



# Developing the Online World: Where is Progress in Europe?

By Philippe Vlaemminck & Delia Orabona

The deadline for the submission to the EU Commission Green Paper consultation on online gambling expired in July. During the period of the consultation (March-July), the legal and political debate in the European Union has been progressing consistently. In fact, on different levels, the EU Commission, the European Parliament and the EESC (European Economic and Social Committee) have all been working on the direction of establishing an extensive dialogue for the EU regulatory framework on online gambling.

Currently, the Commission is continuing to organize workshops on efficient national enforcement measures and administrative cooperation, having as an objective the debate on how the Member State ensures its achievement of the public interest objectives behind its national gambling policy. The Commission is also following up on what the Council of the EU had already identified as a priority in its Conclusions of December 2010 on enforcement tools and cooperation between regulators and other authorities.

From its side, the European Parliament is expecting to vote upon a Report on online gambling in the upcoming October session.

During a hearing of IMCO (the Committee on the internal Market and Consumer Protection) on "On-line Gambling in the EU - New Rules of the Game?" which took place last June, MEP's discussed the Green Paper together with various legal experts, scientists, gambling addiction experts, stakeholders, and representatives of different associations. The EU Commission has been represented by Pamela Brumter Coret, the newly appointed Head of Unit of DG MARKT (European Commission) which has highlighted the priority of the Commission as being the understanding of the current regulatory framework on online gambling and the convergence in the discussion on the discretionary power of Member States which are all challenged, in different ways, by illegal operators coming largely from third countries.

In the autumn of 2011, the Commission will publish a Report to follow up on the consultation.

The intervention of MEP Christel Schaldemose – shadow rapporteur in IMCO– has focused on the importance of the subsidiarity principle and on the possibility to investigate whether further recommendations can be made to improve the protection of consumers and on also how enforcement can be enhanced through the improvement of the cooperation between the Member States.

The so called "Creutzmann draft Report", from the name of the MEP at IMCO- Committee on the Internal Market and Consumer Protection- rapporteur for the Green Paper on Online Gambling at the European Parliament, addresses important issues such as: the fragmentation of the internal market, the need for a larger cooperation between national regulatory bodies in developing common standards, taking joint actions against the illegal market, and the need for a strategy for ensuring the integrity of sport in sport betting.

Two different positions can be detected in the draft Report: on one hand,

Creutzmann recalls the implementation of the principles of the Court of Justice of the EU: the non application of the principle of mutual recognition in the gambling sector, the proportionality, the need for "enforced solutions" (see Council Conclusions), and the need for a common definition for gambling fraud.

On the other, he calls upon a "European framework" of rules which could apply to all Member States. In this way, he gives a compromised answer to opposite positions of the different stakeholders and governments. Furthermore, he highlights that in the absence of a specific European legislative act regulating Internet gambling, there is a need for "European minimum standards" to protect players and consumers and to prevent crime. Along the same lines, Creutzmann suggests the introduction of a "licensing model and common regulatory framework" laying down binding high-level minimum standards, a pan-European code of conduct for Internet gambling and a Directive on minimum standards. In the week of 24 October there will be the plenary vote for the adoption of the Report.

In the framework of the work of the Study Group on Online Gambling, the European Economic and Social Committee did organize for the 6th of September, a hearing on "On-line gambling - After the Green Paper, which way forward", and published a working document of the section for the Single Market, Production and Consumption on the Green Paper (Mallia Report) to discuss upon the key issues on online gambling: general objectives of the Green paper consultation, public interest objectives, establishment and licensing, sports and enforcement.

All these initiatives fall under the consultation initiated by the Commission. These initiatives all aim to gain more understanding about the shape of a sector which is in constant growth but which remains difficult to assess from an economic, social and legal perspective.

Legal certainty remains one of the main goals for the EU Institutions and for Member States. For a long time, the European legal framework on online gambling has been developed by the case law of the Court and by the EU secondary legislation. Today, the ball is in the hands of the Member States. The success of the Green Paper consultation and the way forward for a sustainable political solution will only arrive if the Member States will effectively contribute to the initiatives of the European Institutions, by giving comprehensive answers, and in this way preparing for further policy initiatives at the EU level. These will not automatically lead to a legislative proposal by the Commission and will not necessarily lead to any harmonization in the field of games of chance, but they will certainly contribute to achieving a higher level of awareness and legal certainty among operators and governments.

As the most important expert in EU law and gambling and due to his involvement in all cases at the Court of Justice of the EU on gambling (1994 until present), the IMCO committee of the European Parliament decided

to hear Philippe Vlaemminck on the case law of the CJEU. In September, the European Economic and Social Committee, another EU institution, is also hearing Philippe Vlaemminck on the same questions.

### Summary of the Presentation of Philippe Vlaemminck on the Caselaw of the Court of Justice of the European Union to the European Parliament

1. The principle of mutual recognition is not to be applied in the gambling sector. In the current status of EU law, the EU Member States are allowed to prohibit or restrict market access for foreign operators, who claim they can provide their games within the territory of the Member State based on the license they have obtained in their country of origin.

Therefore, a Member State can impose a national authorisation upon an operator who wants to provide his games within its territory, and can refuse or grant such an authorisation according to its own policy. In this light, advertising measures which promote unauthorised cross-border gambling, can also be prohibited.

2. The Member States are free to opt for a monopoly or a licensing system. The Member States have a very wide discretionary margin in that regard and can determine freely, in accordance with their own scale of values:

- the objectives of their restrictive gambling policy.
- what is required in order to ensure the level of consumer protection and preservation of public order
- whether to allow online gambling or not.
- which enforcement actions to take.
- to impose criminal (or other) sanctions on the unauthorised provision of games, or the advertising thereof.

Given the specific nature of gambling services, the Court believes a monopolistic approach is more appropriate than a competitive licensing system.

3. Online games require a strict regulation: The Court has acknowledged that online games entail a higher risk for crime and fraud and gambling addiction compared to traditional games. In this context, internet is explicitly considered to be a channel through which games of chance may be offered, and not a different type of game.

4. The consistency of a restrictive gambling policy: As a general requirement, the Member State needs to have a legislative framework suitable for ensuring that the monopolistic operator will be able to pursue in a consistent and systematic manner the public interest objectives invoked by the government. This framework should be based on particularly on a high level of consumer protection, if the Member State opts for a monopoly.

In order to channel the players towards his highly regulated and authorised offer of gambling services, the monopolistic operator needs to be able to represent a reliable and attractive alternative and can in that regard: Maintain a wide range of games; Advertise on a certain scale (in particular); Use new distribution techniques (internet).

Within a monopoly, advertising must remain measured and strictly limited to what is necessary to channel consumers towards authorized operators. Therefore, advertising cannot encourage consumers to gamble by stimulating their active participation. It is possible under EU law that different models are maintained for different types of games (lotteries, sport betting, casinos, slot machines, etc.) within a Member State. The fact that some types of games of chance are subject to a public monopoly whilst others are subject to a system of authorisations issued to private operators cannot in itself point to an inconsistency in a restrictive gambling policy.

A restrictive gambling policy in a Member State is however considered to be inconsistent when a monopoly is maintained for certain games (lotteries and sport betting), while for games with a higher potential risk of addiction the authorities develop or tolerate a policy of expanding supply.

5. The allocation of gambling licenses: When a Member State has opted for a sole operator providing (a) certain type(s) of games of chance, and invokes legitimate public interest objective(s) to that end, the obligation of transparency does not apply regarding the grant or renewal of such license. However, it must involve a public operator whose management is subject to direct state supervision or a private operator whose activities are subject to strict control by the public authorities.

In a multiple licensing/concession system, however, the obligation of transparency must be complied with. In such a system, the authorities must ensure a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedure to be reviewed. Moreover, licensing conditions need to be non-discriminatory and proportionate.

Restrictive conditions which may be justified. Operators may be required to adopt a particular legal form as a condition to participate. The obligations binding public limited companies, in particular, with regard to their international organisation, the keeping of their accounts, the scrutiny to which they may be subject and relations with third parties would justify such a requirement, having regard to the specific characteristics of the gaming sector and the dangers connected with it. The number of concessions may be limited (in the light of limiting gambling opportunities). Concession may be granted for a duration of up to 15 years (giving regard to the concessionaire's need to have a sufficient length of time to recoup investments required by setting up a gaming establishment.) ♦

**PHILIPPE VLAEMMINCK** is widely regarded as a leading player in the current debate on gaming and gambling in the EU, and has been involved in every gambling case before the CJEU and the EFTA court. He joined the ALTIUS partnership on 1st July 2011, where he heads the EU Regulatory and Trade Practice. (e-mail: philippe.vlaemminck@altius.com)

**DELIA ORABONA**, Senior associate at the ALTIUS EU Regulatory and Trade Practice, specializes in EU, Competition and Trade Law. Delia is a Member of the Italian Bar (Napoli) since 2004 and since 2011 of the European List of lawyers in Brussels. (e-mail: delia.orabona@altius.com)

**ALTIUS:** The independent law firm ALTIUS brings together the knowledge and experience of more than 60 lawyers, in practice areas including Corporate, M&A, Banking & Finance, Real Estate & Regulatory, Employment & Pensions, Commercial & Competition, EU Regulatory & Trade, ICT and Intellectual Property to deal in the most efficient way with the business and projects of its Belgian and international clients. ALTIUS not only offers creative tailor-made advice but also handles national and international transactions and high-level litigation. ALTIUS co-operates closely with the tax-law firm Tiberghien. More information is available at [www.altius.com](http://www.altius.com).

**REGARDING PHILIPPE VLAEMMINCK & HIS TEAM JOINING ALTIUS:** "I am pleased to join ALTIUS, an independent Belgian law firm with an excellent reputation, and a strong international experience in various legal areas, which are not only very complementary to my practice, but also will enable me to better serve clients. I look forward to co-operating with the various practice groups of ALTIUS and to bring on board my EU regulatory, trade and litigation experience." said Philippe Vlaemminck.

**CARINE VAN REGENMORTEL**, Managing Partner, adds: "We are delighted to welcome Philippe and his team to ALTIUS. Philippe's excellent reputation in the lotteries and gambling sector on a national, European and international level, combined with ALTIUS' well-known expertise in IP, IT, M&A and Competition law will allow us to approach this sector in an integrated manner."