TopIcTalk: App ecosystems and the limits of enforcement

Tiago Bessa, Managing Associate at Vieira de Almeida, Law Firm, speaks about the particular environment of application sales for mobiles and why virtual borders will always remain a challenge when it comes to blockings and enforcement.

APAJO: *Tiago, although the Portuguese online gambling market is developing perfectly well for the fourth year now, keeping non-licensed operators out of the market remains one of the biggest challenges, as we had the occasion to experience this summer with the broad campaigning of an illegal operator based in Curacao?*

Tiago Bessa: Well, non-licensed operators pose not only a problem in regard to tax evasion. They are also not obliged to implement the same protection and self-restriction mechanisms the Portuguese regulator foresees in regard to the platforms, their products and their operators. In addition, since non-licensed operators act outside the offer controlled by Portuguese authorities, there is no guarantee that successful bets are paid out, and in case of disputes, no Portuguese court is in charge, hence, it is difficult for customers to obtain justice in case of doubt. Last but not least, due to the lack of tax payments to the Portuguese state, they are able to offer much better odds to customers.

From the onset, app developers must be very careful not to cross the thin line between a simple fun game and a gambling app. This is so because many app developers are launching mobile games based on sweepstakes which allow for players to win certain prizes.

APAJO: *For the offline environment, such deviations can be still easily identified, relatively easily suppressed and local providers fined, but what about pure online activities? I think of search machines, social media or applications for mobiles.*

Tiago Bessa: The online environment presents indeed specific challenges to authorities and relevant stakeholders interested in tackling illegal operations and advertising. This is not new, and it is experienced in other sectors too. The classical example is the regulator orders the blocking of a certain domain which hosts an illegal operation. However, an illegal operator can easily reopen at a different domain. And a direct order to cease operations or to stop an activity targeting Portuguese consumers might not be as efficient as wanted or may be difficult to execute or to pursue.

Tiago Bessa

App developers disguise illegal gambling mobile apps as non-gambling apps. They do it by submitting descriptions and categorization which are inconsistent with the apps' content. In fact, last year, it was reported that both Apple (through App Store) and Google (through Play Store) acted on this matter, erasing several hundreds of illegal online gambling apps from their stores.

In addition, search engines provide a not-to-underestimate boost for illegal operators since many of them resort to SEO (Search Engines Optimization) methods. These methods allow for search engines algorithms to extract useful information from a webpage (such as the illegal operators' webpage) with accuracy and in a timely manner. This is not an illegal mechanism per se, but when used by illegal operators, it works as a way for them to overcome the fact they cannot obtain good rankings within search results pages. Social

media are another useful tool for illegal operators, not only for advertising but also for broadcasting their activities throughout the community.

Finally, the app ecosystem is a particularly interesting but hazardous field. From the onset, app developers must be very careful not to cross the thin line between a simple fun game and a gambling app. Many app developers are launching mobile games based on sweepstakes which allow for players to win certain prizes.

> Information society services are a major contender for the States' traditional sovereignty, since they cannot enforce their decisions without the technical cooperation of the app stores managers. Contrary to IP or website blocking, it seems more difficult to block or prevent access to an app. Bearing in mind that most online activities are conducted via an app ecosystem living in our smartphones, it is clear that there is a problem that must be addressed.

Also, a trend was identified which consists of app developers disguising illegal gambling mobile apps as non-gambling apps. They do it by submitting descriptions and categorizations which are inconsistent with the apps' content. In fact, last year, it was reported that both Apple (through App Store) and Google (through Play Store) acted on this matter, erasing hundreds of illegal online gambling apps from their stores.

Lastly, app stores tend to act as a self-regulated market (with some of the most powerful companies in the world acting as gatekeepers) and it is very difficult to ascertain jurisdiction over app stores as well as over the applications being made available and the services provided.

> Since apps are not subject to the same regulatory burden as other products are, it is quite easy for a developer to make his or her app available to consumers almost instantly. It is left to app stores managers to decide which apps are admitted and which are restricted.

APAJO: *Let's stay with apps. Why is this a particular issue? Why is it so difficult for a regulator to force app stores to block those operators and brands that are illegal in a certain jurisdiction?*

Tiago Bessa: Due to the immaterial and digital context, it is not easy for authorities or regulators to force app stores to block those illegal operators and brands. But firstly, it is important to mention that the risk starts with the app stores' business model. Since apps are not subject to the same regulatory burden as other products are, it is quite easy for a developer to make his or her app available to consumers almost instantly. It is left to app stores managers to decide which apps are admitted and which are restricted. Therefore, the regulator has no direct control over which mobile apps are made available for consumers.

In addition, there is the technical side. As we have already mentioned, these information society services are a major contender for the States' traditional sovereignty, since they cannot enforce their decisions (whether at administrative or judicial level) without the technical cooperation of the app stores managers. Contrary to IP or website blocking, it seems more difficult to block or prevent access to an app. Bearing in mind that nowadays most online activities are conducted via an app ecosystem living in our smartphones, it is clear that there is a problem that must be addressed.

> In Portugal, in regard to copyright protection, a Memorandum of Understanding was signed between the Cultural Activities General Inspection and telecom operators (through their representative association), which allows for a swift and effective blocking of illegal sites or IPs (even dynamic IPs), which breach copyright, almost as soon as they are identified.

APAJO: *So, what would be your approach if you had to ease the current legal situation so to make enforcement more effective?*

> In the last years, it became clear that there is a growing pressure from the EU legislators to define more rules for the online environment, for online platforms and for digital services.

Tiago Bessa: That is the million-dollar question! There is no easy shortcut or single answer to it. I believe that one path, which has demonstrated promising results in the past, is cooperation between different stakeholders. For example, in Portugal, in regard to the copyright protection, a Memorandum of Understanding was signed between the Cultural Activities General Inspection and telecom operators (through their representative association) which allows for a swift and effective blocking of illegal sites or IPs (even dynamic IPs) which breach copyright almost as soon as they are identified. A similar mechanism between the Portuguese regulator and the app stores managers might be devised so as to protect not only consumers but also lawful operators, as well as the public interest. International cooperation might be also needed in order to better tackle enforcement and execution of administrative and/or judicial measures.

A final step might be the definition of a specific legal landscape for app stores or for applications, but this might be difficult to achieve or might be detrimental to innovation and investment. The right balance is hard to achieve, but in the last years it became clear that there is a growing pressure from the EU legislators to define more rules for the online environment, for online platforms and for digital services.

> A few years ago, we could see advertising on our TVs only, then on websites, and now, we are exposed to advertising and e-commerce (through in-app purchases) even when we are using our apps, which makes sense, since we spend increasingly more hours within the app ecosystem.

APAJO: *When you look at the future and at which rapid pace technology and e-commerce is developing, where do we need to prepare today the legal ground for challenges?*

Tiago Bessa: E-commerce in general and online gambling in particular are fields which will be subject to an enormous degree of disruption and innovation caused by the development and implementation of state-of-the-art technologies. I believe that the widespread implementation of 5G networks, along with the use of predictive tools through AI and Machine Learning, and boosted by big databases, will be the front line leading this disruption. These technologies will drive the implementation of mechanisms such as individual pricing which we had the chance to talk about during our previous interview. Also, the use of augmented or virtual reality tools will completely change the user interface and user experience (UI/UX). A player might be gambling in a casino in Monte Carlo or in Las Vegas without ever leaving his or her own living room!

However, many legal challenges will also arise from the implementation of these technologies, particularly regarding online gambling. In this context, it is relevant to mention the recent [Consultation on new guidance on ads for "loot boxes" and other in-game purchases](), launched by the British Committee of Advertising Practices (CAP). I would highlight three aspects of this document: Firstly, it reflects a trend which I believe is here to stay: soft regulation. Indeed, through formal guidance instead of new strict rules' implementation, regulators can shed a light on the technology path without increasing too much the regulatory burden and thus avoiding hampering innovation. Secondly, this new guidance shows a new advertising reality which is increasingly becoming a multiplatform reality. A few years ago, we could only see virtual advertising on our TVs, then, websites came along, and now, we are exposed to advertising and e-commerce (through in-app purchases) even when we are using our apps. This makes sense since we spend increasingly more hours within the app ecosystem.

> Online gambling operators might leverage their business by inserting advertising or purchases in their apps if they find it interesting to be associated with certain brands, or to gamify even further their user experience. For example, they may sell premium features for their players.

Finally, in-app advertising and purchases might also be an interesting opportunity. Since a major part of people no longer wants to pay for news and media contents, in-app advertising or purchases might help media companies finding a new source of revenue. I might not want to subscribe a digital newspaper, but I might want to buy access to certain news or interviews. In-app purchases will allow me to do such cherry-picking.

Within this context, online gambling operators may leverage their business by inserting advertising or purchases in their apps, if they find it interesting to be associated with certain brands, or to gamify even further their user experience. For example, online gambling operators may sell premium features for their players. However, this opportunity comes with risks attached. It is important to take a closer look at guidelines and orientations such as the ones from CAP which cover important topics like pricing, currency, presentation and purchasing, orientations about how in-game purchases should be marketed in order to prevent consumer harm. Nevertheless, it is again key to make sure these guidelines allow for innovation within sustainable and compliant limits and do not restrict disproportionally development.

APAJO: *Many thanks for sharing your thoughts on these sensible topics.*

Tiago Bessa: Thank you for having me.