Belgium's VAT on online gaming and betting or how to best affect the charms of an otherwise attractive market

by **Tatjana Klaeser**

It all started from a good intention: closing a budget gap partly due to the terrorist attacks in Brussels. This lead the Belgian government, on 9 April 2016, to officially announce a series of measures aimed at boosting its tax income. The measures included a plan to terminate the VAT exemption on private gambling and betting offers, supposed to generate an extra 39 million Euros of revenues for the State. The idea to apply VAT to the private sector was then introduced and voted in a Finances Bill adjusting the budget for 2016.

Despite the provisions of the Finances Bill being immediately applicable and having already been translated into the VAT act, it is not clear, at the moment, how VAT is to be applied to gaming and betting services. An explanatory memorandum from the tax authorities has been announced for months but was still not issued at the time these lines were written.

Nevertheless, the measures are already hugely controversial as they do not apply to the National Lottery's products and will, eventually, adversely affect Belgium's regulatory efforts to channel consumers towards a regulated market.

The VAT debate

The decision to submit all private gambling and betting offers to the application of VAT was introduced on 25 May 2016 through a short reference in the general presentation of the new Finances Bill to adjust the budget for 2016. With no further indication as to the calculation method, it is merely declared that 39.000 million Euros will be generated by terminating the exemption of games of chance and betting from VAT.

The regional government of Wallonia, home to 4 casinos, 82 arcades, 270 betting shops, 460 bookstalls and 2.700 cafés, immediately opposed the government's resolution and requested the meeting of a Conciliation Committee, a typically Belgian way to solve conflicts of interest between the federal and regional Governments. The Committee gathered on 25 May and verbally agreed that only the online gambling and betting sectors should be subject to VAT.

Despite a negative opinion from both the Audit Court and the Council of State, and without any amendment to limit the application of VAT to the online sector, the bill was passed on 30 May 2016, with effect as from 1 July 2016.

At the same time, the Minister of Finances declared on the tax authorities' web site, that the entry into force of the new taxation is delayed until 1 August 2016, to "allow the sector to prepare the changes" and the tax administration to "issue a memorandum which discusses the practical aspects and consequences of these new rules". More than one month after the new rules are supposed to enter into

force, the explanatory memorandum has still not been issued.

To apply or not to apply? The practical situation today

The statements of the new Budget law were translated into legislation. Several sections of the VAT Act were amended accordingly. Article 44 §3, listing VAT exemptions, now states that are exempted from VAT (i) lotteries and (ii) other games of chance or games for money, except those provided by electronic means. The distinction between offline and online games, called for by Wallonia at the Conciliation Committee, has thereby been made.

As a matter of certainty, only online games and bets are now subject to VAT. Whether this also covers the National Lottery's gaming and betting offer is a matter of interpretation. Indeed, not all products offered by the Belgian National Lottery should technically qualify as lotteries. Article 1, §14 of the VAT Act provides a new definition, from a tax point of view, of the terms "games of chance, games for money and lotteries". Accordingly, lotteries exempted from VAT refer to operations requiring the purchase of lottery tickets. A narrow interpretation of the definition should therefore lead to rejecting the exemption for the National Lottery's gaming and betting products.

One question remains: in the current context, should operators already start to collect VAT? Strictly speaking, the answer is yes. The changes brought by the Budget Law have been translated into the VAT Act and the Minister only delayed their application until 1 August 2016. However, no information has been given as to how the tax should be calculated.

It is worth mentioning that the concept underlying VAT is that this tax is supposed to be a neutral operation for the merchant or services provider as it should be borne by the end-customer. This core principle cannot be applied to an industry segment built not on purchases and services to consumers but on wins and losses by players. The European legislator himself seems to consider the gambling and betting industry to be maladjusted to the application of VAT. It would not make sense to charge an extra 21% (the Belgian standard VAT rate) on all player deposits made.

To be on the safe side, operators would be well-advised to already start budgeting VAT, on top of the 11% gaming tax on gross gaming revenue. For foreign providers, this may mean that they have to register to Belgian VAT, given that services provided by electronic means are taxed where their end-customer is located.

VAT on gaming in the cross fire of critics

Although the application of the new VAT provisions is not yet certain, the measures have already attracted fierce critics from public authorities, regional governments as well as at private industry level.

Before the adoption of the new Budget Law, both the Council of State and the Audit Court had rendered a (non-binding) negative opinion against the Bill.

The Court of Auditors considers the revenues anticipated from the reform to be over-estimated and relying on a calculation which is in fact based on a mistaken ratio between online revenues and total revenue. The industry adds that it actually expects to be able to reduce the VAT burden by two thirds by deducting the VAT it currently pays for running its online business.

At a regional level, the government of Wallonia expressed its concerns that VAT on online gambling and betting will have an impact on the already struggling land-based sector because of the Belgian "offline requirement", whereby online gambling licenses are tied to the bricks and mortar business. As a result, Wallonia fears that jobs could suffer, in a region where the private gaming sector has an important role to play.

On top of leading to double taxation for online operators, the VAT will impact the gambling tax revenues, which are a regional competence and source of income. The collection of federal VAT leads to a reduction of the tax base collected at regional level through the gaming tax.

Arguments can be made that the new VAT provisions affect the overall balance in the distribution of powers but also of public finances between the federal and regional government levels. Application of a federal VAT to gaming and betting, which are a regional matter, breaches the laws on attribution of competences and financing between the federal and regional powers. These laws contain the core principles of Belgium's federal structure and Constitution. The reform may therefore also be considered to breach the principle of federal loyalty.

The Court of Auditors noted that the proposed measure is likely to be the subject of judicial proceedings and it is very likely that regional governments will file a claim for annulment before the Belgian Constitutional Court on these grounds.

Critics at a regional level are backed by the industry, which also advances arguments based on the violation of the principle of equal treatment. One of the

main points against the new tax provisions is the distortion of competition between the National Lottery (exempted from VAT as well as from the gaming tax) and the private sector which has to bear all these tax burdens.

The difference in treatment between National Lottery and private sector relies only on public character of the Lottery, regardless of the actual nature of the service provided. It can hardly be argued by the National Lottery that its offer is not in competition with the private sector, especially when it develops and advertises a gaming and betting offer largely exceeding the scope of traditional lotteries. The National Lottery actually benefits from an exorbitant status and protection regime which does not appear to be reasonably justified nor proportional in light of their market practices. Critics of illegal State aid are being heard and this would be even more the case if the new VAT provisions were to be interpreted as not applying to the National Lottery's offer at all.

Discrimination concerns may further arise from the differentiated treatment between the online and the offline sector. Although the specificities of the Belgian market result in a strong connection between online and land based gambling, a differentiated taxation could result in a breach of the principle of fiscal neutrality.

Last you need is tax, or how exaggerated tax on gambling can adversely affect a legal market

Gambling tax is part of a fragile balance between restrictions and attractiveness in all regulatory regimes across Europe. The challenge for legislators is to create an environment where business can thrive, while players' and public interests are being safeguarded. In this context, tax considerations are absolutely crucial, as they directly impact licensed operators' ability to compete with black market offers, especially for the online segment.

Consequently, the new increase of the tax burdens on the Belgian online private sector can only harm the regulator's efforts to channel players and online operations towards a legal market. The Belgian Gaming Commission expressed these concerns before the Budget Bill was passed. Unfortunately, the country's regulation authority has not even been consulted in the political process, while the changes to brought to the tax system are likely to put at risk fundamental policy objectives such as fighting the black market, ensuring players are protected, safeguarding jobs and regional tax revenues.

In the end, if the calculations of the Court of Auditors and the gaming industry's expectations to deduct VAT are correct, the financial impact of the new provisions should remain rather limited. The Belgian government, although not generating the expected extra revenue, will at least not have too seriously affected a well functioning industry. Nevertheless, the VAT exemption for lotteries, the resulting distortion of competition and the adverse effect on Belgium's balance of federal and regional powers, are likely to call for a judicial overhaul of VAT on gambling and betting operations. The newly introduced measures shed a bad light on a country which is already under European scrutiny for its gambling regulation.

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