WRITTEN SUBMISSION TO THE GREEN PAPER ON ONLINE GAMBLING IN THE INTERNAL MARKET

[COM (2011) 128 Final]

Introduction. The Stanley Group and its interest. Executive Summary

1. By the Green Paper of March 2011, the European Commission launched a Public Consultation on on-line gambling in the internal market. The political purpose that transpires from the Green Paper is the possible introduction, by secondary legislation or other action by the Union, of measures which one has difficulty in perceiving aimed at establishing an internal market for on-line gaming services or improving its functioning. These measures may oblige, empower or encourage the Member States to introduce forms of mandatory redistribution of gaming revenue to fund meritorious causes and goals in the general interest, and/or forms of mandatory compensation to sports federations and events organizers where the outcome of the events organised by them is an object of betting. In addition, a broad array of possible measures of control and enforcement is envisaged, aimed at restricting the offer of cross-border gaming services to the citizens of the Union, not only by unlicensed operators or operators licensed in third countries, but likewise by operators licensed in a Member State other than that where the service is acquired.

2. The Stanleybet group of companies, the top entity of which is Stanleybet Holdings Limited, [**"Stanley Group"**, **"Stanley"**] has been active since the late Nineties in numerous Member States and other European jurisdictions in the gaming and betting sector. Amongst its subsidiaries is Stanley International Betting Limited which is the holder of a betting operators licence issued by the UK Gambling Commission. Its subsidiary, Stanleybet Malta Limited, holds a betting licence issued by the Maltese Lotteries and Gaming Authority. Other subsidiaries and affiliates hold betting licenses issued in Austria, Belgium, Poland, Romania and Croatia. In other Member States, such as Italy, Germany and Cyprus, the Stanley Group operates on a cross-border basis, relying on primary EU law and the case law of the Court of Justice. In all jurisdictions where it is active, the Stanley Group operates in accordance with the highest standards of responsibility, self-governance and ethics and is

subject to the supervision and control of the Authorities of the Member States having issued the licence or licences concerned.

3. The Stanley Group commenced cross-border operations in Continental Europe in 1998 in Italy, and thereafter gradually expanded to the other jurisdictions in which it is present. Number of projects are under way to start operations in other EU and non-EU jurisdictions. In 2010, the Stanley Group realized a combined turnover of GBP 475 million, gave employment to more than 2,600 employees, possessed a network of over 2,000 betting shops, and concluded on average more than 1 million betting contracts per week.

4. The Stanley Group has been engaged for more than a decade in legal and judicial campaigns in numerous Member States, and Italy in particular, to seek recognition of its fundamental freedoms of establishment [Art.s 49 ff TFEU] and to render cross-border services [Art.s 56 ff TFEU] in the betting and gaming sector. These actions have resulted in three landmark rulings of the Court of Justice in the ***Gambelli*** [C-243/01], ***Placanica et al.*** [C-338/04 + C-359/04 + C-360/04] and ***Commission v Italy*** [C-260/04] cases, all having arisen from principal cases or underlying domestic situations where Stanley was the substantive party, and where the Italian restrictive measures at stake were invariably held to be not compliant with EU primary law. The Stanley Group is the substantive party of other principal cases in the gaming and betting sector which produced fresh references to the Court of Justice in the process of being adjudged [Cases C-72/10, *Costa*; C-77/10, *Cifone*, and numerous other from Italy; case C-186/11 from Greece].

5. The Stanley Group is concerned that the possible introduction of the measures which are foreshadowed by the Green Paper should result in fresh hindrances to the freedoms of establishment and to provide cross-border on-line gaming and betting services in the EU, (and possibly off-line services too) without the stated legislative objective of channeling demand into safe and controllable circuits being attained. The Stanley Group has a number of legal reservations with respect to the possible introduction of such measures.

6. The Stanley Group is cognizant that the development of the gaming sector must comply with certain imperative requirements in the public interest which fall within the remit of the Member States, such as the protection of consumers and minors, the prevention of fraud and

criminal infiltration and the protection of public order, provided, however, that any restrictions put in place to pursue such goals must be necessary, proportional, coherent and non-discriminatory.

7. Stanley is confident that the gradual opening of national markets that has been brought about by the case law of the Court of Justice and the political action of the European Commission, will in the medium term result in lighter entry barriers and a more efficient supply of cross-border gaming and betting services, ultimately, to the advantage of European consumers. Conversely, in those Member States where regulatory barriers remain pervasive or are raised, the functioning of the market place is bound to be inefficient, and the consumer will pay the price for such lack of efficiency. As discussed in the following paragraphs, it has been shown that, in the gaming sector, over-regulation and over-taxation tend to defeat the legislative policies that are supposed to underpin them.

8. Stanley, therefore, has a direct and concrete interest in the Public Consultation and its outcome.

9. By these Observations, Stanley will provide answers to those of the questions and issues raised by the Green Paper which are closer to its experience and role in the industry and which it considers it can meaningfully contribute to, in particular, as concerns the need and legal bases for introducing secondary legislation on on-line gaming and betting or their absence, and the appropriate form and intensity of any such possible secondary legislation or other measures.

10. In brief:

- Stanley submits that a <u>high degree of legal uncertainty prevail</u> with respect to the breadth and content of the freedoms of establishment and to render services of gaming operators established in a Member State other than that where the service is acquired, in particular, as concerns cross-border (as opposed to locally licensed) operators;

- Stanley would welcome a Commission Notice restating the gaming case law of the Court of Justice (which is abundant and highly instructive) on which the national courts and authorities could rely in dealing with licensing issues and cross-border cases in a uniform and consistent fashion. Stanley submits that primary EU law and the jurisprudence of the Court of Justice would be more than sufficient to that end;

- Stanley furthermore submits that the cause of legal certainty would be well served, if the Commission would re-activate the pending infringement proceedings against a number of Member States with respect to national legislation and measures in the gaming sector found *prima facie* not compliant with EU law and the case law of the Court of Justice, which have seemingly been left in abeyance. Stanley submits that there is bound to be an intrinsic tension between the Member States' duty to comply with EU law in the gaming sector, in particular, as concerns the freedom to render cross-border services, and their wish or need to maintain and increase tax receipts from gaming through tight national licensing systems. Stanley submits that it is up to the Commission, as the guardian of the Treaties, to exercise political action and effectively pursue those infringement cases with a view to that intrinsic tension being allayed, and to prevent the confidence of citizens and undertakings in the European construction and the internal market from being shaken;

- Stanley furthermore submits that the measures of enhanced enforcement aimed at "grey" cross-border gaming providers that are apparently advocated by the Green Paper, are not measures aimed at establishing or improving the functioning of the internal market for on-line gaming services, but rather measures to restrict or impede the functioning of that market, largely comprising police and public order measures falling within the sole remit of the Member States, and which the Member States ought to be free to introduce or not in accordance with their chosen scale of values and level of protection of citizens;

- Even considering those possible measures as internal market measures, Stanley furthermore submits that there is no legal basis to be found in the Treaties for adoption by the Union of possible secondary legislation to introduce them;

- Stanley furthermore submits that there is no legal basis to be found in the Treaties for the adoption by the Union of possible secondary legislation either in the matter of the rechanneling of gaming revenue towards the funding of meritorious causes or goals in the general interest, or to introduce a right of sports federations and events organisers to be remunerated by the betting operators for the use of the outcomes of "their" events as objects of betting. In any event, Stanley recalls that legislation on either rechannelling of gaming revenue (otherwise than by taxation through the general budget) or remuneration of events organisers, capable of being harmonized or approximated by way of internal market measures, is not present in all member states. Stanley submits that the Union has no competence to "invent" new taxes or levies, at least, outside the scope of an unambiguous substantive competence already conferred on it by the Treaties;

- Stanley furthermore submits that, even if legal bases could be found in the Treaties for the possible adoption of secondary legislation on the matters foreshadowed by the Green Paper, Union action of that kind would likely fall foul of the general principles of subsidiarity and proportionality;

- As a single exception, Stanley finally submits that secondary legislation could possibly be introduced resting on an internal market legal basis, to harmonise or approximate certain objective licensing requisites of gaming operators already established in one Member State and wishing to obtain a license in another or other Member States, in order to avoid the repetition of licensing accomplishments and costs. In that way, Stanley submits that consumers would be given a greater choice of suppliers and the cost and inefficiencies of multiple national licensing would be dispensed with or reduced.

* * *

Questions

1. If any, are you aware of any available data or studies on the EU on-line gambling market that would assist policy-making at EU and national level? If yes, do the data or study include licensed non-EU operators in the EU market?

2. Are you aware of any available data or studies relating to the nature and size of the black market for on-line gambling services? (Unlicensed operators)

3. What, if any, is your experience of EU-based on-line gambling operators licensed in one or more Member State and providing and promoting their services in other EU Member States? What are your views on their impact on the corresponding markets and their consumers?

Market structure and market trends. Prosperetti Study and Freedata Study

11. Stanley has instructed a leading expert of regulation economics, Professor Luigi Prosperetti, who holds the Chair of Economic Policy at Milan State University, to carry out an independent analysis of the key-features of on-line gaming in Europe, in the very perspective of the Green Paper and the possible actions foreshadowed therein. By occasionally referring to the Prosperetti Study to the Public Consultation, Stanley intends to be responsive to the purpose of the Green Paper, of securing *"... a full picture of the existing situation ..."*, in particular *"... in view of self-evident cross-border impact of ... on-line gambling services growth ..."*, and determining if the diverse regulatory models of the Member States which are based on different public policy objectives *"... can continue to co-exist and whether specific action may be needed ... for that purpose ..."*. The Prosperetti Study utilizes certain quantitative and statistical data developed by Freedata, a leading statistical research outfit, under the directions of Professor Valeria Severini. The Freedata work surveys the demographic and behavioral features of consumers of on-line gaming services in eight (8) Member States (Austria, Denmark, France, Germany, Greece, Italy, Poland and Spain) and will be independently submitted by Professor Prosperetti as his contribution to this Public Consultation.

On-line and off-line market growth

12. The Prosperetti Study estimates that the on-line gaming market for EU 27 reached in 2010 a value of around € 8.1 bn measured in Gross Gambling Yield (GGY) [i.e., stakes less payout]. The largest national market was the UK (23.7% market share), followed by Italy (14.7%), France (11.4%), Germany (9.8%) and Spain (6.1%). The on-line market, though, remains far less significant than the off-line market, whose value in 2010 could be estimated in around € 72.9 bn. However, from 2004 to 2010 demand for on-line gaming services grew at an average yearly rate of 34%, hence, much more steeply than demand for off-line games, which grew by 4.2% in the same period. Until 2015, the on-line segment is expected to continue to grow at a rate of around 10%, whilst off-line ought to grow at a much slower pace (1.5%). The Prosperetti Study submits that the rapid and continuing growth of on-line gaming is a consequence of the increasing penetration of broadband at all levels of society in the Union, and the ever greater ease with which European citizens utilize the Internet for a vast variety of needs and services, including financial and payment transactions.

Does market reality beat over-regulation?

13. Taking the lead from this scenario, Professor Prosperetti submits that the restrictive policies aimed at the on-line gaming sector, which have been adopted and are made harsher and harsher by certain Member States, miss the objective of streamlining and containing demand, in view of the extreme ease with which European citizens acquire them notwithstanding, and reacting to, prohibitions, enforcement and sanctions, if there are economic reasons to do so. One ought, therefore, to wonder if an excess of regulation does not determine results opposite to those supposed to justify it.

Limited dimension of excessive gaming spend and addiction phenomena

14. With respect to addiction, the Prosperetti Study reaches conclusions that ought to allay the concerns manifested in various instances by the Court of Justice. For instance, in the recent *Zeturf* ruling [30.06.2011, Case C-212/08], the Court expresses the preoccupation that *"... the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons*

and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto …" [para. 80; in the same sense: 08.09.2010, Case C-46/08, Carmen Media Group, para. 103; 08.09.2009, Case C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International, para. 70]. The Court's concern is shared by the Commission in the Green Paper, where the view is expressed that *"… gambling services offered via the internet have several specific characteristics which enable the Member States to adopt measures restricting or otherwise regulating the provision of such services, in order to combat gambling addiction …"*.

15. Conversely, the consumer behaviour surveyed by the Freedata Study with respect to three highly significant on-line product "families" - sports bets, casino games and poker - points at a rather contained monthly per on-line player average spend: € 44 for sports bets, € 115 for poker and € 125 for casino games (not counting re-staked wins). These figures seem to suggest a limited commitment of on-line players, and only a small percentage of them are conceivably exposed to addiction phenomena. Professor Prosperetti estimates that, for more than 95% of players, on-line gaming constitutes an altogether bland form of entertainment, on which modest sums of money are staked.

16. Stanley disposes of no scientific evidence that on-line gaming is positively more addiction-conducive than other forms of gaming. However, Stanley would refer to the case law of the Court of Justice, that on-line gaming is more likely to be conducive to "problem" behaviour than off-line gaming, because of the greater ease with which gaming may be engaged in by the player, in the absence of any social control as concerns both frequency and size of sums played or staked.

Elasticity and substitutability

17. Another significant finding of the Prosperetti Study is the high degree of substitutability that prevails between the services of licensed (or "white") operators, and those of the operators

who - according to the Green Paper's terminology - are placed in the “grey” or “black” segments. Namely, it has been found that if the “white” operators of the Member State where the on-line service is acquired do not competitively satisfy consumer demand (for instance, because their product range is less broad or less attractive, or controls are perceived as being too pervasive, or excessive taxation or payout caps result in poorer odds or produce lower wins), then consumers very easily switch to the offer of “grey” and even “black” operators.

18. In particular, “grey” on-line operators licensed in a Member State other than that where the service is acquired are fundamentally perceived as being as trustworthy as those licensed in the consumer's own Member State. Even “black” operators licensed in third countries are considered acceptable, if there are good enough reasons to choose them, notwithstanding only “white” and “grey” operators established and licensed in the Union offering full security in terms of consumer protection, money-laundering, etc. It follows that the effectiveness of regulation in the on-line market segment is intrinsically low, and is largely bound to remain such, at least in a democratic society where the use of enforcement to underpin economic and public finance policies cannot trespass on the fundamental freedoms of citizens.

Fiscal policies contribute to defeat regulation

19. The Prosperetti Study furthermore shows that national policies aimed at securing ever greater tax receipts from gaming, have produced distorted solutions, which are doomed to fail. Indeed, the concern of Member States not to lose those tax receipts (and rather increase them) has resulted for on-line and off-line in exclusive concessions and national monopolies, presenting protectionist and exclusionary features. The fundamentals of public finance, though, teach that a good or service the demand for which is highly elastic cannot be efficiently over-taxed (or over-regulated), if the economic agent who ultimately bears the burden of the tax (or is subject to the regulation) is able to transfer his demand to a good or service which is less taxed (or less pervasively regulated). Professor Prosperetti submits that this is precisely the case of on-line gaming, where “grey” and even “black” operators are easily accessible alongside “white” operators, offer services of acceptable quality and security, and consumers are ordinarily willing to acquire them.

20. All in all, the conclusion that is conveyed by the Prosperetti Study, is that any regulation of on-line gaming (including by fiscal measures reflecting on the cost of the service) should be quantitatively contained, selective, proportionate and truly aimed at objectives of general interest capable of being easily perceived and shared. If these conditions are not met, there is no way in a democratic society consumers could be stopped from using the Internet and turn to the "grey" (and even "black") supply.

Question

4. What, if any, is your experience of licensed non-EU on-line gambling operators providing and promoting their services in EU Member States? What are your views on their impact on the EU market and on consumers?

21. While Stanley offers its gaming services via a terrestrial (offline) network of points of sale and therefore does not operate online, we are not aware of any non-EU gambling operator providing and promoting services **on an offline basis** to any EU jurisdiction with a national license by its authorities

Question

5. If any, which are the legal and/or practical problems that arise, in your view, from the jurisprudence of national courts and the CJEU in the field of online gambling? In particular, are there problems of legal certainty on your national and/or the EU market for such services?

22. Legal certainty is a fundamental, unsolved issue. In its Reply to this Question, Stanley will submit observations arising from its specific experience of the off-line market in certain Member States, which Stanley believes remain valid also with respect to the on-line segment.

Italy

23. As previously recalled, Stanley commenced offering cross-border betting services in Continental Europe in Italy in 1999. The case of Italy, which is now praised for its controlled liberalization of the gaming sector, is a perfect example instead of how a Member State can for years successfully pursue a policy of protection of the national industry and domestic fiscal goals, at most accepting a handful of second tier Community operators willing to establish themselves in the country entirely obeying the commercial rules of the domestic regulator, and at the same time exclude cross-border supply altogether on pain of criminal and other sanctions.

24. The Stanley Group has been for more than a decade involved in literally hundreds of cases of criminal and administrative litigation in Italy in its attempts to gain access to the market by offering cross-border betting services there from the United Kingdom, and thereafter Malta, through a network of local intermediaries [commonly called Data Transmission Centres].

25. It is against this background that the *Gambelli* [Case C-243/01] and *Placanica et al.* [Cases C-338/04 + C-359/04 + C-360/04] rulings should be placed into context. In these rulings, the Court

of Justice found that the Italian system was not compliant with primary EU law on manifold counts, chiefly because it foresaw the need for a police licence which could only be obtained by the holders of a State concession awarded by public tenders dating back to 1999. The Community operators whose shares were quoted on regulated markets were, though, unlawfully disqualified from participating in those tenders and, not being concession-holders, remained thereafter excluded from the system and prevented from establishing themselves in the country. They, therefore, chose to operate on cross-border basis relying on directly applicable primary EU law.

26. The "Bersani" Decree of 2006, by which a large number of new gaming concessions was put to tender in Italy, did not remedy the old breaches of Community law, and rather reiterated and crystallized them to the prejudice of the same cross-border operators and their intermediaries, and Stanley in particular. This is precisely the object of the *Costa* [C-72/10] and *Cifone* [C-77/10] references, which are in the process of being adjudged by the Court of Justice [Orders of reference of the Court of Cassation of Italy of 25.01.2010].

27. Whilst a handful of cases from Italy was adjudged by the Court of Justice, the vast majority of those involving Stanley and its intermediaries has been ongoing for more than a decade through numerous histories of criminal prosecution and administrative enforcement, as a rule resulting in the shutting down of the intermediary's premises, but frequently followed by judicial measures reopening them and disapplying domestic provisions contrary to EU law and the jurisprudence of the Court of Justice.

28. The legal uncertainly that has been surrounding in Italy the right of Stanley and its intermediaries to offer cross-border off-line sports betting services is extreme and continues. It is witnessed by the fact that as many as 21 references are pending from the Italian Courts to the Court of Justice, to adjudge the compliance with EU law of the prevailing - that is, post-*Gambelli* and post-*Placanica* - Italian regulatory framework for sports betting. Basic particulars of such pending references are supplied in the following Table One:

TABLE ONE

no.	Referring jurisdiction	Reference order and docket no.	Date of reference order	Case no. before the CJEU
1	Corte di Cassazione	ordinanza n. 1705/09	10.11.2009	C-72/10
2	Corte di Cassazione	ordinanza n. 1706/09	10.11.2009	C-77/10
3	Tribunale di Verbania	ordinanza n. 4/10 R.G.T.L.	13.05.2010	C-279/10
4	GIP Roma	ordinanza	14.05.2010	
5	Tribunale di Prato	ordinanza Proc. N. 18/10 R.G.T.L.	03.07.2010	C-413/10
6	GIP Roma	ordinanza, Proc. N. 20828/09 R.G. GIP	23.03.2010	C-255/10
7	Tribunale di S. Maria Capua Vetere	ordinanza N. 12845/10 R.G.N.R.	23.09.2010	C-510/10
8	TAR Lazio	ordinanza n. 504/10	11.03.2010	C-170/10
9	TAR Lazio	ordinanza n. 505/10	11.03.2010	C-176/10
10	TAR Lazio	ordinanza n. 506/10	11.03.2010	C-175/10
11	TAR Lazio	ordinanza n. 507/10	11.03.2010	C-167/10
12	TAR Lazio	ordinanza n. 508/10	11.03.2010	C-164/10
13	TAR Lazio	ordinanza n. 509/10	11.03.2010	C-173/10
14	TAR Lazio	ordinanza n. 510/10	11.03.2010	C-172/10
15	TAR Lazio	ordinanza n. 511/10	11.03.2010	C-174/10
16	TAR Lazio	ordinanza n. 512/10	11.03.2010	C-168/10
17	TAR Lazio	ordinanza n. 513/10	11.03.2010	C-165/10
18	TAR Lazio	ordinanza n. 514/10	11.03.2010	C-169/10
19	TAR Lazio	ordinanza n. 515/10	11.03.2010	C-171/10
20	TAR Lazio	ordinanza n. 516/10	11.03.2010	C-166/10
21	Consiglio di Giustizia Amministrativa per la Regione Siciliana	ordinanza n. 127/11	08.02.2011	C-107/10

29. Without paying much heed to such a blatant uncertainty of the law, the Italian Authorities have in March 2011 launched a new call for tenders to award 200 new on-line gaming and betting concessions [Terms of tender published by the *Amministrazione Autonoma dei Monopoli di Stato* - [**"AAMS"**] on the Official Journal of Italy, GURI no. 133 of 18.03.2011]. This again raises grave concerns of compliance with EU law, entirely analogous to those of the 2006 Bersani tenders, which constitute the object of the *Costa* and *Cifone* references [and all other references enumerated in Table One]. Stanley has challenged in the Italian Administrative Courts the new 2011 on-line tender [Petition to the Latium Regional Administrative Court of 18.04.2011, Docket no. NRG 3480/2011].

Greece

30. Exclusionary and discriminatory provisions against the cross-border gaming and betting industry are in place and continue in other member states. Another exemplary case is Greece, where Stanley is, again, at the forefront of litigation.

31. A principal case pending before the Greek Council of State has resulted in a reference to the Court of Justice, Case C-186/11 [*Stanleybet International Ltd., William Hill Organization Ltd. and William Hill Plc/Ypourgos Oikonomias kai Oikonomikon e Ypourgos Politismou*], later joined to Case C-209/11 [*Sportingbet PLC/Ypourgos Politismou, Ypourgos Oikonomias kai Oikonomikon*] [Orders of Reference of 05/14/20.05.2009 published in 2010]. At stake is the deemed rejection by the Greek Authorities of applications for a national betting licence (in the case of Stanley, dating back to 2004). The deemed rejection was challenged before the Council of State which, sitting in Plenary Session, decided to refer to the Court of Justice wthe question of the overall compliance with EU law of the Greek sectorial framework.

32. This is the first time the Court of Justice concerns itself with the Greek system. Until presently, the Greek gaming market has been entirely closed to Community operators, whether seeking to exercise the freedom of establishment or to render cross-border services. All attempts to enter the market place have been countered by harsh enforcement and police action by the Greek Authorities, which, in the case of certain Stanley intermediaries, went as far as depriving them of their personal freedom. This even led to a petition filed with the European Parliament in 2009 [Petition no. 142/09].

33. The extraordinary feature of the Greek system is that OPAP SA, a company quoted on the Athens Stock Exchange in which the Greek State holds a substantial stake, is attributed special and exclusive rights according to a monopoly model, to organise, exercise and administer all segments of gaming and betting in Greece. Through a wholly owned subsidiary, OPAP furthermore conducts betting and gaming operations in Cyprus, in a highly questionable legal environment of unique privilege. OPAP is a commercial company that pursues profit and the creation of value for its shareholders through aggressive marketing, massive advertising and a nationwide retail network. OPAP boasts the highest market capitalization of all Greek quoted companies. One therefore, fails to see how OPAP could be said to pursue goals in the general interest or for the common good, or Greece to pursue policies of reduction of gaming opportunities for its citizens, that might in the abstract justify its monopoly and the absolute exclusion of Community operators from the Greek market place.

34. Stanley submits that the Greek system is in reality, devised to protect tax revenue and place OPAP in safe harbour from inbound competition from other Member States, whose operators (and their intermediaries) are prohibited on pain of heavy criminal sanctions from carrying out any activity on Greek territory, in particular, by offering there gaming and betting services on cross-border basis, be they off-line or on-line.

35. As the Greek Council of State notes in its reference, the choice of a monopoly model is nominally justified by the Authorities with the alleged need to finance in that way sports, benevolent and other activities in the general interest. However, the Council of State goes on to say that, whilst the circumstance that gaming may be the source of funds destined to deserving purposes is not irrelevant, according to the settled case law of the Court of Justice it cannot in itself amount to grounds for restrictions to the fundamental freedoms of establishment and rendering services, and rather constitutes an ancillary favorable feature of the measures concerned.

36. Significantly, the Council of State doubts that the true purpose of the Greek monopoly is that adduced by the Authorities, to combat fraud and criminal infiltration by exercising a strict control over the sector, and suspects that it pursues fiscal goals instead and therefore

does not fulfill the proportionality, coherence and non-discrimination tests laid down by the Court of Justice.

37. Therefore, also the Greek scenario is characterized by a situation of high degree of uncertainty of the law.

Germany

38. A situation of grave uncertainty in the law in the gaming sector prevails in Germany, where Stanley has also sought to offer cross-border betting services. In Germany, hundreds and hundreds of conflicting decisions of the Administrative Courts of all levels are counted, both before and after the *Markus Stoß et al.* [08.09.2010, Cases C-316/07 + C-358/07 to C-380/07 + C-409/07 + C-410/07] and *Carmen Media* [08.09.2010, Case C-46/08] rulings of the Court of Justice, which were supposed to shed light over the legislative and regulatory landscape.

39. A significant example of this uncertainty is represented by a case in which Stanley applied in 2004 for a betting licence from the Hessen Authorities, which was denied. The denial was challenged in the Administrative Courts, and reached on appeal the OVG Hesse in 2007 [Docket no. 7 UE 2092/07]. The OVG Hessen stayed the case pending the Court of Justice's decision of the *Markus Stoß* references. Following the Court of Justice's judgment in 2010, the case was resumed before the OVG Hessen [Docket no. 8A 2052/10], but was again stayed on 21.04.2011 on procedural grounds, awaiting an interpretative decision of the post-*Markus Stoß* situation and the new domestic scenario by the Federal Administrative Court (BVG).

Portugal and the widespread misconstruction of the *Liga Portuguesa* ruling

40. Yet another source of uncertainty in the law that Stanley has observed is the incorrect interpretation that certain national Authorities and monopolies offer to the *Liga Portuguesa* ruling of the Court of Justice [Case C-42/07], to serve as grounds for domestic prohibitions and enforcement measures put in place against cross-border gaming operators, both off-line and on-line.

41. Stanley submits that the ***Liga Portuguesa*** ruling, which adjudged the Portuguese system to be compliant with EU law, refers to a context which is strictly peculiar to Portugal, and is incapable of broader application.

42. Significantly, in an appearance before the European Parliament on 11.02.2010, Internal Market Commissioner Michel Barnier replied to questions addressed to the Commission on the fate of the infringement proceedings that were in progress against several Member States in the gaming and betting sector, and stated: *"... A la suite des récentes décisions de la Cour, la Commission note que celle-ci exige toujours, conformément d'ailleurs à la jurisprudence établie, que d'éventuelles restrictions soient, premièrement, justifiées par des objectifs d'intérêt général valides et, deuxièmement, soient nécessaires et proportionnées, ce qui inclut la nécessité, pour les restrictions, d'être adaptées, cohérentes et systématiques. Il ne ressort donc pas de l'arrêt Santa Casa que la Cour donne aux Etats membres une plus grand liberté pour imposer des restrictions. La Cour présente des références très longues et précises aux méthodes opératoires du monopole portugais, à sa très longue histoire et aux circonstances très spécifiques de ce pays ..."*.

43. The position of Commissioner Barnier needs to be repeated for a number of reasons.

44. First, the ***Liga Portuguesa*** ruling addresses on-line gaming services only, which are commonly considered to involve risks of criminal infiltration, fraud and exposure to addiction, higher than off-line services distributed through a physical network. Bwin, the bookmaker who was the party in the principal case, offered its services to Portuguese consumers exclusively through the Internet without maintaining any form of establishment in Portugal. Therefore, the ***Liga Portuguesa*** ruling should, already for that reason, not be relevant in assessing national restrictions affecting off-line gaming.

45. Second, the Portuguese monopolist, Santa Casa, was a strictly not-for profit entity directly controlled by the Portuguese State, as the ***Liga Portuguesa*** ruling expressly notes [para. 65]. In that context, the Court of Justice arguably bore the concept of "in-house providing" in mind, which has been the object of abundant public procurement case law commencing from ***Teckal*** [18.11.1999, Case C-107/98]. According to that jurisprudence, the public procurement rules and the EU principles of transparency, competition and freedom to render services do not apply, where, with respect to the award of a public contract, two cumulative conditions are fulfilled: that the awarding Administration exercises over the awardee a

control analogous to that exercised over its own bodies and services, and that the awardee's prevalent activities are carried out in favour of the awarding Administration. It is looking at the criteria of analogous control and prevalent activity, that one easily reaches the conclusion that Santa Casa in fact constituted an "own entity" of the Portuguese Administration. For that reason, the Portuguese State could legitimately dispense with putting to public tender the attribution or re-attribution to Santa Casa of full competence over the gaming and betting sector.

46. Third, the Court of Justice found that, through the Santa Casa monopoly, the Portuguese State coherently pursued goals of reduction - in any event, non-expansion - of gaming opportunities, including through reduction of advertising spend, in that way effectively aiming at a high level of consumer protection.

47. Fourth, the principal case presented a number of unique features. At stake was the setting aside of administrative sanctions imposed by Santa Casa against the well-known on-line bookmaker Bwin and the Portuguese football league, of which Bwin was the official sponsor, for breach of its monopoly. The Court of Justice held that the dual nature of Bwin - as on-line bookmaker and, at same time, official sponsor of the Portuguese league - might have influenced the outcome of football games which were the object of betting. As a result, the strict control over the sector afforded by the Santa Casa monopoly was also justified on those grounds.

48. Stanley submits that, contrary to the opposite view expressed in a number of national contexts in attempts to defend the most diverse domestic restrictions, in the on-line as well as off-line sector, the *Liga Portuguesa* ruling does not constitute a change in the established *Gambelli* and *Placanica* jurisprudence. Otherwise than, for instance, Italy, Greece or Germany, Portugal effectively pursues through the Santa Casa monopoly the objective of the reduction of gaming opportunities for its citizens. As a result, the solutions offered by *Liga Portuguesa* cannot be relied on in other Member States, unless they present a regulatory framework reproducing the Portuguese situation and policy choices. To Stanley's knowledge no such Member State fulfils this criteria.

Question

6. Do you consider that existing national and EU secondary law applicable to online gambling services adequately regulate those services? In particular, do you consider that coherence / consistency is ensured between, on one hand, the public policy objectives pursued by Member States in this field and, on the other hand, the national measures in force and/or the actual behaviour of public or private operators providing on-line gambling services?

49. Stanley submits that the national measures in force applicable to on-line gaming do not result in an efficient regulatory framework, whilst at the same time they adversely reflect on the establishment and functioning of the internal market for those services, as well as legal certainty.

50. Taking the lead from these premises, certain legal considerations in the perspective of the Green Paper are submitted.

Gaming services, primary law and the case law of the Court of Justice

51. The Treaties address by specific rules a limited number of economic sectors only (such as, for instance, transport or agriculture), which in turn constitute the object of abundant secondary law. Most sectors are not specifically addressed, and remain governed by general primary law, as is the case of gaming.

52. Notwithstanding that gaming may produce addictive behaviour or the gaming industry be exposed to criminal infiltration (as has been historically the case for tobacco and spirits) or that players be exposed to fraud (as is the case, for instance, of investment services), gaming nonetheless constitutes an economic activity to which the internal market rules of the TFEU undisputedly apply, with a view to the realization of *"... an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties ..."* [Art. 26 TFEU]. This constitutes settled law since the ***Schindler*** [Case C-275/92] and ***Zenatti*** [Case C-67/98] rulings.

53. According to the case law, gaming activities may fall within the scope of either or both fundamental freedoms of establishment [Art. 49 ff TFEU] and rendering services [Art. 56 ff TFEU]. In *Gambelli*, it was specifically held that [now] Art. 49 TFEU applies to the situation of a gaming operator established in a Member State which maintains a presence in another Member State by means of arrangements with commercial intermediaries established in such other Member State who collect and re-forward by computer means to the foreign operator the consumers' bet proposals. This is the structure of Stanley's off-line activities in Italy and other Member States. If a foreign operator offers its gaming services through a network of intermediaries, any restrictions imposed on their activities by the Member State of destination of the service also result in a restriction of the operator's own freedom of establishment.

54. The issue has repeatedly arisen whether national restrictions to the ability of Community operators to offer their gaming services on a cross-border basis in other Member States and to their right of establishment in other Member States through a network of intermediaries, may be admissible either based on a specific cause for derogation according to Art.s 52 and 62 TFEU, or on grounds of imperative reasons in the general interest according to the jurisprudence of the Court of Justice. Among the latter, the Court of Justice has identified consumer protection, the prevention of fraud and excessive gaming spend by citizens and the prevention of disturbances to social order.

55. In the matter of gaming, Member States are free to set a chosen level of protection for their citizens based inter-alia on moral, religious and social grounds, which may result in the imposition of restrictions and even bans. However, any such restrictions or bans must satisfy the conditions laid down by the Court of Justice as to their necessity to achieve the legislative goal and their proportionality, without going beyond what is required in order to achieve it. Moreover, no restriction can result in a discrimination on grounds of nationality. The correlation of the principles of necessity and proportionality to the chosen national level of citizens' protection has resulted in abundant case law centred on the concept of coherence, as the benchmark to assess national restrictions in the gaming sector [*Gambelli*, *Placanica*, *Carmen Media*, cit.]. The assessment of necessity, proportionality, coherence (and non-discrimination) is assigned to the national Courts.

Secondary law

56. As previously noted, there is no secondary law governing on a sectoral basis either on-line or off-line gaming services. Certain horizontal directives are also applicable to gaming [such as on audiovisual media, unfair commercial practices, distance selling, money laundering, personal data protection and the common value added tax system]. Conversely, other horizontal directives [such as Directive 2000/31/EC on e-commerce [Art. 1.5] and Directive 2006/123/EC on internal market services, socalled Bolkenstein Directive [Art. 2.2]] expressly exclude gaming services from their scope, be they on-line or off-line.

57. The exclusion of gaming services from the ambit of the Services Directive entails that the Member States retained the power to subject them to restrictions in the cases foreseen by Art.s 52 and 62 TFEU or for the imperative reasons in the general interest identified by the Court of Justice. Conversely, as concerns services falling within the scope of the Services Directive, the Member States self-limited their power to impose restrictions to the sole grounds of public order, public security, public health and the protection of the environment [Art. 8]. The Services Directive, thus, produced a binary model of regulation within the internal market. On the one hand, a high degree of liberalization, which is bound to increase, applies to included services; on the other hand, no liberalization applies to excluded services (included gaming services), which remain entirely governed by primary law and the case law of the Court of Justice.

Identifying a hypothetical legal basis for secondary law on on-line gaming services. Competence, subsidiarity, proportionality

58. Against the background previously highlighted, Stanley takes the view that one should in the first place seek to identify a hypothetical legal basis, resting on which the Union could enact secondary legislation or take other action on on-line gaming.

59. Stanley recalls that, pursuant to Art. 5.2 TEU, the Union is given the power to legislate only within the limits of the competences expressly attributed to it by the Member States through

the Treaties. The Treaties do not give the Union the power of self-attribution of competence (socalled "*Kompetenz-Kompetenz*").

60. Within the limits of the competences attributed to it by the Treaties, the Union must furthermore comply with certain fundamental principles.

61. The first is the principle of subsidiarity, enshrined in Art. 5.3 TEU and laid down in more detail by the Protocol on the application of the principles of subsidiarity and proportionality constituting an Annex to the TEU, according to which *"... in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level ..."*.

62. A two-fold condition must, therefore, be fulfilled for the competences attributed to the Union to be lawfully exercised in the perspective of subsidiarity; that the Union's action achieves the objective more effectively than the Member States, and that the Member States are unable to achieve that objective at the national level. As a result, in sectors not covered by primary law, such as on-line gaming, the Member States maintain their legislative competence and the Union is only given concurrent competence. If the Union chooses to act instead of the Member States, that choice must be justified and remains subject – apart from the political control of the Member States and their Parliaments - to the jurisdictional control of the Court of Justice. With reference to [present] Art. 114 TFEU, the Court of Justice held that *"... the principle of subsidiarity applies where the Community legislature uses it as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market ..."* [08.06.2010, Case C-58/08, *Vodafone*, para. 75; 10.12.2002, Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, para. 179].

63. Further, the intensity of all Union action needs to be measured through the principle of proportionality, according to which the means chosen must always bear relation to the goals pursued [Art. 5.4 TFEU]. More particularly, the proportionality principle requires that the Union should always evaluate the need for, and suitability of, acting by binding or non-binding instruments, and should in principle select the latter whenever the object of the action does not necessarily require a uniform legal framework or mandatory technical regulations. Significantly, the Court of Justice held that, even in the presence of a broad

competence, *"... the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators ..."* [Vodafone cit, para. 53; 10.03.2005, Joined Cases C-96/03 + c-97/03, *Tempelman and van Schaijk* para. 48; 15.12.2005, Case c-86/03 *Greece Commission*, para. 96; 12.01.2006, Case C-504/04, *Agrarproduktion Stäbelow*, para. 37].

64. To sum up, Stanley submits that one will need to verify if the TEU and/or the TFEU are comprised of a legal basis justifying the adoption by the Union of measures of harmonization or approximation of national on-line gaming legislations - or specific aspects and features thereof, for instance, fiscal features - provided, always, respecting the principles of competence, subsidiarity and proportionality.

The internal market perspective. Art. 113 TFEU as a possible legal basis for harmonization. Art.s 114 and 115 TFEU as a possible legal basis for approximation

65. Art. 113 TFEU [formerly, Art. 93 EC] provides that: *"... The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition ..."*.

66. Art. 113 TFEU does not establish a true tax competence of the Union, and rather provides that the sovereignty of the Member States in the matter of indirect taxation may suffer limitations where the attainment of internal market objectives by the Union is at stake. The legislative competence of the Union, therefore, subsists subject to two cumulative conditions; (a) that there is a legislative objective to eliminate distortions caused by the national indirect tax systems which hinder the realization of the internal market and competition, and which could not be removed by other means, and (b) that the objective should be realized by harmonising aspects of indirect taxation common to the Member States.

67. The concept of indirect - as opposed to direct - taxation is not defined in the Treaties, and has been developed by the case law of the Court of Justice. For instance, Advocate General

Stix-Hackl, in her opinion of 14.03.2006 delivered in Case C-475/03, *Banca Popolare di Cremona*, proposes the following definition: *"... a direct tax is collected directly from the person who bears the economic burden; an indirect tax is included in a sum paid by that person to another, who does not bear the economic burden but who accounts for the tax ..."* [para. 54].

68. The difference between direct and indirect taxation is not clearcut. In reality, the criterion that tends to be utilized by the European Institutions seems to be that of the taxable basis. The object of indirect taxes is an act or an expense, whilst the object of direct taxes is the income or wealth of the taxpayer [MATROT DE LA MOTTE, *Souveraineté fiscale et construction commonautaire, LGDJ,* 2005, 8-9].

69. As a result, Art. 113 TFEU could in the abstract be utilized as the legal basis for secondary legislation in the matter of on-line gaming to harmonise the existing legislations of all Member States providing for a tax or taxes arising from expenses or acts of consumption of players, provided this serves the twofold purpose of ensuring the functioning of the internal market for those services and avoiding distortions of competition therein. Looking at the Green Paper, Stanley submits that these premises and requisites are not fulfilled and that, therefore, Art. 113 TFEU could not serve as the legal basis for the adoption of secondary legislation on on-line gaming.

70. Art. 114.1 TFEU [formerly, Art. 95.1 EC] foresees in general the competence of the Union for approximating the legislative, regulatory and administrative measures of the Member States having as their object the establishment and functioning of the internal market. Art. 114.2 TFEU [formerly, Art. 95.2 EC] specifies that Art. 114.1 does not apply to (inter alia) fiscal provisions. Art. 115 TFEU [formerly, Art. 94 EC] finally provides that *"... Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market ..."*.

71. Art.s 114 and 115 TFEU read in conjunction with Art. 113 TFEU, should be construed in the sense that, where Union action is envisaged utilizing indirect taxation as a tool to achieve internal market objectives, the method needs to be harmonisation and the legal basis is Art. 113 TFEU. Conversely, if Union action is contemplated by resort to direct taxation,

the method needs to be approximation and the legal basis necessarily is Art. 115 TFEU. Outside the system of Art.s 113 and 115 TFEU, the Union has no competence to "invent" new taxation.

72. In Stanley's view, it is hard to see that Union legislative action in matter of on-line gaming according to the Green Paper, could be brought under the substantive scope of either indirect (harmonisation) or direct (approximation) taxation. One will, therefore, necessarily need to look at the general internal market legal basis supplied by Art. 114.1 TFEU.

73. The Court of Justice held in *Germany v Parliament and Council* [05.10.2000, Case C-376/98], that legislative measures resting on the legal basis of Art. [now] 114 TFEU *"... are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it ..."* [para. 83]. And the Court continues:*"... Moreover, a measure adopted on the basis of Article 100a of the Treaty* [now Art. 114 TFEU] *must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty ..."* [para. 84]. Under all the circumstances, it is *"... necessary to verify whether* [a] *Directive* [concerned] *actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition..."* [para. 95].

74. Therefore, the adoption of secondary legislation on on-line gaming services based on Art. 114.1 TFEU would, in accordance with *Germany v Parliament and Council*, need to effectively pursue objectives of improving the establishment and functioning of the internal market for those services, and effectively contribute to eliminate distortions of competition therein. It follows that the Union Legislator could not utilize Art. 114.1 TFEU as the legal basis for obliging and/or empowering the Member States to only introduce restrictions to the

internal market for on-line gaming services, or only introduce enforcement tools aimed at strengthening those restrictions.

75. A second limit to the general internal market legal basis of Art. 114.1 TFEU results from the broad discretionary powers that the Court of Justice recognizes belongs to the Member States in setting a chosen level of protection for their citizens in the matter of gaming. This entails that a restriction, or even a ban, introduced by a Member State in that sector does not need to reflect a scale of values shared by all Member States [*Carmen Media* cit., para. 104]. Mirror-wise, the adoption of secondary law on on-line gaming must not affect those discretionary powers recognized to the Member States.

76. In a different perspective, even if one could legitimately trespass on the discretionary powers of the Member States previously recalled, the adoption of secondary legislation on on-line gaming would raise an issue of proportionality. Indeed, Directive 2006/123/EC already foresees a number of exceptions to the freedom to render services dictated by imperative reasons in the general interest, and expressly excludes gaming services from its scope. Stanley submits that, at most, Art. 114.1 TFEU could serve as the legal basis for also bringing or bringing in part gaming services under the general regime of exceptions of the Directive, with a view to improving the functioning of the internal market for them and reducing the distortions of competition that prevail therein, not for further hindering and restricting the functioning of that market.

77. To sum up, in Stanley's view, Art.s 113, 114 and 115 TFEU could sustain only a very limited degree of harmonisation and/or approximation of the existing national legislations on on-line gaming, provided, always, that Union action taken resting on those legal bases proves both more effective than Member States action, and necessary and proportional to the achievement of the stated legislative purposes.

78. If these conditions are not fulfilled, only primary new law produced by a revision of the Treaties could supply a legal basis for introducing secondary legislation or on-line gaming services. Stanley submits that the horizontal directives in force - for instance, on audiovisual media, unfair commercial practices, distance selling, money laundering, etc. - and the gaming case law of the Court of Justice already supply an adequate legal framework to

respond to the concerns of certain of the Member States with respect to on-line gaming. As the Green Paper itself recognizes, *"... As a consequence of the lack of political will to consider the adoption of secondary law in this sector, the focus turned to the application of primary law ..."* [page 10].

Question

7. How does the definition of on-line gambling services above differ from definitions at national level?

8. Are gambling services offered by the media considered as games of change at national level? Is there a distinction drawn between promotional games and gambling?

9. Are cross-border on-line gambling services offered in licensed premises dedicated to gambling (e.g. casinos, gambling hall or a bookmaker's shop) at national level?

79. **Questions 7 and 8:** No reply given.

80. **Question 9:** There is a complete range of various types of gambling practices and activities, authorized or unauthorized, taking place online within EU Member States. However, this question can only be properly answered in the context of a wider review taking into account the offline gambling sector as well.

Question

10. What are the main advantages/difficulties associated with the coexistence in the EU of differing national systems of, and practices for, the licensing of on-line gambling services?

The mutual recognition principle and the possible additional legal basis of Art. 53.1 TFEU

81. The application of the general principle of mutual recognition of licenses and qualifications to the gaming sector constitutes a controversial issue. There being no harmonisation or approximation in place in this field, whilst certain Member States recognize, or recognize in part, the gaming licenses issued by other Member States, others do not recognize them at all and impose at the national level the full repetition of licensing procedures already accomplished elsewhere. The Court of Justice has recorded, rather than held in law, that in view of the discretionary powers retained by the Member States in setting a chosen level of protection of their citizens in the matter of gaming *"… and the absence of any Community harmonisation in the matter, a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law …"* [Markus Stoß et al., C-316/07 + C-358/07 to C-380/07 + C-409/07 + C-410/07, para. 112].

82. However, the Court continues in *Markus Stoß*, that whilst *"… each Member State retains the right to require any operator wishing to offer games of chance to consumers in its territory to hold an authorization issued by its competent authorities, without the fact that a particular operator already holds an authorisation issued in another Member State being capable of constituting an obstacle …"* [para. 113] to that end, *"… in order to be justified under Articles 43 EC and 49 EC* [now 49 and 56 TFEU respectively] *it is also necessary, having regard to the obstacles which it creates in relation to the right to the freedom to provide services or the freedom of establishment, that such an authorisation system* [of the Member State of destination of the services] *should satisfy the requirements which follow in that respect from the case-law, particularly as to its non-discriminatory character and its proportionality …"* [para. 114]. It follows that, if the licensing system of the Member State of destination of the service is not compliant with primary law and the gaming jurisprudence of the Court of Justice, a Community operator adversely affected by a discriminatory or non-proportional feature of that system could to some extent

claim recognition of its national requisites and qualifications in order to compensate for the legal defects of the system and not to be put twice in a position of disadvantage.

83. Discriminatory features aside, one wonders if a system imposing the repetition of objective requisites and qualifications - such as, to exemplify, on solvency, professional skills and technical features - that are necessary for the issuance of a national gaming licence, in fact respects the principle of proportionality having regard to the legislative purpose pursued by the provision imposing the requisite or qualification, and if the Member State of destination of the service should not to take into consideration instead the objective requisites and qualifications which the applicant proves to already possess in its home Member State. Stanley submits that the latter solution would be consistent with settled caselaw on mutual recognition outside the gaming sector [17.12.1981, case 279/80, *Webb*; 07.05.1991, Case 340/89, *Vlassopulos;* 01.02.1996, Case C-164/96, *Aranitis;* etc;] and the principle of proportionality, besides being in line with the clear jugement contained in para. 114 of the *Markus Stoß* ruling.

84. If one concurs with the need for a proportionality review of national systems imposing a duplication of licensing requirements according to *Markus Stoß*, this could pave the way for secondary legislation aimed at establishing a common framework for mutual recognition of specified licensing requisites and qualifications. According to this perspective - besides the general legal basis of Art. 114.1 TFEU, inasmuch as the hypothetical legislation should aim at improving the functioning of the internal market of on-line gaming services and at eliminating the evident distortion of competition brought about by the need for new entrants to meet the cost and hurdle of replicating objective requisites and qualifications which the incumbents would not need to meet - the specific legal basis of Art. 53.1 TFEU [formerly, Art. 47.1 EC] providing for the power of the Council to issue according to ordinary procedure *"… directives for the mutual recognition of diplomas, certificates and other evidence of formal qualification …"* could, in Stanley's view, be also available.

Question

11. With focus on the categories mentioned above, how are commercial communications for (on-line) gambling services regulated for at national level? Are there specific problems with such cross-border commercial communications?

85. No reply given.

Question

12. Are there specific national regulations pertaining to payment systems for online gambling services? How do you assess them?

86. The Member States tend to attribute to the national regulators a broad discretionary enforcement power, which sometimes not only target the gaming industry, but likewise third parties providing ancillary services instrumental to the carrying out of gaming. Payment services are a significant example.

87. For instance, Italy has very recently introduced legislation [Decree-Law no. 98 of 06.07.2011] obliging banks, credit card companies and financial intermediaries established in Italy, on pain of extremely heavy financial sanction, to block the execution of payments addressed by payors in Italy to non- .it TLD unauthorised gaming websites, which feature in a "black list" drawn-up by AAMS, the national regulator. The "black list" indistinctly includes the gaming websites of all non-domestically licensed operators, without distinguishing between "grey" operators licensed in another or other Member States, and "black" operators licensed in a third country or unlicensed altogether.

88. Stanley submits that the introduction of *ad hoc*, pervasive payment restrictions in addition to ordinary money-laundering compliance obligations, constitutes proof of the ineffectiveness of a regulation model that seeks to restrict the citizens' freedom to utilize the Internet. Since in a democratic society that freedom cannot be cancelled, a third party (the payment services provider) is forcibly made part of the enforcement machinery put in place in defence of the national licensing system and, above all, the tax revenue generated by gaming. Stanley submits that such measures evidently lack proportionality, and furthermore entail a restriction on the freedom of movement of capital in breach of Art. 63 TFEU. On those grounds, the Court held that the principle of free movement of payments [Art. 63.2 TFEU, formerly Art. 56 EC] is intended to enable a person liable to pay a sum of money for a supply of goods or services or in connection with a capital investment to discharge that contractual

obligation voluntarily without undue restriction and to enable the creditor freely to receive the payment [22.06.1999, Case C-412/97, *ED*, para.s 17; 31.01.1984, Joined Cases 286/82 and 26/83, *Luisi and Carbone*, para.s 21 and 22].

89. Moreover, payment blocking measures such as those recently introduced in Italy, whilst nominally indistinct, in reality indirectly discriminate against the EU cross-border gaming providers, who - otherwise than "white" AAMS licensed providers - will for that reason alone risk being perceived by consumers as a more problematic choice, because the payment of stakes from Italy and of wins into Italy could be blocked, for the sole reason that the operator is "grey".

90. Finally, one should consider that payment blocking measures fall within the sphere of application of GATS, since commercial gambling and betting services are included in the *W/120 List.* Such characterisation has been confirmed by the WTO Appellate Body on 07.04.2005, in the *US Gambling* [*Antigua-Barbuda v. Stati Uniti d'America*] case. In consequence, payment blocking measures are incompatible not only with the commitment to accord market access laid down by Art. XVI of GATS, but also with the subsidiary commitment to allow the transfers of capital necessary for such purpose. In fact, Art. XVI of GATS makes it a commitment of Contracting Parties to allow such transfers - both outbound and inbound - insofar as they form an "*essential part* " of the service to which access must be guaranteed.

Question

13. Are players' accounts a necessary requirement for enforcement and player protection reasons?

91. Stanley submits that individual players' accounts are not an indispensable requirement for purposes of player protection. The issue of whether individual players' accounts serve as a tool of enforcement should not be for the gaming operators to answer, it is difficult to see that it fits within the correct context of ensuring the establishment and improvement of the functioning of the internal market for on-line gaming services.

92. More particularly, Stanley submits that those Member States that introduced a mandatory player's account - which, in the case of Italy, must be necessarily interfaced with the portal and control system of the regulator - as a prerequisite for rendering and utilizing on-line gaming services, in reality pursue goals of control of tax revenue produced by gaming, not of consumer protection. One fails to see how the requirement for individual players' accounts protects minors and "problem" players who, by utilizing a common PC and simple pre-set password and log-in procedures, will extremely easily access gaming websites from home at any time.

93. In Stanley's view, the decision of whether or not to put a durable relationship in place with an operator through a gaming contract and an individual player's account, is an economic decision that should belong to the consumer. Consumers should be permitted to choose between creating a player's account with a chosen operator in view of a regular relationship, earning bonuses and schemes, utilizing automatic payment systems and gaining access to a more sophisticated service infrastructure, inevitably at a higher cost of the service or less attractive odds or payouts, and utilizing gaming services and operators on an occasional basis, presumably at a lower cost or for more attractive odds or payouts. Stanley submits that the imposition of a general obligation on the on-line operators to institutionalize players' accounts primarily serves fiscal and enforcement purposes, rather than purposes of consumer protection. The resulting paradox is that the availability from one's home PC of a "ready for use" player account will likely encourage more intensive and more frequent

gaming and possibly push the user towards addictive or "problem" behaviour, which he would have been less prone, to if he had been "forced" to utilize less ready and less convenient infrastructures.

94. Therefore, Stanley submits that a generalized player's account obligation does not necessarily serve purposes of player protection, and may constitute a non-proportional and incoherent measure instead.

Question

14. What are the existing national rules and practices relating to customer verification, their application to on-line gambling services and their consistency with data protection rules? How do you assess them? Are there specific problems associated with customer verification in a cross-border context?

95. No reply given.

Questions

15. Do you have evidence that the factors listed above are linked to and/or central for the development of problem gambling or excessive use of on-line gambling services? (If possible, please rank them)

16. Do you have evidence that the instruments listed above are central and/or efficient to prevent or limit problem gambling relating to on-line gambling services? (If possible, please rank them)

96. No reply given.

Questions

17. Do you have evidence (e.g. studies, statistical data) on the scale of problem gambling at national or EU level?

18. Are there recognised studies or evidence demonstrating that on-line gambling is likely to be more or less harmful than other forms of gambling for individuals susceptible to develop a pathological gaming pattern?

97. The Prosperetti Study [Annex I], relying on the Freedata Study [Annex II], reports that *"... The 'typical' (i.e., median) on-line sports gambler (Table 7) places bets very frequently (he is active in 24% of the period considered), but with a very low intensity (3 bets per day) and a low stake per bet (4.5 euro). On the other hand, the typical on-line casino gambler has a very low frequency of activity (11 days in a 25-month period, equivalent to 8%), but a higher intensity (46.3 games played per day), still with a low stake per game (4.7 euro). Finally, the typical on-line poker gambler shows a low frequency of activity (64 sessions in a 25-month period) and a higher stake per session (12.9 euro)..."* [page 32]. Whilst *"... the on-line sector is characterized by very different gamblers' behaviours and preferences across the several games; the level of commitment of the typical gambler is however low. Only for a very small amount of gamblers there could be indicators of excessive gambling, that Freedata defines in terms of deviation from the mean..."*. The *"... incidence of potential excessive gambling is between 0.9% and 1.9% ..."* [pages 33 ff].

98. Based on such data, Professor Prosperetti submits that *"... there are no major overall consumer protection issues in online gambling, and that only very few gamblers show symptoms of wagering too much: for over 95% of gamblers, gambling is a form of bland entertainment, for which they spend – sometimes often – very small sums of money; only 1-2% of them spend substantially more than average..."* [page 34].

99. Whilst being a commercial operator with no direct insight of or access to scientific evidence, Stanley notes that the statistical and quantitative data of which it is aware - including that contained in the Prosperetti and Freedata Studies, which Stanley understands are representative and were drawn up for the very purpose of supplying independently an objective basis resting on which a view could be taken on the issues raised in the Green Paper - does not, in a macro-perspective, seem to point to "problem" gaming of major scale at Member States or EU level.

100. On a different subject, Stanley disposes of no scientific evidence that on-line gaming is positively more addiction-conducive than other forms of gaming. However, Stanley would refer to the case law of the Court of Justice, that on-line gaming is more likely to be conducive to "problem" behaviour than off-line gaming, because of the greater ease with which gaming may be engaged in by the player, in the absence of any social control as concerns both frequency and size of sums played or staked.

Questions

19. Is there evidence to suggest which forms of on-line gambling (types of games) are most problematic in this respect?

101. No reply given.

Questions

20. **What is done at national level to prevent problem gambling? (E.g. to ensure early detection)?**

21. **Is treatment for gambling addiction available at national level? If so, to what extent do on-line gambling operators contribute to the funding of such preventive actions and treatment?**

22. **What is the required level of due diligence in national regulation in this field? (E.g. recording on-line players' behaviour to determine a probable pathological gambler?).**

102. No reply given.

Questions

23. **Are the age limits for having access to on-line gambling services in your or any other Member State in your view adequate to attain the objective sought?**

24. **Are on-line age controls imposed and how do these compare to off-line 'face-to-face' identification?**

25. **How are commercial communications for gambling services regulated to protect minors at national or EU level? (E.g. limits on promotional games that are designed as on-line casino games, sports sponsorship, merchandising (e.g. replica jerseys, computer games etc) and use of social on-line networks or video-sharing for marketing purposes).**

26. **Which national regulatory provisions on licence conditions and commercial communications for on-line gambling services account for these risks and seek to protect vulnerable consumers? How do you assess them?**

103. No reply given.

Questions

27. Are you aware of studies and/or statistical data relating to fraud and on-line gambling?

28. Are there rules regarding the control, standardisation and certification of gambling equipment, random generators or other software in your Member State?

29. What, in your opinion, are the best practices to prevent various types of fraud (by operators against players, players against operators and players against players) and to assist complaint procedures?

30. As regards sports betting and outcome fixing - what national regulations are imposed on on-line gambling operators and persons involved in sport events/games to address these issues, in particular to prevent 'conflicts or interest'? Are you aware of any available data or studies relating to the magnitude of this problem?

31. In your view what issues should be addressed as a priority?

32. What risks are there that a (on-line) sports betting operator, which has entered into a sponsorship agreement with a sports club or an association, will seek to influence the outcome of a sports event directly or indirectly for profitable gain?

104. No reply given.

Questions

33. What cases have demonstrated how on-line gambling could be used for money laundering purposes?

34. Which micro-payments systems require specific regulatory control in view of their use for on-line gambling services?

35. Do you have experience and/or evidence of best practices to detect and prevent money laundering?

36. Is there evidence to demonstrate that the risk of money laundering through on-line gambling is particularly high in the context of such operations set up on social web-sites?

37. Are there national on-line gambling transparency requirements? Do they apply to cross border supply of on-line gambling services and are these rules enforced effectively in your view?

105. No reply given.

Questions

38. Are there other gambling revenue channeling schemes for the public interest activities at national or EU level?

39. Is there a specific mechanism, such as a fund, for redistributing revenue from public and commercial on-line gambling services to the benefit of society?

106. With respect to Questions ## **38** and **39** it is necessary to determine the possible legal basis, resting on which the Union could adopt secondary legislation or other instruments, aimed at obliging or encouraging the Member States to provide for the rechanneling of part of gaming revenue for public interest activities.

107. In this respect, Stanley recalls that the principle constantly affirmed by the Court of Justice from *Zenatti* [Case C-67/98, para.s 36-37] onwards until *Markus Stoß* [Case C-316/07 etc., para. 104], whereby the funding of meritorious causes out of gaming revenue may constitute a laudable ancillary feature, but does not amount to an imperative reason in the general interest justifying restrictions to the fundamental freedoms of establishment and rendering services, remains valid and in place also in relation to rechanneling measures.

108. The Green Paper enumerates six different rechanneling models that could in the abstract be implemented:

"…

The organisation or company responsible for the public interest activities:

(1) Is granted a licence to offer on-line gambling service in order to support the "good cause" recognised by the relevant licensing authority (e.g. a national Olympic committee, a national horse racing body , an association for blind persons, etc.);

(2) Receives funds directly from a State gambling operator (e.g. a national lottery) according to a rate fixed by the licence or legislation regulating that operator;

(3) Receives funds from a State gambling operator indirectly via the State budget into which that State operator has contributed;

(4) Receives funds from one or more private gambling operators and the contribution of funds is:
(a) Determined by the licence or legislation or
(b) Based on voluntary contributions from the operators;
(5) Receives economic compensation for the use of an event it organises and on which bets are placed even if the organisation or company is not involved in the organisation of the gambling activity itself;
(6) Receives funds from the State budget that has been contributed to by both State and commercial gambling operators ...".

These hypothetical measures could be assessed from a number of different perspectives.

Rechanneling in the fiscal perspective. Art.s 113, 114 and 115 TFEU as possible legal bases

109. With respect to Art.s 113, 114 and 115 TFEU, Stanley refers to the observations submitted in its Reply to Question # **6**. If the chosen model of rechanneling should present a fiscal nature, the internal general market legal basis of Art. 114.1 TFEU could not be relied on. Conversely, the legal bases of Art.s 113 and 115 TFEU would be available in the abstract on the conditions therein stipulated, if the chosen model of rechanneling partook of the nature of indirect or direct taxation, to adopt harmonisation or approximation measures respectively. However, since the Treaties do not attribute to the Union the competence to "invent" new taxation, for there to be harmonisation or approximation there should be already in place in all Member States existing legislation to be harmonised or approximated. Stanley is informed that such is not the case as concerns national measures of rechanneling of gaming revenue. Therefore, the legal bases of Art.s 113 and 115 TFEU would not be available.

110. At any rate, the resort to measures of approximation of direct taxation resting on Art. 115 TFEU presupposes that there should be taxes or levies concerned applied on compulsory basis and aimed to fund a public policy or action, without constituting consideration or compensation in exchange for receiving a service. It is submitted that this automatically rules rechannelling hypotheses (1), (4) and (5) out, because there would be specific consideration or compensation and there would be no levy in the first case, because the levy would not be compulsory in the second case and, again, because there would be specific consideration or compensation in the third case.

The perspective of the protection of property according to Protocol no. 1 to the 1950 European Convention for the Safeguard of Human Rights and Fundamental Freedoms [“ECHR”] and Art. 17 of the Charter of Fundamental Rights of the European Union [“European Charter”]

111. One may wonder if Union measures of compulsory rechanneling of gaming revenue would be compatible with the system of protection of property that is enshrined in Art. 1 of Protocol no. 1 to the ECHR and Art. 17 of the European Charter.

112. Stanley recalls that the right to the protection of property, which includes the right to its enjoyment, constitutes a fundamental right guaranteed by the ECHR, which is furthermore enshrined in the constitutional traditions common to the Member States and amounts to a general principle of Union law.

113. Stanley further recalls that the legal concept of property includes both existing and future property and assets, such as receivables and income, and is fundamentally determined in accordance with the domestic law concerned. In both the EU and ECHR systems, the right to property is not absolute, and may be limited for objective reasons in the general interest, provided the limitation is proportionate and does not result in the deprivation of the “core” of the right. Limitations to the right of property may specifically include those introduced to ensure the payment of taxation and fines. One could say that, from the point of view of Art.s 1 of Protocol no. 1 to the ECHR and Art. 11 of the European Charter, domestic measures of rechanneling of gaming revenue could in the abstract be permissible, provided they are proportional and effectively aimed at objectives in the general interest.

114. However, the need for a legal basis to legitimize hypothetical Union action to introduce measures obliging or encouraging the Member States to adopt rechanelling measures, remains unaffected and, in Stanley’s view, unsolved. In other words, the absence of a legal obstacle to Union action based on the ECHR system and Art. 17 of the European Charter, does not supply a legal basis for that action which is not already present in the Treaties.

The perspective of neutrality of ownership regimes

115. A distinct aspect worth considering is whether Art. 345 TFEU, which establishes the principle of neutrality of ownership regimes, might be relevant in assessing the possible introduction of rechanneling measures.

116. Stanley recalls that Art. 345 TFEU [and its predecessor Art. 295 EC] is commonly construed in the sense that the Member States retain exclusive competence to establish and regulate their domestic ownership regimes, and that Union action cannot interfere therewith or prejudice the exercise of such competence. In Stanley's view, Art. 345 TFEU is neutral as concerns rechanneling measures and, in the same way as it would in the abstract not prevent the adoption of Union measures of that kind, it does not supply any legal basis for their adoption either.

The State aid perspective

117. The EU State aid system may also be relevant in assessing rechanneling.

118. According to Art. 107.1 TFEU, subject to the exceptions and derogations foreseen by Art.s 107.2 and 107.3, aid is deemed to be State aid incompatible with the internal market, if the aid (a) is granted in any form by a Member State or with State resources, (b) selectively favours certain undertakings or industries, (c) affects trade between Member States and (d) distorts or threatens to distort competition. These four conditions are cumulative.

119. Rechanneling models (1) and (4) above foresee the utilization of resources from private bodies and would, therefore, not be relevant to a State aid analysis. Conversely, rechanneling models (2), (3), (5) and (6) might be relevant in the abstract, because there would be application of State resources, as well as selectivity, inasmuch as certain bodies or organisations would benefit from rechanneling without being obliged to discharge a duty or obligation in exchange therefore. The two other conditions, of prejudice to intra-Union

trade, which can be presumed, and distortion or threat of distortion of competition are likely to be easily fulfilled.

120. The case law has clarified, in particular, that the horse betting industry is extraneous to the Union rules applicable to agriculture and, for that reason, aid to horse breeding through resources rechanneled from horse betting is not placed outside the scope of State aid. However, that aid might qualify for a derogation pursuant to Art. 107.3 TFEU [Court of First Instance, 27.01.1998, Case T-67/94, Ladbrokes v Commission, upheld by Court of Justice, 16.05.2000, Case C-83/98, France et al v Commission, holding that *"... A Member State's decision authorising the body responsible for managing the organisation of totalisator betting in its territory to defer payment of part of the State's share of levies on bets taken on horse-races is caught by the definition of State aid for the purposes of* [then] *Article 92(1) of the Treaty. Such a measure has the effect of granting financial advantages to an undertaking and improving its financial position. Although it may also, indirectly, benefit a number of other operators whose affairs depend on the direct beneficiary's principal activities, it does not follow that the measure in question is a general measure outside the ambit of Article 92(1) of the Treaty; at the very most it may qualify for the sectoral derogation provided for in Article 92(3)(c) of the Treaty..."* [para. 12].

121. To sum up, the issue remains open, as to whether hypothetical measures introducing rechanneling models (2), (3), (5) or (6) constituting State aid could fall within a derogation category out of those enumerated by Art. 107.3 TFEU, arguably letter (c), which addresses *"... aid to facilitate the development of certain economic activities ... where such aid does not adversely affect trading conditions to an extent contrary to the common interest ..."*. If an Art. 107.3(c) TFEU derogation was not available, there would need to be political will at Union level to create a fresh aid category according to Art. 107.3(e).

The perspective of compensation of services of general economic interest

122. One finally wonders if Union measures possibly introduced to implement a rechanneling model might fall within the concept of compensation for services of general economic interest, pursuant to Art. 106.2 TFEU. If the conditions for the application of Art. 106.2 TFEU were fulfilled, the public funding would not need to be assessed as State aid.

123. According to the *Altmark* [24.07.2003, Case C-280/00, para.s 65 ff] ruling, for compensation of services of general economic interest to remain outside the scope of State aid, a number of cumulative conditions needs to be satisfied. Namely, that (a) the undertaking concerned should have been effectively entrusted with the public service of general interest by clear and unambiguous provisions, that (b) the criteria of calculation of the compensation should be determined in advance, transparently and in a general way, that (c) the compensation should not exceed what is necessary to cover the costs incurred plus a reasonable margin, and (d) if the undertaking entrusted with the service was not chosen by a call for tenders, that the compensation should be determined based on the cost levels of an average efficiently managed undertaking.

124. Stanley submits that, at the present level of elaboration of the rechanneling models under review, it is impossible to determine if the *Altmark* tests be might met by any of them.

Summing up on rechanneling

125. To sum up, Stanley submits that there is in the system of the Treaties no available stand-alone legal basis to justify the adoption of secondary legislation or other Union measures introducing a rechanneling model of the kinds recalled. The only conceivable legal basis to do so, therefore, remains the general one of Art. 114.1 TFEU, for the approximation of the existing non-tax legislations of all Member States already providing for the rechanneling of gaming revenue, subject to the conditions previously recalled.

Question

40. Are funds returned or re-attributed to prevention and treatment of gambling addiction?

126. We are not aware of any government-sponsored or funded requirement in this regard in any EU jurisdiction. However, it must be noted that gambling operators, either online or offline to contribute on a voluntary basis to various academic or otherwise organizations whose purpose is the prevention and / or treatment of problem gambling and / or gambling addiction.

Questions

41. What are the proportions of on-line gambling revenues from sports betting that are redirected back into sports at national level?

42. Do all sports disciplines benefit from on-line gambling exploitation rights in a similar manner to horse-racing and, if so, are those rights exploited?

127. The question of whether there could or should be adopted secondary legislation providing for the rechanneling to sports federations and organisers of sports events of part of betting revenue, where the outcome of the event constitutes an object of bets, is different from, and more specific than, the general rechanneling issues previously addressed. Again, the first step is identifying a suitable legal basis.

Art. 165 TFEU and the Union competence in the matter of sports

128. New Art. 165 TFEU has introduced a limited extent of Union competence in the matter of sports, subject to the twofold limit of the primary competence of the Member States and the independence of sports governance bodies. The main consequence of new Art. 165 TFEU is that it is no longer legally possible to invoke the "sports exception" in order to keep sports activities and the sports industry out of the European construction altogether, notably, with respect to competition and fundamental freedoms issue. Significantly, the Commission stated that "*... in line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law...*" [*White Paper on Sport*, 11 July 2007, para. 4.1]. On the other hand, Art. 165.4 TFEU expressly provides that, in order to attain the objectives of Art.s 163.2 and 165.3 in the matter of sports, the Union may by co-decision procedure adopt incentivating actions, at the exclusion of any form of harmonisation of the legislations and regulations of the Member States, and the Council may adopt recommendations.

129. Therefore, Art. 165 TFEU constitutes no legal basis for the adoption of secondary legislation to rechannel betting revenue to sports event organisers.

Art. 118 TFEU and the Union competence on intellectual property

130. A different perspective could in the abstract be found in Art. 118 TFEU, which foresees for purposes of establishment and functioning of the internal market a specific competence aimed at *"... provid*[ing] *a uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements ..."* in the matter of intellectual property.

131. It has been argued that the organisers of sports events should, as in France, be attributed a right akin to a right of intellectual property, inasmuch as an event is an intangible thing capable of being perceived and appropriated, which is the product of "creation". Therefore, the "use" of the event by third parties, including as an object of betting, should entail their duty to remunerate the "creator".

132. This proposition may be reasonable as concerns the event itself. To exemplify, it is fair that the name of the Roland Garros tennis tournament could not be appropriated by third parties, and that no third parties could legitimately commercialize merchandising articles bearing the Roland Garros name or emblem, or commercialize or broadcast photographs or footage of the tournament, without remunerating the "creator". However, the same conclusion is far from obvious where at stake is the "raw outcome" of the event, to exemplify, the fact that tennis player X has on a given date been successful in a Roland Garros match against tennis player Y, and in how many sets, with what scores, etc.

133. Stanley submits that the outcome of sports events constitutes information, which has nothing to do with the events themselves, or the efforts deployed by their creators to organise them. Outcomes are news capable of being learned and apprehended by the public, as for all other facts of life. Extending the proposed *sui generis* right of organisers from their events to all news referring to them would go beyond the scope of that right. Significantly, in a recent ruling on the Database Directive [Directive 96/9/EC] [09.11.2004, case C-444/02, *Fixtures*], the Court of Justice held that *"... neither the obtaining, nor the verification nor yet the*

presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the sui generis right provided for by Article 7 of the directive…" [para. 52], which provides *"… for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database …"*. On those grounds, the Court held : *"… The expression 'investment in … the obtaining … of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league…"*. Stanley submits that this reasoning in relation to the special intellectual property right of makers of databases should apply by analogy to the right of events organisers, if that right existed.

134. To sum up, even assuming that Art. 118 TFEU supplies an appropriate legal basis for the adoption of secondary legislation introducing a *sui generis* intellectual property right of the organisers of sports events, there would still be no grounds therein allowing the unbundling of that right into a series of stand-alone exclusive sub-rights on single elements and components of the event. If an unbundled sub-right was introduced on outcomes, this would result in the creation of a monopoly on information belonging to the public domain. Stanley submits that such an unbundling would constitute a textbook case of impermissible extension of the monopoly conferred by a right of intellectual property beyond its characteristic object, contrary to nearly five decades of Court of Justice jurisprudence.

135. Stanley, therefore, submits that Art. 118 TFEU does not supply a legal basis for secondary legislation on the rechanneling to sports events organisers of part of betting revenue, because the outcome of an event taken in isolation should not qualify as an object of intellectual property.

Horse betting in particular

136. As concerns <u>horse betting</u> in particular, the Green Paper points to two peculiar features. On the one hand, certain Member States foresee monopolies or special and

exclusive rights for horse betting in order for a portion of stakes and/or wins to flow back to equestrian sports and horse breeding, which would otherwise not support themselves. On the other hand, in other Member States, equestrian traditions and horse breeding deploy a significant role in rural areas and could, therefore, be relevant to objectives of regional development and cohesion policies. The question, though, arises of whether these circumstances are sufficient to result in an appropriate legal basis for secondary legislation providing for the upstream rechanneling of betting revenue to the horse breeding chain.

Art.s 38 and 39 TFEU on common agricultural policy. Arts. 174 ff TFEU on economic and social cohesion policies

137. Whilst it is generally true that equestrian sports necessarily presuppose horses and, therefore, horse breeding, it does not appear that objectives of support of the "horse economy" could be pursued on the legal basis of either the common agricultural policy or regional and cohesion policies.

138. There is no doubt that equestrian sports do not partake of the nature of agriculture. The Court of Justice held in *Commission v The Netherlands* [03.03.2011, Case C-41/09, para. 65] that *"... horses are not ordinarily generally utilized in agricultural product ..."* and, otherwise than cattle, sheep and pigs, they are not ordinarily destined to consumption. Significantly, in his opinion delivered in that case on 05.10.2010, Advocate General Bot stated that *"... point 11 in Annex III to Directive 2006/112 covers goods and services intended for use in agricultural production, whereas participation in horse races does not come under that activity. A transaction involving a horse intended to participate in races does not, therefore, fall within the scope of that provision..."* [para. 87].

139. Therefore, Art.s 38 and 39 TFEU could not supply a legal basis.

140. The analysis leads to no different conclusions if one looks at the legal bases supplied by Art.s 174-178 TFEU on economic, social and territorial cohesion. In his opinion delivered on 02.04.2009, in *European Parliament v Council* [Case C-166/07, para. 82], Advocate General Bot warned that *"... The protean nature of economic and social cohesion and the general nature of the tasks given to that policy mean that it is difficult to define it exactly. It thus proves difficult to lay down the limits of the area covered by the policy because economic and social cohesion*

emerges as a broad overall concept with imprecise contours. The Court's case-law offers no decisive guidance in that connection ...".

141. Stanley submits that it would be hard to anchor something as specific as a special right of horse betting organisers, to primary provisions as undetermined as those of Art.s 174 ff TFEU, providing for the role of the Union in *"... promot*[ing] *overall harmonious development ..."* and *"... strengthening ... economic and social cohesion ... reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions, including rural areas ...".*

142. Therefore, Stanley concludes that Art.s 174 ff TFEU would not supply a legal basis for secondary legislation introducing a special right of the organisers of horse events to share in the revenue produced by horse betting.

The WTO and TRIPS perspective

143. The introduction by EU secondary legislation of a *sui generis* right of sports events organiser raises serious doubts in the perspective of WTO law and the TRIPS system.

144. In brief, among the intellectual property rights that are encompassed by the TRIPS system, compilations of data are expressly addressed. Art. 10.2 TRIPS provides that *"... Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself...".* In Stanley's view, Art. 10.2 TRIPS provides clear confirmation that the unbundling of the (hypothetical) *sui generis* right into a series of rights bearing on the single components of the event, in our case, its outcomes, would not be consistent with the TRIPS architecture, in the same way as the maker of a protected database could not claim an exclusive right on the individual raw data which add up to its content.

145. Stanley further submits that a *sui generis* right of event organisers would arguably be extraneous to the very function of intellectual property, which the Contracting Parties of the WTO, which include the European Union, have pledged to recognize and reflect in their legislation: "... *The protection and enforcement of intellectual property rights should contribute to the*

promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations ..." [Art. 7]. A proliferation of unbundled exclusive rights, such as would be involved by the *sui generis* right of events organisers, would not reward innovation, not disseminate technology and not lead to social and economic welfare. Quite evidently, it would produce a highly uneven balance of the rights and obligations of the organisers of events, the betting industry utilizing their outcomes as an object of betting and the public also wishing to utilize such outcomes as objects of betting.

Question

43. Do on-line gambling exploitation rights that are exclusively dedicated to ensuring integrity exist?

146. We are not aware of any such rights existing in any jurisdiction in the EU.

Questions

44. Is there evidence to suggest that the cross-border "free-riding" risk noted above for on-line gambling services is reducing revenues to national public interest activities that depend on channelling of gambling revenues?

45. Are there transparency obligations that allow for gamblers to be made aware of whether and how much gambling service providers are channelling revenues back into public interest activities?

46. Is there a regulatory body in your Member State, what is its status, what are its competences and its scope of action across the on-line gambling services as defined in this Green Paper?

147. **Question 44:** We are not aware of the existence of such evidence.

148. **Question 45:** We are not aware of any such obligations.

149. **Question 46:** Stanley holds a number of licences in various EU Member States. Each licence is issued and regulated by or through a Government Ministry or Government-appointed Body.

Question

47. Is there a national register of licensed operators of gambling services? If so, is it publicly accessible? Who is responsible for keeping it up to date?

150. No reply given.

Question

48. Which forms of cross-border administrative cooperation are you aware of in this domain and which specific issues are covered?

151. The only such agreement we are aware of is the Memorandum of Understanding (MoU) between the Italian (AAMS) and French (ARJEL) Authorities as it was reported on 29 June 2011. According to the report, this MoU will see the two Authorities "*operate with synergy to combat illegal gaming sites, promote sporting ethics and control and support legal gaming operators whilst looking after the interests of players*" (Gambling Compliance, 29 June 2011) .

Question

49. Are you aware of such enhanced cooperation, educational programmes or early warning systems that are aimed at strengthening integrity in sport and/or increase awareness among other stakeholders?

152. Stanley is a member of the European Sports Security Association (ESSA). ESSA has been significantly active in the context mentioned in this particular question as launched a Code of Conduct in 2010 for Athletes on the subject of sports integrity and betting in particular, with an adjoining Pilot Programme operated jointly with the European Betting and Gaming Association (EGBA) implemented in France, Spain, and Germany across various sports. Since 2011 this programme has been extended in collaboration with the Remote Gaming Association (RGA) to which Stanley is also a member. ESSA also operates an Early Warning System with its members which works by coordinating security and scrutiny efforts among individual members and by delivering any information on suspected abuses in real time to the relevant sports governing body. To this end, ESSA has already signed over 20 memorandums of understanding with leading international sports governing bodies, including FIFA, UEFA, the IOC, the ATP and other sporting regulators.

Questions

50. Are any of the methods mentioned above, or any other technical means, applied at national level to limit access to on-line gambling services or to restrict payment services? Are you aware of any cross-border initiative(s) aimed at enforcing such methods? How do you assess their effectiveness in the field of on-line gambling?

51. What are your views on the relative merits of the methods mentioned above as well as any other technical means to limit access to gambling services or payment services?

153. No reply given.