



Brussels, 9 September 2005

Position of the European Casino Association on the Proposal for a Directive on Services in the Internal Market for the gaming sector

The proposed Directive on Services in the Internal Market covers most services provided to consumers and businesses across the EU. In the proposal the Commission put forward in January 2004, the Directive also addresses the issue of games of chance in the internal market.

The European Casino Association (ECA) agrees that in the interest of consumers and fair competition the gaming sector has to be addressed at EU level. However, members of the ECA do not believe the inclusion of the gaming sector in the proposed Directive on Services is the right way forward.

The Commission proposal

Despite the fact the European Commission has included some safeguards in its proposal, namely through recital 35 and the temporary derogation of Article 18 until further harmonisation of the sector is achieved, taking into account internal market law and the relevant jurisprudence from the European Court of Justice (ECJ) proposed provisions will inevitably lead to an unrestrained opening of national markets of games of chance.

This would be in contradiction with sector specific rulings of the ECJ's where it stated that it is up to the Member States' governments to decide what restrictions to impose on the freedom to provide this type of services for the purposes of maintaining the social order and consumer protection, objectives which are deemed to be overriding reasons relating to the public interest.¹

ECA position: Exclusion of Gaming Sector from Directive

In view of the above, the ECA takes the position that the gaming sector should be addressed separately and therefore be **TOTALLY EXCLUDED** from the scope of application of the proposed Services Directive.²

¹ See Case C-275/92, Her Majesty's Customs and Excise v G. Schindler and J. Schindler, 1994 ECR I-1039, Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd. v Kihlakunnansyyttäjä, Suomen Valtio, 1999 ECR I-6067, Case C-67/98, Questore di Verona v Diego Zenatti, 1999 ECR I-7289, Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) v Portuguese State, 2003 ECR I-08621, Case C-243/01, Procuratore della Repubblica v Piergiorgio Gambelli, 2003 ECR I-13031 and Case C-42/02, Diana Elisabeth Lindman v Skatterättnämnden, 2003 ECR I-13519.

² All 18 ECA members but two, the UK and Estonia, support this position. The UK abstained. Estonia agrees with fellow ECA members to exclude gaming from the Directive and the proposed country of origin principle. However they propose to leave in the Directive the need for the Commission to assess one year after the entry into force of the Directive the possibility of presenting harmonization proposals for gaming services.

To this end, the ECA supports the position of rapporteur MEP Gebhardt and similar amendments from MEPs including MEPs Harbour and Wuermeling excluding gaming services from the scope of the directive.

Amendments to Commission proposal

Further to the above, the ECA supports amendments 10, 59, 116 and 146 introduced by Rapporteur Gebhardt requesting the exclusion of gaming from the scope of application of the directive.

Likewise, the ECA supports amendments 213, 214, 567, 568, 569, 570, 571, 925, 926, 927, 930, 937, 1131, 1132 and 1133 to the extent they pursue the same objectives as those tabled by Rapporteur Gebhardt. In addition the ECA fully supports amendments 299, 304, 305, 307 and 308.

Moreover, it is ECA's view that amendments such as amendment 906, requesting that only gambling services not open to competition in the Member State where the service is received are excluded from the scope of the Directive are misleading and will create legal uncertainty. If, for instance, a casino operator has a monopoly or exclusive right in its jurisdiction, this does not rule out that it could operate "in competition" with other licensed gambling operators (such as lottery operators, sports betting operators, bingo, etc.). Hence, this would imply that the country of origin principle could become applicable to gambling services in all Member States irrespective of current monopolies in the casino sector.

The ECA supports the following amendments:

Amendment (number)	Content
10, 29, 59, 213, 214, 571, 567, 568, 569, 570	excludes gambling activities from the scope of the Directive
116, 925, 926, 927, 930, 937, 146, 1131, 1132, 1133,	deletes the temporary derogation for gambling services from the country of origin principle abolishes the need for the Commission to assess, one year after the entry into force of the Directive, the possibility of presenting harmonisation proposals for gambling services
299, 304 307, 308	deletes references to gambling and lottery services in the preamble gives argumentation as to why gambling services must be removed from the scope of the Directive (public order, consumer protection, fiscal disparities between Member States,...)

The ECA does not support the following amendments:

Amendment (number)	Content
906	Country of origin principle is applicable to gambling services to the extent that the provision of gambling services is open to competition in the Member State where the service is received.
572	Confirms the need for the Commission to assess, one year after the entry into force of the Directive, the possibility of presenting harmonisation proposals for gambling services

Annex:

Clarifications on the ECA and its position on the Services Directive

The European Casino Association (ECA) represents the interests of over 800 casinos and approximately 62,000 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 (Estonia, Luxembourg, Germany, France, the UK, Belgium, the Netherlands, Italy, Portugal, Spain, Slovenia, Poland, Finland, Sweden, Denmark, Austria, the Czech Republic) and from Switzerland.

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

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For more information on the ECA, please visit <http://www.europecasinoassociation.org/>

Does the Services Directive have a direct impact on the national regulation of gambling? Will it lead to a deregulation of the European gambling sector?

Under the Commission's proposal, gambling services are temporarily excluded from the country of origin principle, but have not been carved out from the provision on establishment.

Although the European Commission has included some limited safeguards in its proposal (see recital 35 and the temporary derogation of Article 18), the ECA believes that the proposed Services Directive is an important step in the liberalization of the European gambling sector.

The provisions on establishment (Articles 9 to 15) harmonize the conditions for granting an authorization to operators which want to set up a business in a Member State. The Directive allows national authorization schemes (including casino licences and casino concessions) *only* if they are objectively justified by an overriding reason relating to the public interest (e.g. the prevention of fraud/crime, the maintenance of order in society, the prevention of problem gambling, etc.). Moreover, the conditions for granting a (casino) licence or concession must satisfy a number of other requirements, such as non-discrimination and proportionality.

One of the most controversial aspects of the establishment chapter is the mutual evaluation procedure provided for in Article 41 of the Directive. Under this procedure, Member States will have to submit a report, in which they motivate the compatibility of their authorisation schemes and licensing systems with the rules on non-discrimination, proportionality and necessity.

In relation to gambling services, for example, this would mean that national authorities will have to demonstrate that a restrictive gambling environment (for example, the availability of a limited number of casinos licenses or the requirement that only state licensed monopolies are allowed to operate casinos) fulfils the conditions of necessity, non-discrimination and proportionality.

The reports are reviewed by an "Advisory Committee" in which Member States are represented. Based on the observations of the Advisory Committee and the Member States,

the Commission will, by 31 December 2008 at the latest, present a summary report, accompanied where appropriate by proposals for complementary initiatives.

Although the Commission is required to "take the utmost account of the opinion delivered by the Committee", it is under no obligation to abide by it. Given the non-binding nature of an advisory committee's opinion, it would appear that the European Commission's extensive powers in the mutual evaluation procedure would significantly reduce Member States' discretionary power to regulate their national gambling markets.

It is to be expected that the proposed mutual evaluation procedure will have a big impact on the way Member States can regulate gambling activities on their territory. If the Commission considers that an authorisation scheme does not satisfy the rules on non-discrimination, necessity and/or proportionality, the **mutual evaluation procedure could oblige Member States to allow gambling operators to set up businesses on their territory** if they operate under a license from another Member State. Under these circumstances, Member States would no longer be capable to control the volume of gambling on their territory if they would be obliged to open up their markets for gambling offers originating from other EU jurisdictions. This would undermine the national gaming policies of the Member States and would run counter to the jurisprudence of the European Court of Justice. In *Läära*, the European Court of Justice confirmed that Member States have a discretionary right to decide about the number and type of operators and about the type and volume of games.

Finally, amendment 906 introduced in the IMCO Committee would further accelerate the deregulation in the gambling sector. This amendment makes the country of origin principle applicable to gambling services to the extent that the provision of gambling services is open to competition in the Member State where the service is received.

The concept "open to competition" is flawed and would create legal uncertainty. Even if a casino operator has a monopoly or exclusive right in its jurisdiction, this does not rule out that it could operate "in competition" with other licensed gambling operators (such as lottery operators, sports betting operators, bingo, etc.). This view is confirmed by several decisions of national competition authorities, which held that a gambling operator, although operating with an exclusive right, is considered as being in direct competition with other local gambling operators which have an exclusive right in another field of activity. Finally, according to the European Court of Justice (see paragraph 60 of *Schindler*, paragraph 16 of *Zenatti*), all types of gambling services are in competition with each other since lotteries are comparable to other forms of gambling services.

Hence, amendment 906 implies that the country of origin principle would become applicable to the sensitive games of chance sector, even if a casino operator holds a monopoly/exclusive right.

Is the Services Directive a good instrument to address a sensitive sector like casinos?

Due to the potential risks of crime, fraud and addiction, gambling services cannot be regarded as normal economic services. Such a sensitive sector requires a specific approach, apart from the Services Directive.

The ECA notes that there is currently no evidence available that a deregulation of the gambling sector will have a positive effect or added value for the European economy.

The Council accepted in 1992 that gambling services are better regulated at national level in view of the subsidiarity principle. The Amsterdam Protocol on subsidiarity requires the

Commission to justify its legislative proposals with regard to subsidiarity. Although the European Commission has included gambling services in the scope of the Directive, the ECA doubts that Community action in this field would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States, as required by the Amsterdam Protocol.

The ECA welcomes that the European Commission appointed, begin 2005, the Swiss Institute of Comparative Law to conduct a study on "Gambling Services in the Internal Market". The purpose of this Study is to evaluate how the differing laws regulating gambling services 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. The results of the Study are due in 2006.

In view of the above, the ECA believes that gambling services must be removed from the scope of the Services Directive as long as no evidence is provided that gambling is better regulated at Community level.

Is it necessary to provide a definition of gambling services in the Services Directive?

The ECA does not consider it necessary to define gambling services in the Services Directive. In analogy with the Electronic Commerce Directive, it is sufficient to state that the Directive does not apply to "gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions".

The terms of reference of the Commission's Study on Gambling Services in the Internal Market also follow a similar approach. Gambling services are, for the purpose of the study, considered to cover any service, including any information society service, which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions. This covers the following market sectors:

- (i) Betting services (including horse and dog racing, event betting and pool competitions),
- (ii) Bingo services,
- (iii) Casino services,
- (iv) Gambling services operated by and for the benefit of recognised charities and non-profit making organisations,
- (v) Services related to gambling machines that can be placed in locations other than in licensed casino services,
- (vi) Lottery services,
- (vii) Media gambling services (i.e. games in the editorial content of the media) and
- (viii) Sales promotion services consisting of promotional games with a prize exceeding €100,000 or where participation is exclusively linked to purchase.

The European Court of Justice has also not defined gambling and makes no distinction between the different types of games of chance. In *Schindler and Zenatti*, the European Court of Justice considered lotteries to be like other forms of gambling.