

February 2010

## ECA position on licensing

### Introduction

This position paper aims to address the issue of licensing in the area of gambling services and strives to thereby make a contribution to ongoing discussions amongst policy-makers at national and EU level on this important question.

In doing so, the paper establishes that in accordance with the recent Santa Casa ruling of the European Court of Justice (ECJ) Member States are entirely free to determine their respective licensing models, and that operators have to respect the respective national licensing conditions and allocation procedures.

While national licensing schemes need to be applied in respect of the principles of transparency and non-discrimination, Member States are by no means legally obliged to allow any non-EU based operators to participate in a tendering procedure for the granting of a gambling license for their territories.

A crucial element of any national regulatory framework is its effective enforcement. This applies in particular to gambling services, a very sensitive activity, in relation to which illegal offerings by unauthorised operators is widespread. The paper therefore calls on Member States to provide for strict and effective enforcement measures, for instance through ISP blocking, payment blocking and bans on operators who in the past have shown a lack of integrity.

### Member States' competence to regulate gambling within their territory

After the ruling of the European Court of Justice in the **Liga Portuguesa de Futebol Profissional case**, it is clear that the principle of mutual recognition cannot apply in the gambling sector and that the national gambling markets can only be organised according to a **national authorisation regime, whereby the operators are regulated and controlled by the Member State of residence of the consumer.**

Such a national authorisation system can amongst others take the form of a sole or multiple licensing system. As recognised by the ECJ, Member States have a wide margin of discretion to determine how to organise their gambling policy, in accordance with the moral, cultural and socio-economic traditions in the country concerned, and to determine what is needed to achieve the desired level of protection. Therefore, **a Member State is free to opt for a monopoly or another form of exclusive right, a sole or multiple licensing system or a concession system, as long as it is in conformity with requirements laid down in the ECJ case law.**

If a Member State opts for a licensing system, the licensing conditions and license allocation procedure will be organised in accordance with the discretion of the Member States in the gambling sector, and in conformity with the ECJ case law in this regard. In general this means that the principles of transparency and non-discrimination will apply.

### **No white list: no market access for third country operators**

The ECA wants to emphasize that the **Member States are by no means legally obliged to allow any non-EU based operators, whether land-based or online, to participate in a tendering procedure** for the granting of a license to provide games of chance on its territory. ECA believes it is essential for the national gambling markets in the EU to be safeguarded from competition coming from outside the EU.

The EU has indeed not bound itself to a market access commitment regarding gambling under WTO law. Only a full commitment on market access provides assurance that no restrictions, as prohibited by article XVI of GATS (Market Access Provision) will be imposed on the supply of a particular service. The EU did not accept any market access commitment for any of the four modes of supply of a service (1. cross border supply; 2. consumption abroad; 3. establishment of commercial presence; 4. supply through presence of natural persons).

Under WTO law, a non-EU based operator means an operator which is either constituted or otherwise organised under the law of a third country, and is engaged in substantive business operations in the territory of that country, or, in the case of the supply of a service through commercial presence, owned or controlled by natural or judicial persons of that third country.

In this regard it is also important to note that the US still maintains a full prohibition on online gambling, not allowing for any European companies to have market access in the US. It would be unfair to grant US operators an access to the EU market while the EU operators are excluded from access to the US market.

### **Bilateral solutions are contrary to EU law**

Moreover, **ECA strongly opposes to Member States engaging in bilateral agreements with other Member States or third countries regarding market access to their (online) gambling market, and the recognition of licenses between their territories.**

This would be a blunt violation of European law, as the Member States have no competence to engage in bilateral agreements regarding gambling services.

## Law enforcement

**Effective enforcement measures constitute an essential part of a national authorisation regime**, in order to be able to attack and prosecute the operators who provide their services unauthorised on the territory of the Member State concerned.

In this respect, ECA is of the opinion that **ISP blocking and payment blocking measures** are very effective and proven mechanisms to tackle the unauthorised offer on the market. Given the need for a flexible and efficient reaction on behalf of the national competent authorities when the offer of an unauthorised operator within the territory of the Member State is detected, ISP and payment blocking measures **must be able to be maintained upon an administrative decision**. This indeed allows the national competent authorities to react more rapidly and more efficiently than would be the case when a judicial decision is required.

Moreover, Member States who aim to open up their online market in a controlled manner must take the appropriate measures in order to prevent that operators, who provided their services unauthorised under the former regime, are granted a license under the new regime immediately. This falls within the discretionary power of the national licensing authority. In any case, ECA favours that such operators should be banned from the market at least during a period of one year and it should be ensured that such operator be required not to make use of any national customer data bases built up during the period this operator offered its services illegally in the particular Member State.

\*\*\*\*\*