

Decision n° 2010-605 DC of May 12th 2010

Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling.

On April 13th 2010, the Constitutional Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, for review of the constitutionality of the Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling from Mr Jean-Marc AYRAULT et al, Members of the National Assembly

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58 1057 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to Institutional Act n° 2009-1523 of December 10th 2009 pertaining to the application of Article 61-1 of the Constitution together with decision n° 2009-595 DC of December 3rd 2009;

Having regard to the Treaty on the Functioning of the European Union, in particular Article 267;

Having regard to the General Tax Code;

Having regard to the Social Security Code;

Having regard to the Act of June 2nd 1891 designed to regulate the authorising and operating of horse racing;

Having regard to the Act of April 18th 1924 amending Section 2 of the Act of May 21st 1836 prohibiting lotteries;

Having regard to the observations of the Government, registered on April 28th 2010 and the decision of the Cour de cassation n° 12003ND of April 16th 2010

Having regarded to the new observations of the Government, registered on April 30th 2010

Having heard the Rapporteur;

1. The Members of the National Assembly have referred for review by the Constitutional Council the Act pertaining to the Opening up to Competition and the

Regulation of Online Betting and Gambling. They criticize this statute in its entirety and challenge in particular sections 1, 26, 47 and 48 thereof;

WITH RESPECT TO THE CRITICISM OF THE STATUTE IN ITS ENTIRETY

2. The parties making the referral argue that the statute referred for review was enacted in proceedings which were unconstitutional. They contend that it fails to comply with the fundamental prohibition on betting and gambling; that it runs counter to the law of the European Union; that it runs counter to the general interest and fails to comply with the objective of safeguarding public policy and lastly that the means which it implements are patently insufficient to achieve the purposes it seeks to achieve.

As regards the argument that the statute was enacted in proceedings which were unconstitutional:

3. The parties making the referral argue that when suspending proceedings in public after having announced that voting would take place on the motion for a preliminary rejection at second reading, the President of the National Assembly failed to comply with the regulations of the House and the requirements of clarity and accuracy of Parliamentary debate.

4. The records of parliamentary proceedings show that the President of the sitting had not announced that voting had commenced prior to deciding to suspend the sitting during explanations on voting. The Regulations of the Houses of Parliament do not per se have constitutional status and in all events no provision of the Regulations of the National Assembly precludes the President of the National Assembly from suspending the sitting of the House during explanations on forthcoming voting on a motion. The argument raised must therefore be dismissed.

As regards the argument contending failure to comply with a fundamental prohibition on betting and gambling recognized by the laws of the Republic :

5. The parties making the referral argue that “when deciding to open up the online betting and gambling sector Parliament has attacked head-on a French legal tradition going back to the 19th century whereby three principles govern betting and gambling: “prohibition, exclusivity, exception”, and that by so acting it has failed to comply with a fundamental principle recognized by the laws of the Republic.

6. The Republican tradition cannot be usefully relied upon to argue that a statute which runs counter to it is unconstitutional unless this tradition gave rise to a fundamental principle recognized by the laws of the Republic within the meaning of the first paragraph of the Preamble to the Constitution of 1946.

7. Although the Act of June 2nd 1891 referred to above prohibits betting on horse racing and that of April 18th 1924 confirmed the principle of prohibition of lotteries

introduced by a statute of 1836, these statutes have never been given the status of absolute rules but have constantly been accompanied by substantial exceptions and departures. In addition Parliament also introduced further departures from these rules by the Act of June 15th 1907 which regulated gambling in casinos and clubs in thermal, seaside and health resorts, and by section 136 of the Finance Act of May 31st 1933 authorising the Government to set up the National Lottery. These laws of the Republic cannot thus be regarded as having recognized a fundamental principle.

8. Sections 11, 12 and 14 of the statute referred for review provide that organizing online betting and gambling on horses, sports or casino games shall require prior official approval. The argument whereby the statute has “lifted all controls” on online betting and gambling should therefore be dismissed.

As regards the arguments concerning the law of the European Union:

9. The parties making the referral contend that “European Community law in no ways requires such opening up to competition since on the contrary the European Court of Justice allows monopolies once they are justified by public policy and law and order considerations”. They invite the Constitutional Council to check whether the statute in question does not “run counter to international commitments”, referring to the decision of the Cour de cassation of April 16th 2010 referred to above which holds that the Constitutional Council may exercise “a review of conformity of statutes with France’s international commitments, in particular European Community law”.

- *As regards the primacy of European and international commitments over domestic statutes.*

10. Firstly, Article 55 of the Constitution provides: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or Treaty, to its application by the other party. Although these provisions confer upon Treaties, in the conditions which they determine, primacy over domestic statutes, they neither require nor imply that compliance with this principle must be ensured in the framework of a review of the conformity of statutes with the Constitution.

11. Firstly, to implement the right recognised by Article 61-1 of the Constitution for any person coming under the jurisdiction of the courts to argue that a statutory provisions infringes rights and freedoms guaranteed by the Constitution, paragraph 5 of Section 23-2 of the Ordinance of November 7th 1958 referred to hereinabove and paragraph 2 of section 23-5 thereof specify the articulation between the review of statutes for the purpose of verifying their conformity with the Constitution, which is incumbent upon the Constitutional Council, and the review of their compatibility with the international and European commitments of France, which is incumbent upon the Courts of law and Administrative courts. The argument based on the incompatibility of a statutory provision with the international and European

commitments of France cannot therefore be deemed to constitute an argument as to unconstitutionality.

12. The examination of such an argument, based on the Treaties and laws of the European Union, comes under the jurisdiction of Courts of law and Administrative Courts.

13. Firstly, the authority attached to the decision of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.

14. Secondly, under the terms of section 23-3 of the Ordinance of November 7th 1958 referred to hereinabove the judge who transmits an application for a priority preliminary hearing on the issue of constitutionality, which must be heard within a strictly delimited period of time, may firstly hand down his decision without waiting for the ruling on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that he shall give his ruling within a specific time or as a matter of urgency; secondly he may also take all and any conservatory measures as may be necessary. He may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of the court. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 referred to hereinabove preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union;

15. Lastly, Article 61-1 of the Constitution and sections 23-1 and following of the Ordinance of November 7th 1958 referred to hereinabove do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary hearing on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.

16. In the foregoing conditions, it is not incumbent upon the Constitutional Council, under a referral made pursuant to Article 61 or 61-1 of the Constitution, to review the compatibility of a statute with international and European commitments entered into by France. Thus, notwithstanding the reference on the Treaty signed in Lisbon on December 13th 2007, it is not its task to review the compatibility of a statute with the provisions of this Treaty. The referral for review of the compatibility of the impugned statute with international and European commitments entered into by

France, in particular with the law of the European Union, should therefore be dismissed.

- *As regards the requirement of transposition of European directives*

17. Article 88-1 of the Constitution provides: “The Republic shall participate in the European Union constituted by States which have freely chosen, by virtue of the Treaty on European Union and the Treaty on the Functioning of the European Union as worded pursuant to the Treaty signed in Lisbon on December 13th 2007, to exercise some of their powers in common”. The transposing into domestic law of a Community Directive thus derives from a constitutional requirement.

18. It is incumbent upon the Constitutional Council, when referral is made in the conditions provided for by Article 61 of the Constitution with respect to a statute designed to transpose into domestic law a Community Directive, to ensure compliance with this requirement. However the review which it carries out to this end is subject to a twofold restriction : firstly the transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France unless the Constituent power has agreed to the same. Secondly, insofar as it is required to give its ruling before the promulgation of the statute in the timeframe provided for by Article 61 of the Constitution, the Constitutional Council cannot refer the matter to the European Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union. Therefore it can rule unconstitutional under Article 88-1 of the Constitution solely a statutory provision which is patently incompatible with the Directive its purports to transpose. In all events, it is incumbent upon Courts of law and Administrative Courts to review the compatibility of a statute with European commitments entered into by France and, if need be, to make a reference for a preliminary ruling to the European Court of Justice.

19. Compliance with the constitutional requirement of transposition of Directives is not one of the “rights and freedoms guaranteed by the Constitution” and thus cannot be raised in the framework of an application for a priority preliminary ruling on the issue of constitutionality.

20. In the case in hand, the statute referred for review is not intended to transpose a Directive. The argument based on failure to comply with Article 88-1 of the Constitution must thus be dismissed.

21. As is show by the foregoing, the arguments based on failure to comply with the law of the European Union must be dismissed.

As regards the argument that the statute referred for review runs counter to the general interest, fails to comply with the constitutional objective of safeguarding public policy and lastly that the means which it implements are patently insufficient for the purposes it seeks to achieve.

22. The parties making the referral contend that the statute referred for review runs patently counter to the general interest since it tends to “ensure the promotion of private interests to the detriment of the higher interests of the community”. They argue that the statute referred for review “appears evidently and radically in contradiction with the safeguarding of public policy and law and order without which the exercising of freedoms cannot be guaranteed”. They argue that Parliament has not adopted the measures necessary for the purposes it is sought to achieve, in particular where advertising is concerned, and lastly that opening up online gambling will facilitate corruption.

23. Firstly, the Constitutional Council, unlike Parliament, is not vested with any power of appraisal and decision taking. Parliament is at all times at liberty, when acting within its powers, to adopt such new measures as it shall see fit in order to achieve or reconcile objectives of constitutional status and to amend or repeal previous statutes, replacing them, if need be, by other provisions so long as, when exercising the powers vested in it, Parliament does not deprive constitutional requirements of statutory guarantees.

24. Secondly, Parliament is at liberty to impose on freedom of enterprise, which derives from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, restrictions connected with constitutional requirements or justified in the general interest, on condition that they do not lead to any disproportionate adverse effects as regards the purpose it is sought to achieve.

25. In the case in hand, when passing the disputed statute, Parliament wished to combat the harmful consequences of online betting and gambling by creating a legal opportunity to indulge in such pastimes under the supervision of the State. To this end, it has laid down the requirement that organising online gambling shall require prior approval. It has created an independent administrative body, the Online Gambling Regulatory Authority, in charge of granting official approval to new operators, enforcing compliance by the latter with their obligations and combating illegal operators. It has laid down measures designed to prevent addiction, protect vulnerable members of the public, combat money laundering and guarantee the authenticity of sporting matches and games. It has chosen not to open access to approved operators to games of chance. It has also regulated advertising in favour of legal gambling while imposing criminal penalties on those offering illegal gambling. In view of the purpose it is sought to achieve, Parliament has enacted measures to ensure a reconciliation which is not patently disproportionate between the principle of the freedom of enterprise and the objective of constitutional status of the safeguarding of public policy.

26. In view of the foregoing, the arguments raised against the statute in its entirety should be dismissed.

WITH RESPECT TO SECTION 1:

27. Section 1 of the statute referred for review provides : “ Betting and gambling are neither an ordinary commercial activity nor an ordinary service; with due respect for the principle of subsidiarity they are strictly regulated to take into account the requirements of public policy, public safety, the protection of health and minors”.

28. Article 6 of the Declaration of 1789 proclaims: “The law is the expression of the general will”. It derives from this article as from all other norms of constitutional status pertaining to the purpose of the law that, subject to specific provisions set out by the Constitution, the purpose of the law is to lay down rules and hence is to be given normative scope.

29. Contrary to what is contended by the parties making the referral, section 1 of the statute referred for review, which removes betting and gambling from the normal law governing freedom of enterprise, is not devoid of normative scope.

30. Section 1 of the statute referred for review is therefore not unconstitutional.

WITH RESPECT TO SECTION 26:

31. Section 265 of the statute referred for review provides: “An officially approved operator of online betting or gambling facilities pursuant to section 21 shall be required to refuse participation in online betting and gambling facilities offered by said operator to persons who have been banned from such activities by regulations at such time in force or at their own request. To this end, said operator shall, via the Online Gambling Regulatory Authority and in compliance with the provisions of Act n° 78-17 of January 6th 1978, consult the files of the Ministry of the Interior containing the names of those banned from betting and gambling. It shall close the account of any gambler concerned by a ban or an exclusion. It shall take preventive measures with regard to any excessive or compulsive behavior by installing auto-exclusion and moderation mechanisms, together with devices for auto-limitation of amounts wagered. It shall ensure continuous communication to any gambler using its site of the state of his/her account at any given time. It shall inform gamblers of the risks connected with compulsive or excessive gambling via warning messages on the site, together with the procedure for inclusion on the list of banned persons kept by the Ministry of the Interior. A Ministerial Order from the Ministry of Health shall specify the contents of said warning message”.

32. The parties making the referral contend that these provisions infringe the right to protection of health deriving from paragraph 11 of the Preamble of 1946. They argue that Parliament was only empowered to intervene in such matters to

strengthen consumer protection and the methods employed by the State to combat addiction. They also contest the fact that the legal means of intervention of the Online Gaming Regulatory Authority are for the most part restricted to granting official approval on the basis of specifications imposed on online betting and gambling operators.

33. Under paragraph 11 of the Preamble of 1946, the Nation “shall guarantee to all, in particular to children, mothers and elderly workers, the protection of health, material security, rest and leisure”. Parliament is at all times at liberty, when acting within its powers, to amend or repeal previous statutes, replacing them, if need be, by other provisions so long as, when exercising the powers vested in it, Parliament does not deprive constitutional requirements of statutory guarantees.

34. The challenged provisions require betting and gambling operators firstly to refuse participation by persons who have been banned from such activities and secondly to take preventive measures designed to prevent and combat addiction. In addition sections 5 and 7 of the statute referred for review forbid minors from taking part in betting and gambling and prohibit advertising for such activities intended for minors. Sections 27 to 29 put operators under a duty to encourage promotion of “responsible betting and gambling”, while section 30 prohibits gambling on credit. When enacting such provisions Parliament did not deprive of statutory guarantees the requirements set forth in paragraph 11 of the Preamble of 1956.

35. Section 26 of the statute referred for review is not unconstitutional.

WITH RESPECT TO SECTIONS 47 AND 48:

36. Firstly, section 47 of the statute referred for review inserts into the General Tax Code articles 302 *bis* ZG to 302 *bis* ZN pertaining to levies on gaming and betting to the benefit of the State. In particular article 302 *bis* ZK fixes the rate of these levies at 5.7% of monies wagered for racing or sporting events, irrespective of their manner of distribution, and at 1.8% for online casino gambling.

37. Secondly, section 48 of the statute referred for review inserts into the Social Security Code articles L 137-20 to L 137-26 concerning levies on betting and gambling to the benefit of social security. In particular articles L 137-20 and L 137-21 introduce a levy of 1.8% on monies wagered on sporting events or horse racing and article L 137-22 fixes a levy of 0.2% on monies wagered for online casino gambling.

38. The parties making the referral argue that the difference in taxation of online betting on horse racing or sporting events and money waged on casino games runs counter to the principle of equality before public burden sharing.

39. Article 13 of the Declaration of the Rights of Man and the Citizen proclaims:
“ For the maintenance of the forces of law and order and administrative expenses a general tax is indispensable and shall be equally borne by all citizens in

proportion to their ability to pay the same". Under Article 34 of the Constitution it is up to Parliament to determine, taking into account constitutional principles and the nature of each tax, to lay down the rules for appraising the ability of each citizen to pay taxes. In particular, to comply with the principle of equality, this appraisal must be based on objective and rational criteria in view of the purpose it is sought to achieve. This appraisal must not however lead to any clear infringement of the principle of equality before public burden sharing.

40. Any person participating in the same betting or gambling activities shall be taxed in the same conditions. The difference between taxation of betting on horse racing or sporting events and casino games, which are of a different nature, does not introduce any difference in treatment between persons indulging in such activities in the same conditions. The same holds good for poker played in casinos and online poker, which also have different characteristics.

41. Sections 47 and 48 of the statute referred for review are not unconstitutional.

42. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution.

HELD

Article 1. Sections 1, 26, 47 and 48 of the Act pertaining to the Opening up to Competition and the Regulation of Online betting and gambling are not unconstitutional.

Article 2. This decision shall be published in the Journal official of the French Republic.

Deliberated by the Constitutional Council sitting on May 12th 2010 and composed of Mr Jean-Louis DEBRE, President, Messrs Jacques BARROT, Guy CANIVET, Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Messrs Hubert HAENEL, Jean-Louis PEZANT and Mr Pierre STEINMETZ