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CLIENT ALERT

Contracts & E-Commerce

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Belgian Government introduces new draft Gaming Act in Parliament

The Belgian Government has introduced a draft act in both the Belgian Senate and the House of Representatives. The draft act aims at reforming and modernizing the Belgian gaming and betting legislation, and in particular the 1999 Act on games of chance. The act provides in some far-reaching and controversial changes.

Introduction
In Belgium, gaming and betting is governed by several sets of legislation. In general, a distinction must be made between lotteries, games of chance and sports betting. The most comprehensive piece of legislation is the 1999 Act on games of chance, which however does not cover lotteries or sports betting. With the draft act, the Belgian Government now aims at

- expanding the powers of the supervisory body, the Gaming Commission;
- expanding the scope of the 1999 Act on games of chance so that it also covers sports betting;
- expanding the scope of the 1999 Act on games of chance so that it also covers online gaming and betting;
- expanding the scope of the 1999 Act on games of chance so that it also covers media games.

Timing
The Belgian government has introduced the draft act in both the House of representatives and the Senate, and aims at having a parliamentary vote before the end of July 2009. The entry into force of the draft act would probably be scheduled for January 2010.

The contents of the draft act
From a TMT perspective, the draft act contains several innovations, some of which may give rise to debate and criticism.

First , licensed operators of a casino (license A), a gaming arcade (license B) or of a betting service (license F1) will be able to obtain a license to offer their services online (via a so-called '+-license', either A+, B+ or F1+). The licensed operators will be

subject to a number of conditions such as age controls, proving the reliability of payment transactions, etc. One of the most important conditions is that the server from which the online games are offered must be based within Belgium.

This innovation may be subject to criticism because only incumbent, land-based license holders will be able to apply for an online license.

Second, TV-, radio- and print media will need to obtain a license in order to offer games via their various channels. This is either a G1-license for television programs entirely focused on the game in question, and a G2-license for all other games (SMS-games, promotions in magazines etc.). The G1-license can only be obtained by broadcasters legally recognized in Belgium.

This innovation may again be subject to criticism because it is unclear why a licensing system needed to be imposed upon the media sector whereas, seemingly without any problem, media games have been offered since many years without licensing requirement. In addition, foreign broadcasters may object to the fact that they cannot obtain a G1-license.

Third, intermediaries may increasingly appear on the Gaming Commission's radar since the draft act provides for a blanket-type prohibition pursuant to which no intermediary may knowingly provide services or publicity that contributes to the operation of a game of chance for which no license was obtained.

This innovation may also be subject to criticism since the European Court of Justice and the European Commission take a particularly critical approach towards legislation restricting the free movement of betting and gambling services and unduly tackling and restricting the rights of intermediaries.

Analysis and conclusion
The Belgian government has the merit of finally making an attempt to introduce more coherence in the Belgian gaming and betting legislation. However, the question is whether this attempt will pass the test of the European Commission and of the European Court of Justice, which are increasingly critical of national legislations that unduly limit the free movement of cross-border gaming services.

Interested parties may still try to intervene in the legislative process but time is short, since a parliamentary vote is expected before Summer.

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The Belgian prohibition on combined offers declared contrary to European law

In its decision of 23 April 2009, the European Court of Justice ruled that a general prohibition of combined offers to consumers, such as the Belgian prohibition, is contrary to European law. Only combined offers that can be qualified as unfair commercial practices given the specific circumstances of the offer can be prohibited. This ruling raises interesting questions as to the application of the Belgian prohibition by the courts while awaiting intervention from the legislator. Moreover, other general prohibitions in the Belgian Act on Trade Practices and Consumer Protection are likely to meet with the same fate.

Introduction

A combined offer is often used in sales promotions and exists where the acquisition of products, services or other advantages, or of vouchers with which they can be acquired, is tied to the acquisition of other products or services. Apart from some exceptions, combined offers are generally and preemptively prohibited in Belgian law, more specifically in article 54 of the Act of 14 July 1991 on Trade Practices and Consumer Protection.

In the course of two proceedings, in the first case between VTB-VAB NV and Total Belgium NV and in the second between Galatea BVBA and Sanoma Magazines Belgium NV, the Commercial Court of Antwerp referred the case to the European Court of Justice for a preliminary ruling. The European Court was asked whether the Belgian general prohibition on combined offers infringes Article 49 EC and the European Directive 2005/29/EC on Unfair Commercial Practices.

The Court's decision

a. European Directive 2005/29/EC on Unfair Commercial Practices

The European Court of Justice first sets out the system of Directive 2005/29/EC:

In accordance with Article 5(2) of the Directive, a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

Article 5(4) of the Directive defines two precise categories of unfair commercial practices: misleading practices and aggressive practices. Such practices are prohibited where, having regard to their nature and the factual context, they cause or are likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

Finally, Annex I to the Directive establishes an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of the Directive, are regarded as unfair "in all circumstances". These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment.

b. The Belgian prohibition on combined offers

Combined offers are not listed in Annex I of Directive 2005/29/EC as commercial practices which are prohibited in all circumstances. They can therefore only be prohibited if they can be qualified as unfair trade practices on a case-by-case basis, having regard to the factual context at hand.

However, the Belgian prohibition on combined offers prohibits, generally and preemptively, bans combined offers without any verification of their unfairness in the light of the specific circumstances. By doing so, the Belgian legislation is more restrictive than Directive 2005/29/EC. Since Member States should refrain, according to Article 4 of the Directive, from maintaining or adopting more restrictive national measures, the European Court decided that the Belgian legislation does not meet the requirements of Directive 2005/29/EC.

The Court furthermore noted that the fact that the Belgian Act of 14 July 1991 provides in a number of exceptions to the prohibition, does not alter this assessment. Although these exceptions are liable to restrict the scope of the prohibition of combined offers, the fact remains that, because of their limited and pre-defined nature, they cannot take the place of the

analysis of the facts of each particular case and of the "unfairness" of a commercial practice if such practice is not listed in Annex I of the Directive 2005/29/EC.

Consequences of the Court's ruling

a. With regard to Article 54 of the Belgian Act of 14 July 1991

First of all, the question arises whether combined offers are from now on allowed in Belgium.

The European Court of Justice clearly stated that combined offers should be deemed lawful except when they can be qualified, given the specific circumstances, as an unfair commercial practice. However, the Belgian Act of 14 July 1991, and more specifically, the general prohibition on combined offers provided for in Article 54, is still in force.

Although incorrectly implemented directives, such as Directive 2005/29/EC in this instance, have direct effect, this is only the case in vertical relations. Courts will indeed be obliged to disapply conflicting rules of national law in cases where provisions of an incorrectly implemented directive are invoked by or against a public authority (*e.g.* the Economic Inspection). However, the impact of a directive in horizontal relations seems far less obvious. It is clear that in horizontal relationships, the provisions of national law should as much as possible be interpreted in a manner that is consistent with the improperly implemented provisions of the directive. However, the national courts can not simply set aside the provisions of national law. More specifically, their duty to interpret the law in a manner consistent with the directive does not extend to interpretations *contra legem*. In other words, national courts cannot go against the clear wording of national law.

In the particulars of our case, this means that when courts will be faced with a claim between competitors involving a combined offer, they will not be allowed to simply disregard the clear wording of Article 54 of the Act of 14 July 1991. The only sound approach will be to try to interpret as much as possible the prohibition in a manner that is consistent with the directive and the result of which will be to only ban combined offers that are unfair within the meaning of the Directive.

In this sense it is to be regretted that the European Court of Justice did not rule on the conformity of the Belgian prohibition on combined offers with Article 49 EC, which has both vertical and horizontal direct effect. The Court of Justice stated that, since Directive 2005/29/EC precludes a prohibition of combined offers such as that provided for by the Belgian Act of 14 July 1991, there was no need to examine the possibility of a breach of Article 49 EC.

Based on the above reasons it is unclear what courts will decide when faced with this problem during the period between the decision of the European Court of Justice and the modification of the Belgian Act of 14 July 1991. Only a legislative intervention can remedy this uncertainty.

b. With regard to other general prohibitions in the Belgian Act of 14 July 1991

There are several other provisions in the Belgian Act of 14 July 1991 which provide for general prohibitions even though these practices are not included in Annex I of Directive 2005/29/EC. Among others, we can refer to the rules relating to the announcement of price reductions, the rules regulating seasonal sales etc.

It can be argued that for these prohibitions, the same reasoning can be applied as the European Court's reasoning in its decision of 23 April 2009: since these practices are not included in Annex I of Directive 2005/29/EC, they have to be assessed based on

the factual circumstances of the case. It is therefore likely that, when the Belgian legislator modifies the Act of 14 July 1991, these general prohibitions will also have to disappear.

Links : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0261:EN:HTML

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