



BAGO

Belgian Association
of Gaming Operators

**Belgian Association of Gaming
Operators
Trade Association**
Louizalaan 143/4
B-1050 Brussel

European Commission
DG Internal Market, Industry,
Entrepreneurship and SMEs
DG GROW/E/3
Attn. M. Radek Maly, Head of Unit
N105 4/66
B-1049 Brussels

Brussels, 4 July 2022

BY E-MAIL: GROW-E3@ec.europa.eu
and grow-dir2015-1535-central@ec.europa.eu

Copy to:

Belgian Gaming Commission
Kantersteen 47
1000 Brussel
info@gamingcommission.be

and

via e-mail to the contact points listed at
<https://ec.europa.eu/growth/tools-databases/tris/en/contact/contact-points/>

Dear Mr Maly,

**Subject: Belgium – Draft Royal Decree laying down detailed rules for advertising of
games of chance (Notification 2022/332/B – H10)**

We write to you on behalf of the Belgian Association of Gaming Operators (BAGO), a not-for-profit association bringing together five prominent legal operators of games of chance, together representing roughly 70% of the private legal gaming and betting market in Belgium (i.e. excluding the public operator, the National Lottery).

On 8 May 2022, your services received from the Belgian authorities the above-mentioned notification pursuant to Article 5 of Directive (EU) 2015/1535 of a draft Royal Decree providing for a near-total ban on advertising for (legal) games of chance in Belgium. We wish to express our serious concerns regarding the very significant and detrimental impact the proposed regulation would have, not only on our industry but also on undertakings in the advertising and media sectors and on sports organisations, with further repercussions on employment and tax collection.

This draft regulation, which was not introduced to the entire Belgian Government as it is usually done in a collegial manner¹ and is devoid of a sound scientific basis, proposes measures which are not only discriminatory, ineffective and disproportionate in view of their intended effects, but moreover also constitute a violation of EU laws and notably of Articles 49 and 56 TFEU.

1. Current regulatory framework for games of chance in Belgium

Belgium already has a strict regulatory framework for games of chance whereby the exploitation of games of chance is in principle prohibited except with a licence granted by the Belgian Gaming Commission. The number of available licences is limited and licences are granted only following a strict application procedure before the Gaming Commission. Only operators that have a “land-based” licence for the provision of games of chance in the real world can obtain a complementary licence to offer the same type of games online (e.g. only an operator authorized to run a land-based casino can also offer casino games on the internet).

In 2018, a set of restrictions regarding advertising for online games of chance was introduced by the Royal Decree of 25 October 2018². Amongst other things, these measures restricted advertising for casino games and arcade games, implemented further restrictions towards minors and imposed a set of rules on content and distribution. This Royal Decree was subsequently partially annulled by the Council of State.

It is important to note that the aforementioned framework does not apply to lotteries and scratch card games, for which the Belgian National Lottery (a fully state-owned undertaking) has a legal monopoly which is subject to separate legislation. Accordingly, the new draft Royal Decree does not apply to the very popular lottery and scratch card games of the National Lottery, for which it has a legal monopoly.

2. Scope of the proposed measures

The draft regulation is addressed to the legal, i.e. licensed, operators of games of chance in Belgium and covers advertising both for online and offline games of chance (Art. 1). Only those licensed operators will be allowed to advertise their own company and the games of chance they offer.

On the substance, the regulation bans all forms of advertising except for those limited forms that are specifically authorized under Chapter 2 (Art. 2).

Accordingly, most common forms of advertising will be banned as from the entry into force of the regulation (expected later this year), including print advertising, out-of-home advertising (except on the shop fronts of the gaming establishments), television and radio ads, merchandise,

¹ The draft, an initiative of the Belgian Minister of Justice, was formatted as a royal decree rather than a law amending the Belgian act on games of chance to avoid a discussion thereof in the Council of Ministers, where one of the parties in the governing coalition (i.e. the French-speaking liberal party MR) would oppose the far-reaching measures. Hence, the draft is currently being pushed through despite opposition from one of the parties in the governing coalition. This *modus operandi* of the Minister of Justice has been strongly criticized in the Belgian press (Annex 1).

² The latest version of this Royal Decree of 25 October 2018 on the conditions for operating games of chance and gambling operated by means of information society instruments (in French) is attached as Annex 2.

advertorials, influencer marketing, and most forms of online advertising (e.g. display banners). Sponsoring of sports (and “e-sports”) organisations and tournaments will be limited and ultimately also banned by 2025.

For the limited forms of advertising that would remain authorized, the regulation imposes strict conditions regarding placement, timing, content and distribution (Art. 5-20).

3. Potential impact

First of all, it should be noted that BAGO is not opposed to sensible regulation of advertising for games of chance. This is demonstrated, among other things, by the fact that BAGO has developed its own ethical advertising charter³ and has also endorsed the Responsible Advertising Code of the European Gaming and Betting Association (EGBA).⁴

However, BAGO has serious concerns that a blanket advertising ban as the one which is now proposed is unnecessary, ineffective, disproportionate and even counterproductive.

We would like to draw your attention to the following issues in particular, as supported by the available data:

- Advertising is not only an indispensable tool for companies to make themselves and their product offer known in the market and to differentiate themselves from competitors, as in other economic sectors. For games of chance specifically, advertising also fulfils a very important social function in **channelling users toward a legal and controlled offer**, thereby protecting these users and especially the most vulnerable groups among them.
- A near-total ban on advertising for legal games of chance will inevitably lead to a significant loss of visibility of the legal (i.e. duly licensed and controlled) operators. Based on scientific evidence, this can be expected to lead to an **increase in illegal gambling, especially online**.^{5,6} This is further reinforced by the fact that the Belgian authorities have always failed to provide the Gaming Commission with the necessary tools and resources to effectively combat illegal (online) gambling websites, which remain widely available and easily accessible to Belgian players.⁷

³ <https://bago.be/fr/bago-adopte-une-charte-pour-une-publicite-responsable/> (Annex 3).

⁴ <https://www.egba.eu/news-post/belgiums-online-gambling-sector-endorses-egbas-responsible-advertising-code/> (Annex 4).

⁵ Prof. Dr. Frederik Zuiderveen Borgesius, Mr. Arthur Zimin, Lauren Power, Prof. Dr. Nico van Eijk, Kansspelreclame: toestaan, beperken, verbieden? Onderzoek over mogelijke regels voor kansspelreclame. In opdracht van het Directoraat-Generaal Straffen en Beschermen van het Ministerie van Justitie en Veiligheid. Instituut voor Informatierecht (IViR), Universiteit Amsterdam (Sept. 2019); Gambling and advertising: an international study of regulatory intervention, Regulus 2019 (Annex 5)

⁶ Regulus, Gambling and advertising: an international study of regulatory intervention, 2019 (Annex 6)

⁷ See e.g. the judgment of the Belgian Constitutional Court of 29 March 2018 (Nr. 42/2018) annulling Article 2.12.3 of the Law of July 12, 2016 containing the first adjustment of the general expenditure budget for the 2016 budget year (Annex **Error! Reference source not found.**). This article allocated the available assets of the “12-62-5 Fund” of the Gaming Commission (amounting to 15,618,000 euros) to the general resources of the Treasury. The “12-62-5 Fund” is a fund created to support the personnel and

In Italy, where a similar blanket ban on advertising for games of chance was adopted in 2018 and which was apparently never notified to the European Commission⁸, similar concerns were raised by the Italian Communication Authority (in charge for monitoring the Italian gambling advertising ban) in a letter of 24 July 2019 to the Italian Government. In this letter, the Italian Communication Authority warned that a generalized ban could make it more difficult to distinguish between legal and illegal gaming offerings, with potential negative consequences to consumer protection, contrary to the stated objectives of the legislator.⁹ The same was confirmed by a 2021 Censis study commissioned by Lottomatica which found that illegal gambling had soared since the ban was introduced in Italy. The report estimated that illegal gambling in Italy was worth €18bn, up from €12bn in 2019 (+50%) and warned that the illegal sector could exceed €20bn by the end of 2021. Meanwhile, the legal sector, hit both by the advertising ban and COVID 19-related restrictions, saw a very significant drop in revenues (and, consequently, tax collection).¹⁰

The fact that the Italian Sport Deputy Secretary, Ms. Valentina Vezzali, has recently expressed the political endorsement for reforming the Italian gambling provisions highlights that a generalized ban on gambling advertisement does not necessarily lead to the desired result of protecting consumers or vulnerable groups, but can go too far and lead to adverse consequences instead. Ms. Vezzali has announced that she intends to work with the Italian gambling regulator and the Italian Tax Agency on a reform of the current provisions.¹¹

So far, the legal gaming industry in Belgium has been highly successful in channelling consumers with a propensity for gambling and betting towards a legal and controlled offer. H2 Gambling Capital estimates that the “channelling rate” in Belgium exceeds 85% online and 90% offline, which is significantly better than the (already high) EU average (76.6%).¹²

operational costs of the Gaming Commission and financed by contributions paid annually by the legal operators of games of chance. The Court considered that such reallocation to the general resources Treasury of contributions paid for a specific public service was unlawful. As a result of the annulment of the contested provision, the funds were reallocated to the Gaming Commission.

⁸ A notification of the Italian measure could not be found in the TRIS database.

⁹ Oggetto: Segnalazione al Governo ai sensi dell'articolo 1, comma 6, lett. c), n. 1) della legge 31 luglio 1997, n. 249 sulla normativa introdotta dall'articolo 9 del decreto-legge 12 luglio 2018, n. 87, recante “Disposizioni urgenti per la dignità dei lavoratori e delle imprese”, convertito con modificazioni dalla legge 9 agosto 2018, n. 96, in materia di pubblicità del gioco a pagamento, p. 23 (Annex 9). (English machine translation: *Report to the Government pursuant to Article 1, Paragraph 6(c)(1) of Law No. 249 of 31 July 1997 on the regulations introduced by Article 9 of Decree-Law No. 87 of 12 July 2018, on "Urgent Provisions for the Dignity of Workers and Businesses," converted with amendments by Law No. 96 of 9 August 2018, on the subject of paid game advertising*, p. 23) (Annex 10).

¹⁰ www.censis.it/economia/rapporto-lottomatica-censis-sul-gioco-legale (Annex 11).

¹¹ See [https://www.agiprnews.it/attualita/C3%A0-e-politica/Decreto-Dignita%C3%A0-Vezzali-Sport-divieto-sponsorizzazione-scommesse-id.184406#:~:text=%2C%20Vezzali%20\(sottosegr.-,Sport\):%20%22Divieto%20di%20sponsorizzazione%20del%20betting%20non%20ha%20sortito,ha%20sortito%20gli%20effetti%20sperati](https://www.agiprnews.it/attualita/C3%A0-e-politica/Decreto-Dignita%C3%A0-Vezzali-Sport-divieto-sponsorizzazione-scommesse-id.184406#:~:text=%2C%20Vezzali%20(sottosegr.-,Sport):%20%22Divieto%20di%20sponsorizzazione%20del%20betting%20non%20ha%20sortito,ha%20sortito%20gli%20effetti%20sperati) (Annex 12).

¹² 2020 figures. See <https://www.egba.eu/uploads/2020/12/European-Online-Gambling-Key-Figures-2020-Edition.pdf> (Annex 13).

As the example of Italy illustrates, the imposition of an advertising ban risks jeopardizing this.

- The imposition of a near-total ban on advertising by legal operators will make it impossible for the legal operators not only to promote their offer, but also to distinguish it from that of illegal operators, especially online. **All users, and especially young and vulnerable groups**, will continue to be exposed to aggressive promotion of illegal websites, operated with relative impunity.¹³

Like many other sectors, the gaming and betting sector is in the midst of a digital transition, a trend that has been accelerated by the pandemic. However, the fact that the digital space is more difficult to police than the physical world, only underscores the importance of the role of the legal sector in channelling demand towards a safe and controlled offer. However, it is obvious that the legal operators can only fulfil this role if they remain sufficiently visible online. In the meantime, similar concerns have been raised by VIA (the Belgian Association of Belgian TV broadcasters) and the Pro League, which have voiced their positions against a full ban.^{14,15}

4. Legislative process

Despite the potential negative repercussions of the proposed regulation on both the sector and the players, the Belgian government did not request, much less take into account the advice of the industry regulator, the Belgian Gaming Commission, in preparing this far-reaching advertising ban. The Gaming Commission's role was reduced to issuing an opinion at its own initiative when the text was already at an advanced stage.¹⁶ The president of the Belgian Gaming Commission, Ms. Clavie, has publicly expressed her dissatisfaction to that end in a letter addressed to minister Van Quickenborne and the Belgian Prime Minister, noting that she *"welcomes a more restrictive approach"*, but that she is *"surprised that the Commission was not consulted to give its opinion on this draft Royal Decree, even though one of its legal missions is precisely to give the government an opinion on any regulatory initiative in the field of games of chance, and it is undeniable that advertising is a subject of such importance that it would undoubtedly have*

¹³ As already mentioned above, legal (i.e. licensed) online operators in Belgium are required to also have land-based activities in Belgium and to operate their website from a server located in Belgium. Illegal operators on the other hand do not risk losing their license (since they have none) and are typically based offshore and beyond the effective reach of Belgian enforcement authorities.

¹⁴ See <https://thinkvia.be/belgische-televisiezenders-stellen-zelf-maatregelen-voor-om-reclame-voor-kansspelen-in-te-perken/> and <https://sporza.be/nl/2022/05/09/pro-league-over-verbod-op-gokreclame-meer-dan-12-van-sponsorinkomsten-weg~1652087582285/> (Annex 14).

¹⁵ Belgian Online Gambling Channelling – Impact of Regulatory Restrictions, H2 Gambling, September 2020 (Annex 7)

¹⁶ The draft regulation refers to an advice of the Gaming Commission of 5 April 2022. In reality, the Government did not request the advice of the Gaming Commission, and the advice referred to was an ex officio advice which was not based on the actual draft regulation. The Gaming Commission subsequently published a summary of its recommendations to the Government on its website: <https://gamingcommission.be/fr/publicite-pour-les-jeux-de-hazard-le-point-de-vue-de-la-commission-des-jeux-de-hazard> (Annex 15).

benefited from being submitted to it".¹⁷ The input of the Gaming Commission would have ensured a more balanced approach to advertising, taking into consideration the concerns of the relevant stakeholders in the affected sector.

Furthermore, nothing in the draft regulation as notified to your services suggests that the Gaming Commission's recommendations were seriously taken into consideration. This is especially surprising because only recently (in September 2021), the Gaming Commission organised a dedicated meeting with stakeholders from relevant healthcare, social and scientific organisations to specifically discuss the legal framework around advertising for games of chance, including an assessment of the current legal framework and recommendations for further improvement.¹⁸ A report with recommendations was published following this meeting, which pleads for more scientific research to allow for well-founded regulation and which proposed a number of measures which are altogether far less restrictive than those formulated in the present draft regulation.¹⁹

In addition to ignoring the regulator, the Belgian government has also failed to carry out an impact assessment or to discuss the measure with stakeholders.

Moreover, the proposed measure is not backed up by any scientific evidence that a near-total advertising ban would be beneficial to consumers or offer a better protection to vulnerable groups. In accordance with the principle of open government, BAGO has issued a request to the Belgian government on 1 June 2022 to receive access to the information on which the draft regulation was based, but so far BAGO has not received any response.

5. Infringement of EU law

The draft regulation also infringes EU law, and in particular Articles 49 and 56 TFEU.

5.1. Principles

From an EU law perspective, national regulations imposing limitations on gaming activities or related advertising constitute restrictions of the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU), as was confirmed by the EU courts on several occasions.²⁰

The Court of Justice furthermore held that national legislation which imposes a general and absolute prohibition of any advertising for a certain activity is liable to restrict the possibility, for the persons carrying out that activity, of making themselves known to their potential clientele and

¹⁷ <https://www.lecho.be/economie-politique/belgique/federal/confusion-entre-courriers-et-avis-de-la-commission-des-jeux-de-hazard/10388014> (Annex 17).

¹⁸ <https://www.gamingcommission.be/en/protection-of-players/consultation-with-the-help-sector/7092021> (Annex 18).

¹⁹ The Dutch version of the report is available <https://gamingcommission.paddlecms.net/sites/default/files/2021-10/Rapport%20vergadering%20%28NL%29.pdf> (Annex 19).

²⁰ CJEU case C-463/13, *Stanley International Betting and Stanleybet Malta*, 22 January 2015; CJEU case C-371/10, *National Grid Indus*, 29 November 2011.

of promoting the services to the public.²¹ In addition, the Court stated that legislation of a Member State which prohibits the advertising, organisation and facilitation of games of chance via the internet, constitutes a restriction on the freedom to provide services.²²

The EU courts have consistently held that such “*restrictions on gaming activities may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling*”.²³ However, these restrictions must satisfy the principle of proportionality, “*that is to say, be suitable for ensuring attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective*”. The Court recalled in this respect “*that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner*” and is “*applied without discrimination*”.²⁴

5.2. Application to this case

The draft regulation does not meet these criteria:

- First, a blanket, near-total ban on advertising for games of chance is **not a proportionate**²⁵ **measure** having regard to the ostensible objective of protecting vulnerable groups against the risk of addiction. As also suggested by the Belgian Gaming Commission itself,²⁶ less restrictive measures specifically aimed at protecting such vulnerable groups (such as youngsters and players with a history of addiction) are available and likely more effective. For the vast majority of players, gaming and betting are fun, recreational activities.

According to scientific research, only 0.9% of the Belgian population above the age of 15 is at risk of problematic gambling (and only 0.3% at a moderate to high risk).²⁷ In light of these findings, a blanket ban on advertising is clearly not justified.

²¹ CJEU case C-339/15, *Luc Vanderborght*, 4 May 2015.

²² CJEU joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, *Stoß and Others*, 8 September 2010.

²³ See case C-46/08, *Carmen Media Group* [2010] ECR I-8149, para. 55 and the case law cited there.

²⁴ See case C-176/11, *HIT and HIT LARIX*, EU:C:2012:454, para. 22 and the case law cited there. See also case C-375/14, *Rosanna Leazza*, EU:C:2016:60, para. 36.

²⁵ The requirement of proportionality is all the more important as advertising is protected speech under Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the EU Charter on fundamental rights. This means advertising restrictions should be assessed under paragraph 2 of Article 10 ECHR, meaning that they should be “*prescribed by law and necessary in a democratic society*” for the protection of the public interests listed there.

²⁶ <https://gamingcommission.be/fr/publicite-pour-les-jeux-de-hazard-le-point-de-vue-de-la-commission-des-jeux-de-hazard> (Annex 15).

²⁷ Sciensano, Belgian Health Interview Survey (2018), <https://www.sciensano.be/en/projects/health-interview-survey/hisia#lifestyle> (click on “gambling”, then select indicator = “Severity of problematic gambling”, year = “2018”, geographical level = “Belgium” and “No additional parameter” – Annex 16).

With regard to the Italian advertising ban, the Italian Communication Authority also noted that during the consultation process, numerous respondents raised similar concerns regarding Article 56 TFEU, with particular reference to the principle of proportionality and non-discrimination.²⁸

Second, the advertising ban is **not applied in a consistent and non-discriminatory manner** to all legal operators. The State-owned National Lottery, which accounts for approximately 38.94% of total revenues from legal games of chance in Belgium with a turnover of over €1.5bn in 2021, remains largely exempt from the advertising ban.²⁹ The ban will only affect the National Lottery's sports betting offer, but the very popular lottery and scratch card games, for which it has a legal monopoly, are not covered by the ban.

According to a letter that was leaked to the press,³⁰ the advertising ban was in fact introduced at the express request of the National Lottery, as a *quid pro quo* for increasing the so-called "monopoly rent" (a share of the National Lottery's revenues that is directly contributed to the Treasury) by € 10 million per year.³¹ Not for the first time, BAGO finds that the National Lottery exercises an undue influence over the Belgian government policies towards their sector, while at the same time being a competitor in that sector.³² The National Lottery ranks consistently among the top advertisers in Belgium, with large-scale mass-market advertising campaigns which more often than not dangle the prospect of enormous gains or suggest that playing can be a solution to financial problems

²⁸ Oggetto: Segnalazione al Governo ai sensi dell'articolo 1, comma 6, lett. c), n. 1) della legge 31 luglio 1997, n. 249 sulla normativa introdotta dall'articolo 9 del decreto-legge 12 luglio 2018, n. 87, recante "Disposizioni urgenti per la dignità dei lavoratori e delle imprese", convertito con modificazioni dalla legge 9 agosto 2018, n. 96, in materia di pubblicità del gioco a pagamento, p. 26. (English translation: *Report to the Government pursuant to Article 1, Paragraph 6(c)(1) of Law No. 249 of 31 July 1997 on the regulations introduced by Article 9 of Decree-Law No. 87 of 12 July 2018, on "Urgent Provisions for the Dignity of Workers and Businesses," converted with amendments by Law No. 96 of 9 August 2018, on the subject of paid game advertising*, p. 26) (Annex 10).

²⁹ Financial results of the National Lottery as published in the press release of 14 January 2022 (Annex 20).

The 'gross gaming revenue' (consisting of the total amount of stakes paid minus the amounts paid to the players) of all legal operators together amounted to 969.095.385,40 EUR in 2020 (see p. 47 of the Gaming Commission's year report 2021, available at https://www.gamingcommission.be/sites/default/files/2022-05/CJH_Rapport%20Annuel%202021.pdf. (Annex 21).

³⁰ <https://www.hln.be/nieuws/hln-onderzoek-verbod-gokreclame-was-eis-van-nationale-loterij-alleen-als-concurrentie-vleugellam-wordt-gemaakt-krijgt-staat-zijn-miljoenen-ab2491c6/> (Annex 22).

³¹ This "quid pro quo" is explicitly confirmed by the notification of the pluriannual budget for the period 2022-2024, which explicitly links the increase of the "monopoly rent" of the National Lottery to (i) a ban on offering different types of games of chance on the same website; (ii) restrictions on advertising by the private sector and (iii) restrictions on betting activities in press shops (Annex 23, pp. 25-26).

³² This undue influence is even partly institutionalized, given that the Minister responsible for the National Lottery appoints a representative in the Belgian Gaming Commission (even though this Commission is also supposed to supervise the betting activities of the National Lottery) and the law on the National Lottery also provides for regular meetings between the chairman of the Gaming Commission and the CEO of the National Lottery, who thus has privileged access to the regulator.

(practices strictly forbidden for private operators).³³ The National Lottery also sponsors several sports teams (e.g. the Lotto Soudal cycling team and RSC Anderlecht football club³⁴) and tournaments (e.g. Euromillions Basketball League, Euromillions Volley League).

In recent years, the National Lottery has also significantly expanded its online offer, with an increasing number of short odds “e-games”, which are very far removed from the traditional concept of a lottery and are nearly indistinguishable from the slot games also offered by the private sector (even though the National Lottery does not have a licence for this type of games).³⁵ The National Lottery thus encroaches more and more on the activities of the private operators without facing the same restrictions in terms of advertising and sponsoring.

- Third, and most importantly, by drastically reducing the visibility of the legal operators, the advertising ban **goes directly against the overall objectives of the Belgian regulatory regime for games of chance, i.e. channelling demand to a limited and controlled offer** as the main way to protect consumers against the dangers of the unregulated offshore market. As already explained, a blanket advertising ban risks driving players (back) into the arms of the illegal operators, especially online. However, consumers who play on illegal websites do not enjoy any protection, not only in terms of responsible gaming but also as regards cybercrime.

In the *Placanica* case, the Court of Justice observed that “a policy of controlled expansion in the betting and gaming sector³⁶ may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated. As the Belgian and French Governments, in particular, have pointed out, in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques”.³⁷ Thus, the Court accepted – upon the suggestion of none other than the Belgian government – that allowing authorized operators to advertise on a certain scale was an integral and necessary part of a credible “channelling policy”. This confirms that a blanket ban on advertising, as proposed in the notified measure, is inconsistent with such a policy and therefore does not satisfy the requirements laid down in the case law of the EU Court for such restrictions to be compatible with Articles 49 and 56 TFEU.

- Furthermore, while on its surface equally applicable to all (private-sector) market players, the far-reaching ban on advertising will **distort competition in the internal market** and

³³ See slogans such as “Euromillions: become scandalously rich”, “What kind of a millionaire would you be?” and “Win for Life: be chill for life”.

³⁴ The stadium of this football club was even renamed “Lotto Park”.

³⁵ <https://www.e-lotto.be/FR/eGames/woohoo> (Annex 24).

³⁶ Such as the Belgian “channeling” policy, based on a licensing regime allowing a limited number of operators to provide gaming and betting services legally.

³⁷ Case C-338/04, *Placanica*, EU:C:2007:133, para. 55; see also case C-258/08, *Ladbroke's*, EU:C:2010:308, para. 38.

create artificial barriers to entry on the Belgian market. Large international brands and other brands that are already well-established and well-known on the Belgian market will be affected less than smaller and/or new brands, which need advertising to make their offer known to the public. Potential new entrants, including undertakings based in other Member States wishing to enter the Belgian market, will find it more difficult to do so (or will even be deterred from doing so) as they would face an uphill battle to establish their brand and make their offer known to the public. This may eventually lead to a less competitive market, to the ultimate detriment of consumers who might face higher prices, less choice, lower quality and/or less innovation.

The new rules also make arbitrary distinctions as to the few remaining forms of advertising that are still allowed. For example, while banning most forms of online advertising, the draft measure still allows search engine advertising (SEA). This will mainly benefit Google, the dominant player in SEA, and large international groups, who are better placed to win the programmatic auctions to obtain a prominent place in Google's search results, to the detriment of smaller local players.

- Moreover, certain provisions of the notified draft Royal Decree also **do not seem in line with the Audiovisual Media Services Directive (AVMSD).**

Whilst the Directive allows Member States to lay down stricter rules on television advertising, these rules must comply with EU law and shall not be applicable to the retransmission of broadcasts originating in other Member States. Pursuant to the freedom of reception and retransmission principle (Article 3 AVMSD) and the country of origin principle, such broadcasts only need to comply with the rules of the country of origin (subject only to limited exceptions). However, the draft Royal Decree makes no distinction between domestic and foreign broadcasts and bans all advertising through audiovisual media services, without distinction as to the **origin of the broadcasts.**

With respect to **product placement**, the draft Royal Decree provides that it is allowed only in programmes recorded abroad, except if they are specifically targeting the Belgian market. However, pursuant to Article 11 AVMSD, product placement shall be allowed in all audiovisual media services, subject only to the exceptions and requirements noted there. In addition, the draft Royal Decree does not explain how it may be determined whether a programme “specifically targets” the Belgian market, which leads to legal uncertainty.

As regards **sponsorship messages** during live broadcasts of sports events, the draft Royal Decree makes an arbitrary distinction between broadcasts of “Belgian sports tournaments” (where such messages will only be allowed until 31 December 2024) and broadcasts of “international and European tournaments” (where such messages will continue to be allowed after that date). This will create an **unfair advantage** for large international groups, to the detriment of smaller and/or purely domestic market players. Article 10 AVMSD in principle allows sponsoring, subject only to the exceptions and conditions laid down in that provision. If Member States introduce stricter rules, they should do so in a proportionate and non-discriminatory manner, which is clearly not the case here.

- Finally, we would like to draw your attention to the fact that the draft text is often **imprecise** and uses several undefined terms (e.g. “incidental advertising”, “specifically targeting the

Belgian market”, “vulnerable groups”, “well-known person”, etc.), which will lead to **diverging interpretations, legal uncertainty and unequal application/enforcement.**

6. Conclusion

It is clear from the above that the notified regulation:

- is not in line with the recommendations of the competent national regulator;
- is not evidence-based;
- is clearly disproportionate to the stated objective of protecting vulnerable groups;
- is not applied in a non-discriminatory fashion and is manifestly inconsistent with the overall objective of the Belgian regulatory framework for games of chance, i.e. to “channel” demand towards a safe and controlled offer;
- does not fulfil the conditions set out in the case law of the EU courts for the compatibility of restrictions on gaming and betting activities with the freedom to provide services and the freedom of establishment and infringes Articles 49 and 56 TFEU;
- is incompatible with the AVMSD; and
- will lead to legal uncertainty and unequal application/enforcement.

Instead, BAGO proposes a more sensible regulation of advertising for games of chance, which is (i) based on the relevant empirical evidence available, (ii) created in close cooperation with the competent Belgian national regulator, (iii) proportionate, consistent and non-discriminatory in view of the regulatory objectives regarding games of chance, (iv) compatible with the applicable Belgian and EU legislation, and (v) able to provide legal certainty to all actors involved. In light of the above, BAGO considers it more proportionate, on the one hand, to focus on ensuring (more) knowledge and awareness regarding a legal and safe framework of games of chance, and, on the other hand, to adopt a multilevel strategy for the purpose of effectively combating (illegal and unsafe) gambling, which contemplates not so much an absolute and indiscriminate ban on advertising, but a more balanced approach.

In light of these concerns, we invite the European Commission and the Member States to make use of the possibility under Article 6 of Directive 2015/1535 to deliver an opinion to the Belgian authorities to the effect that the notified measure may create unacceptable obstacles to the free movement of services or to the freedom of establishment of service operators within the internal market.

We remain at the disposal of the Commission and the Member States to discuss the issues set out in this letter and to answer any questions regarding the same.

Yours sincerely,
On behalf of BAGO,

Tom De Clercq

Tom De Clercq
BAGO President



Emmanuel Mewissen
BAGO Vice President

Annexes:

1. De Standaard 12 May 2022 - Gambling advertising ban remains, but MR does not disarm (Dutch)
2. Royal Decree of 25 October 2018 on the conditions for operating games of chance and gambling operated by means of information society instruments (French)
3. BAGO press release of 14 February 2017 - BAGO adopts a charter for responsible advertising (French)
4. EGBA communication of 12 May 2020 - Belgium's online gambling sector endorses EGBA's responsible advertising code
5. Prof. Dr. Frederik Zuiderveen Borgesius, Mr. Arthur Zimin, Lauren Power, Prof. Dr. Nico van Eijk, "Kansspelreclame: toestaan, beperken, verbieden? Onderzoek over mogelijke regels voor kansspelreclame", Instituut voor Informatierecht (IViR), Universiteit Amsterdam, Sept. 2019
6. Regulus, Gambling and advertising: an international study of regulatory intervention, 2019
7. H2 Gambling, Belgian Online Gambling Channeling – Impact of Regulatory Restrictions, September 2020
8. Constitutional Court, judgment Nr. 42/2018 of 29 March 2018
9. AGCOM Report to the Government of 24 July 2019 (Italian)
10. AGCOM Report to the Government of 24 July 2019 (English translation)
11. Lottomatica-Censis report on legal gaming of 15 November 2021 (Italian)
12. Agipronews.it 31 January 2022 - Dignity Decree, Vezzali (undersecretary of Sports): "Ban on betting sponsorship did not have the desired effects" (Italian)
13. EGBA European Online Gambling Key Figures 2020 Edition
14. a. Thinkvia.be undated - Belgian television channels propose their own measures to curb gambling advertising (Dutch)

b. Sporza.be 9 May 2022 - Pro League on ban on gambling advertising: "More than 12% of sponsorship revenue gone" (Dutch)
15. Gaming Commission 26 April 2022 – Gambling advertising - The Gaming Commission's view (French)
16. Sciensano, Belgian Health Interview Survey (2018)

17. L'Echo 12 May 2022 - Confusion between letters and opinions of the Gaming Commission (French)
18. Gaming Commission – Advertising games of chance - Meeting with stakeholders of 7 September 2021
19. Gaming Commission – Advertising games of chance – Report of meeting with stakeholders of 7 September 2021
20. National Lottery press release of 14 January 2022 (French)
21. Gaming Commission year report 2021 (French)
22. HLN Research 11 June 2022 - Banning gambling advertising was demand of National Lottery - only if competition is winged, state gets its millions (Dutch)
23. Pluriannual budget notification 2022-2024
24. National Lottery - Woohoo games