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The shortcomings of France's Digital Republic Bill in relation to online gambling



France's Bill for a Digital Republic includes developments relating to online gambling, including in regard to the sharing of poker liquidity and to the legal environment relating to eSports. Rhadamès Killy and Jean-François Vilotte of De Gaulle Fleurance & Associés discuss these developments relating to gambling within the Digital Republic Bill and share their criticisms in regards to the limited potential success to be gained from sharing liquidity and the stance being taken towards eSports, which they believe to be inconsistent with France's gambling laws.

The French Bill for a Digital Republic was passed on 7 October 2016 ('Digital Act'¹) and aims to regulate the digital sphere. The Digital Act sets out three objectives: wider data and knowledge dissemination, equal rights for internet users, and social cohesion through an inclusive digital society². More specifically, it addresses *inter alia* net neutrality, data portability, confidentiality, openness of public data, internet accessibility, and digital erasure³.

In this context, the Digital Act proposes key amendments to the Law of 12 May 2010⁴ ('Gambling Act') with a view to permit the sharing of poker liquidity, which has been called for by the French gambling regulator ARJEL and poker operators for the last five years. It is hoped that such a measure will help contain the slumping online poker market in France. The reasoning for this is twofold: 1) the French market has become more mature and the players have greatly improved, with the result being

that they now seek to join international tables to deal in more money and feed off a greater number of average players; and 2) the failure to adjust the regulatory environment would naturally induce players to play on illegal poker websites to the detriment of licensed operators. With this backdrop in mind, Article 95 of the Digital Act supplements Article 14 of the Gambling Act, and provides that ARJEL⁵ may authorise a licensed operator to offer any registered player the right to participate in circle games (i.e. poker) with players registered with operators licensed in other EU/EEA⁶ Member States. Such authorisation is subject to the conclusion of an agreement between ARJEL and the relevant EU/EEA regulators setting out the regulatory conditions for online poker and the obligations to be imposed on operators for the sharing of liquidity. More specifically, such agreements must provide for the conditions under which ARJEL and its EU/EEA counterparts

exchange information necessary to carry out their regulatory duties.

Although these provisions are to be welcomed as a matter of principle, in practice they may have very little impact on the French online poker market, for the following reasons:

1. There are only a small variety of online poker games currently authorised in France, which include Texas Hold'em Poker, Omaha Poker, Seven Card Stud, and Poker Triple (Deuce to Seven). Under the existing regulatory framework, French players will not be permitted to join international tables where poker games other than those permitted in France are played. This will stymie the attractiveness of the liquidity sharing.
2. The number of EU/EEA Member States that have regulated gambling and enacted legislation regarding liquidity

1. Loi pour une République numérique n° 2016-1321 du 7 Octobre 2016.
2. See <http://www.republique-numerique.fr/pages/in-english>
3. See <http://www.gouvernement.fr/en/the-digital-bill>
4. LOI n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne.
5. Autorité de Régulation des Jeux en Ligne: Online Gaming Regulatory Authority.
6. European Economic Area.
7. Loi n°2014-344 du 17 mars 2014. The specific gambling provisions were codified under Articles L. 322-1 and seq of the Home Security Code.
8. Article L. 321-8 of the Digital Act.
9. Codified under Article L.
10. To be inserted under Article L. 321-9 of the Home Security Code.
11. La régulation des jeux d'argent et de hasard, Enquête demandée par le Comité d'évaluation et de contrôle des politiques publiques de l'Assemblée nationale, Cour des comptes, Octobre 2016.
12. Called CDD d'usage.

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similar to that in France is scarce.

Hence, ARJEL has a limited number of regulators that it can sign cooperation agreements with pursuant to Article 95 of the Digital Act, thus narrowing the international scope sought after.

3. ARJEL will impose technical norms on operators to control the sharing of liquidity. Given the heaviness of the current technical norms, one might fear that such new norms could end up being excessive and expensive for operators. Although it took a long time for the French Government to enact legislation on the sharing of poker liquidity, it was a lot swifter in addressing eSports. The Digital Act creates a new regime for video game competitions which is derogatory to the general gambling prohibition stemming from Loi Hamon⁷ and is outside the purview of ARJEL.

Under this regime, a video game competition is defined as bringing 'at least two players or teams of players from a video game face to face to score or win.' Video games are in turn defined as 'any entertainment software made available to the public on a physical medium or online and incorporating artistic and technological design elements, offering one or more users a series of interactions based on a story-frame or simulated situations that are translated into moving images with or without sound⁸.' Moreover, the organisation of video game competitions expressly excludes betting.

1. On that basis, the Digital Act provides for the right to organise video game competitions involving the physical presence of players, subject to the following conditions:

- The total amount of registration fees or costs incurred by players must not exceed a fraction - the rate of which is to be set by secondary legislation

- of the total cost for organising the competition, unless the organisers of the competition guarantee the pay back of all winnings or prizes to players.

By way of explanation, under Loi Hamon, there exists a general gambling prohibition⁹ (with the exception of regulated gambling, gambling operated by state monopolies, and casinos) pursuant to which gambling is defined as any game: (i) proposed to the public, (ii) which raises the hope of making a profit, and (iii) involves disbursement or costs for players. Article 101 of the Digital Act¹⁰ excludes video game competitions involving the physical presence of players from the scope of the above prohibition (i.e. Articles L. 322-1, L. 322-2 and L. 322-2-1 of the Home Security Code), and, in that context, makes allowances for some level of disbursement or costs incurable by players as well as repayment to them, if such costs or disbursements are above the statutory limit (to be set by decree). This is a new concept; its implementation appears complicated.

- The organisers of video game competitions must inform the administrative authority of the staging of such competitions.

This is an exception to the existing regulatory framework, as no licence is required. Moreover, an administrative authority (which is not named, but will not be ARJEL) will be in charge of compliance. From a regulatory standpoint, it is hard to fathom why this new set up was created, especially because it runs contrary to the position held by the French State Accountability Court, which favours one regulator for both online and offline gambling¹¹.

- The participation of minors in video game competitions may be authorised under conditions set by decree. The participation is conditional

on the authorisation of the legal representative of the minor.

This goes against one of the major regulatory principles in the Gambling Act, whereby minors are never permitted to gamble. This approach is again hard to fathom from a regulatory perspective.

2. The Digital Act also provides for the right to organise online video game competitions, provided that they do not fall within the definition of gambling under Article L. 322-2 of the Home Security Code. In that context, only free online video game competitions would seem to be permitted. However, Article L. 321-11 of the Digital Act broadens the scope by making the following exception: for online video game competitions and their qualifying rounds, the internet access fees and costs incurred for the purchase of the video game do not constitute a financial offering within the meaning of Article L. 322-2 of the Home Security Code. This is again an exception to the existing framework.

3. Moreover, the Digital Act creates a new customary fixed-term employment contract¹² for video game competition players which is an exception to common law, and is similar to customary fixed-term employment contracts in sport. Although it is right to create a propitious legal environment for video game competitions, the Digital Act juggles with novel concepts that are inconsistent with the framework applicable to all other money games, which are subject to regulation (Gambling Act) or prohibition (Loi Hamon). It would have made more sense to subject video game competitions (as well as fantasy games and other skill games, for that matter!) to regulation within an adapted framework, in line with existing principles.