

Malta's Position and General Comments on the Green Paper on online gambling in the internal market (SEC (2011) 321): Malta's Position and General Comments

Malta is pleased to submit its response to this important consultation process launched by the European Commission through the publication of the Green Paper on the future of on-line gambling in the Internal Market (Green Paper).

Malta believes that the on-line gaming sector and its development over recent years need to be thoroughly understood, both from a regulatory perspective and from a consumer protection perspective. The different national policy and regulatory approaches that have developed in this sector over the past few years, the absence of sector-specific legislation at an EU level, the numerous references for preliminary rulings, the pending infringement procedures against some Member States and certain Member States' failure to comply with the obligations under Directive 98/34/EC which lays down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services ("TRIS" notification procedure), have increased legal uncertainty in this sector.

Malta acknowledges that the Commission has a difficult task insofar as reconciling the varying national gaming policies and authorisation regimes with the cardinal principles enshrined in the Treaties. However, Malta believes the Green Paper and this consultation process provides an important opportunity for the Commission to obtain a better understanding of the sector.

Malta calls upon the Commission, as a follow-up to this consultation, to take initiatives to strengthen the functioning of the internal market in the area of on-line gaming.

The Green Paper gives a clear message that from an economic perspective, the on-line gaming sector has positioned itself as an important contributor to the European economy, where effective regulation has attracted the establishment of serious operators in one or more EU Member States. Nevertheless, the figures quoted in the Green Paper (page 3 last paragraph), and the assessment that only 15% of operators active in the Europe are actually legitimately licensed in one or more Member States is worrying.

Correctly, the Green Paper emphasises the importance of social values, the need for consumer protection and the need to ensure that integrity at various levels is upheld and strengthened. These considerations have, since 2004, formed the basis of Malta's regulatory approach in this sector; Malta's legislation is based on the cardinal principles of fairness for consumers; ensuring that the vulnerable and minors are not exploited; and that gaming is kept free from crime, fraud and money laundering. Malta believes that these policy objectives provide an area of convergence amongst European jurisdictions.

Malta has always maintained the position that in the absence of a specific Directive on on-line gaming, the Treaty provisions (namely free movement of services and freedom of establishment) must apply. Operators licensed in Malta legitimately expect that these fundamental freedoms are not obstructed by Treaty incompatible restrictions imposed by other Member States. Malta's main concern in the gaming sector is the fragmentation of the internal market brought about by the continued undermining of internal market rules. Maltese licensed

gaming operators presently face difficulties in offering cross-border services and this, in view of national gaming policies including the development of national authorisation / licensing systems in some Member States.

Over the past few years, Europe has seen a number of Member States introducing regulatory regimes for the on-line gaming industry which, by systematically requiring a national authorisation irrespective of whether a service provider is already authorised and regulated in another Member State, undermine one of the Treaty freedoms on the basis of 'claimed' but unsubstantiated public interest objectives. Malta refers the Commission to its many Detailed Opinions and Comments on draft Member State legislation as well as those submitted by the European Commission under the notification system established by Directive 98/34/EC ("TRIS" notification procedure). Malta is of the opinion that in order to make use of the limited grounds for derogation from the Treaty freedoms, Member States need to have real and actual justifiable reasons to conduct the necessary assessments; the CJEU, in its preliminary rulings, has required the same from Member States in order for them to prove that policies consistently and systematically address the objectives pursued and that any restrictive measures are indeed necessary, suitable and proportionate.¹

Malta maintains that the requirement of a "national authorisation" by many EU jurisdictions is leading to a fragmentation of the internal market in total disregard of Treaty principles.

Mutual Recognition of Licences issued by other Member States and Non-duplication of requirements and controls

The principle of mutual recognition of licences has been at the centre of debate in recent years. In line with the rulings of the CJEU, Malta maintains that even if there is no sector specific internal market legislation concerning on-line gaming, the Treaty provisions on the freedom to provide services (Article 56 TFEU) apply in the field of online gaming; the CJEU has confirmed on numerous occasions that gaming is an economic activity as defined by Article 57 TFEU and falls within the notion of a "service" under Article 56 TFEU. Moreover, on-line gaming is by its very nature accessible across borders and, therefore, the internal market dimension cannot be refuted or indeed ignored at a European level. Over the years, and in the absence of a specific Directive regulating the industry, CJEU jurisprudence has addressed the notion of mutual recognition of licences issued by Member States other than the one where the services are consumed.

The CJEU has provided some clarity on the application of the mutual recognition principle in the *Santa Casa v Bwin* case (C-42/07), whereby contrary to what was claimed by some, the CJEU did not rule out mutual recognition in this sector, but remarked that:

A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member

¹ For example in the recent *Zeturf* preliminary ruling of 30 June 2011 (C-212/08) the CJEU concluded that: "*In order to be consistent with the objectives of combating criminality and reducing gambling opportunities national legislation establishing a gambling monopoly must be based on a finding that criminal and fraudulent activities linked to gaming and gambling addiction are a problem in the territory of the member State concerned which the expansion of authorised and regulated activities would be capable of solving*"

State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.”

Malta contends that this position taken by the CJEU is qualified and it is only applicable if there are real “difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators”.

In this regard, Malta highlights that cooperation between regulatory authorities for the purposes of “sharing of information on operators” (thereby assisting the assessment of the qualities and integrity of operators) as well as for “reducing administrative burdens”, has been politically agreed to in the Competitiveness Council Conclusions on the framework for gambling and betting in the EU Member States, of December 2010. Malta considers that regulatory cooperation could help facilitate the application of this principle which is necessary to ensure that operators licensed in well regulated jurisdictions such as Malta are allowed to provide cross-border services in other Member States without having to obtain prior authorisation, and this particularly where the two countries pursue the same objectives and where the level of measures applied to attain these objectives are essentially the same or similar. The recent updates by Member States of their regulatory regimes in order to regulate online gambling demonstrate that Member States have the same objectives. Furthermore, the measures and conditions being imposed on operators by the various jurisdictions to achieve these objectives are strikingly similar as well.

Malta notes a consistent trend in national gaming laws towards the total discounting of establishment requirements and controls, licensing systems and regulatory regimes already imposed on and fulfilled by duly licensed operators in other EU Member States. In this regard, Malta highlights that recent important case law concerning the application of Article 56 TFEU delivered by the Grand Chamber of the Court of Justice on 25 January 2011 in the *Michael Neukirchinger* preliminary ruling², continues to re-affirm that (para. 42) “[...] for a Member State to require a person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those applying to the licence already issued to him in another Member State, is not [...] proportionate to the legitimate objectives pursued”

The principle of non-duplication is a principle, which needs to be reinforced. Strangely, this principle is not mentioned in the Green Paper although the Commission calls for the application of this principle in on-line gaming in the Detailed Opinions it delivers on draft laws notified by Member States through the TRIS notification system.

Malta considers that the application of this principle should be facilitated through the establishment of cross-border administrative cooperation. Malta considers that regulatory cooperation in this sector is in line with the spirit of the CJEU rulings whereby, in the absence

² Case C-382/08, *Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen (Austria)*, judgment of 25 January 2011, ECR 2011 Page 00000.

of harmonisation, regulatory cooperation would indeed help determine whether the requirements imposed by one regulatory regime are already fulfilled in another Member State.

In view of the above Malta invites the Commission to take the initiative to propose EU-wide action to establish the necessary cooperation mechanisms in order to put into effect and facilitate the application of the principle of non-duplication. In order to effectively apply this principle with least administrative burdens for Member States, Malta proposes that either:

- (1) specific regulatory cooperation is carried out through a proper structure to exchange information with the aim of helping Member States become familiar with each other's legislation regarding the issuing of licences and the controls which are thereby applied. This would also be a first step towards building mutual trust. Malta considers the Internal Market Information System could be used as a tool to assist and enable this form of regulatory cooperation, which aims at promoting and ensuring the functioning of the internal market; or
- (2) the Commission could carry out this role itself and give genuine effect to the principle of non-duplication by regularly circulating updated information about Member States' requirements, conditions and controls. Indeed, the Commission is already in possession of this information as draft national legislation has to be notified to the Commission through the TRIS notification system.

Harmonisation

Malta submits that targeted harmonisation is needed to cover particular areas. In this regard, Malta believes that EU action is necessary in the following areas:

- Consumer protection (for players, minors, vulnerable, problem gamblers);
- Prevention of money laundering (by broadening the scope of the Anti-Money Laundering Directive), anti -fraud measures and prevention of other crime.
- Addressing sports integrity;
- On-line payments;
- Regulatory requirements and controls including licensing conditions;
- Server hosting requirements.

Consumer Protection – A 'Must' for the Benefit of All

Consumer protection exists in multiple forms including ensuring that the on-line gambling service they receive is based on the offering of a service that is fair, transparent and integral; ensuring that the vulnerable and minors are not exploited; and ensuring that consumers rights are fully respected in the service transaction received and that consumers have the adequate means of redress.

These are without any doubt cardinal and imperative objectives that are at heart of all legislation and regulation in this field. Malta, believes that even in a situation whereby there is no common approach in terms of the model as to how on-line gambling is to be regulated across the EU, the protection of the EU consumer should be the basis for unified action across the EU. This should be done irrespective of the authorisation models adopted across Member States. Malta believes,

and will support, the establishment of minimum standards for consumer protection purposes that would apply across Member States, such as:

- the creation of an EU/ EEA wide player self-exclusion system;
- establishing a ‘Gambling Advertising Code’;
- the establishment of a minimum standard on the player verification process;
- the establishment of a minimum standard on ‘reality checks’ which any online gaming operator, irrespective of where the operator is licensed, needs to implement within its system to provide players with financial and time checks so as to ensure that online players do not lose the notion of time and spend.

Malta will support such minimum standards and believes that any transaction that a European consumer is engaged in, merits effective and universal protection irrespective of his or the service provider’s residence.

As determined in numerous cases determined by the European Court of Human Rights, the consumer has a right to access services and has the right to enjoy freedom of choice within the EU. Malta, therefore, believes that since consumers have these rights which are applicable anywhere in the EU, then operators licensed anywhere in the EU need to have mandated requirements that correspond to the right of choice and access with the right of being protected.

Enforcement

Malta does not agree with the introduction of invasive enforcement mechanisms such as the blocking mechanisms mentioned in the Green Paper especially in relation to EEA licensed online gaming service providers offering services on the basis of the EU Treaties since the appropriateness of such measures, and their proportionality is doubtful at best.

In addition Malta submits that such measures have proven ineffective from a technical perspective as they are easily circumvented. Furthermore, the burden imposed on the intermediaries is substantial. Malta submits that the introduction of such enforcement measures needs to be analysed in the light of the European Convention of Human Rights.

Defining and Determining the Grey Market

The Green Paper attempts to give its interpretation of the various regulatory models in place within the EU. In its attempt to try to define the heterogeneous models in place across the EU, the Green Paper classifies the market under three main categories:

- The “illegal or black market” which is defined in the Green Paper as “markets on which unlicensed operators seek to provide on-line gambling services (pg 3) and as “unlicensed clandestine betting and gaming including from third countries” (pg 6). Therefore operators classified as forming part of the black market are those operators who do not hold any authorisation from any Member State;
- The ‘so called’ grey market, which the Green Paper describes as being markets consisting of operators duly licensed in one or more member states providing online gambling services in

other member states without obtaining authorisation to do so under the corresponding national legislation;

- The third category, which is not defined in the Green Paper, which is defined by exclusion, that is the market, which is neither black nor 'so called' grey.

Whereas the classification of the black market is clear, the Green Paper does not enter into detail on the licit market, other than alluding to the 'so called' grey online market. Such a lack of clarity continues to fuel, at least during this consultation process, more legal uncertainty. Malta cannot accept that the definition of "grey market" encompasses Malta's regulatory framework because this 'so called' grey market was endorsed and promoted by the Commission. Malta recalls that in November 2007, the Commission had requested Malta to bring its primary gaming legislation (Lotteries and other Games Act, Cap. 438) in line with the freedom to provide services to include, in its legislation, a provision concerning the acceptance of licensed operators from the EEA to offer their services in Malta; a request Malta fulfilled without hesitation. In view of this, Malta maintains that its regulatory model cannot suddenly be defined as "grey". Malta notes that such a definition of the 'so called' grey market also seems to encompass the regulatory models of the UK, Gibraltar and France, apart from Malta. Although France adopts the requirement of the need to obtain a national authorisation in order to target the French market, French licensed operators are allowed to freely accept non-French citizens and thus operate anywhere in the EEA with their French licence³.

Furthermore, Malta notes that, with respect to the definition of the 'so called Grey Market', the Green Paper includes a specific parallelism to the notion of 'parallel importation of goods'⁴. By analogy to this market of parallel importation of goods, Malta submits that parallel importation of goods is *de facto* legal, whereby the receiving Member State cannot declare such an importation as an illegal activity in its territory, and thus the internal market rules apply. Thus, by analogy, if a Member State has a system of 'National Authorisations', it cannot declare the parallel import to be illegal.

Malta invites the European Commission to acknowledge in an unequivocal way which model is acceptable in terms of the functioning of the EU Treaties and Internal Market rules.

Malta submits that it is not the regulatory regime of the Member State in which the operators offering their services to citizens in other Member State/s are licensed, that should be put into question. On the contrary, it is the impediments and restrictions on licensed operators placed by

³ Source: http://www.arjel.fr/IMG/pdf/FAQ_PRO_20100512.pdf (Frequently Asked Questions page 4 of 95) Question: **Des joueurs « non français » peuvent-ils s'inscrire sur le site de l'opérateur et jouer contre les joueurs français. Si oui, doit-on tracer l'ensemble des événements liés à ces joueurs dans le coffre-fort ?** **ARJEL:** *Toute personne est autorisée à jouer sur un site accessible depuis le territoire français, à la condition que celui-ci soit exploité par un opérateur agréé par l'ARJEL et ce, peu important l'Etat dont elle est ressortissante ou celui où elle a fixé sa résidence. Toute offre de jeux ou de paris en ligne d'un opérateur agréé doit être proposée conformément à toutes les exigences du droit français, exigences que l'opérateur s'oblige à respecter lors du dépôt de son dossier de demande d'agrément.*

⁴ Source: Green Paper on 'Online Gambling in the Internal Market' page 3, footnote 3: 'The notion of "grey" is often used to describe a factual or legal situation in the context of EU law (regarding for instance, i.e., the parallel importation of goods)'

the Member States in which such operators are offering their services that is creating uncertainty and “greyness” and that need to be put into question. In view of this, Malta considers that the follow-up to the Green Paper needs to address these restrictions placed by Member States on EEA duly licensed operators; the Commission’s own comments and detailed opinions issued against certain Member States’ notified legislation through the “TRIS” notification system support this position.