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(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – BELGIA

Pomoc państwa SA.53630 (2019/FC) – Domniemana pomoc przyznana przedsiębiorstwu Ladbrokes w związku z wirtualnymi zakładami

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2020/C 355/02)

Pismem z dnia 2 września 2020 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Belgię o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

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Otrzymane uwagi zostaną przekazane Belgii. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

PROCEDURA

W dniu 1 marca 2019 r. przedsiębiorstwa Rocoluc NV oraz European Amusement Company NV („Rocoluc” i „EAC”) skierowały do Komisji skargę dotyczącą domniemanej niezgodnej z prawem pomocy państwa przyznanej przez Belgię na rzecz przedsiębiorstwa Derby NV (zwanego dalej „Ladbrokes” zgodnie z nazwą, pod jaką prowadzi działalność handlową w Belgii).

OPIS ŚRODKA POMOCY

Decyzja dotyczy wydanego przez Belgię przedsiębiorstwu Ladbrokes zezwolenia *ad hoc* na prowadzenie wirtualnych zakładów w Belgii. Skarżący twierdzą, że środek ten skutkował faktycznie przyznaniem temu przedsiębiorstwu wyłącznego prawa do prowadzenia od 2014 r. wirtualnych zakładów w Belgii, bez odpowiedniego wynagrodzenia.

Wirtualne zakłady to gra losowa, w ramach której gracze obstawiają fikcyjne wydarzenia sportowe, którego wynik określa się przy pomocy generatora liczb losowych. W trzech „notach ramowych” wydanych w latach 2012–2015 Komisja ds. Gier Hazardowych, federalny organ regulujący i kontrolujący ten sektor, wyjaśniła, że uważa wirtualne zakłady za zakłady dotyczące (wirtualnych) wydarzeń i że w związku z tym, jej zdaniem, powinny być one oferowane wyłącznie przez ośrodki gier hazardowych klasy IV. Za pośrednictwem wiadomości e-mail z dnia 10 lutego 2014 r. oraz 5 marca 2015 r. Komisja ds. Gier Hazardowych zezwoliła przedsiębiorstwu Ladbrokes na prowadzenie wirtualnych zakładów.

Następnie w latach 2015–2016 wspomniany organ odmówił kilkakrotnie innym podmiotom klasy IV prawa do oferowania wirtualnych zakładów, powołując się na prowadzoną przez siebie w owym czasie ocenę adekwatności ram regulacyjnych. Nie zawiesił on jednak przy tym swoich not ramowych, ani nie anulował zezwolenia udzielonego przedsiębiorstwu Ladbrokes do 2017 r.

OCENA ŚRODKA POMOCY

Przyznanie podmiotowi gospodarczemu specjalnego lub wyłącznego prawa przez państwo członkowskie może stanowić pomoc państwa w rozumieniu art. 107 ust. 1 TFUE. Jeżeli państwo występuje w charakterze organu regulacyjnego przyznającego prawa specjalne i zarządza tymi prawami, może ono zgodnie z przepisami podjąć decyzję o niemaksymalizowaniu przychodów, które w przeciwnym razie zostałyby uzyskane w wyniku przyznania takich praw, pod warunkiem że wszystkie zainteresowane podmioty są traktowane zgodnie z zasadą niedyskryminacji. W takich przypadkach proces wyboru powinien podlegać kryteriom ustalonym *ex ante* w przejrzysty i niedyskryminujący sposób. Wówczas podmioty uprawnione nie czerpią korzyści płynących z zasobów państwowych i nie jest to traktowane jako pomoc państwa w rozumieniu art. 107 ust. 1 TFUE.

W niniejszej sprawie wydaje się, że przez pewien czas przedsiębiorstwo Ladbrokes korzystało *de facto* z wyłącznego prawa do oferowania wirtualnych zakładów w Belgii. W tym okresie nie uiszczało ono żadnej szczególnej opłaty (licencyjnej) ani opłaty w postaci dodatkowego odsetka od przychodów z gier brutto w zamian za to faktycznie wyłączone prawo.

W świetle powyższego Komisja uznaje wstępnie, że przedsiębiorstwo Ladbrokes uzyskało korzyści przyznane z zasobów państwowych w postaci faktycznego wyłącznego prawa do świadczenia usług w zakresie zakładów wirtualnych w Belgii. Ponieważ kwestionowany środek miał zastosowanie wyłącznie do przedsiębiorstwa Ladbrokes, Komisja wstępnie stwierdza, że wspomniane korzyści były selektywne. Komisja uważa również, że kwestionowany środek można przypisać Belgii, ponieważ zezwolenie udzielone przedsiębiorstwu Ladbrokes, a także nota ramowa, na podstawie której zostało ono wydane, zostały przyjęte przez organ publiczny – Komisję ds. Gier Hazardowych. Komisja stwierdza też wstępnie, że kwestionowany środek może zakłócać konkurencję i wpływać na wymianę handlową między państwami członkowskimi, ponieważ przedmiotowa pomoc stanowi pomoc operacyjną, która wzmacnia pozycję przedsiębiorstwa Ladbrokes w stosunku do konkurentów. Rynek gier hazardowych jest rynkiem, na którym w Belgii poza Ladbrokes działa jeszcze kilka innych podmiotów, takich jak skarżący, a przedsiębiorstwo Ladbrokes prowadzi również działalność w kilku innych państwach członkowskich.

Ponadto na obecnym etapie postępowania Komisja nie dysponuje żadnymi informacjami wskazującymi na to, że przedmiotowy środek, o ile stanowi pomoc państwa, może zostać uznany za zgodny z rynkiem wewnętrznym.

TEKST PISMA

The Commission wishes to inform Belgium that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

1. PROCEDURE

- (1) By letter of 1 March 2019, the Commission services received a complaint lodged by Rocoluc NV and European Amusement Company NV (hereafter respectively referred to as 'Rocoluc' and 'EAC' or together as the 'complainants') concerning the alleged grant of State aid by Belgium to Derby NV through an ad hoc authorisation to operate virtual betting granted to Ladbrokes ('the contested measure'). Derby NV (hereafter referred to under its commercial name in Belgium, 'Ladbrokes') is a local branch of the betting and gambling company Ladbrokes PLC.
- (2) On 1 April 2019, the Commission services forwarded the complaint to Belgium and requested additional information. By letter of 15 May 2019, Belgium submitted its views on the complaint and replied to the request for information after requesting and obtaining an extension of the deadline to reply.
- (3) On 17 June 2019, the Commission services forwarded the non-confidential version of Belgium's submission of 15 May 2019 to the complainants, inviting them to state their views with regard to the arguments put forward by Belgium. By letter of 23 July 2019, the complainants submitted their views in reaction to Belgium's arguments, maintaining their complaint, after requesting and obtaining an extension of the deadline to reply.
- (4) On 4 December 2019, the Commission services requested additional information and documents from the Belgian authorities, which were provided, after granting an extension of the deadline to reply, on 30 January 2020.
- (5) By letter dated 16 July 2020, the Belgian authorities granted a language waiver to the Commission, agreeing to have the decision adopted and notified in English.

2. DESCRIPTION OF THE MEASURE

- (6) The contested measure is the ad hoc authorisation granted by Belgium to Ladbrokes to operate virtual betting in Belgium. According to the complainants, that measure resulted in Ladbrokes enjoying a *de facto* exclusive right since 2014 to operate virtual betting in Belgium without appropriate remuneration.

2.1. General legal framework governing gaming in Belgium

- (7) The Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players (the 'Gaming Act')⁽¹⁾, as amended by an Act of 10 January 2010⁽²⁾, together with Royal Decrees implementing it (together referred to as the 'legislative framework'), distinguishes between four classes of gaming establishments in Belgium: (i) Class I: casinos; (ii) Class II: gaming arcades; (iii) Class III: drinking establishments; and (iv) Class IV: betting offices.
- (8) The Gaming Act also specifies the licenses each class of gaming establishment needs to operate. For instance, class II establishments, such as the complainants, require a class B license to operate. Class IV establishments, such as Ladbrokes, require an F1 or F2 license to operate.
- (9) The Gaming Commission is a federal regulator within the Federal Public Service of Justice (formerly, the Ministry of Justice) tasked with advising the Government and Parliament on the gaming legislative framework, taking decisions (including the granting of licenses necessary for opening any of the above establishments), and controlling the sector.

(1) Act of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players ('Loi du 7 mai 1999 sur les jeux de hasard, les paris, les établissements de jeux de hasard et la protection des joueurs'). Published in the *Belgian Official Gazette* on 30 December 1999.

(2) Act of 10 January 2010 modifying the Act of 7 May 1999 as regards the Gaming Commission ('Loi du 10 janvier 2010 modifiant la loi du 7 mai 1999 sur les jeux de hasard, les établissements de jeux de hasard et la protection des joueurs, en ce qui concerne la Commission des jeux de hasard'). Published in the *Belgian Official Gazette* on 1 February 2010.

- (10) Two main gaming categories referred to in the present Decision are gambling and betting. Gambling is an ‘automatic game of chance’ whereby the player bets on the outcome of a game or event that has an uncertain, randomly determined, result that depends on probabilities (e.g. slot machines). Automatic games of chance can be offered mainly by class II establishments with a B license. Betting, on the other hand, is about predicting the outcome of a future, real event, based on certain criteria (e.g. betting on the outcome of a football match based on the relative strength of the teams). Betting is offered mainly by class IV gaming establishments and it requires an F1 or F2 license⁽³⁾. Class IV establishments may also offer automatic games of chances under certain conditions. Under Article 43/8 of the Gaming Act, operators with an A, B or F1 licence may acquire an additional licence ‘plus’, by which they are authorised to offer the same games online as they do land-based.
- (11) Rocoluc and EAC are class II establishments both holding offline B and online B+ licenses. Ladbrokes is a class IV establishment holding offline F1 and F2⁽⁴⁾ and online F1+ licenses.

2.2. Rules governing virtual betting in Belgium

- (12) Virtual betting is a game of chance, which appeared in Europe in 2011, whereby players can bet on the outcome of a fictional sport event (e.g. a fictional horse race) and where the results are determined by a random number generator.
- (13) By way of three ‘framework notes’ or ‘memoranda’ (*omkaderingsnota* and *nota*) dated 12 January 2012⁽⁵⁾, 17 April 2013⁽⁶⁾ and 1 July 2015⁽⁷⁾ (‘the Framework Notes’), the Gaming Commission explained that it considered virtual betting to be betting on (virtual) events and, thus, that it should be offered only via class IV gaming establishments.
- (14) Following requests by e-mails from Ladbrokes dated 9 February 2014 (regarding land-based or ‘offline’ virtual betting, i.e. in betting outlets) and 5 March 2015 (regarding online virtual betting), the Gaming Commission authorised Ladbrokes to operate virtual betting by e-mails dated 10 February 2014 and 5 March 2015 respectively.
- (15) On 9 September 2015, following reactions received from the sector, the Gaming Commission came to ‘new insights’ as to the classification of virtual betting and set up a sub-commission to investigate whether legal action was required to regulate virtual betting.
- (16) On 28 October 2015, another class IV establishment requested authorisation to operate virtual betting. The Gaming Commission rejected that request, justifying that rejection with reference to the sub-commission’s ongoing reflexion on the classification of virtual betting.
- (17) In a report (*avis*) dated January 2016⁽⁸⁾, the sub-commission recommended the creation of a specific legal framework for offline virtual betting and the suspension of the framework note of 1 July 2015. It also recommended the suspension of the authorisation granted to Ladbrokes, to take effect as of 1 April 2016, in order to provide for a transitional period in line with usual administrative practices⁽⁹⁾.

⁽³⁾ Operators with an F2 license can also offer betting outside a class IV gaming establishment under certain conditions.

⁽⁴⁾ An F2 license permits the acceptance of bets for the account of the holder of an F1 license.

⁽⁵⁾ ‘*Omkaperingsnota aangaande de mogelijkheid tot het inrichten van weddenschappen op virtuele evenementen*’. The Belgian authorities consider that it is very likely that this framework note was published on the following page: www.gamingcommission.be/opencms/opencms/jhksweb_nl/gamingcommission/besl/wdsch/. It is however not or no longer publicly available there.

⁽⁶⁾ ‘*Omkaperingsnota aangaande de mogelijkheid tot het inrichten van weddenschappen op virtuele evenementen*’. The Belgian authorities consider that it is very likely that this framework note was published on the following page: www.gamingcommission.be/opencms/opencms/jhksweb_nl/gamingcommission/besl/wdsch/. It is however not or no longer publicly available there.

⁽⁷⁾ ‘*Nota: Weddenschappen op virtuele evenementen*’. According to the Belgian authorities, this note was published on the following page: www.gamingcommission.be/opencms/opencms/jhksweb_nl/gamingcommission/besl/wdsch/. It is however not or no longer publicly available there.

⁽⁸⁾ ‘*Avis de la Sous-commission concernant la réglementation souhaitée des “paris virtuels” tant en ligne que hors ligne*’.

⁽⁹⁾ Extract from the report: ‘*Le Sous-commission conseille de prévoir une période transitoire raisonnable avant de suspendre la note compte tenu de l’approbation d’exploitation de ces jeux accordée précédemment aux agences de paris. Le terme habituel de 60 jours prévu pour les actes juridiques administratifs semble également approprié comme période de transition minimale dans ce cadre. La Sous-commission recommande donc de suspendre la note du 1^{er} juillet 2015 en ce qui concerne l’exploitation des paris virtuels dans les agences de paris et l’approbation délivrée à Ladbrokes, à compter du 1^{er} avril 2016 jusqu’à ce que les modifications nécessaires aient été apportées aux arrêtés royaux et protocoles techniques correspondants pour les différentes catégories d’établissements de jeux.*’

- (18) On 13 January 2016, following the advice of the sub-commission on the need to adapt the regulatory framework, the Gaming Commission adopted a first transitional decision⁽¹⁰⁾, whereby it suspended the 2015 framework note and the authorisation granted to Ladbrokes, effective as from 1 June 2016. In its decision, the Gaming Commission stated that ‘the current regulation on virtual offline betting, by means of the note of 1 July 2015, does not provide an adequate framework for such games.’
- (19) On 1 June 2016⁽¹¹⁾ and on 2 January 2017⁽¹²⁾, the Gaming Commission adopted two other transitional decisions delaying the suspension of the framework note and of Ladbrokes’ right to operate virtual betting until 30 June 2017 ‘for reasons of legal certainty’.
- (20) The Gaming Commission’s handling of a second request for authorisation to offer virtual betting submitted by the operator referred to in recital (16) on 17 June 2016 as well as a request from another class IV operator on 23 August 2016 was first suspended because the submissions were allegedly incomplete. The Gaming Commission later informed the first operator (by two emails of 15 September and 3 November 2016) and the second operator (by email of 3 November 2016) that it had to delay its review of their requests. The reason given by the Gaming Commission was that the legislative framework for virtual betting was being updated.
- (21) On 1 July 2017, the suspension of the Framework Notes and of Ladbrokes’ authorisation to operate virtual betting became effective, which means no operator, including Ladbrokes, was permitted to provide virtual betting in Belgium. Notwithstanding that suspension, Ladbrokes did not stop offering virtual betting in its betting outlets. As a result, several gaming operators brought legal proceedings against Ladbrokes to ensure that it would refrain from operating virtual betting machines⁽¹³⁾.
- (22) On 4 May 2018, the Royal Decree on ‘games of chance on virtual sporting events in fixed class IV gaming establishments’⁽¹⁴⁾ was adopted. It set out that virtual betting is a ‘game of chance on virtual sporting events’ and embedded it into the existing regulation on automatic games of chance that are offered in class IV gaming establishments. Therefore, as of 4 May 2018 all class IV establishments are allowed to operate virtual betting machines (two devices maximum per betting office). As of 30 January 2020, there were at least five operators providing offline virtual betting in Belgium, including Ladbrokes.
- (23) Throughout the period that it provided virtual betting in Belgium, Ladbrokes did not pay any specific fee to the Gaming Commission on top of the fee it paid for its F1 and F1+ licenses.

2.3. National legal proceedings brought against the Belgian State and Ladbrokes

- (24) Rocoluc, EAC and other operators have brought legal proceedings linked to virtual betting against the Belgian State and Ladbrokes on several grounds before Belgian courts.
- (25) In a judgment of 27 September 2018, the Brussels Court of First Instance found that the Belgian State violated an article of the Constitution guaranteeing non-discrimination between Belgians⁽¹⁵⁾. The Court noted, as regards the period after 13 January 2016 when the Gaming Commission acknowledged the illegality of virtual betting and suspended its earlier framework notes, that ‘[i]nstead of immediately prohibiting and stopping the effective operation of illegal games of chance by means of its lawful competences as a regulator, over a long period the Gaming Commission made every effort not to obstruct Ladbrokes.’

⁽¹⁰⁾ ‘Nota: Beslissing van de Kansspelcommissie betreffende “virtuele weddenschappen” (13 januari 2016)’.

⁽¹¹⁾ ‘Beslissing van de Kansspelcommissie betreffende “virtuele weddenschappen” de dato 1 juni 2016’.

⁽¹²⁾ The reference comes from the minutes of a meeting of the Gaming Commission of 2 January 2017, which indicate: ‘*Décision: La décision du 13 janvier 2016 est suspendue jusqu’au 30/06/2017 et aucune nouvelle autorisation d’exploiter ne sera mise à l’agenda; il n’y a pas d’objections.*’ It was also indicated on the website of the Gaming Commission: “2.1.2017: ‘Note paris virtuels — Au cours de la réunion extraordinaire de la Commission des jeux de hasard d.d. 2 janvier 2017 on a décidé de prolonger la note d.d. 13/01/2016 concernant les paris virtuels jusqu’à 30/06/2017.’”

⁽¹³⁾ Proceeding lodged on 7 August 2017 before the Brussels Commercial Court. In its judgment of 28 March 2018 (A/17/03428), the Court ordered Ladbrokes to refrain from operating virtual betting machines starting from the 3rd day following notification of the judgment, under penalty of a periodic payment of EUR 10 000 per day of delay.

⁽¹⁴⁾ ‘*Arrêté royal relatif aux jeux de hasard sur des événements sportifs virtuels dans les établissements de jeux de hasard fixes de classe IV*’. Published in the Belgian Official Gazette on 9 May 2018.

⁽¹⁵⁾ Brussels Court of First Instance (NL), judgment 2018/10474 in case 2016/4751/A.

- (26) In a judgment of 19 September 2019, the Council of State ruled that, through the framework note of 1 July 2015, the Gaming Commission ‘allowed, without being empowered, the organisation of [virtual betting], while the Act of 7 May 1999 did not allow it.’⁽¹⁶⁾ Therefore, the Council of State annulled the three framework notes of 12 January 2012, 17 April 2013 and 1 July 2015 and the transitional decision of 2 January 2017, which according to the Court prolonged the effects of the note of 1 July 2015 and in which explicit reference is made to the fact that no request for the operation of virtual betting can be put on the agenda of the Gaming Commission.

3. POSITION OF THE PARTIES ON THE MEASURE UNDER ASSESSMENT

3.1. Position of the complainants

3.1.1. Existence of aid

- (27) The complainants consider that the measure constitutes State aid.
- (28) They argue that the Gaming Commission granted Ladbrokes a *de facto* exclusive right to provide virtual betting in Belgium, without the latter having to pay any remuneration. According to the complainants, this foregoing of public revenues constitutes a loss of State resources. Since the Gaming Commission is an administrative authority falling under the responsibility of the Minister of Justice, the complainants also consider that the measure is imputable to the Belgian State.
- (29) The complainants claim that Ladbrokes benefited from this exclusive right for the provision of both offline and online virtual betting, conferring on it an advantage.
- (30) The complainants consider that advantage to be selective, since it benefited only Ladbrokes.
- (31) The complainants claim, lastly, that the measure ‘substantially strengthen[ed] the position of one single undertaking, namely Ladbrokes, as compared to other undertakings competing in intra-Union trade.’ According to them, the turnover of Rocoluc and EAC sharply declined between 2014 and 2017, whereas Ladbrokes’ turnover increased by more than 200 %⁽¹⁷⁾. They claim that these figures are due to Ladbrokes’ virtual betting offering. In addition, the complainants indicated that Derby NV (i.e. Ladbrokes’ official name in Belgium) is the Belgian branch of the company Ladbrokes PLC, which is active in several EU Member States, as are other competitors. The complainants therefore consider the measure to distort competition and affect trade between Member States.

3.1.2. Compatibility

- (32) According to the complainants, the measure does not fall under any of the potential compatibility grounds listed under Article 107(2) and (3) TFEU. For this reason, the aid cannot be declared compatible with the internal market.

3.2. Position of Belgium

3.2.1. Existence of aid

- (33) According to Belgium, the measure does not constitute State aid.

3.2.1.1. State resources

- (34) The Belgian authorities contend that ‘there is no rule under European or national law obliging a State to attach a remuneration to the granting of certain rights, not even if such right would be exclusive [quod non].’ They add that this holds even truer ‘when the granting of the license is based on objective criteria.’
- (35) The Belgian authorities claim that Ladbrokes was the only operator that fulfilled the conditions set out by the Gaming Commission. The fact that Ladbrokes was *de facto* the only operator allowed to operate virtual betting was the consequence of the underlying licensing system ‘set up by the Gaming Act and [...] the conditions set out by the Gaming Commission.’ According to Belgium, any grant of a (de facto exclusive) right to Ladbrokes free of charge did not involve a transfer of State resources.

⁽¹⁶⁾ Judgment of the Belgian Council of State of 19 September 2019, n°245.497, in case G/A 217.704/XI- 20.916, p. 27: ‘Il découle donc de ce qui précède que lorsque la partie adverse a pris sa note d’encadrement, le 1^{er} juillet 2015, “relative à la possibilité d’organiser des paris sur des événements virtuels”, la loi du 7 mai 1999 ne permettait pas l’organisation de tels paris. Par cette note, la partie adverse ne s’est donc pas limitée à encadrer l’organisation de paris sur des événements virtuels autorisée par la loi mais elle a permis, sans y être habilitée, l’organisation de tels paris alors que la loi du 7 mai 1999 ne l’autorisait pas.’

⁽¹⁷⁾ Minus 53,2 % for Rocoluc and minus 67,9 % for EAC, compared to + 223,6 % for Ladbrokes, according to the figures provided by the complainants.

- (36) According to Belgium, the absence of an advantage (see Section 3.2.1.2) also confirms that the Belgian State did not forego State resources.

3.2.1.2. *Advantage*

- (37) The Belgian authorities stress that according to case law ‘when an undertaking is relieved from a burden that it would not have to bear in a normal situation, the Member State is not granting an economic advantage to the undertaking ⁽¹⁸⁾’. Belgium explains that the Belgian Gaming Act does not provide for a concession system, ‘implying that a licensed operator is never required to pay a concession fee in return for the right granted to it to operate [...] a certain game of chance that is considered to fall within the framework of such license.’

- (38) The Belgian authorities also point out that Member States are allowed to provide for a licensing system in which the licenses are granted free of charge. They stress that ‘[in] the case at hand, the “abnormality” exists in the fact that the authorisation granted free of charge to exploit virtual betting was de facto exclusive to the benefit of Ladbrokes.’ For these reasons there was, according to the Belgian authorities, no economic advantage given to Ladbrokes.

3.2.1.3. *Selectivity*

- (39) The Belgian authorities based their assessment of selectivity on a three-step analysis. First, the system of reference was according to the Belgian authorities made of the notes of 12 January 2012, 17 April 2013 and 1 July 2015 on virtual betting.

- (40) Second, they point out that the measure was not prima facie selective in light of the reference system because the undertakings concerned were not in a comparable factual and legal situation. Labrokes, on one hand, and other license F holders, on the other, requested the authorisation to operate virtual betting at different times. According to Belgium, the other F licence operators ‘only requested authorisations at the moment that the legal framework was in a significant transition, reason for which a *de facto* moratorium was installed by the Gaming Commission.’ The Belgian authorities add that, in order not to breach the principle of legal certainty, the Gaming Commission had to hold off authorising other operators to offer virtual betting, but it also could not immediately revoke Ladbrokes’ authorisations when the moratorium was set up.

- (41) Lastly, the Belgian authorities argue that if the Commission disagrees that Ladbrokes and the other F license holders that requested the authorisation were in a different factual and legal situation (implying ‘prima facie selectivity’), the way the authorisations were handled was in any case justified by the nature of the reference system. The Gaming Commission could ‘determine the license type needed to exploit such type of game and [could] also interpret the conditions that need[ed] to be fulfilled by the operators before being allowed to offer such game to the public in the framework of such license’. According to the Belgian authorities, the consequence was that certain choices had to be made. The Belgian authorities conclude in their views that the measure was not selective.

3.2.2. *Compatibility*

- (42) The Belgian authorities did not put forward any grounds for declaring the measure compatible with the internal market.

4. ASSESSMENT OF THE MEASURE

4.1. **Existence of State aid**

- (43) For measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

- (44) The grant of a special or exclusive right by a Member State to an economic operator may constitute State aid within the meaning of Article 107(1) TFEU.

⁽¹⁸⁾ Belgium refers to the judgment of the Court of Justice C-237/04, *Enirisorse v Sotacarbo*, ECLI:EU:C:2006:197, para. 48: ‘It stems from the above that Law No 273/2002 merely prevents Sotacarbo’s budget from being burdened with a charge which, in a normal situation, would not have existed. Consequently, that law merely regulates the exceptional right to withdraw granted to members of that company by Law No 140/1999, and does not seek to reduce a charge which that company would normally have had to bear.’

- (45) Where the State acts as a regulator granting and managing special rights, it can decide legitimately not to maximise the revenues which could otherwise have been achieved from the grant of those rights ‘provided that all the operators concerned are treated in line with the principle of non-discrimination⁽¹⁹⁾.’ In such cases, the selection process should be subject to criteria established *ex ante* in a transparent and non-discriminatory manner⁽²⁰⁾.” Where that is the case, the right holders do not enjoy an advantage from State resources and no State aid is present within the meaning of Article 107(1) TFEU.
- (46) The grant of an exclusive right is by its very nature discriminatory, so the aforementioned conditions cannot be met. In such cases, no State aid is present provided the State, when granting the right, leaves the right holder with only the minimum return necessary to cover its operational and capital costs from exercising the right, plus a reasonable profit⁽²¹⁾. That is because the recipient of the exclusive right shall not be considered to have enjoyed an advantage from State resources that it could not have obtained under normal market conditions⁽²²⁾.
- (47) For the following reasons, Ladbrokes appears to have enjoyed a *de facto* exclusive right to provide virtual betting in Belgium for a certain period of time.
- (48) While the Framework Notes were intended to be of general application, only Ladbrokes actually obtained an authorisation to provide virtual betting subsequent to the adoption of those notes. On 10 February 2014, Ladbrokes received a confirmation from the Gaming Commission that it could provide virtual betting services (see recital (14)). On 5 March 2015, it received confirmation from the Gaming Commission that it could provide online virtual betting services (see recital (14)). In contrast, the Gaming Commission rejected three requests from two class IV operators for authorisation to provide virtual betting in 2015 and 2016. The first of those rejections was based on the argument that the sub-commission was looking into whether the regulatory framework covering virtual betting had to be updated (see recital (16)). The last two rejections were based on the argument that the legislative framework for virtual betting was being updated (see recital (20)).
- (49) The Belgian authorities have advanced contradictory arguments as to whether the Framework Notes carried legal weight and whether an explicit authorisation from the Gaming Commission, based on those notes, was needed in the first place⁽²³⁾. In addition, according to the complainants the Framework Notes on which Ladbrokes’ authorisation was based were not made public. In answer to requests for clarification from the Commission, the Belgian authorities were unable to provide evidence that those notes had in fact been published (see also footnotes 5 to 7).
- (50) In any event, the Gaming Commission explicitly denied other class IV operators the authorisation to operate virtual betting, while Ladbrokes was authorised to do so, and it adopted a first transitional decision suspending the 2015 framework note and the authorisation granted to Ladbrokes, effective as from 1 June 2016. It justified those suspensions by arguing that the 2015 framework note did not provide an adequate framework for such games, which implies that it carried legal weight and formed the basis for Ladbrokes’ authorisation.
- (51) The timing of the Gaming Commission’s decisions was also favourable to Ladbrokes. According to minutes from the Gaming Commission of 29 October 2015, after the sub-commission had started investigating the nature of virtual betting, a member of the Gaming Commission noted that if virtual betting should be allowed in betting establishments, ‘other operators [besides Ladbrokes] should also be allowed to obtain authorisation⁽²⁴⁾.’ Yet, the Gaming Commission delayed its suspension of the framework notes and of Ladbrokes’ authorisation twice. Those suspensions only became effective on 1 July 2017, one and a half years after the sub-commission had published its assessment into the regulation of virtual betting.

⁽¹⁹⁾ See Commission Decision of 20 July 2004 on State aid NN 42/2004 — France — Modification of payments due from Orange and SFR for UMTS licences (OJ C 275, 8.11.2005, p. 3), recitals 28, 29 and 30, upheld by the Judgment of the General Court of 4 July 2007, *Bouygues SA v Commission*, T-475/04, EU:T:2007:196, paragraphs 108 to 111 and 123, and by Judgment of the Court of Justice of 2 April 2009, *Bouygues and Bouygues Télécom v Commission*, C-431/07 P, ECLI:EU:C:2009:223, paragraphs 94 to 98 and 125. See also Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, EU:C:2011:551, paragraphs 88 et seq. and to the judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraphs 46 et seq.

⁽²⁰⁾ See Judgment of the General Court of 4 July 2007, *Bouygues SA v Commission*, T-475/04, EU:T:2007:196, paragraph 104, in which the General Court noted that, in granting access to a scarce public resource such as the radio spectrum, national authorities simultaneously performed the roles of telecommunications regulator and manager of such public resources.

⁽²¹⁾ See Commission Decision of 4 January 2013 in case SA.33988 — Greece: Arrangements for the extension of OPAP’s exclusive right to operate 13 games of chance and the granting of an exclusive licence to operate Video Lottery Terminals (OJ C 1, 4.1.2013, p. 7), recitals 28-29 and 32, upheld by the Judgment of the General Court of 8 January 2015, *Club Hotel Loutraki and Others v Commission*, in Case T-58/13, EU:T:2015:1, and by the Judgment of the Court of Justice of 21 December 2016, *Club Hotel Loutraki and Others v Commission*, Case C-131/15 P, EU:C:2016:989.

⁽²²⁾ Judgment of the Court of Justice of 11 July 1996, *SFEI and others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽²³⁾ On authorisation, Belgium claimed in one instance that the request for an authorisation to offer virtual betting was a purely voluntary act and that ‘no authorisation was as such required’ to offer virtual betting”, but it also stated in another instance that ‘the setting up of virtual games of chance had to be preceded by a request for admission to the Games of Chance Commission’. Successive responses contradicted themselves on the existence and the nature of specific conditions and the publicity given to these conditions.

⁽²⁴⁾ ‘Indien virtual betting toch verder wordt toegelaten in wedkantoren zal men de markt moeten openstellen voor andere operatoren.’

- (52) Notwithstanding those suspensions, Ladbrokes did not stop offering virtual betting in its betting outlets and the Belgian authorities do not appear to have taken action to enforce those suspensions. It is only as from 4 May 2018, with the Royal Decree on 'games of chance on virtual sporting events in fixed class IV gaming establishments', that all class IV operators were permitted to offer virtual betting in Belgium.
- (53) Consequently, the Commission's provisional conclusion is that Ladbrokes enjoyed a *de facto* exclusive right to provide virtual betting in Belgium during a certain period of time between 10 February 2014, at the earliest, and 4 May 2018, at the latest.
- (54) The date of 10 February 2014 corresponds to the date on which Ladbrokes received confirmation from the Gaming Commission that it could provide virtual betting services. At the latest, Ladbrokes' *de facto* exclusive right started on 13 January 2016, the date on which the Gaming Commission adopted its first suspension decision (*de facto* refusing new requests to operate), or 1 April 2016, the date recommended by the sub-commission to suspend the framework note of 1 July 2015 and thus also Ladbrokes' right to operate virtual betting.
- (55) The date of 4 May 2018 corresponds to the date on which other class IV operators were able to offer virtual betting in Belgium. At the earliest, Ladbrokes' *de facto* exclusive right ended on 1 July 2017, the date on which the suspension of the Framework note of 1 July 2015 and of the authorisation granted to Ladbrokes became effective. However, the Belgian authorities do not appear to have taken steps against Ladbrokes to ensure that it ceased to provide virtual betting after 1 July 2017.
- (56) During the aforementioned periods, Ladbrokes did not pay any specific (license) fee in return for that *de facto* exclusive right. Like other licensed gaming operators operating on competitive segments of the market, Ladbrokes only paid (i) a fee fixed by law for each kind of license that the operators hold, mainly to cover the costs of the Gaming Commission; and (ii) the general taxes that apply to gambling and betting, depending on the region where it takes place and whether it is offline or online. Ladbrokes did not pay any lump sum for the exclusive right, nor did it redistribute any percentage of its gross gaming revenues⁽²⁵⁾ to the Belgian State.⁽²⁶⁾
- (57) In light of the foregoing, the Commission's provisional conclusion is that Ladbrokes enjoyed an advantage granted from State resources in the form of a *de facto* exclusive right to provide virtual betting in Belgium without paying adequate consideration for that right. Since the contested measure applied only to Ladbrokes, the Commission provisionally concludes that that advantage is selective. The Commission also considers the contested measure to be imputable to Belgium, since the authorisation granted to Ladbrokes as well as the Framework Note on the basis of which that authorisation was granted were adopted by the Gaming Commission, a public body. Finally, the Commission provisionally concludes that the contested measure is liable to distort competition and affect trade between Member States, since the aid in question is operating aid that strengthens Ladbrokes' position as compared to its competitors and gaming is a liberalised, competitive market, with several operators besides Ladbrokes, such as the complainants, active in Belgium, and with Ladbrokes active in several other Member States.
- (58) Since the contested measure appears to fulfil all the conditions of Article 107(1) TFEU, the Commission provisionally concludes that that measure constitutes State aid granted to Ladbrokes.

4.2. Compatibility

- (59) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) TFEU⁽²⁷⁾ and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) TFEU⁽²⁸⁾. It is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Article 107(2) or (3) TFEU⁽²⁹⁾.

⁽²⁵⁾ The gross gaming revenue is the difference between the revenues collected from games and the return paid to players.

⁽²⁶⁾ This can be contrasted with the arrangement made by Belgium with the Belgian 'National Lottery' (*Nationale Loterij* / *Lotterie Nationale*), a legal monopoly providing lottery games, under the Management agreement it concluded with the Belgian State (C – 2016/03279, 30 August 2016. 'Arrêté royal portant approbation du contrat de gestion entre l'Etat belge et la Loterie Nationale, société anonyme de droit public'). In 2017, the National Lottery paid a lump sum, determined *ex ante*, combining a 'monopoly rent' (*rente de monopole*) and financial levies (*subsidies*), in exchange for its exclusive right, for a total amount equivalent to 78 % of its gross gaming revenue of 2017. Based on the information available to the Commission, Ladbrokes' gross gaming revenue from land-based virtual betting was EUR 34.6 million in 2017. Applying the National Lottery's redistribution rate (78 %) as an indicative amount, Ladbrokes should have remunerated the Belgian State with EUR 27 million for offline virtual betting for the year 2017, on top of which online virtual betting would have to be added.

⁽²⁷⁾ The exceptions provided for in Article 107(2) TFEU concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

⁽²⁸⁾ The exceptions provided for in Article 107(3) TFEU concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

⁽²⁹⁾ Judgment of the General Court of 12 September 2007, *Olympiaki Aeroporia Ypiresies v. Commission*, Case T-68/03, EU:T:2007:253, paragraph 34.

- (60) Belgium has as yet offered no grounds in support of declaring the contested measure compatible with the internal market. Nor does the Commission have any indication at this stage that that measure, if it constitutes State aid, can be considered compatible with the internal market.

5. CONCLUSION

In light of the foregoing, the Commission has reached the provisional conclusion that the *ad hoc* authorisation to operate virtual betting granted by Belgium to Ladbrokes constitutes State aid within the meaning of Article 107(1) TFEU. The Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Belgium to submit its comments and to provide all such information as may help to assess the measure within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Belgium that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Belgium that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
