

à la une

IP/ IT / Media Department

This newsletter presents an overview of the French online gaming and betting market (Internet and mobile Internet) legal framework, in the context of its potential opening.

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Special Issue: Online gaming and betting

The promising potential of France's opening of its online gaming and betting market is riddled with uncertainties concerning its exact scope, extent and limit.

- **A context of promising potential**

The 2006 Trucy Report estimated that the worldwide online gaming and betting market was worth 243 billion dollars in 2005 and would be worth 282 billion dollars in 2006. The mobile online gaming and betting market was valued at 1.16 billion dollars in 2005. In 2007, Gartner estimated it would be worth 4.5 billion dollars in 2008. The Trucy Report predicted that this market would be worth 6.3 billion dollars in 2011.

The "Française des Jeux" (FDJ) and the "Pari Mutuel Urbain" (PMU) hold 25% of the French Gaming and Betting market, while the remainder (75%) is held by unlawful Online Gaming sites.

According to the "Observatoire de la Cybercriminalité des Jeux à Distance" (French cyber criminality watch group), 8% of the games offered online in 2007 came from sports betting sites, 28% from online casinos, 25% from online lotteries and 39% from sites offering a variety of games.

- **A context of uncertainties pertaining to the extent and limits of the market's opening**

On June 3rd and 6th, 2008, the Finance Minister presented the broad lines of his plan to the European Commissioner, Charlie McCreevy, who reacted favorably to its measures but still awaits the draft bill scheduled to be submitted to Parliament in the fall of 2008.

Meanwhile, 2008 reports were building up: In February 2008, the Blessig/Myard Report suggested a controlled opening of the market, which would take into account the risk of increased player addiction. In March 2008, Mr. Bruno Durieux presented the Prime Minister with the report he had asked for, offering three possible solutions for the controlled opening of the online gaming market. On June 26th, 2008, Mr. Alain Bauer presented the Finance Minister with his report on "online gaming and criminality threat".

The following is a legal overview of the questions raised by the gaming sector in this dynamic landscape.

I. Current regulations and future liberalisation

The principle here is one of exclusive rights governed by laws which are sometimes very old. For example, the May 21st, 1836 lottery laws and the June 2nd, 1891 betting on horse racing laws were based on the principle of State monopoly. The January 5th, 1988 Chaban Law Amendment subordinates the authorisation to open a casino to strict requirements. In this overview, it is important to take into account the online gaming and betting distinctions between those of casinos, horse racing and sports.

- **Online gaming and betting**

The aforementioned games essentially comprise of lotteries and promotional competitions. Both are subject to a monopoly held by the FDJ, which prohibits other operators from organising lotteries. Four

combined criteria define a lottery (law No. 1836-05 of May 21st, 1836; Code "Consommation" Art. L.121-36): the marketing of the offer, the necessity to make a financial sacrifice, gain expectation and chance intervention.

The "financial sacrifice" and "expectation of gain" criteria requirements are the most problematic. A game is considered lawful when there is no purchase obligation and no financial sacrifice for the person engaging in it. For example, case law considers a game lawful when the cost of sending in the entry form and obtaining game rules are refunded upon request.

Much has been written regarding the "absence of any financial element" criteria. Specifically, case law deems valid the principle of a lottery which is free, but for which the game organiser asks winners for a financial contribution to send out the prizes.

Sanctions for organising unlawful games of chance are defined in the July 12, 1983 Law on games of chance, subsequently strengthened by the March 5th, 2007 Law on delinquency prevention. The devices and machines used to commit offences can be confiscated and destroyed; marketing these games is also sanctioned and the criminal liability of involved legal entities can be incurred.

- **Casinos**

The rules governing the casino operation authorisation come as an exception to the prohibition principle set by the July 12th, 1983 Law. This exception is based on a temporarily regulated authorisation granted by a decree from the Ministry of the Interior to casinos which offer three types of activities: entertainment, gaming and high-end restaurant services (December 23rd, 1959 Decree).

- **Horse racing**

The PMU holds exclusive horse racing rights, although its monopoly appears to have been challenged by the "Zeturf" Case Law. The draft bill, scheduled to be adopted in the fall of 2008, could ultimately allow for a mutual, no fixed-odds betting system (punters betting against each other).

- **Sports betting**

According to the May 31st, 1933 Law, sports betting is covered by a State monopoly held by the FDJ. The draft bill would open up sports betting to competition, provided that bets be placed on real event and sporting results, organised in a mutual betting system. Conversely, bets on "disconnected events" not related to the sport (first player sanctioned by the referee, first goal, etc.) or non-sport events such as bets on political election winners, should in all likelihood continue to be unlawful.

The stakes involved in opening the market to competition are mostly fiscal and pertain to how much the State will levy both placed bets and gross game proceeds (in other words, sums received by the organisation after deducting the winnings paid out to players). To date, the State levies on average 9.4% on bets (the rate applied by the FDJ is significantly higher at 28%, while the casino rate is of 4%).

A challenged monopoly

On October 18th, 2006, France received a first formal notification from the European Commission. Then, on June 27th, 2007, the European Commission sent France a detailed notice relating to sports betting. France is not the only European country under scrutiny, since nine others (including Denmark, the Netherlands, Finland, Hungary, Italy and Sweden) were also subject to infringement procedures. France displayed willingness to take action and has committed to reforming its monopolies.

The Community's position was reaffirmed, particularly after the Gambelli (ECJ, November 6th, 2003) and Placanica (ECJ March 6th, 2007) judgment Cases. An analysis of these decisions reveals French Law as being out of step with Community rules. In fact, the Court of Justice considers national restrictions on the freedom to organise games of chance justifiable only if imperative reasons of general interest exist, contrarily to the Italian laws in question, since in the process of being overhauled.

France's being the subject to an infringement procedure stemmed from existing monopolies and the non-ability of operators established abroad to offer their services on French territory. The February 2008 Attali Report has since become France's first official recognition of its determination to liberalise its online gaming and betting market.

The Durieux Report

The report, presented by Mr. Bruno Durieux to the Prime Minister in March 2008, offers three solutions for the gradual opening of the online gaming and betting market, namely:

The opening to competition of sports and horse race betting only. The FDJ's activities and remote casinos would continue to be governed by current rules. Only bets on real sporting events and mutual betting (sports and horse racing) would be authorised. This could be achieved in either of two ways: the PMU would retain its exclusive management rights but grant licences to interested operators, or it would approve of games operators being authorised to distribute them.

A broader opening to competition, integrating online gambling clubs, but excluding lotteries and gaming machines. In this scenario, a legal services offer including online Poker could be offered. It would focus strictly on player against player games (More specifically Baccarat and Poker), and not player against the house games (blackjack and roulette) or gaming machines. This solution would provide a broad opening while protecting public order, particularly through the prevention of money-laundering and fraud.

The opening of all sectors to competition, lotteries, but including virtual gaming machines. The FDJ would retain exclusive rights to real-life casinos and lotteries. This proposal is subject to criticism by observers because it constitutes high-risk in terms of public area gaming machine winnings redistribution, money-laundering and legalisation.

The report also suggests new regulatory methods:

A **regulatory authority**, which would monitor regulations, define required conditions, grant operator approvals and monitor them. This authority would have jurisdiction over both remote and real-life games. A Regulatory Commission already exists (the Higher Gaming Commission) but it reports to several Ministries and hasn't instauraed a seamless procedure.

A **national licence** system, which would define the required conditions for potential operators. The Durieux Report recommends a French-French licensing system, thus excluding reciprocal recognition of validly obtained licences from other Member State operators. This system would provide varying guarantees depending on game-type. For sporting events, actual events existence guarantees may need to be provided. These guarantees could be implemented in the form of good practice charters (prohibition of playing on credit) and a manner in which to exclude players. One recommendation is that no player be allowed to create several accounts for himself. On the other hand, it isn't known whether this license would be granted with or without restrictions to a fixed or unlimited number of operators. - The operator would have to be fiscally and physically established in France, which reveals the intention to control servers.

Setting up **centralised electronic solutions**, such as a transaction recording regulatory platform, or a portal between players and game operators. These technical solutions are however complex, costly to set up, and would require participating operators to upgrade their systems.

The game operator's revenues

Taxation base, taxation rate and tax rules governing online gaming and betting also require revision. Regarding the taxation base issue, some people want bets to be taxed, while others want game proceeds taxed. In his report, Mr. Bruno Durieux recommends that bets be taxed, except for player against player games.

For the time being, no one knows whether real-life and online games will be taxed at the same rate. Rates will probably be fixed, on the basis of current practice, at 12% for sports and horse race betting, and at 29% for lottery betting. For player against player games, a 58% rate is applied to all bets, from which redistributed winnings are deducted (at 29% for scratch cards bets, and at 4-6% for gaming machines).

Towards a liberalisation in the fall of 2008

Current laws contain a broad range of rules aimed at preventing illegal online gaming and betting offers.

The Finance Minister introduced the broad lines of his reform proposal during the Minister's Council meeting held on June 11th, 2008. The proposal is scheduled to be voted on in the fall of 2008. Among the three solutions put forth in the Durieux Report, the proposal opts for the second, thereby opening up for competition player against player games (poker, blackjack, roulette), sports betting on real sports events, and fixed-odds bets. Current restrictions on lotteries and gaming machines would be maintained.

The PMU would no longer hold exclusive rights to horse racing, and only mutual bets would be authorised.

A regulatory authority should be created to define the required conditions for operators and issue their approvals. Approvals would be granted to operators with a minimum of 7 years of operating experience in the field, for periods of 3 to 5 years depending on game-type, and would be renewable. An invitation to tender should be issued in January 2009 and the first licences should be granted in the second half of that year. It isn't yet known whether online gaming and betting advertising will be authorised, and, if so, if it will be subject to Evin Law-like rules. Meanwhile, the Minister has asked for compliance with both the word of Law and French Case Law pertaining to this issue.

Note that since the draft bill is devoid of territorial restriction, any company established in the European Union could apply for approval to become an online gaming and betting operator.

The constraints associated with the online gaming and betting services development

Although France currently seems intent on opening the gaming and betting sector to competition, the March 5th, 2007 Law on delinquency prevention constitutes a weapon in the arsenal of a radically opposed movement.

This law strengthens enforcement measures against the Organisation of Unlawful Betting and Lotteries, with fine amounts increasing from EUR 30,000 to EUR 60,000.

This law also introduces the "advertising unauthorised gambling" offence, sanctioned by a fine of EUR 30,000, which the judge can increase up to four times the amount of the advertising cost.

The March 5th, 2007 Law also contains provisions which allow the government to prohibit any movement or transfer of funds from organisers of unlawful games, betting or lotteries. The administrative Judge alone has jurisdiction to hear any appeal.

Finally, the March 5th, 2007 law sets obligations for internet service providers and hosting providers. These are now obligated to set up an easily accessible and visible system to alert their subscribers of online gaming and betting sites deemed unlawful by relevant authorities. They must also inform subscribers of the risks incurred in playing on such sites in breach of the Law. The failure to fulfil this obligation is sanctioned by a one-year imprisonment term and a fine of EUR 75,000. This point will be subject to an implementation decree.

Many sites currently advertise online games. Note that in light of the Gambelli case law, it could be argued that it is non-conform with EU Law to sanction the advertising of games of chance which have been authorised in other Member States.

The strategy of sports federations

The Paris TGI recently rendered decisions concerning the French Tennis Federation and the PSG football club (May 30th, 2008, FFT v/ Unibet and June 17th, 2008, PSG v/ Unibet). These decisions demonstrate that, apart from the prohibitions' regulatory aspects, issues related to intellectual property rights (trademarks, databases) and sports federations rights must be taken into account. The former two judgments were based on various grounds:

Infringement

Can the French Tennis Federation, owner of the "RG Roland Garros" trademark prevent the use of this trademark in betting services?

The Court disagreed. Unibet invoked Article L.713-6 of the Intellectual Property Code, which authorises the use of a trademark as "*the necessary reference to state the intended purpose of the product or service, specifically as an accessory, provided no confusion exists as to their origin*". The Court noted that use of the "RG Roland Garros" trademark was necessary to designate the sports tournament on which bets were to be placed, so its use did not qualify as infringement.

On June 17, 2008, the Court applied this same reasoning when considering the necessity of Unibet's use of the "PSG" trademark, held by the PSG football Club, to advertise matches and betting. The infringement case was dismissed.

It is worthy to note that these Article L.713-6 applications of the French code are unlikely to be validated upon appeal, or, if it comes to that, before the Supreme Court.

Unfair competition and "passing off" (usurpation of the work or reputation of another)

In the Unibet versus the French Tennis Federation case, the Federation considered that both its "RG Roland Garros" trademark and "Internationaux de France" name were used by Unibet for promotional purposes. It thus sued Unibet on the grounds of "passing off", claiming that this use misappropriated one of its intangible assets, and that Unibet had placed itself in its Federation's wake to benefit from the investments it had made to promote the tournament. The French Court adhered with this argument and ordered Unibet to pay the Federation a EUR 300,000 penalty.

It is noteworthy that, conversely, in the Unibet versus PSG Case, Unibet was not sanctioned for "passing off", because the Judges found that the absence of commercial competition between the parties ruled out any "passing off".

Sports law

The French Tennis Federation is a sports federation with a Sports Code status. It can therefore rely on Article L.333-1 of this Code, which states that sport federations in particular are the "*exploitation rights owners of the sporting events or competitions they organise*". The Federation used this article against Unibet, claiming that organising sports betting was a for-profit activity and therefore an exploitation of the competition it organised.

The Court considered that Article L.333-1, paragraph 1 of the French Sports Code authorised the Federation to receive all the proceeds of its efforts dedicated to organising the event and not just the proceeds of the audiovisual exploitation referred to in Article L.333-1, paragraph 2. The exploitation of a sports betting service is therefore in complete disregard of the exploitation monopoly which the federations hold under the law.

The Court rejected Unibet's argument that the said activity fell into the scope of FDJ's monopoly rather than of the Federation's, on grounds that "no one can rely on their own turpitude". It also observed that the Federation's exploitation monopoly isn't contrary to the freedom of commerce and industry, as Unibet failed to produce any evidence that this monopoly was an unjustified, inappropriate, disproportionate and discriminatory restriction in light of the principle of the freedom to provide services. In this Case, Unibet was ordered to pay the Federation EUR 200,000 in damages.

The Court's judgment is in line with the European Parliament's May 8th, 2008 Resolution, which asks the European Commission to present a proposal for the remuneration of federations and sporting event organisers in the context of sports betting.

The sports betting organisers must now approach various sports federations to acquire exploitation rights; collective agreements are a distinct possibility.

Database protection

The PMU sued Eturf (formerly called Zeturf) for breaching its rights as a database producer, on the grounds that Eturf was unlawfully extracting data from its www.pmu.fr website which displays its Infocentre PMU database and using the data for commercial purposes. Databases are in fact protected by the sui generis intellectual property right contained in Articles L.341-1 and fall into the Intellectual Property Code. Eturf (Zeturf) needed horse racing results to design and run an engaging interactive service and therefore argued that it needed to have access to this database. The database owner's right, however, allows for the prevention of the extraction and subsequent use of any part of its data, whether qualitative or quantitative.

The Paris TGI June 20, 2007 judgment found the PMU to be the rightful producer of the database, insofar as the organisation's meeting the criterion of substantial financial, material or human investment necessary to the database's creation.

In addition, the TGI found that Eturf's data extraction for subsequent use was qualitatively substantial, because essential to its activity. Eturf was therefore ordered to pay the PMU EUR 120,000 in damages.

The question of the protection of minors

On May 7th, 2007, two decrees pertaining to the organisation of lotteries and sports betting were adopted, thereby modifying the FDJ's prohibition to encourage minors under the age of 16 to play.

FDJ is now prohibited from selling lottery games to minors, even if they have been emancipated.

The question remains as to whether this sudden text modification, arising two months after the Gambelli judgment, aims to guarantee the defence of a "legitimate interest" to justify State monopoly. Note that the text also states that "with this provision, no person may be held liable for non-compliance, if such person has been misled as to the age of the minor(s) concerned".

The prohibition of games for minors principle is certainly be challenged in the future. The remaining question is whether the FDJ's liability exemption will also be granted to other players.

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