the sponsorship and supply agreement, the court granted Pepsi's request for termination and reduction in its sponsorship fees for the years preceding termination.

This case highlights the caution that must be exercised by stadium and venue developers and operators when they are seeking business partners, suppliers and sponsors. It is natural to provide a 'hard-sell', but caution must be taken to ensure that all contractual obligations are realistic, measurable and achievable. It is advisable to set measurable performance standards and the method of measurement of those standards, as well as possible means of dealing with the matter if the performance of one party falls short.



## All Hail the Dear Leader and the Great Leader

North Korea will play in this month's World Cup in South Africa in Legea gear after signing a €4 million deal with the Italian kit supplier. This is despite the general secretary of the North Korean football association saying last month that it was difficult to find a kit supplier as there is no market for sports apparel in North Korea. One UK academic compared the deal to sponsoring Tiger Woods. We're not sure Tiger's antics are really comparable to a totalitarian regime which is the real life equivalent of George Orwell's 1984, but hey some people will do anything to get themselves in the spotlight.

North Korea has a fine (albeit fabricated) sporting history. The 'Dear Leader', Kim-Jong-il (not to be confused with his father, Kim-II-sung, the 'Great Leader', who is still the country's leader despite being dead for over fifteen years) is a fine golfer. In his first round he managed to shot thirty-eight under par, including five holes in one. He also scored North Korea's late consolation goal against Brazil on Tuesday night!

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