

Schibsted Sverige AB

Comments to the Green Paper on "On-line Gambling in the Internal Market"

COM(2011) 128 final / SEC(2011) 321 final

1. Introduction

1.1. The purpose of the consultation

Schibsted Sverige AB ("Schibsted Sverige") welcomes the European Commission's public consultation on its Green Paper concerning "On-line Gambling in the Internal Market"¹, the purpose of which we understand is:

- a) To launch an extensive debate on relevant public policy challenges and possible Internal Market issues resulting from the rapid development of on-line gambling activities towards EU citizens;
- b) To exhaust a number of questions related to the effects of, and to the possible public policy responses to, the rapid growth in on-line gambling activities;
- c) To gain a full picture of the existing situation in the EU to facilitate the exchange of best practices between Member States; and
- d) To determine if the differing national regulatory models for gambling can continue to coexist and whether specific action may be needed in the EU for that purpose.

To this effect, we understand that the consultation also aims at collecting information on the regulatory and technical means Member States use or could use to ensure consumer protection, the preservation of public order or other public interests, and their effectiveness, in view of the need for a proportionate, systematic and coherent application of their policy vis-à-vis on-line gambling.

Furthermore, we understand that the consultation seeks help to identify whether the current rules applicable to on-line gambling services at EU level are fit to ensure the overall coexistence of the national systems and determine if greater cooperation at EU level might help Member States to achieve more effectively the objectives of their gambling policy.

1.2 The relevance of the public consultation to Schibsted Sverige

Schibsted is a Scandinavian media group with approximately 7,200 employees and operations in 16 EU/EEA Member States (i.e. Austria, Belgium, Denmark, Finland, France, Greece, Hungary, Italy, Norway, Portugal, Estonia, Lithuania, Latvia, Spain, Sweden and Switzerland). Our objective is to develop our business activities so that we can offer our users a wide range of services, irrespective of which media channels they choose to use. The diversity of Schibsted's product range is closely aligned with our strong tradition of editorial freedom and our ability to adapt to a media market that is constantly undergoing rapid change.

In 2009 Schibsted's Swedish activities were merged into one company, Schibsted Sverige, which consists of three entities: Aftonbladet, Svenska Dagbladet and Schibsted Tillväxtmedier. Schibsted Sverige has approximately 1,300 staff, most of whom are employed in the media companies Aftonbladet and Svenska Dagbladet. The newspaper publications and news websites for Aftonbladet and Svenska Dagbladet are core activities of Schibsted Sverige's business. Aftonbladet is Sweden's biggest newspaper. Today we are market leaders in the digital media business in Sweden. Aftonbladet.se and Blocket.se are Sweden's leading websites. Our activities reach out to half the Swedish population every day.

[.....]

1.3 The present situation in the Swedish market for “related services performed and/or used by on-line gambling services providers”

This section corresponds to the kind of information set out in section 1.2. of the Green Paper, but focuses on the present situation for a media company like Schibsted Sverige and its newspaper Aftonbladet as provider of relevant related services used by on-line gambling services providers.

a) The relevant provisions of the Swedish legislation

According to section 45 of the Swedish Lottery Act (Lotterilagen (SFS 1994:1000))², the Government may grant special authorisation to organise lotteries in Sweden. Such special permission in the form of a license has only been granted to two State owned or State controlled companies, AB Svenska Spel and AB Trav and Galopp (ATG). Since betting on sport events and poker on the Internet are exempted from the definition of traditional lotteries in section 4 of the Act, such gambling can only be organised in Sweden provided that a special permission under section 45 has been granted.

Moreover, in section 38 of the Act, it is stated that:

¹ http://ec.europa.eu/internal_market/consultations/docs/2011/online_gambling/com2011_128_en.pdf

² <http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=1994:1000>

“it is not allowed, in a professional activity or otherwise with the objective of economic gain, to further participation in a non-authorized organised lottery within the country or in an organised lottery outside the country”.

A breach of the “furthering” prohibition in section 38 (in Swedish the co-called “främjandeförbudet”) is sanctioned according to section 54 of the Act, which states that:

“a person who intentionally or by gross negligence, organises a lottery without permission [...], or without such permission, in a professional activity or otherwise for economic gain, intentionally furthers participation in a lottery outside the country, if that furthering particularly concerns participation from Sweden, is subject to penalties or imprisonment for maximum six months. For minor infringements, no sanctions are to be imposed. For serious infringements, the offender is charged with two years of imprisonment.”

It should be noted that the Lottery Act does not prohibit non-Swedish gambling service providers to offer their services to the Swedish population and that consumers in Sweden also gamble with non-Swedish providers of gambling services. Moreover, the Lottery Act does not prohibit the many different forms of marketing tools used by non-Swedish gambling services providers directed towards Sweden such as general marketing on the Internet that is not only directed towards Sweden, general marketing in newspapers from other Member States which are distributed in Sweden, marketing in TV channels broadcasting in Sweden from other Member States (e.g. TV3, Channel 5).

However, at the same time, the Lottery Act prohibits advertisement in Swedish newspapers and other similar forms of marketing.

Schibsted Sverige is seriously concerned about the way the Lottery Act has been formulated and its discriminatory, inefficient and disproportional effects in relation to the various kinds of media channels that Schibsted Sverige offers its customers.

b) Recent relevant rulings by the European Court of Justice and the Swedish Courts

On 8 July 2010, the European Court of Justice (ECJ) handed down a preliminary ruling in the joined Cases C-447/08, *Otto Sjöberg*, and C-448/08, *Anders Gerdin*. The judgment concerns two requests for preliminary rulings by the Swedish Appeal Court (“Svea Hovrätt”) in relation to criminal proceedings under sections 38 and 54 of the Swedish Lotteri Act. Mr. Sjöberg and Mr. Gerdin were at the material time editors-in chief and publishers for the newspapers Expressen and Aftonbladet, respectively.

Between November 2003 and June 2004, Mr. Sjöberg and Mr. Gerdin had published some advertisements in their newspapers for the Internet gambling operators Expekt, Unibet, Ladbrokes and Centrebet, which are private companies established in other Member States than Sweden and who offer, in particular, their services to persons resident in Sweden. The gaming activities that they offered included, among others, sports betting and poker.

In their capacity, Mr. Sjöberg and Mr. Gerdin had the responsibility for the publication by their respective newspaper of advertisements for gambling organised abroad by the above mentioned companies.

The Public Prosecutor's Office ("Åklagaren") subsequently took proceedings against Mr. Sjöberg and Mr. Gerdin for infringement of section 54(2) of the Act, claiming that they had furthered, unlawfully and for profit, the participation of Swedish residents in gambling organised abroad.

The referral by the Svea Hovrätt to the ECJ for a preliminary ruling sought answers to a number of questions, essentially concerning (a) the fact that the Swedish Government allows the State owned/controlled gambling operators AB Svenska Spel and AB Trav och Galopp (ATG) to use extensive marketing to attract customers and further their interest in gambling activities, and (b) the discrimination on grounds of nationality, and whether such discrimination may be accepted, under some circumstances, on national gaming and lottery markets on the basis of overriding reasons in the general interest.

In its judgment, the ECJ concluded that:

1. Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.

Schibsted Sverige understands, and is of the view that, this part of the judgment is not intended to establish a new separate ground justifying restrictions by national legislation, but that this conclusion by the ECJ – although not explicitly stated in the judgment – is intended to be complemented with the requirements (i.e. regarding proportionality, necessity etc) established by the ECJ in its earlier judgments. Another interpretation of this part of the judgment is our view not logical. If a Government would not longer have to fulfil the requirements of proportionality, necessity etc., it would have full freedom to maintain or introduce restrictive legislation with the very purpose of foreclosing the national market from private operators. In our view, this would run contrary to EU internal market and competition law.

2. Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the furthering of gambling organised in another Member State is subject to stricter penalties than the furthering of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.

On 22 June 2011, the Svea Hovrätt delivered its judgment (Case nr B 4240-05). The Court, in describing the relevant provisions in the Swedish regulatory system regarding gambling, initially noted that while, on the one hand, the "furthering" prohibition in section 54 covers any furthering of a participation in a gaming activity arranged outside Sweden, it, on the other hand, is not prohibited to participate in an unauthorized gaming activity in Sweden or to further such participation. It is only if an activity furthers the very arrangement of such an activity in Sweden, that the action could be

sanctioned as complicity in crime under the relevant provisions of Swedish criminal law. The Court against this background found that the furthering through advertisements in the daily press for an unauthorized lottery in Sweden would not fall within any provisions of Swedish criminal law.

The Court concluded that:

1. The prohibition in section 38 and the sanctions set out in section 54 of the Lottery Act only concern the furthering of participation in a lottery organised outside Sweden; and
2. The provisions in section 54 means that a person who furthers the kind of gaming activities that the advertisements in question concern and which are organised in another EU Member State can be subject to more severe criminal sanctions than a person who furthers gaming activities organised in Sweden without authorisation.

On these grounds, the Court ruled that section 54 of the Act violates the EU prohibition on discrimination. The sanctions in section 54 could therefore not be applied to the accused, Mr. Sjöberg and Mr. Gerdin. A leave to appeal against this judgment has been made to the Supreme Court and a final ruling on the case is pending.

c) *The remaining problem*

It should be noted that the judgment by the Svea Hovrätt focuses upon the sanctions set out in section 54 of the Act, in other words the fact that the sanctions that may be imposed upon someone that furthers gaming activities organized in another EU State, be they legally authorized or not, may be more severe than those that may be imposed upon someone that furthers an unauthorized gaming activity in Sweden. The judgment thus essentially concerns a technicality in the sanction system, where the discriminatory element of section 54, and hence the violation of EU law, could be removed by amending the relevant provision so that the same kind of sanctions equally apply to both situations. If the Government would introduce such an amendment, it could still continue enforcing the “furthering” prohibition in section 38 of the Act as it stands today.

At present, it would seem that the Swedish Government and the Agency in charge of ensuring that the Swedish gaming and gambling market is legal, safe and reliable i.e. the Swedish Gaming Board (“Lotteriinspektionen”³) are keen to maintain the furthering prohibition in section 38 of the Act. Moreover, it is not sure whether the judgment by the Svea Hovrätt will stand if it would be appealed, and such a legal process could take many years.

It would, however, also seem that the “furthering” prohibition in section 38 of the Act, in itself, amounts to a violation of EU law such as a non-justified breach of the fundamental principles of non-discrimination and proportionality. At present, the Lottery Act:

- Prohibits advertisement for gambling operators in other Member States in Swedish newspapers like Aftonbladet and other similar forms of marketing; but
- Does not prohibit licensed gambling operators in other Member States to offer Internet gambling services in Sweden;
- Does not prohibit Swedish consumers to gamble with non-Swedish providers of gambling services;
- Does not prohibit the many different forms of marketing tools used by non-Swedish gambling services providers directed towards Sweden such as general marketing on the Internet that is not only directed towards Sweden, general marketing in newspapers from other Member States which are distributed in Sweden, marketing in TV channels broadcasting in Sweden from other Member States (e.g. TV3, Channel 5).

In our view, this is an inconsistent approach that runs against the EU prohibition on discrimination and the case law of the ECJ, which protects both the right to provide services and the right to receive services (Case 186/87, *Cowan v Trésor Public* [1989] ECR 195). Section 38 of the Act, prohibits newspapers like Aftonbladet to meet the existing and future demand in the internal market for our services.

With the rapid technological developments in the on-line gambling and media markets, advertisement income from gambling operators have become essential to Aftonbladet's activities. If such advertisement income would disappear as a consequence of incorrect enforcement of Swedish rules on advertisement for gambling, Aftonbladet would face difficulties continuing its present activities, and would need to consider leaving the market. In such circumstances, both Swedish licensed gambling operators and gambling operators in other Member States may not longer have the possibility to place advertisements in Aftonbladet.

As a further consequence, the present link between the wider business community and citizens may become less apparent. If so, other companies outside the gambling sector could be faced with fewer options to place advertisements in newspapers like Aftonbladet, which would result in further negative consequences to the overall economic and competitive situation in the market. Schibsted Sverige takes the view that the accumulated negative effects to the society of the present furthering prohibition in section 38 of the Act already today runs contrary to EU law and the joined efforts at EU level under the Europe 2020 Strategy and the Single Market Act to boost economic growth, competition and employment within the EU.

Schibsted Sverige and its newspaper Aftonbladet are therefore seriously concerned about the present formulation of section 38 in the Lottery Act and its discriminatory, inefficient and disproportional effects

³ The Lotteriinspektionen: <http://www.lotteriinspektionen.se/en/>

in relation to the various kinds of media channels that Schibsted Sverige offer its customers. The relevant provisions of the Act generate a series of negative consequences to the internal market and competitive conditions with regard to certain forms of marketing for gambling. Those negative consequences mainly concern marketing in Swedish newspapers, which are discriminated against in relation to all other forms of marketing of gambling that legally are taking place in Sweden.

We therefore believe that the relevant provisions in section 38 of the Lottery Act are inappropriate in relation to the objectives they seek to achieve. Schibsted Sverige is concerned that if section 38 is not amended, the Government's and the Gaming Board's interpretation and application of the Act will continue to lead to incorrect discriminatory and disproportionate enforcement of the law.

To that effect, and in addition to the information provided above, it will also be important for the Government and the Board:

3. To recognise and take into account the growing competitive disadvantage that Swedish newspapers like Aftonbladet are facing, as a direct consequence of the furthering prohibition, in comparison to newspapers and media operators in other Member States, where the national legislation does not impose a discriminatory, categorical and disproportionate ban on advertisements in printed press for gambling operators.
4. To use a more balanced and proportionate approach towards advertisement income from gambling operators, irrespectively of whether they are based in Sweden or in other Member States, and the possibility for newspapers to place advertisements for such operators;
5. To take into account important developments in today's media market and the increasing importance of advertisement income from gaming activities to the economy of newspapers like Aftonbladet and the negative impact on its business activities and ability to meet consumer demand in an increasingly technology-dependent media landscape;
6. To take into account, on the one hand, the link between the importance of advertisement income from gambling operators to newspapers like Aftonbladet, and on the other, the importance of newspapers like Aftonbladet for other businesses' placement of advertisements.

Without a more market-based and reasonable approach towards advertisement for gambling services providers, the present Swedish legislation increasingly places newspapers like Aftonbladet in an unfavourable competitive situation in comparison with media companies in other Member States, who do not face such a discriminatory and outright ban.

3. Schibsted Sverige's comments on specific sections of the Green Paper

In addition to the above information, Schibsted Sverige would like to submit some comments on some specific sections of the Green Paper, which are relevant to our activities in relation to gambling operators and which we hope will contribute to facilitate the European Commission's forthcoming work with reviewing the policy and rules in this area.

Section 2.2 - "Related services carried out/or used by suppliers of online gambling services".

In this section, it is stated that a number of services, for example marketing- and payment services, are used by gambling operators to promote or facilitate online gambling. Some of the services fall within the scope of secondary law. To that effect, it is further explained under the sub-heading "*promotion of online gambling – commercial messages*", that suppliers of online services uses commercial messages to promote their services, related products and their image with customers and/or distributors.

Schibsted Sverige notes the Commission's comments that the following commercial messages are most commonly used: (1) TV-commercial, (2) advertisement in printed press, (3) commercial messaging online, (4) sale promoting measures, (5) direct marketing (e.g. direct mail, e-mail and sms to registered customers, and personal follow-up contacts), (6) sponsoring agreements. In that respect, it is stated that the Commission is aware that there in many Member States are limitations for such commercial messages, from strait bans to provisions on what advertisement in media for online gambling services may contain. The European Commission welcomes comments on such limitations (points 1 and 2 above).

On this point, Schibsted Sverige would like to submit the following additional comments:

=> *The strait ban on advertisement in printed press for gambling services is discriminatory, disproportionate and goes beyond what is necessary in relation to the objectives it seeks to achieve.*

Schibsted Sverige is of the view that the prohibition in paragraph 38 of the Lottery Act violates EU law and the EU principles on equal treatment, proportionality and necessity because:

- As it stands, section 38 imposes a categorical strait ban for printed press to publish advertisement for non-Swedish gambling services and for non-licensed Swedish gambling operators. The Act thus places *authorised* gambling service providers in other Member States on an equal footing with *non-authorised* gambling service providers in Sweden. The law is therefore discriminatory against non-Swedish gambling service providers, which are prevented from placing advertisements in newspapers like Aftonbladet. The Act also discriminates against newspapers like Aftonbladet because other forms of media such as TV are not prohibited to advertise for gambling services (see sections 1.3 a) and c) above).

- The ban is disproportionate and inconsistent since it does not apply equally to all forms of media (see sections 1.3. a) and c) above). The impact of the ban is not either limited to Swedish newspapers like Aftonbladet, but has negative effects outside the media markets in which Aftonbladet and similar newspapers operate. It pushes back the newspapers economically, which reduces growth potential and ability to innovate to meet the increasing consumer demand in the rapidly changing media landscape. Just like other companies, newspapers like Aftonbladet need to keep up with technological developments to compete on equal terms with other media operators in the internal market who do not face such a ban.
- It does not address the negative consequences to the further integration and increased competitiveness in the internal market. Schibsted Sverige would like to emphasise that the case law of the ECJ, so far, mainly has focused on analysing the compatibility of national restrictions or prohibitions on advertisement for gambling activities on the basis of internal market provisions of the TFEU. However, in the light of the economic crisis and the need for measures to deal with sovereign debts, we believe that there is now a need to take a more constructive approach to remove unnecessary and costly obstacles to create a better functioning, further integrated and more competitive internal market also in respect of Internet-based activities and media.

To this end, efforts which are based on the Europe 2020 Strategy and Single Market Act should therefore also focus on addressing discriminatory and disproportionate bans such as the prohibition for advertisement in section 38 of the Lottery Act. Schibsted Sverige believes that a more balanced legislative and policy approach is needed to create further possibilities for printed press to place advertisements for gambling services providers, irrespective of where in the EU gambling operators are based. This would also bring further benefits to the wider business community and consumers.

Section 2.3.1 - “Consumer protection”

In question 16 under the this section, the Commission explains that, “to date across the Member States the instruments that have been used to try to limit excessive “problem gambling” in on-line services are those applied to all gambling”, including “limits on commercial communication – restrictions on the use of certain media [...]”. In question 16, the Commission asks for evidence on whether such an instrument is central and/or efficient to prevent or limit problem gambling relating to on-line gambling services.

Schibsted Sverige would like to draw the Commission’s attention to the fact that there is a lack of a systematic and coherent approach by the Swedish Government and the Betting Board towards the advertisement of gambling service providers. The depending on what kind of media is involved. Aftonbladet has received several letters from the Board referring to the relevant provisions of the prohibition in the Lottery Act, whilst commercial pillars with the same kind of advertisement frequently can be seen in Sweden, as well as in other media channels (see sections 1.3 a) and c) above).

Newspapers like Aftonbladet are therefore facing discriminatory treatment in relation to other media channels. In our view, this demonstrates that the Swedish Government and the Board is not coherent in its policy and justifications for restricting and prohibit advertisement of gambling services in seeking to protect consumers.

2. Conclusions

Schibsted Sverige believes that the furthering prohibition (“främjandeförbudet”) in section 38 of the Swedish Lottery Act is discriminatory, disproportionate and unnecessary. It is therefore in violation of EU law and fundamental principles of non-discrimination and proportionality. Section 38 of the Act also runs contrary to the joined efforts at EU level under the Europe 2020 Strategy and the Single Market Act as the prohibition prevents Swedish newspapers to meet the demand for advertisement from gambling service providers in the internal market. The prohibition pushes back economic growth, employment and ability for Swedish newspapers like Aftonbladet to innovate and compete on equal footing with media in other Member States that do not face similar categorical, outright and disproportionate bans. The ban therefore results in negative consequences to the wider business community and consumers.

3. Recommendations

In light of the above information and comments, Schibsted Sverige and Aftonbladet would welcome a revision of the relevant provisions in section 38 of the Swedish Lottery Act that entails a more balanced legislative and policy approach towards advertisement of gambling services also in newspapers. In our view section 38 of the Act should enable printed press and other media to compete on equal terms and contribute to achieve the objectives of the joined efforts under the Europe 2020 Strategy and the Single Market Act.

Schibsted Sverige and Aftonbladet therefore hope that the information it has submitted can contribute to facilitate the Commission’s work with further integration and strengthening of the internal market and competitiveness in the gambling market and in the closely related media market across the EU.