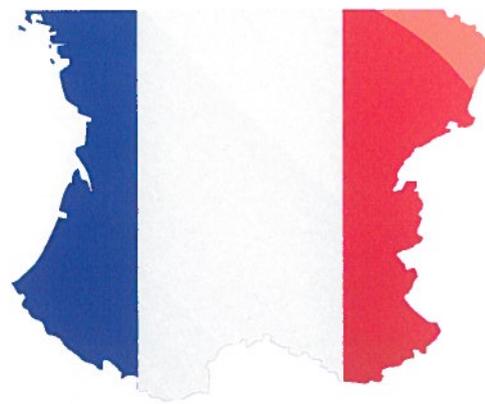


FRANCE



On May 12, 2010, France adopted new legislation to open the French online gaming market¹ (hereinafter, the Gambling Act). In fact, it would be inaccurate to say that it 'opened up' the online gaming market, for it merely regulated an existing market where French consumers used to play or place their wagers on websites outside of France, whether licensed in other EU Member States² or not. This situation – which from a public policy perspective was undesirable because of its negative social effects – was further compounded by the pressure Brussels placed on Paris to ease up its (then) existing monopoly legislation³. This backdrop paved the way for the passage of the Gambling Act.

The current legal landscape

Games of chance and lotteries are prohibited in France by laws dating back to 1836⁴, 1891⁵ and 1907⁶, as well as more recent ones adopted in 1983⁷ and 2007⁸. By way of special exception, Française des Jeux (FDJ) and PMU have been granted monopolies to operate lotteries and sportsbetting (retail and online) in the case of the former, and horse-race betting (retail and online) in the case of the latter. The Gambling Act carved out a further exception by allowing operators to obtain licences in three sectors: online sportsbetting, online horse-race⁹ betting and online poker. Since the enactment of the Gambling Act, FDJ and PMU have become market players in sectors formerly under their respective monopolies. FDJ has retained its monopoly over the lotteries (online and retail) and sportsbetting shops, whilst PMU has remained the monopoly operator in respect of horse-race betting shops.

Under the current legal landscape, online lotteries or games of chance that are offered on a free basis fall outside the scope of the prohibition, provided no costs are incurred by players participating in them. Online skill games are not covered by the Gambling Act. However, skill games are prohibited under the Act of May 21, 1836, provided that any element of chance is present, however small, and if the three following criteria for prohibited lotteries are present: an offer is made to the public; raising hope for making a profit as a result of playing the game; participation which involves some kind of disbursement or cost.

The regulatory framework

The Gambling Act aims to address the following public policy issues:

- preventing excessive or compulsive gambling and protecting minors;
- ensuring the integrity, reliability and transparency of gambling operations;
- preventing fraud or crime, as well as money laundering and financing of terrorism;
- ensuring a balanced and equitable development of the various types of games, avoiding destabilising the business of the sectors concerned¹⁰.

It created the following general regulatory framework:

- ARJEL was created with strong regulatory functions, including issuing operating licences, promoting the Gambling Act's public policy objectives, fighting illegal websites, ensuring the compliance of licensed operators with their licensing objectives, and generally taking regulatory action.

- Licences are issued for five years (and renewable) to operators who comply with strict specifications.
- Non EU/EEA-based operators are barred from requesting a licence.
- Licensed operators have to set up a real-time recorder ('frontal') of transactions taking place with players which must be situated in France.
- Operating a gambling website accessible in France without a licence is a criminal offence. So is the advertisement thereof.
- Licensed operators are subject to an annual certification process conducted by an independent company listed by ARJEL, covering legal, financial and technical compliance issues.
- Regarding compulsive gaming, licensed operators have to set mandatory mechanisms (such as self-exclusion, moderators, preventive alerts, etc), as well as advise addicted players about their gaming activity.
- International liquidity is not allowed with respect to online poker.
- Only pool betting (pari-mutuel) is allowed with respect to horse-race betting.
- Taxes are levied on stakes.
- A maximum pay-back ratio of 85 percent has been imposed on licensed operators.

Sports-related provisions contained in the Gambling Act

When the bill containing the Gambling Act was being debated, sports governing bodies (SGBs) voiced concerns about the risk of match-fixing in relation to sportsbetting. It has often been said that match-fixing in relation to sportsbetting is a risk akin to doping. Moreover, the cross-border nature of the Internet means that punters now have a far-reaching interest in sporting events around the world, thereby multiplying and exacerbating any existing risk. The Gambling Act has therefore inserted special regulatory features relative to sportsbetting, as amended by the Act of February 1, 2012¹¹:

¹ Act No. 2010-476 of 12th May, 2010 relative to the opening of the online gambling industry to competition and deregulation.

² 75% of all gambling occurred on websites outside of France.

³ France received a letter of formal notice, followed by a reasoned opinion from the Commission requesting it to amend its gambling legislation to make it compatible with EU law.

⁴ Act of 21st May, 1836 prohibiting lotteries.

⁵ Act of 2nd June, 1891 purporting to regulate the authorisation and the functioning of horse races.

⁶ Act of 15th January, 1907 on castros.

⁷ Act No. 83-628 of 12th July, 1983 relative to games of chance.

⁸ Act No. 2007-297 of 5th March, 2007 on the prevention of delinquency.

- Pool-betting, fixed-odds and live betting are authorised. Exchange betting and spread betting are prohibited.
- ARJEL was given special powers to decide, upon advice from SGBs and in light of criteria set out in secondary decrees, which competitions and types of outcomes were fit-for-betting.
- SGBs are under a legal obligation to enact rules in order to prohibit “actors (participants) of sport competitions” from doing any of the following: (1) provide sportsbetting forecasting consultancy if they are under contract with a licensed sportsbetting operator or if the consultancy is provided as part of a programme sponsored by such an operator; (2) hold shares in any licensed sportsbetting operator that has a betting offering in the relevant sport; (3) wager, directly or through a third party, on the competition in which they are participants and provide privileged information, unknown to the public, obtained in the course of their work¹².
- Any licensed operator holding controlling shares, directly or indirectly, in any competition, or in any club partaking therein, cannot offer bets in relation to that competition. Similarly, a licensed operator cannot offer bets on any given competition if they are controlled by that competition’s organiser.
- Licensed operators are required to obtain a betting right from sports organisers for events taking place in France. The betting right will be granted to all licensed operators who comply with the organiser’s specifications and pay a fee to cover costs incurred by the sports organisers in setting up procedures and controls to respond to the challenges of corruption and match-fixing. This framework, based on contractual agreements between operators and competition organisers, makes it possible for sports organisers to manage the risk levels of the betting that takes place on their events.
- With a view to undertaking disciplinary proceedings against any “actor of a sport

competition” having wagered in breach of sports rules, SGBs have the right to file requests with ARJEL for the transmission of relevant personal data related to gaming operations recorded by licensed operators¹³.

- Two new criminal offences have been introduced in the criminal code in relation to the manipulation of sports results. The first deals with the bribing of athletes. Hence, it is now a criminal offence, under penalty of imprisonment for five years and a fine of €75,000, to promise or offer to give gifts or advantages, directly or indirectly, to a participant of a competition with a view to have him alter, through his conduct, by act or omission, the normal and equitable course of a competition on which bets are proposed. The second offence is the corollary of the first offence: it purports to criminalise the conduct of participants of a sport competition who accept a bribe, i.e. who accept gifts or advantages whatsoever, for himself or a third-party, with a view to alter, through his conduct, by act or omission, the normal and equitable course of a competition on which bets are proposed. This conduct is also punishable with imprisonment for five years and a fine of €75,000¹⁴.

The aforementioned provisions, insofar as they were enacted by the Act of February 1, 2012, are borne out of the Vilotte Report. Jean-François Vilotte, Chairman of ARJEL, submitted a report to the French sports Minister on March, 17, 2011 entitled, “Maintaining the integrity and honesty of sporting competitions in the face of expanding online sports betting”. In this report, he assessed the situation regarding the threat of corruption in sport in relation to sportsbetting and drew two conclusions. Firstly, that there is no satisfactory system to effectively understand and assess the risks at hand in France. Secondly, that there are serious concerns in respect of the integrity of sporting competitions that require immediate action. He then made ten proposals, three of which were enacted in the Act of February 1, 2012.

Future forecast

The prospective question which needs to be addressed is whether the French legal framework is likely to be modified to be compliant with imperative regulations. In this regard, it must be noted that several complaints have been filed with the European Commission (DG MARKT) against the Gambling Act and its secondary decrees. These complaints, which were lodged by individual gaming operators and by the EGBA are based on potential violation of EU freedoms, notably the freedom to provide services. Among the constraints and restrictions which seem to have been targeted by the complainants are *inter alia*: (i) the limited statutory opening of the gaming sector, which does not concern betting shops, casino games (except for poker) or fixed-odds betting on horse-races; (ii) the maximum payback ratio imposed on licensed operators, potentially resulting in limiting their commercial attractiveness; (iii) the tax regime, which is based on stakes rather than GGR; (iv) the betting right in favour of sports organisers and, lastly (v) the technical requirements and specifications with which licensed operators must comply in order to obtain and maintain their licence.

Beyond the question of the consistency and proportionality of standards against which national restrictive measures must be assessed in light of consistent ECJ case-law, what is at stake here is the willingness of the European Commission to initiate infringement proceedings against France. The challenge for complainants is to convince the Commission that the changes that have been brought upon the French gaming system, once considered as one of the most stringent systems in the EU, are insufficient. To date, the Commission has not taken action but it cannot be discounted that this lack of activity stems from the Commission’s perception that the issues raised will be more efficiently addressed through Antitrust law.

The French Competition Authority (FCA) provided the initial impetus in this regard by releasing an Opinion on January 20, 2011 on the online gaming sector. It is the first time ever in Europe that a competition authority

⁹ Note that, in France, horse racing is not considered a sport. It falls under the aegis of the Ministry of Agriculture.

¹⁰ Gambling Act, Art. 3.

¹¹ Act No. 2012-58 of 1st February, 2012 aiming at reinforcing ethics in sport and athletes’ rights.

¹² Art. L131-16 of the sport code, as enacted by the Act of 1st February, 2012.

¹³ Art. L131-16-1 of the sport code, as enacted by the Act of 1st February, 2012.

¹⁴ Art. 445-1-1 and Art. 445-2-1 of the criminal code, as enacted by the Act of 1st February, 2012.

has made a global assessment of this kind. The FCA first provided a series of operational indications towards delineating narrow, relevant markets. It went on addressing specific issues and concerns such as the cross-exploitation of customer bases and brands' mutual use by the French incumbents Française des Jeux and PMU, as well as cross-subsidies and the pooling of PMU stakes. As is usually the case, the recommendations and concerns put forward by the FCA through its consultative opinion are practical enough to lead to regulatory changes. Assuming that these would not take place in the absence of political will, one would expect litigation to take the lead, which could give rise to either fines or commitments adopted by operators to restore sound market conditions. It seems that the latter scenario will prevail, as complaints were reported to have been filed against the practices and the particular situation enjoyed by PMU in the horse-race betting sector (and outside of it). However, time is of the essence, as the space for new entrants to manoeuvre is narrow in light of their shrinking activities, thus leaving them with little hope of being profitable anytime soon if the incumbent monopoly is not forced to cooperate in any way, shape or form.

On the Antitrust front, another interesting issue relates to state aid regulations. On November 17, 2010, the European Commission notified France of its decision to initiate the procedure laid down in Article 108(2) TFEU, in respect of a para-fiscal levy on online horse-race betting, the purpose of which was to finance horse racing companies which are members of PMU. As it was not convinced by the explanation submitted by the French government on the rationale of such a levy, the Commission invited interested parties to submit their comments in January 2011 (proceedings C 34/10 [ex N 140/10]). In a nutshell, the Commission clearly held that the levy in question was unjustified since, notably, horse racing companies are not vested with any mission of general economic interest under Article 106(2) TFEU. Facing the first objections raised by the Commission, the

French authorities decided, rather hastily, to set up a transitional system, applicable as of August 2010, whereby the eight percent levy would constitute a tax for the state; no longer benefiting the horse racing companies. The procedure opened by the European Commission is still pending, which suggests that discussions and negotiations have been taking place between the French state and the Commission in order to try to find the most suitable solution. There is little doubt this process has also been slowed by the political changes that have taken place in France this year; however, since the Commission is bound to proceed within compulsory timeframes, one may expect that a decision will be issued shortly. The impact of this decision will be significant and may lead to further challenges against the financing of the incumbent French gaming duopoly.

Two years after the 'opening' of the online gambling market, the amount of stakes wagered on licensed websites outweigh the estimated amount that had been wagered on illegal sites prior to May 12, 2010. At the end of 2011, the 'licensed' stakes wagered amounted to €592 million for sportsbetting, €1,034 million for horse-race betting, and €7593 million (cash games) and €1,159 million (tournaments) for poker. However, the number of licence annulments has been very high, thereby hinting that the French market might not be so sustainable in light of the restrictive regulation and high taxes. Arguably, the complaints lodged with the Commission, as discussed earlier, may prove that operating an online gaming business in France is a genuine challenge from an economic viewpoint, which may also explain why several operators have withdrawn in recent months. However, the market is naturally undergoing a level of concentration. There were many entities who obtained a licence in 2010, including a large number of small companies who had to jockey for position, incurring substantial marketing costs which proved disastrous for those who failed to convert players. Today, 36 licences are still active: poker (18), sportsbetting (10) and horse-race betting (8).

Even so, as Jean-François Vilotte so aptly pointed out¹⁵, the regulation needs to be constantly adjusting and, therefore, the Gambling Act and its secondary legislation require amendments. In this regard, ARJEL made fifty proposals to the French government with a view to improving regulation. The French government will probably issue statutory instruments from time to time in order to adopt certain proposals made by ARJEL. The Gambling Act may also be amended, but not in the near future, which means that issues such as changing the taxation from a stake tax to a GGR tax (so important to licensed operators) will not be addressed in 2013. Some fear that this will compel more licence annulments with a concurrent slide towards an unregulated market¹⁶. However, ARJEL has been very aggressive in combating the black market; its presence in France having nearly completely disappeared.

To all intents and purposes, whether pressured by Antitrust or EU law, the profound changes that have taken place in the French gaming system in 2010 will not be the end of the story.

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¹⁵ 2011 ARJEL Activity Report, p. 3.
¹⁶ Online Gambling Report, Volume 11, 9 September 2012, p.2.

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