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Position of the European Casino Association on the draft final report of the Study of Gambling Services in the Internal Market of the European Union

The European Casino Association (ECA) appreciated the initiative taken by the European Commission's DG Internal Market to tender a study on the legal and economic framework for gambling services in the European Union's Member States. A legal analysis of national rules is, for as far as it does not exist already, a helpful tool.

The ECA, however, would like to highlight its concerns regarding a few significant shortcomings of the study. More specifically, the study's objectives were set out in a way which, the ECA believes, leaves many important questions on the internal market in gambling services unanswered.

The ECA therefore is of the opinion that it would be important to complement the study with additional research. In fact, the ECA considers this a prerequisite to addressing gambling services at an EU level. A lack of complete and accurate data would prevent an informed discussion on the subject matter which would clearly be to the detriment of all parties involved: regulators, operators, and consumers alike!

Selective Focus

The European Commission tendered the aforementioned study in July 2004 with the stated objective to "evaluate how the differing laws regulating on-line and off-line gambling services as well as games in the editorial content of the media and certain types of promotional games impact upon the smooth functioning of the Internal Market for these and associated (e.g. media, sports, charity, tourism) services and thus could restrict the economic and employment growth associated with such services."

Social and public order and consumer protection

The draft final report, members of the ECA conclude, reflects the parameters the Commission had set in its objectives: a selective focus on current national legislation and legislations' potential impact on growth. The report scarcely addresses the social and public order dimension of gambling and consumer protection. For instance, the issue of problem gambling is raised in chapter 9, covering a merely 17 pages of the 1498 page report.

Given the wording of the study's objective, the ECA can somehow understand the limited attention the authors were able to give to this important aspect of gambling. As representatives of the Swiss Institute explained during the stakeholder meeting on 8 May,² it

¹ OJ/S 27/7/2004 S144

² Stakeholder meeting, 8 May 2006, Geneva; called upon by the European Commission in the context of the study, organised by the Swiss Institute of Comparative Law

appears the aim was "to identify barriers". Problem gambling, Mr Sychold³ outlined, was only addressed in the context of where and how it can justify market restrictions, or barriers as Mr Sychold referred to them.

In line with contributions of various participants in the stakeholder meeting, the ECA however strongly advocates that any future discussion on the internal market in gambling services must be preceded by accurate and as complete as possible research including adequate research on the particular requirements of this sector concerning social and public order and consumer protection.

National vs EU legislation

The final draft report provides an overview of existing rules and legislation in the 25 Member States concerning gambling services and to some extent takes account of EU jurisprudence affecting Member States' rules and legislation. The ECA would like to emphasise that not only did the report fail to adequately incorporate the full scope of EU jurisprudence; it also failed to address existing EU legislation affecting the gambling sector.

The authors of the report made repeated reference to the European Court of Justice's (ECJ) clarifications on restrictions to gambling services and the proportionality of these in amongst others the Gambelli, the Zenatti, and the Schindler cases. However, regrettably in the draft final report the authors failed to make adequate reference to the ECJ's confirmation of Member States' discretionary choice as clarified in the Läärä case. The ECJ in Läärä clarified Member States' fundamental discretionary choice concerning types of games, volume, number of operators, etc, and as such the ECA is of the opinion that it has to be part of any sound analysis of the gambling market in Europe – a legal and an economic analysis.

Through its focus on national legislation the study turned out to neglect important existing EU legislation addressing the gambling sector. In relation to the study's objective of assessing "the differing laws regulating on-line and off-line gambling services", the ECA would for instance point to the fact that the EU Money Laundering Directive⁴, addresses gambling in casinos and a substantial amount of national legislation restricting the gambling industry is based on this Directive. What makes this example particularly interesting is that the Directive in its current wording appears to apply only to land-based casinos, or off-line gambling as the Commission termed it. The study unfortunately missed not only the importance of the Directive but also the fact that on-line gambling at this point does not appear to be covered by the Money Laundering Directive, which not only distorts the market but more importantly might be a loophole the regulator had not thought of in the non-internet age. This point is dramatically underestimated by the authors while the sector is undergoing significant change.

Three scenarios

The ECA understands that the value of the three different scenarios "is not so much to make concrete forecasts", because as the authors point out, "much of what will happen with for instance remote gambling over the next decade may not be able to be anticipated today"⁵, "but much more to demonstrate probable interactions among the possible sectors of the European gambling market"⁶.

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³ Mr Martin Sychold, Staff Legal Counsel, Swiss Institute of Comparative Law, Project Manager of the Study of Gambling Services in the Internal Market

⁴ Directive 05/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

⁵ Executive Summary, p.XL, first paragraph

⁶ Executive Summary, p.XLIII, fourth paragraph

The ECA as such supports the idea of drawing up different scenarios with a view to create starting points for discussion. The drawback of the three scenarios is, however, that given the selective focus of the study, and what appears to be an even more selective focus of the authors of this part of the study, the scenarios only look at a certain segment of the market and as such provide a much distorted outlook on it.

They disregard, amongst other issues, potential social implications of increased gambling activities and focus a considerable part of their analysis on remote gambling. This focus is in no balance to the role remote gambling plays within the gambling sector, most importantly the little growth it can offer with regards to employment. Also, the ECA was very surprised and shocked to learn from Professor Eadington⁷ during afternoon discussions at the stakeholder meeting, that the scenarios and the economic analysis were based on more or less exclusively Anglo-American literature research.

The ECA recognizes and acknowledges the challenges in dealing with 20 official languages in the EU. However, the association and its members find it very difficult to understand how a study on gambling services in the internal market can even be considered an internal market study unless it incorporates the contributions of all European stakeholders which have provided extensive material on national markets, mind you, in their national language. To revert to study referred to in the report as the "GBGC analysis" because that was the only available material in English, the ECA concludes, undermines the purpose of the study and in doing so reduces its value as an analysis of the internal market to close to zero.

In saying this, the ECA does not want to question the authority of the two authors that drafted the economic analysis, but merely highlight the shortcomings in the data collection and data processing that seem to have occurred.

First alternative scenario

In addition to the above, the ECA finds the choice of scenarios arbitrary if not to say obscure. The first alternative scenario is, the authors explain, based on "a hypothetical situation where courts or legislative bodies are generally sympathetic to the argument that state monopolies and other constraints on free and fair trade in the gambling services sector cannot be justified". For the ECA it was impossible to understand the basis for arguing that state monopolies in this sector could form an unjustified constraint to what the authors describe as free and fair trade.

Firstly, despite research it was impossible to find any trace or reference in EU internal market rules to "free and fair trade", let alone to free and fair trade in the gambling sector.

Secondly, the ECA fully supports the idea of the internal market and within this context would like to refer the authors to the decision of the ECJ in Läärä where the Court explained that the freedom to provide services does not preclude national legislation which grants to a single public body exclusive rights to operate gambling services, i.e. the ECJ confirmed that state monopolies are in line with internal market legislation.

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⁷ Prof. William R. Eadington, University of Nevada, Sub-contractor for the economical aspects of the Study of Gambling Services in the Internal Market

⁸ GBGC (2005), Double or Quits? - Global Gaming Review 2004-2005. London: Report by Gaming and Betting Global Consultants.

⁹ Executive Summary, p.XLIV, fifth paragraph

• Second alternative scenario

Concerning the second alternative scenario the ECA refers back to the aforementioned court case. While the ECA supports the idea of using scenarios to start discussions amongst stakeholders and policy makers, the ECA would prefer if those scenarios were based on EU legislation and jurisprudence rather than arbitrary preferences.

Conclusion

To conclude, the ECA would like to reiterate that it welcomes the initiative taken by DG Internal Market to commission a study of gambling services. Underscoring the studies very narrow scope paying little attention to important aspects of the gambling market such as problem gambling, the ECA is of the opinion that the study's first part, the legal analysis, can nevertheless provide a helpful reference for potential future discussions of the internal market in gambling services.

It remains to be seen whether the study's second part, the economic analysis, will be of the same benefit. Too little considerations it appears have gone into the management and utilization of information on the economic structure of the EU's national markets, leaving out for instance any detailed aspects of gambling in media, and too much emphasis has been put on a very small sector within the gambling market, the remote gambling industry. The study makes it clear that the remote gambling sector only plays a small role in the gambling market and is unlikely to contribute significantly in terms of employment. Given this imbalance between the sectors importance and the attention it received in the report readers of the study are left to think the authors seem to pursue other objectives than the one stated by the Commission, i.e. to assess the economic and employment situation and potential growth within the sector.

One thing that the study has made very clear is that, quoting the authors of the draft final report: "Much more research needs to be done in order to underpin future policy making" 10. The ECA and its members hope that with the above comments it has contributed to the Commission's considerations on the internal market in gambling services and potentially to complementing the study.

Furthermore, the ECA would like to confirm its interest and willingness to collaborate with the Commission should the latter take any initiative to investigate or address the gambling market again in the future.

On behalf of the ECA, Yours sincerely,

Ron Goudsmit Chairman

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¹⁰ Executive Summary, p.XXXIV, second paragraph

The European Casino Association (ECA) represents the interests of approximately 850 casinos and 70,000 employees across Europe. Founded in the early 90's as the European Casino Forum, the ECA has gradually grown over the years and today includes Members from the majority of the EU's Member States (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the UK) and from Switzerland.

The ECA's current chairpersons are Ron Goudsmit and Anders Galfvensjö:

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For more information on the ECA, please visit http://www.europeancasinoassociation.org/