
BELGIUM TIGHTENS LEGISLATION ON ONLINE GAMBLING ADVERTISING: FOR BETTER OR FOR WORSE?

1. In Belgium, the online gambling sector has experienced significant growth over the last few years, despite the restrictive policy put in place by the authorities.

According to some commentators, this growth can to a large extent be explained by the intensive marketing campaigns that have been conducted by gambling operators, in particular bonus/promotions systems and loyalty programmes. According to some sources, the private gambling sector has doubled its marketing and advertising spend in recent years¹.

Following the political will expressed by Minister for Justice Koen Geens to combat invasive and aggressive advertising in the gambling sector, the Belgian government adopted on 25 October 2018 a new Royal Decree enacting long-discussed restrictions on online gambling advertising.

After a brief historical recap of the situation, this article analyses the new restrictions imposed by this Royal Decree.

I. Brief historical recap

2. When the Belgian Gambling Act (hereinafter “the BGA”) was originally adopted on 7 May 1999, it did not contain any specific provisions relating to gambling advertising, subject to two exceptions.

Firstly, Article 61 of the BGA empowered the executive to adopt implementing measures regarding the drafting of an ethical Code aimed at informing the public about the risks inherent in gambling. This provision is still in force but, despite several initiatives, this ethical Code has not been formally adopted so far by the executive.

Secondly, Article 64 of the BGA provided for criminal sanctions in the case of advertising for illegal gambling. This prohibition of advertising for illegal gambling is now contained in Article 4, § 2 of the current version of the BGA² and is still subject to criminal sanctions by virtue of Article 64 of the BGA³.

¹ See, among others, <https://www.jeu-argent.be/article-succes-des-jeux-d-argent-en-ligne-inquiete-la-population-belge.html>; https://www.rtf.be/info/societe/detail_la-proliferation-des-jeux-de-hazard-en-ligne-inquiete-les-belges?id=9701594; <https://www.7sur7.be/7s7/fr/1502/Belgique/article/detail/3252709/2017/09/06/La-popularite-des-jeux-de-hazard-inquiete-les-Belges.dhtml>.

² It is worth noting that, pursuant to Article 4 § 2, of the BGA, advertising for illegal gambling constitutes a criminal offence only if the person was aware that the games in question were illegal (prohibited games or unlicensed games). In most cases, such awareness requirement will however be met given that the relevant information in this respect is publicly available, especially with regard to online gambling for which the Gaming Commission publishes at regular intervals a black list of illegal gambling websites.

³ Article 64 of the BGA provides for the following criminal penalties in case of advertising for illegal gambling: (1) imprisonment for a period of between 1 month and 3 years, and/or (2) a fine of between 208 € and 200,000 €. Article 65 of the BGA provides that these sanctions may be doubled in two circumstances: in the event of a repetition of the offence within 5 years following a conviction; or where the offence has been committed against a person under 18 years of age.

3. In the meantime, the regulatory landscape has however evolved due to the emergence and growth of online gambling.

Hence, in 2010, at the time the regulation of online gambling was originally introduced and promulgated, the Belgian legislator decided that advertising for online gambling should be regulated by law, through the adoption of executive implementing measures⁴.

However, Rome was not built in a day.

4. A first step was accomplished in 2011 with the adoption of the Royal Decree of 21 June 2011 on the quality requirements to be met by an applicant for an online gambling licence, which established two rules regarding advertising: (1) the operator must clearly explain the advertising strategy that it will implement and demonstrate that some form of restraint will be exercised⁵; (2) the operator must ensure that a representative is available to be contacted by the Gaming Commission for each advertising campaign and that such representative has the authority to discontinue any advertising campaign upon the Gaming Commission's simple request⁶.
5. A second step was accomplished in 2015 when the Minister for Justice Koen Geens asked the Gaming Commission, together with the Jury for Ethical Practices in Advertising, to establish a more effective framework for better control of online gambling advertising⁷. Thus, in the course of 2016, consultations and working groups were held by the Gaming Commission with the different sector stakeholders, with the aim of agreeing on a self-regulatory Code, the so-called "Covenant for ethical and responsible advertising for and marketing of gambling". These discussions however collapsed and no consensus was ever reached.
6. Against this backdrop, the Minister for Justice therefore suggested to regulate by law online gambling advertising, through the adoption of a compulsory Royal Decree. In a press report dated 29 June 2016⁸, the Minister's spokesperson indicated that the draft text of such Royal Decree had already been prepared.
7. In reaction to this, on 20 October 2016, the six main gambling operators active on the Belgian market, united under the trade association BAGO⁹ (which represents about 70% of the market) adopted their own ethical advertising Code which contains some 30 guidelines¹⁰.

On 14 February 2017, BAGO adopted an additional Charter under which any advertising made by the signatory operators must feature an awareness message on the risks inherent in gambling¹¹. To this end, BAGO notably developed a uniform pictogram bearing the minimum age to play, a reference to the prevention website playsafe.be, as well as the prevention slogan "Play responsibly" ("Jouez responsable"/"Speel verantwoord").

⁴ See Article 43/8, § 2, 1°, e), of the Belgian Gambling Act of 7 May 1999 (hereinafter "the BGA").

⁵ Article 8 of the Royal Decree of 21 June 2011.

⁶ Article 9 of the Royal Decree of 21 June 2011.

⁷ For more details in this respect, see the Gaming Commission's 2016 Annual Report, pp. 15-16

(https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/GC-Annual-Report-2016_ENG.pdf).

⁸ <https://www.7sur7.be/7s7fr/1536/Economie/article/detail/2777134/2016/06/29/Koen-Geens-veut-mettre-fin-aux-publicites-agressives-pour-les-paris-sportifs.dhtml>; see also <https://www.koengeens.be/fr/news/2016/06/29/koen-geens-veut-mettre-fin-aux-publicites-agressives-pour-les-paris-sportifs>.

⁹ Belgian Association of Gaming Operators (<http://bago.be/>). At its creation, BAGO was composed as follows: Napoleon Games, Golden Palace, Ladbrokes, Ardent Group, Unibet and Betfirst. However, in March 2018, Ladbrokes left BAGO due to divergences of opinions.

¹⁰ The text of BAGO's ethical advertising Code is available in French (http://bago.be/wp-content/uploads/2016/12/161018_Convention_FR.pdf) and in Dutch (http://bago.be/wp-content/uploads/2016/12/161018_Convenant_NL.pdf).

¹¹ The text of BAGO's additional Charter is available in French (<http://bago.be/wp-content/uploads/2017/02/Charte-Application-de-la-convention-pour-une-publicite-et-un-marketing....pdf>) and in Dutch (<http://bago.be/wp-content/uploads/2017/02/Charter-Toepassing-van-het-convenant-voor-etische-en-verantwoorde-recl....pdf>).

8. The self-regulatory initiative taken by BAGO did not however make the policy makers refrain from pursuing the adoption of an implementing Royal Decree, which would be legally binding upon the whole gambling sector.

Thus, on 13 October 2017, the Council of Ministers approved the draft Royal Decree on online gambling advertising as submitted by the Ministry for Justice.

In accordance with Directive (EU) 2015/1535 (“Technical Standards and Regulations Directive”), this draft Royal Decree was then notified to the European Commission on 17 October 2017¹². No detailed opinions were delivered by the European Commission or other Member States during the three months’ standstill period, which thus ended on 18 January 2018.

The Commission for the protection of privacy (now the Data Protection Authority) and the Council of State issued their opinions on the draft Royal Decree, respectively on 2 May 2018¹³ and 17 July 2018¹⁴.

The Council of Ministers then approved at second reading the draft Royal Decree on 12 October 2018.

The Royal Decree was finally promulgated on 25 October 2018 and published in the Belgian Gazette on 31 October 2018¹⁵. Subject to a few exceptions, the new rules imposed by the Royal Decree are scheduled to enter into force on 1 June 2019 (see para 15 below).

II. The new rules imposed by the Royal Decree of 25 October 2018

9. The new rules imposed by the Royal Decree of 25 October 2018 (hereinafter “the Royal Decree”) can be classified into three main categories: (1) advertising restrictions, (2) gaming limits and protection of players, and (3) bonus restrictions.

1) Advertising restrictions

10. **Addressees of the new obligations.** Before examining the content of the new rules imposed by the Royal Decree, the question arises as to who are the addressees of the obligations deriving therefrom.

The provisions of the Royal Decree regulate advertising for the games offered by online casino games operators (A+ licence), online arcade games operators (B+ licence) and online betting operators (F1+ licence).

From a textual perspective, most of the provisions of the Royal Decree are formulated in an impersonal manner, i.e. they impose restrictions on advertisements for online gambling (in terms of medium used, content and time slots) without specifically determining the addressees of the obligations deriving therefrom.

Based on such textual argument, one might argue that the new obligations laid down in the Royal Decree are incumbent not only upon the online gambling operators but also, respectively, upon all the parties involved in the advertising supply chain (such as the designers, producers and diffusors/broadcasters of the advertisements).

Despite the merits of this argument, such position does not appear to reflect the intent of the Belgian Government, as expressed in the impact analysis annexed to the draft measure which was notified to

¹² Notification number 2017/489/B, <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=489>.

¹³ Commission for the protection of privacy, opinion nr 37/2018 of 2 May 2018, https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/avis_37_2018.pdf.

¹⁴ Council of State, opinion nr 63.662/VR/V of 17 July 2018, <http://www.raadvst-consetat.be/dbx/avis/63662.pdf#search=63.662%2FVR%2FV>.

¹⁵ The text of the Royal Decree of 25 October 2018 is available at the following addresses:

<http://www.ejustice.just.fgov.be/eli/arrete/2018/10/25/2018014587/moniteur> (in French) and

<http://www.ejustice.just.fgov.be/eli/besluit/2018/10/25/2018014587/staatsblad> (in Dutch).

the European Commission in accordance with Directive (EU) 2015/1535. Indeed, in this impact analysis, the representatives of the Ministry for Justice made it clear that the draft Royal Decree only imposes obligations/requirements on “holders of supplementary gambling licences” (A+, B+ and F+ licences holders) and no reference whatsoever was made in this context to the other economic actors that are involved in the advertising supply chain¹⁶.

These elements clearly suggest that the new obligations imposed by the Royal Decree are specifically and solely addressed to the online gambling operators.

This appears to be confirmed in Article 1, second paragraph, of the Royal Decree which provides that “holders of A+, B+ or F1+ licences are required to enforce compliance with the provisions contained in this Decree”¹⁷.

11. **Restrictions in terms of medium used.** The Royal Decree imposes several restrictions with respect to the type of medium that can be used to promote online gambling services. These restrictions vary depending on the type of games offered.

With regard to online casino games (A+ licence) and online arcade games (B+ licence), Article 1 of the Royal Decree provides that the promotion of such games will now only be allowed “on the website on which the operation of these games is authorised” or “through personalised advertising”. The Royal Decree specifies that no personalised advertising can be sent to prohibited or excluded players.

As regards the notion of “personalised advertising”, the Royal Decree refers to Books VI and XII of the Code of Economic Law (CEL). However, the relevant provisions of these Books which deal with direct marketing¹⁸ do not clearly define the notion of personalised advertising. Logic dictates that such notion should cover any advertising that is specifically addressed to one or many given consumers, notably by e-mail, phone call, fax, SMS or post, and which thus involves the processing of personal data (identity, address, phone/fax number, e-mail address).

According to some commentators, the intent of the Belgian Government would have been to limit the possibility of using personalised advertising only to the existing customers of online casino games/arcade games operators.

Although this limitation might have been effectively discussed during the process of preparation of the Royal Decree, such limitation is however not reflected in the wording of the Decree¹⁹ so that it cannot be excluded that the possibility of using personalised advertising will also be authorised towards non-existing customers of the operators, provided that such type of advertising complies with the principles laid down in the CEL which govern the sending of unsolicited communications²⁰.

With regard to online betting (F1+ licence), Article 3, § 2, of the Royal Decree provides that advertisements for such games cannot:

- be broadcast via advertising platforms or media known for being mainly targeted at minors;
- be shown in a cinema during the screening of a movie mainly intended for minors;
- be run in places predominantly frequented by minors or in health establishments.

¹⁶ The impact analysis notified by the Belgian authorities to the European Commission is available at the following address: <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=489>.

¹⁷ Free translation of: “Les titulaires de licences de classe A+, B+ ou F1+ sont tenus de faire respecter les dispositions contenues dans le présent arrêté” / “De houders van een vergunning klasse A+, B+ of F1+ zijn ertoe gehouden om de bepalingen van dit besluit te laten naleven”.

¹⁸ See Articles VI.110 to VI.115 CEL (unsolicited communications) and Article XII.13 CEL (spamming).

¹⁹ Unfortunately, no preamble clarifying the provisions of the Royal Decree (the so-called “Rapport au Roi”/“Verslag aan de Koning”) has been attached to the Decree.

²⁰ In a nutshell, depending on the type of medium or technique used, the sending of unsolicited advertisements for direct marketing purposes is subject to opt-in or opt-out (see, in this respect, Articles VI.110 to VI.115 CEL).

In addition, Article 10 of the Royal Decree states that online betting operators cannot advertise the games or products they offer on the players' equipment (such as their jerseys or shorts) or sporting equipment of under-age sports teams.

With regard to all online gambling services (A+, B+ and F1+ licences), Article 5 of the Royal Decree provides that promotional offers (such as game credits or bonuses) can only be made on the operator's own website and are thus prohibited on any other medium.

12. **Restrictions in terms of content.** The Royal Decree imposes on all online gambling operators (A+, B+ and F1+ licences) a set of restrictions and guidelines with respect to the content of their advertisements.

On the one hand, several provisions of the Royal Decree (Articles 2 to 5, 8 and 9) impose on operators *negative obligations* in terms of content. More specifically, their promotional and advertising campaigns cannot:

- exaggerate the chances of winning;
- create or maintain a gambling addiction or abusively incite play;
- give information relating to winnings or the chances of winning that is not verifiable or that does not correspond to the rates of return to the player of the game in question;
- suggest that winning depends exclusively on knowledge of the game;
- praise people who play or criticise those who do not play;
- put pressure on a person if he/she does not wish to participate in the game;
- suggest that all participants will win large sums of money;
- insinuate that gambling is a solution to financial and personal problems;
- suggest that gambling constitutes an alternative to working and saving;
- imply that gambling is a way of paying bills and debts;
- capitalise on the vulnerability of persons who are experiencing financial difficulties or exploit their financial difficulties;
- represent situations in which persons play a game or bet while simultaneously consuming alcohol and/or tobacco;
- represent illegal forms of gambling, betting, lottery or competition;
- depict content of a violent nature or which incites violence, or themes with a degrading sexual connotation or illegal behaviours;
- convey a message of discrimination in any form whatsoever;
- promote or associate themselves with advertisements offering loans that may be obtained for the purposes of gambling;
- represent athletes or sports clubs placing bets or playing games of chance;
- use images, logos, portraits, indications or wording pertaining to the events to which betting relates without the authorisation of the rights holders;

- encourage persons under the minimum age required²¹ to gamble or suggest that they are authorised to gamble, or target them or portray in their advertisements persons of the same age group (in fact or in appearance) who are gambling;
- incite persons under the minimum age required to persuade their parents or other persons to participate in the games to which the advertisement relates;
- use drawings or marketing techniques referring to persons/characters, images or expressions that are popular or fashionable among people under the minimum age required;
- disclose the identity, address and other data pertaining to the players and their families, including their photographs or other visual recording;
- offer game credits or bonuses of any kind, except on the operator's own website (see para 9 above);
- incite persons to play by promising a new contribution in the game or a reimbursement of their stake in the event of a loss;
- amalgamate the different types of licensed games, such as presenting casino games and/or arcade games like betting, and vice versa;
- present the licensed games offered by the operator as games that do not fall within the scope of the Belgian Gambling Act and that would therefore not be subject to gambling regulation.

On the other hand, several provisions of the Royal Decree also impose on online gambling operators *positive obligations* in terms of content.

Article 2, § 2, of the Royal Decree thus provides that any advertisement for online gambling must indicate the minimum age required to participate in the games/bets.

Article 2, § 3, of the Royal Decree states that any advertisement for online gambling must also contain the following prevention message: "Play with moderation!" ("Jouez avec moderation !"/"Gok met mate!"). The size of this message must not be less than 4% of the advertisement and must have a minimum font size of 7, but without being less than a quarter of the size of the largest characters used in the advertisement.

13. **Restrictions in terms of time slots.** Article 3, § 1, of the Royal Decree sets out several rules with respect to the time slots during which online gambling advertising is prohibited:

- no advertisements may be broadcast during live coverage of sport competitions, i.e. from the effective start until the effective end of the sport competition, regardless of the type of media used to broadcast the live coverage (television, radio, internet, ...). Advertisements are thus prohibited in the break(s) during live sport competitions but remain authorised before and after these competitions;
- no advertisements may be broadcast during programmes specifically aimed at children and minors, as well as during the 15 minute periods before and after these programmes²²;

²¹ In accordance with Article 54, § 1, of the BGA, the minimum age required for online betting is set at 18 years old, and for online casino games and online arcade games at 21 years old.

²² In this respect, it is worth noting that the French version of the Royal Decree (Article 3, § 1, 2°) is worded in an ambiguous manner, which could be interpreted as meaning that the prohibition of advertising applies only to the periods of 15 minutes before and after the programmes specifically aimed at children and minors but not during such programmes ("*aucune publicité ne sera diffusée : (...) durant la période de quinze minutes qui précède le début et la période de quinze minutes qui suit la fin de programmes qui s'adressent spécifiquement à des enfants et des mineurs*"). The Dutch version of this

- no advertisements for online sport bets may be broadcast before 8 pm, unless sports programmes are being broadcast²³. Advertisements for online sport bets thus remain authorised before 8 pm (in the morning or in the afternoon) where a sports programme is being broadcast. The number of advertisements available for operators of online sports betting is limited to one advertisement per commercial break.

14. **Potential issue with respect to Belgium’s constitutional rules on the distribution of competences.** The fact that the new rules imposed by the Royal Decree (federal measure) are also applicable to advertisements broadcast by television and radio might raise some questions with respect to Belgium’s constitutional rules governing the distribution of competences between the Federal State and the different Language Communities in Belgium.

Indeed, while the regulation of gambling belongs to the competence of the Federal State, the regulation of advertisements broadcast by television and radio falls under the field of competences of the Communities.

It is worth noting, however, that the case law has already acknowledged that a federal measure which imposes advertising restrictions can impinge on the competences of the Language Communities in the field of television and radio broadcasting provided that such impingement is not disproportionate, i.e. that it would make it impossible or unreasonably difficult for the Communities to exercise their competences in this field²⁴. Although this issue has to be assessed on a case-by-case basis, the impingement is generally accepted where it is of very limited scope.

One might consider that this is the case here given that the restrictions on television and radio advertising which derive from the Royal Decree are confined to the online gambling sector, both in terms of services/products and addressees that are targeted by the regulation.

2) Gaming limits and protection of players

15. Gaming limits and protection of players. Article 6 of the Royal Decree imposes on all online gambling operators (A+, B+ and F1+ licences) several obligations pertaining to the gaming limits and the protection of players.

Firstly, online gambling operators must ensure that the player cannot top-up his/her online accounts by more than 500 euros per week across all games in which he/she participates.

At the request of the player, such maximum top-up amount can however be reduced with immediate effect.

The player may also request to have his/her maximum top-up amount increased. In such case, the operator must immediately notify the player’s request to the Gaming Commission by electronic means. Within 3 days of receipt of the player’s request, the Gaming Commission must decide whether or not the increase can be authorised, after consultation with the National Bank in order to verify that the player is not listed as a defaulter on the file of the Central Individual Credit Register (CICR). The player

provision does not contain such ambiguous wording and clearly states that the prohibition of advertising is also applicable during the said programmes (*“geen reclame [zal] worden uitgezonden: (...) tijdens en in de periode van vijftien minuten vóór het begin van en vijftien minuten na het einde van programma’s die zich specifiek richten tot kinderen en minderjarigen”*). The Dutch version of the Royal Decree should be followed given that, in view of the objective pursued by this provision, i.e. the protection of children and minors, it would make no sense that advertising for gambling could be broadcast during programmes specifically aimed at the latter. Such interpretation of the Royal Decree has been confirmed in a press release from the Ministry for Justice dated 1 June 2018, after the draft measure had been approved at second reading by the Council of Ministers (<https://www.koengeens.be/fr/news/2018/06/01/geens-restreint-les-publicites-relatives-aux-jeux-de-hazard-et-renforce-la-participation>).

²³ In this respect, it is to be noted that the scope of the rules applicable to advertisements for online sport bets might give rise to divergent interpretations. On the one hand, one could argue that advertisements for online sport bets are only subject to the 8 pm watershed rule as a *lex specialis* derogating from the general rule which prohibits any gambling advertisements during live coverage of sport competitions. On the other hand, one might consider that the 8 pm watershed rule specifically applicable to online sport bets should be applied cumulatively with the aforementioned general rule. This second interpretation appears to be followed in the press release from the Ministry for Justice dated 1 June 2018, which indicates that: *“It is prohibited to broadcast advertisements for online sport bets before 8 pm, unless sports programmes are being broadcast. Advertising will be allowed before and after a sport competition which is broadcast live during the afternoon. During a sport competition, advertising will not be allowed”* (free translation; <https://www.koengeens.be/fr/news/2018/06/01/geens-restreint-les-publicites-relatives-aux-jeux-de-hazard-et-renforce-la-participation>).

²⁴ See, among others, Constitutional Court, 22 May 2003, nr 70/2013, para B.6, available in French (<http://www.const-court.be/public/f/2013/2013-070f.pdf>) and in Dutch (<http://www.const-court.be/public/n/2013/2013-070n.pdf>).

will only be able to play with the increased gaming limit after a positive decision from the Gaming Commission. The Gaming Commission must then check every month with the National Bank whether or not the players who had been granted an increase are registered on the file of the CICR. Should this be the case, the authorisation granted by the Gaming Commission will be withdrawn.

Secondly, online gambling operators must refuse the top-up of an account by means of a credit card.

Thirdly, online gambling operators must offer the player the possibility of temporary self-exclusion. During this period, operators must refrain from any promotional activities.

Fourthly, online gambling operators must inform the players by means of notifications and pop-up windows about the potential risks of participating in gambling. These measures must be documented and made available upon simple request by the Gaming Commission.

Fifthly, online gambling operators cannot pass on to the players costs related to the creation, management or closure of a player's account.

Sixthly, online gambling operators must ensure that the general terms and conditions and the provisions relating to responsible gambling are available to the player directly on the homepage of their website.

16. **Protection of prohibited/excluded players.** Pursuant to Article 12 of the Royal Decree, all online gambling operators (A+, B+ and F1+ licences) are required to check that players are not prohibited or excluded from gambling, before authorising them to participate in the games, irrespective of the data they provided when they opened their player account.

Moreover, as already stated, Article 1 of the Royal Decree prevents online casino games/online arcade games operators from sending personalised advertising to prohibited or excluded players.

3) Bonus restrictions

17. In accordance with Article 11 of the Royal Decree, the maximum amount of the bonuses that can be offered to a player is set at 275 euros per month.

In addition, as already indicated above, Article 5 of the Royal Decree provides that promotional offers (such as bonuses of any kind) can only be made on the operator's own website.

III. Sanctions in case of breach of the new rules

18. The Royal Decree does not provide for any specific sanctions in case of breach of its provisions.

Having said this, pursuant to the general provision laid down in Article 15/2 of the BGA, in case of violation of the BGA or its implementing decrees (such as the Royal Decree at hand), the Gaming Commission is empowered to issue a warning to the online gambling operator concerned, suspend or revoke its licence for a fixed period, and temporarily or permanently prohibit it from operating its activities in Belgium.

In addition, any breach of the provisions of the Royal Decree could – unless the existence of a ground for exemption can be established – be considered as constituting a fault (under Belgian tort law) that is capable of giving rise to liability on the part of the online gambling operator.

IV. Entry into force of the new rules

19. Pursuant to Article 13 of the Royal Decree, the new rules imposed on online gambling operators will enter into force on 1 June 2019, with the exception of the rules regarding the possibility to request an increase of the gaming limit, which will become effective no later than 1 January 2019 or, where applicable, at a later date set by another Royal Decree.

At the time of entry into force of the Royal Decree, when placing their first stake, existing players will be entitled to increase their gaming limit immediately, and the same applies during the period of 6 months following the entry into force of the Decree.

V. Conclusion

20. Admittedly, the case-law of the Court of Justice of the European Union (CJEU) acknowledges that Member States enjoy a wide margin of discretion as to how they can regulate gambling activities (including gambling advertising²⁵), but this latitude is subject to certain limitations²⁶.

According to settled case-law, the restrictions imposed by Member States in the field of gambling must not only be justified by overriding reasons in the public interest but also appropriate and proportionate for achieving the objective pursued, in a consistent and systematic manner²⁷.

21. It seems debatable whether the new rules imposed by the Royal Decree are in line with this CJEU case-law.

Although it is clear that the objectives pursued by the restrictions imposed by the Royal Decree – i.e. the protection of players, the prevention of incitement to squander money on gambling and the fight against gambling addiction – constitute legitimate aims which qualify as overriding reasons in the public interest under established case-law²⁸, the appropriateness and the proportionality of the said restrictions might be questioned.

Indeed, due to the very restrictive character of certain measures imposed by the Royal Decree, it cannot be excluded that the regulation could have a negative impact on the online gambling sector (perverse effect), by reducing the attractiveness of the available legal offers of gambling services and thus redirecting the players towards the illegal market.

It is significant to note that this risk had been pointed out by the Belgian Government itself in the impact analysis annexed to the draft measure notified to the European Commission: “*Negative impact: holders of supplementary licences will be faced with stricter rules as regards their proposed advertising, player admission and monitoring, limitation of the gambling options, etc., which could have an impact on the attractiveness of games. Over-strict regulation could have a reverse effect that could push players back towards illegal options. (...) It is necessary to achieve a balance between player protection and the attractiveness of games. Overly strict rules could have the effect of redirecting customers towards the illegal market, which would negate the purpose of the regulation*”²⁹.

In order to alleviate this risk, the Belgian Government proposed to increase enforcement actions against the illegal market, as well as to invest in specialised controllers capable of controlling and providing internet monitoring in an informed manner.

22. Only time will tell whether the measures imposed by the Royal Decree have succeeded in achieving this delicate balance between the player’s protection and the attractiveness of (legal vs. illegal) online gambling. Particular attention will have to be given to the next set of figures and statistics to be published by the Gaming Commission, in order to determine whether the regulation has borne fruit or proved to be counter-productive.

Let us hope that the old saying according to which “the road to hell is paved with good intentions” will prove to be wrong ...

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²⁵ See, notably, CJEU, 19 October 2017, *Sportingbet*, C-166/17, paras 37 to 41; CJEU, 12 July 2012, *HIT hoteli*, C-176/11, paras 16 to 36. As specified by the Court in other cases, “according to consistent case-law, activities which consist in allowing users to participate, for remuneration, in gambling constitute ‘services’ within the meaning of Article 49 EC [Article 56 TFEU] (...). The same applies to the activity of promoting and placing gambling, such an activity constituting only specific steps in the organisation or operation of the gambling to which that activity relates” (see, among others, CJEU, 8 September 2010, *Markus Stoß*, C-316/07, para 56).

²⁶ See, notably, CJEU, 20 December 2017, *Global Starbet*, C-322/16, para 39; CJEU, 8 September 2016, *Domenico Politanò*, C-225/15, para 39.

²⁷ *Idem*, para 40.

²⁸ See, notably, CJEU, 22 June 2017, *Unibet International*, C-49/16, para 39.

²⁹ <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=489>.