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Position paper

ECA position on illegal gambling

With this paper, the European Casino Association (ECA) aims to put forward its position with respect to the most pertinent issues on the agenda of the Spanish Presidency of the Establishment and Services Working Group.

Definition of illegal gambling

According to the ECA, 'illegal gambling operators' are to be defined as those gambling operators, who provide their gambling services within the territory of a EU Member State, without having obtained the national authorisation to do so. In that regard, it is required that the operator concerned has obtained a national authorisation (i.e. a license or concession) in the Member State of residence of the consumer. It is not relevant that this operator has obtained a license in its country of origin (or country of establishment) and therefore has to be considered a legal operator in its country of origin.

Indeed, after the ECJ ruling in the Liga Portuguesa de Futebol Profissional case, it is clear that the principle of mutual recognition does not 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 authorities in the Member State of residence of the consumer.

Moreover, gambling operators have to respect the national licensing conditions, imposed by the authorities of the Member State of residence of the consumer, in order to operate their games of chance legally.

Measures to be taken against illegal gambling operators

The ECA would like to emphasize that effective law enforcement constitutes an essential part of a national authorisation regime and as such is crucial in order to be able to prosecute and penalise the operators, who provide their services unauthorised within the territory of the Member State concerned.

In this context, it should be noted that online gambling suppliers offering their services in EU Member States without having the required national license benefit from a substantial financial advantage insofar as they do not pay gambling taxes, which would otherwise be applicable to legally licensed entities for the respective games of chance. As a general rule, gambling taxes have to be paid in the Member State where the player is located at the time he gambles. The non-compliance with this tax obligation by withholding taxes on revenues is commonly considered as tax fraud, and hence a criminal act. Therefore, Member

States must ensure that effective enforcement measures are in place allowing national authorities to prosecute and sanction tax evaders. Moreover, in order for those enforcement measures to be effective, a coordination between the Member State might be required.

The ECA is convinced that ISP blocking and payment blocking measures are very effective and proven mechanisms to tackle the unauthorised games of chance on the market. Furthermore, as ISP and payment blocking are to be considered as proportionate measures, Member States must be able to make use of these measures and they need to be able to do so upon an administrative decision. This latter element is crucial given the fact that national competent authorities need to be able to react efficiently and with immediate effect once an (illegal) service offering by a non-authorised operator within the territory of the Member State has been detected. Indeed, an administrative decision allows much quicker decisions than a judicial decision does.

Requirements for license application in case of (partial) market openings

In light of the changing market conditions in some Member States, the ECA would like to emphasize that it is crucial that a fair level playing field on these newly opened markets between the different market operators is restored.

Based on the principle of mutual recognition, several gambling operators have over the past years built up a significant client database, while being in permanent breach of the laws and rules of the Member State of residence of the consumer. These operators have managed to capture parts of the gambling market based on the wrongful assumption that the principle of mutual recognition applies 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, including taxation laws.

In contrast, the members of the ECA have always respected all the rules and regulations, including tax obligations, of the Member State, in which they operate their casino games and as such have, in line with the requirements of ECJ jurisprudence, channelled consumers' desire to gamble towards their highly regulated and controlled offer.

This situation, which provides an unfair competitive advantage to those operating illegally, i.e. without the required license and regardless of any legal obligation or restriction, is clearly unacceptable.

Now that several jurisdictions are restructuring their national gambling markets, allowing for an, at least partial, opening of the online gambling sector, there is a clear need for fair competition to be restored. Indeed, in those jurisdictions it will become possible for market players, who formerly operated 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 during which they provided their services within the territory of that Member State in an unauthorised manner. In order to create equal opportunities on the market, this unfair competitive advantage needs to be levelled out before any license can be granted.

For this purpose, ECA recommends that all operators, who formerly provided their casino games 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. Automatic transfers of client accounts should not be possible and neither should it be done without the consumer's explicit consent. No transfer of funds may be undertaken, the account operated illegally must be emptied and closed and new funds provided to the new, legal account.
