

Update on France and the opening of the gaming market

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1. A “change of heart”

2007 and the first semester of 2008 have been marked by a “change of attitude” towards online gambling on the part of both the executive and the judiciary. This can be largely explained by the sending of a reasoned opinion by the European Commission to France last June, which put pressure on the one hand on the government to modify its gaming legislation to make it consistent with European law, and on the other hand on courts.

2. National courts have endorsed ECJ teachings

In a landmark ruling of the French Supreme Court in July 2007 in the Zeturf case, the court dismissed the court of appeal’s verdict and referred the case back to another court of appeal: the French Supreme Court endorsed the ECJ teachings of the Gambelli and Placanica cases, deciding that where French gaming laws restrict free movement of services, lower courts must verify whether these restrictions comply with the requirements set by article 49 of the Rome Treaty. The Supreme Court also required from lower courts that they check whether the general interest invoked is guaranteed in the Member State where private operators are established.

Moreover, recently the highest administrative court, the “Conseil d’Etat”, as requested by the Maltese operator Zeturf, decided to suspend its decisions until the ECJ rules on two preliminary questions regarding the consistency of horse betting monopoly (the “PMU”) with the EC treaty and how the infringement to the free provision of services should be considered: from the sole perspective of the provision of

online betting services or more widely from the perspective of the whole gambling sector.

Eventually, in January 2008, the “instruction chamber” of the Court of Appeal of Versailles requested additional information from the judge in charge of the investigation against Unibet’s Didier Dewyn. The judge is to assess whether the French gambling legislation is compatible with community law and the criteria established by the European Court of Justice case law.

As French courts have become more “EU friendly”, it seems that the battle against the online gaming industry could now be fought on other legal grounds, namely commercial law: on 30 May, the Paris District Court decided to block betting on the French tennis open (Roland Garros) stemming from operators Unibet and Expekt. The judges found that the betting operators were guilty of commercial free-riding by unduly taking profit of the investment made by the French Tennis Federation (the “FFT”).

Using this decision, the Professional League Association stated that it already sells broadcasting rights to media operators and that it should therefore be entitled to determine the conditions under which betting operators are allowed to offer bets on their activities. It has asked the government to “clarify the rules” in this respect.

3. The opening of the market is on the way

Most importantly, in November 2007 the French government appointed a mission in charge of preparing a report on the regulated opening of the French online gaming market (the “*Durieux mission*”), thereby marking the first step towards a possible regulatory change in France.

The mission handed out its report to the government at the end of March. It favors a slow and progressive opening of the gaming market, roughly under the following conditions:

- 1) The opening to sports betting and to other games of chance such as poker, but not to lotteries and slot machines
- 2) The authorization of pool betting only
- 3) A national licensing system to operate on the French market with an establishment requirement in France
- 4) An equal level of taxation for online and offline games

It should be stated that this report does not constitute the official position of the government which is divided as to how the opening should take place. Whereas the president Nicolas Sarkozy, who is close to the casino industry, is in favor of quickening the pace of things, the ministry of budget Eric Woerth is more reserved.

Proposals have been made to the government to opt for a "conditional recognition" system, whereby licenced EU operators would only be subject to a formal fit and proper test.

Discussions are still under way between France and the European Commission which is unlikely to accept a double licensing system and the establishment obligation as this would contradict the mutual recognition principle.

The European Commission is now waiting for France to submit the details of its legislation before giving its go ahead. The ministry of budget is to present the big lines of its reform project at the council of ministers meeting in Paris next Wednesday.

The opening raises currently many unsolved questions: the rate of taxation; the exclusion of fixed odd betting; the exclusion of the mutual recognition principle are all points which will have to be dealt with. The exclusion of slot machines from the scope of the opening is also raising discontent amongst the

French casino industry as slots account for the main share of its turnover.