

LEGALITY OF THE BLACK LIST AND BLOCKING MEASURES IN BELGIUM

In order to enforce the Belgian Gaming Act (BGA) and give the regulator the means to efficiently sanction illegal gambling, the Belgian Gaming Commission (BGC) has published a list of illegal gambling operators on its web site available at <http://www.gamingcommission.fgov.be/website/jsp/main.jsp?lang=FR>. Services providers such as ISPs or financial institutions which have signed a protocol with the BGC are to block all transactions and access to illegal web sites marked on the black list.

However, the legal grounds alleged by the Gaming Commission for the publication of the black list (Article 48, §2, 5°) clearly state that measures undertaken to ensure player protection (such as issuance of a black list) shall be set by Royal Decree. No such Royal Decree was adopted. Thus, the legality of the black listing and blocking measures deriving there from have been questioned until a decision of the President of the Brussels Court of First Instance of 13 June 2012 in the BwinParty case.

BwinParty's claim

The Gibraltar based operator who had been black listed by the BGC and saw its website www.bwin.com blocked by ISPs filed a preliminary injunction against the Belgian State and the BGC in an interim procedure. The nature of such procedure is for a judge to rule on the basis of *prima facie* rights, without consideration as to the merits of the case which is time sensitive and presents risks of irreparable damage.

BwinParty requested the judge to forbid black listing and any kind of negative statements towards operators by the Belgian State and to lift the web site blocking alleging that it caused irreparable damage to their good name and reputation.

BwinParty questioned the BGC's competence to draw up a black list on the grounds that the BGA requires an additional Royal Decree to declare the blacklisting as a necessary measure to ensure player protection. Furthermore, BwinParty underlined that despite the fact that the exploitation of games of chance through its web site is not legal under the BGA because the company was not licensed by the BGC, the BGA and the whole licensing process are actually on shaky legal grounds. BwinParty's argumentation as to the illegality of the BGA refers to several precedents in Belgium:

1/ THE EC'S OPINION ON THE DRAFT BGA

The European Commission (EC) issued a detailed opinion on 29 June 2009 pertaining to the draft BGA of 2009 notified in application of Directive 98/34/EC¹. Parliamentary works² and press releases show that the EC's concerns towards the draft BGA mainly related to:

- (i) the fact that the draft BGA does not contain any "mutual recognition" principle by not taking into consideration the conditions previously fulfilled in the framework of license applications elsewhere in the EU. This raises issues in view of Article 56 TFEU relating to the free movement of services;
- (ii) the offline requirement demanding a permanent licensed establishment and server location in Belgium to be granted a supplementary license, which conflict with the EU principle of free movement;
- (iii) the limitation of licenses (*numerus clausus* principle);
- (iv) the criminal sanctions against consumers wishing to take part in gambling operations offered by licensed operators established in another Member State ; and
- (v) The tools used to detect unlawful gambling operations.

The EC's opinion was not taken into account by the Belgian legislator to revise the draft bill, which was enacted without any substantial amendment as compared to the notified draft.

2/ THE EGBA AND RGA'S COMPLAINT OF 23 JUNE 2010

A complaint against the Belgian State on the above mentioned grounds was filed with the European Commission by world leading gambling operators' associations – RGA and EGBA – on 23 June 2010.

The claimants also argued that the Belgian legislation is designed to protect the domestic market from legitimate competition by putting in place unacceptable barriers (offline and server location requirements) to new entrants seeking to offer online gambling.

The complaint is still pending to date.

3/ THE CONSTITUTIONAL COURT'S RULING OF 14 JULY 2011

Requests for annulment of the provisions of the BGA were introduced by Telebet, the RGA and Betfair before the Belgian Constitutional Court on the basis of arguments of (i) violation of the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Belgian Constitution) and (ii) violation of EU law principles of freedom of

¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ.*, L 204, 21 July 1998, p. 37–48.

² See parliamentary works, *Chambre des représentants*, législature 2009/2010, doc. Nr. 4-1411/6.

establishment and services provision (Articles 49 and 56 TFEU). Raising a preliminary question with the CJEU was also requested.

After a proportionality check, the Constitutional Court stated that the restrictions to the abovementioned principles were legitimate, necessary and legally justified and ruled out raising a preliminary question with the CJEU.

The State's counterclaim

The Belgian State requested the judge to confirm the stoppage of the claimant's online activities in Belgium, to forbid the sending of emails to Belgian nationals and to reimburse all sums belonging to Belgian players.

The Court's ruling

The President of the Court of First Instance of Brussels has validated the black listing, despite the irregularities put forth in BwinParty's argumentation. He first considered the claimant's request to imply rendering a web site available to the public although it offers activities which are criminally sanctioned under the Belgian Law.

The judge then refers to national and European case law and declares that, given the scope of its own competence within the interim procedure, he cannot find the Belgian law to be obviously contrary to European Law.

Consequently, the BGC's competence to draw up a black list and the web site blocking have been recognized as legal on the basis of the BGC's general mission to safeguard the State and society from illegal operators. According to the President of the Brussels Court of First Instance, the BGC must fulfill the following duties:

- 1) Filter operators complying with the Belgian Gaming Act's requirements on the basis of the licensing procedure; and
- 2) Inform the public on the basis of the black list.

The regulator has a margin of interpretation of the best ways to achieve the tasks assigned by the legislator. In this sense, Article 43/8, §2, 5° of the BGA contains, according to the Court, a possibility for the BGC to foresee preventive measures to ensure player protection and the black listing can be regarded as such a preventive measure.

Therefore, and as far as the *prima facie* examination of an interim procedure goes, the judge deems the actions undertaken by the BGC to fall within the general tasks assigned to the regulator.

The Belgian State's counterclaims were rejected by the Court since the requested general prohibition to exploit online activities in Belgium and send emails to the Belgian nationals would be a heavy invasion in the parties' freedom to act and to trade, which could not be justified by any imminent risk for the public order.

Reimbursement to Belgian players was also rejected on the grounds that the Belgian State is not entitled to the funds at stake.

Assessment

In an interview by the news group RTLinfo.be, Bart Heynickx, a lawyer at the law firm which defended the Belgian State, said that *"it is absolutely natural that an online gambling operator deliberately choosing to operate illegally on the Belgian market cannot expect any kind of protection from Belgian jurisdictions"* (free translation)³. In a procedure dealing with *prima facie* rights such an outcome could have been expected in view of the fact that BwinParty does indeed violate the Belgian law.

Nevertheless and despite judicial confirmation, EU compliance of the BGA is not guaranteed and the black listing remains controversial in many ways.

Additionally to the lack of legal basis and judicial review within the black listing process, it is also confusing for players and services providers: for the time being, only a handful of operators are contained on the BGC's black list (which also raises the question of discriminatory treatment as compared to the many other operators continuously accepting wagers from the Belgian public) but the BGA has a broader scope and forbids dealing with any unlicensed operator. Consequently, a services provider or player could potentially be considered as joint-tortfeasers together with the illegal operator himself and risk criminal prosecution although a web site was not officially marked illegal by the BGC.

Player protection and information to the public would be better achieved by clearly stating that any web site not contained on the BGC's white list is illegal rather than listing just a few unlicensed operators under a black list.

While the BwinParty precedent currently contributes to comforting the legality of the BGA and stands unless it is challenged, it remains to be seen whether further contentious steps are undertaken in Belgium, either on the basis of the merits of the case or with reference to the EC or CJEU.

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³ <http://www.rtl.be/info/belgique/faitsdivers/885343/la-justice-refuse-de-debloquer-le-site-bwin-com-en-belgique>