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Remote Gambling Services in the EU

A Working Paper by the European Casino Association¹

This working paper aims to address the issue of regulating remote gambling services. It does so by focussing on the following key points:

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Executive Summary

People like to play games of chance and skill and they want to gamble. This applies to any means of distribution for gambling activities including through land based or remote means.

Remote means are no more than the meaning of the words, i.e. alternative means of distribution. The ECA's members believe that a license+ system whereby licensed operators could secure an enhanced license expanding their distribution channels to include remote means would be the most appropriate for the gambling sector, in particular with a view to maintain public policy objectives such as consumer protection and crime prevention.

The ECA's demand for license+ systems is based on a recent WTO ruling confirming remote gambling as a like service and thus making it equal to any other form of gambling currently regulated in EU Member States.

In light of very diverse national legislation on gambling across EU Member States the ECA furthermore considers it appropriate in the long-term to create a consistent framework for gambling at the EU level creating a level playing field taking into account all of the important elements enshrined into national gambling legislation such as

¹ This paper was approved by a great majority of the 21 ECA members: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovenia and Spain (not in favour: UK, Sweden, Switzerland).

responsible gambling provisions, crime prevention, consumer protection, taxation etc.

In the absence of such an EU framework, the ECA and its Members call on the Member States to, as a first step, enforce the application of the Country of Destination Principle for gambling services. In other words, the application of the Principle to all gambling operators and to all means of distribution for gambling services (both terrestrial and remote).

1. What is remote gambling?

In order to address the issue of remote gambling it is important to understand what is meant by “remote gambling”.

In general terms, remote gambling refers to all gambling activities supplied through remote technologies as opposed to land-based operations. Such remote technologies today include the Internet, mobile phones, PDA's, dial-in services, and digital television. In light of the fast evolving development of communication technology, however, it would make little sense to define tools for remote gambling as opposed to the mechanism, i.e. provision of services through available remote technologies.

As such, remote gambling today offers several forms of gambling:

- Betting services (including fixed odds betting, peer-to-peer betting, and spread betting)
- Casino games (including typical casino games like slot machines, Roulette, Black Jack, Baccarat and Poker).
- Lotteries (including long-odds games as well as more recently short-odds lottery games, which stands for games with a long and a short time frame between purchasing the ticket and receiving the results)

2. Why is it necessary to regulate remote gambling?

People like to play games of chance and skill and they want to gamble. This applies to any means of distribution for gambling activities including through land based or remote means and history has proven it applies whether gambling is legal or not. History also proves that if not properly regulated gambling can lead to negative social and economic consequences.

Further to the above and based on its Members' extensive experience in operating in the gambling market, the ECA has three main concerns in relation to remote gambling:

- The social impact (especially youth and problem gambling);
- Consumer protection including crime prevention (the potential of an escalation of illegal, criminal and fraudulent activities through remote gambling sites, such as money laundering);
- Level playing field (the effects of the growing expansion of unregulated remote gambling sites on the heavily regulated land-based casino operators and the need to ensure fair play competition).

The challenge for a successful gambling policy is thus to channel the demand for gambling away from a grey or illegal offer to ensure that the demand for gambling is satisfied and the undesirable effects of gambling prevented or minimised. Players should be able to expect fair games in a safe environment.

a) Member States

Based on their extensive experience EU Member State governments feel a strong moral and public responsibility to regulate, restrict, and control gambling to prevent any negative impact on society. The ECA supports that Member States today have control of the legalized gambling markets on their respective territories.

This control is efficient and based on political considerations including on the appropriate size of the gambling market. If the market would be out of balance the government could with immediate effect act and reduce or increase the offer, or regulate certain aspects of the market.

Control is also based on the principle of subsidiarity which states that rules within the EU should be set at the level where it is most appropriate. In the case of gambling services Member States and the Commission at the Edinburgh Council in 1992 agreed that Member States should be responsible for setting and administering the legal framework.

b) EU Court of Justice

The European Court of Justice (ECJ) as well as the EFTA Court recognise the right of Member States to control and restrict the supply of gambling services.²

With a view to maintain the aforementioned principle of subsidiarity and with it national governments' ability to regulate the gambling markets on their territory, this control applies to all available means of distribution, including remote technologies using the Country of Destination principle for all gambling services in the EU.³

c) WTO

The fact that existing rules on gambling services apply to any means of distribution for these services has been confirmed not only at the level of the ECJ but also at global level by the WTO.

The WTO Appellate Body as well as the WTO Panel consider Internet gambling just another "like" distribution method of a gambling service whereby the supply

² see Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd. v Kihlakunnansyyttäjä, Suomen Valtio, 1999 ECR I-6067; Case C-243/01, Procuratore della Repubblica v Piergiorgio Gambelli, 2003 ECR I-13031; Case C-275/92, Her Majesty's Customs and Excise v G. Schindler & J. Schindler, 1994 ECR I-1039; C-338/04, C-359/04, C-360/04, Placanica et al., 2007 ECR; Case E-1/06, EFTA Surveillance Authority v The Kingdom of Norway, 2007

³ In the Gambelli ruling the ECJ in §§ 54 & 55 clarified that Internet gambling services were delivered by a supplier, without moving, to recipients in a Member State other than that in which the supplier is located. Internet gambling services are thus delivered in the jurisdiction of the consumer/recipient or in other words according to the Country of Destination principle.

is taking place on cross border basis. This means the WTO acknowledges that the transaction happens under the jurisdiction of the consumer, i.e. the recipient rather than the jurisdiction of the supplier.⁴ In other words the WTO is in favour of the Country of Destination principle for gambling services.

3. How to regulate remote gambling?

Falling within the scope of gambling in general, remote gambling in the EU is today governed by the principle of subsidiarity. This principle means Member States are responsible for setting up and administering rules for their respective markets, based on their national needs and cultural preferences, including gambling services.⁵

a) EU level

Under EU law, the basic principle is the free movement of services. However, restrictions on gambling services can be applied in line with the Country of Destination principle under strict conditions for reasons of public order and/or social protection.

This reasoning was applied for the first time in the UK in 1999 by the High Court of Justice, Queen's Bench in the course of the case of the International Liechtenstein Lottery Foundation and the Electronic Fundraising Company against UK The Department of Home Affairs. The High Court of Justice, Queen's Bench, in London declared that the UK was entitled to look at the overall negative impact of gambling in the UK and was therefore entitled to stop ILLF from offering lotteries into the territory of the UK.⁶

In parallel to this and other Court decisions confirming Member State competence for gambling policy, EU Member State governments consider that gambling services delivered through the Internet or other remote means of distribution should legally fall under the gambling laws at the Country of Destination. This view goes hand in hand with the objective to preserve public order and social protection. Further to discussions on the recently adopted Services Directive the ECA understands that this majority includes a clear majority of Member States. The Commission acknowledged this majority and the decision taken by the European Parliament and the Council of Ministers to

⁴ Antigua–US WTO Internet Gambling case "*Measures Affecting the Cross-Border Supply of Gambling and Betting Services*" (WT/DS285): During the recent legal dispute between Antigua and the USA about the cross border supply of Internet gambling services the WTO dispute settlement organs decided that Internet Gambling was legally not different than terrestrial gambling and that the Internet was nothing more than another distribution method.

In line with the above, during the legal discussion on whether the Internet gambling service was taking place in Antigua or in the USA, the WTO decided that the Internet Gambling service coming from a server in Antigua was taking place on the territory of the USA

⁵ For more information on the general framework for gambling services in Europe see "Gambling Services require a Special Framework – The European Casino Association's Viewpoints on Rules on Gambling", from 30 October 2006

⁶ London High Court of Justice, Queen's Bench Division, 14 June 1999, *R v The Secretary of State for the Home Department ex parte The International Lottery in Liechtenstein Foundation and the Electronic Fundraising Company plc*

exclude gambling from the Services Directive. In its handbook on the implementation of the Directive the Commission clarifies that

“The exclusion in Article 2(2)(h) covers any service which involves wagering a stake with pecuniary value in games of chance, including in particular, numeric games such as lotteries, scratch cards, gambling services offered in casinos or licensed premises, betting services, bingo services and gambling services operated by and for the benefit of charities or non-profit-making organisations.”⁷

Further to the above a Member State under the Country of Destination principle is entitled to set certain objective restrictions for as long as those restrictions are compatible with the EU treaty and the interpretation given thereof by the European Court. In other words, restrictions like maximum stake, type of game, opening hours, registration of players, responsible gambling programmes, etc to protect the consumer are allowed to the extent that these restrictions are non-discriminatory, necessary and proportionate to the objectives legally pursued. The Commission again confirmed this in its Handbook

“The number of cases in which the ECJ has accepted the invocation of public policy is quite limited. For example, it was accepted [...] in cases of risks for fundamental values of social order which can result from gambling.”⁸

Commission vs Member States

One element on which the European Commission still seems to disagree with Member States, the European Parliament, and other stakeholders including the ECA is limiting the number of licenses for operators. More specifically the Commission seems to have reservations concerning limiting the number of licenses for operators as a legitimate means to pursue social order and consumer protection objectives.

To address this it is important to understand that if one would disallow Member States to set such licensing restrictions for the market of gambling (including internet gambling) without creating beforehand a level playing-field for operators across the EU, the Commission would trigger a race to the bottom. In other words, a race to the country with the least consumer protection and crime prevention rules. It would also lead to an uncontrolled supply of gambling services and it would undermine and contradict the public order and consumer protection objectives currently employed at national level.

Under national competition law, a casino licence is considered to have a local dimension supplying an estimated number of consumers in its range (be that physical or electronic). Taking this control away would remove authorities' ability to pursue social order and consumer protection objectives which can not be in the interest of the EU.

⁷ p.14 Handbook on implementation of the Services Directive, European Commission, 2007

⁸ p.50-51 Handbook on implementation of the Services Directive, European Commission, 2007

ECA considerations

In light of the above, the ECA calls upon Member States to create a level playing field for gambling at the EU level taking into account all the key parameters needed to allow for a sustainable gambling market.

In the absence of such a framework, Member States' first step, the ECA believes, should be to forbid unregulated gambling services and to enforce the application of the Country of Destination principle. Only operators who are licensed in a Member State should be allowed to offer their services in this particular Member State.

The EU applies the country of destination principle also on the application of VAT on B2C services offered from outside the EU territory⁹. This includes VAT on Internet gambling services if VAT is applied. Moreover, a proposed EU Regulation for intercommunity trade in services suggests applying VAT on B2C services at the country of destination.¹⁰

In the context of the above, the ECA with a view to preserve public order and social protection advocates that the Country of Destination principle should continue to be applied to all gambling operators and to all means of distribution for gambling services (both terrestrial and electronic). This should apply without any exception.

b) The National level

A number of Member States have started to address the lack of rules for remote gambling incorporating this new means of distribution into their national legal framework. For instance, Austria, Finland, France, Sweden, and certain regions in Spain have already put in place laws addressing remote gambling and Germany is on the way to do so. All of these Member States have tailored rules for their respective markets on the basis on their national cultural and social needs and preferences.

This development is in line with international developments including the aforementioned WTO decision as well as a decision taken in 2006 in the US by which internet gambling has been restricted. Internet gambling in the US is only legal if gambling is made available and received exclusively within the same state. Similar to the EU principle of subsidiarity, the US approach guarantees that state rules apply to any form of gambling within the respective state. It allows each state to keep control of gambling on its territory.¹¹

⁹ Council Regulation No 218/92. The Regulation does foresee that VAT on B2C services offered from outside the EU territory to recipients inside the EU is subject to VAT at the country of reception/destination.

¹⁰ Proposal for a Council Regulation amending Regulation (EEC) No 218/92 on administrative co-operation in the field of indirect taxation (VAT) as regards additional measures regarding supplies of travel services (COM/2003/0078 final)

¹¹ See US House of Representatives, The Unlawful Internet Gambling Enforcement Act, 2006 (as incorporated in The Safe Port Act 2006)

In light of the above, the ECA strongly advocates that the principle of subsidiarity, which since 1992 is being applied to gambling services, is applied to any means of distribution including land-based and remote gambling.

ECA considerations

In what would be a very pragmatic yet efficient solution the ECA calls to extend the scope of national rules on gambling to include remote gambling activities. The same rules devised to balance the offer and demand of gambling through land-based operators should apply to remote operators.

Given the extensive experience in complying with these national rules as well as in cooperating with authorities to help refine and update the rules to the evolution of the market, the ECA believes that a so-called "license+" system would be the ideal approach to addressing remote casino gambling. In a "license+" system land-based casinos would under certain conditions be entitled to expand their offering to supply online casino gambling services. Such a sensible approach could if and when appropriate be lifted up to the EU level.

To understand the logic behind this approach it is important to underline the advantages that the "licence+" system would bring to the gambling market. More information is included in the annex to this document.

1. Online casino services would be provided only by licensed operators from land-based casinos. Remote casino games would be an extension of their offers. This implies that regulators would have a clear picture of the number of operators in its jurisdiction, the scope and the supply of services, the operators' assets, and its revenue streams. Also, land-based operators experience and knowledge in complying with existing rules and operating responsibly would be built into this extension.
2. The licence+ system will enable consumers to operate in a transparent remote gambling market. Currently in an unregulated and uncontrolled remote gambling market there is a growing number of unknown and illegal providers.
3. A licence+ system will prevent that consumers using remote gambling services are victims of fraudulent or criminal practices. The ECA is concerned by the growing number of unregulated and unknown remote providers whose "operations" are neither audited nor approved and whose revenues and profits are neither traced nor published. To prevent illegal providers to take advantage of their users, the ECA believes that land-based casinos should provide online casino gambling services. In this context, the ECA believes that all remote gambling services that are provided illegally should be prohibited and in line with US legislation should be prevented from entering the national markets of EU Member States through control of payments.
4. The licence+ system would be in line with the existing EU framework applying the principle of subsidiarity to the gambling market and the country of reception principle to gambling services. The latter is particularly important with a view to maintain national control of gambling activities and in doing so ensure that the moral, ethic, religious and cultural particularities of each country and the social order objectives are met through control of the offer. Licensed operators can easily be monitored and if necessary interventions can be made to change the scope of quantity of the offer.

5. The licence+ system would maintain national control of incomes from remote gambling activities including incomes used for benevolent causes as well as more general taxation of gambling revenues. This would be a very important asset of a licence+ system assuming that national governments want to integrate and include the internet and gambling revenues generated through the Internet into their tax framework. This is currently not the case.



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The ECA represents the interests of almost 900 casinos and approximately 80,000 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 and from Switzerland

The ECA's members in 2007 include Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, and the UK.

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ANNEX

Technical evolution

The fact that today it is technically possible to offer gambling services directly to the customers all over the EU does not mean that this is necessarily in the interest of Europe's citizens.

If one was to make the grave error to apply the country of origin principle on remote gambling one would circumvent national regulations and national controls of the gambling markets. More dramatically, one would circumvent and demolish any national ability to define and maintain a politically and socially desirable level of gambling. To this end the ECA recommends to apply the country of destination principle on remote gambling.

The social impact

The most dramatic impact of today's still mostly unregulated remote gambling activities is that they do not adhere to national restrictions concerning the provision of gambling services through "traditional" means. The Internet and other media are making it possible for providers of online gambling to offer their services without any access limitation.

Without controls this situation is detrimental to the objectives and limitations national authorities put in place with a view to encourage responsible gambling and to limit the social impact of irresponsible gambling.

The ECA therefore believes that remote gambling needs to be regulated. For such rules to be effective they should be part of the overall approach to gambling with a view to prevent remote gambling from inviting irresponsible gambling and in doing so potentially causing significant damage to society.

Crime

An unregulated and uncontrolled remote gambling market is open to abuse by criminals. Without control websites offering gambling services can be used to carry out illegal activities such as fraud by operators and money laundering activities.

Crime prevention has been addressed in the context of land based gambling with regulations in place to prevent the potential influx of criminal behaviour in the gambling market. However, at this point remote gambling operators do not have to adhere to national restrictions addressing crime prevention.

The ECA deems it therefore necessary to regulate remote gambling by imposing the same crime prevention rules and obligations applied to land-based operators including total transparency of funding and ownership of remote gambling operators. In the ECA's view this is the only appropriate measure to safeguard fair, legal and regulated gambling via remote means.