



# EUROPEAN COMMISSION'S COMMUNICATION ON ONLINE GAMBLING: The wrong method to safer gambling markets in the EU Member States

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The European Commission recently put forward a statement titled “*Towards a comprehensive framework for online gambling.*” published on October 23, 2012. It attempts to clarify the EU Commission position as regards the matter of regulation. This is an important statement to all member states and their lotteries, and so bears scrutiny.

First, it should be pointed out and emphasized that gambling is not regulated at the EU level. That is to say that no EU harmonized legislation has been adopted by the institutions of the European Union (EU) to regulate gambling activities. Moreover, as there is no sector-specific EU regulation, gambling activities are regulated under Articles 49 and 56 of the Treaty on the Functioning of the EU (TFEU), and according to the interpretation given to the said provisions by the case-law of the Court of Justice of the EU (CJEU), the Highest Court of the EU.

The first case-law in which the CJEU had to deal with gambling (*Schindler*, 1994) granted the power of regulation of the gambling activities to EU Member States, considering that individual Member States were the most appropriate entities given the sensitive differences between Member States in terms of gambling. Gambling is considered to be a sector closely linked to the tradition, culture and specificities of each individual EU Member State. The Subsidiarity principle provides that the EU should only intervene when EU Member States do not have the means to regulate a sector of activities in an efficient manner. In compliance with the Subsidiarity principle, the CJEU has decided that the appropriate jurisdiction to regulate gambling is the Member State. Accordingly, the CJEU has further ruled that EU Member States be allowed to adopt their own legislations and to follow their own objectives in terms of player protection, the fight against criminality and problem gambling, and to do that without taking into consideration the rules and regulations implemented in other EU Member States (*ANOMAR*, 2003). In other words, EU Member States are allowed to implement different types of gambling regimes which can range from a total prohibition of certain gambling activities to a total liberalization of the market of other activities. It is up to the individual Member State whether to limit the number of licences or not, whether to opt for a monopoly model instead, whether to prohibit online gambling or not, allow land-based gambling

and casinos or not, etc.

Even though Article 56 TFEU prevents an EU Member State from restricting the offer of services coming from another EU Member State, the CJEU usually accepts exceptions to that principle when a national legislation pursues objectives of general interest, such as player protection, prevention of gambling addiction, protection of vulnerable persons or the fight against criminality (including corruption and money-laundering).

It follows from the above that the gambling debate within the EU (as is also the case in United-States) is still an ongoing subject leading to much debate and lobbying coming from various actors of the gambling sector.

According to the TFEU, EU institutions are allowed to adopt binding and non-binding proposals to regulate or help to interpret the provisions of the TFEU in specific sectors. Needing more precise guidelines as regarding that allowance, the European Commission has adopted its long-awaited *Communication on Online Gambling* on the 23rd of October 2012 which is accompanied by a Staff Working Document aimed at providing guidance related to certain sections of the *Communication*. The *Communication* at issue follows the guidance of the Green Paper on online gambling, adopted in 2011 after a consultation of the different actors of the sector with the aim of obtaining a full picture of the current situation of the EU gambling sector in order to analyze the manner for the different regimes to coexist, and whether possible EU initiatives are required.

The *Communication* defines five areas of action. The first area of action is the compliance with EU law of national regulatory frameworks. The European Commission commits to strengthen its controls and assessments of national legislations by requesting further information from national authorities as well as to move forward in the infringement proceedings against national legislations deemed, according to the European Commission, not compliant with EU law.

The second area of action regards administrative cooperation wherein the European Commission urges EU Member States to equip their national regulators with adequate means in order to cooperate at EU level with the different regulators concerned. The European Commission further emphasizes that the first immediate step should be the exchange of general information and best practice. The objective of the European Commission is to facilitate the cooperation between all EU and EEA regulatory authorities.

The third area is the player protection and the protection of citizens where the European Commission commits to adopt a Recommendation on common protection of consumers as well as a Recommendation

tion on responsible advertising. A Recommendation is a non-binding instrument adopted by the European Commission which aims to provide the actors concerned with information and guidance on a specific area. Nevertheless, the CJEU emphasized that national courts have to take such instrument into consideration when deliberating on disputes, as they were meant to supplement Treaties and other binding provisions without replacing them (*Grimaldi*, 1989). **One can question here whether this is the role of the European Commission to do so.** All Member States have issued their own rules on consumer protection and have their own approach to advertising. **There is no need to re-invent the wheel and to oblige all Member States to adopt the same rules.** This violates the principle of subsidiarity and does not create any added value. On the contrary the risk does exist that Member States will no longer be able to maintain their own gambling policies.

Anti-money laundering and other forms of fraud comprise the fourth area of action. In this, the European Commission calls upon national states to encourage the exchange of best practice and experience as well as to train judiciary on issues related to money-laundering and other frauds in terms of gambling. Moreover, the European Commission further points out that the new Directive on anti-money laundering, which is an EU instrument which has to be transposed into national laws within a certain period of time, will provide rules applicable to all types of gambling (premises) as it currently only applies to casinos.

Regarding the fifth area of action, the European Commission has planned to adopt a Recommendation in terms of sports integrity and fight against match-fixing in 2014 in order to enhance the cooperation between all relevant actors of the sector to introduce mechanisms such as whistle blowing, reporting obligation of suspicious behaviors, etc. in order to strengthen the fight against such type of fraud. Furthermore, the European Commission calls upon Member States to set up national points of contact allowing discussions between actors of the sector and also to equip national and administrative systems with tools, resources and expertise in order to fight against match-fixing.

Finally, it has to be mentioned that an expert group on online gambling has been set up as provided for by the Communication in order to address all the specific issues mentioned therein. Such expert group includes different representatives and regulators of the EU Member States. The first meeting of the expert group was held on December 5th. Up to now it is not clear what the role of this group is, nor whether the States will have anything to say. The European Commission tries to use this group to move forward fast and avoid political weight from the States.

Given the above, one could submit that the approach of the European Commission is not coherent. Indeed, on the one hand, the European Commission asks EU Member States to cooperate in order to create a safer EU gambling market by fighting illegal operators while, on the other hand, the European Commission commits to keep on acting against Member States the legislation of which is not considered compliant with the CJEU case-law. This approach leads accordingly to more uncertainty for players, and thus to a gambling market which presents less protection for consumers. In other words, in the case that the European Commission desires gambling to be a safe and peaceful sector of activity for citizens, it cannot at the same time keep on acting aggressively against Member States' legislation to accomplish same, as this would lead to a period of legislative lack which illegal operators could take advantage of.

Furthermore, regarding the Recommendations planned to be issued by the European Commission, it has to be emphasized that such initiative will leave the door opened to future EU legislation of the gambling sector that could further violate the principle of subsidiarity.

Indeed, even though the European Commission submits that such instruments do not aim at replacing the binding provisions in force, adopting Recommendations will force national judges to take them into account when settling a dispute. The European Commission should accordingly not adopt non-binding instruments to impose rules on national authorities. The content of such instrument will have to be assessed to define exactly what is the scope of the so-called Recommendations as we would like to point out that only the content will define the nature of the instruments and not the name granted by the European Commission. In the event that the content will be binding for national authorities, it would lead to a form of harmonization contrary to the CJEU case-law.

Moreover, the European Commission seems to make it a priority for cooperation to play a defining role in producing a safer EU gambling market. Even though administrative cooperation is indeed useful and necessary to fight against illegal gambling, we do believe the European Commission should have defined **enforcement measures** as the priority area of action. Consumer protection does indeed start with the enforcement of the laws adopted to protect them against illegal and fraudulent offerings. The European Commission touches upon enforcement measures in the Staff Working Document, setting forth two different types of measures: preventive and responsive enforcement. Considering the scale, and the rapid and relentless growth of illegal gambling, we are of the opinion that the priority should have been the implementation of responsive enforcement measures (e.g. IP/DNS blocking, blacklists, payment blocking, etc.) which are already carried out in different national legislations and have already proven their effectiveness.

It has also to be pointed out that the Council of Ministers of the EU decided, within its Conclusions of December 2010, that in all discussions at EU level the specific role of lotteries and the fundamental contribution of lotteries to the EU society has to be recognized. It is consequently very surprising that the European Commission has not taken into consideration the aforementioned Conclusions and puts at risk the highly important contribution that State Lotteries make to educational, cultural, sports, health, and other societal activities. One could question whether the European Commission does not exceed its competence by denying the Council's decision.

Regarding the agenda, the European Commission will have to work together with other EU institutions such as the EU Parliament as well as with Member States and all interested shareholders in order to implement the Communication at stake. A conference of shareholders should also be organized in the course of 2013. The European Economic and Social Committee, which is a consultative body of the EU, has planned to issue its Opinion on the Communication by March 2013.

To conclude, we would like to highlight the necessity to preserve the principle of subsidiarity as drawn by the CJEU in order to safeguard EU citizens from all the dangers and risks related to illegal gambling. The European Commission seems driven by the desire to create an EU Internal Market for gambling activities, forgetting the aforementioned principle as well as the fact that the CJEU recalled in 2009 (*Liga Portuguesa*) that the principle of mutual recognition (whereby a state needs to recognize the license issued by another State) is not applicable to the gambling sector. Stated simply, individual EU Member States are the best placed entities to regulate gambling efficiently.

Law enforcement and enhanced cooperation measures should accordingly be the first means possible to stop illegal gambling activities in compliance with the principle drawn by the Highest Court of the EU. At the same time the societal role of Lotteries needs to be recognized and consolidated into any EU framework. ♦