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**COMMISSION STAFF WORKING DOCUMENT**

**Online gambling in the Internal Market**

*Accompanying the document*

**Communication from the Commission to the European Parliament, the Council, the  
Economic and Social Committee and the Committee of the Regions**

**Towards a comprehensive framework for online gambling**

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## 1. INTRODUCTION

The online gambling services sector accounts for 10.9% of the gambling market share in the EU with a growth rate for 2015 estimated to be double that of 2008, which stood at €6.6 billion. In parallel, online technology is developing at a fast pace. A large number of Member States has engaged in a review of gambling legislation particularly over the last few years. Given the cross-border nature of online gambling improving and sustaining the protection of consumers and the regulatory environment is in the interest of all Member States. This is achievable by the Member States and the EU working together.

Against this backdrop the Commission launched the Green Paper<sup>1</sup> in March 2011 primarily aimed at obtaining a facts-based assessment of the EU online gambling market and of the different national regulatory frameworks of the Member States. The consultation focused on six key interrelated themes: 1) Definition and organisation of online gambling services; 2) Rules and practices relating to services performed and/or used by online gambling service providers; 3) Consumer protection, including minors; 4) Public order (fraud and money laundering); 5) Financing of benevolent and public interest activities and events; 6) Enforcement of applicable laws.

The responses to this consultation encompass close to 260 contributions from a diverse range of stakeholders: public authorities, commercial and public operators, intermediary services providers (e.g. media, internet, data storage, payment) beneficiaries of societal organisations, researchers and academia. An overwhelming majority of Member States contributed to the consultation. A Resolution<sup>2</sup> was adopted by the European Parliament whilst the Economic and Social Committee adopted an Opinion<sup>3</sup> on the Green Paper.

The Commission services complimented the consultation with five thematic workshops organised around key issues identified in order to benefit from the knowledge and experience of experts in the field. The workshops focused on sports integrity (fight against match-fixing), detection and prevention of problem gambling and gambling addiction, financing mechanisms regarding public interest activities benefitting from revenue derived from gambling and the prevention of crime and enforcement.

The Commission services have assessed the contributions to the Green Paper in detail and have drawn from the resourceful information and valuable insight provided together with the workshop conclusions, the expert group meetings with the regulatory authorities of EU/EEA jurisdictions, meetings with stakeholders as well as other sources of information.

Whilst the Green Paper focused on the online segment of gambling services and topics linked to the free movement of services (Article 56, Treaty on the Functioning of the EU), a number of these are pertinent to all forms of gambling services.

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<sup>1</sup> Green Paper on online gambling in the Internal Market of 24 March 2011 (COM(2011)0128 final)

<sup>2</sup> European Parliament resolution of 15 November 2011 on online gambling in the Internal Market (2011/2084(INI)).

<sup>3</sup> Opinion of the European Economic and Social Committee on the Green Paper on online gambling in the Internal Market COM(2011) 128 final

Finally, the supply of online gambling services is influenced by evolving information and communications technology. It includes forms of gambling using means of electronic or distance communication such as digital TV, mobile phone technology, telephone and fax.

It is within this context that the present staff working document addresses the challenges in the EU. The staff working document accompanies the Communication "Towards a comprehensive European framework for online gambling". The Action Plan, seeking to enhance legal clarity and establish policies based on evidence, identifies the prevailing issues across the Member States, examines the shortcomings and explores solutions for:

- compliance of national regulatory frameworks with EU law
- enhancing administrative cooperation and efficient enforcement
- protecting consumers and citizens, minors and vulnerable groups
- preventing fraud and money laundering
- safeguarding the integrity of sports and preventing match-fixing

This document is structured along these parameters, substantiating the issues and shortcomings as well as the mix of actions being proposed to strengthen the impetus to tackle the shared challenges. In addition, this document delves into the definitions, the market for online gambling services, the regulatory situation in Europe, the fundamental principles of the EU Treaty and the financing systems for public interest activities. The evidence in the report stems from the Green Paper public consultation; case-law of the Court of Justice of the EU and the EFTA Court, and other sources referred to earlier.

The proposed list of actions and the timeframes for taking forward the initiatives in this area can be found in the Action Plan.

The summary of replies to the Green Paper consultation is published alongside the Communication and this staff working document. All the non-confidential contributions and the conclusions of the workshops can be consulted on the Commission website<sup>4</sup>.

This is an indicative document of the Commission services, which cannot be considered in any way binding on the Commission as an institution, and it is without prejudice to the interpretation of EU law by the Court of Justice of the European Union.

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<sup>4</sup> [http://ec.europa.eu/internal\\_market/services/gambling\\_en.htm](http://ec.europa.eu/internal_market/services/gambling_en.htm)

## 2. DEFINITION

The term "online gambling" refers to a range of different gambling services and distribution channels<sup>5</sup>. Definitions at national level vary or do not exist.

The term "games of chance" when the activity is offered online can cover a number of different gambling services, such as

- Betting services (including horse and dog racing, event betting and pool competitions),
- Poker and casino services,
- Bingo services,
- Gambling services operated by and for the benefit of recognised charities and non-profit making organisations,
- Lottery services,
- Media gambling services (i.e. games in the editorial content of the media),
- Sales promotion services consisting of promotional games with a prize or where participation is exclusively linked to purchase.

It is not only the cooperation between gambling authorities and the exchange of information that depends on a common understanding of what online gambling means but also the development of policy initiatives and actions online. In order to ensure a successful and sustainable policy such common understanding therefore needs to be established in the EU.

### 2.1. Games of chance

#### 2.1.1. EU

The long-standing definition that exists for gambling activities in general in EU secondary legislation is that relied upon to exclude such services from the Electronic Commerce Directive<sup>6</sup>:

*"gambling activities ... involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions."*

In later texts such as the Services Directive<sup>7</sup> and most recently in the Audiovisual Media Services Directive<sup>8</sup> a slightly different definition is "games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services". While the Anti-Money Laundering Directive<sup>9</sup> refers to the term 'casino' it does not define it.

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<sup>5</sup> See below Chapter 3 paragraph 4.

<sup>6</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

<sup>7</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

<sup>8</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

<sup>9</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

To date, the Court of Justice of the European Union (CJEU) in its rulings on games of chance has not given specific guidance on the interpretation of the definitions used in secondary legislation<sup>10</sup>.

### **2.1.2. Member States**

While not all Member States have a legal definition of the concepts of “games of chance” and of “gambling”, in most jurisdictions a game of chance is defined as a game that offers an opportunity to compete for prizes, where success depends completely or predominantly on coincidence or an unknown future result and cannot be influenced by the player. At least one of the players loses his or her stake. The first important element characterising a game of chance is that of stake money or monetary value. The second essential characteristic of a game of chance is the element of chance. Success or loss must depend completely or predominantly on coincidence and not on abilities and knowledge. Success is considered to depend in any case on coincidence, if the relevant aspect is the occurrence of an uncertain event.

In order to avoid that certain games are not covered by the definition because a skill element can prevail in playing a particular game and therefore risking that a common policy would be incoherent, the understanding of games of chance should also comprise games of chance and skill. This concerns games where the result is not totally accidental but depends, to a certain extent on the skill and/or knowledge of the participant (such as poker or sports betting). However, the distinction between games of chance and skill and games of skill is not always easy to make and has been subject to numerous court proceedings at national level.

## **2.2. Online gambling**

Many Member States do not yet have a definition of online gambling at national level. In the Green Paper contributions Member States and stakeholders alike stressed that there is a need for any definition to encompass all forms of gambling and all forms of electronic or distance communication, such as internet, mobile phone, digital TV. A number of jurisdictions therefore do not refer to online gambling but to remote gambling in order to have a more technology neutral term given evolving information and communications technologies.

Gambling services offered by the media are typically covered by national gambling laws. Generally no distinction is made between gambling and promotional games if these fulfil the conditions of application of the respective gambling law (stake, prize, random outcome). In some cases specific rules for commercial communication games are laid down in the gambling law. In other cases Member States have specific rules in their consumer protection regulations or have established specific acts or codes of conduct for promotional games. Promotional games not involving a stake but promoting other games of chance may also fall within the scope of the national gambling law.

In the Green Paper on online gambling in the Internal Market the Commission took the view that the definition as set down in the e-Commerce Directive should be maintained for gambling and that it should be combined with that for information society services as set

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<sup>10</sup> See for the notion “games of chance” and the application of primary EU law below, Chapter 5.



down in Directive 98/34/EC, as amended by Directive 98/48/EC<sup>11</sup>. In this respect, the following common definition for online gambling services should be applied as defining the scope of the consultation:

*Online gambling services are any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient of services.*

Most responses to the Green Paper consultation supported this definition as a basis for discussions at European level. At the same time some respondents raised concern that such a definition is too restrictive, in particular because of the criteria "individual request of a recipient of services", and would incorrectly exclude certain activities from the term "online gambling".

The Commission services will, together with the Member States, further develop a common understanding of types of games and the means of electronic or distance communication used to be covered by the term "online gambling".

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<sup>11</sup> 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

### **3. THE MARKET FOR ONLINE GAMBLING SERVICES IN EUROPE, AND BEYOND**

The gambling sector is a growing market, both land based and online. In 2011, the annual revenues generated by the gambling service sector, measured on the basis of Gross Gaming Revenues (GGR) (i.e. stakes less prizes but including bonuses), were estimated to be €84.9 billion (EU 27), with an average annual growth rate of 2.8%. Online gambling services accounted for annual revenues in excess of €9.3 billion, 10.9% of the overall gambling market. The average annual growth rate for online gambling services is 14.7%. In 2015 online gambling is estimated to generate annual revenues of €13.0 billion, 14.2% of the overall gambling market<sup>12</sup>.

Online gambling is not only developing at a rapid pace economically but also technologically. Gambling services are increasingly used and offered on mobile phones, tablet computers and IPTV. Furthermore, gambling operators are also using and relying on business-to-business services (B2B) and intermediaries, for managing gambling platforms, providing software, payment services, internet services or marketing.

The consistent growth of the market fuels the need for a comprehensive and technology neutral set of rules and measures at EU and national level. New technologies create new challenges and regulation needs to adapt to keep up the pace.

#### **3.1. Global Market**

In 2010 the global gambling market (land-bases and online) generated GGR of €275 billion. With a GGR of €80 billion the EU had a market share of 29% of the world market. The total global internet gambling market (all products) was worth €23.28 billion. The EU online gambling market represented 45% of the world market share.

Worldwide online gambling profits (GGR) amounted to €16.39 billion in 2008. Approximately, €4.7 billion of this total comes from the 6.84 million European consumers who participate in online gambling (compared to 4.32 million consumers in Asia & Middle East and 4.21 million consumers in North America).

Asia is the fastest growing market. It is already bigger than the European market and will most probably soon overtake the US as the biggest gambling market in the world. The US is currently debating and preparing the opening of the online gambling market.

#### **3.2. Gambling market in Europe**

The overall gambling market in Europe is growing, both land-based and online. Lotteries and gambling machines remain the biggest sectors in the overall gambling market.

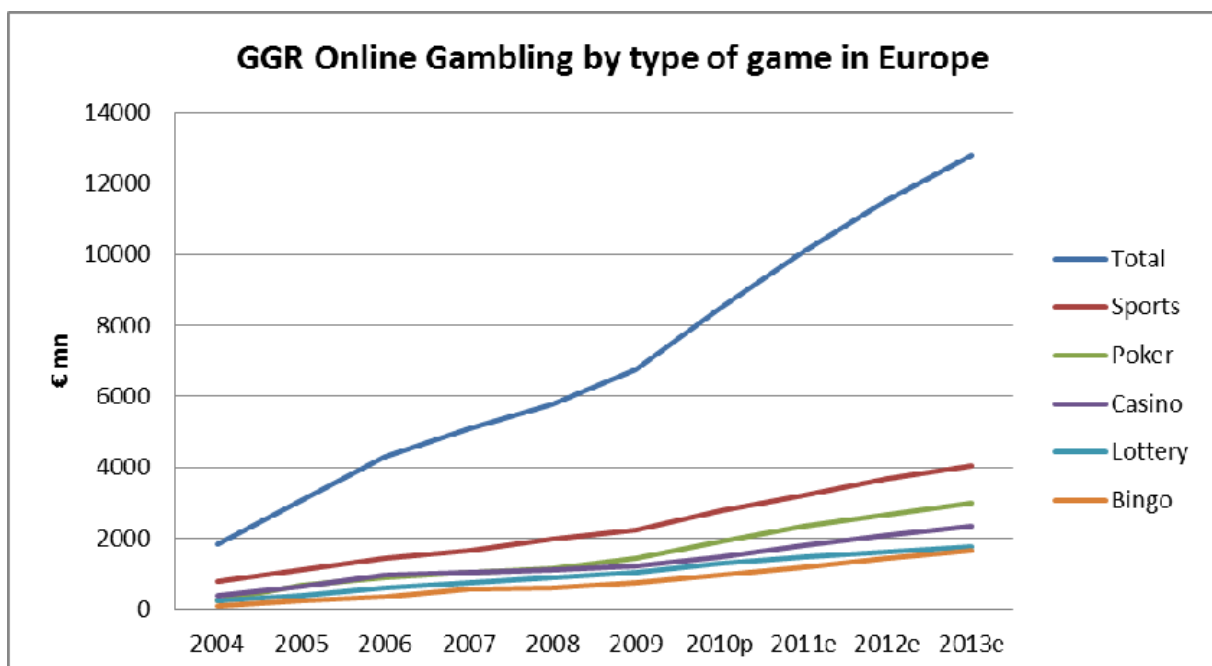
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<sup>12</sup> H2 Gambling Capital



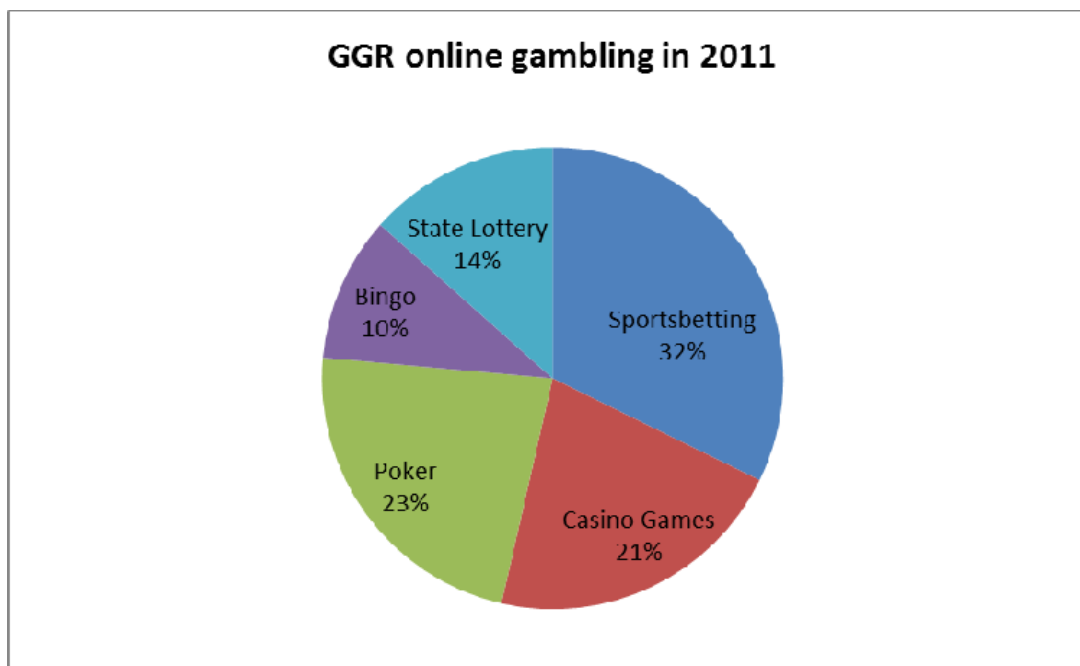
Source: H2 Gambling Capital

The online gambling market is growing though at a faster pace. With annual growth rates of almost 15% the market will most probably double in size between 2008 and 2013. However, with a market share of 10.9% online gambling is still a relatively small part of the overall market.



Source: Global Betting and Gaming Consultants (GBGC), year?

Compared to the overall gambling market the online gambling market shares are slightly different. Betting is the biggest sector followed by poker and casino games.



Source: H2 Gambling Capital

The size of the online gambling market differs significantly between Member States. In Austria, Denmark, Finland, Ireland, Sweden and the UK online gambling already constitutes 20% or more of the overall gambling market.



Source: H2 Gambling Capital

### 3.3. Cross-border dimension

In many Member States no data exists on the scale of the cross-border gambling market. Member States stress that it is difficult to quantify the cross-border dimension of online gambling services as these services are very often not regulated in the respective Member State. A number of Member States however have conducted studies and surveys whilst for others third party studies are available:

- In the UK the regulator concludes that players appear to gamble on UK regulated sites. There is little, if any evidence, of an unauthorised market.
- In Sweden the number of players gambling with foreign operators is growing: from 3% of the population in 2008/2009 to 4.5% in 2009/2010. 29% respectively 38% of the players was gambling only with foreign operators. The market share of foreign online operators is estimated to be 10% of the overall gambling market.<sup>13</sup> 150 foreign commercial operators are estimated to be active in the market. Their marketing expenses rose from SEK 437 million in 2000 to SEK 1.6 billion in 2010. Licensed non-EU operators are only a small proportion of the total online market.
- The government estimates the turnover of the unauthorised sports betting market in Germany (land-based and online) to be at least €2.7 bn (€350 million GGR), about 60% is generated online. Germany is considered to be the biggest cross-border online poker market in the EU with a market size of around €320 million and almost 600 000 players.<sup>14</sup>
- In Finland the value of gambling on foreign sites totalled €120 million in 2008 (betting €40 million, casino games €40 million, poker €30 million and bingo €10 million)<sup>15</sup>. In 2009 the total amount of sports betting by players located in Finland using service providers outside Finland was approximately €50 million<sup>16</sup>.
- In France regular data collection and reporting has been introduced by the new gambling law in 2010 and studies are under preparation. Previously unlicensed operators now have a market share of 65% for betting, 12% for horse racing, 90% for casino in the regulated market. Out of 35 operators that have been issued a licence since the introduction of the new law 14 operators already had a license from another Member State and 12 are part of a group with a license in another Member State.
- In Greece government estimates that around 250 unauthorised online gambling sites, 60 of which have Greek language versions, are active in the country. 20 000 gaming machines and 150 000 computers in public places are offering unauthorised online games. The annual turnover of illegal online betting in Greece is estimated to reach €2 billion, equal with brick and mortar betting of state monopoly. Also, the turnover in the betting exchanges, illegal poker and casino games reaches a €1.5 - 2 billion.
- In 2008 1 million Dutch citizens used unauthorised gambling services. 5.1% of the population or 500 000 citizens gamble online; with an average stake of €12-13<sup>17</sup>.
- In Slovenia the number of players placing sports bets with foreign operators has increased in comparison with previous years while the number of players gambling in casinos or playing the lottery decreased. An increasing number of players from Slovenia are gambling with foreign online gambling providers (almost 40% of those surveyed), for example betting an average of over €30 during the 2010 World Cup in South Africa<sup>18</sup>
- In Slovakia the government estimates that 90% of online players gamble on foreign sites.
- In 2010 380 000 Norwegians gambled online; 55% only in Norway, 25% only with foreign operators, 20% both. The total turnover amounted to NOK 7.2 billion while

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<sup>13</sup> SWELOGS population study

<sup>14</sup> Online Poker in the European Union; Ingo Fiedler, Ann-Christin Wilcke; University of Hamburg.

<sup>15</sup> TNS Gallup survey, 2008

<sup>16</sup> The Atlas Survey, 1-6/2009

<sup>17</sup> "The nature and scale of illegal gaming in the Netherlands", Ministry of Justice, November 2009

<sup>18</sup> Research study on Gambling in Slovenian households, with emphasis on internet gambling, FIHO, August 2011

foreign sites only generated NOK 5 billion (suggesting that players set higher stakes on foreign sites)<sup>19</sup>.

### **3.4. Technology**

The change in information and communications technology is also influencing the supply of online gambling services. Online gambling does not only include gambling services offered and used on the internet but any type of gambling using a means of electronic or distance communication (including digital interactive TV, mobile phone technology, telephone and fax).

The provision of remote gambling services through mobile telephone technologies is gaining popularity and market share. In France for example the number of players using mobile phones and tablets has doubled for sports betting, and tripled for poker from 2011. Within a year the number of players using mobile phones for sports betting and poker increased to 15 %. 12% of all horseracing bets are done via mobile phones<sup>20</sup>. Digital interactive TV seems to be an obvious distribution channel for gambling services and with the development of Digital interactive TV services the offer of gambling services through this channel will most probably increase.

The gambling platform hosting the online game of chance is not necessarily provided and managed by the gambling operator dealing with the player but will often be managed and provided by a different operator. The platform operator is providing B2B services to the gambling operator offering the game to the player. It is rather common that the platform is established and authorised in a different jurisdiction than that of the gambling operator. The possible take-up of cloud computing solutions in the gambling sector may add further complexity to this situation. A new and important development is also the offering of games of chance for money or money's worth in social media networks.

### **3.5. Data and understanding**

While data and information exist for some markets a comprehensive overview of the market is missing. There is a need for further information on the size and the development of the online gambling market (domestic and cross-border, intra EU and global, authorised and unauthorised offer). Furthermore, there is a need for a better understanding of the market (in Europe and globally), its dynamics and the technological challenges.

The Commission services will, together with Member States and all stakeholders concerned, discuss and develop means of improving statistics on online gambling services and of fostering understanding of the technological and market developments.

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<sup>19</sup> Regular survey of the Norwegian Gaming Authority

<sup>20</sup> Quarterly analysis of the online games market in France 1st quarter 2012, ARJEL

## 4. THE REGULATORY SITUATION IN EUROPE AND NATIONAL FRAMEWORKS

Gambling services are not regulated by sector-specific regulation at EU level. Nevertheless gambling services are subject to a number of EU acts. In other cases gambling services have been explicitly excluded from the scope of EU law.

The regulatory situation at national level shows a very diverse picture across the EU. Member States have regulated online gambling services in very different ways, by banning them, by establishing a monopoly for the offering of online gambling services or by issuing licences for the operation of these services. Few Member States do not have any rules at all covering this service activity.

### 4.1. EU secondary legislation relevant to online gambling

In addition to benefiting from horizontal rules such as those pertaining to Intellectual Property Rights (IPR) protection, the following texts are relevant to online gambling: the Audiovisual Media Services Directive, the Unfair Commercial Practices Directive, the Distance Selling Directive, the Directive on Consumer Rights, the Anti-Money Laundering Directive, the Data Protection Directive, the Directive on privacy and electronic communication, the e-commerce Directive and the Directive on the common system of value added tax.

The **Audiovisual Media Services Directive (AVMSD)**<sup>21</sup> aims at coordinating certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services. Gambling offers, where any audiovisual content is merely incidental to the service and not its principal purpose, are not considered AVMS.

The **Unfair Commercial Practices Directive (UCPD)**<sup>22</sup> aims at protecting consumers from unfair practices which are likely to induce a transactional decision which they would otherwise not have taken. Common rules and principles provide consumers with protection against unfair practices whether they are buying from their corner shop or purchasing from a website based abroad. Businesses can advertise and market to all consumers in the EU, in the same way as to their domestic customers. Although the UCPD is without prejudice to authorisation regimes such as the rules related to gambling activities, advertising and marketing practices fall within its scope. As a consequence, gambling advertising falls foul of the Directive if it is contrary to the requirements of professional diligence and if it is distorting the economic behaviour of the average customer or a clearly identifiable group with an underlying vulnerability, e.g. minors, where the gambling provider can reasonably expect such a distortion. The UCPD bans in particular misleading and aggressive commercial practices.

The **Unfair Contract Terms Directive**<sup>23</sup> aims to protect European consumers against unfair terms in the contracts they conclude with professionals. It introduces a notion of "good faith"

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<sup>21</sup> Directive 2010/13/EU.

<sup>22</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

<sup>23</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found unfair under the Directive are not binding for consumers. The Directive also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers.

The **Distance Selling Directive**<sup>24</sup> applies to most contracts where a consumer and a supplier running an organised distance-selling scheme do not meet face-to-face at any stage until after the contract has been concluded. "Distance communication" includes traditional means of distance communication but also covers more technologically advanced means of distance communication such as teleshopping, mobile phone commerce (m-commerce), and the use of the internet (e-commerce). The Directive provides a number of rights for consumers in order to ensure consumer protection throughout the EU, including provision of comprehensive information before the purchase, right of withdrawal, protection from unsolicited selling and protection from fraudulent use of payment cards. Article 6(3) however excludes the right of withdrawal for contracts for gaming and lottery services, unless the parties have agreed otherwise. The Directive will be repealed once the rules of the Directive on Consumer Rights will have to be applied in all Member States, i.e. by 13 June 2014. The Directive on Consumer Rights incorporates the provisions of the Distance Selling Directive.

The **Directive on Consumer Rights**<sup>25</sup> aims at achieving a real business-to-consumer (B2C) internal market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises. The Directive contains requirements on the information to be provided by traders prior to the conclusion of all consumer contracts, provides for specific information requirements and regulates the right of withdrawal distance and off-premises contracts and for rules on delivery and passing of risk applicable to contracts for the sale of goods as well as certain rules applicable to all types of consumer contracts. These include rules on the costs for the use of means of payment (e.g. credit or debit cards), on telephone hotlines operated by traders as well as on additional payments and pre-ticked boxes. In comparison with the Distance Selling Directive, the Directive on Consumer Rights however does not apply anymore to contracts for gambling (Article 3(3), sub (c)).

The **Anti-Money Laundering Directive (AMLD)**<sup>26</sup> requires certain institutions and businesses to apply a series of preventive measures with a view to prevent money laundering and terrorist financing. For the gambling sector the AMLD explicitly covers casinos. Member States can however extend the rules to other categories of undertakings with a particular risk to be used for money laundering and terrorist financing purposes. Those subject to the Directive are obliged to:

- verify the identity of their customer and to monitor their business relationship with the customer (casino customers must be identified and their identity verified if they purchase or exchange gambling chips with a value of EUR 2000 or more),

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<sup>24</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

<sup>25</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights

<sup>26</sup> Directive 2005/60/EC



- report suspicions of money laundering or terrorist financing to the public authorities; and
- take supporting measures, such as ensuring a proper training of personnel and the establishment of appropriate internal preventive policies and procedures.

Competent authorities should ensure that the persons who effectively direct or will direct the business of such entities and the owners of such entities are fit and proper persons. It furthermore imposes enhanced due diligence procedures in certain situations which carry higher risks of money laundering, e.g. where the customer has not presented himself physically.

The **Data Protection Directive**<sup>27</sup> and the **Directive on privacy and electronic communication**<sup>28</sup> provide for the legal data protection legal framework in the EU. The Data Protection Directive sets out the general framework for the protection of individuals with regard to the processing of personal data and the free movement of such data while the Directive on privacy and electronic communication contains specific rules on processing of personal data and the protection of privacy in the electronic communications sectors, and regulates areas such as confidentiality, billing and traffic data, rules on spam/unsolicited commercial communications, cookies, etc. For gambling services these rules not only cover static data such as contact or financial information but also behavioural data, like gambling frequency and pattern or the stake.

The **E-Commerce Directive**<sup>29</sup> sets up an Internal Market framework for electronic commerce. It establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. While Article 1(5)(d) excludes gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions from the scope of the directive the liability regime for information society service providers hosting or transmitting illegal content, Articles 12 to 15 of the Directive, also applies to gambling-related content.

Article 135(i) of the **Directive on the common system of value added tax**<sup>30</sup> exempts betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State, from the common system of value added tax. This however means that, in practice, a margin of discretion is available to Member States and in practice, not all forms of winnings from gambling are exempt in all Member States. In some cases, the tax exemption extends only to a limited number of forms of gambling (typically lotteries and

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<sup>27</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. On 25 January 2012 the Commission has proposed a data protection reform package, including a Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) which will replace Directive 95/46/EC, see [http://ec.europa.eu/home-affairs/doc\\_centre/police/docs/com\\_2012\\_10\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/police/docs/com_2012_10_en.pdf).

<sup>28</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

<sup>29</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

<sup>30</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

some forms of betting) and in practice it may not specifically cover all forms of online gambling.

#### **4.2. The notification procedure**

The notification procedure under Directive 98/48/EC<sup>31</sup> (the "Transparency Directive") allows the Commission and Member States to follow legislative developments in the Member States.

The Transparency Directive lays down a procedure for the provision of information about rules on information society services. The Directive is intended to help avoid the creation of new barriers to trade within the EU. The Directive requires Member States to notify their rules on information society services in draft form, and generally observe a standstill period of at least three months before formal adoption, in order to allow other Member States and the Commission to raise concerns about potential barriers to trade. Where notified drafts are liable to create barriers to the free provision of information society services under primary or secondary EU law, the Commission and other Member States may submit a detailed opinion, or comments in the case of more minor concerns, to the Member State that has notified the draft. Private stakeholders can submit contributions, thereby assisting the Commission and national authorities in identifying possible trade barriers at an early stage.

Over the years, the active participation of Member States in assessing the notified draft has generated an effective dialogue between them and the Commission. In the period 2009-2011, around 100 notifications were submitted by the Member States on online gambling. Recent notifications have dealt with issues such as seat requirement, server location, limitations on the number of licences and exclusive rights systems.

However, Member States do not always respect the obligation to notify draft rules on information society services under the Transparency Directive or do not provide the information as required by the Directive to properly assess if restrictions contained in the notified texts are justifiable. Moreover, Member States do not always take into account the Commission's position or provide only brief responses to the Commission's comments and detailed opinions. The Commission services will remain vigilant so as to ensure that unlawful barriers to online services are detected at the earliest possible stage. In this respect the Commission promotes an open and constructive dialogue with Member States in the notification process.

#### **4.3. Regulatory framework for online gambling in Member States**

A number of Member States prohibit gambling on their territories, except in so far as exceptions are provided by law. This restrictive policy normally aims to safeguard the interests of consumers and to prevent fraud, illegal gaming and problem gambling or addiction. It also aims at ensuring that the profits derived from the gambling market are attributed to the public's general interests. In certain Member States, it is unlawful to facilitate participation in foreign games of chance. In a similar manner, it may be unlawful to

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<sup>31</sup> 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations

deliberately participate in a game of chance offered by an operator not licensed by the competent national authority of the Member State where the participant resides.

For online gambling services different regulatory frameworks exist:

- **Ban**

A few Member States (e.g. Germany, The Netherlands) prohibit the offering of games of chance on the internet, either for all games of chance or for certain types of games, such as poker and casino games.

- **Monopoly**

Some European jurisdictions (e.g. Finland, Portugal, Sweden) have set up monopolistic regimes for the offering of online gambling services. These services are offered either by a state-controlled public operator or by a private operator on the basis of an exclusive right.

- **Authorisation/licensing**

The notifications received over the past years show that a growing number of Member States establish licensing systems for the offering of online gambling services, allowing more than one operator to offer its services on the Member State's market (e.g. Denmark, Estonia, France, Italy, Spain). The vast majority require every operator of online gambling offering services on their territories to obtain a licence within the jurisdiction. These gaming licenses can only be issued by national or regional authorities; whether or not the operator disposes of a gambling licence from one or more EU Member State is not always taken into consideration. Some Member States accept proof and documents demonstrating compliance with domestic licensing requirements. A few Member States recognise licences issued in other EU Member States. In general, the policy of granting licenses is elaborated and potential licensees have to comply with a series of strict requirements. In some Member States, there are also specific requirements as to the type of legal entity entitled to run a specific gambling activity. In a few cases, licences are only issued to non-profit national companies.

Online licences at large do not only cover online gambling services but all types of remote offers of gambling services, including mobile phones, tablet computer and IPTV.

While most Member States issue only one type of online licence, for business-to-consumer (B2C) services, some jurisdictions issue B2C and B2B licences. B2C licenses are the individual licences for the offering of different types of games (lotteries, betting, poker and casino type games) and for the promotion of gambling services. B2B gambling licences are issued for the hosting and managing of remote gambling operators, i.e. the provision of management and hosting facilities on a platform.

- **No specific regulation**

A few Member States (e.g. Ireland, Lithuania) still do not have any rules on the offering of online gambling services.

## 5. EEA CASE-LAW ON GAMES OF CHANCE

### 5.1. Introduction

Since its land-mark decisions in *Schindler* (1994) and *Gambelli* (2003), the Court of Justice of the European Union (CJEU or "Court") has delivered over 20 judgments on games of chance in the area of the free movement of services and the freedom of establishment. In recent years the Court's jurisprudence has increasingly dealt with national rules on online gambling.

The Court's case-law in this field has been developed mainly on the basis of references for preliminary rulings from national courts under Article 267 TFEU. In those cases, the Court provided general principles and criteria for the interpretation of Articles 49 and 56 TFEU in the area of games of chance, so as to enable the referring national court to take the final decision on the compatibility of the relevant national law with EU law.

The EFTA Court has also established case-law with respect to the fundamental freedoms of the internal market in the area of gambling. It issued two judgments in 2007.

This section provides a summary of the main jurisprudence developed by the CJEU and the EFTA Court ("the courts") on gambling rules. It is structured in the following manner:

- the qualification of the organisation of games of chance as an "economic activity" covered by the fundamental freedoms of the Treaty (chapter 5.2);
- restrictions on the free movement of services and the freedom of establishment (chapter 5.3);
- recognised reasons of general interest which can justify restrictions (chapter 5.4);
- specific characteristics of gambling services provided via the Internet (chapter 5.5);
- criteria for assessing the proportionality (suitability and necessity) of the national restrictions under the different types of regulatory frameworks: a ban on games of chance (chapter 5.6.1), an exclusive right/monopoly (chapter 5.6.2) and a system of licences (chapter 5.6.3), as well as in the case of specific corporate requirements (chapter 5.7).

The main focus of this section is on the circumstances under which restrictive national gambling laws can or cannot be justified on grounds related to the general interest, which are also the basis for the Commission to assess the compatibility of national gambling laws under the Treaty.

It is important to underline that some of the principles enshrined in the case-law of the CJEU and the EFTA Court on gambling apply both to the online and the land-based games of chance. Other features of the case-law are specifically relevant for games of chance offered via the internet.<sup>32</sup> This section deals with both channels.

In addition, the document is limited to case-law developed by the courts in the context of national rules on gambling and the Treaty provisions on the free movement of services and the freedom of establishment. The following table provides an overview of the relevant cases:

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<sup>32</sup> See most explicitly chapter 5.5.1.

## **CJEU judgments and pending cases**

### **Preliminary Rulings**

Judgment of 24/03 1994	Schindler, C-275/92	ECR [1994] I-01039
Judgment of 21/09 1999	Läärä & Others, C-124/97	ECR [1999] I-06067
Judgment of 21/10 1999	Zenatti, C-67/98	ECR [1999] I-07289
Judgment of 11/09 2003	Anomar & Others, C-6/01	ECR [2003] I-8621
Judgment of 06/11 2003	Gambelli & Others, C-243/01	ECR [2003] I-13031
Judgment of 13/11 2003	Lindman, C-42/02	ECR [2003] I-13519,
Judgment of 06/03 2007	Placanica & Others, C-338/04, C-359/04 & C-360/04	ECR [2007] I-1891
Judgment of 08/09 2009	Liga Portuguesa de Futebol Profissional & Bwin International (Santa Casa), C-42/07	ECR [2009] I-7633
Judgment of 03/06 2010	Sporting Exchange & Others (Betfair), C-203/08	ECR [2010] I-4695
Judgment of 03/06 2010	Ladbroke's Betting & Gaming and Ladbroke's International, Case C-258/08	ECR [2010] I-4757
Judgment of 08/07 2010	Sjöberg & Gerdin, C-447 & C-448/08	ECR [2010] I-6921
Judgment of 08/09 2010	Winner Wetten, C-409/06	ECR [2010] I-8015
Judgment of 08/09 2010	Stoß & Others, C-316/07 etc.	ECR [2010] I-8069
Judgment of 08/09 2010	Carmen Media Group, C-46/08	ECR [2010] I-8149
Judgment of 09/09 2010	Engelmann, C-64/08	ECR [2010] I-8219
Judgment of 30/06 2011	Zeturf, C-212/08	ECR [2011] I-0000
Judgment of 15/09 2011	Dickinger and Ömer, C-347/09	ECR [2011] I-0000
Judgment of 16/02 2012	Costa and Cifone, C-72/10 & C-77/10	ECR [2012] I-0000
Judgment of 12/07 2012	HIT and HIT LARIX, C-176/11	ECR [2012] I-0000
Judgment of 19/07 2012	SIA Garkalns, C-470/11	ECR [2012] I-0000

### **Pending Cases**

Joined cases C-186/11 & C-209/11,	Stanleybet International & Sportingbet	[Opinion of the Advocate General of 20 September 2012]
Joined cases C-660/11 & C-8/12	Biasci & Rainone	
Case C-390/12	Pfleger and others	

## EFTA Court Rulings

Judgment of 14/03/07,	EFTA Surveillance Authority v The Kingdom of Norway (gaming machines), Case E-1/06,	EFTA Court Report 2007, p.11
Judgment of 30/05/07,	Ladbrokes Ltd. v The Government of Norway, Ministry of Culture and Church Affairs and Ministry of Agriculture and Food (Ladbrokes), Case E-3/06,	EFTA Court Report 2007, p.89

This section is not intended to provide an exhaustive overview of all EU and EFTA courts' case-law that might be potentially relevant in future cases of national legislation on gambling, nor does it cover certain requirements of general application which are not limited to the gambling sector. For example, restrictions on the participation of foreign capital and certain banking requirements may also be incompatible with (secondary) EU law but are not dealt with here.<sup>33</sup>

A separate part of this section is dedicated to the application of the state aid rules in the gambling sector (chapter 5.8).

### **5.2. The organisation of games of chance is an "economic activity" covered by the fundamental freedoms rules of the TFEU**

The CJEU ruled for the first time in its judgment in *Schindler* that the organisation of all games of chance or gambling<sup>34</sup> such as lotteries can be considered an economic activity since there is a particular service provided for remuneration and an intention to make a cash profit.<sup>35</sup> Hence, they are subject to the fundamental freedoms of the Treaty: the free movement of services (Articles 56-62 TFEU) and the freedom of establishment (Articles 49-55 TFEU). The Court held in *Gambelli* that services offered by electronic means are also covered by these Treaty principles.

The notion of “services” within the meaning of Articles 56 and 57 TFEU applies not only to activities allowing users to participate in gambling, but also to the activity of promoting gambling, given that such an activity merely constitutes a specific step in the organisation or operation of the gambling to which it relates.<sup>36</sup>

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<sup>33</sup> Such conditions should be assessed, for example, under Article 63 TFEU on the free movement of capital (e.g. for restrictions on participation of foreign capital in order to obtain national gambling licences) and/or Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the businesses of credit institutions (e.g. for requirement to use a national credit institution). See however also chapter 5.8 for case-law on corporate requirements in the gambling sector.

<sup>34</sup> The CJEU appears to use “games of chance” and “betting and gaming” interchangeably, see e.g. Dickinger and Ömer, par. 44, 45 and 47. In this section these notions are, together with the term “gambling”, used in a general manner.

<sup>35</sup> See in particular *Schindler*, par.19 et seq., and *Anomar*, par. 47 and 48.

<sup>36</sup> See Case *Schindler*, par. 22; Case *Winner Wetten*, par. 43 and *Stoß and Others*, par. 56.

Magazine competitions involving crosswords or other puzzles in which a number of readers who have given correct answers receive a prize following a draw, do not constitute an economic activity in their own right. They are merely one aspect of the editorial content of a magazine, and are organised on a small scale, with small stakes. The CJEU has assessed restrictions on the organisation of such competitions under the Treaty rules on the free movement of goods.<sup>37</sup>

### **5.3. Restrictions on the free movement of services and the freedom of establishment**

Articles 49 and 56 TFEU require the abolition of all restrictions on freedom of establishment and freedom to provide services – even if those restrictions apply without distinction to national providers of services and to those from other Member States – if they are liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State in which it lawfully provides similar services.<sup>38</sup>

National rules in the area of gambling constitute an obstacle to the freedoms guaranteed by the internal market freedoms if they:

- ban the exercise of an economic activity in the area of gambling;<sup>39</sup>
- confer exclusive rights to organise and promote games of chance on a single operator;<sup>40</sup>
- make the exercise of an economic activity subject to a licensing requirement.<sup>41</sup>

The *freedom to provide services* involves the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the provider is established, and also the freedom to receive or to benefit as recipient from the services offered by a provider in another Member State. The freedom to provide services therefore is for the benefit of both providers and recipients of services.<sup>42</sup>

Restrictions on *freedom of establishment* for nationals of a Member State in the territory of another Member State are prohibited by Article 49 TFEU, including restrictions on the setting-up of agencies, branches or subsidiaries.

As regards the delimitation of the scope, respectively, of the principles of freedom to provide services and freedom of establishment, it is necessary to establish whether or not the economic operator is established in the Member State in which it offers the service in question.

According to the Court's case-law, for there to be "establishment" within the meaning of the Treaty, a commercial relationship entered into by an operator established in a Member State with operators or intermediaries established in the host Member State must make it possible for the operator to participate, on a stable and continuous basis, in the economic life of the

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<sup>37</sup> Case C-368/95, *Familiapress* [1997] ECR I-3689, par. 23. See also *Zenatti*, par. 17.

<sup>38</sup> *Costa and Cifone*, par. 69; *Liga Portuguesa de Futebol Profissional and Bwin International*, par. 51 and the case-law cited therein.

<sup>39</sup> E.g. *Schindler*, par. 43-44.

<sup>40</sup> E.g. *Dickinger and Ömer*, par. 41.

<sup>41</sup> E.g. *Costa and Cifone*, par. 70.

<sup>42</sup> See Case *HIT*, par. 16, and case-law cited.

host Member State and must thus be such as to enable customers to take advantage of the services offered through a permanent presence in the host Member State, which may be done simply by means of an office managed by a person who is independent but authorised to act on a permanent basis for the operator, as would be the case with an agency.<sup>43</sup>

On the other hand, every provision of services which are not offered on a stable and continuous basis from an establishment in the Member States of destination constitutes a "provision of services" for the purposes of Article 56 TFEU. In this context, the Court has ruled that no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supplier of a service or of a certain type of service can no longer be regarded as the provision of services. Accordingly, "services" for the purposes of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years.<sup>44</sup>

The CJEU has recognised that that "any restriction concerning the supply of games of chance over the internet is more of an obstacle to operators established outside the Member State concerned, in which the recipients benefit from the services, those operators, as compared with operators established in that Member State, would thus be denied a means of marketing that is particularly effective for directly accessing that market".<sup>45</sup>

In *Dickinger and Ömer*, the Court clarified which fundamental freedoms may apply in a situation where gaming services are marketed over the internet in the territory of a host Member State by an operator established in another Member State but with a certain infrastructure in the host Member State. It ruled that the mere fact that a provider of games of chance marketing over the internet makes use of material means of communication (such as a server, a helpdesk) supplied by another undertaking established in the host State is not in itself capable of showing that the provider has, in that Member State, a fixed establishment similar to an agency, which would have the consequence that the Treaty provisions on freedom of establishment would apply.<sup>46</sup> The Court answered the questions of the referring court under the provision of Article 56 TFEU on the free movement of services.

In practice, in the area of gambling, the importance of the difference between the application of the Treaty provisions governing the free movement of services or the provisions on the freedom of establishment is rather limited. Under both Articles 49 and 56 TFEU, the case-law provides for a similar interpretation of whether there is a restriction to the free movement and whether such a restriction can be justified on the basis of a general interest.<sup>47</sup>

Concrete examples of national rules in the gambling sector which constitute a restriction on the freedom to provide services and/or the freedom of establishment, as interpreted by the courts, are:

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<sup>43</sup> See *Dickinger and Ömer*, par. 35; *Stoß and Others*, par. 59-60.

<sup>44</sup> See recently *Garkalns*, par. 28.

<sup>45</sup> See *Case Zeturf*, par. 74.

<sup>46</sup> See par. 33-38 of the judgment.

<sup>47</sup> See, along these lines, Advocate-General Bot in *Dickinger and Ömer*, par 55-56.



- the ban on the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in other Member States;<sup>48</sup>
- the prohibition of promoting gambling organised legally in other Member States and of unlicensed gambling nationally thus ensuring that national consumers only take part in gambling in the context of the national licensing system;<sup>49</sup>
- where a company established in a Member State pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State, any restrictions of the activities of those agencies would constitute such an a obstacle<sup>50</sup>
- the conferral of exclusive rights on a single operator (set up either under public or private law) to organise and promote games of chance, and whereby all other operators, including operators established in another Member State, are prohibited from offering, over the internet, services falling within the scope of that regime in the territory of the first Member State;<sup>51</sup>
- the prohibition on individuals to connect by internet from their home to a bookmaker established in another Member State;<sup>52</sup>
- the limitation of the number of licences or operators;<sup>53</sup>
- the prohibition of activities in the betting and gaming sector without prior authorisation from the administrative authorities;<sup>54</sup>
- restricting the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas created by decree-law;<sup>55</sup>
- treating foreign lotteries differently for tax purposes from national lotteries;<sup>56</sup>
- the obligation that persons wishing to operate gaming establishments must adopt the legal form of a public limited company, which prevents, inter alia, operators who are natural persons and undertakings which, in the country in which they are established, have chosen another corporate form, from setting up a secondary establishment;<sup>57</sup>
- the obligation on persons holding concessions to operate gaming establishments to have their seat in the national territory.<sup>58</sup>

Finally, the CJEU has made clear that restrictions which are incompatible with the freedom of establishment and the freedom to provide services, because they do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply, not even during a transitional period.<sup>59</sup>

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<sup>48</sup> Case Schindler, par. 37.

<sup>49</sup> Case Sjöberg and Gerdin, par. 33 and 34; Case HIT, par. 17.

<sup>50</sup> Case Gambelli, par. 45-46 and 58; Case Carmen Media Group, par. 41.

<sup>51</sup> Dickinger and Ömer, par. 41; Sporting Exchange, par. 24; Case Liga Portuguesa, par. 52-53; Ladbrokes Betting & Gaming and Ladbrokes International, par. 16; *Ladbrokes*, par. 40

<sup>52</sup> Case Gambelli, par. 56-57.

<sup>53</sup> Case Placanica, par. 42, 51.

<sup>54</sup> Case Garkalns, par. 34.

<sup>55</sup> Case Anomar, par. 66.

<sup>56</sup> Case Lindman, par. 21.

<sup>57</sup> Case Engelmann, par. 28.

<sup>58</sup> Case Engelmann, par. 32.

<sup>59</sup> Case Winner Wetten, par. 69.

#### 5.4. General interest reasons which may justify restrictions on gambling activities

Member States may justify restrictions to the fundamental freedoms for reasons related to the general interest.<sup>60</sup> A restriction to the freedom to provide services or to the freedom of establishment may be:

- allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for by Articles 51 and 52 TFEU, which are applicable in the area of services by virtue of Article 62 TFEU,<sup>61</sup> or
- justified, in accordance with the case-law of the CJEU, by overriding reasons in the public interest.<sup>62</sup>

With regard to the justifications which are capable of being accepted, the CJEU has observed that the objectives pursued by national legislation adopted in the area of betting and gaming, considered as a whole, usually concern:

- the protection of the recipients of the services in question and of consumers more generally, and
- the protection of society.

Within these two general categories of objectives, the courts have identified more specific interests such as the fight against gaming addiction, the reduction of gambling opportunities, the fight against crime and malpractice, and the general need to preserve public order.

On the other hand, the general interest objectives must be of a non-economic nature. Other reasons put forward by Member States have been rejected by both courts, owing to their economic or financial nature. These reasons include:

- a) the diminution of the reduction of tax revenue<sup>63</sup> / maximising public revenue;<sup>64</sup>
- b) the need to ensure continuity, financial stability and a proper return on past investments of licence holders<sup>65</sup> / protecting the market positions of existing operators;<sup>66</sup>
- c) the contribution to the rural development by financing horse breeding.<sup>67</sup>

It is also settled case-law that a “ground of economic nature” such as the financing of benevolent or social or other public-interest activities through a levy on the proceeds of authorised games of chance may constitute only “an incidental beneficial consequence” and not the real justification for restricting the freedoms of establishment and the provision of

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<sup>60</sup> Consistent case-law, see most recently Case Garkalns, par. 35, and the case-law cited.

<sup>61</sup> The reasons referred to in Articles 51 and 52 TFEU may justify national measures which are either discriminatory vis-à-vis foreign operators or which apply without discrimination to national and foreign operators. See, to that effect, Case Dickinger and Ömer, par. 79; Case Placanica, par. 49.

<sup>62</sup> Restrictions justified by overriding reasons in the public interest must be applied without discrimination.

<sup>63</sup> Case Gambelli, par. 61.

<sup>64</sup> Case Dickinger and Ömer, par. 55.

<sup>65</sup> Case C-260/04, Horse-race betting licences (Commission v. Italy), par. 35; Costa and Cifone, par. 59.

<sup>66</sup> Case Costa and Cifone, par. 65.

<sup>67</sup> Case Zeturf, par. 51; Ladbrokes, par. 68.

services related to games of chance.<sup>68</sup> Therefore, a Member State is not entitled to rely on reasons of public policy relating to the need to reduce opportunities for gambling in so far as the public authorities of that State incite and encourage consumers to participate in games of chance so that the public purse can benefit.<sup>69</sup>

The Member State concerned should in each case determine which legitimate objectives may justify the restriction, and the justification grounds put forward by a Member State must be taken together and considered as a whole.<sup>70</sup>

The Court has acknowledged that, when analysing the betting and gaming sector, it is not possible to disregard the associated “moral, religious or cultural factors” or the “morally and financially harmful consequences for the individual and for society” associated with betting and gaming.<sup>71</sup>

According to settled case-law, in the absence of harmonisation on the games of chance, all those particular factors justify national authorities having “a sufficient margin of discretion [...] to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the protection of society”.<sup>72</sup> The Member States are therefore “in principle free to set the objectives of their policy on gaming of chance and, where appropriate, to define in detail the level of protection sought”.<sup>73</sup>

The Court has also held that, in the context of legislation which is compatible with the Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling falls within the margin of discretion enjoyed by national authorities.<sup>74</sup>

However, the restrictive measures imposed by the Member States must be applied without discrimination and must satisfy the conditions laid down in the case-law as regards their proportionality. Thus, they must be suitable for ensuring the attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. In this connection, it is settled case-law that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.<sup>75</sup>

## **5.5. The provision of gambling services via the Internet**

### **5.5.1. Specific characteristics of on-line gambling**

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<sup>68</sup> Case Zenatti, par. 36; Case Gambelli, par. 62; Case Gaming machines, par. 36; Dickinger and Ömer, par. 61, with references to previous case-law; Ladbrokes, par. 75. The financing of public-interest activities with the revenues of gambling and betting activities must be distinguished from the “aim of preventing gambling from being a source of private profit”. The latter issue relates to the condition of limiting the grant of a licence to one or more non-profit entities (see further chapter 5.6.3.3)..

<sup>69</sup> Dickinger and Ömer, par. 62.

<sup>70</sup> Schindler, par. 58; Zenatti, par. 31; Gaming Machines, par. 34; Ladbrokes, par. 44.

<sup>71</sup> See already the judgment in Case Schindler, par. 60; see also Case Dickinger and Ömer, par. 45.

<sup>72</sup> Dickinger and Ömer, par. 45; Stoß and Others, par. 76, and case-law cited.

<sup>73</sup> Liga Portuguesa, par. 59; Case Dickinger and Ömer, par. 47.

<sup>74</sup> Stoß and Others, par. 92, and case-law cited.

<sup>75</sup> Case Garkalns, par. 37, and the case-law cited.

Internet constitutes a "channel" through which games of chance may be offered.<sup>76</sup> In light of the assessment of whether the establishment of a public monopoly on the offer of games of chance via the internet is necessary, the Court has however made clear that gambling services offered via the internet have several specific characteristics which enable the Member States to adopt measures restricting or otherwise regulating the provision of such services, in order to combat gambling addiction and protect consumers against the risks of fraud and crime. Those specificities are the following:<sup>77</sup>

- (1) In the sector of on-line gambling, authorities of the Member State of establishment encounter specific difficulties to assess the professional qualities and integrity of operators<sup>78</sup> (see further chapter 5.5.2).
- (2) The lack of direct contact between the consumer and the on-line gambling operator gives rise to different and more substantial risks of fraud by operators against consumers compared to the traditional gambling market.<sup>79</sup>
- (3) The particular ease and the permanent access to on-line gambling services and the potentially high volume and frequency of such an international offer, in an environment which is characterised by isolation of the player, anonymity and an absence of social control are factors likely to develop gambling addiction and lead to other negative consequences. The Court has also stated that the internet may prove to be a source of risks of a different kind and of a greater order in the area of consumer protection, particularly in relation to young people and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games.<sup>80</sup>

According to the Court, when assessing a national restriction on the provision of gambling services, all the substitutable marketing channels should be taken into account, unless the consequence of using the internet is to increase the risks linked to games of chance beyond those that exist in relation to games marketed through traditional channels. In the context of a national single licence system for betting on horseracing which did not draw any distinction between the online and land-based marketing channels, the CJEU has clarified that an assessment of the scope of the restriction on the freedom to provide services should be made from the point of view of restrictions placed on the entire sector concerned.<sup>81</sup>

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<sup>76</sup> See Case Carmen Media Group, par. 100.

<sup>77</sup> See most recently Zeturf, par. 78-80; Ladbrokes Betting & Gaming and Ladbrokes International, par. 54-55.

<sup>78</sup> Liga Portuguesa, par. 69.

<sup>79</sup> Liga Portuguesa, par. 70. In Sporting Exchange, the CJEU underlined that the fact that an online operator does not pursue an active sales policy in the Member State of the consumer, particularly because he is not making use of advertising in that State, cannot be regarded as running counter to this consideration (par. 35)

<sup>80</sup> Case Carmen Media Group, par. 103.

<sup>81</sup> Case Zeturf, par. 81, 82.

### 5.5.2. Taking account of the checks on operators of games of chance carried out in other Member States

The courts have ruled that, in the current state of EU / EEA law, there is no duty of mutual recognition of authorisations issued by the various EU / EEA States.<sup>82</sup>

Thus, the EFTA Court acknowledged in *Ladbroke's* that the EEA State where the services are provided has a right to require possession of a new licence even if the service provider already holds a licence in its home state. It added, however, that national measures must not be excessive in relation to the aims pursued. This would be the case if the requirements to which the issue of a licence is subject coincided with the requirements of the home state.<sup>83</sup>

The CJEU has similarly ruled in *Stoß and Others* that a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the margin of discretion recognized to Member States and the absence of any EU harmonisation in this matter.<sup>84</sup>

This line of case-law has been recently developed by the Court in the context of the specific features of online gambling, referred to in the previous section.

In the absence of sectoral harmonisation of legislation at European Union level, the mere fact that an operator lawfully offers services in one Member State, in which it is established and is in principle already subject to statutory conditions and controls on the part of the competent authorities of that State, cannot be regarded as a sufficient assurance that national consumers will be protected against the risks of fraud and crime. The Court has justified such exemption to the rule in view of:

- the substantial differences between the objectives pursued and the levels of protection sought by the legislation of the various Member States; and
- the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operator.<sup>85</sup>

Moreover, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions, which must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.<sup>86</sup>

The Court has also accepted that various Member States do not necessarily have the same technical means available for controlling online games of chance, and do not necessarily make the same choices in this respect. The fact that a particular level of protection of consumers against fraud by an operator may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not permit the conclusion that

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<sup>82</sup> *Ladbroke's*, par. 84-86, *Stoß and Others*, par. 112; *Dickinger and Ömer* par. 96; *Sporting Exchange*, par. 33-35.

<sup>83</sup> See par. 86 of the judgment.

<sup>84</sup> See par. 112 of the judgment

<sup>85</sup> *Liga Portuguesa*, par. 69; *Dickinger and Ömer*, par. 96.

<sup>86</sup> *Dickinger and Ömer*, par. 97.

the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory. That would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems outside its control.<sup>87</sup>

Consequently, the case-law which states that it is not compatible with Article 56 TFEU to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded in the Member State where he is established does not apply, in the present state of development of European Union law, in a field such as that of games of chance. This area is not harmonised at European Union level, and the Member States have a wide discretion in relation to the objectives they wish to pursue and the level of protection they seek.<sup>88</sup>

## **5.6. General criteria for assessing the proportionality (suitability and necessity) of national restrictions under different types of regulatory frameworks**

### **5.6.1. A ban on games of chance**

The Schindler judgment remains the only decision where the CJEU ruled on a national (UK) general ban on a certain category of games of chance - the organisation of lotteries (subject to very limited exceptions). The Court decided that under the circumstances in question, the national legislation amounted to an obstacle to the freedom to provide services, but was not incompatible with the Treaty in view of the concerns of social policy and the prevention of fraud which justify it.

The conclusion was based on a number of considerations, in particular the moral, religious and cultural aspects of lotteries, the high risk of crime or fraud that lotteries involve and the incitement to spend which may have damaging individual and social consequences. In addition, the general ban on lotteries could not be considered to be discriminatory based on the nationality of the operators.<sup>89</sup>

National legislation on gambling may also contain bans on the organisation and promotion of games of chance through certain channels, in particular via the Internet. In *Sporting Exchange* and *Ladbrokes Betting & Gaming and Ladbrokes International*, the Court decided that in the light of the specific features associated with the provision of games of chance via the Internet, a total ban may be regarded as justified by the objectives of combating fraud and crime.<sup>90</sup>

### **5.6.2. An exclusive right/monopoly**

Most of the case-law on gambling of both the CJEU and of the EFTA Court deals with national legislation which:

- creates a public entity which enjoys an exclusive right to offer certain games of chance and which does not itself operate such services but instead manages a network of

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<sup>87</sup> Dickinger and Ömer, par. 98.

<sup>88</sup> Dickinger and Ömer, par. 99.

<sup>89</sup> See in particular par. 60 of the judgment.

<sup>90</sup> *Sporting Exchange*, par. 36 and *Ladbrokes Betting & Gaming and Ladbrokes International*, par. 57.

“concessions”, i.e. natural or legal persons which are allowed by an act of the competent administration to operate on the market on behalf of the public entity holding the exclusive right;<sup>91</sup>

- establishes an exclusive right/legal monopoly for a public or State-controlled operator directly by law,<sup>92</sup> or
- limits the organisation and promotion of games of chance to one public or private operator through the grant of a single licence.<sup>93</sup>

The courts have developed a number of specific requirements which should be met by national regimes of exclusive rights/monopolies in order to be considered proportionate under the free movement principles. These include the need for a strict state control (chapter 5.6.2.1); the need for a particular high level of protection of consumer protection (chapter 5.6.2.2) and the need for a detailed analysis of the consistency of the national gambling policy, in particular as to the commercial strategy of the holder of the exclusive licence/monopoly and as to the overall national policy pursued in the field of games of chance (chapters 5.6.2.3-5.6.2.5).

#### **5.6.2.1. Strict state control**

The CJEU has ruled that a Member State seeking to ensure a particularly high level of protection of consumers or of society may be entitled to take the view that it is only by granting exclusive rights to a single entity which is subject to strict control by the public authorities that it can tackle the risks connected with the gambling sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness.<sup>94</sup>

The public authorities of a Member State may legitimately consider that the fact that, in their capacity as overseers of the entity holding the monopoly, they will have additional means of influencing its conduct, outside the statutory regulating and monitoring mechanisms, is likely to secure for them a better command over the supply of games of chance and better guarantees that their policy will be implemented more effectively than in the case where those activities are carried out by private operators in a competitive environment. This is the case even if private operators are subject to a system of authorisation and a regime of supervision and penalties.<sup>95</sup> The choice between granting exclusive rights to a public body whose management is subject to direct State supervision or to a private operator over whose activities the public authorities are able to exercise tight control falls within the margin of discretion which Member States enjoy in the context of games of chance.<sup>96</sup>

With respect to the objective of fighting gambling addiction caused by gaming machines, the EFTA Court admitted in the Gaming machines case that "it is reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the

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<sup>91</sup> The (previous) Italian system, in particular subject to the judgments in the cases Zenatti, Gambelli and Placanica,

<sup>92</sup> E.g. EFTA Court in Case Gambling machines; CJEU in Läära and Dickinger and Ömer.

<sup>93</sup> E.g. Sporting Exchange, Stoß and Others, Zeturf.

<sup>94</sup> See Dickinger and Ömer, par. 48, and case-law cited.

<sup>95</sup> See Dickinger and Ömer, par. 49 and cited case-law.

<sup>96</sup> Stoß and Others, par. 81-82.

competent public authorities will tend to accommodate legitimate concerns of fighting gambling addictions better than a commercial operator or organisations whose humanitarian or socially beneficial activities partly rely on revenues of gaming machines. Furthermore, it is plausible to assume that in principle the State can more easily control and direct a wholly State-owned operator than private operators. Through its ownership role, the State has additional ways of influencing the behaviour of the operator besides public law regulations and surveillance."<sup>97</sup>

The condition of strict state control has been elaborated on in *Liga Portuguesa*. This case concerned the granting of exclusive rights to organise online lotteries, lotto games and sports betting to Santa Casa, a "legal person, in the public administrative interest". It was submitted that the main objective pursued by the national legislation was the fight against crime, more specifically the protection of consumers of games of chance against fraud on the part of the operators.

The Portuguese Government argued that the grant of exclusive rights to Santa Casa would ensure that the system would function in a secure and controlled way. The CJEU analysed the national legal framework and acknowledged that Santa Casa operates under the strict control by the public authorities.<sup>98</sup> The Court concluded that, in circumstances such as those in the main proceedings, the granting of exclusive rights to operate games of chance via the internet to a single operator may confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators. In view of the specific features associated with the provisions of games of chance via the internet (see chapter 5.5.1), the CJEU also considered the restrictive measure to be necessary.<sup>99</sup>

In *Zeturf*, the CJEU assessed a national system conferring an exclusive right to a single operator to organise off-course betting on horseracing. It concluded that national legislation is appropriate to ensure the objective of combating the criminal and fraudulent activities linked to gambling, as well as that of protecting society, having regard to the effects of gambling on individuals and on society, in the situation where there appears to be particularly strict State control over the organisation of betting on horseracing. Thus, "the State exercises direct control over the functioning of the exclusive operator, the organisation of the events on which bets are placed, the types of bet authorised and their channels of distribution, including the proportion of the winnings to the stakes and the conduct and supervision of the regulated activities".<sup>100</sup>

#### **5.6.2.2. High level of consumer protection**

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<sup>97</sup> Par. 51 of the judgment.

<sup>98</sup> This was for example illustrated by the government's involvement in appointing the members of its administrative organs and by the powers of the Gaming Department of Santa Casa - the licence holder - to open, institute and prosecute proceedings involving offences of illegal operation of games of chance to which Santa Casa had the exclusive rights.

<sup>99</sup> *Liga Portuguesa*, par. 62-72.

<sup>100</sup> Par. 56 of the judgment.



However, as a monopoly is an unusually restrictive measure, it must be ascertained that the national authorities really intend to ensure a particularly high level of consumer protection with regard to the objectives relied on, and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary.<sup>101</sup> In this context, it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality.<sup>102</sup>

In the *Gaming machines* case, the EFTA Court, examined the introduction of an exclusive right for the operation of gaming machines of a fully state-owned public company supervised by the relevant Norwegian Ministry. It considered that the national legislation did not opt for a total ban, but for a monopoly system with a view to reducing the risk of gambling addiction to a level which it deems acceptable and to reduce crime and malpractice. In such a situation, the necessity test consists of an assessment of whether the monopoly option is functionally needed in order to reduce the problems to the level opted for, or whether this reduction could equally well be obtained through other, less restrictive means such as admitting private operators under a stricter licencing regime. The EFTA Court noted, as regards the objective of reducing crime and malpractice, that Norway "failed to demonstrate that a licensing scheme allowing private operators, if necessary with more restrictive rules on who may qualify, will not be equally effective as an exclusive right [for the monopoly operator] in preventing money laundering and embezzlement". Nonetheless, it concluded that taking into account the public interest objectives considered as a whole, including the one of fighting gambling addiction, the exclusive right system is likely to be more effective, in the end, than the other available regulatory means.<sup>103</sup>

On the level of protection, the EFTA Court ruled in the *Ladbroke* case that "if it turns out that the national authorities have opted for a rather low level of protection, it is less probable that a monopoly is the only way of achieving the level of protection opted for. In that case, it is more likely that less restrictive means, for instance in the form of a licensing system [...] could suffice".<sup>104</sup>

National authorities will therefore be more easily able to justify an exclusive right scheme if they can demonstrate that the relevant legislation entails a high level of protection which could not be ensured with the same efficiency under a normal licensing system.

### **5.6.2.3. The consistency of the national gambling policy**

Member States must not take, facilitate or tolerate measures that would run counter to the achievement of the stated objectives of a given national measure.<sup>105</sup> Thus, restrictions on gaming activities are suitable to achieve their public interest objectives only insofar as those objectives are being pursued "in a consistent and systematic manner", which involves a

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<sup>101</sup> Dickinger and Ömer, par. 71; Case Zeturf, par. 47.

<sup>102</sup> Stoß and Others, par. 71; Dickinger and Ömer, par. 54.

<sup>103</sup> See par. 49-52 of the judgment.

<sup>104</sup> Par. 59 of the judgment.

<sup>105</sup> Case Gaming machines, par. 43.

complete assessment of the gaming policy of the concerned Member State in respect of the level of players' protection it has freely chosen to ensure. The "consistency" requirement will apply, first, in regard to the games of chance which are subject to the exclusive right scheme and the way they are being marketed by the monopoly holder and, secondly, in regard to the gaming policy which the national authorities pursue in other sectors of the gambling industry.<sup>106</sup>

Concerning the commercial strategy of the exclusive right holders, the Court noted that there is a certain degree of conflict of interest for all operators, including those that are public or charitable bodies, between the need to increase their income and the objective of reducing gambling opportunities. A public or non-profit-making operator may, like any private operator, be tempted to maximise its income and develop the gambling market, thus undermining the objective of seeking to reduce gambling opportunities. The single operator may be encouraged to increase the income generated by the gambling in order to fulfil public interest objectives more effectively. The allocation of income to those objectives may, moreover, lead to a situation in which it is difficult to forgo the amounts generated by the gambling, the natural tendency being to increase opportunities for gambling and to attract new bettors.<sup>107</sup>

This is particularly relevant in situations where a single operator holds exclusive rights over the organisation of games of chance. That operator is then in a very favourable position to increase, should it so wish, gaming activities.<sup>108</sup>

In this context, the CJEU has underlined that:

"the establishment of a measure as restrictive as a monopoly must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities."<sup>109</sup>

On the other hand, the overall national gambling policy of a Member State should also be consistent with the public interest objectives invoked to justify restrictions to free movement. This assessment needs to be made taking into account the game of chance for which the exclusive right/monopoly is provided, and the way in which other types of games of chance are marketed.

If the national legislation is based on more than one legitimate objective, the consistency of the gambling policy must be assessed in relation to each of these legitimate objectives. Moreover, as the objectives pursued may not apply equally to all games of chance covered by

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<sup>106</sup> See, in particular, the judgments in *Gaming machines*, *Ladbrokes*, *Gambelli*, *Placanica*, *Stoß and Others*, *Carmen Media Group*, *Dickinger and Ömer and Zeturf*.

<sup>107</sup> *Zeturf*, par. 59, 60.

<sup>108</sup> *Idem*, par. 61.

<sup>109</sup> *Idem*, par. 58.

the national law in question, it may also be necessary to distinguish between the different games.<sup>110</sup>

The next sections will provide more details of the application of the "consistency" condition in the context of the main general interest objectives of reducing gambling opportunities and combating fraud and crime.

#### **5.6.2.4. The commercial strategy of the exclusive right holder**

The CJEU has accepted in steady case-law<sup>111</sup> that Member States may justify limitations on the number of operators allowed to offer games of chance by invoking the objective of "preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controlled systems". The Court has also admitted that "a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine bettering and gaming – and, as such, activities which are prohibited - to activities which are authorised and regulated". It is for the Member States to demonstrate that such channelling measures including, if relevant, the development of new games may reasonably be assumed to serve their purpose.<sup>112</sup>

To be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly of games of chance which allows the holder of the monopoly to follow an expansionist policy must be based on a finding that the crime and fraud linked to gaming and addiction to gambling are a problem in the Member State concerned which could be remedied by expanding authorised regulated activities.<sup>113</sup>

According to the Court, "[s]ince the objective of protecting consumers from gambling addiction is, in principle, difficult to reconcile with a policy of expanding games of chance characterised, inter alia, by the creation of new games and by the advertising of such games, such a policy cannot be regarded as being consistent unless the scale of unlawful activity is significant and the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful."<sup>114</sup> That fact that demand for games of chance has already increased noticeably particularly at a clandestine level, must be taken into consideration.<sup>115</sup>

The Court underlines the need for national authorities to bring all the necessary evidence in this regard.<sup>116</sup> In *Placanica*, the Court accepted factual evidence of the Italian Government (investigations carried out by the Italian Senate) which led to the conclusion that the activities of clandestine betting and gaming, prohibited as such, were a considerable problem in Italy as

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<sup>110</sup> Ladbroke's, par. 52.

<sup>111</sup> See the decisions in Case *Placanica*, par. 55, *Stoß and Others*, par. 101-102, *Dickinger and Ömer*, par. 63 ff, and *Ladbroke's Betting & Gaming and Ladbroke's International*, par. 25.

<sup>112</sup> Ladbroke's, par. 54.

<sup>113</sup> See, to that effect, the judgments of the CJEU in *Ladbroke's Betting & Gaming and Ladbroke's International*, par. 29, and in Case *Dickinger and Ömer* par. 66.

<sup>114</sup> *Ladbroke's Betting & Gaming and Ladbroke's International*, par. 30; *Dickinger and Ömer*, par. 67.

<sup>115</sup> *Ladbroke's Betting & Gaming and Ladbroke's International*, par. 31.

<sup>116</sup> See for instance Case *Zeturf*, par.70, on the black market for betting on horseracing.

it appeared that half the total turnover figure of the betting and gaming sector in Italy was generated by illegal activities.<sup>117</sup>

In order to achieve the objective of drawing players away from clandestine betting and gaming, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. As such, this may require "the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques".<sup>118</sup>

An increase in the commercial activity of an operator who has been granted exclusive rights in the field of games of chance and a substantial increase in the income received from those games require particular attention when examining of whether the legislation at issue is consistent and systematic, and hence whether it is appropriate for pursuing the objectives recognised by the case-law.<sup>119</sup>

The courts recognised<sup>120</sup> the following concrete features of such expansionist policy:

- the public monopoly extends to lottery games and the holder is engaged in intensive advertising campaigns for lottery games, emphasising the need to finance social, cultural or sporting activities to which the profits are allocated, thereby making it appear that maximisation of the profits destined for such activities is becoming an end in itself of the restrictive measures concerned;
- the development and marketing of addictive games by the monopoly holder;
- the public authorities are developing or tolerating policies of expanding supply of casino games and automated games, despite the fact that they present a higher risk of addiction than bets on sporting competitions;
- the public authorities tolerate the offering of new possibilities of casino games on the Internet;
- the relaxation, by the public authorities, of the conditions in which automated games may be exploited in establishments other than casinos, such as gaming arcades, restaurants, cafes and places of accommodation;
- restrictions on how often per week or per day games are on offer, restrictions on the number of outlets which offer games of chance and on sales and marketing activities of the outlets, as well as restrictions on advertising and development of new games (from the owner of an exclusive licence);
- the extent and effect of marketing and development of the games of chance, inter alia, how much the owner of an exclusive licence spends in that regard as well as the form or content of the marketing and the susceptibility of the targeted groups;
- the fact whether the advertising of the gambling and betting services is rather more informative than evocative in nature;
- the fact that the number of casinos has risen from 66 to 81 in 6 years;

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<sup>117</sup> Case Placanica, par. 56-57.

<sup>118</sup> Case Dickinger and Ömer, par. 63-64; *Ladbrokes Betting & Gaming and Ladbrokes International*, par. 25; Case Placanica, par. 55.

<sup>119</sup> Case Dickinger and Ömer, par. 61.

<sup>120</sup> Stoß and Others, par. 100; Case Gaming machines, par 43-45, Ladbrokes, par. 52-54, 59-62, Carmen Media Group, par. 67, Zeturf, paragraph 65.

- the fact that the exclusive right holder makes use of sustained and growing advertising for its products, including on the internet, is increasing the number of outlets for betting and for the products offered to bettors, and uses a commercial strategy seeking to draw in new audiences for the betting offered.

More specifically in the context of the objective to draw players from illegal gambling to controlled channels, the CJEU has considered a number of features related to advertising, relevant for the assessment of the commercial policy of the holder of the monopoly:

- any advertising by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order thus to channel consumers towards controlled gaming networks. Such advertising cannot aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it. Examples are trivialising gambling or giving it a positive image because revenues derived from it are used for activities in the public interest, or increasing the attractiveness of gambling by means of enticing advertising messages holding out the prospect of major winnings.<sup>121</sup>
- in particular, a distinction should be drawn between strategies of the holder of a monopoly which are intended solely to inform potential customers of the existence of products and serve to ensure regular access to games of chance by channelling gamblers into controlled circuits, and those which invite and encourage active participation in such games. A distinction must therefore be drawn between a restrained commercial policy seeking only to capture or retain the existing market for the organisation with the monopoly, and an expansionist commercial policy whose aim is to expand the overall market for gaming activities.<sup>122</sup>

#### **5.6.2.5. The overall national policy in the field of gambling**

Consistency of the national policy should also be assessed by reference to the gambling sector taken as a whole, in particular in regard to other types of games of chance, which are not subject to the respective monopoly. In this context, the specific differences between games, including their addictive level, should be properly considered.

The Court has recognised that the various types of games of chance can exhibit significant differences, particularly as regards the actual way in which they are organised, the size of the stakes and winnings by which they are characterised, the number of potential players, their presentation, their frequency, their brevity or repetitive character and the reactions which they arouse in players, or by reference to whether, as in the case of games offered in casinos and slot machines in casinos or other establishments, they require the physical presence of the player.<sup>123</sup>

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<sup>121</sup> Stoß and Others, par. 103; Dickinger and Ömer, par. 68.

<sup>122</sup> Dickinger and Ömer, par. 69. Advocate-General Mazák concluded in the *Stanleybet International & Sportingbet* case that it is apparent from the observations referred to the Court that the expansionist commercial policy pursued by the monopolist OPAP and the exclusive right granted to it are "manifestly inconsistent" with the purported objective of reducing the betting and gaming opportunities in that Member State, see par. 51 of his Opinion.

<sup>123</sup> Stoß and Others, par. 95. The CJEU has also clarified that (prohibited) lotteries and (authorised) other games for money, such as football pools or "bingo" might give rise to comparable stakes but they may differ in their

In those circumstances, the fact that some types of games are subject to a public monopoly while others are subject to a system of authorisations issued to private operators is not, in itself, capable of affecting the suitability of the monopoly to achieve the relevant objectives pursued.<sup>124</sup>

However, in the particular circumstances of the case, the Court acknowledged that the referring courts "may legitimately be led to consider that the fact that, in relation to games of chance other than those covered by the public monopoly [...], the competent authorities thus conduct or tolerate policies aimed at encouraging participation in those other games rather than reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner, has the effect that the objective of preventing incitement to squander money on gambling and combating addiction to the latter, which was at the root of the establishment of the said monopoly, can no longer be effectively pursued by means of the latter, so that the latter can no longer be justified having regard to [Articles 49 and 56 TFEU]".<sup>125</sup>

Measuring the level of gambling addiction requires an assessment of the danger of certain games of chance. In the *Gaming machines* case, for example, Norway had chosen to fight gambling addiction through the reduction of gambling opportunities by subjecting the operation of gaming machines to a State-owned monopoly. The EFTA Court considered that an increase in gambling addiction had occurred simultaneously with the increase in gaming machine gambling, and that 81% of the callers of a helpline reported gaming as a problem. Studies presented pointed at gaming machines as the single most potentially addictive form of gambling, due to the structural characteristics of the machines, such as rapid event frequency, the near miss, and light and sound effects. From this, the EFTA Court concluded that gaming machines are more dangerous in terms of leading to gambling addiction than other games lawfully offered on the Norwegian market. Even though other games may also lead to gambling addiction, the EFTA Court could not see this on a comparable scale, and considered in this particular case the marketing and development of other games not relevant when assessing the consistency of the contested legislation.<sup>126</sup>

In this context, the EFTA Court clarified that "when assessing the consistency of the contested legislation, it is, in the light of the overriding legislative motivation of fighting gambling addiction, essential to put the focus on games with comparable effects with respect to creating such addiction. Whether and to which extent a given game can lead to gambling addiction must be evaluated by taking into account the specific circumstances, including its features, its presentation, the reactions of its potential consumers and the broader social-cultural environment".<sup>127</sup>

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objects, rules and methods of organisation in which case those games are not in a comparable situation and they cannot be assimilated. (Case Schindler, par. 50 and 52; Stoß and Others, par. 94)

<sup>124</sup> Stoß and Others, par. 96.

<sup>125</sup> Stoß and Others, par. 106.

<sup>126</sup> Case Gaming machines, par. 43.

<sup>127</sup> Case Gaming machines, par. 44.

### 5.6.3. A system of licensing

#### 5.6.3.1. General

Licensing systems for certain categories of offline gambling are common in many countries. A growing number of Member States is introducing licensing systems for the provision of online gambling services (see chapter 4). These licenses may be issued on the basis of a call for tender which sets out the eligibility requirements. Once awarded the licence, its holder will be subject to the national gambling laws and supervisory structure.

According to consistent case-law of the CJEU, a prior administrative authorisation scheme, even though it derogates from a fundamental freedom, may be justified on the basis of objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Also, any person affected by a restrictive measure based on such derogation must have a judicial remedy available to them.<sup>128</sup> In order to enable the impartiality of the authorisation procedures to be monitored, it is also necessary for the competent authorities to base each of their decisions on reasoning which is accessible to the public, stating precisely the reasons for which, as the case may be, authorisation has been refused.<sup>129</sup>

Case-law has developed as regards the procedure to grant such licences. The principles of transparency, equal treatment and legal certainty appear to apply both in the situation where a Member State opts for an "open" system of licences in which access to a certain gambling activity is granted to every operator which fulfils the requirements provided by the relevant national law (such as a bank guarantee, absence of previous offences, etc.), and in the situation where a Member State establishes a "closed" system of licenses under which only one or several licences are granted by the national authorities in respect of each of the games of chance authorised (see also chapter 5.6.2).

#### 5.6.3.2. The principles of transparency, equal treatment and legal certainty

The case-law of the CJEU states that public authorities which grant betting and gaming licences have a duty to comply with the fundamental rules of the Treaties and, in particular, with Articles 49 and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency.<sup>130</sup>

The *obligation of transparency* applies if the licence in question may be of interest to an undertaking located in a Member State other than that in which the licence is granted. It requires the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition and the impartiality of the award procedures to be reviewed, without necessarily implying an obligation to launch an invitation to tender. The award of such licences must therefore be based on objective, non-

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<sup>128</sup> See *Sporting Exchange*, par. 50, and the case-law cited, and *Garkalns*, par. 42. It should be also noted that service concessions are currently not governed by any EU directives on public procurement (see, for instance, *Sporting Exchange*, par. 39).

<sup>129</sup> *Garkalns*, par. 43.

<sup>130</sup> See, to that effect, most recently *Costa and Cifone*, par. 54 and the case-law cited.

discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.<sup>131</sup>

The purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure.<sup>132</sup>

The *principle of equal treatment* requires moreover that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions.<sup>133</sup>

The principle of *legal certainty* also requires that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings.<sup>134</sup>

The CJEU ruled in *Costa* that the effect of an obligation for new licence holders to observe a minimum distance between their establishments and those already in existence is to protect the market positions acquired by the operators who are already established. This is to the detriment of new licence holders, who are compelled to open premises in less commercially attractive locations than those occupied by the former. Consequently, any such measure entails an unequal treatment which could not be justified on the basis of the general interest objectives. As regards the objective of combating of criminality by making the operators active in the sector subject to control and channelling betting and gaming into the systems thus controlled, the Court observed that the rules on minimum distances were imposed exclusively on new licence holders and not on those already established. It ruled that even if a system of minimum distances between outlets were in itself justifiable, it could not be acceptable for such restrictions to be applied in circumstances such as those of the cases pending before the national court, in which the only operators to be placed at a disadvantage would be the new licence holders entering the market.<sup>135</sup>

In *Sporting Exchange*, the CJEU elaborated the case-law on the principle of transparency. It had to rule on the validity of the renewal of a licence to operate games of chance granted to a single operator without a competitive tendering procedure.

The Court recalled that the obligations of equal treatment and transparency is also applicable in the situation of such "closed" systems of licences.<sup>136</sup> It accepted however an exception to

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<sup>131</sup> Case Commission v Italy, par. 24 and the case-law cited; Case Sporting Exchange, par. 40 and 41; Case Engelmann, par. 50, 55; Costa and Cifone, par. 55-56, 72.

<sup>132</sup> See Costa and Cifone, par. 73 and the case-law cited.

<sup>133</sup> Costa and Cifone, par. 57.

<sup>134</sup> See Costa and Cifone, par. 74 and the case-law cited;

<sup>135</sup> Case Costa and Cifone, par. 58, 63-64.

<sup>136</sup> Sporting Exchange, par. 39-51.



the compliance with that obligation in so far as the operator in question is a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities”.<sup>137</sup> In such situations, granting an operator with exclusive rights to operate games of chance, or renewing such rights, without any competitive tendering procedure would not appear to be disproportionate in the light of the objectives pursued by the national legislation in question (protection of consumers and combating both crime and gambling addiction).<sup>138</sup>

### **5.6.3.3. Reserving the grant of licenses to non-profit entities**

The CJEU assessed in *Sjöberg and Gerdin* the compatibility with EU law of national legislation which makes the award of a licence to organise gambling activities subject to the condition of the applicant being a public or a non-profit organisation. The Swedish law in question prohibited the promotion of gambling legally organised in other Member States and the promotion of unlicensed gambling in Sweden.

The Court underlined that the purpose of the national law was “to ensure that those consumers take part in gambling only in the context of the system licensed at national level, thereby in particular ensuring that private profit-making interests are excluded from that sector”, which is a restriction to the free movement of services.<sup>139</sup> It then ruled that “it might be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune” and consequently that “according to the scale of values held by each of the Member States, and having regard to the discretion available to them, a Member State may restrict the operation of gambling by entrusting it to public or charitable bodies”.<sup>140</sup> Moreover, the Court considered that the prohibition on the promotion of services of private gaming operators run for profit, who would never be entitled to obtain national licences for the operation of gambling, may be regarded as necessary to meet such an objective.<sup>141</sup>

In *Ladbroke's*, the EFTA Court recalled that the aim of preventing gambling of being a source of private profit may in principle justify restrictions on the right of establishment and the free movement of services. As an aim in itself, it must be based on a general resentment of games of chance for reasons of morality, in particular if it relates to non-addictive games. Thus, the aim of preventing gambling from being a source of private profit can serve as a justification only if the restrictive measure (such as the introduction of a State-owned monopoly offering a range of gambling opportunities) reflects that moral concern.<sup>142</sup> However, national authorities cannot be required to oppress all games of chance offered by socially beneficial organisations. The acceptance of certain games of chance of a limited volume offered by such organisations, typically in local communities, constitutes a reasonable use of statutory prohibitions which does not fatally undermine the moral position on which the aim is based.<sup>143</sup>

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<sup>137</sup> Sporting Exchange, par. 59, 62, dictum.

<sup>138</sup> Sporting Exchange, par. 60, 30.

<sup>139</sup> *Sjöberg and Gerdin*, par. 33.

<sup>140</sup> *Sjöberg and Gerdin*, par. 43.

<sup>141</sup> *Sjöberg and Gerdin*, par. 45.

<sup>142</sup> Par. 48, 75 of the judgment.

<sup>143</sup> Par. 75 of the judgment.

#### **5.6.3.4. Limited number of licences**

Some Member States limit the number of licences, for example to a maximum for a certain category of gambling. In *Placanica*, the national (Italian) law at issue limited the number of licenses for the management of sport bets on competitive events not involving horses (to 1000), and also the number of licences for the acceptance of bets on competitive horse events.<sup>144</sup> Similarly to the case-law on exclusive rights/monopolies (see chapter 5.6.2), the CJEU made clear that limits on the number of operators are restrictions to the fundamental freedoms which are in principle capable of being justified.<sup>145</sup>

Under the specific circumstances of *Placanica*, the Court first analysed the general interest objective of “reducing gambling opportunities”. It ruled that the restrictions on the number of operators “must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit the activities in that sector in a consistent and systematic manner”. In that case it was however common ground, according to the national court, that “the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue, and that no justification for the Italian legislation is to be found in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling”.<sup>146</sup>

The CJEU turned then to the objective of “combating criminality”, which was identified as the true goal of Italian legislation at stake. In this context, it underlined that it is possible that a policy of controlled expansion may be entirely consistent with the objective of drawing players away from clandestine betting and gaming to activities which are authorised and regulated. A licensing system may, in those circumstances, constitute an efficient mechanism enabling operators active in the betting sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. It must nevertheless be ascertained whether the imposed limitations satisfy the conditions laid down by the CJEU case-law as regards their proportionality.<sup>147</sup>

#### **5.6.3.5. Restriction on advertising of licence holders established in another Member State**

In its recent case *HIT and HIT LARIX*, the CJEU assessed the rejection of a permit to carry out advertising in Austria for gaming establishments located in Slovenia, in particular for casinos. In order for such permit to be granted, the Austrian legislation required that the level of protection of gamblers in the Member State of origin should be comparable to the level in Austria. It was not in dispute that such national legislation pursues the objective of protecting consumers against the risks connected with games of chance.

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<sup>144</sup> Case *Placanica*, par. 50.

<sup>145</sup> Case *Placanica*, par. 52 et seq. In this context, the Court ruled in *Zeturf* that the mere fact that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than supervision of a single operator is irrelevant. It is apparent from the case-law of the CJEU that administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law. (par. 48 of the judgment)

<sup>146</sup> Par. 53-54 of the judgment.

<sup>147</sup> *Placanica*, par. 55-58.

The CJEU ruled that such authorisation is in principle capable of fulfilling the condition of proportionality if it is limited to making authorisations to carry out advertising for gaming operators established in other Member States conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation. Such a condition does not appear to constitute an excessive burden for operators given the objective of protecting the population against the risks inherent in games of chance. The legislation would however have to be regarded as disproportionate, if it required the rules in the other Member States to be identical or if it imposed rules not directly related to protection against the risks of gaming.<sup>148</sup>

## **5.7. Assessing the proportionality of specific corporate requirements imposed on gambling operators**

### **5.7.1. Seat requirements**

The CJEU has held that "the requirement that an undertaking create a permanent establishment or branch in the Member State in which the services are provided runs directly counter to the freedom to provide services since it renders impossible the provision of services, in that Member State, by undertakings established in other Member States".<sup>149</sup> The CJEU has furthermore underlined that "if the requirement of authorization constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom. For such a requirement to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued."<sup>150</sup>

The Court has stated that a requirement for a licence holder to have its seat in the national territory is a discriminatory restriction which can therefore be justified only on the grounds of public policy, public security or public health.<sup>151</sup> The Court has, in this context, underlined that "it is settled case-law that the concept of public policy, first, presumes that there is a genuine and sufficiently serious threat to a fundamental interest of society and, second, must, as a justification for derogation from a fundamental principle of the Treaty, be narrowly construed."<sup>152</sup>

In *Engelmann*, the national (Austrian) legislation provided that one of the conditions for granting concessions for the operation of land-based games of chance was that operators should have their seat in Austria. The Austrian Government claimed that the purpose of this was to permit effective control of operators in the gambling sector, with a view to preventing those activities from being carried out for criminal or fraudulent purposes. The obligation would permit, in particular, a degree of control to be exercised over the decisions taken by the company's organs by reason of the presence of representatives of the State in organs such as the supervisory board.

The CJEU ruled however that, without it being necessary to determine whether that objective can fall within the definition of public policy, "the categorical exclusion of operators whose

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<sup>148</sup> HIT and HIT LARIX, par. 28-32.

<sup>149</sup> C-546/07 Commission v Germany, par. 39.

<sup>150</sup> See, inter alia, Case C-452/04 Fidium Finanz AG, ECR [2006] I-09521, par. 46.

<sup>151</sup> Dickinger and Ömer, p.79, Engelmann, p. 34.

<sup>152</sup> Par. 82 of the Dickinger and Ömer.

seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime. There are indeed various measures available to monitor the activities and accounts of such operators".<sup>153</sup>

The Court referred, *inter alia*, to the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders. Any gaming establishment in the Member State can be supervised and have sanctions imposed on it, regardless of the residence of its managers. Member States can also carry out supervision on premises of the gaming establishments located in national territory in order, in particular, to prevent any fraud being committed by operators against consumers.<sup>154</sup>

In *Dickinger and Ömer*, the Court assessed a similar condition for the exploitation of online casinos. The national (again Austrian) law provided that the holder of the monopoly of operating lotteries must have its registered office in national territory. According to the Austrian Government, this obligation should allow effective monitoring the holder of the monopoly for online casinos, and it is necessary to ensure effective supervision of the operator, *inter alia* by the presence of State commissioners in its supervisory bodies. The CJEU ruled that it is for the national court to determine, first, whether the objectives in question are capable of falling within the concept of public policy, and, if so, whether the obligation concerning the registered office satisfies the criteria of necessity and proportionality. In particular, it must be considered whether there are other less restrictive means of ensuring a level of supervision of the activities of operators established in another Member State equivalent to that which can be carried out in respect of operators whose registered office is in the country of the provision of the service.<sup>155</sup>

### **5.7.2. Legal form for operators of games of chance**

The CJEU has clarified that the requirement of a particular legal form for operators of games of chance such as a public limited company may, by virtue of the obligations binding certain kinds of company with respect in particular to their internal organisation, the keeping of their accounts, the scrutiny of which they may be subject and their relations with third parties, be justified by the objective of preventing money laundering and fraud.<sup>156</sup>

### **5.7.3. Minimum share capital requirements**

Similarly, the requirement for a share capital of a certain amount may prove to be of use in order to ensure a certain financial capacity on the part of the operator and to guarantee that it is in a position to meet the obligations contracted towards winning gamblers. The observance of the principle of proportionality requires however that the restriction imposed does not go

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<sup>153</sup> Engelmann, par. 37, with reference to, *inter alia*, the judgments in the cases *Gambelli* and *Placanica*.

<sup>154</sup> Engelmann, par. 38-39.

<sup>155</sup> See par. 83 and 84 of *Dickinger and Ömer*.

<sup>156</sup> *Dickinger and Ömer*, par. 76; Engelmann, par. 28-30.

beyond what is necessary for achieving the aim pursued, having regard to other possible ways of ensuring that the claims of the winning gamblers will be honoured by the operator.<sup>157</sup>

### **5.8. Application of State aid rules**

The European Commission opened, under the EU state aid rules (Articles 107 and 108 TFEU), two formal investigations in the field of gambling. One formal final decision has been adopted whilst the other one is pending:

- Denmark: here the Commission examined whether lower taxes for online casinos in comparison to traditional casinos in Denmark could procure an anticompetitive advantage for such online casinos. Denmark had decided to reform the national legislation on gambling and betting services and to replace the monopoly regime with a regulated and partially liberalised one. Under the notification provided to the Commission in July 2010, online providers of casino games and gaming machines would be subject to a flat tax of 20 % on the GGR compared with up to 75 % for land-based casinos and gaming halls. The Commission submits that the measure constituted State aid as the differential treatment entails a competitive advantage for online casinos as compared to their land-based "competitors". However, the Commission concluded that the measure is compatible with the internal market under Article 107(3)(c) TFEU because the overall balance of implementing the measure was considered to be positive. If the tax rate for online gambling had been set at the same rate or at a similar level as the rate for land-based gambling operators this would have led to a situation where the industry and the players would not have responded to the possibility of legally providing online gambling services on the Danish market. This would have defeated the objectives of general interest pursued by the Gaming Act (keep gambling at a moderate level, protect gamblers, ensure public order and prevent gambling being used for criminal purposes).<sup>158</sup>
- France: here the Commission has opened the formal investigation procedure to examine whether a parafiscal tax (levy) to finance horse racing companies is in line with competition rules because of its doubts regarding the qualification of the mission conferred on horseracing companies as a service of general economic interest.<sup>159</sup> The procedure is still to be finalised with a formal decision.

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<sup>157</sup> Dickinger and Ömer, par. 77.

<sup>158</sup> Commission Decision 2012/140/EU of 20 September 2011 on the measure C 35/10 (ex N 302/10) which Denmark is planning to implement in the form of duties for online gambling in the Danish Gambling Duties Act, OJ L 68/3 of 7.5.2012. Two appeals to the General Court have been submitted against this decision: T-601/11 submitted by the DAB (Danish Amusement Machine Association) and T-615/11 submitted by the Royal Casino Aarhus. To be noted, in this context, that the Commission has received other complaints against Member States' regulations imposing different taxation on online and off-line gambling services.

<sup>159</sup> State aid C 34/10 (ex N 140/10) – Levies to finance the public service mission of improvement of the equine species and the promotion of horse breeding, training in the horse racing and breeding sector and rural development. See the invitation to submit comments ex Article 108 (2) TFEU in OJ C 10/4 of 14.1.2011.

## **6. ADMINISTRATIVE COOPERATION AND EFFICIENT ENFORCEMENT**

The increased supply of online gambling services, authorised and unauthorised, their cross-border impact and the progressing regulation of gambling services in Member States raises the immediate question about the need for enhanced administrative cooperation and efficient national enforcement. One of the objectives of the Green Paper consultation was to determine if greater cooperation at EU level would help Member States to achieve more effectively the objectives of their gambling policy. The response has been an almost unanimous call from Member States, the European Parliament and stakeholders for an enhanced administrative cooperation between gambling authorities at EU level. The Council already stressed in December 2010 in its conclusions on the framework for gambling and betting in the EU member states<sup>160</sup> that *"the cross-border nature of the different issues requires Member States to work more closely together, and with third countries where appropriate, in order to address them"*.

### **Set the conditions for a successful administrative cooperation**

The supervisory structure in Member States differs significantly. The role and competences of the gambling regulatory authorities differ, yet sufficient competences are crucial if administrative cooperation is to be effective. Albeit administrative cooperation is taking place, this is often on an ad-hoc basis and informally. Existing bilateral and multilateral cooperation is considered useful by Member States. However they recognise the deficits in terms of the quality of information that can be exchanged and the implementation of the decisions taken in the ambit of these multilateral structures because frequently these do not meet the needs of a regulator. Outside the area of sports administrative cooperation with other stakeholders is limited.

### **Ensure effective enforcement for the achievement of policy objectives**

The Green Paper also highlighted the importance of effective enforcement for Member States to ensure the achievement of the public interest objectives behind their national gambling policy. Effective enforcement encompasses the organisational structure and competences of the national gambling authority, adequate administrative cooperation with other regulators and suitable enforcement tools. The responses to the Green Paper show a relative absence of preventive enforcement methods. While responsive enforcement methods are used by some Member States there is still a lack of information and of experience on these methods in the EU. Therefore, the efficiency, technical limits and costs of responsive enforcement methods need to be discussed.

#### **6.1. The regulatory authority**

The effective implementation and enforcement of gambling rules and an efficient cross-border administrative cooperation requires strong institutional arrangement in Member States.

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<sup>160</sup> Conclusions on the framework for gambling and betting in the EU member states, 3057th COMPETITIVENESS (Internal Market, Industry, Research and Space) Council meeting, Brussels, 10 December 2010

### **6.1.1. Role and competences of regulators**

In the EU the role and competences of gambling regulators differ amongst Member States in terms of powers and scope. Whilst more and more Member States establish independent regulatory bodies, normally in parallel with the introduction of an open licensing system for the offering of online gambling services, the majority of Member States still entrust a specific department within a Ministry (mainly within the Ministry responsible for finance or the interior) with the task of regulating and supervising the gambling market. Having said this, the regulation and supervision of gambling services can be the competence of several authorities, depending for example on the type of game regulated or the channel of distribution.

### **6.1.2. Institutional arrangements**

In a rapidly developing market, it is essential for regulators to understand the business and the technology and to have up-to-date information. This assists regulators not only when setting licensing/authorisation requirements but also in the supervision of the licence holders and the enforcement of the national gambling rules. Today a number of regulators in the EU lack experience with online gambling regulation. In other cases regulatory authorities have not been set up or suffer from limited staff and resources. In the workshop organised by the Commission on efficient national enforcement measures and administrative cooperation a number of regulators expressed a lack of experience with online gambling regulation, due to their unregulated or newly regulated markets, as well as their desire to draw knowledge from the more experienced regulators<sup>161</sup>.

Regulators need to have a coherent legal basis, be adequately resourced and have rules and procedures that are fit for purpose. A number of regulators deem that a regulator's powers should cover all forms of gambling (online and land-based). Sufficient competences are crucial for effective administrative cooperation with regulatory authorities in other Member States. Effective cooperation could be hampered by the fact that not every Member State has a single, central and independent gaming regulatory authority. Also the European Parliament considers the establishment of a regulator with suitable powers in each Member State to be a necessary step towards more effective regulatory cooperation.

All Member States are therefore encouraged to set up a regulatory authority with an appropriate structure and powers or embedded in an appropriate network of competent authorities at national level to ensure appropriate administrative cooperation. Regulators need to have proper competences and engage in cooperation with relevant authorities at national level in order to meet demands for cooperation from other Member States' regulators and not fall short of their expectations.

## **6.2. Administrative cooperation**

Enhanced administrative cooperation is imperative to meet today's regulatory challenges. The European Parliament calls for cooperation among national regulatory bodies to be considerably expanded, giving them a sufficient remit, with the Commission as coordinator,

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<sup>161</sup> [http://ec.europa.eu/internal\\_market/services/docs/gambling/workshops/workshop-v-conclusions\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/gambling/workshops/workshop-v-conclusions_en.pdf)

to develop common standards and take joint action against online gambling operators which operate without the required national licence.

### **6.2.1. Existing administrative cooperation**

Today administrative cooperation is organised in multilateral or bilateral agreements, mainly with a view to discuss and exchange information and best practices on gambling-related issues.

#### **Multilateral cooperation**

Multilateral cooperation between gambling regulators has been ongoing since the 1980's. It takes place in two regulatory organisations, in which Member States participate: the Gaming Regulators European Forum (GREF)<sup>162</sup> and the International Association of Gambling Regulators (IAGR)<sup>163</sup>.

IAGR is a world-wide organisation including members from the EU (Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, the UK). The mission of IAGR is to advance the effectiveness and efficiency of gaming regulation. GREF is the only multilateral organization that concentrates on European countries. Regulators from most but not all Member States are active members of GREF. GREF's main importance is described as providing a forum for the competent authorities to meet both at formal and informal level, exchange information and views and learn from the different approaches of the participating countries (best practices) regarding land-based and remote gambling. GREF serves as a body to represent the different views of European gambling regulators and also provide a central point of contact for enquiries directed at them from authorities or related organisations in Europe and elsewhere. Both, GREF and IAGR, have established eGambling working groups. The work focuses primarily on getting a common understanding of the risks and the options for dealing with the risks in terms of consumer protection, ensuring gambling is fair and keeping crime out of gambling.

Existing multilateral cooperation has been successful in sharing experiences and good practice. The group has produced good practice guidelines for internet gambling. Members learn from one another and discuss particular challenges of gambling regulation and enforcement, on a non-political and technical basis. However the work and the results achieved seem to be limited due to the scope and mandate of the organisations and a number of constraints on the exchange of information and data. The informal structure and the non-binding character of statements and recommendations discussed impede the development of common policies and measures.

#### **Bilateral cooperation agreements**

More recently Member States' regulators have started to enter into bilateral cooperation agreements. On 28 June 2011 the French and Italian gambling authorities signed a first cross-

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<sup>162</sup> <http://www.gref.net/>

<sup>163</sup> <http://www.iagr.org/>



border cooperation agreement.<sup>164</sup> The purpose of the agreement is to improve the enforcement of the respective national regulatory systems and the effectiveness of the regulatory work by sharing information and experience in four key areas: compliance checks on operators licensed in both countries and adoption of player protection measures, institutional communication strategies, preventing fraud in the sports sector and the fight against websites of unauthorised operators.

In May 2012 Denmark and Malta entered into a cooperation agreement.<sup>165</sup> The two jurisdictions intend to exchange information in particular to enhance and facilitate respective licensing processes and the monitoring of licence holders, to protect young and vulnerable groups and to protect players. The agreement also raises the issues of equipment location parameters and common use of B2B service providers. The Member States aim to cooperate on enforcement of their gambling laws regarding joint licensees and to collaborate on areas such as non-duplication of requirements and controls, shared responsible gaming initiatives and employee exchange programmes.

Denmark has signed agreements with a number of jurisdictions, such as Alderney, Gibraltar and the Isle of Man, in order to establish a formal basis for cooperation and information sharing between the competent authorities.

Bilateral cooperation allows for a better adaptation of the scope and content of the cooperation to the individual needs of the parties and can be more effective than multilateral cooperation. However, by its very nature it covers only two Member States and does not allow for common initiatives tackling the existing challenges in the cross-border online gambling market. Bilateral cooperation agreements furthermore require sufficient resources if entered into with a number of Member States.

Existing bilateral and multilateral cooperation agreements help Member States in their regulatory work and have proved useful in achieving a certain degree of cross-border cooperation. These agreements however have deficits in terms of the quality of information that can be exchanged and the implementation of decisions taken in multilateral structures and thus often does not meet needs of a regulator. Member States miss appropriate structures for the exchange of information as well as focussed discussions and an appropriate follow-up on agreed implemented programmes.

## **6.2.2. Areas for administrative cooperation**

Successful administrative cooperation requires a clear definition of the areas Member States can request and exchange information on and develop common actions and initiatives.

In the conclusions on the framework for gambling and betting in the EU Member States the Council concluded that the cooperation between the Member States seems required to assess the scope, possibilities and mechanisms, in order:

- to share information on gambling operators,
- to protect consumers, minors and ensure the integrity of games,

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<sup>164</sup> <http://www.arjel.fr/IMG/pdf/20110628CP.pdf>

<sup>165</sup> <http://www.lga.org.mt/lga/content.aspx?id=319936>

- to minimize, where possible, any unnecessary administrative burdens,
- to identify and share best practices in relation to for example player protection, technological tools for effective regulation and responsible gambling measures.

The development and implementation of technical solutions such as cross-border B2B licences or cloud computing in the gambling sector might pose further challenges in terms of multijurisdictional regulation and increases the need for enhanced cooperation.

The level of administrative cooperation depends on the information and data that can be exchanged between gambling regulators. In terms of the quality of the information and data and the conditions for sharing it a distinction can already be made between sharing information of a more general nature and sharing information and data on specific issues.

General information sharing would concern

- National legislation governing online gambling and the competences of the national authorities regulating gambling,
- Experience and best practice regarding the enforcement and supervision of national online gambling regulations, consumer protection, gambling addiction, prevention of fraud and money laundering, ensuring the integrity of sports,
- Authorisation/licensing conditions for operators seeking to operate in a Member State, including information on testing and certification of gambling equipment.

Information and data exchange on specific issues would cover

- Applicants at the pre-licensing stage,
- Testing results and certification of gaming equipment, software, games to be offered,
- Post-licensing information exchange such as
  - monitoring of authorised operators,
  - enforcement of applicable rules for consumer protection,
  - enforcement of applicable rules prevention of fraud and of money laundering,
  - operators' compliance with applicable legislation and/or licence conditions,
  - any breach by operators of their license conditions,
  - audit reports/findings,
  - licensees suspended,
  - customer interaction, and
  - complaints against authorised operators,
- Consumers/players such as
  - exclusion lists or barred citizens,
  - identity checks for the purpose of age verification,
  - identity checks for the purpose of crime prevention (identity theft, money laundering),
- Illegal unregulated operators such as
  - their identity,
  - the means used to detect them,
  - the means used to prevent them from operating in the jurisdiction, and
  - interaction with the authority/jurisdiction authorising them (where this exists).

### **6.2.3. Tools for administrative cooperation**

Administrative cooperation will only work if arrangements are put in place defining why, on what and how regulators should cooperate. Many responses to the Green Paper consultation see a crucial role for the Commission in organising administrative cooperation among Member States. The Commission is called on to create a structure for administrative cooperation and to assist this cooperation, in order to ensure focused discussions as well as an appropriate follow-up on agreed implemented programmes. In exploring how to improve administrative cooperation in the EU two different goals have to be distinguished: (1) involve the Member States in the development and implementation of an EU policy on online gambling services and (2) provide a structure for the coordination of administrative cooperation between Member States. Both are needed.

#### **Involve Member States in the development and implementation of an EU policy on online gambling services**

The Communication "Towards a comprehensive European framework for online gambling" and this Commission Staff Working Paper define an action plan identifying initiatives to be taken at national and EU level in response to key challenges for the regulation of gambling services. In order to better involve Member States in the development and implementation of an EU policy on online gambling services the Commission will establish an expert group on gambling. The expert group, composed of representatives of Member States, will provide advice and expertise on the preparation of EU initiatives. It will also be tasked with facilitating the development of mutual understanding and the exchange of information and best practices. Several Member States have called for the establishment of an expert group by the Commission. Stakeholder experts may be invited to the expert group, in line with respective Commission procedures.

#### **Provide a structure for the strengthening of administrative cooperation between Member States**

In order to strengthen cooperation assisting Member States and gambling regulators in their regulatory and supervisory work and responding to daily and operational needs an appropriate structure for administrative cooperation between Member States needs to be in place. This corresponds to a request from the European Parliament calling on the Commission to explore – in keeping with the principle of ‘active subsidiarity’ – all possible tools or measures at the EU level designed to protect vulnerable consumers, prevent addiction and combat illegal operators in the field of gambling, including formalised cooperation between national regulators. The structure such formalised cooperation between national regulators could take however depends to a large extent on the kind of information and data to be exchanged between the authorities.

As a first step cooperation needs to focus on exchange of more general information and best practices, in order to share intelligence, reduce administrative burdens and build confidence and trust between regulators. Member States have suggested that regulators should start collaborating on common objectives.

In order to facilitate this cooperation the Commission will set out, together with all EU/EEA regulators and in cooperation with Member States, the objectives of cooperation, common principles and cooperation arrangements. Ultimately, the aim is to facilitate cooperation between the all EU/EEA regulators, setting out the arrangements for sharing of information, views and assessments, and preparing for the management and resolution of cross-border issues.

The advantage of a step-by-step approach as regards administrative cooperation is the general acceptance of all Member States and the prospect of immediate implementation. It may be general in scope and requests for information or intelligence exchange may be more on a case-by-case basis, entailing therefore a degree of administrative work. In the long term this may not suffice to deal with the challenges of the online gambling market adequately as inter alia it may not facilitate the exchange of information on applicant licensees and on authorised operators (eg minimal application process requirements met, such as financial stability of company, shareholders, certified technical equipment and software, monitoring, complaints by customers, interaction with regulator), and it will not allow for the use of existing instruments for mutual assistance and administrative cooperation in the EU, such as the Internal Market Information system (IMI)<sup>166</sup>.

Therefore, in a second step cooperation could be extended to exchange of information on operators and players. This will enable administrative cooperation to be fully functional. However, the challenge will be to define the kind of information to be shared and to put the right infrastructure in place to guarantee protection and reliability of data.

The EU has a solid data protection legal framework. The exchange of information between Member States should comply with the rules on the protection of personal data in the Data Protection Directive. The processing of personal data under EU Law may only take place under certain conditions and in accordance with a set of principles. EU law furthermore requires an adequate and specific legal basis for the processing of personal data.

In its conclusions on the framework for gambling and betting in the EU member states the Council concluded that IMI could become a useful tool in order to facilitate administrative cooperation<sup>167</sup>. This has been reiterated by a number of Member States and stakeholders in the consultation. The European Parliament states that IMI could serve as the basis for more effective cooperation among national regulatory bodies. IMI is a software application accessible via the Internet, developed by the Commission in cooperation with the Member States, in order to assist Member States with the practical implementation of information exchange agreements by providing a centralised communication mechanism to facilitate cross-border exchange of information and mutual assistance. In particular, IMI helps competent authorities to identify their counterpart in another Member State, manage the exchange of information, including personal data, on the basis of simple and unified procedures and overcome language barriers on the basis of pre-defined and pre-translated workflows.

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<sup>166</sup> About IMI: [http://ec.europa.eu/internal\\_market/imi-net/index\\_en.html](http://ec.europa.eu/internal_market/imi-net/index_en.html)

<sup>167</sup> 3057th COMPETITIVENESS (Internal Market, Industry, Research and Space) Council meeting

The Commission proposal for a Regulation on administrative cooperation through IMI<sup>168</sup> is to create the possibility to launch IMI pilot projects to test the use of IMI for administrative cooperation, including the exchange of personal data, in any single market area. In practice, IMI guarantees a high level of technical and procedural data protection. The processing of personal data in IMI offers a considerably higher level of protection and security than other methods of information exchange such as mail, telephone, fax or e-mail. In addition, data protection considerations are addressed in the day-to-day use of the system. The Commission will therefore, through a dialogue with Member States, explore further the possibilities for an exchange of personal data, in particular through the application of IMI and in compliance with applicable data protection rules.

The Regulation on Consumer Protection Cooperation<sup>169</sup> sets up an EU-wide network of national enforcement authorities with similar investigation and enforcement powers investigating possible breaches of consumer laws and to take action against traders. The network seeks to tackle breaches of consumer law in areas such as misleading advertising and distance selling. The Regulation further sets out supporting measures to foster expertise and cooperation between authorities as well as the possibility of international cooperation agreements with third countries. The Commission will further assess the use of this tool and may draw from this network in seeking to facilitate administrative cooperation amongst regulators.

#### **6.2.4. Cooperation with other enforcement bodies and stakeholders**

In the Commission's workshop on efficient national enforcement measures and administrative cooperation participants considered cooperation with other enforcement bodies and dialogue with industry (not only operators but also related services such as hardware and software IT providers and consumer associations) crucial to properly regulate the market as well as share knowledge and experience. Cooperation on criminal investigations should be improved. Dialogue with industry can be formal or informal or on an ad-hoc basis. Regulators and industry alike stressed that continuous cooperation and dialogue can only benefit the quality and efficacy of regulation.

The Commission therefore encourages Member States to ensure cooperation between relevant competent authorities at regional and national level, such as enforcement and consumer organisations. In order to respond to the regulatory challenges of a technologically complex and fast developing market regulators should also engage in a constructive dialogue with the industry sectors concerned.

#### **6.2.5. Cooperation with third countries**

The challenges in the online gambling market are of a transnational character, often originating from outside the EU borders. With regard to illegal offers from third countries regulators have little or no contact with relevant authorities in other parts of the world, often

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<sup>168</sup> The proposal for a Regulation is envisaged to be adopted by the European Parliament and the Council before the end of 2012.

<sup>169</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)

because no such regulators or contact points exist, making it difficult for the regulators of the Member States to follow-up on operators from such countries (e.g. Asian ones). In some instances regulators use established networks in other industry sectors, such as financial services, for information sharing.

Currently no agreements exist between the EU and third countries covering gambling related issues. However, Member States almost unanimously call on the Commission to coordinate actions and initiatives toward third countries.

The Commission will together with Member States identify the issues that need to be raised with third countries and will seek to strengthen the dialogue with these countries. Existing international information and intelligence exchange mechanisms need to be understood and better exploited.

### **6.3. Enforcement measures**

The success of a national gambling policy also depends on a Member States' ability to effectively enforce its national rules. For this purpose Member States can use preventive and responsive enforcement measures.

#### **6.3.1. Preventive enforcement measures**

Preventive enforcement means aim at reducing the contact of citizens with the unregulated gambling offer and ensuring compliance with national gambling rules and common principles.

##### **Inform players about the available legal offer**

Today many players are not aware of or ignore if and where a gambling service is authorised. In order to enforce national gambling rules players need to be enabled to make a distinction between authorised and unauthorised gambling services offered online. Member States should therefore explore means encouraging users to play on websites of authorised operators as opposed to websites of unauthorised operators providing services without a licence.

While many Member States have information campaigns to inform consumers about the risks of gambling the Commission has little information about campaigns held to inform consumers about the availability of an authorised offer and the specific risks of using unauthorised gambling services provided without a licence.

One way of informing players about the reliability of a gambling service offered online is the use of trustmarks, issued by gambling regulators to authorised operators. They exist in several jurisdictions and players are thus better able to identify if a gambling site is licensed and by which jurisdiction. Nonetheless, the question remains as to effective such trustmarks are in channelling players to regulated websites, in particular without complementary promotional campaigns enabling player recognition. In the Commission's workshop on enforcement views differed on the impact that trustmarks have on consumers in choosing an operator over another.

The Commission will explore, together with Member States, best practices for consumer information and education.

## **Understand citizens' choice/behaviour**

Many EU citizens purchase online gambling services for entertainment purposes. Many of these users, either because of a lack of national supply of such services or because they seek to maximise their return on stakes, search across competing online gambling services across borders. It was highlighted in many responses to the Green Paper, from Member States and stakeholders alike, that in order to channel these requests into the authorised national market a Member State will have to provide an attractive authorised offer.

## **Responsible Business Conduct**

Naturally, industry inherently has an important role to play in the enforcement of national gambling rules. The nature of the internet allows consumers to access gambling services cross-border. Very often Member States require a national licence for the offering of gambling services to a citizen. In order to ensure the effectiveness of national gambling regimes operators need to respect these regimes and refrain from offering their services to consumers if not authorised to do so.

At the same time industry can and has launched its own initiatives to ensure the attainment of policy objectives. The European Committee for Standardisation (CEN) workshop agreement on responsible remote gambling measures<sup>170</sup> for example was initiated by the gambling operators. The CEN workshop agreement developed a set of control measures designed to ensure the adequate protection of customers and the responsible behaviour of gambling operators, software suppliers and associated service providers.

## **Appropriate reporting obligations and supervision of licensees**

A thorough post-licensing process is imperative to ensure full compliance of authorised operators with the respective national regulatory regime. In order to have a full understanding of the market and of the regulated entities that are operating it is crucial to collect information from all relevant sources not only from the regulated operators. Establishing the information requirements, collecting and processing the information are key challenges for regulators.

In an online and technology-based sector the monitoring of gambling transactions between the player and the operator and access to the operators' server are considered essential for proper supervision of authorised gambling operations. In some Member States monitoring of gambling transactions is conducted in real time. Access to the server is important to perform the monitoring of gambling transactions and of the operator's compliance with the licensing requirements. In order to have access to an operator's server it does not seem necessary to have the server located in the Member State where a game is offered. From the authorities present in the Commission's workshop on efficient national enforcement measures and administrative cooperation only few regulators consider the location of the server in the recipient Member State as essential while the majority of regulators do not see a need for such requirement from a technological standpoint. Instead, access to servers at a distance, central control units and real time control through technical supervisory tools (allowing, for example, for "know your customer" (KYC) checks by operators, central list of excluded players and

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<sup>170</sup> <ftp://ftp.cen.eu/cen/AboutUs/Publications/GamblingMeasures.pdf>

storage of players' balances) were considered far more efficient and appropriate, provided that the information is processed and analysed adequately. Ensuring the accuracy of data is considered more important than physical access to it. Software and hardware certification can play an important role in this respect. Duplication of IT infrastructure furthermore increases the complexity of a system without necessarily facilitating access to information.

However, while technology is an important enforcement tool many regulators have highlighted that it should not be overestimated. They consider direct contact with operators to be at least equally important.

Together with Member States the Commission will discuss the necessary means for the supervision of authorised gambling operators and explore methods and technologies for remote supervision. The Commission could promote best practices for this important regulatory task.

### **Administrative cooperation**

Enhancing administrative cooperation amongst public authorities, including enforcement bodies, and with the gambling operators and other relevant stakeholders will further improve the quality of enforcement.

#### **6.3.2. Responsive enforcement measures**

Responsive enforcement measures should provide the appropriate tools to cater for those cases where gambling operators or other relevant service providers do not comply with national rules. Member States are in need of means for the execution of administrative decisions prohibiting the provision of unauthorised gambling services in cases where an operator fails to implement a decision prohibiting the offer. Technical enforcement means available have certain benefits but also a number of significant shortcomings. As responsive enforcement measures directly impact not only on the rights of the player but also of the service providers they require a proper legal basis in national law.

### **Blocking access to websites**

Blocking access to websites is used in a number of Member States in order to enforce national gambling rules. This is the case at least in Belgium, Estonia, France and Italy. Other Member States have provisions for blocking access to websites in their national gambling laws but are currently not applying them, such as Denmark. While in principle two main methods are available for blocking access to websites, Domain Name System (DNS) filtering and Internet Protocol (IP) blocking, most Member States applying blocking methods seem to use DNS filtering:

In order to access a website, rather than having to write the full IP address (which is actually the 'location' where the content really is on the worldwide network), it is possible to use a domain name. A domain name is an alias to an IP address, and an IP address can have an unlimited amount of aliases. A domain name looks like <http://europa.eu>. To ensure that these aliases work, a matching table associates a precise domain name to a specific IP address; they are provided by the DNS Servers.



An example:

1. The Internet user opens a web browser and types "europa.eu";
2. The browser asks the DNS servers which IP address is associated with "europa.eu";
3. The DNS server checks its matching table and, if a match is found, it answers by giving the associated IP address '123.345.567.789';
4. The browser contacts the given IP address and tries to access its content.

DNS blocking occurs at Step 3. Instead of answering the real IP address which is associated to the given alias, the DNS Server answers with another IP address which is, in most of the cases, owned by a governmental service such as the police or, in the case of gambling, the gambling authority.

### **National procedures**

Procedures for the rules for blocking access to websites offering unauthorised gambling services differ between Member States. Gambling authorities are either authorised to order internet service providers (ISPs) directly to block access to websites identified by the regulator or they first have to seek a court order:

In the first case, the gambling authority is authorised to issue a list of websites providing unauthorised gaming services. The list, which is regularly updated, is communicated to ISPs, which have to deny access to listed websites, normally by redirecting players to a regulator's website informing them that they were trying to access a website offering an unauthorised gambling service. The gambling authority can also be empowered to impose fines on ISPs for any breach of their blocking obligations.

In the latter case, a court, upon an application by the gambling authority, may order a provider of information society services to restrict access to websites through which online gambling services are provided without authorisation. Before applying for a Court decision the gambling authority will have to request the gambling operator to cease its activities in the Member State and the operator has to fail to abide by this decision. Member States associate a number of benefits with blocking access to websites. It is considered as a communication tool, providing information to consumers in terms of what are authorised and unauthorised offers under national law. Citizens are thus made aware of the existence of authorised and unauthorised gambling services offered online. For those who do not wish to use unauthorised operators or first time gamblers blocking can serve as an effective deterrent. Authorised operators and consumers consider state control as beneficial.

However, blocking access to websites does not work as an isolated enforcement tool and can be easily circumvented. Moreover, depending on the technology used, website blocking can impact on legitimate businesses. The efficiency of the blocking method furthermore depends on the validity of the list of blocked websites. Keeping the list up-to-date requires significant resources while internet addresses can be changed instantly. Lastly, ISPs are faced with the implementation of the provisions for blocking access to websites, not only implying costs and tying-up of resources but also creating potential liability issues.

### **EU framework**

The E-Commerce Directive provides for exemptions from liability for information society service providers when they host or transmit illegal content that has been provided by a third party. Information society service providers can under certain conditions benefit from these exemptions when they provide one of the so-called intermediary services set out in Articles 12 to 14 of the Directive. Moreover, Article 15 of the Directive prohibits Member States from imposing on providers of these services a general obligation to monitor content that they transmit or host. The Directive provides for a technologically neutral framework and the liability regime strikes a balance between the several interests at stake, in particular between the development of intermediary services, the societal interest that illegal information is taken down quickly, and the protection of fundamental rights.

Article 14 of the E-Commerce Directive contains the basis for procedures for notifying and acting on online illegal content. It provides that hosting providers, in order to benefit from a liability exemption, should act expeditiously to remove (take down) or to disable access to (block) illegal activity or information of which they have obtained actual knowledge.

### **EU initiative**

The E-Commerce Directive provides the basis for Member States' rules on blocking access to websites of unauthorised gambling operators. As announced in the Communication on the "Completing the Digital Single Market – A coherent framework for building trust in the Digital Single market for E-commerce and online services",<sup>171</sup> the Commission services are preparing an initiative on procedures for notifying and acting on illegal online content. The cross-border nature of the Internet, the lack of development of regulatory codes at European level and conflicting jurisprudence within and across Member States justify an analysis of the need for EU action. The initiative will have a horizontal scope in the sense that it will cover all types of online services (not only gambling but also entertainment, adult, health, etc.)<sup>172</sup>.

### **Blocking payments between players and operators**

A number of Member States, such as Belgium, Denmark, France, and Germany, are introducing or have introduced provisions in their national gambling laws on the blocking of payments between players and gambling operators not authorised to offer their services in the Member State. Different payment means are offered and used in gambling transactions. The methods for blocking payments between the player and the gambling operator and their efficiency depend on the payment means used:

- Payment blocking for card payments is based on the Merchant Category Code (MCC) used by the merchant, i.e. gambling operator. All card transactions are tagged with a specific four-digit identifier, the MCC. This number is based on ISO standards and is applied globally by issuing and acquiring member banks. The purpose of the MCC is to identify the goods or services the merchant provides or to classify the nature of the merchant's business. MCC 7995 is the universal identifier for gaming and gambling merchants and is linked to all transactions from these merchants. It covers all transactions

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<sup>171</sup> COM (2011) 942 final

<sup>172</sup> See for more details: [http://ec.europa.eu/internal\\_market/e-commerce/notice-and-action/index\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm)

(face to face and online) from merchants that provide betting, lottery tickets, casino gambling chips, off-track betting and wagers at racetracks.

- The prohibition of processing payments is undertaken via the blocking of payment orders where cards are using MCC 7995. Payment for authorised gambling services in a Member State is approved using of the respective country code in combination with MCC 7995. Payment service providers covered by the regulations therefore must implement routines to differentiate between requests for the authorization of payments for authorised and for unauthorised gambling services, on the basis of the combination of the MCC and the respective country code, before the approval or denial of a transaction.
- Payment blocking for bank transfers is based on the account number used by the gambling operator. It covers transactions both originating from (payments crediting players' accounts) and going to (repatriation of profits by players) unauthorised gambling operators. The implementation requires the gambling authority to identify bank accounts used by unauthorised operators and submit respective bank account numbers to the banks. Banks then have to block these accounts; they cannot be used for payment transfers related to gambling activities to and from the Member State.
- For e-wallets, the implementation of the prohibition of processing payments to unauthorised gambling operators seems to depend on the active involvement and internal controls of the e-money issuer. The issuer uses a single worldwide system for senders and receivers of payments. Both, sender and receiver are customers of the issuer and information is available about each party involved. All gambling operators are identified as such in the system, and a payment is considered to be for gambling if it goes to a gambling operator. Based on the verified and recorded information to indicate a customer's nationality the issuer can block payments for gambling services according to the customer's nationality. The issuer can also check the payer's IP address at the time of payment as an additional precaution.

For other payment means, such as pre-paid cards, little information has been provided in response to the public consultation on how the prohibition of processing payments is undertaken.

Some gambling regulators consider financial blocking a more efficient instrument than ISP blocking. The European Parliament calls on the Commission to examine the possibility of proposing a legally binding instruments obliging banks, credit card issuers and other payment system participants in the EU to block, on the basis of national black lists, transactions between their clients and gambling providers that are not licensed in their jurisdiction, without hindering legitimate transactions. However, being a relatively new enforcement tool the debate about the use and efficiency of payment blocking system suffers from a lack of experience and data.

Within Europe Norway is the only country having significant experience with the implementation and enforcement of payment blocking rules. In a recent evaluation of the law the Norwegian authorities concluded that access to gambling without a Norwegian license has

become somewhat complicated, but the effect of the ban on payment transfers has been less effective than intended when the provisions were introduced<sup>173</sup>.

The advantages most frequently attributed to payment blocking rules are the observation that the transfer of payments to unauthorised gambling operators becomes more difficult for players and the prohibition is considered to have an effect on spontaneous, first time gamblers. The prohibition provides the information to the player that an available online gambling site is not necessarily licensed or supervised by the national authority.

However, a number of shortcomings of payment blocking systems are raised in the debate. A payment blocking mechanism may result in blocking licit commercial transactions, in particular if based on the operators MCC. At the same time the effectiveness seems to be limited as in those countries applying payment blocking the majority of players continues to use the services of unauthorised gambling operators, using their credit or debit cards. Payment blocking systems can also be circumvented, for example by using third-party solutions or by changing payment details frequently. If a payment blocking system covers only certain means of payments it might urge players to resort to less controlled and regulated means of payment, not covered by existing enforcement measures. The implementation of payment blocking systems entails substantial costs for the payment service provider and other financial institutions.

## **EU framework**

The main objective of the EU policy on payment services is the establishment of a Single European Payment Area, in which citizens and businesses can make cross-border payments as easily, safely and efficiently as they can within their own countries and subject to identical charges. The Directive on Payment Services (PSD)<sup>174</sup> provides the legal foundation for the creation of an EU-wide single market for payments. In Article 55 II to IV the PSD provides rules on the blocking of payment instruments referring *inter alia* to the suspicion of unauthorised or fraudulent use of the payment instrument. However, it is unclear how existing rules on the blocking of payments for unauthorised gambling services would fit within the PSD provisions.

## **EU initiative**

Considering the general lack of data and experience with payment blocking methods it is not the time to consider an EU policy initiative. The Commission will assess the possibilities and limits of payment blocking in more detail before taking a final decision. It will discuss the issue with Member States and stakeholders concerned. The upcoming review of the PSD might also offer an opportunity to look into the issue.

## ***Other enforcement means***

### **White- and Blacklisting**

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<sup>173</sup> "A ban for Norwegian companies to provide payment services to gambling services on the Internet will significant help to reduce the availability of such gaming" (Proposition. No. 80 2007-2008, p. 19).

<sup>174</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

In most Member States gambling regulators provide a list of licenced operators (white list). These lists can provide useful information on the one hand to players, informing them that a gambling operator is authorised to offer services in the Member State and supervised by the competent authorities, and on the other hand to regulatory authorities in other Member States, verifying that an operator is regulated in another EU jurisdiction.

In a few instances Member States provide lists of operators not authorised to offer gambling services in the Member State. The European Parliament stresses in this respect that more action should be taken by Member States to prevent illegal gambling providers from offering their services online, for example by blacklisting illegal gambling providers. While black lists in principle can also inform consumers and regulators about the absence of an authorisation and thus the absence of supervision in a Member State it is almost impossible to keep these lists up-to-date, considering the huge number of gambling operators active on the internet.

In both cases players need to be aware of the existence and accessibility of the list.

### **Domestic Domain Name**

A number of Member States require that licence holders offer their gambling services on a website with the country code top-level domain of the respective Member State, for example website.fr for France or website.es for Spain. Players should thus be enabled to identify quickly if the gambling service offered on a website is authorised in a Member State.

### **Advertising bans**

National gambling laws commonly prohibit the advertising of online gambling services not authorised in the respective Member State. Member States consider such a prohibition as an indispensable part of their enforcement policy. Advertising bans for unauthorised gambling services are generally compatible with EU law. In *Sjöberg & Gerdin* the Court found that Article 56 TFEU does not preclude legislation of a Member State which prohibits the advertising to residents of that State of gambling not authorised in the Member State, under the condition that the general regulatory framework for gambling services in the Member State is in compliance with EU law. In *HIT and HIT Larix* it held that Article 56 TFEU does not preclude legislation of a Member State which permits the advertising in that State of casino's located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member state provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State. Member States however find it difficult to enforce the restrictions on advertising, in particular against advertising on the internet. Regulators experience the same technical and legal challenges as with blocking access to the unauthorised gambling service itself. Links and banners directing players to unauthorised gambling websites are easily changed and difficult to control and hosting websites often receive a percentage of the profit for each player directed to the website.

### **Administrative and criminal sanctions**

In the workshop on efficient national enforcement measures and administrative cooperation some regulators suggested that regulatory authorities need to have full enforcement rights

against unauthorised offers, including appropriate administrative and criminal sanctions. Without such powers close and robust working arrangements with law enforcement authorities are required. A number of participants advocated that a sanction regime should also cover related services, such as ISP, financial services and media services.

### **EU initiative**

The efficiency of enforcement tools is crucial for the successful implementation of a national gambling policy. Commission services, together with Member States and stakeholders concerned, will discuss the issue of efficient enforcement measures and seek to develop best practices.

## 7. PROTECTION OF CONSUMERS AND CITIZENS, INCLUDING MINORS AND OTHER VULNERABLE GROUPS

The Green Paper consultation embraced the relevant public interest objectives like consumer protection that gambling touches upon. The objective of protecting consumers and preventing gambling disorders are societal issues recognised by the Court, providing a margin of appreciation for Member States in devising national policy in this area, in compliance with the Treaty and respective case-law<sup>175</sup>. Further, in 2008 the Council highlighted the '*significant similarities in the Member States objectives as regards gambling and betting*', and the variety of arrangements devised to attain the converging aims<sup>176</sup>. Taking account of the contributions<sup>177</sup> to the Green Paper from Member States, stakeholders and the European Parliament, the calls for measures to protect all citizens and consumers are intended to

- Protect minors and young adults from gaining access to gambling facilities
- Protect other vulnerable groups
- Channel players (recreational and professional) into an authorised competitive offer
- Prevent the development of gambling-related disorders

as well as ensuring a transparent, fair and safe gaming environment.

### 7.1. The current framework

In the EU a number of similar if not outright common measures for safeguarding consumers exist in the regulatory frameworks of Member States. This is clearly manifested through the contributions provided in the Summary of Responses. However, whilst these are generally provided for in legislation, the range and detail of the prescribed provisions required by licensed operators differ. The requirements to be met by licensed operators may also be laid out in the licence requirements, against which an operator is to be monitored for compliance. Some competent authorities substantiate these provisions with other initiatives, such as Codes of Practice. Industry has also developed its own initiative towards adequate detective and preventive consumer standards through the CEN workshop agreement<sup>178</sup>, and against which the signatory gambling operators are externally audited.

Although clearly a number of binding and non-binding measures exist, given the lack of such measures at an EU level, not all citizens may be adequately protected, minors may be exposed to gambling content and consumers in general may be exposed to unregulated gambling sites. Not all regulatory systems may require strict age verification and player identification checks and controls to open an account with an authorised operator, on-line self-reality checks in real time or protection of player funds/accounts. Different solutions are used in the Member States for personal identification, digital or manual, and not all may be robust enough to prevent minors accessing online gambling activities. Support to customers by operators and by regulators may not currently be obligatory in all regulatory systems to which a customer can turn to for information and complaints. Further, education and awareness of online gambling

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<sup>175</sup> See Chapter 5 of this document

<sup>176</sup> Council Presidency Progress report 'Gambling and betting: legal framework and policies in the Member States of the European Union', 27 November 2008, 16022/08

<sup>177</sup> See Chapter 3 of the Summary of Responses

<sup>178</sup> <ftp://ftp.cen.eu/CEN/AboutUs/publications/GamblingMeasures.pdf>

and potential ensuing risks, including for minors, as well as information on the national or regional regulating authority are not necessarily readily available in the Member States. In addition, gambling service providers use a broad range of commercial communications for marketing purposes and citizens may not be well-informed on the choices they may pursue. However, gambling-specific advertising initiatives are not available in all Member States, even though there are existing examples such as codes of conduct by regulatory authorities or other designated competent bodies as well as industry.

Lastly, the intrinsic nature of gambling can give rise to problem gambling or lead to gambling addiction. However, research and studies or surveys on the nature and scale of this aspect is significantly limited. Yet, this is imperative for instance to ensure that the preventive and detective measures in place serve the purpose of protecting consumers adequately. The factors potentially leading to gambling-related problems equally need to be better grasped. These issues are important in order to be able to prescribe the dedicated treatment that would be required by those exposed to such problems.

The Commission is seeking to ensure that all citizens across the EU/EEA are afforded a high level of common protection throughout the internal market, both as regards an authorised and safe offer and against the unregulated offers which are accessible to consumers because online gambling inherently crosses national borders. As highlighted earlier, consumers do not necessarily pay attention to operators' authorisation details when seeking to play online. In any event, market figures show that there is consumer demand for this type of service in the EU<sup>179</sup>. As the Commission described in launching the Green Paper consultation *'Citizens search across borders for competing online gambling services and currently they may not be sufficiently protected against the risks associated with these illegal offers'*. It is therefore also imperative that regulatory approaches to protect consumers are not overly cumbersome such that players seek access to unregulated sites. Further, according to available data online gambling is a recreational activity for the majority of consumers in Europe. However, although the percentage of people with a type of gambling-related disorder has broadly remained within 0.5-3% to date it is nonetheless a significant number of individuals in the EU. It is an area which duly requires dedicated research to understand the risks entailed and to identify adequate early detection and preventive measures. Finally, there is an important segment of the population that must be protected appropriately, that is minors and other vulnerable groups.

Following from this perspective the Commission is proposing a number of actions with a view to providing adequate protection of consumers and citizens, including minors and vulnerable groups, as well as drawing from relevant Commission initiatives.

## **7.2. A safe and regulated offer to protect consumers**

From the outset, the Green Paper stressed the importance of adequate protection of consumers. More than enhancing consumer confidence, consumers need to be able to make informed choices online and be cognisant therefore of the existing offers online of unregulated gambling. Transparency is important, including clear terms and conditions on the operator's site. It is frequently said that consumers are faced with information overload on

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<sup>179</sup> See Chapter 3



online services in general but consumers do not necessarily have the information they need and do rely on labels.<sup>180</sup> First and foremost given the number of unregulated gambling sites on the European market<sup>181</sup> and the ensuing risk of fraud, the Commission services believe that consumers need to be able to distinguish a regulated online gambling offer from an unregulated one. This is primarily possible through an immediately visible and recognisable logo of the authorising competent authority in the EU/EEA Member States together with the details of the authorised operator on its website. In this respect trustmarks,<sup>182</sup> raised earlier, are generally referred to for online services inter alia to protect consumers against illegal sellers and can provide a means by which consumers can be informed on the protection offered by the authorised operator.

In the EU consumers should feel assured that an authorised online site they choose to play on has adequate safeguard measures in place, such as

- prevention and detection measures e.g.,
  - time and financial limit-setting possibilities for the player,
  - signposting to helplines (in respective languages),
  - exclusion possibilities,
  - reality checks (e.g. account and session activity on player screen at regular intervals),
- no playing on credit or wagering a bet if the registered player account does not have the necessary funds,
- the protection of their funds,
- customer support inter alia for treating information requests and for handling complaints.

It follows that players must be able to review deposit limits, that their requests are promptly dealt with and that any requests for upward increases are enabled only after a fixed period. Information on the types of games offered on respective authorised sites and warning signs of addiction possibilities should also be available. Identity checks and age verification for registering and opening an online gambling account are to be carried out in the first instance to abide with age limit requirements and to protect minors from accessing online gambling sites. Currently, it may not always be the case that an account is activated, enabling player activity, only once all checks are carried out. Furthermore, player activity should be monitored by the operator including for tracking gambling behaviour. The training of employees responsible for such monitoring is necessary in order to be able to identify alterations in player activity. This is also so as to ascertain adequate awareness, enable appropriate intervention (e.g. cooling off period) or if required provide guidance to support centres, treatment centres or to debt counselling for instance. The Commission services encourage both Member States' regulating authorities and industry to provide for these.

To adequately protect consumers all regulatory frameworks need to embrace these types of safeguards, with authorised operators incorporating these in the responsible business conduct

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<sup>180</sup> Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'A European Consumer Agenda – Boosting confidence and growth COM (2012) 22 final

<sup>181</sup> Green Paper: out of 14,823 active gambling sites in Europe more than 85% operate without any licence

<sup>182</sup> See Chapter 6.3.1 'Inform players about the available legal offer'

that they pursue and as part of their authorisation requirements. A regulating authority should responsibly carry out checks and controls on operators as an intrinsic part of post-licensing monitoring to ensure the protection of consumers. In a similar vein, the Commission services believe that support to customers should extend to regulators, so as to enable consumers to take complaints to the responsible regulator. In this respect complaints relating to contractual disputes for instance could be handled through the use of alternative dispute resolution (ADR) and online dispute resolution (ODR) entities<sup>183</sup>. Today, data on complaints taken to regulating authorities does not seem to be readily available, however consumers should be afforded support.

The benefit of these types of measures is that they can be viewed as benchmarks against which regulators assess authorised operators for compliance. Currently, some authorising systems can monitor operators in real times whilst others entail reporting obligations<sup>184</sup>.

The Commission services consider that at the minimum a common set of principles is to be established with a view to providing a high level of consumer protection across the EU/EEA. This is also essential for enhancing trust and for facilitating the exchange of information between regulators. Developing common measures at EU level contributes to mutual trust and to confidence-building. As regards exchange of information, as described earlier the Data Protection Directive sets out the general framework for the protection of individuals with regard to the processing of personal data and the free movement of such data<sup>185</sup>.

The adverse effect of the absence or lack of common measures is less protection being afforded to consumers. This is because authorised operators in the EU may choose to concentrate their activities in the larger markets, due to costs of compliance to meet the requirements of the regulatory regimes across the Member States. Secondly, overly rigid measures sought by a regulatory system can lead consumers to seek more accessible offers across borders. The net effect is that consumers may end up on unregulated sites, and out of the protection of a regulated framework.

#### **7.2.1. A Recommendation on common protection of consumers**

To this effect the Commission intends to ensure comparable and improved information and safeguards to consumers, including a high level of protection as regards minors and other vulnerable groups, and will as a matter of course adopt a **Recommendation on Common Protection of Consumers**. The Commission will draw on the existing practices introduced in the EU in identifying solutions aimed at safeguarding consumers and protecting minors. These will be drawn up with Member States' authorities in the expert group on gambling that is being established by the Commission.

In a first phase the Recommendation will provide Member States with an instrument at the national level for the adequate protection of consumers and it should also help optimise synergies between competent authorities. The Recommendation can be only be effective if it

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<sup>183</sup> E.g. The Commission has adopted a proposal for a Directive on consumer Alternative Dispute Resolution and a proposal for a Regulation on Online Dispute Resolution COM (2012) 19 final, [http://ec.europa.eu/consumers/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm)

<sup>184</sup> See Chapter 6.3 on 'Appropriate reporting obligations and supervision of licensees'

<sup>185</sup> Directive 95/46/EC

is applied by Member States. It is therefore significantly reliant on the take-up by Member States at the national and regional level within their system of authorisation and supervision. Having said this, action requires efforts of all stakeholders. In light of the Communication the Commission services will assess the application of the Recommendation after its adoption. The information provided by Member States on the actions undertaken to implement the Recommendation will help the Commission services to assess the effectiveness of the implementation of the Recommendation. The findings will help determine the course of action that will be subsequently called for. A Recommendation can take the form of standardisation of protective approaches. The Commission could mandate CEN to develop standards for the protection of consumers in the area of online gambling, which can also take the form of a European standard. CEN provides a platform for developing European standards, recognised under the Transparency Directive<sup>186</sup>. Service standards can be used to promote best practices or to set benchmarks to measure the quality and performance of the service. Their value is that these are drawn up by bringing together expertise of interested parties (manufacturers, consumers, regulators) of a particular service. European standards offer a common standard in the Member States, in the area of online gambling helping to enhance the understanding of consumer protection requirements and transparency.

**A Behavioural Study on Online Gambling** could test the consumer policy options<sup>187</sup>. The Commission services could undertake this exercise through a framework contract for behavioural studies. It analyses policy options from a consumers' perspective and is intended to support an initiative such as the above-mentioned Recommendation. Carried out for areas like retail investment services, tobacco and bank accounts, these studies have provided a useful foundation, as well as supplementary information for the initiatives subsequently undertaken. As an example, the study could provide whether warning signs and helplines provided on websites are effective or to what extent types of images used are effective. The benefit of this study is that it can be carried out within a 6-month period from the date it is contracted, within the terms of reference provided.

### **7.2.2. The Commission Proposal on Electronic Identification**

The Commission services believe that registration by customers to open a player account with an online gambling operator should be a pre-requisite of the protective measures in place online. According to the contributions to the Green Paper consultation identification checks are carried out by authorised operators, in line with the requirements of respective jurisdictions. Currently, there are different solutions in the Member States for personal identification, which can be digital or manual (e.g. credit card details, tax registration number, recognised third party databases, hard-copy documentation) which lend to interoperability problems, and which gives rise to challenges in view of the number of EU citizens, including consumers, crossing borders for short or longer term periods. A legal framework for the legal acceptance and recognition of electronic identification means improves confidence in electronic transactions for consumers, enhances the technical interoperability of identity authentication schemes and facilitates the administrative work of the gambling regulating authorities. The importance of consumers' perception of less cumbersome but secure

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<sup>186</sup> Directive 98/48/EC

<sup>187</sup> [http://ec.europa.eu/eahc/consumers/tenders\\_2011\\_cons\\_01.html](http://ec.europa.eu/eahc/consumers/tenders_2011_cons_01.html)

registration processes is also in light of the prevalence of unregulated online gambling offers on the European markets. The need for an EU-wide legislation on electronic identification and authentication was identified in the Digital Agenda<sup>188</sup> and the Single Market Act<sup>189</sup> and confirmed by the results of the public consultation launched by the Commission<sup>190</sup>.

The Commission has adopted a **proposal for a Regulation on electronic identification and trust services for electronic transactions in the internal market**<sup>191</sup> providing common rules on mutual recognition and acceptance of electronic identification means, which are already used in many Member States to access mostly public online services but not yet generally utilised to access online gambling services. The proposal should support further Commission initiatives to foster administrative cooperation between gambling regulators as well as consumer protection in the context of the above-mentioned Recommendation. Furthermore, the mutual recognition and acceptance of eIDs enables age verification without the need to disclose personal data. However, the proposed Regulation does not in itself oblige Member States to introduce electronic identification schemes.

In Denmark, for example electronic identification with a code card is obligatory, together with a secure digital signature which the players provide, when they register with a gambling provider.<sup>192</sup>

'Scoping the Single Digital Identity Community (SSEDIC) is a thematic network for European eID<sup>193</sup>. Its objective is to provide a platform for all stakeholders of electronic identity to collaborate together to develop an agenda for a SSEDIC. A number of sectoral stakeholder groups were set up, including a business-focused group, to assess the political, economic, social, technical, legal and environmental aspects of a single European digital community. In this respect, the ongoing work by SSEDIC may be of interest to online gambling operators.

### 7.2.3. Consumer Survey of Gambling Services

Information on national consumer conditions, consumer markets and consumer behaviour assists the devise of policies that fit the purpose. The Commission attaches utmost importance to providing adequate policy responses at EU level. Since 2008 the Commission has been gathering evidence by monitoring markets and national consumer conditions and studying consumer behaviour. The Commission's annual **Consumer Scoreboard**<sup>194</sup> includes the market for gambling and lottery services (online and offline combined) amongst the 50 consumer markets that it monitors garnering feedback from consumers in the Internal Market. However, the Commission services feels that better information regarding the market performance of the online segment and the behaviour of consumers regarding online gambling is needed. This should assist the Commission in its approach towards ensuring the

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<sup>188</sup> Digital Agenda for Europe COM(2010)245

<sup>189</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single market Act, Twelve Levers to boost growth and strengthen confidence, "Working together to create new growth" COM(2011) 206 final

<sup>190</sup> Public consultation: [http://ec.europa.eu/information\\_society/newsroom/cf/itemdetail.cfm?item\\_id=6732](http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=6732)

<sup>191</sup> COM(2012) 238/2

<sup>192</sup> <http://cms.skate.dk/SKAT.aspx?old=2035321&lang=US>

<sup>193</sup> <http://www.eid-ssedic.eu/>

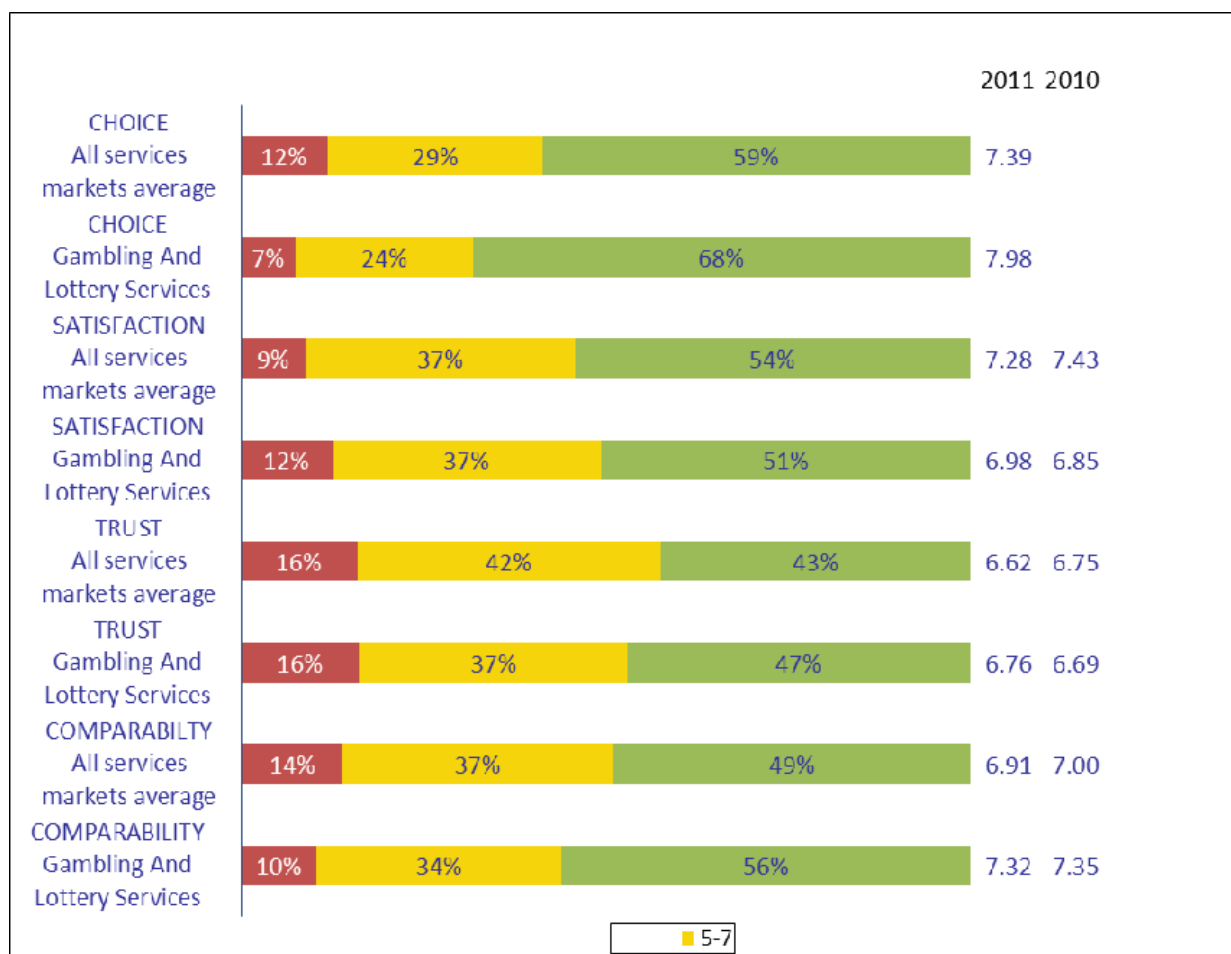
<sup>194</sup> [http://ec.europa.eu/consumers/strategy/cons\\_satisfaction\\_en.htm](http://ec.europa.eu/consumers/strategy/cons_satisfaction_en.htm)

protection of all consumers in the EU. Therefore, the Commission services seek to better identify any malfunctioning of online gambling from the consumers' perspective.

The aim of the Scoreboard is to show those markets which are at risk of malfunctioning and which are not meeting consumer expectations. The market performance is monitored from the perspective of economic and social results for European consumers and ranks and monitors markets from their perspective. The indicators used to rank the markets include comparability of offers, trust in retailers or providers, problems, complaints and overall consumer satisfaction. As a second step in-depth market studies for the sectors that appear to underperforming are carried out to analyse the problems and propose possible solutions.

The Scoreboard edition of October 2011 rates the market for gambling and lottery services as tenth out of the 30 services markets surveyed, performing above the average of all services markets on almost all indicators. Consumers' ranking of 'comparability', a key component capturing consumers' ability to compare offers and therefore to make informed choices was at 7.3 out of a 0-10 scale mirroring 2010, whilst 'trust' is ranked 6.8. This is 0.4 and 0.2 respectively above the average for all service markets, mirroring the ranking achieved in 2010. Further, only 3% of consumers mentioned that they have experienced problems in the market in comparison to the average of 12.5% of all services markets. Moreover, the proportion of experienced problems in this market dropped in comparison to 2010 (4.2% in 2010). In terms of complaints, 78% consumers complained about problems with 55% being complaints to the retailer or provider. As for the overall consumer satisfaction the market is ranked 7 on a scale of 0-10 which is below the average score of 7.3 points of all service markets. Finally, with an average on the competition component of 8.0, the market for gambling and lottery services is among the top markets of all services markets.

## Market performance



Breakdown by indicator					
	0-4	5-7	8-10	Average 2011	average 2010
<i>COMPARABILITY</i>					
Gambling And Lottery Services	10.4%	33.6%	56.0%	7.32	7.35
All services markets average	14.0%	37.0%	49.0%	6.91	7.00
<i>TRUST</i>					
Gambling And Lottery Services	16.2%	36.9%	47.0%	6.76	6.69
All services markets average	15.9%	41.6%	42.5%	6.62	6.75
<i>SATISFACTION</i>					
Gambling And Lottery Services	12.5%	36.8%	50.7%	6.98	6.85
All services markets average	9%	37%	54%	7.28	7.43
<i>CHOICE</i>					
Gambling And Lottery Services	7.4%	24.5%	68.2%	7.98	
All services markets average	12%	29.4%	58.7%	7.39	

Source: 2011 Market Monitoring Survey

The Commission will seek to obtain more thorough feedback on market performance of gambling. Therefore from 2013 the Commission will obtain targeted feedback for the online gambling market separate to the offline market, in light of adequate consumer protection and player support that should be sought.

### 7.3. The protection of minors

An underlying objective of the Commission in launching the Green Paper consultation was to gather information on the measures in place at national level to protect minors from online gambling. The internet is used as a source of information, education and entertainment by children and therefore they may be exposed online gambling content. One way in which regulatory frameworks seek to protect minors is by setting age limits against which an authorised operator is to comply. In this respect, operators are also generally required to carry out age verification checks alongside identification controls. However, diverse methods are used to carry out these checks and the extent of their effectiveness in detecting an under-aged seeking to open an account may differ. Furthermore initiatives regarding education and awareness of minors and parents on internet content and the safe use of the internet are important. Different regulatory or self-regulatory policies are implemented in the Member States. Some Member States require ISPs to provide parental control software as a means to raise awareness and provide support to parents in protecting minors.

As indicated earlier Member States share common objectives in their respective regulatory frameworks. As recognised by the Council in 2008 *'the protection of minors and vulnerable persons is a concern shared by all Member States'*<sup>195</sup>. In fact the Council held, amongst other, that the possibility of a common approach on access of such persons to gambling and betting could be explored. Further, the EP has called on the Commission to explore *'all possible tools or measures at the EU level designed to protect vulnerable consumers'*<sup>196</sup>. Vulnerable groups were highlighted in the Green Paper to gather specific feedback.

The Green Paper contributions show that most Member States set age limits for gambling services and 18 is by and large the minimum age limit set for online gambling services. In fact one reason regulatory systems require age verification to register with an authorised operator is to protect minors (children and young persons) from gambling content. At the same time different identification requirements and methods exist to be able to open a player's account as the contributions to the Green Paper indicate, and they may not all be robust to a similar degree. In addition age verification tools to protect minors from accessing online content such as gambling in the Member States are mainly implemented as a voluntary measure and are widely used for online services such as gambling<sup>197</sup>. Age verification for the purpose of protecting minors must also be viewed from a risk management perspective. A prevailing issue is that there will be instances where a minor manages to circumvent systems and open an online account. Detection by the operator may then be more difficult. Although there is no available data, one way in which minors can manage to do this is through the use of parent's credit cards, so called 'identity theft'. This is by no means the only possibility, as there are other payment systems used (see Section 8.2).

It seems that traditional authentication controls serve to prove the user's identity without necessarily providing accurate information about the age of the registering player. In this

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<sup>195</sup> Presidency Progress Report 2008

<sup>196</sup> 2011/2084(INI)

<sup>197</sup> Background Report on Cross Media Rating and Classification, and Age Verification Solutions, Safer Internet Forum, 25-26 September 2008

respect, the non-activation of accounts until all checks are carried out and carrying out checks also at the time of withdrawal of winnings to verify the age can mitigate this risk. A number of preventive possibilities exist, such as requiring systems to feature messages regarding under age play and clearly displaying information on the measures taken to verify age.

Nonetheless, the Commission services feel that age verification solutions should complement other methods to protect minors in the online environment. The Internet is increasingly used as a source of information, education and entertainment by children not just adults. Conversely, it exposes children as they may be less able to immediately identify potential risks during the time they spend online. Minors may be prone to misuse of the internet and must be protected. For instance parental awareness of associated risks can be increased as well as encouraging software filtering in the home. As the findings in the recent Commission Communication '**European Strategy for a Better Internet for Children**'<sup>198</sup> show, different regulatory or self-regulatory policies are implemented in the Member States, such as for parental controls or for content rating. A Member State can require ISPs to provide parental control software free of charge or they can require that customers are asked if they want such software at the time of purchase. Industry has also drawn up Codes of Conduct.

### **7.3.1. Initiatives to protect minors**

The envisaged **Recommendation on Common Protection of Consumers** is also intended to protect minors from accessing gambling websites and one of its core principles will be a requirement of age verification controls, which are necessary in order to substantiate the identity details which should be provided to register and open an account.

Through the **Safer Internet Programme (2009-2013)**<sup>199</sup> which runs till 2014 as well as the **Connecting Europe Facility**<sup>200</sup> the Commission will vigorously seek to increase the awareness of parents and of children on the safe use of the internet to protect children. The Commission will support benchmarking and testing of parental controls and relevant support services to empower parents and children, as well as research and development (R&D) to look into how age-rating and content classification systems could be made interpretable by parental controls that can deal with a wide range of languages. .

Safety education and awareness raising are key. The Digital Agenda promotes awareness-raising campaigns for the wider public. The Commission encourages Member States to pursue these objectives through e-safety curricula in schools and by analysing the impact on children of using digital technologies through independent research<sup>201</sup>. The Commission also encourages public authorities to take a more prominent role, by equipping children and young people with knowledge and skills to navigate the internet safely. In this respect, operators should provide a link to a recognised filtering programme to assist parents in preventing minors from going on gambling sites. Further, the Commission services believe that a clear

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<sup>198</sup> Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(2012)196 final

<sup>199</sup> Decision No 1351/2008/EC of the European Parliament and Council of 16 December 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies

<sup>200</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the Connecting Europe Facility COM(2011) 665

<sup>201</sup> COM(2010)245



message that minors are not permitted to participate in online gambling activities should also feature prominently on the website of the operator.

Whilst the role of parents in the home is imperative, the Commission has also called on industry to take positive action and in response a Coalition<sup>202</sup> has been set up committing to make the internet a better place for children and to achieve this goal in the EU. One of the concerted efforts of the Coalition is the establishment of age-appropriate privacy settings across services, as well as build on content classification systems. This requires outreach to interested stakeholders. The uptake of parental control tools by industry is also stressed in the Communication 'European Strategy for a Better Internet for Children'. Industry need to ensure that user-friendly parental controls are available and accessible as regards all internet-enabled devices in Europe. Parental control tools must enable the blocking, filtering and monitoring of websites to prevent minors from accessing online gambling websites. The Commission encourages Member States to carry out awareness-raising campaigns and education on risks associated with gambling and with playing excessively seeking abroad outreach and targeting all vulnerable groups. A main role of a regulating authority should be to assure the protection of minors and vulnerable groups, including through responsible advertising requirements.

**Mystery shopping exercises** are carried out to check the possibilities of minors accessing online sites. The contributions to the Green Paper did not give in-depth detail. However these exercises serve to test compliance with age limit requirements and with verification systems. Regulating authorities can commission mystery shopping designed to protect minors and vulnerable groups. This initiative can be carried out as part of a rolling programme of mystery shopping exercises looking at compliance of authorised operators with social responsibility and license requirements. They can also serve to re-test operators found non-compliant through the exercise.

#### **7.4. Responsible Advertising**

A wide array of commercial communications is used by online gambling service providers for marketing purposes. Whilst gambling services are not subject to sector-specific regulation at EU level the advertising and marketing of the offer and promotion of gambling services are covered by the Unfair Commercial Practices Directive. The Commission believes that in a competitive online cross-border environment consumers need to be sufficiently informed on the choices they make and they should feel that enforcement of existing provisions for online services is adequate. Another important consideration however given the broad outreach of advertising in printed or online form is that limitations of advertising are to be regulated to protect minors and other vulnerable groups.

The Green Paper specifically raised the issue of regulation of commercial communications at national level to protect all vulnerable groups. Vulnerability may arise due to a financial situation, previous behavioural including gambling disorders or daily interaction by persons working in or with the gambling industry, as well as the frequent exposure of persons such as athletes and other sport persons. Responses show that there are a few codes of conduct or codes of practice for socially responsible advertising and promotions drawn up by competent

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<sup>202</sup> The Coalition builds on, inter alia, the Safer Social Networking Principles, Framework for the Safer Use of Mobile Phones and the Principles for a Safer Use of Connected Devices

authorities or by industry, and there are variations in these. However, not all Member States have advertising regulations specific to gambling services or dedicated to online gambling services. National legislation can provide for the limits of advertising which can then be detailed further by the competent authorities and to which operators are to comply as part of their license requirements.

International organisations such as the European Advertising Standards Alliance (EASA) or the International Chamber of Commerce (ICC) have drawn up best practice models and standards respectively for self-regulatory advertising with a view to protecting consumers. These concern advertising in general but principles that advertising should be honest are applicable to gambling-related advertising. Another pan-European self-regulatory initiative is the CEN workshop agreement which incorporates guidelines for responsible marketing, including for the protection of minors. IAGR eGambling Guidelines on the other hand are an international initiative. Similar initiatives also exist in some jurisdictions with a view to contributing to integrating of online gambling.

## **Challenges**

All citizens need to be well-aware that gambling can be harmful if not played responsibly, from a financial, social and health perspective. Transparency is key. The inherent risks associated with gambling, such as problem-gambling or addiction, call for clearer guidelines across Member States as regards responsible gambling advertising. Furthermore, this is also called for in light of unregulated offers of online gambling so as to ensure that consumers are channelled to authorised and regulated sites. There is the risk that overly restrictive advertising requirements will inadvertently be to the detriment of consumer protection leading them to the black market. Nonetheless, the provision of certain key information on any form of advertising should be compulsory, such as the details of the regulating authority and that underage gambling is not allowed. Factually correct information should equally be given as to the winning and losing possibilities for example, the risks of chasing losses and warning messages against excessive gambling.

As regards minors advertising concerns frequently focus on the potential effects on children and young people. Advertising Codes generally outright prohibit the specific or intentional targeting of minors, including in the media, or require a clear '*No underage gambling*' message. However, online commercial communications such as pop-up promotional images on non-gambling sites also need to be addressed. There is the risk that minors are not protected or shielded from exposure to the same degree in all Member States.

A main aim of regulating authorities should be to provide the parameters for advertising and promotion messages or images that authorised operators are to comply with. The core principle should be that gambling advertisements are to be socially responsible. These can comprise provisions to the effect that advertising shall not imply that gambling allows for social acceptance, that it shall not play on the susceptibilities of the vulnerable, in particular minors or young adults and that it shall not be portrayed as means to solve financial or other problems. Under-age and vulnerable groups must be specifically protected and in no manner enticed to gamble, whilst images used should not portray persons which look below the age limit or within the minimum age limit threshold. Further, operators should not engage directly

or indirectly in unsolicited mail, including to persons who have self-excluded themselves from a site.

#### **7.4.1. A Recommendation on Responsible Gambling Advertising**

The Commission aims to improve socially responsible advertising, seeking to guarantee an equal level of protection of European consumers, minors and other vulnerable groups. The Commission will adopt, a **Recommendation on Responsible Gambling Advertising**. The aim is to draw up common rules of conduct at European level according to the specifics of the sector.. The aim is to capitalise on synergies of existing regulatory and self-regulatory approaches encompassing both regulators and industry to devise a set of core principles for responsible advertising. The objective is to provide Member States with the parameters to undertake adequate protection measures, including therefore sanctions for non-compliance or for knowing or repeated breaches which in themselves are an incentive for operators to abide by them. The Commission intends to seek the balanced involvement of all stakeholders. The Recommendation will be drawn up with the expertise of industry and discussed with the authorities in the expert group on gambling that is being established.

The Recommendation should extend to intermediaries providing the ancillary marketing service and operators should ensure that intermediaries contracted to carry out their advertisements do so in respect of the code.

The Recommendation will take the form of a voluntary commitment by Member States and industry. However, self-regulation cannot operate in a vacuum. The effectiveness of the Recommendation will depend on its functioning within a regulatory framework and should therefore be concretely implemented. Regulating authorities should be able to actively assess the Recommendation against the requirements set out for the authorised gambling operators. The Commission will encourage Member States to endeavour to take up its provisions of within their regulatory frameworks. Member States may set out more detailed provisions at national level, in law or in regulatory practices, to cater for respective regulatory systems, given that contexts differ from one Member State to another.

Additionally, self-regulatory approaches require regular review as to whether the provisions are sufficient in meeting the objectives. The Commission will carry out such an assessment in cooperation with Member States to review its operation throughout the EU and to determine the course of action that may be subsequently called for. The findings will be published in the form of a report. Where implementation falls short of the core principles set out, the possibility of introducing more binding norms can be considered.

The Commission encourages the Member States to complement the Recommendation on Responsible Advertising with awareness and education campaigns at national and regional level. This should include informing on the regulating authority so that the logo indicating an operator is authorised is well-recognised from a potential false one.

The Recommendation does not replace national legislation nor applicable EU legislation. It is intended to compliment legislation, beyond what is already provided for. In addition, it will

compliment and support the **Recommendation on Common Protection of Consumers** as well as the **Unfair Commercial Practices Directive**<sup>203</sup>.

Finally, the **Unfair Commercial Practices Directive** has contributed to better protection of consumers against misleading or aggressive marketing. Misleading commercial practices can be misleading actions or omissions and to this effect the Directive refers to information requirements that must be provided to consumers. Aggressive practices include those practices that use undue influence impairing consumer's ability to make a decision. To this end the Commission will undertake a more prominent role in monitoring the Directive in the Member States. The Report on the application of the Unfair Commercial Practices Directive will be published in autumn 2012 and will assess the existing relevant provisions aimed at safeguarding minors and vulnerable groups. The Directive covers the vulnerability of consumers and protects their economic interests; it does not extend to other areas such as safety or health.

### **7.5. Problem-gambling and gambling addiction**

The development of online gambling services gives rise to gambling disorder considerations. The need to protect consumers, including minors and vulnerable groups, from potentially developing a gambling problem is invoked by Member States in restricting or limiting the offer of online gambling or the types of games and bets that may be offered.

One of the aims of the Green Paper has been to look at the potential social consequences of online gambling. The Green Paper sought to gather evidence on the factors linked to the different types of games or bets, the instruments used to keep gambling habits in check and types of games suggested to be more problematic, as well as the scale of the problem in the Member States and available treatment. The responses primarily point to a limited understanding of problem-related gambling behaviour, which is needed so as to comprehend the nature and scale of a problem. Conversely this is also needed in order to determine the action required, both as regards detection and prevention measures as well as the type of treatment. These findings were confirmed by the expert participants in a workshop on detection and prevention of problem gambling and gambling addiction organised by the Commission services.

Member States, the European Parliament and stakeholders call for more action at EU level in this sphere. A main objective of the Recommendation on common minimum protection of consumers is to prevent problem gambling or gambling addiction.

The Green Paper showed that there are marked differences (e.g. scope, criteria, population range) in the studies and surveys on gambling carried out in the EU. The available studies do not allow for comparisons to be drawn between Member States or for instance, the environmental factors that may be linked to the problem. The lack of empirical evidence or comparable national studies do not allow for a much-needed comprehension of the prototype and percentage of the adult population gambling online excessively and the elements categorising the behaviour of a person. Current research or academic writings extend to two ends of the pendulum ranging from gambling overall viewed as inherently dangerous to views

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<sup>203</sup> Directive 2005/26/EC

that the majority of the population and players in that respect are not subject to gambling-related actual harm. This is also because behavioural research in this area is in its infancy.

Extracts from the Green Paper responses<sup>204</sup>:

MS	Year	+/- Scale of problem given
Belgium	2007 Report	20,000 deemed pathological players from an estimated 100,000 players
Denmark	2006 Survey	0.2% of 18-74 deemed addicted to gambling at some stage, 0.13% 'currently' addicted or had been in the last 12 months. A 2007 survey found 1 in 3 of problem gamblers referred to the internet
Finland	2007 Study	3% of the population deemed problem gamblers, 1% deemed gambling addicts
France	2009/10 Phone Survey	0.4% of 18-85 deemed pathological gamblers, 0.8% deemed problem gamblers (at moderate risk)
Germany	2011 Study	0.35% of 14-64 deemed pathological gamblers, the prevalence of problem gambling is 0.31%, 1.41% are 'high risk gambling'
Italy <sup>205</sup>	2010	1.01% of 18-74 deemed problem gamblers, 1.71% of adult gamblers deemed problem gamblers
Norway	2008 Survey	0.7-0.8% of population deemed problem gamblers but not all can be categorised as pathological problem gamblers. Surveys for 2002 and 2007 provide the same %
	2010 Study	Adolescent (13-17) gaming: 1% deemed problem gamblers
Poland		3% of the population deemed problem gamblers
Sweden	2009/10 Study	1.9% deemed at moderate risk, 0.3% deemed problem gamblers
UK	2009/10 Survey	Problem gambling is 0.7% or 0.9% of adult population (2 screening instruments used). Overall prevalence is that 5.5% are deemed at low risk gambling, 1.8% at moderate risk gambling and 92% experience no problems from gambling. Online gambling represented 2% of the gamblers.
Other		
INSERM global study <sup>206</sup>	2008	1-2% of the population deemed problem gamblers (at risk players)
Harvard Medical School affiliate	2007 Study	1% of players considered highly involved bettors

The prevalence level depends extensively on the tool used. A range of identification tests are used in prevalence surveys, with South Oaks Gambling Screen (SOGS) being the most used tool. Other surveys and studies may be carried out differently. Nonetheless, the scale of the problem also depends on the population used as the denominator, which could be the whole population or all of-age gamblers for example.

<sup>204</sup> The data cannot be compared because the range, scope and criteria of terms used differ, and the surveys are a mix of online and offline offers and regulatory situations in the individual Member States. Link to contributions: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

<sup>205</sup> Carried out by Lottomatica in collaboration with La Sapienza university of Rome and Eurisko

<sup>206</sup> <http://english.inserm.fr>: Institut National de la sante' et de la recherche medicale

A common set of criteria is called for, particularly to determine the link with the size of the problem and with regulatory approaches including monitoring systems for early problem detection.

#### **7.5.1. Key challenges**

- **Understanding the definitions and terminology**

The terms generally used are 'problem gambling', 'gambling addiction', 'compulsive gambling', 'excessive gambling' and 'pathological gambling'. There is a tendency to use the terms interchangeably but there are variances between these terms. 'Pathological gambling' for example means a mental disorder, according to the international disease classification systems DSM, IV, ICD 10. A 'problem gambler' for instance may gamble frequently or infrequently and does not need to gamble every day to manifest symptoms of a problem. A 'compulsive gambler' finds it difficult to control the impulse to gamble, whilst problems caused by 'excessive gambling' are not only financial ones. Impulsive behaviour in itself lends to vulnerability of the player. 'Gambling disorder' is a more neutral term to refer to the issue.

A complex pattern of genetic, neuropsychological, individual vulnerability and social factors are relevant to the development of an expression of terms used. A core set of agreed definitions is needed for a better understanding of the problem, the scale of the problem at EU level, the determinants and the type of treatment required.

- **Understanding the determinants**

The Green Paper suggested non-exhaustive factors that may be relevant to the development of a gambling disorder: event/game frequency, payout interval, accessibility/social environment, chasing losses/being close to winning, perceived skills, commercial communications. Frequency, duration of gambling episodes or intensity of gambling engagement are factors often highlighted. However, the responses to the Green Paper confirm the lack of researched evidence on the factors. Whilst a combination of factors can be relevant to defining the problem, none of these types of factors individually cause the development of a gambling disorder or rank higher in terms of potential harm than another. Furthermore, consideration to the development of new markets or the expansion of existing ones is required, for instance the wider accessibility of the internet to young people, women and ethnic groups, as well as to pensioners.

The lack of interdisciplinary collaboration restricts evidence on the situational and structural features contributing to the risk of problem development. There are also genetic features to consider. Past manifestations of behavioural characteristics or disorders can also contribute to the risk, including previous gambling problems in the off-line environment. Accessibility of the online environment and the development of new enabling technologies can be a characteristic. Available research suggests that online gamblers tend to be frequent players who take part in different forms of gambling not only online. Further research is required as to whether internet gambling is the cause of problem gambling or reflective of problem gambling.

In addition, individual characteristics such as genetics, personality factors (impulsivity), early vulnerability factors (stress) and impaired cognitive control must play a role in the development of gambling disorders, compared to gambling characteristics and environmental factors. It is a minority of regular gamblers that develop some type of gambling disorder.

The Commission services feel that a better understanding is needed amongst researchers experienced in online gambling as to the direct or indirect link of these types of factors to the development of a gambling disorder or the transition to pathological gambling. A stronger evidence base for the possible links and relative risks will help identify and sustain adequate protective measures in the EU to deter the development of gambling disorder.

As regards commercial communications, regulatory frameworks should require socially responsible advertising in particular for the protection of consumers and vulnerable groups. Additionally, imagery and test should not give rise to false perceptions about gambling. Whilst advertising should be subject to regulatory oversight, this may be more challenging for online advertising.

- **Understanding the types of games and bets**

In the EU/EEA more than one type of online game or bet can be promoted and offered on authorised gambling sites and a player may participate in more than one type at any time. There is no causal evidence available to allocate levels of risk to different types of games or bets as being more problematic or riskier than another. Some games or bets may appear to be more problematic than others. Slot machines, bingo, casino-type games or skill games are types of games that are sometimes cited as being potentially riskier both in the online and in the offline environment. However, whilst there is no supporting evidence the potential risks need to be seen alongside other situational features and corresponding factors.

Players do use multiple gambling products and they also tend to have preferences for a type of game. The problem or addiction will be to gambling and not to an individual type of game or product.

Regulators not just business need to appreciate the technology and be up-to-date on related information. The Commission services encourage Member States to increasingly promote the use of risk-assessment mechanisms, such as the objectives of AsTERiG<sup>207</sup> or GAM-GaRD<sup>208</sup> to test new products against a number of factors and determine the level of risk. The factors used by such mechanisms to assess the potential risk of products are not unlike those highlighted in the Green Paper.

- **Understanding the preventive instruments**

The regulatory systems in the EU/EEA often require the authorised operator to have in place a number of preventive measures. However, a comparison of the impact of regulatory systems in the EU is needed to understand if these are effective in helping the prevention of problem development and facilitate early detection or if there is a risk that over-regulation or restricted competition leads players away from an authorised offer to an unauthorised one.

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<sup>207</sup> <http://www.forschung-gluecksspiel.de/pdf/AsTERiG.pdf>

<sup>208</sup> <http://www.gamgard.com/>

The Green Paper listed the instruments most often used to protect consumers, including minors and vulnerable groups: age limits, self-limitation (financial and time), self-exclusion, information, warnings, self-tests, banning use of credit, reality checks, diligence obligations, restricting certain types of games or bets. The responses clearly indicate that none of these measures can meet the objective individually, they are effective where all or most are required to protect players. As the summary to the responses shows, to varying degrees, these types of measures are in place in a number of Member States, mainly through legislation or license requirements and supplemented by industry self-regulatory measures. Additional detective and preventive measures such as customer support or remitting player funds into the same deposit account are referred to earlier. Employees responsible for player monitoring are warranted so as to be able to detect behavioural changes in player activity and have the powers to act accordingly, such as triggering 'self-exclusion' if necessary. This should be part of the 'Know Your Employee' criteria.

Players should be able to follow their own activities online. There are arguments that the online environment entails the risk of 'loss of social control'. On the other hand, the online environment offers technical possibilities for player self-control, alerts during game play and for close monitoring of individual player activity by the operator, which should enable early detection of behaviour symbiotic to the development of a problem. The supervisory role of the regulator is key. The regulator should have sufficient competence to be able to carry out adequate monitoring of the authorised operators and follow-up on customer complaints. Further research as to the effectiveness of these measures for the early detection of potential problem development is called for. This is also so as to better understand the potential shift from a 'social' gambler to a problem gambler. In this respect, data on the use of responsible gambling tools by the players would help such research.

### ***Self-exclusion and cooling-off possibilities***

Warning signs of addiction possibilities should be provided at all times on the operator's site, alongside helplines and signposting to dedicated support sites. The possibility of immediate and confidential support to callers is of great importance. The responses to the Green Paper suggest player self-exclusion possibilities amongst the preventive measures. Generally, regulatory systems require that a player must be able to self-exclude or authorised operators provide for this as part of their responsible gambling tools. The self-exclusion period can be up to twelve months or more. However, there should be a minimum period for self-exclusion.

Some regulatory systems also provide for cooling off periods as part of reality check possibilities. Cooling-off enables player to voluntarily lock their account for a shorter period, in order to prevent themselves from online gambling participation. Cooling-off can be for 24-hour period or longer.

In both instances however, the player request to reactivate an account should be done by email or phone to the authorised operator, in no manner giving the player the possibility to reactive the account simply by accessing the registered player account. During the self-inactivation period, efforts should be undertaken to prevent marketing to such consumers, including emails. Furthermore, a player should also be able to choose further increments. The procedures concerning self-exclusion and cooling-off similarly to warning signs, should be



readily accessible through the website. Finally, guidance to dedicated assistance should be immediately provided by the operator in processing exclusion requests. Where exclusion requests are by third parties, such as family members, the identification provided should be verified.

In some Member States a registry of self-excluded persons is maintained. However, having such a registry in place at European level raises issues of enforcement and of data protection of individuals.

- **Treatment**

In the EU access and availability of general or dedicated treatment, including counselling differs. In some Member States services are provided free of charge. Given the different types of centers and treatment possible, as well as respective national policy (e.g. in Scandinavian countries the system would view this from a social rather than a health perspective) it does not seem opportune to promote a network linking national research centers. Furthermore, gambling disorder treatment is not necessarily of long duration as for other behavioural disorders and often the treatment required is brief intervention or non-medical, for instance debt-related or money-management counselling. However, the nature of the treatment, and whether this should be inpatient or out patient, should be dependent on the type of gambling disorder problem of the individual.

There are also social repercussions concerning the immediate family and employment for example resulting from the development of the problem or addiction.

### ***Funding***

The responses to the Green Paper on funding of problem gambling from gambling revenues provide that some Member States re-distribute parts of this revenue to treatment and research centers or to education campaigns. Voluntary contributions by operators are also made directly or indirectly. The optimal scenario is that treatment is independent from industry and that funding is channelled through governments or a central/regional fund but not directly. Furthermore, there seems to be scope for funding being directed into gambling-related research and education.

#### **7.5.2. EU Initiatives**

The Commission believes that evidence is the first required step to determine the prevalence and the scale of the problem. Identification of the risk and vulnerability factors for gambling disorders and improved knowledge about the trajectories of the players are key objectives for setting out preventive actions as well as for defining the relevant treatment. The objective of having adequate measures should be to prevent adverse social, economic and health consequences that may result from gambling.

A **trans-disciplinary EU co-funded project 'ALICE RAP'** is underway with the objective of re-framing the understanding of addiction and re-designing addiction policy based on

objective scientific evidence<sup>209</sup>. Online gambling is one of addictions that is being researched, to help policy making and political decisions to be taken through informed debates. Whilst the overall project runs for 5 years given its broad scope, it is divided into areas and work packages which will carry out interim reports. Gambling will be researched, with other addictions, under the following working group areas:

- *Counting addictions*: definition and classification of addictions, compiling data and impacts on health and society
- *Determinants of addiction*: arriving at a better understanding of the initiation of the problem, the transition to problem use, the transition to dependence and emerging from the problem
- *Business of addiction*: studies of revenues, profits and participants in legal and illegal trade the impact of suppliers and the webs of influence on policy responses
- *Governance of addictions*: research the ways in which societies steer themselves to deal with different lifestyles, present governance practices on established and emerging addictions and future scenarios.

The findings of the research work, together with the review of the Recommendation and the Code of Conduct, will assist the Commission to determine further action in this field. The project is also envisaged to provide a consolidated figure for the percentage of problem gambling in the EU.

Initiatives under **Horizon 2020** will seek to deepen the scientific understanding of consumer behaviour and health, safety and sustainability dimension of choices they face. Through a challenge-based approach it aims to bring together resources and knowledge across different fields, technologies and disciplines. It covers activities from research to market. Funding will include focus on health, demographic change and wellbeing. The Commission publishes calls for proposals.

Education and awareness should be part and parcel of preventive measures by Member States. This public information can be made available through self-tests, advertisements and brochures and also by dedicated government authorities or agencies

The Commission services also see the relevance of bringing the **public health dimension** into the debate as it broadens the focus on individual behaviour and it would also better-encompass societal issues and costs. Therefore, the Commission will capitalise on the meetings with experts from Member States working with the relevant Commission services, such as the expert group on mental health. These can serve to draw up common actions or good practice guidelines of national authorities, including health promotion agencies, and research networking across the Member States. This is also in consideration of the role of health authorities in developing relevant policies in the Member States.

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<sup>209</sup> Co-financed by the Seventh Framework Programme for research and technological development, under the theme 'socio-economic sciences and humanities' and coordinated by a team in the Fundació Clínic per la Recerca Biomèdica (Hospital Clínic de Barcelona)

Minors and adolescents are a specific vulnerable group in looking at risk of addictive behaviour of persons. A **Study on Internet Addictive Behaviour of Minors** is being carried out through EU NET ADB project which is evaluating the prevalence and determinants of addictive behaviour. The project is looking at specific issues on the magnitude of internet addictive behaviour, the factors that lead to development of addictive behaviours, the consequences and the psycho social correlates. Increasing awareness amongst relevant stakeholders and the public at large, and improving the knowledge base towards bettering public health strategies related to internet addictive behaviour amongst the young in Europe is an intrinsic objective of the project. The project outcome should feed into policy making and awareness raising as well as provide impetus for further actions and studies, in particular through the harmonized databank that will be developed. Finally, the policy recommendations stemming from this project, which are for October 2012, will be both for the Commission and Member States.

Further, Commission services will draw from the surveys that are carried out by Eurostat on behaviour of children more generally, every 3-5 years with a view to conducting more-tailored surveys.

## **8. FIGHT AGAINST FRAUD AND MONEY LAUNDERING**

The prevention of fraud and money-laundering are amongst the main objectives of Member States regarding public order. In principle, all existing national gambling regulations seek to prevent and tackle gambling fraud in order to protect consumers as well as gambling operators. Different types of fraudulent behaviour may occur in the online gambling environment but among them identity theft seems to be the most frequently committed crime. Identity theft may be defined as the misuse of personal data in order to impersonate another individual with the intent to commit an illegal activity (e.g. abusing the victim's banking or other facilities, unduly gaining employment or receive medical treatment). In the context of online gambling, identity theft aims at opening a player's account falsely and is very often linked with unauthorised use of credit cards in order to obtain a credit and other benefits in another person's name.

Another common fraudulent behaviour identified by stakeholders is the so called chargeback fraud. This occurs when an individual claims that a transaction is fraudulent and the credit card issuer then debits the money from the merchant's account. This facility is designed to protect consumers from fraudulent use of their credit card, but can also be used to try to get back any losses they may have occurred while gambling. It is suggested that a significant number of these claims are fraudulent. When it comes to cyber-attacks against gambling operators' infrastructure, their frequency and risk is not considered higher than in any other industry sector.

As for money laundering, there is currently very limited information or evidence suggesting that licensed online gambling operators in Europe are subject to money laundering activities. The prevailing problem is linked to unregulated operators who are offering their services at a distance from outside of the EU with either no or a very low degree of regulation and supervision.

The fact that regulated gambling operators are subject to strict antifraud and anti-money laundering provisions, which stem either from licensing conditions including certification of gambling equipment or internal risk assessment procedures, does not, however, mean that no problematic issues arise, in light of the cross border context. It seems that structured cooperation between national gambling authorities, national police and international enforcement authorities needs to be enhanced given the complexity of fraudulent transactions operators and regulators have to face. In a number of jurisdictions either no online gambling regulations exist or there are weak regulations and the lack of cooperation at the international level, including with authorities such as Interpol, gives rise to problems in the cross-border application and enforcement of existing tools, such as customer verification checks, transactions and audit trail integrity.

### **8.1. Commission initiative on identity theft**

The Commission has been addressing identity theft for several years, both with legislative measures and with other initiatives. In 1995 a Directive on the protection of individuals with

regard to the processing of personal data was adopted<sup>210</sup>. The Directive laid down rules for the legitimacy and the confidentiality and security of data processing. The EU Action Plans 2001-2003 and 2004-2007 on fraud on non-cash means of payment developed public/private cooperation between the financial sector, law enforcement agencies, other Ministries, retailers and consumer groups<sup>211</sup>.

The need to more effectively combat identity theft on a transnational level has been recognized in the EU policy framework on several occasions, such as for example in the 2009 Stockholm Programme<sup>212</sup> and in the 2010 Council Conclusions on Preventing and Combating Identity-Related Crimes and on Identity Management.<sup>213</sup> The Commission also carried out a study on the status quo of the legal framework governing identity theft in the Member States, which resulted in a 2011 report on the "Comparative Study on Legislative and Non-Legislative Measures to Combat Identity Theft and Identity-Related Crime". As a follow up to this report, the Commission has launched an external study for an impact assessment to explore what is needed to tackle the issue of identity theft effectively. Subject to the results of the study and the Commission impact assessment, such provisions may include a common definition of identity theft, the establishment of identity theft as a criminal offence, measures to protect the victims of identity theft, and an obligation to establish national reporting mechanisms that would also allow a follow-up of complaints.

In this context, the possibility of mandating the European Cybercrime Centre<sup>214</sup> to cover other forms of cybercrime than those related to identity theft such as hacking into on-line gambling systems, will be explored. The European Cybercrime Centre, which will be established within Europol in the beginning of 2013, will strengthen the EU's capacity to tackle cybercrime and could contribute to addressing other forms of cybercrime. It should, amongst other, help the fight against online identity theft by tackling organized crime groups involved in online fraud through stolen credit cards and banking credentials. The Centre should act as the focal point in the fight against cybercrime in the EU, having four core functions

- it should serve as the European cybercrime information focal point,
- it should pool European cybercrime expertise to support Member States,
- it should provide support to Member States' cybercrime investigations,
- it should become the collective voice of European cybercrime investigators across law enforcement and the judiciary.

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<sup>210</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

<sup>211</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, the European Central Bank and Europol of 20 October 2004 - A new EU Action Plan 2004-2007 to prevent fraud on non-cash means of payment [COM(2004) 679 final – Official Journal C 49 of 28.6.2006].

<sup>212</sup> The Stockholm Programme: An open and secure Europe serving the citizen, is a five-year plan with guidelines for justice and home affairs of the member states of the European Union for the years 2010 through 2014.

<sup>213</sup> Council conclusions on preventing and combating identity related crimes and on identity management, including the establishment and development of permanent structured cooperation between the Member States of the European Union, adopted on 2 and 3 December 2010

<sup>214</sup> Communication from the Commission to the Council and the European Parliament of 28 March 2012 Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre COM(2012) 140 final, Council Conclusions of 4 June 2012 on the establishment of a European Cybercrime Centre

## 8.2. The EU Anti-Money Laundering Directive

The Green Paper consultation has confirmed that the following practices are being used for money laundering purposes:

- Online gambling firms credit winnings or unused funds back to an account other than the one from which the original bet was made,
- Players are allowed to register multiple accounts with the same operator,
- Peer-to-peer games such as e-poker, where value transfers can occur between both electronic and human players as a result of deliberate losses, at a relatively low cost to the players. Players will make large bets on very bad hands (expecting to lose to the accomplice),
- Use of e-cash as a payment option or similar means of payments such as Stored Value Cards (those of concern are characterised by high limits, no post-purchase monitoring and poor KYC controls).

As regard the EU legislative framework, the AMLD<sup>215</sup>) applies to casinos with regard to gambling activities. The term 'casinos' is not defined in the Directive. In addition to the general aspects caught by the Directive as described above in section 4.1, the Green Paper consultation shows that regulated online gambling operators and national regulators have established a range of operational practices to fight against money laundering. These include:

- Customer due diligence tools aimed at verifying the player's identity, the player's place of residence and, the player's valid e-mail address. The due diligence process may include velocity analysis (deposit/trades), geographic risk analysis, player behaviour anomaly, exposing player associations and cybercrime arrest policy. In all cases the player has to opt-in to provide the relevant personal data to allow for his account to be established,.
- Payment controls whereby the player should always receive any pay out from winnings by the same means in which the money was originally received (and to the account from which it was deposited). Operators also carry out controls over the credit card numbers and personal data, relating to players, which they have stored in their systems. Moreover, direct payments between customers are often prohibited. With regard to the use of means of payment (e.g. credit cards, pay safe cards) for online gambling, it is suggested that these could pose different risks in terms of fraud and money laundering. Some may be subject to identity thefts whilst others, due to their anonymity, could be abused for money laundering operations. Operators deal with the different fraud/money laundering risks within the due diligence checks carried out on customers, taking account of the degree of regulation of the different payment systems and anti-money laundering controls already applicable to the financial sector.
- Operational controls whereby operators use age verification lists and lists used by banks to identify terrorists and politically exposed persons (PEPs), i.e. World Check and the European Sports Security Association's (ESSA ) watch list. Operators also keep statistical records of transactional behaviour, which must comply with EU data protection rules, in order to be able to identify suspicious activities. They are required

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<sup>215</sup> Directive 2005/60/EC

to apply stricter due diligence requirements where there are high limits on stakes. Operators must also submit Suspicious Activity Reports (SAR) to the national Financial Intelligence Units (FIU).

There is a broad demand to extend the scope of application of the AMLD to all types of games of chance. This general support for a broader definition of gambling under the AMLD is based on a number of reasons. Namely, to create a level playing field for all gambling operators since the cost of compliance would give entities that are not covered an "unfair" economic advantage, and to remove market access obstacles arising from the application of different national anti-money laundering regulations in the field of gambling.

The Directive is currently under review and the Commission services have been seeking views from stakeholders about how the Directive is applied, and what possible changes could be introduced when the Directive is revised. The process of revision of the AMLD will not be confined to a straight implementation of the new FATF international standards. The Commission is conducting its own review process to assess the need for change to EU rules beyond simply taking on board the new FATF standards. The Commission will reflect on how broad the definition of gambling should be, and how could proportionality be assured (for example, ensuring that bars and social establishments that include one or two slot machines would not fall under the AMLD rules).

### **8.3. Certification of gambling equipment**

Certification of gambling equipment is another instrument used in the gambling sector in order to prevent fraud. Certification of online gambling software is commonly required by Member State's competent authorities within the process of gambling licence application. To that end accredited testing agencies, specialising in the certification of online gambling software and systems are being entrusted.

In this context, there is a strong call by gambling operators for more approximation of technical standards so that re-testing and certification of equipment, with the associated costs, is not required. The Commission services indeed believe that in order to ensure a comparable level of security of online gambling in the EU as well as to reduce the administrative burden relating to different national certification procedures, it would be useful to explore the possibility of introducing an EU standard on gaming equipment certification. The main added value of European standardisation is facilitation of free movement of goods and services. Standards normally increase competition and lower output and sales costs, benefiting economies as a whole. In addition standards may maintain and enhance quality, provide information and ensure interoperability and compatibility, thereby increasing value for consumers. European standards are adopted by CEN, the European Committee for Electrotechnical Standardisation (CENELEC) or the European Telecommunications Standards Institute (ETSI).

## 9. INTEGRITY OF SPORT AND MATCH FIXING

The Commission fully acknowledges the seriousness of the problems related to match fixing that are affecting the ethics and integrity of sport. In the Communication on Developing the European Dimension in Sport<sup>216</sup>, the Commission addressed the issue of sports integrity and proposed a number of initiatives to be taken over the next few years. Furthermore, the Commission adopted in June 2011 a package of measures which cover the fight against corruption at EU level and which includes corruption in sport, match fixing in particular<sup>217</sup>. Within the Green paper consultation on online gambling in the Internal Market<sup>218</sup>, the Commission sought i) to understand the scale of the problem, ii) to map the measures currently in place in order to combat match fixing as well as the efficiency of these measures.

The European Parliament has also given consideration to the issue of match-fixing, in its 2009 Resolution on the integrity of online gambling (the 'Schaldemose Report')<sup>219</sup>, the 2011 Resolution on online gambling in the Internal Market (the 'Creutzmann Report')<sup>220</sup>, and the 2012 Resolution on the European Dimension in Sport (the 'Fisas Report')<sup>221</sup>. The Council first dealt with the fight against match-fixing in the EU Work Plan for Sport and in November 2011 adopted conclusions on combating match-fixing. In these conclusions, Member States, the Commission and relevant stakeholders are invited to forge close cooperation in order to better protect the integrity of sport. The two EU agencies in charge of cross-border judicial and police cooperation, EUROPOL and EUROJUST, are also actively involved in the fight against match-fixing through the establishment of Joint Investigation Teams (JIT) involving several countries.

Besides the EU, on 28 September 2011, the Committee of Ministers of the Council of Europe adopted the Recommendation on the promotion of integrity of sport against manipulation of results, notably match-fixing.<sup>222</sup> On 15 March 2012, the Council of Europe's Conference of Ministers Responsible for Sport meeting in Belgrade invited the Enlarged Partial Agreement on Sport (EPAS) to launch the negotiations, in coordination with the EU, on a possible international legal instrument (Convention) against the manipulation of sports results, notably match fixing. Negotiations on the Convention are expected to be launched in autumn 2012, following the meeting of the Committee of Ministers of the Council of Europe on 13 June 2012.

The International Olympic Committee launched a working group in March 2011, composed of high-level representatives of the sport movement, public authorities, international organisations including the European Commission, and betting operators. The objective of the

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<sup>216</sup> Communication from the Commission to the EP, the Council, the Economic and Social Committee and the Committee of Regions "Developing the European Dimension in Sport, 18/1/2011 COM(2011) 12 final

<sup>217</sup> Package of anti-corruption measures adopted by the Commission on 6 June 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/678>

<sup>218</sup> Commission's Green paper on online gambling in the Internal Market COM (2011) 128 final

<sup>219</sup> 2008/2215(INI)

<sup>220</sup> 2011/2084(INI)

<sup>221</sup> Motion for a European Parliament resolution on the European dimension in sport (2011/2087(INI))

<sup>222</sup> Recommendation CM/Rec(2011)10 of the Committee of Ministers to member states on promotion of the integrity of sport against manipulation of results, notably match-fixing (Adopted by the Committee of Ministers on 28 September 2011)



working group is to propose ways to fight against irregular and illegal sports betting. A roadmap for follow-up action was adopted by the working group on 2 February 2012<sup>223</sup>.

There are currently various interpretations of the concept of match-fixing, also described as sporting fraud or sport-fixing. The Commission services believe that an agreed definition would facilitate a common understanding of the problem and would ensure that an appropriate legal arsenal is in place to fight against this phenomenon. The definition provided in the Council of Europe Recommendation on the promotion of integrity of sport against manipulation of results, notably match fixing, provides a good working basis for this purpose:

*"The manipulation of sports results covers the arrangement on an irregular alteration of the course or the result of a sporting competition or any of its particular events (e.g. matches, races...) in order to obtain financial advantage, for oneself or for other, and remove all or part of the uncertainty normally associated with the results of a competition".*

Despite the lack of a common definition, there is a broad agreement amongst all stakeholders that match fixing poses a direct threat to the integrity of sport competitions. Past experience shows that match fixing can occur both with and without the involvement of betting operators. This means that not all match fixing scandals are necessarily betting-related<sup>224</sup>. When it comes to betting-related match fixing, Member States, sport organisations and regulated gambling operators seek to fight this specific type of gambling fraud in order to, in particular:

1. protect financial interests of both players (consumers) and regulated operators,
2. prevent money laundering through betting on events with fixed outcome,
3. protect fairness in sport which is crucial for sport organisations as well as for individual sportspeople.

Match fixing occurs in both the offline and the online gambling markets, and both regulations and self-regulations seek to address this threat in similar ways, at the same time taking account of technical specificities of the particular platform used. In this context, it is suggested that in regulated markets, due to customer identity verification procedures and profiling of customer's behaviour, online bets are less anonymous than offline bets and, therefore, match fixing threats are more detectable in the online segment. When it comes to sport disciplines exposed to match fixing, whilst it is easier to influence the outcome of events of individual sports, football seems the most threatened discipline because of its popularity and the liquidity volume involved.

As regards the scale of the problem, the Commission services note a lack of reliable data since in the majority of cases online betting related match fixing seem to occur, through gambling operators established in unregulated markets outside the EU. Statistics confirm that regulated operators detected very few match scandals over the past few years<sup>225</sup>. It certainly has to do

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<sup>223</sup> IOC recommendation against match fixing of 2 February 2012

<sup>224</sup> Research by the Centre for the International business of Sport at the University of Coventry shows that 57.89% of proven match fixing cases between 200-2010, which were subject to analysis, were betting related and 42.11% of them non-betting related.

<sup>225</sup> According to its Integrity Report 2010, the European Sports Security Association (ESSA) identified 58 incidences across its members in 2010 that were deemed to be irregular. Only 4 of these 58 alerts were suspicious and their case files were sent to the relevant sports governing bodies. In 2011, there were 69 alerts leading to 8 referrals of suspicious betting patterns to the relevant sports governing and gambling regulatory

with the fact that in regulated gambling markets monitoring mechanisms designed to detect suspicious betting patterns have been developed by regulators, gambling operators or sport federations and, therefore, fraud attempts are likely to be efficiently tackled. On the contrary, cases originating outside regulated markets cannot be systematically monitored and, therefore, there is a real lack of information concerning the scale of match fixing at global level. By way of example, Interpol has conducted four soccer gambling operations (SOGA) over the past years targeting illegal football gambling across South-East Asia. These operations led to more than 7,000 arrests, closure of illegal gambling dens<sup>226</sup> and seizure of close to \$27 million in cash.

### **9.1. Existing anti-match fixing measures**

As far as the current measures to combat match fixing are concerned, a number of various regulatory (gambling licensing conditions, statutes of sport federations) and self-regulatory mechanisms (codes of conduct), exist, introduced either individually or jointly by Member States, sport federations, associations of athletes and gambling operators. Educational campaigns for athletes, coaches and referees are in place but it is often questioned whether these adequately reach out to the targeted audience<sup>227</sup>. Other preventive measures used are conflict of interest rules such as betting bans for sports people and their family relatives, betting bans for employees of operators, exclusion of certain events from betting such as youth competitions, limitation or prohibition of certain types of bets, authorisation of bets by sport bodies, bet monitoring systems, alert tools (whistle blowing, hotlines), mutual reporting obligations applied between operators, sport bodies and gambling regulators (e.g. through memoranda of understanding).

In the context of anti-match fixing measures, it is argued by some that certain types of bets increase the risk of an event being fixed and should be, therefore, prohibited. There are also calls for a system whereby sport federations remain in control of the way bets are offered on competitions organised by them. The Commission services believe that as regards limitation and regulation on types of bets and/or types of events on which bets can be placed, further debate is necessary. Whilst at this stage it may be difficult to determine by law for all sports which types of bets are or are not allowed, the risk to the integrity of sport should be a factor in determining which bets may be offered. Gambling regulators could play a role in this context, certainly facing the challenge to strike the right balance between commercial interests of gambling operators and interests of sport bodies so that customers are not directed to unregulated markets with more attractive gambling offers. Therefore, increased structured dialogue between gambling regulators, sport bodies and gambling operators is certainly necessary. Cross border dialogue and exchange of best practice between national gambling regulators is equally important in this respect given the differing regulatory approaches in Member States. In this context, the Commission will, by using part of the funds available

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authorities. The European Lottery Monitoring System (ELMS), founded in 1999, investigated 5000 matches between January and April 2011 and raised 93 alerts. According to research by the Centre for the International business of Sport at the University of Coventry cases out of 2089 proven cases of corruption over the period 200-2010, which were subject to analysis, only 57 concerned match fixing (both betting and not betting related).

<sup>226</sup> These dens handled more than \$2 billion worth of bets.

<sup>227</sup> According to research conducted by Sport Athletes, in the UK 40% of football players and 60% of rugby players are not aware of rules/limitations on self-betting enshrined in statutes or contracts with sport federations.

under the 2012 Preparatory Action for European Partnerships in Sport, launch test projects aimed at promoting international cooperation in the fight against match fixing notably in the area of prevention through education and awareness-raising mechanisms<sup>228</sup>.

Various regulatory and self-regulatory mechanisms also exist in relation to sponsorship and to ownership of sport events/clubs by gambling operators, bearing a different degree of restriction across Member States and sport disciplines. In general, the responses to the Green Paper consultation indicate that sponsorship by betting companies of sport clubs or sporting competitions does not create a higher risk of fixed outcome of an event, especially in well regulated gambling markets. Operators seek sponsorship of sport events and clubs within regulated markets because this gives credibility and fair play labels and in this way distinguish them from the unregulated operators.

As for bet monitoring systems, a number of them are currently used by stakeholders such as sports governing bodies, betting operators and gambling regulators. A number of memoranda of understanding on sharing of intelligence and data have been signed between some regulated operators and large sport federations as well as between regulated operators and gambling regulators. It is, nonetheless, evident that effectiveness of these systems is limited to bets placed through operators providing services in regulated markets. Data protection issues are often mentioned as a barrier for sharing information, in particular with regard to match fixing alerts involving player's sensitive data. Furthermore, it seems that the various bet monitoring systems currently in place should be better coordinated and complement each other, in order to increase the overall efficiency of detection of match fixing threats. To that end, a higher level of cooperation seems necessary both at national and international level.

With regard to financing of sports integrity mechanisms/measures including bet monitoring systems, there are clearly different approaches across Member States. For example, the Italian gambling regulator runs its own real time monitoring system, financed from gambling licensing fees, France by law requires the operators to directly contribute to sport federations in charge of the event on which bets are placed, whilst in the UK sports integrity measures are financed by the sport sector itself. Also gambling operators (both lotteries and commercial) have established their own detection systems in order to protect themselves from the negative effects of match fixing. None of the financing models currently applied has been found to be more or less efficient than the others. Nonetheless and as stated by the Commission in its Communication entitled "Developing the European Dimension in Sport"<sup>229</sup>, sport stakeholders perceive challenges with regard to continued income streams from gambling activities into sport. Regulatory approaches vary among Member States in areas relating to intellectual property rights and gambling activities, in particular regarding the extent of property rights for the organisers of sport competitions in relation to the events they organise, as well as the issue of image rights in sport.

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<sup>228</sup> In March 2012 the Commission adopted the 2012 Annual Work Programme on "grants and contracts for the Preparatory Action - European Partnership on Sports and for the Pilot Project - Knowledge Partnerships". On this basis, the Commission launched a call for proposals to support transnational projects presented by public bodies or civil society organisations in the field of sport. See [http://ec.europa.eu/sport/news/20120417-2012-call-for-proposals\\_en.htm](http://ec.europa.eu/sport/news/20120417-2012-call-for-proposals_en.htm)

<sup>229</sup> Section 3.2, COM(2011) 12 final

The Court of Justice has in a recent judgment<sup>230</sup> held that *"sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright. Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property. Nonetheless, the Court also stated that "sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders."* In order to further explore the nature and scope of property rights owned by organisers of sporting competitions, the Commission has launched an external study<sup>231</sup>. The aim of the study is to provide a comprehensive analysis of the issues related to sports organisers' rights from an EU perspective and to formulate suggestions as to whether EU action is needed to address any identified problem in this respect.

## **9.2. Criminalisation of match fixing**

As a follow up to the Communication on Developing the European Dimension in Sport, the Commission carried out a study on how sporting fraud offences, and notably match fixing, are being covered by the national laws of the Member States. The aim of the study was to enable the Commission to assess whether EU action in this field is necessary. The study results suggest that difficulties in prosecuting match fixing are frequently more of an operational than legal nature (difficulties in gathering evidence, prioritisation of cases and cooperation amongst law enforcement authorities). The study also showed that the specific incrimination of sport offences did not necessarily lead to a better track record in courts or to fewer suspicious cases. In particular due to the lack of broader EU acquis in the area of sport offences, combating match fixing at EU level by establishing a common definition of sport fraud is not a feasible policy option at this stage. The Study also served as a basis for a debate in the Commission and Member States' Expert Group 'Good Governance', which concluded that despite the existence of differences in the Member States' legal frameworks applicable to match-fixing, harmonisation through an EU-defined crime of sporting fraud does not seem necessary. Having said this, Member States have been invited to consider the adoption of a possible international legal instrument against match-fixing aimed at ensuring that national legal and administrative systems are provided with the necessary legal tools, expertise and resources to combat this phenomenon.

When it comes to harmonisation of sanctions imposed as a result of match fixing, it should be stressed that without a harmonisation instrument in place, criminal and administrative sanctions cannot be laid down at EU level. The only EU instrument in place in this field is Framework Decision 2003/568/JHA<sup>232</sup> on private corruption which, however, leaves Member States free to set levels of sanctions and penalties.

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<sup>230</sup> Judgment of 4 October 2011 in joined cases C-403/08 and C-429/08 *Football Association Premier League and Others*, par. 98-100.

<sup>231</sup> Open Call for tender EAC/18/2012, Study on sports organisers' rights in the EU Contracting Authority: European Commission Directorate-General for Education and Culture

<sup>232</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

### **9.3. International cooperation on match fixing**

Law enforcement cooperation of police and judicial authorities across borders is essential in view of the transnational nature of match fixing, in particular when it is betting-related. EU-wide coordination is currently implemented through Europol and Eurojust. Cooperation at international level between Europol and Interpol is also in place whilst no international equivalent of Eurojust exists. The Commission services suggest that the next orientation document to be adopted by the Council with a view to providing guidance on the action of Europol includes a reference to the fight against match-fixing as a type of serious cross-border crime.

Furthermore, the Commission services cooperate with and participate in meetings/working groups of the IOC and the Council of Europe. A series of measures aiming at addressing this phenomenon in a global manner have been recently recommended by these two organisations. Concerning cross-border cooperation at EU level, the Commission services will, through the expert group on gambling, seek Member States views on whether and how to enhance cooperation amongst public authorities, including enforcement bodies, in the fight against betting related match fixing. It seems that the creation of national points of intelligence, where all relevant actors involved in fighting match fixing at national level would meet, exchange information and coordinate actions, would be the first necessary step for efficient cooperation at EU and global level. In this context, the possibility of including the protection of integrity of sport and the fight against match-fixing as topics for political discussion with third countries and the competent international organisations in the field of sport will equally be explored by the Commission services. To that end, identification of countries that raise specific issues in terms of betting related match-fixing of sport events taking place within the EU would be necessary.

## 10. FINANCING SYSTEMS FOR BENEVOLENT AND PUBLIC INTEREST ACTIVITIES

As regards financing of public interest activities from revenue derived from gambling this is of paramount importance for all Member States. This was clearly highlighted in the contributions to the Green Paper. One of the objectives of the Green Paper consultation has been to determine the revenue streams from online gambling services and the mechanisms in place in the EU. The consultation encompassed the relevant public interest objectives that gambling touches upon, including the policy reasons invoked to justify the objectives such as the financing of benevolent or public interest activities, including sport. The Council stressed in its conclusions of December 2010 on the framework for gambling and betting in the EU Member States<sup>233</sup> that *'contributions, in particular from state lotteries or lotteries licensed by the competent state authorities pay an important role for society via for example the funding of good causes, directly or indirectly, where applicable'*.

The Green Paper suggested gambling-derived revenue channelling systems in place in the EU. The contributions confirmed that diverse systems have been set up in the Member States to collect the revenue from all forms of gambling (online and offline) and, in turn, to allocate these to activities of interest to society at large. Within this context, examples of existing systems broadly include the granting of a licence for gambling services often to a pre-determined benefitting entity, revenue from the State gambling operator and commercial operators channelled by the State or through an established mechanism (e.g. Funds), revenue from the State gambling operator channelled directly to a benefitting entity or entities and voluntary channelling by some commercial operators. In a number of the existing systems legislation or the licence may determine the benefitting benevolent or public interest activity and/or the rates (aside from fiscal revenue). A mix of these financing systems also co-exists.

In the EU contributions stemming from gambling are a source of income for a broad range of public interest activities largely identified by the Member State, such as

- culture
- sport
- youth
- tourism
- education
- the arts
- national heritage
- health and welfare
- research, education and treatment of problems related to gambling

Therefore, national systems of financing are also linked to Member States' ambition to safeguard the revenues for the activities these are distributed to. Whilst the manner in which contributions are collected and re-distributed differ, in part this is also a reflection of cultural, historical and national traditions. Reforms of gambling legislation have taken place in a number of Member States, namely to regulate online gambling which also at times seek avenues to channel revenue from this type of gambling. These considerations were confirmed by the stakeholder participants in the workshop on systems of revenue distribution.

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<sup>233</sup> Conclusions on the framework for gambling and betting in the EU member states, 3057th COMPETITIVENESS (Internal Market, Industry, Research and Space) Council meeting, Brussels, 10 December 2010

National lotteries are by and large state-owned or state-controlled in the Member States and the contribution systems have been set up with a view to re-distributing to society the revenue from this traditional offline activity, for instance lottery tickets. The expansion of the online environment for gambling services has given rise to questions on the collection and allocation of revenue from these activities, including whether the existing more traditional systems are directly transposable to the online environment and in relation to the commercial operators. The regulated markets in Europe allow for contributions generated from State-owned or State-controlled lotteries, commercial operators as well as charity and private lotteries, to the benefit of society at large.

However, the CJEU has expanded on the question of public interest activities benefitting from gambling, that this should not be the real justification for national restrictions to the free movement of services<sup>234</sup>. The Court has stated that the financing of social activities through proceeds from authorised gambling services is only to be an ancillary or incidental result to restrictions in light of reasons of public interest. This is without prejudice to the legitimacy, as ruled by the Court, of certain monopolies and of State aid rules.

#### **10.1. Societal activities benefitting from revenue derived from gambling**

At the same time, a number of benefitting societal activities do rely on these contributions, some organisations more extensively than others and there may be scope for national systems to explore alternate systems with a view to reducing over reliance on a single or main stream. In light of this, the Commission considers that funds lying in unclaimed prizes from gambling and in dormant player accounts merit further consideration in the Member States. Furthermore, there is merit for national systems to seek fair distribution systems so that these do not inadvertently benefit some benevolent or public interest activities over or more than others.

There is also scope for consideration towards ensuring that revenue from gambling to certain organisations, for example people with disabilities, does not portray this social group as being dependent on charity. This was an intended aim of the UN Convention on the Rights of Persons with disabilities which inter alia defines equal rights of persons with disabilities.

The challenge is to reconcile the revenue generated by Member States from gambling services and the systems to allocate funding to support public interest activities with relevant EU rules and with recipient activities.

Examples of revenue derived from gambling from the contributions to the Green Paper

MS	Distribution	€ +/-	Year
Finland	State budget earmarks % of revenue from gambling: sports, youth work, sciences, arts, health, social causes		
Greece	20% of total gambling revenues are redistributed: treating gambling addiction, fight against unemployment, disabled persons		
Italy	Online and offline tax revenues are directed to the	10 billion	2010

<sup>234</sup> E.g. Stoß and others. See also Section 04 of this document.

The Netherlands	State budget and re-distribution is usually determined through budget laws		
	By law 50% of stakes of private charity lotteries is for charitable organisations: development aid, human rights, nature and environment, health and well-being, culture and heritage. Other lotteries are also operated	375 million	2010
Norway	Earmarked % of revenue from gambling distributed by government or by the Gaming Authority: sports, culture, humanitarian or social NGOs	61% of the GGR re-distributed	2009
Spain: ONCE	Spanish National Organisation of the Blind operating gambling in order to fund specialised social services it provides to blind and severely partially sighted people and towards social inclusion of all persons with disabilities in Spain	800 million	p.a.

The diverse financing systems generate revenue which is of significance to the Member States which adopt mechanisms they feel are most suited to channel the revenue from gambling to benevolent and public interest activities. A number of good practices exist, in particular where the proportions and the beneficiaries are pre-determined. Existing data does not indicate the growth in Europe of only one type or types of gambling service or to reduced revenue and, by analogy, of reduced contributions to benevolent and public interest activities related to such considerations. Gambling revenue data is provided in Section 3.

Nonetheless, there is scope for financing systems to be as **transparent** as possible in terms of both operators and the beneficial public interest activities, inter alia the distribution as well as use of the contributions by recipients. However, any transparency measures should be aligned with responsible gambling advertising so as to avoid any potential misleading portrayal of gambling to the general public<sup>235</sup>.

## 10.2. Sport, including horseracing: a main beneficiary

In a number of Member States sports is a main beneficiary of revenue derived from gambling. A specific distributing Fund mechanism for this type of revenue is set up only in a few Member States. From the many and varied sport disciplines, including at grassroots level, football is a main beneficiary through direct or indirect allocation.

A Study contracted by the Commission looked into the financing systems across the EU. The analysis concluded that in 2008 €2.1 billion was directed to sport through the State from gambling and €0.2 billion reached sport directly from compulsory levies<sup>236</sup>. Of this, €1.1 billion is directed to the grassroots level, representing 2.2% of the total budget of grassroots sport, 90% of which is channelled through government accounts. Some sports tend to have a more mixed revenue stream than other sports, with the effect, in particular at the grassroots level, some sport may be more reliant on these proceeds to promote their sport, attract young athletes, offer suitable facilities and organise competitive events. The Study, whilst not finding significant regulatory barriers of the structures in place did not identify a single best practice funding model for sport, including grassroots sport.

<sup>235</sup> E.g Zeturf. See also Section 7 of this document

<sup>236</sup> [http://ec.europa.eu/internal\\_market/top\\_layer/docs/Executive-summary\\_en.pdf](http://ec.europa.eu/internal_market/top_layer/docs/Executive-summary_en.pdf)



MS	System	€ +/-	Year
Denmark	70.18% of profit through a fixed model		2010
Finland	25% of gambling revenue from the Lottery monopoly	143 million	2010
France	1.8% levy on lottery monopoly revenue	228 million	2011
	1.8% tax on turnover of bets on sports	million	2012
	Both directly to the ' <i>Centre National pour le Developpement du Sport</i> ' to distribute across sport federations.	18 million	est
Italy	State allocates funds to National Olympic Committee to distribute across sport federations	470 million	2009 /2010
The Netherlands	14.1% from lottery revenues	61.5 million	2009
Slovenia	80% of the concession fee (fee is 25% of GGR)		

### *Horse and greyhound racing*

Across jurisdictions where this takes place, horse race betting systems are generally set up around specific structures of financing on which the industry largely relies. Similar in this respect to the situation for national lotteries this financing structure stems from national traditions, in this case of the equestrian sport, horse breeding and husbandry. The established mechanism in the Member States tends to be unique to this sport. In the EU, more than €30 billion is bet on horseracing every year. Pari-mutuel betting alone totalled €13 billion in the EU in 2010, with €1.2 billion of this reinvested in the horse industry and racing. In the Nordic countries (Sweden, Finland, Norway), an average of 12-13% of the total turnover is redirected into trotting and thoroughbred racing, whilst in France the rate is 8%.

In Ireland and the UK, greyhound racing also takes place. Ireland has established a fund to redistribute the betting duty, set at 1%, both for horse and for greyhound racing. The UK operates a similar compulsory levy scheme for horse racing.

MS	System	€ +/-	Year
France	PMU (the pari mutual operator) funds 80% of the French horseracing sector, 8% levy return to the horseracing by PMU	727 million	2009
Italy	+/- 14% of revenue online and offline from horse racing bets is allocated to the National Union for the Betterment of Horse Breeds and for 2009 and 2010 an additional contribution of €150 million/year		2009 / 2010
The Netherlands	Revenue from the totalisator is received by the horse racing authority	1.9 million	2009
Poland	By law 2% of total stakes of horse racing bets is allocated to the Horse Racing Club		
Sweden	Swedish Horse Racing Totalisator (ATG) directs around 13% of total turnover to trotting and thoroughbred racing sport (70% returned winnings, 11% is State tax, 6% is ATG recovery of costs)	180 million	2010
UK	Statutory Horserace Betting Levy scheme; the rate is set annually through an established system, and varies	20.35 million <sup>237</sup>	2011

<sup>237</sup> £16.4 million

per type of horseracing bet. E.g. 1 operator paid `£6 million in 2011 (+/- 10% of gross profits of horseracing bets by UK residents). Veterinary science is also funded through the levy scheme.

Following the Communication 'Developing the European Dimension in Sport'<sup>238</sup> the Council in its Resolution on a European Union Work Plan for Sport for 2011-2014<sup>239</sup> set up an Expert Group 'Sustainable Financing of Sport'. The Expert Group, to which 21 Member States have appointed experts, reports to the Council. The Expert Group intends to present recommendations on strengthened solidarity mechanisms by the end of 2012. Commission will assess these recommendations with a view to determining possible future action that may be necessary at EU level. Furthermore the Commission will continue the discussions in this area in light of the economic dimension of sport, in particular sustainable financing of grassroots sport, which is prioritised as a theme for EU level cooperation in sport.

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<sup>238</sup> COM(2011) 12 final

<sup>239</sup> [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/educ/122118.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/122118.pdf)