



BAGO

Belgian Association
of Gaming Operators

Belgian Association of Gaming Operators
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European Commission
DG Internal Market, Industry,
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Attn. M. Radek Maly, Head of Unit
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Brussels, 13 July 2022

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Dear Mr Maly,

Subject: Belgium – Proposal for a law amending the Act of 7 May 1999 on gambling, betting, gambling establishments and the protection of players (2023/0242/BE)

We write to you on behalf of the Belgian Association of Gaming Operators (BAGO), a not-for-profit association bringing together six 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).¹

On 17 May 2022, your services received from the Belgian authorities the above-mentioned notification of a draft law amending the law of 7 May 1999 on gambling, betting, gambling establishments and the protection of players (hereafter the “Gaming Act”).

With this letter, the BAGO members would like to express their serious concerns about the compatibility of the proposed measure with EU law and about its impact on the internal market.

¹ <https://bago.be/fr/membres/>.

1. Background

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 (“BGC”). The number of available licences is limited and licences are granted only to operators that comply with strict conditions. 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 (“class A license”) can also offer casino games on the internet (“class A+ license”).

The Gaming Act imposes a minimum age of 21 years to be eligible to play casino and slot games; the minimum age for betting is currently 18 years.

In a judgment of 9 November 2017, the Belgian Constitutional Court held that the Gaming Act was unconstitutional insofar as it does not prohibit the combined offer on a single domain name and the associated URLs of games of chance belonging to different license classes (e.g., casino games and betting), on the basis that the offer of games of chance belonging to different classes within the same land-based establishment is also prohibited.² The Constitutional Court has subsequently confirmed this jurisprudence on several occasions.³

In 2018, a set of restrictions regarding games of chance offered via instruments of the information society was introduced by the Royal Decree of 25 October 2018. Amongst others, these measures included capping player bonuses to 275 euros per month, limiting deposits into player accounts to 500 euros per week and placing restrictions on advertising. This Royal Decree was subsequently partially annulled by the Council of State by two judgments of 6 February 2020.⁴ Among other provisions, the Council of State annulled the provision capping bonuses at 275 euros per month, based on a reasoning according to which bonuses are already generally prohibited by Article 60 of the Gaming Act and that the King could therefore not authorize them, even if only up to a certain amount. Until then, it was assumed that Article 60 only applied to land-based gaming establishments. Since this judgment, bonuses are considered to be generally banned, both online and offline (with a limited exception for casinos). The restrictions on advertising were mostly unaffected by the partial annulment, except for a few specific provisions on advertising targeting minors.

On 27 February 2023, a new Royal Decree was adopted which bans all advertising for the games of chance of the licensed operators, both online and offline, with only limited exceptions.⁵ This Royal Decree is based on Article 61, paragraph 2, of the Gaming Act, which empowers the King only to determine the “modalities” of advertising for games of chance. The Royal Decree enters into force on 1 July 2023. Several petitions for annulment of this Royal Decree are pending before the Council of State.

It is important to note that the Gaming Act and its implementing decrees do not apply to lotteries and scratch card games, for which the Belgian National Lottery (a fully state-owned undertaking)

² Const. Court nr. 129/2017.

³ Const. Court nrs. 108/2018, 109/2018, 114/2021 and 122/2022.

⁴ Council of State nrs. 246.998 and 246.999.

⁵ See notification 2022/0332/B, final text. The Royal Decree was published in the Belgian Official Gazette on 8 March 2023.

has a legal monopoly and which is subject to separate legislation. Accordingly, the notified proposal for a law amending the Gaming Act also does not apply to the activities of the National Lottery, except for its sports betting offer “Scoore” (offered through a subsidiary).

2. Overview of the notified measure

The notified measure is based on a legislative proposal by Belgian MPs Van Hecke et al.,⁶ introduced in 2019, which initially proposed to:

- Ban the so-called “3.3 machines” (a specific type of slot machines that can be operated without a license);
- Codify the case law of the Constitutional Court concerning the combined offer of games of different classes on the same domain name and associated URLs;
- Increase the minimum age for betting and lotteries from 18 to 21 years (i.e., the same as for other games of chance);
- Reduce the deposit limit for online gaming to 250 euros per week;
- Ban advertising for games of chance, betting and lotteries;
- Extend the Excluded Persons Information System (EPIS) checks to betting at racecourses and in press shops.

After languishing in parliament for several years, the proposal was endorsed by the government in the context of the adoption of the Royal Decree of 27 February 2022 on advertising for games of chance. Meanwhile a Royal Decree of 22 March 2022 (effective date: 1 October 2022) had already extended the EPIS checks to betting agencies⁷ and a Royal Decree of 19 June 2022 had already reduced the online deposit limit to 200 euros/week.

The notified measure provides for:

- A ban on “3.3 machines” (Article 2);
- Raising the minimum age for betting (but not for lotteries as initially proposed) to 21 (Articles 3 and 5);
- A codification of the case law of the Constitutional Court regarding the combined offer of games of chance belonging to different classes on the same domain name and associated URLs (Article 4);
- A codification of the case law of the Council of State on the “bonus ban” (Article 6);
- A general ban on advertising for games of chance and betting (but not for lotteries as initially proposed), save for the exceptions laid down in a Royal Decree (Article 7);

⁶ Proposition de loi, parl. doc. (Chamber of Representatives) 2019, nr. 55-0384/001 (Annex 1).

⁷ Following a court decision, the application of this Royal Decree has however been suspended.

- A retroactive endorsement by the legislator of the Royal Decree of 27 February 2023 (Article 8).

The note from the Belgian authorities accompanying the notification states that the notification concerns only Articles 4 and 7 of the draft law. This is incorrect, as Articles 3, 5 and 6 also concern information society services. Moreover, Article 8 is indissociable from Article 7. Hence, all of these provisions qualify as “rules on services” within the meaning of Article 1(1)(e) of Directive 2015/1535 and only Article 2 could be considered out of scope.

3. Legal assessment

3.1. Advertising ban

At the outset, we would like to emphasize that BAGO is not opposed to sensible regulation of advertising for games of chance, with a view to protecting vulnerable groups. This is demonstrated, among other things, by the fact that BAGO has developed its own ethical advertising charter⁸ and has also endorsed the Responsible Advertising Code of the European Gaming and Betting Association (EGBA).⁹

However, BAGO has serious concerns that the advertising ban laid down in the notified measure is unnecessary, ineffective, disproportionate and even counterproductive.

The Belgian authorities have already drastically limited advertising for games of chance by way of the Royal Decree of 25 October 2018¹⁰ and the Royal Decree of 27 February 2023.¹¹ The latter Royal Decree even introduces a near-total ban on advertising for games of chance, but is legally on shaky ground, as the legal basis in the Gaming Act (Article 61, para. 2) does not contemplate such a ban but merely empowers the King to “determine the modalities” of advertising for games of chance. The legislative proposal that is now being notified basically aims to retroactively create a legal basis for the Royal Decree, in an approach that is highly questionable from a Belgian constitutional law point of view.

The notified measure basically reverses the principle that advertising for games of chance offered by duly licensed operators is in principle allowed subject to certain conditions (and as opposed to advertising for games of chance offered by non-licensed operators). It asserts that all advertising for games of chance is henceforth in principle banned, except if it is specifically allowed by Royal Decree. The same principle is already asserted in Article 2 of the Royal Decree of 27 February 2023.

As currently defined by that Royal Decree, and leaving aside sports sponsoring (for which there is a gradual phase-out as further discussed below), the advertising ban means that all the main advertising channels will be closed for the duly authorized providers of games of chance in Belgium:

⁸ <https://bago.be/fr/bago-adopte-une-charte-pour-une-publicite-responsable/> (Annex 2).

⁹ <https://www.egba.eu/news-post/belgiums-online-gambling-sector-endorses-egbas-responsible-advertising-code/> (Annex 3).

¹⁰ See notification 2017/0489/B.

¹¹ See notification 2022/0332/B of 9 May 2022. This notification prompted a detailed opinion of the state of Malta, which was however basically ignored in the final measure as adopted by the Belgian authorities.

- All out-of-home advertising (except on the storefront of authorized gaming establishments);
- All advertising in the audiovisual media (radio and TV), with only three exceptions (“incidental” advertising during broadcasts of sports competitions and other events, e.g. events taking place abroad, where advertising is still allowed) and product placement in TV programmes that were not specifically made for a Belgian audience;
- All advertising in the print media (except “incidental” advertising in reports of sports competitions or other events and advertising in specialized publications for persons working in the sector);
- All advertising on the internet and on smartphones (except search engine advertising and advertising on the own websites and social media accounts of an authorized operator, on condition that no interaction is possible);
- All influencer marketing;
- All direct marketing (and personalized advertisements generally, see Article 16);
- Etc.

Evidently, this leaves very few meaningful opportunities for advertising.

Most of the exceptions to the advertising ban in the Royal Decree of 27 February 2023 are of limited interest, namely:

- “B2B” advertising, i.e., advertisements aimed exclusively at persons working in the gambling sector (Article 4 of the Royal Decree);
- “incidental” advertising (Articles 5 and 9); and
- advertising aimed mainly at existing customers (Articles 7, 8, 11 and 12).

The only forms of advertising that may still enable the authorized operators to reach potential new customers are limited to:

- sports sponsoring (Article 6) and
- search engine advertising (i.e. search ads on the results page of a search engine, when a user has search for key words related to games of chance – Article 10).

However, sports sponsoring will be restricted and subsequently gradually phased out by 2028, at least as regards sponsoring of professional sports clubs. As of 1 July 2023, only three forms of advertising by way of sport sponsoring are still allowed:

- Placing a brand or logo on the clothing of the players (“shirt sponsoring”);
- Advertising at the place where the competition takes place;
- Short, 5-second sponsorship messages before and after (but not during) tv broadcasts of sports competitions.

As of 1 January 2025, advertising at the place where the competition takes place and sponsorship messages before and after broadcasts of Belgian competitions will also be banned, while “shirt sponsoring” will be limited to a logo on the back of the shirts with a maximum surface of 75 cm². As of 1 January 2028, all forms of sport sponsoring for professional clubs will be banned, whereas sponsoring for non-professional clubs will be limited to placing a logo on the back of the shirts with a maximum surface of 50 cm².

In addition, regarding the advertising that is still allowed generally, the Royal Decree imposes additional restrictions that seem specifically designed to make the advertising unappealing, such as completely banning the use of images of physical persons or fictitious characters (Article 17).

These are just the restrictions imposed by the Royal Decree of 27 February 2023, which are now confirmed by Article 8 of the notified draft law.¹² However, the draft law empowers the King to adopt even more restrictive measures at any moment.

The EU courts have confirmed on several occasions that 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).¹³ 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 of promoting the services to the public.¹⁴ 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.¹⁵

In the present case, it is obvious that the near-total advertising ban will substantially **raise barriers to entry to the Belgian market** for operators from other Member States. Without a meaningful ability to advertise (other than to already existing customers), new entrants in the market will not be able to make their brand and offer known to the public, creating an all but insurmountable barrier to market entry. Thus, **the Belgian market for games of chance will be closed off to competition**. The only way operators from other Member States, who are not yet active on the Belgian market, could realistically still enter this market, is by acquiring an operator who is already established in the market with a well-known brand. However, this does not allow for the introduction of more competition into the market. It is hard to see how this serves the interests of consumers.

The EU courts have consistently held that restrictions on gaming activities in principle violate Articles 49 and 56 TFEU but “*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*

¹² Note that the Royal Decree of 25 October 2018 is not abrogated by the Royal Decree of 27 February 2023 and therefore also remains in force.

¹³ 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.

¹⁴ CJEU case C-339/15, *Luc Vanderborght*, 4 May 2015.

¹⁵ 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.

gambling".¹⁶ 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*".¹⁷

It is submitted that the proposed ban, even with the limited exceptions laid down in the Royal Decree of 27 February 2023, is neither suitable nor proportionate to the attainment of any public interest objectives.

First, a near-total ban on advertising for games of chance is **not proportionate** to the ostensible objective of protecting vulnerable groups against the risk of addiction. As also suggested by the Belgian Gaming Commission itself,¹⁸ 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.

Any analogy drawn by the Belgian State with the tobacco advertising and sponsorship ban is inappropriate, because the premise that games of chance and tobacco products are comparable is a false one. Whereas there is ample scientific evidence that smoking is inherently harmful to human health, this is not the case for gambling and betting. Gambling and betting are a form of entertainment that is not harmful as such. 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).¹⁹ These findings may justify proportionate measures to protect vulnerable consumers, but not a (near-)total ban.

Second, the measure **undermines the coherence** of the Belgian authorities' policy regarding games of chance. In fact, 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. A blanket advertising ban will therefore likely be counterproductive, as it 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.

¹⁶ See case C-46/08, *Carmen Media Group* [2010] ECR I-8149, para. 55 and the case law cited there.

¹⁷ 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.

¹⁸ <https://gamingcommission.be/fr/publicite-pour-les-jeux-de-hasard-le-point-de-vue-de-la-commission-des-jeux-de-hasard> (Annex 4).

¹⁹ 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"). See Annex 5.

In the *Placanica* case, the Court of Justice observed that “a policy of controlled expansion in the betting and gaming sector²⁰ 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”.²¹ 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.

Third, the notified measure gives rise to **discrimination** between authorized private operators of games of chance and the publicly owned operator the National Lottery. As mentioned above, the initial legislative proposal called for the advertising ban to apply equally to games of chance, betting and lotteries. However, in the version as notified, the reference to lotteries has been deleted. Consequently, the advertising ban will not cover the products for which the National Lottery has a monopoly (lottery draw-based games and scratch card games), but only the National Lottery’s sports betting offer (marketed via a subsidiary and of marginal importance compared to its lottery products).

Thus, the National Lottery, which is by far the largest provider of legal games of chance in Belgium with a turnover of over €1.5 bn in 2021, remains largely exempt from the advertising ban.²² The ban will only affect the National Lottery’s sports betting offer,²³ but the very popular lottery and scratch card games, for which it has a legal monopoly, are not covered by the ban.

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 (practices strictly forbidden

²⁰ Such as the Belgian “channeling” policy, based on a licensing regime allowing a limited number of operators to provide gaming and betting services legally.

²¹ Case C-338/04, *Placanica*, EU:C:2007:133, para. 55; see also case C-258/08, *Ladbrokes*, EU:C:2010:308, para. 38.

²² 2021 financial results of the National Lottery as published in the press release of 14 January 2022 ([Annex 6](#)). The 2022 result was only slightly lower at 1.48bn, see press release of 13 January 2023 ([Annex 7](#)). We used the 2021 results for comparability with the turnover of the private sector (as no information is available yet for 2022).

For comparison, 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 nearly 1.18 bn EUR in 2021 (see p. 36 of the Gaming Commission’s year report 2022, available at https://gamingcommission.be/sites/default/files/2023-06/CJH_2022_rapport%20annuel_FR.pdf. ([Annex 8](#))).

²³ The National Lottery’s sports betting offer is marginal at best: in the last financial year (from 22 March 2021 until 31 December 2022, i.e. 1 year and slightly more than 9 months), the National Lottery subsidiary Scoore, which is responsible for this offer, realized a turnover of only 6.4 million euros. This is negligible compared to the total turnover of the National Lottery.

for private operators).²⁴ The National Lottery also sponsors several sports teams (e.g. the Lotto Dstny cycling team and RSC Anderlecht football club²⁵) and tournaments (e.g. Euromillions Basketball League, Euromillions Volley League), as well as the national teams in several sports disciplines (football, basketball, hockey, etc.).²⁶

In recent years, the National Lottery has also significantly expanded its online offer, with an increasing number of short-odds “instant games” (the so-called “Woohoo 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).²⁷ 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. Recently, the Belgian Gaming Commission has analysed these games and confirmed that they are games of chance that should be subject to the same regulations as the games of chance offered by the private sector, which implies that the National Lottery is currently offering these games unlawfully, without the appropriate license.²⁸ So far, this finding has not prompted any action by the Belgian government. This is unsurprising, given the conflict of interest between the State as regulator and the State as shareholder of the National Lottery.

Against this background, the blanket exemption of the lottery products of the publicly-owned monopolist is not objectively justified having regard to the objectives of the notified measure (i.e., the protection of players). Contrary to what the Belgian State maintains, the products of the National Lottery are not, across the board, less “dangerous” than the products of the authorized private operators. For instance, scientific studies show that scratch card games and “instant” games such as those offered by the National Lottery, including online, present a similar risk of addiction as some games offered by the private sector (and even a higher risk than the betting products of the private operators).²⁹ In addition, the Belgian Council of State (legislative section) considered that the offer of the National Lottery was sufficiently comparable to that of the licensed operators to warrant a regime providing a comparable level of protection for players.³⁰

We consider that this discriminatory treatment in favour of the National Lottery constitutes a measure contrary to the rules contained in the EU Treaties within the meaning of Article 106(1) TFEU, as it creates an inequality of opportunity distorting competition in the internal market.³¹ The measure in particular enables the National Lottery to extend its market power from the “reserved area” of its legal monopoly (which constitutes an “exclusive right” within the meaning of Article 106(1) TFEU) to other fields, notably by leveraging its notoriety as a provider of lottery products

²⁴ See slogans such as “*Euromillions: become scandalously rich*”, “*What kind of a millionaire would you be?*” and “*Win for Life: be chill for life*”.

²⁵ The stadium of this football club was even renamed “Lotto Park”.

²⁶ <https://www.loterie-nationale.be/bien-plus-que-jouer/sponsoring>.

²⁷ <https://www.e-lotto.be/FR/eGames/woohoo>.

²⁸ See Note – Jeux Woohoo exploités par la Loterie Nationale (Annex 9).

²⁹ See Prof. Michael Auer, “Game Risk Assessment Belgian private and public games of chance”, 2023 (Annex 10).

³⁰ Advice of the Council of State nr. 72.190/4 of 12 October 2022 (Annex 11).

³¹ See CJEU 17 July 2014, C-553/12P, *DEI*, para. 43; see also CJEU 22 May 2003, C-462/99, *Connect Austria*, para. 83 and the case law cited.

and cross-promoting the products that it already offers (i.e. sports betting) or may still introduce in neighbouring markets exposed to competition.

Furthermore, the National Lottery's exemption from the advertising ban likely amounts to State aid within the meaning of Article 107(1) TFEU. It constitutes an economic advantage for the National Lottery, which is granted by the State (by way of the notified legislative measure) and is selective, since it benefits only a single undertaking. The measure involves the use of State resources, as by introducing the advertising ban, the Belgian State forgoes revenues, i.e. taxes on the advertising activities. And as demonstrated above, the measure is discriminatory, distorts competition in the market and creates barriers to trade within the internal market.

Finally, the near-total advertising ban constitutes a disproportionate interference in several fundamental rights guaranteed by the EU Charter of Fundamental Rights, notably the right to free speech (Art. 11 of the Charter), the freedom of enterprise (Article 16 of the Charter) and the right to (intellectual) property (17 of the Charter).

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 "*prescribed by law and necessary in a democratic society*" for the protection of the public interests listed there. In the present case, the restriction of the right to free (commercial) speech is manifestly disproportionate, as less restrictive but equally effective (or actually, more effective) measures are available. A similar reasoning also applies for the right to free enterprise.

Finally, the measure assimilates any "*apposition of the brand or logo*" of the licensed operators with advertising. Thus, any "apposition" of logos and brands is prohibited, save for the marginal exceptions laid down in the Royal Decree of 27 February 2023 (see above). As such, the measure goes beyond merely regulating the use of the licensed operators' brands and logos but makes their use virtually impossible and therefore constitutes an expropriation of intellectual property rights. This expropriation is not proportionate to any legitimate objective allegedly pursued by the measure and therefore infringes the right to (intellectual) property guaranteed by Article 1 of the First Protocol to the ECHR and Article 17 of the EU Charter of Fundamental Rights.

3.2. Prohibition on combining different licenses on the same website

The Belgian Constitutional Court has annulled the Gaming Act "*insofar as it does not prohibit the cumulation of several complementary licences of different classes for the exploitation of games of chance and bets via one and the same domain name and its associated URLs*".³² The Court therefore considered that there is a "gap" in the Gaming Act which gives rise to a difference in treatment between operators that (only) offer games of chance and betting in the "real world" (offline, in land-based establishments) and operators that (also) offer games of chance and betting online, because land-based gaming establishments (casinos, arcades, betting agencies) cannot offer games of chance falling within different license classes. The Court considers that this difference in treatment cannot be objectively justified having regard to the objective of the legislation (i.e. the protection of players) and is therefore unconstitutional.

Although in our view a finding by the Constitutional Court that a law contains an unconstitutional "gap" does not automatically "fill in" that gap but merely constitutes an invitation to the legislator to fill the legal void, the Belgian authorities have already acted as if offering games of chance of

³² Constitutional Court nrs. 108/2018 and 114/2021.

different categories on the same website is prohibited since the judgments of the Constitutional Court.

Nevertheless, the notified draft law aims to codify the jurisprudence of the Constitutional Court and close the legal void by explicitly providing that such “cumulation” of licences is prohibited.

However, the draft law goes further than that by additionally (i) prohibiting the “redirection” of players towards games belonging to a different licence category and (ii) requiring a strict separation between player account, with a prohibition on transferring money between accounts.

We understand that the prohibition on “redirection” also implies a ban on the currently widespread practice of linking a website offering one category of games to a website offering another category by way of a simple hyperlink between the two (i.e., without actively redirecting the player).

As regards the separation of player accounts, this will likely be counter-productive for the protection of players. Indeed, the strict separation of player accounts means that players wishing to play different types of games will have to make separate deposits in several accounts, which might induce them to spend more, not less.

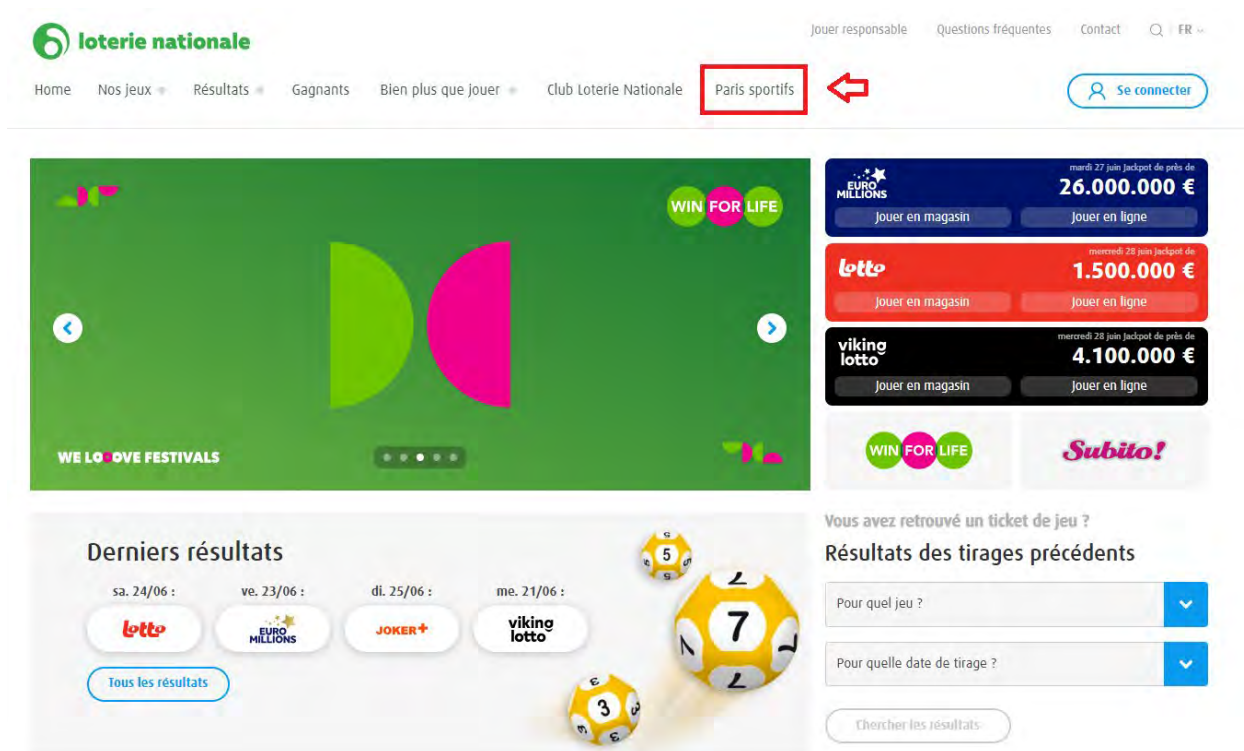
It should be noted that the license categories defined by the Gaming Act (A for casinos, B for gambling halls/arcades, and F1 for betting agencies, with the corresponding complementary licenses for games of chance and betting offered online distinguished by adding a “+” to the letter) are to some extent arbitrary. In particular, the distinction between games that can be offered under class A and B licenses is not always clear (notably, slot machines can also be operated in casinos), and that distinction is even more blurred with respect to these games in their digital form.

The relevance of a strict separation of websites and player accounts from the point of view of player protection is therefore far from obvious.

At the very least, less restrictive measures are available that would be equally suitable and effective to attain the objectives of the notified measure, such as e.g. a requirement to force users to log on again every time they pass from games of one class to another.

Point 9 of the note accompanying the notification incorrectly states that the prohibition of combining several licenses on the same website provided for in Article 4 will also apply to lotteries (“*jeux de loterie*”). In fact, the notified draft law modifies the law of 9 May 1999 on games of chance, which per its Article 3*bis* is not applicable to the public lotteries for which the National Lottery has a monopoly.

In practice, this means the National Lottery will still be able to cross-promote its sports betting offer on its website loterie-nationale.be / nationale-loterij.be, whereas private operators of games of chance will no longer be able to link between websites dedicated to games belonging to different classes (e.g. casino/betting).



This obviously confers an undue competitive advantage to the publicly owned National Lottery. Again, this difference in treatment is not objectively justified for the same reasons the difference in treatment regarding advertising is not justified, i.e. that the “lottery” products of the National Lottery are not by definition less “risky” than other games of chance.

4. Conclusion

It is clear from the above that the notified draft law:


- will create insurmountable barriers to entry into the Belgian market for games of chance and distort competition in the internal market;
- is clearly disproportionate to the stated objective of protecting consumers;
- 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;
- constitutes a measure contrary to the Treaties within the meaning of Article 106(1) TFEU;
- amounts to unlawful State aid to the National Lottery;

- infringes fundamental rights guaranteed by the EU Charter of Fundamental Rights, such as the freedom of (commercial) speech.

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,

DocuSigned by:

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Tom De Clercq

President

DocuSigned by:

64000D2386A843F...

Emmanuel Mewissen

Vice-President