II-8.6: The ARJEL's Disciplinary Commission decided it was not competent to sanction an operator even though the President of the ARJEL had requested such sanctions. The President of the ARJEL appealed the decision.


Translated Article


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MAIN INFORMATION

In 2010, the Autorité française de régulation des jeux en ligne (ARJEL — French Online gambling regulatory authority) decided that operators should have required all players to open an account even before they had been approved by the ARJEL to provide online gambling services, that all players should have been required to accept the general conditions of sale before their first bet, and that operators should have saved this information in a real-time archival format. This allows records to be kept that prevent manipulation and allow operators to carry out their legal obligation of surveillance of players to prevent fraud and money laundering. The ARJEL accused an operator of not complying with these obligations and deferred the affair to the disciplinary commission. But, on June 6, 2011, the ARJEL's disciplinary commission decided that it had no legal mandate to examine this case. According to the disciplinary commission, the law obliges operators to save information in real-time, but this information does not include the date players opened their accounts nor whether they accepted the general conditions of sale. The President of the ARJEL appealed this decision. This is the first time that this procedural mechanism has ever been used.

CONTEXT AND SUMMARY

In 2010, the ARJEL's *Direction des enquêtes et de contrôle* (Investigation and Surveillance Department) gained remote access to an operator's archives on sports betting and drew up a report showing that the first event recorded in these archives did not correspond to the opening of an account; that players' acceptance of the general conditions of sale were not recorded before they were allowed to bet; that limits on the first bet were not set up; that the creation of a new account was subject to an examination of the list of people forbidden from betting; and that many people who were forbidden from betting had active accounts with this operator.

The President of the ARJEL instructed the operator to comply with the law. Later, the ARCEP's board of directors decided to file suit against the operator. During the trial, the ARJEL realized that the operator had placed limits on the amount players were able to bet, and therefore dropped that part of the complaint. Similarly, during the disciplinary commission hearing that took place on May 12, 2011, the ARJEL announced that it was also dropping the complaint about opening accounts for blacklisted players, since the operator had already remedied this situation. It maintained its other complaints.

The first complaint that remained concerned monetary transfers from unregistered players (they had no account and had not been archived in the operator's "safety deposit box"). The ARJEL alleged that this meant that players were able to transfer money into their accounts before the operator was legally licenced to operate in France, and the operator should have closed and then reopened the litigious accounts.

The second complaint was similar, because it was based on the fact that there was no record that players had accepted the general conditions of sale before placing their first bet. The ARJEL considered that the company should have closed and then reopened the accounts in question.

The ARJEL insisted that these obligations are regulatory obligations and that the regulator has the statutory power to access this information at any time, and that generally, it is one of the ways that operators must help prevent online gambling from being used as a means for fraud and money laundering, which is also a statutory obligation.

Nonetheless, the disciplinary commission ruled that it could only use its powers "when an licensed online gambling or betting operator does not comply with the legal and regulatory obligations applicable to its activity." The decision continues: "in the absence of non-compliance, disciplinary sanctions cannot be imposed." It notes that since it ruled that the case was not within its jurisdiction, it was not necessary to examine the material facts of the complaints brought by the ARJEL's board of directors.

The disciplinary commission performed an exegesis of the applicable laws and pointed out that the obligation to perform real-time data archival contained in Paragraph 31 of the law only concerned data exchanged between players and operators mentioned by the third subsection of paragraph 38, namely bets placed, related operations, and all other data contributing to the constitution of the balance available on players' accounts.

The complaint bore upon information concerning the date accounts were opened and the references of the payers' accounts. However, these are data mentioned by the second subsection of paragraph 38, and not the third subsection.

The decision goes on, affirming that the implementation decree could have legally extended the obligation to archive data in real time to other information than what is mentioned in paragraph 38th's 2nd subsection, but did not do so.

Indeed, paragraphs 7 to 9 of the implementation decree oblige operators to grant the regulator access to a certain amount of information, including the date accounts were opened. But, according to the disciplinary commission, archives are simply one way that regulators can access this information. Statute does not oblige operators to store such information on real-time archival disks, and they can make this information accessible by any means they choose. Indeed, real time storage methods are simply one out of the many possible methods that operators can comply with their obligation to inform the regulator of the dates accounts were opened, since paragraph 7 does not create the obligation for operators to perform real-time storage of the dates on which accounts were opened.

This is why, since no statutory provision punishes the behavior invoked by the regulator, the disciplinary commission did not have to examine the material facts of the matter and did not punish the operator against which the board of directors had filed suit.

The President of the ARJEL, Jean-François Vilotte, immediately published a communiqué indicating that he would appeal this decision.

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BRIEF COMMENTARY

This decision is important for three reasons.

First of all, this is the first time that the president of a regulatory authority appeals a decision handed down by the disciplinary commission, which is independent from but still integrated within the regulatory authority that he presides. We know that this seemingly strange procedural technique was implemented after the EADS affair. Indeed, the directors of the French Financial Markets Authority (AMF) had filed suit against the directors of EADS, but the AMF's own disciplinary commission decided that there were no grounds for sanctions in a December 17, 2009 decision. The President of the AMF publicly stated that he needed to have the right to be able to appeal this type of decision, since it made the regulator seem incoherent to the

markets, since the same institution had filed suit and then not punished.

His wish was granted by the Banking Regulation Act of 22 October 2010. The scheme was reproduced within the procedural organization of the online gaming regulator.

The case is particularly interesting since the financial regulator had never used its new right to appeal, whereas the president of the ARJEL has just done so. It is interesting to observe the behavior of the president of a regulatory authority attacking a part of his own authority, which is nonetheless—by essence and by European obligation (Article 6 of the European Convention on Human Rights)—independent.

The second point that will be interesting to observe is the way the Council of State will handle this type of legislative mechanism through its particular outlook on administrative procedure and Independent Administrative Authorities. Indeed, the Council of State's annual reports have seemed to describe Independent Administrative Authorities as a sort of "necessary evil" that French law should get used to. Reading the Council of State's December 3, 1999 decision on the "Didier" case and comparing it to the Court of Cassation's Plenary Assembly's February 5, 1999 decision on the "Oury" affair shows that the Council of State only accepted under constraint and force that regulators could be qualified as courts of law "in the European sense of the term" when they carried out disciplinary activities. This is why one might think that any procedural mechanism leading to the control or limitation of disciplinary commissions' margins of maneuver, such as in the present case the exercise of a right to appeal by the president of the regulatory authority, will be welcomed by the Council of State.

Finally, and in third place, concerning gambling itself, we see here that the "review clause" allowing Parliament to modify its statute one year after it came into force, is welcome. Indeed, one might think that a new law will complete paragraph 38 in order to specifically oblige operators to perform real-time archival of the dates players' accounts were opened, and their acceptance of operators' general terms and conditions before placing their first bet. This is coherent with operators' obligation to fight against gambling being used as a means for fraud and money laundering, as intended by statute.

The ARJEL was therefore right to raise this point before its own disciplinary commission. One might even think that the disciplinary commission only adopted such a restrictive position in the case at hand in order to speed up the amelioration of statute in this area.