Online Gambling in Belgium – Recent Developments

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General Introduction

On 3 December 2009 the Belgian Parliament adopted the new Belgian Gaming Act, entered into force on 1 January 2011 even though its implementing provisions (Royal Decrees of execution) had not been adopted given that the Belgian government was outgoing.

Further to the new Gaming Act, online gambling licenses may only be issued to land-based operators already operating in Belgium under an A, B or F1 license (the so-called "offline requirement"). They are therefore referred to by the legislator as "supplementary licenses". Additionally, online gambling servers are required to be located in Belgium.

It is unsure whether the Gaming Act, as currently drafted, would pass EU scrutiny, although the Belgian Constitutional Court rendered a verdict on 14 July 2011 in which it dismissed claims of violation of the constitutional principles of equality and non-discrimination and refused to raise a preliminary issue at the CJEU.

Despite the fact that the political situation in Belgium remains unchanged, the implementing provisions of the Gaming Act, regarding (i) the form, application and examining terms for supplementary licenses and (ii) the qualitative conditions to be satisfied by a supplementary license applicant have finally been published at the Official Gazette on 15 July 2011. They shall enter into force as from 1 September 2011.

Therefore, it is the BGC's opinion that sanctions could be

pushed through as from the moment when operators have had the chance to legalise their online gambling activities. In this respect, the BGC plans to implement new sanctions in order to efficiently regulate online gambling operations in Belgium.

This article aims at providing a general outline of the new provisions soon to be applicable to the online gambling market in Belgium in order to allow a first risk assessment by gaming operators.

I. Overview of the provisions of the Royal Decrees

A. Royal Decree pertaining to the form, application and examining terms for supplementary license

According to Article 1 of the Royal Decree, licenses for online gambling can be submitted either by mailing the application form (a template of which is attached to the Decree) by registered letter to the regulator or by filling it out online on the BGC's website.

Pursuant to Article 2, a plan of the web site, containing (a) the web site's name, (b) its structure, (c) the place from where it is managed, (d) information for a permanent contact by the BGC and information regarding the web site's manager, shall be attached to the application.

Applications are processed within 6 months as from their submission and the BGC's decision is notified to the applicant by registered letter.

Article 5 imposes a copy of the granted license to be made available to players on the gambling web site for them to be able to verify whether the exploitation of the web site is legal.

B. Royal Decree pertaining to the qualitative conditions to be satisfied by a supplementary license applicant

Article 1 of the Royal Decree imposes the applicant to

guarantee the honesty of the game play and its legit functioning.

Pursuant to Article 2, the applicant must also see to it that the BGC has the possibility to contact a person in charge at any time and must ensure a permanent link regarding data between the web site and the BGC.

According to the preliminary comments of the legislation, Articles 1 and 2 are general requirements which can be read independently or in combination with other sections of the Royal Decree.

Article 3 of the Royal Decree imposes on the applicant to fulfil a condition of solvency of 40%, without however specifying how this condition can be met. Further to the preliminary comments, this condition does not need further detail because, "*so far it had been clear for each applicant*" (free translation). It appears from the comments that this requirement is linked to a distinct Royal Decree (of 22 December 2010) which sets the maximal number of gaming arcades and the criteria for their geographic dispersion and aims at ensuring the applicant's solvency in order for the players to be paid. This condition of solvency is stricter for online gambling than it is for land-based operations.

The applicant must also present a detailed plan to the BGC regarding security of payment operations towards the players containing at least (a) technical characteristics and (b) permanent security controls to be performed (Article 4).

Furthermore, the applicant shall pursue a policy to prevent socially vulnerable groups to access the web site (Article 5) and set up a complaint procedure ensuring the BGC's information of every complaint, permanently available to the players (Article 6). The applicant is to detail the measures taken to ensure permanent processing of these complaints (Article 7).

As to advertisement, the applicant shall describe which policy he intends to pursue being aware that it shall express a certain restraint (Article 8) and comply with the provisions of EC Directive 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (see preliminary comments). Moreover, the applicant must designate an advertising manager who can immediately put an end to any advertisement campaign upon simple request from the BGC (Article 9).

The preliminary comments note that Articles 5, 8 and 9 regarding policies for gambling by socially vulnerable groups and advertisement are to be combined with the provisions of Article 61 of the Gaming Act which foresee the future elaboration of an ethics Code. These policies are intended as precautionary measures according to the above mentioned preliminary comments.

Finally, further to Article 10, the applicant must produce a statement from the Federal Tax authority certifying that all certain, undisputed tax debts have been paid up at the time of application.

C. Comments

An important part of the new legislation actually concerns more the disclosure of information by gambling operators as to security measures or general policies in order to control online gambling activities rather than directly imposing concrete obligations to regulate such activities from the beginning.

From this perspective, it seems regulation would intervene a posteriori, in response to certain behaviours instead of directly providing operators with precise guidelines to follow which would limit their uncertainty.

This consideration goes together with the general wording used in the Royal Decrees that seems to indicate that the

legislation sets a framework without providing further specifications as to its exact outlines and concrete implications.

In its opinion n° 49.082/2 of 12 January 2010, the Belgian Council of State expressed its concerns regarding the lack of precision of the requirements imposed by the Royal Decree pertaining to the qualitative conditions to be satisfied by a supplementary license applicant.

In response, the legislator indicated in its report to the King, that the Decree foresees "*minimal but sufficient requirements*" and that "*given the limited experience in the field of legal online gambling markets, the requirements are provisionally limited to what is strictly necessary*" (free translation).

Also, the general wording can be partly explained by the fact that applications for online gambling licenses are limited to land-based licensees, well-known from the authorities and for which certain conditions, such as the provision of a proof of solvency, are automatically fulfilled. This could be interpreted from the preliminary comments of the Royal Decree pertaining to the qualitative conditions to be satisfied by a supplementary license applicant.

Nevertheless, this justification is not convincing for the general wording and the lack of specific conditions underlined by the Belgian Council of State raise many questions as to what is actually expected from online license applicants.

In a nutshell, it seems the Royal Decrees state what to do but do not mention how to do it, thereby failing to indicate to the operators the means to achieve compliance and keeping them in a situation of awkward uncertainty.

II. Implementation of new sanctions targeting unlawful online gambling operators

In order to give the BGC the means to block financial flows from illegal websites operating in Belgium discussions were initiated with Febelfin, a body representing 237 financial institutions in Belgium.

The regulator plans to have a legal framework for bank blocks ready as soon as online licenses are available, so around the month of September. As from that moment, the BGC would draw up a blacklist of gambling companies to pass onto banks for these to freeze all transfers of capital from and to these companies.

However, here again the exact outlines of such provisions are not set out yet and it remains unclear whether this sanction will be equivalent to bank blocks in France where the ARJEL needs first to summon the non-approved website to stop its activities before ordering a freezing of transfers of capital, through a ministerial order.

Provisions setting up bank blocks would complete the array of sanctions foreseen against illegal websites, such as the maximum five years of imprisonment and the 25.000 Belgian francs (approx. € 625) fine (to be doubled in case of repeated infringement) foreseen in the current legislation.

III. Potential conflicts with EU Law

It could nevertheless be argued that the conditions for obtaining a license in Belgium (requirement of a corresponding land-based license and server location in Belgium) are not compliant with sound EU law principles pertaining to freedom of establishment and provision of services to challenge the sanctions based upon the Belgian gaming legislation.

However, as already mentioned, the Belgian Constitutional Court rendered a verdict on 14 July 2011 in which it dismissed Telebet, Betfair and the Remote Gaming Association’s claims as to the violation, by the Belgian Gaming Act, of the constitutional principles of equality and non-discrimination

and EU law principles of freedom of establishment and the provision of services.

Indeed, the claimants argued that the conditions of holding an equivalent land based license and of server location in Belgium conflict with articles 10 and 11 of the Belgian Constitution and Articles 49 and 56 of the Treaty on the Functioning of the European Union.

After a proportionality check, the Court stated that the restrictions to the abovementioned principles were legitimate, necessary and legally justified.

The Constitutional Court also ruled out raising a preliminary question with the CJEU on the basis that the latter had formerly ruled on the possibility, for a Member State, to restrict the principles of freedom of establishment and service provision (see CJEU, 3 June 2010, Ladbrokes Betting & Gambling Ltd. and Ladbrokes intl Ltd. and CJEU, 8 September 2009, Liga Portuguesa de Futebol profissional and Bwin international and Carmen Media Group).

Despite this ruling, it seems however that the mentioned CJEU's case law is in fact case-to-case based and it could still be argued that the Gaming Act's provisions conflict with European competition law principles.

One should also keep in mind the European Commission's critics, further to the notification of the draft Gaming bill by the legislator on 27 March 2009, as to the requirements of an offline license and server location in Belgium to obtain a license. It therefore remains unsure whether the legislation would actually pass EU scrutiny should the matter be raised.

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