

Message 791 Communication from the Commission - SG(2012) D/50777
Directive 98/34/EC
Notification: 2011/0188/D

Reaction of the Commission to the response of a Member State notifying a draft regarding a detailed opinion (9.2)

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6. In accordance with the notification procedure under Directive 98/34/EC, on 15 April 2011, Germany notified the above-mentioned draft law to the Commission.

The draft Act introduces a regulatory framework for the organisation and operation of betting and gambling on the Internet, thereby aiming at a limited and controlled opening of these markets. As such, the notified draft contains rules on Information Society Services within the meaning of Article 1 (5) of Directive 98/34/EC as amended by Directive 98/48/EC namely rules specifically governing Information Society Services.

On 18 July 2011 the Commission sent its observations to the German authorities, taking the form of a detailed opinion and comments. On 7 December 2011 the German authorities responded to these observations.

Examination of the response has prompted the Commission services to issue the following comments, which put an end to the procedure under Directive 98/34/EC.

1. Detailed Opinion

In its detailed opinion the Commission raised concerns in view of (1) the restrictions on the offering of on-line gambling services and (2) the provision on hosting and intermediation of casino games and poker in the Internet.

(1) The restrictions on the offering of on-line gambling services

The Commission observed that with reference to the main objectives put forward by the German authorities (i.e. channelling the consumer's demand into a controlled system, and combating crime and fraud) and while it does not object to strict licensing conditions as a matter of principle, it failed to see how

a limitation of the total number of licences for the offering of on-line sport betting services would be suitable to achieve the objectives set out. The German authorities were thus required to provide an analysis of the appropriateness and proportionality of the restrictions in this regard.

The Commission also noted in this context, that strict licensing conditions – implying limits on stakes, types of bets and advertising possibilities, combined with a limited number of available licenses in regard of the overall size of the market and a very high gambling levy seemed in view of their cumulative effect to render it very difficult to provide an economically viable and subsequently reliable and attractive on-line sports betting offer.

The German authorities state that in a revised draft treaty a number of conditions have been modified:

- the number of sports betting licences has been increased from 7 to 20, with a possibility to review this number on the basis of experience gathered in the application of the new system,
- the gambling levy has been decreased from 16 2/3 % on stakes to 5 % on stakes,
- the monthly limit on stakes has been increased from 750€ to 1000€ and can also be individually set in the licence,
- clarification on the scope of the advertising ban during sports events ("right before and during the live broadcasting of a sports event"),
- introduction of a progressive schedule for the initial and the annual licensing fee, based on the expected administrative costs for and the turnover of the individual licence holder.

The Commission services welcome these changes. They agree with the German authorities that combating the illegal market, preventing addiction, and fighting the criminal and fraudulent activities linked to gambling are amongst the overriding reasons in the public interest capable of justifying restrictions to the freedom to provide services. The Commission services furthermore agree that in this respect a Member State is in principle entitled, if it pursues the objective to reduce gambling opportunities, to establish a system of authorisation and in that respect to lay down restrictions as to the maximum number of operators authorised.

The Commission services however would like to reiterate that such restrictions must be suitable for achieving the objectives sought and satisfy the conditions laid down in the Court's case-law as regards their proportionality. While the Commission services do not question the cautious approach taken by the German Federal States it would like to restate that the suitability and proportionality of the measures needs to be properly demonstrated. In this respect the Commission services would also like to remind the German authorities that the procedure for the granting of licenses needs to be organised in a transparent and non-discriminatory manner, subjecting incumbent and new operators to the same conditions and timeline.

The Commission services welcome the proposal of a review clause allowing

for a subsequent adjustment of the number of licences, should it be recognised that the objectives of the treaty cannot be adequately realised on the basis of the number of licenses granted.

The Commission services also welcome the possibility to adjust, under certain conditions, the limit on stakes in the licence and thus to take into account the situation of particular players and operators, in full compliance with the principles of transparency and non-discrimination

With regard to its concern that in regard of their cumulative effect, the restrictions imposed may render it very difficult to provide an economically viable, hence reliable and attractive licit on-line sports betting offer, the Commission services note that the Federal States are now convinced that on the basis of the revised conditions it will be possible for the future licensees to provide an attractive, legal offer and at the same time operate profitably. On the basis of the information provided by the German authorities the Commission services are not in a position to assess the economic viability of the future online sports betting system. However, they would like to highlight the need for a continuous evaluation of the implementation and application of the future treaty. They therefore welcome the commitment of the German authorities to provide the Commission with a first evaluation of the regulatory mechanism to be put in place, aimed at assessing the suitability and efficiency of the system for the achievement of the objectives of the treaty, within two years from the entering into force of treaty.

(2) Hosting and intermediation of casino games and poker in the Internet

The Commission questioned the introduction of an establishment requirement for on-line casinos and poker (only land-based casinos were allowed to offer on-line casino games and poker) and asked for further information on the authorisation procedure (only one land-based casino in a Federal State was allowed to offer on-line casino and poker games) and on the implementation of the provisions for poker games. In response to these observations the German authorities state that they chose to delete the provision in question. The revised draft text does not allow for any kind of on-line casino and poker game offer.

The German Federal States now justify the ban on on-line casino and poker games by stating that "in light of the fact such games are highly vulnerable to rigging and have significant addiction potential, as well as the fact they are vulnerable to being exploited for the purposes of money laundering, it does not appear to be justifiable to open up the Internet as a distribution channel". The authorities claim that "the objectives of combating the black market, protection of young people and protection from addiction are not attainable through channelling in the sector, but rather should be pursued through a continual administrative process with the help of the instruments explained in Section 9 of the treaty."

In view of the above, it is worth recalling that the Court of Justice of the EU has acknowledged that a prohibition measure covering any offer of games of

chance via the internet may, in principle, be regarded as suitable for pursuing the legitimate objectives of preventing incitement to squander money on gambling, combating addiction to the latter and protecting young persons, even though the offer of such games remains authorised through more traditional channels (case C-46/08, Carmen Media, paragraph 105). The Court furthermore recognised that ensuring the objective of combating the criminal and fraudulent activities linked to gambling is amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services (see case C-243/01, Gambelli and Others, paragraph 67).

Whilst in the case at issue the reasons invoked to justify the ban appear to constitute valid public interest objectives, the Commission services note that no data has been provided to adduce evidence of the existence of the risks identified. In this context the Commission services would like to reiterate that the suitability and proportionality of the measures in question needs to be established to the requisite standard.

In the context of the assessment of whether such a standard is met, it would need to be determined whether, first, criminal and fraudulent activities linked to gambling and, second, gambling addiction are significant problems in Germany and whether the ban of certain types of games or gambling on the internet is capable of solving such problems (see to that extent case C-258/08, Ladbrokes Betting & Gaming and Ladbrokes International, paragraph 29). Indeed, it is settled case law that if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it should supply all the evidence of such a kind as to enable a proper assessment if the said measures do indeed fulfil the requirements arising from the principle of proportionality (see case C-316/07, Stoß and Others, paragraph 71). On the basis of the information provided by the German authorities the Commission services are not yet in a position to assess the extent of the problems identified or the suitability and proportionality of the measure proposed.

In this respect and notwithstanding the above, the Commission services would like to highlight again the need for a continuous evaluation of the implementation and application of the treaty. It therefore welcomes the commitment of the German authorities to provide the Commission with a first evaluation of the regulatory mechanism in place, assessing the suitability and efficiency of the ban on online casino and poker games for the achievement of the objectives of the treaty, in particular in view of the current development of the on-line poker market in Germany, within two years from the entering into force of treaty.

2. Comments

The Commission services welcome the explanation and information given in response to the comments submitted to the German authorities. The Commission services would like to take the opportunity to further comment to a number of points made in their reply:

- 2.1. Licensing procedure for sports betting and conditions of participation – Sections 4a and 4b

The Commission services now understand that the tender notification will specify the individual conditions and criteria, including inter alia the “social concept” (measures to ensure the exclusion of minors and barred players and other social measures) and the “profitability concept” (description of the economic viability taking into account the duty to pay taxes), used by the competent authorities as the basis for making decisions on applications in order to ensure a transparent licensing procedure that is based on objective and non-discriminatory criteria.

The Commission services welcome that by introducing an explicit provision stating that documentary evidence and documents from another Member State or another Signatory State to the Agreement on the European Economic Area are tantamount to domestic documentary evidence and documents the German authorities will take due account of the requirements to which the applicant operator is already subject in the country where it is established.

- 2.2. Right to set up a sales network of land-based sports betting outlets, Section 10a (5)

The Commission services welcome the clarification that the opening of a land-based betting outlet is not required as a prerequisite for the issuing of a licence for the provision of online betting services. The Commission services understand that granting permits for the opening of a betting outlet is now the individual competence of each Federal State. In this respect the Commission services would like to remind the German authorities that such a procedure also needs to be organised in a transparent and non-discriminatory manner.

- 2.3. Licensing requirements for incumbent operators, Sections 10a (1), 10 (6) and (2) and 2.9. Transitional period

The Commission services welcome the clarification that incumbent and new operators will only be able to offer on-line gambling services after having been granted a license under the new treaty, i.e. an authorisation according to Section 4 (5), and that these operators are subject to the same licensing conditions and timeline.

- 2.4. Authorisation of gambling brokering services

The Commission services welcome the explanations given by the German authorities and the changes announced with regard to the authorisation of gambling brokering services. Section 19 (2) now foresees a bundled procedure in which one authority grants all general authorisations for the offering of gambling services (authorisation according to Section 4 (1)). The Commission services understand however that this does not mean that the responsible authority will grant one authorisation covering the whole territory of Germany but rather that it will grant up to 16 individual authorisations for the Federal States concerned, potentially on the basis of different licensing

requirements for each Federal State and thus in fact still requiring individual applications for each Federal State.

Furthermore, the bundled procedure does not seem to apply to section 4 (5) imposing the obligation to obtain a permit for the provision of gambling brokering services in the Internet. As a permit is necessary for each German Federal State (Section 9 (4)), it seems that in addition to the bundled procedure for the granting of the general gambling authorisation an on-line commercial broker will still have to apply in each Federal State for an authorisation for the offering of on-line gambling services (authorisation according to Section 4 (5)) in order to be able to offer his services on the whole German territory.

The Commission services would like to invite the German government to explain why a revised treaty would merely introduce a bundled procedure for the authorisation of on-line gambling brokering services and would not define a uniform procedure, also in view of the fact that the notified draft already created such a procedure for the authorisation of lottery collectors (Section 9a (1)) and on-line sports betting services (Section 9a (2) 3).

- 2.5. Limitation on stakes, Section 4 (5) No 2

The Commission services welcome the explanation given on the reasoning justifying the limitation on stakes. It welcomes the introduction of a more flexible approach, allowing for the adjustment of the limit in the operator's licence. An adjustment might be necessary for individual operators or players in order to better achieve the objectives of the treaty.

- 2.6. Advertising of on-line betting services in the Internet, Section 5 (3)

The Commission services take note of the explanations given on the application of the advertising rules. It would respectfully request the German authorities to transmit the advertising guidelines mentioned in Section 5 (4) to the Commission once these guidelines have been drawn up.

- 2.10. Limiting betting activities in a consistent and systematic manner

The Court in its assessment of the compliance of the German regulatory framework for gambling services explicitly referred to rules on types of games (slot machines and horse racing, see Case C-46/08 Carmen Media) which are not fully covered by the notified text but also subject to regulation at federal level. The Commission services understand that these rules have already been partly amended through their inclusion in the draft (within the competence of the Federal States) and will also be amended in federal legislation. While the Commission services welcome further explanations given by the German authorities in their response to the detailed opinion it will only be in a position to assess compliance with the requirement of a consistent and systematic approach once all relevant legislation has been amended and notified.

- 2.11. Further notification obligations

Future decrees implementing the provisions of the notified draft and relating to electronically transmitted gambling operations could contain technical regulations or rules on information society services within the meaning of Directive 98/34/EC. Should this be the case, the Commission services would like to remind the German authorities of the obligation to notify them before adoption, in accordance with Directive 98/34/EC.

Finally, the Commission services would like to recall that the mechanism set up by Directive 98/34/EC as amended by Directive 98/48/EC is based on the obligation of the Member States to inform and consult each other and the Commission before they adopt national rules aimed specifically at information society services and to modify their drafts if necessary. Following the notification of a draft text, the Commission and the Member States examine these rules in order to assess their compatibility with Union law, particularly with the free movement of services and the freedom of establishment of service operators, and to reach a decision, where necessary, on their consistency with the concerned provisions.

It should be pointed out in this regard that in the framework of the Directive 98/34/EC, the Commission does not examine the compatibility of rules not aimed specifically at information society services, even if they are part of the notified text, or, in such a situation, the compatibility of the draft text as a whole.

It should also be recalled that when a Member State has fulfilled all its obligations resulting from the Directive, it can adopt the draft measures notified and amended as the case may be. After the adoption of the draft, the procedure is deemed to be finalised. However, the termination of the procedure under Directive 98/34/EC cannot per se be deemed to imply compliance with EU law. Such termination is without prejudice to the possibility for the Commission to subsequently initiate infringement proceedings in regard of certain notified or amended provisions, as appropriate.

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