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Position paper

The need to restore fair competition on the gambling market & The location of the essential elements of online operations

On 8 September 2009, the European Court of Justice (ECJ) delivered a landmark ruling in the sector of games of chance by explicitly denying the application of the principle of mutual recognition in the gambling sector. This judgment gives a clear outline on the future regulation of gambling in the EU and clarifies the approach to be taken towards gambling related issues such as the location of the server of an operator. Moreover, following this judgment it is clear that there is a need to restore fair competition within the gambling market.

The need to restore fair competition on the gambling market

In light of the changing market conditions, in particular the fact that a number of EU Member States are currently revising their national gambling frameworks to allow for at least a partial opening of their online gambling markets, the ECA would like to emphasize the importance of restoring a fair level playing field on these newly opened markets between the different market players. Logically, this only applies to those markets which are being (partially) opened, and not to the markets in those Member States where the government grants the exclusive right of online gambling to the existing authorised operators.

Indeed, many gambling operators are providing games of chance without authorisation within the territory of several Member States which maintain a restrictive gambling policy, meaning that these operators did not obtain a national license to provide their games in the territory of the Member State involved. Instead, they are justifying their operations by the fact that they have obtained a license in another EU or EEA jurisdiction (i.e. Gibraltar, Malta, etc). They invoke the free movement of services within the EU, and in their defence wrongly state that the principle of mutual recognition of such licenses between Member States applies.

Based on this theory, several gambling operators have built a significant client database over recent years, while they were breaching the laws and rules of the Member State of destination. Consequently, these operators have captured the gambling market based on a wrongful assumption that the principle of mutual recognition should apply in the gambling sector, allegedly providing them market access without the need to respect the laws of the Member State of residence of the consumer (Member State of destination for their gambling offer), including taxation laws.

The members of the ECA however have always respected all the rules and regulations of the Member State they operate their casino games in and as such, have channelled the desire to gamble towards their highly regulated and controlled offer, in accordance with the ECJ case law.

This situation has created a clear unfair competitive advantage in favour of those who operate their games unauthorised within the territories of the Member States of residence of the consumer, not abiding by the laws of those Member States, and therefore acting without any restriction or obligation whatsoever.

In this context, it has to be noted that the legal and illegal gambling market are to be considered as separate markets, as was recognised by both the Italian Competition Authority (in the case Lottomatica/Sisal) and the Dutch Competition Authority (in the case NPL/SUFA).

However, on 8 September 2009, the ECJ delivered a very clear ruling in the Liga Portuguesa de Futebol Profissional case (C-42/07), denying the application of the principle of mutual recognition in the gambling sector. The ECJ stated that

"the grant of exclusive rights to operate games of chance via the internet to a single operator which is subject to strict control by the public authorities 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. "

The ECJ confirmed again that

"the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected.

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 provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure. The Member States are therefore free to set the objectives of their policy on betting and gambling, and where appropriate, to define in detail the level of protection sought."

Moreover, the ECJ has been very clear in denying the principle of mutual recognition by saying that, in the absence of harmonisation,

a Member State is entitled to take the view that the mere fact that an operator lawfully offers services in the gambling sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part

of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of 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 operators.

The ECJ clearly recognised the right of the Member States to regulate and control the offer within their territory according to the level of protection sought (through exclusive rights or through licenses/concessions) and did not grant operators the right to provide their gambling services in another jurisdiction based on a foreign license.

Now that several jurisdictions (i.e. France) are restructuring their national gambling market, allowing for a controlled opening of their online gambling sector, there is a clear need for fair competition to be restored. Indeed in those jurisdictions it will become possible for operators which operated formerly in an unauthorised manner to apply for a national license and to start offering their services legally in accordance with the licensing conditions imposed by the Member State concerned (the Member State of residence of the consumer).

These operators however still have an **important unfair competitive advantage over the other operators (including land based casinos)**, dating from the period in which they **provided their services** within the territory of that Member States **in an unauthorised manner**. In order to create equal opportunities on the market, this **unfair competitive advantage needs to be abolished** before any license can be granted.

For this purpose the **ECA recommends that all operators, who formerly provided their casino services in an unauthorised manner, and now apply for a license in the Member State concerned, are obliged to close down and delete their client database** before applying for a license in that Member State.

Transferring clients cannot be done automatically and neither may it be done without the customer's explicit consent. No transfer of funds may be done, the account operated illegally must be emptied and closed and new funds provided to the new, legal account.

Under the French law proposal, which opens the French online market in a controlled manner, such a closedown of an 'illegal client database' is a requirement for operators to obtain a license under the new regime, in order to ensure fair competition.

The requirement for the essential transaction elements regarding an online casino game to be located within the EEA

The ECA is strongly opposed to the possibility for the equipment (hardware and software) of online casino operators to be located outside the EEA. It is of utmost

importance for national regulators to be able to control and regulate the online gambling offer in the different EU jurisdictions. However, online gambling operators are free to install their software on servers in data centres anywhere inside the EEA, only the essential elements of the transaction need to be physically accessible within the territory of the Member State of residence of the consumer.

In that respect, it has been recognised in the *Liga Portuguesa de Futebol Profissional* case that the competent authorities in another Member State, where an operator is subject to statutory conditions and controls, cannot guarantee a sufficient assurance that national consumers will be protected against the risks of fraud and crime. The ECJ states that the authorities of the Member State of establishment encounter difficulties to assess the professional quality and integrity of operators.

Therefore, in order to enable the national regulator of the Member State of residence of the consumer to control and regulate the offer of online casino games, it is of utmost importance that the regulator has access to the essential elements of a gaming transaction. This will require that operators physically place certain parts of their hardware and software within the territory of the Member State of residence of the consumer, meaning inside the country that has issued the gambling license.

The essential elements for a regulator to have access to concern both the customer account and the financial transaction. Regarding the customer account the following information must be available to the regulator:

- full name (including maiden name),
- address,
- date and place of birth (city, country)
- additional information such as phone number, ID or passport number, IP address, date of opening of account and e-mail.

Furthermore, the presence on the Member State's territory of data concerning financial activity is strongly recommended. This information includes details of all transactions between the registered player and the operator and will also be used to demonstrate compliance with anti-money laundering legislation. In addition, session details of wins or losses will be required in order to justify taxation levels.

At least this information regarding the customer account and financial activity should be kept within the territory of the Member State of residence of the consumer. In addition, a license provision can be foreseen entitling the national competent authorities of the Member State of residence of the consumer to have access to the equipment and operations of the operator installed in another jurisdiction, from where services are provided within the territory of the Member State.
