Legal Certainty by Regulating the Online Gaming Industry

Study

by the european center for e-commerce and internet law

Author:

Wolfgang Zankl

Professor at the Department of Civil Law at the University of Vienna
Former Dean of the Faculty of Law at UFL
Director of the european center for e-commerce and internet law

With the scientific assistance of
Manuel Boka, Markus Hübner, Thomas Nikodem, LL.M.

www.e-center.eu

(e center
vienna | brussels | london | leipzig | prague | budapest
europäisches zentrum für e-commerce und internetrecht
european center for e-commerce and internet law

Study

Legal Certainty by Regulating the Online Gaming Industry

Current situation
Target situation
Proposal for a Directive

September 2010

NOTE: this is a translation from the German original into English; only the German original is valid and binding

kohlmarkt 1
1010 wien
fn 171119x, hg wien
tel: +43 1 5354660
fax: +43 1 5354660
www.e-center.eu
office@e-center.eu

Executive Summary

1. This study examines the ***general conditions for online gaming using the methods of law***, notably resulting in a focus on the normative requirements for legal certainty and a comparative evaluation of lex lata and lex ferenda.
2. ***European gaming law in its current state*** is characterised by an extreme fragmentation caused by the construction of law, as well as the fact that it is not tailored to accommodate the specifics of information and communication technology. Across Europe, this finds its expression in the exemption of gaming from the E-Commerce Directive and, at national level, in gaming monopolies that are confined to the national borders while online gaming, by definition, is cross-border in nature: "***erasing physical and legal boundaries"*** (*EU Presidency Progress Report 2010*). A lack of legal harmonisation and formal competencies in the preliminary ruling procedure, but also the ECJ's rejection de lege lata of a comparison between the different protection levels in the various Member States, has given rise to a situation in which this discord cannot be overcome even by the judicature, leading to significant shortcomings in player protection and crime control.
3. The ***situation of European gaming law as it ought to be*** is inferred from the requirements for legal certainty. In terms of online gaming, these requirements primarily consist in creating an unambiguous, certain and stable regulatory environment ("s*afe environment*") for consumers and suppliers to operate in. For consumers, this is the case particularly if they are protected from
   - crime and
   - problematic gambling behaviour;
   - specifically with the optimised use of the possibilities offered by information and communication technology.

   For suppliers, a safe legal environment means being subject to a homogeneous, normative body of regulations that takes into account the specifics of electronic and cross-border gaming, especially online gaming, by means of:

- *regulatory rules* enforced by independent and networked (both electronically and otherwise) authorities
- *licensing rules* based on harmonised minimum standards, allowing mutual recognition of fulfilled license requirements, insofar as they are based on the same protection levels of the relevant Member States – and would thus be in the spirit of the European *Passporting Principle*, which has been successfully applied to other industry sectors, and finally
- *rules for taxation,* which would complement the above rules and help to prevent any competitive disadvantages vis-à-vis the black market.

4. The ***target situation described above is not congruent with the current situation***, particularly not with the requirements for legal certainty. Empirically, this is demonstrated by the seemingly endless judicature of the ECJ. The fact that the number of rulings has been increasing significantly over time rather than diminishing is an unambiguous and scientifically recognised indication of qualified legal uncertainty, which has also come to the attention of the European Parliament (*2008 Report on the Integrity of Online Gambling*).
5. ***Legal certainty comes topmost in normative regulatory hierarchies*** and is thus one of the fundamental principles in national and supranational legal systems. If, therefore, it does not exist de lege lata – as in the case under review – because the legal situation does not allow it and because the judicature is not willing or able to bring it about, it must be sought de lege ferenda.
6. Applied to online gaming, this means that a suitable ***regulation*** at a pan-European level (as this would be the only way to ensure that it works across borders as it does online) is not merely desirable, as expounded in widely published opinions, but ***jurisprudentially imperative***.
7. The *european center for e-commerce and internet law* has therefore drawn up a proposal for a directive that ensures the normative and jurisprudential fulfilment of the requirements for legal certainty detailed above as part of a ***European Regulatory Framework***. It follows the spirit of the pertinent Progress Report of the EU Presidency ("the Internet has considerably altered the gambling and betting sectors in Europe") and current findings of various research studies by taking into account the changing requirements necessitated by the developments of information society. These changes

are characterised primarily by the fact that the player protection targets and crime control can no longer be ensured by keeping up or reinforcing national lock-in effects for stationary gaming. Since the online community can easily sidestep any such measures without any further ado by making use of the ubiquitous and countless alternative offers (substitution effects) - thus exposing themselves to the perils of the uncontrolled black market - a legally valid regulatory approach must take into account the special nature of online gaming while making allowances for the relevant research results: not the imposition of quantitative restrictions but the qualitative formation of law for online gaming geared towards player protection and crime control is suitable to achieve these aims (*Levi:* ***"prefer regulation over prohibition"***).

8. The objective of the thus sought regulatory system must be to achieve, by way of methodological analysis of the current and target situation, a situation in which online gaming in Europe is harmonised to such an extent as to prompt an adequate as well as legally and technically up-to-date *balance of interests*; this should be done by safeguarding the sovereignty of Member States - as recognised by the ECJ - in determining their respective levels of protection and at the same time striking a balance between economic, fiscal and social interests, paying particular attention to player protection and crime control. To promote the above-referenced target situation this should be *regulation-based,* to allow players and operators to act in a *clear, established and consistent legal environment* ("***safe environment***"). For consumers, this means protection from crime and problematic gambling behaviour, as mentioned above, while fully complying with the requirements and prospects of the information society. For operators, the above mentioned target situation would constitute a legal framework for *supervisory, licensing and taxation rules* that take into account the factual, economic and legal characteristics of cross-border gaming. Overall, these measures also promote competitive conditions in the interest of consumer protection, reducing the extent to which consumers turn to the uncontrollable black market, a behaviour that has been observed particularly often with online gaming.
9. Irrespective of this initiative, which is needed for the whole of Europe, Member States ***still have a duty*** to update national conditions for online gaming ***as intended by the current Progress Report of the EU Presidency***. This specifically concerns Member States whose gaming

monopolies – some of which are legally dubious – are among the main causes for the lack of legal certainty, because they are obstacles to mutual control among competitors (which in many cases ensures actual consumer protection while monopoly supervision often proves to be insufficient) and whose national quantitative intentions (limitations) provide no qualitative impetus for the international gaming sector, as explained above.

Proposal for a Directive

1. Recitals

The recitals of the proposal are reserved for the European legislature. In the context of the present proposal for a directive, the grounds and specific circumstances that led to the formulation of this text (cf.I.3 *infra*) are commented in the explanatory notes (cf. II *infra*).

2. Table of Contents

3. Text

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND COUNCIL

on the regulation and harmonisation of the requirements for licensing and operating electronic games of chance, combined games and betting at a distance (Online Gaming Directive)

THE EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION -

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53 (1) and Article 62 thereof,

Having regard to the proposal of the European Commission,

in accordance with the proper legislative procedures,

Whereas:[1] … –

HAS ADOPTED THIS DIRECTIVE:

[1] See Explanatory Notes (III *infra*)

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject Matter and Purpose of the Directive

(1) The purpose of the Directive is to regulate online games of chance, combined online games and online betting games, as well as to harmonise the license requirements in the internal market. The aim of harmonisation is protection of consumers and minors as well as crime control.

(2) The provisions of this Directive ensure, insofar as necessary to achieve the objectives mentioned in paragraph 1 above, a harmonisation of certain national regulations applicable to online games of chance, combined online games as well as online betting games pertaining to the start-up and operation of online games of chance, online combined games as well as online betting games, and relating to cooperation among Member States.

(3) Member States shall restrict the provision and implementation of online games of chance, online combined games as well as online betting games within the internal market solely in accordance with this Directive.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

a) "Game of chance": a game that is played for stakes, in which winning or losing is mainly a matter of chance. In particular, games of chance include games of dice and roulette;

b) "Combined game": a game that is played for stakes, in which winning or losing may be influenced by the player's individual skills. Combined games include poker, black jack and backgammon;

c) "Betting game": a game that is played for stakes, in which winning or losing depends on the outcome of a sports or other event. Betting games include betting on horse racing and football.

d) "Game": all games of chance, combined games and betting games;

e) "Stake": any amount that the player pays to the gaming operator regarding the outcome of a game, in order to receive winnings in the event that the game turns out as predicted by the player;

f) "Online": the implementation of games in a virtual environment with no personal contact between the gaming operator and the player by direct and exclusive application of electronic means of telecommunication;

g) "Gaming operator": a legal person licensed to offer, implement and advertise online games of chance, combined online games and online betting games;

h) "Player": a natural person or gaming pool consisting of several natural persons participating in online games;

i) "Licence": any act of state, irrespective of its form, that grants an authorisation to offer, implement and advertise online games.

Article 3

Scope

(1) This Directive applies to the offering, implementation and advertising of online games.

(2) This Directive does not apply to:

- online games offered and implemented by a natural person for the purpose of personal entertainment for low stakes;

- insurance undertakings within the meaning of Article 1 of Directive 73/239/EEC or insurance undertakings within the meaning of Article 1 (1) (a) of Directive 2002/83/EC as well as undertakings providing reinsurance and retrocession as mentioned in Article 2 of Directive 64/225/EEC;

- credit institutions within the meaning of Article 1 (1) of Directive 2000/12/EC or financial services undertakings within the meaning of Article 1 of Directive 2004/39/EC;

- promotional competitions;

- lotteries;

- online games in which the player uses terminals supplied by the gaming operator in a public area (slot machines and betting terminals);

- games that take place in a physical environment with personal contact between the gaming operator and the player without the direct and exclusive application of electronic means of telecommunication (offline games).

CHAPTER II

AUTHORISATION

Article 4

Licensing

(1) Member States shall stipulate that a national licence must be obtained before advertising, offering and implementing online games. Said licence shall be granted by the national authorities.

(2) Member States shall establish the licence requirements in accordance with Articles 4 through 9 of this Directive.

(3) The licence may be granted for any or all of the online games referenced in Article 2 (a) through (c) above.

(4) Without prejudice to the licence requirements established by Member States in accordance with paragraph 2 the licences shall be granted by virtue of an open, transparent and non-discriminatory process.

Article 5

Licence Requirements

(1) Member States shall ensure that potential gaming operators satisfy at least the following requirements before granting a licence. According to these requirements, a gaming operator must:

a) have the legal form of a corporate entity subject to mandatory audits within the meaning of Article 1 (1) of Directive 78/660/EEC;

b) have at least one branch in a Member State of the European Union;

c) comply with the information requirements established in Articles 17-18 of Section I of Directive 2004/109/EC;

d) prove that it has own funds of at least 1 million euros;

e) prove that it has taken organisational measures to protect the data of players within the meaning of Directive 95/46/EC and to protect the financial transactions performed by players;

f) satisfy technical prerequisites corresponding to the state of the art;

g) ensure that its managers possess the appropriate qualifications and experience in order to perform their duties reliably;

h) prove that it has easily understandable conditions of participation (Article 13) and an appropriate social programme (Article 14);

i) appoint an authorised representative as Compliance Officer for every Member State where a branch has been established and online games are offered, implemented or advertised.

(2) Member States may, without prejudice to the licence requirements mentioned in paragraph 1, establish further licence requirements through national provisions. Such special licence requirements must be necessary, proportionate and non-discriminatory.

(3) National authorities must notify the European Gaming Agency (Article 23) of special licence requirements within the meaning of paragraph 2 before their enactment. The European Gaming Agency shall review the special licence requirements within the meaning of paragraph 2 to ensure that they are necessary, proportionate and non-discriminatory.

(4) If the European Gaming Agency determines that the special licence requirements within the meaning of paragraph 2 are necessary, proportionate and non-discriminatory, then said Agency shall inform the competent national authorities and the European Commission thereof. The European Gaming Agency shall be obliged to decide within a six month period after receipt of notification within the meaning of paragraph 3, otherwise the special licence requirements of Member States may be enacted.

Article 6

Recognition of Compliance with Licence Requirements

Member States shall ensure that the competent national authorities recognise the legitimacy of any another Member State's prior verification that a gaming operator complies with license requirements.

Article 7

Denial of a Licence

Any denial of a licence must be accompanied by a statement of reasons and announced to the applicant within three months of receipt of the application or, if the application is incomplete, within three months after the applicant has supplied all the information required for the licence. In any case, the competent national authority shall reach a decision within three months of receipt of the complete application.

Article 8

Notification and Publication of a Licence

The European Gaming Agency shall be notified of each licence in accordance with this Directive. Each licensed gaming operator shall be included in a list to be managed by the European Gaming Agency; the European Gaming Agency shall ensure that said list is kept up to date and published in the Official Journal of the European Union.

Article 9

Maintenance and Revocation of a Licence

(1) Member States shall ensure that the competent national authorities may impose conditions on the gaming operator in order to maintain the licence and may revoke said licence if the gaming operator:

a) does not make use of the licence within twelve months, expressly relinquishes the licence or suspends its activities for a period of more than six months, or

b) was granted the licence on the basis of false or incomplete statement or through any other irregular means, or

c) no longer fulfils the conditions for the licence under Article 5 or

d) commits offences that call for revocation of the licence under the applicable national laws. For ascertaining such offences, the notification procedure under paragraphs 2 through 5 of Article 5 shall apply.

(2) The European Gaming Agency shall be notified of each revocation of a licence.

CHAPTER III

PROTECTION OF MINORS AND PLAYERS

Article 10

Registration

(1) Member States shall ensure, through appropriate national legislation, that each player demonstrably supplies the gaming operator with at least the

information specified in paragraph 3 below in the course of the registration process.

(2) Member States shall require the gaming operator, by no later than the first payout of winnings, to obtain the proof of identity from the player specified in paragraph 3; if the player's identity is not ascertained, the gaming operator shall refrain from paying out the winnings.

(3) Member States shall ensure that the gaming operator requests at least the following information from the player:
- name, place of residence and date of birth;
- player's acceptance of the conditions of participation (Article 13) and the gaming operator's social programme (Article 14).

Article 11

Rights and Obligations of the Gaming Operator

(1) Member States shall ensure that gaming operators are entitled to exclude players from participation in the gaming without stating any reasons.

(2) Member States shall ensure that gaming operators are required to demonstrably inform the player prior to registration of the conditions of participation and the social programme.

(3) Member States shall ensure that gaming operators, without prejudice to Articles 5 and 6 of Directive 2000/31/EC, are required to make the following information directly available to the players in an easily understandable manner and free of charge:
- any costs of registration;
- any costs for participating in specific online games apart from the stakes;
- the name of the gaming operator;
- the geographical address of the gaming operator’s registered office;
- information that enables the player to contact the gaming operator without delay;

- if the gaming operator is registered in a public register, the name of said register and the corresponding registration number or equivalent identification code used in said register;
- information on the competent supervisory authority;
- in the case of advertising that does not originate directly from the gaming operator, the name and geographical address of the principal.

(4) Member States shall further ensure that the gaming operator is required:

- to refuse registration to players who live in a Member State in which the gaming operator is not licensed;
- to check the active restricted list (Article 16) before the start of the game and to exclude players appearing on said list from taking part in online gaming;
- to check the passive restricted list (Article 16) before the start of the game and to expressly inform players appearing on said list that they are allowed to participate in online gaming only to the extent that their way of life is not jeopardised thereby;
- to place players on the restricted list if they so request and to exclude them from participating in online gaming for the requested duration of the restriction if they expressly so request. Players must have the option of requesting the blocking of their accounts for a limited or unlimited time period. If players opt to have their accounts blocked for a limited time period, then this period shall be no less than one week;
- to give players the option of imposing a limit on their stakes;
- to give players the possibility of retracing all their own online gaming activities, including all deposits and payouts, over at least a six-month period;
- to display the European Gaming Label (Article 22) such that it is clearly visible for players during the registration process and in the gaming operator’s advertisements;
- to ensure the payout of the winnings by means of a bank guarantee, insurance or other liquid funds;
- to prohibit its employees from participating in the online games implemented by it;
- to pay the player compensation for damage suffered as a result of violations of obligations under this Directive. The conditions of such

liability may not discriminate the player against the general conditions for liability of the Member State;

- the player's details as defined by Article 10 (3) shall be stored for at least six months after the most recent online game and shall be disclosed to the European Gaming Agency and competent authorities upon request in accordance with the national provisions;
- a record of the stakes wagered, winnings made and losses incurred by players shall be kept for at least six months and disclosed to the European Gaming Agency and competent authorities upon request in accordance with the national provisions, in which case the players concerned shall be informed of said disclosure;
- the gross gaming revenue shall be determined as the total stakes received less winnings paid out; the nationwide gross gaming revenue shall be broken down according to the players' places of residence.

(5) The foregoing shall not release the gaming operator from its other obligations.

Article 12

Rights and Obligations of the Player

(1) Member States shall ensure that the players, without prejudice to Articles 10, 11 and 12 of Directive 95/46/EC, are entitled to ask the gaming operator what player details, if any, are stored by it or what player details have been disclosed by the gaming operator and to request that said data be corrected.

(2) Member States shall ensure that players are required to give all the information specified in Article 10 (3) truthfully, to keep said information up to date, and to pay compensation to the gaming operator for any expenses incurred by the gaming operator due to intentional misrepresentations by the players.

(3) If a player indicates a false place of residence when registering from a Member State for which the gaming operator is not licensed, then Member States shall ensure, through appropriate national provisions, that the

agreements of said player are deemed null and void and all transactions are reversed by the gaming operator.

(4) If a player under the age of 18 gives a false date of birth when registering, then Member States shall ensure that all agreements of said player are deemed null and void and all transactions are reversed by the gaming operator.

Article 13

Conditions of Participation

(1) Member States shall ensure that gaming operators are required to inform the player of the online gaming line-up (conditions of participation), providing at least the following information:
- a list of the online games offered;
- minimum and maximum stakes in the online games offered;
- an explanation of the online games offered; this explanation shall inform the player of the objective of each online game, the necessary steps to be taken by the player in order to participate, the conditions under which the player may lose the stakes, and the conditions under which the player may win and how much.

(2) The conditions of participation must be written clearly and comprehensibly in the language of the licensing Member State in which the players are registered.

Article 14

Social Programme

Through appropriate national provisions, Member States shall ensure that:

– gaming operators are required to take measures for the prevention and early recognition of gaming addiction and to document said measures in a social programme;

- the social programme includes information about institutions or authorities to which the player can turn for the purposes of prevention, early recognition and treatment of gaming addiction;
- the social programme must be maintained at the state of the art and communicated each year to the competent authorities;
- the competent authorities shall evaluate the social programmes within their area of jurisdiction and inform the gaming operator and the European Gaming Agency of the results of said evaluation. The European Gaming Agency shall publish all evaluations electronically.

Article 15

Confidentiality

(1) Without prejudice to Article 16, the employees of gaming operators, their contracting parties or other persons working for the gaming operator shall not disclose to third parties any information regarding the player and the player's participation in online gaming, stakes wagered, winnings, losses and account blocks.

(2) The obligation to maintain confidentiality shall not apply:
- in criminal and civil proceedings;
- toward tax authorities;
- toward the competent national supervisory authorities;
- toward the European Gaming Agency.

Article 16

Restricted Lists

(1) The gaming operator shall provide the European Gaming Agency with the details of the player blocked by the gaming operator without delay. The details shall include the duration of the block and whether it has been imposed upon request or unilaterally by the gaming operator.

(2) When entering a player into the active list (paragraph 3), the European Gaming Agency shall promptly report the player's details to the national authority having jurisdiction over the blocked player's place of residence. This report shall include the duration of the block and whether it has been imposed upon request or unilaterally by the gaming operator.

(3) The European Gaming Agency shall keep an electronic register accessible to the competent national authorities in which the currently and previously blocked players are recorded. This register shall include information on the duration of the block and whether it was imposed upon request or unilaterally by the gaming operator. Upon expiration of the blocked period, the player shall be removed from the list of currently blocked players (active list) and added to a list of previously blocked players (passive list). The time a player is kept in the passive list shall equal the time period of the previous block; notwithstanding the foregoing, said time period shall in no case exceed 18 months.

(4) Only licensed gaming operators shall have access to the restricted lists, and only to the extent necessary to determine whether or not a player is blocked.

Article 17

Advertising

(1) Member States shall take appropriate measures to ensure that the gaming operators devise their advertising in such a manner that the information they provide focuses on the range of products offered. Statements or presentations that are likely to encourage players to wager unreasonably high stakes or anticipate winnings that are to be expected only rarely according to the laws of probability with average stakes are prohibited.

(2) Member States shall ensure that competitors may prosecute any violation of the stipulations under paragraph 1 above in accordance with the applicable national laws on competition.

(3) Member States shall ensure that the gaming operators display the European Gaming Label clearly and visibly in their advertisements.

Article 18

Ineffective Agreements

Any agreements that depart from the provisions of this Directive to the detriment of the player shall be deemed ineffective.

CHAPTER IV

CRIME CONTROL

Article 19

Cooperation with the Competent Authorities

(1) The gaming operator shall monitor the online gaming operations in compliance with recognised standards and report any particularly noticeable activities to the competent authorities.

(2) Without prejudice to other accounting provisions, the gaming operator shall submit its annual financial statements to the competent authorities.

Article 20

Fraud, Money-Laundering and Financing of Terrorism

(1) Without prejudice to the provisions of Directive 2005/60/EC, the gaming operator shall monitor the online gaming operations in compliance with recognised standards in order to find any evidence determining whether the participation in online gaming involves fraudulent means or intentions or may be connected with money-laundering and the financing of terrorism.

(2) In the event of any such suspicion, the gaming operator, without prejudice to the provisions of Directive 2005/60/EC, shall promptly inform the competent authorities and the European Gaming Agency and pay out the stakes and winnings only with the approval of the competent authorities. The competent authorities shall reach a decision within three months and shall not deny such approval without reasonable grounds for suspicion of the relevant player.

(3) The competent authorities, if they have reasonable grounds for suspicion, shall promptly report the suspected player to the appropriate law enforcement authorities.

Article 21

Acceptable Methods of Payment

(1) Member States shall establish, in accordance with recognised standards, which methods of payment are acceptable for participation in gaming within the meaning of Article 2 (a)-(c).

(2) In the case of payment methods that are available to minors, Member States shall be allowed to require a heightened degree of diligence from the gaming operators.

CHAPTER V

LABELLING

Article 22

European Gaming Label

Once the competent authorities have informed the European Gaming Agency that they have granted a licence in accordance with Article 8, the European Gaming

Agency shall award the European Gaming Label to the newly licensed gaming operator.

CHAPTER VI

AUTHORITIES

Article 23

European Gaming Agency

The European Gaming Agency shall be established by official order in accordance with Article 352 of the Treaty on the Functioning of the European Union and shall perform the duties established in the provisions of this Directive.

Article 24

Competent Authorities

(1) Each Member State shall determine which national authorities are responsible for performing the duties defined by the provisions of this Directive and for the supervision of the gaming operators established in its respective Member State. Member States shall provide the European Gaming Agency with the necessary information on the authorities responsible for the performance of said duties as well as any relevant task-sharing.

(2) The competent authorities within the meaning of paragraph 1 must be independent state or state-supervised non-profit-oriented entities that are not permitted to gain any advantages from the activities of the gaming operators.

(3) Any assignment of duties to entities other than the authorities under paragraph 1 shall not be connected with an exercise of state authority or with any discretionary margin in decision-making. Prior to any such assignment, Member States shall ensure that the competent authorities take appropriate precautions to verify that the entities to which the duties are assigned have the necessary capacities and means to actually perform said

duties, and that no such assignment will be made without clearly defined and documented rules on the performance of the assigned duties describing the duties and conditions of performance thereof. Said conditions shall include a clause that obliges the pertinent entity to act and be organised in such a way as to prevent conflicts of interest and to ensure that the information contained in the assigned duties is not used dishonestly or to impair competition. In any case, the competent authorities mentioned in paragraph 1 above shall be responsible for verifying compliance with this Directive and the measures adopted for the implementation thereof.

(4) Each Member State shall inform the European Gaming Agency and the competent authorities of the other Member States of its institutions responsible for matters regulated by this Directive, as well as the scope of authority of each such institution.

(5) At least once a year, the European Gaming Agency shall publish, in the Official Journal of the European Union, a list of the competent authorities within the meaning of paragraphs 1 and 2 and update said list on a regular basis on its website.

(6) The competent national authorities or the European Gaming Agency shall be authorised to reverse a block imposed on a player by a gaming operator (Article 11). The national jurisdiction for this purpose shall be determined by the respective player's place of residence.

(7) If deemed necessary by a tax or law enforcement authority or court of law according to the national regulations, the competent national authorities may block a player's account.

Article 25

Cooperation between the Authorities

Member States shall ensure that the competent national authorities cooperate as necessary, particularly for the purpose of reviewing the licence requirements.

CHAPTER VII

FINAL PROVISIONS

Article 26

Sanctions

Member States shall establish sanctions applicable to violations of the national implementing provisions for this Directive and shall take all appropriate measures needed to ensure the enforcement thereof. The sanctions shall be effective, proportionate and dissuasive.

Article 27

Review

The European Gaming Agency shall submit a report on the enforcement of the provisions of this Directive to the European Parliament, Council and Economic and Social Committee, Committee for the Internal Market and Consumer Protection, and the Commission prior to XX/XX/XXXX and every two years thereafter, and shall communicate, when indicated, suggestions for the adaptation of this Directive to the legal, technical, social and economic developments in online gaming, particularly in relation to the protection of minors and players, crime control and the proper functioning of the internal market.

Article 28

Transitional Provisions

Licences that were granted before the effective date of this Directive shall be reported to the European Gaming Agency.

Article 29

Implementation

(1) Member States shall enact, prior to XX/XX/XXXX, the necessary statutory provisions in order to ensure compliance with this Directive and inform the Commission thereof without delay.

(2) Member States shall inform the Commission of the wording of their own national statutory provisions and of all subsequent amendments of said provisions enacted within the scope of this Directive.

Article 30

Amendment to Directive 2000/31/EC (E-Commerce Directive) and Directive 2005/60/EC (Money-Laundering Directive)

1. The Directive 2000/31/EC (E-Commerce Directive) is hereby amended as follows:

Article 1 is worded as follows:

"Objective and scope

(1) This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States.

(2) This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic

contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

(3) This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

(4) This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

(5) This Directive shall not apply to:

a) the field of taxation;

b) questions relating to information society services covered by Directives 95/46/EC and 2002/58/EC;

c) questions relating to agreements or practices governed by cartel law;

d) the following activities of information society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
- the representation of a client and defence of his interests before the courts."

(6) This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

2. The Directive 2005/60/EC (Money-Laundering Directive) is hereby amended as follows:

a) The following lettered subparagraph shall be added to the end of Article 2 (1) (3):

"g) Gaming operators within the meaning of Directive XX/XX/EU (Online Gaming Directive)."

b) Article 10 (2) shall be amended as follows:

"(2) Operators of games of chance and gaming operators within the meaning of Directive XX/XX/EU (Online Gaming Directive) subject to state supervision shall in any event be deemed to have satisfied the customer due diligence requirements if they register, identify and verify the identity of their visitors and players immediately before the first pay-out of winnings, regardless of the amount of the gaming chips purchased or stakes."

c) Article 36 (1) shall be worded as follows:

"(1) Member States shall provide that currency exchange offices and trust and company service providers shall be licensed or registered and casinos and gaming operators within the meaning of Directive XX/XX/EU (Online Gaming Directive) be licensed in order to operate their business legally. Without prejudice to future Community legislation, Member States shall provide that money transmission or remittance offices shall be licensed or registered in order to operate their business legally."

d) Article 37 (3) shall be worded as follows:

"(3) In the case of credit and financial institutions as well as casinos and gaming operators within the meaning of Directive XX/XX/EU (Online Gaming Directive) competent authorities shall have enhanced supervisory powers, notably the possibility to conduct on-site inspections."

Article 31

Entry into Force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 32

Addressees

This Directive is addressed to the Member States.

II. Explanatory Notes

The purpose of this proposal for a Directive is to meet the requirements of legal certainty in accordance with a ***European Regulatory Framework*** and the objectives of the study; it is therefore geared towards creating the **necessary prerequisites for a clear, precise and consistent legal framework for online gaming** (**"*precise legal framework for online gaming*"**[2]**)**.

Accordingly, we tried to draft the Directive in such a way that its regulatory content would be self-explanatory to the extent possible.

Thus, the following explanatory notes do not constitute a conclusive or binding commentary and are not intended to anticipate the recitals of the proposed directive. Much rather they are confined to explaining certain ***particularly important provisions*** of the individual chapters and articles.

The central regulatory concerns of the proposed European Regulatory Framework are discussed in detail, specifically:

- the ***licence requirements*** within the meaning of passporting principle

- ***player protection*** and the associated ***responsible gaming concept*** as well as the provisions on ***crime control***

- inspection by independent **supervisory authorities** engaged in cross-border cooperation.

[2] Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 11 regarding the distinction between legal and illegal operators.

GENERAL PROVISIONS

Regarding Article 1: Subject Matter and Purpose of the Directive

Paragraph 1:

This proposal for a Directive ***only concerns online gaming***, because online gaming, for the reasons already explained (cf. I supra), has characteristics that essentially distinguish it from land-based gaming in terms of legal construction and the resulting need for regulation primarily concerns games of chance on the internet or in the course of distance selling of other electronic transactions (see Article 2).

Paragraph 3:

By virtue of the regulatory harmonisation of the proposed Directive Member States should, as a matter of principle, ***not be entitled*** to impose **total bans** on online gaming. The research the present study has considered (especially the *Goldmedia Study* on German law, the *Sparrow Study* on US law and *MAG Consulenti* on Italian law) has shown that total bans do not warrant greater legal security; rather the above-cited evidence indicates or empirically proves quite the contrary, insofar as they unanimously emphasise the effects bans have on driving users into the black market, thereby jeopardising efforts to protect players and control crime. Since player protection and crime control are among the fundamental objectives of gaming law that are regularly required by the ECJ, regulations should avoid imposing limitations that run contrary to these objectives.

The proposed Directive thus respects the autonomy of Member States insofar as they would be allowed to stipulate ***qualitative licence requirements*** that go beyond the minimum standards of the directive and thereby set their own level of protection in accordance with ECJ case law (cf. Art 5 (2)); ***quantitative limitations,*** on the other hand, are considered inadmissible, which means that every gaming operator that satisfies the national licence requirements should be licensed according to the proposed directive.

An alternative worth considering, on the other hand, is an ***opt-out system*** that would allow Member States to maintain quantitative restrictions (e.g., monopolies) - particularly existing ones - or even introduce new ones. That would enable Member States that accept the harmonisation of laws (by not opting out) to implement, at least among each other, cross-border cooperation of authorities

(Article 25) with the objective of reciprocal recognition of licence requirements that have already been reviewed (Art 6), which would result in significant advantages with respect to coordination.

Independently of such options, Member States should ensure basic conditions for online gaming that are in line with contemporary standards. This concerns, above all, the Member States whose **gaming monopolies are in part questionable from the perspective of constitutional law**, giving rise to one of the main causes of the lack of legal certainty, as they are diametrically opposed to the realities of communication and information technology: whereas monopolies end at the national borders, online gaming is cross-border by definition[3], so that the nationally oriented intentions underlying such monopolises come to nothing in international online gaming.

Regarding Article 2: Definitions

Subparagraphs (a) – (c):

The proposed directive distinguishes between classic games of chance, combined games and betting, citing **examples by way of illustration**.

In classic (pure) games of chance, the likelihood of winning, as indicated by the term itself, depends on mere luck, exclusively or to a large extent. In the case of combined games, the player gets to influence the factor of chance through his or her individual skills; indeed, as the name "combined game" suggests, the outcome of the game still depends on a certain degree of luck: the player's skill cannot directly determine the outcome of the game but can only have a positive or negative effect on its stroke of luck. Betting was placed in a separate category since this form of gaming generally involves random events that are different from ***gaming in the strict sense*** (i.e., game of chance and combined game).

The term "event" in Art 2 (c) was intentionally chosen in order make the category of betting accommodate not only the types of sports mentioned by way of example but also betting on the outcome of political elections or other areas.

Subparagraph d:

[3] Cf also the Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11/5/2010, 9495/10, 7: "the Internet has considerably altered the gambling and betting sectors in Europe, ***erasing physical and legal boundaries***" (emphasis added).

While subparagraphs a – c distinguish between gaming in the strict sense of the term (games of chance and combined games) and betting, subparagraph d addresses ***gaming in the broader sense*** as the sum total of such concepts. This is done, because combining the concepts in that way simplifies the systems of regulation and formulation: instead of talking about operators of games of chance, operators of combined games, and betting operators, all three can be referred to as "gaming operators" for short (cf. subparagraph g).

Subparagraph f:

The legal definition of the term ***"online"*** primarily refers to the internet but also includes all other distribution channels by which games are offered electronically and without the physical presence of the distribution partners (through distance selling), such as mobile devices.

Regarding Article 3: Scope

Paragraph 1:

The broad formulation is intended to achieve as ***comprehensive a protection of players as possible***, who might already be induced to take part in online gaming by advertising, for example, at a time when the online gaming has not yet been implemented by the actual gaming operators.

Paragraph 2:

Games of chance in the broader sense (e.g., tombolas) that are performed **privately** under the specified conditions should be excepted from regulation in the online sector, as well, because such gaming does not entail the risks inherent in games of chance to the same extent as when implemented for commercial purposes. In order to prevent the regulations from being circumvented, the first item listed in Article 3 (1) limits the exception to natural persons. Unlicensed legal persons whose purpose is defined as commercial must therefore refrain from offering and implementing online games of chance even if the stakes are low.

Regarding the exception of ***insurance contracts***, although it is true that such contracts sometimes involve elements of chance (especially in the case of life insurance policies), such contracts establish the reciprocal obligations of risk assumption in exchange for payment of a premium, whereas the exchange of

services involved in a game of chance focuses on entertainment in exchange for the stake wagered.

The activities of ***credit institutions and financial services providers*** also involve an element of chance – as in online securities trading – but they should likewise be exempted from the present regulations because sector-specific regulations already exist (e.g., in the form of the Financial Services Directive).

To make it clear that telephone and internet charges are not considered "stakes" within the meaning of this proposed directive, it has been pointed out that **promotional competitions,** in which no distance selling is involved, do not fall within the scope of this Directive.

The exception of ***lotteries*** is due, first of all, to their national character and, secondly, because they are currently not disseminated over the internet or in the mobile business.

The exception of gaming on ***slot machines or betting terminals installed in public places*** is based on the special nature of the online gaming covered by the proposed directive and therefore has to do with the fact that consumers usually play in their ordinary surroundings (at home, at work or using their own mobile terminals). If spatial distances are overcome, this exclusion is not applicable, especially if the players use terminals provided to this purpose, regardless of whether said devices are connected with one another or centrally networked.

Chapter II

AUTHORISATION

Regarding Article 4: Licensing

Paragraph 1:

Regarding the gaming operator's ***scope of activities***, it should be noted that only online activities fall within the scope of the present regulation. Stationary forms of advertising, offering and implementing gaming are therefore governed by purely national regulations (regarding the implications for advertising, for instance, cf. the explanatory notes on Article 17 (3)).

Regarding the ***Scope of the Licence***, the license may be applied for and granted for any or all of the online games defined in Art 1 (d).

The ***regulatory framework of licensing*** is organised as follows: The licence must first be granted by the competent authorities of the Member State in which the gaming operator has its established place of business, based on the harmonised requirements (Art 5 (1)) and any applicable special licence requirements that Member States may impose (Art 5 (2)). In order to be entitled to register players residing in other Member States (Art 10), the gaming operator does not need to be established in said other Member State but a Compliance Officer is required (Article 5 (1) (i), and in particular a licence from the authorities of said Member State, in which case no further verification of compliance with licence requirements is necessary for requirements that were already verified when granting the first licence (Article 6: *"Passporting Principle"*). The corresponding cooperation of the authorities is ensured by Article 25.

Paragraph 4:

The ***formal organisation of the procedure*** is up to the Member States provided that they ensure fair and open conditions (cf. Article 1 of the UK Gambling Act 2005: "in a fair and open way").

Regarding Article 5: Licence Requirements

Paragraph 1:

The licence requirements under paragraph 1 are the ***minimum requirements*** that must be demanded by Member States without prejudice to their right to impose further (special) requirements (paragraph 2).

Subparagraph a:

In order to receive a licence, a gaming operator must be a corporate entity within the meaning of Directive 78/660/EEC, especially because this legal form is subject to more stringent accounting rules than partnerships or sole proprietorships.

Subparagraph d:

Since these licence requirements are minimum requirements (cf. paragraph 1 above), Member States may also require higher levels of **own capital**, provided that they comply, in particular, with the principle of proportionality set forth under paragraph 2. This principle was held to be violated when, in the case of the current Austrian Gaming Act, a capital endowment of at least EUR 109 million was required *(Griller/Reindl*, ZfV 1998, 241 ff.).

Subparagraph f:

Standards within the meaning of this provision include, for example, ISO 27001 and the Payment Card Industry Data Security Standard, which are not normative and therefore not obligatory but reflect the ***state of the art***. In contrast, Member States could also enact statutory – and thus obligatory – standards, provided that they comply with Directive 98/34/EC ("procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services"), according to which Member States are required to inform the Commission and the other Member States of any draft of technical regulations concerning information society products and services before they are adopted as national law. Since according to the E-Commerce-Directive (Article 30) as amended, online gaming services are information society services, the corresponding provision regarding notification should also be taken into account in the present context.

Subparagraph g:

The licensing authorities should perform a ***"Fit and Proper" Test*** to evaluate the **suitability and experience** of the gaming operator's **managers.** Such procedures are considered very important, even decisive by some (cf. *Levi*, Money Laundering Risks and E-Gaming: A European Overview and Assessment [2009]: "One reason to prefer regulation over prohibition is to ensure that operators have to undergo a fit and proper person test before receiving a licence").

Paragraph 4:

Special national licence requirements may be enacted six months after receipt of the ***notification*** even if these requirements are unnecessary, disproportionate and discriminatory. The European Commission would then have to initiate the corresponding steps, however.

Regarding Article 6: Recognition of Compliance with Licence Requirements

The (satisfied) licence requirements that should be mutually acknowledged include, in particular, the requirement under Article 5 (f) that the technical conditions, such as the ***the operator's IT infrastructure,*** must correspond to the state of the art. Any duplication or even multiplication of such areas in other Member States would entail considerable costs and should therefore be avoided to prevent competitive disadvantages vis-à-vis the black market. The fact that the infrastructure is not physically present in the Member State that is required to recognise its validity because it has already been examined by the authorities of another Member State, does not prevent such recognition as it is covered by the cooperation among the national authorities (Article 25). "Fit and Proper" tests performed previously (cf. Art 5 (1) (g)) should also be recognised as valid.

This measure would ***not*** establish ***"automatic" recognition of licenses*** granted in other Member States. The national sovereignty of gaming laws, which has often been emphasised and acknowledged even by the ECJ, is thus respected. Each Member State can continue to set its own level of protection by establishing special licence requirements within the meaning of Art 5 (2). The gaming operator will still need to be licensed by all Member States in which the operator wishes to conduct business online (by registering players residing in those Member States, permitting them to participate in online gaming), as confirmed by the EU

Presidency's conclusions drawn from the reports of Member States: "Operators should adhere to the national laws of the countries where services are offered"[4].

However, since the licenses are granted in compliance with Community law and uniform standards, namely on the basis of Articles 4 - 9 and thus based on a European Regulatory Framework, it is logical and efficient for the internal market when Article 6 stipulates that identical license requirements already examined by the Member State in which the gaming operator is domiciled do not have to be re-examined in other Member States; rather such requirements are to be recognised as already satisfied, following the example of the ***"passporting principle"*** that has proved effective in the banking sector.

That is also in line with ECJ case law (C-279/80, *Webb*, par. nos. 19-21) and the EFTA Court (E-3/06, *Ladbrokes*, par. no. 86) and the report on the integrity of gaming, 2008/2215 (INI) 6, which rejects a "pure Internal Market approach".

According to the principles of Community law, it is not necessary for the gaming operator to be established in the Member State that is to recognise the licence; nor is it necessary for tax purposes, because taxation goes by the Member State in which the player resides (cf. Article 11 (4) and the corresponding explanatory notes). This arrangement does not prevent establishing special national licence requirements (in accordance with Article 5 (2)) or interfere with ***national tax sovereignty***.

Regarding Article 7: Denial of a Licence

As part of the transparent procedure set forth by Article 4 (4), any ***negative decision by the national authorities should be accompanied by a statement of reasons***, informing the gaming operator of which prerequisites remain to be satisfied and, for the sake of defence of legitimate interests, how to effectively appeal against the decision through legal channels.

Regarding Article 8: Notification and Publication of a Licence

[4] Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 6

Notifying the European Gaming Agency of licences granted (Article 23) is necessary in order to ensure ***centralised records of all licensed gaming operators*** in the territory of Member States. Such records are necessary, for example, to allow gaming operators to run checks on restricted lists (Article 16) and to allow the national authorities to perform their duties of supervision and control (Article 24).

Regarding Article 9: Maintenance and Revocation of a Licence

Paragraph 1:

In order to safeguard the regulatory objectives, competent authorities may impose ***conditions*** on the gaming operators (regarding the content and scope of such conditions, see the explanatory notes on Article 24: competent authorities).

Under the stated prerequisites (which may be extended by Member States in accordance with Article 5 (2)), the ***licence must be revoked***. The logic of the different time limits (12 months in the case of failure to exercise the licence vs. 6 months in the case of cessation of activities) is as follows: an operator that is granted a licence should be allowed enough time to establish all the necessary business conditions, whereas an operator that ceases its activities does not need the same amount of time to wind up its business activities (but rather only half as much, in our estimation).

For the purposes of this directive, the licence is also considered to be used if advertising is performed by an operator who does not yet offer online gaming, and the activity is not considered to have ceased if an operator who no longer offers online gaming continues to advertise these activities.

If the licence was granted for individual online games (see Article 4 (1) *supra*), then Member States may determine whether the licence should be revoked for all online games or only for the games for which the prerequisites for revocation are satisfied.

Paragraph 2:

The European Gaming Agency shall **cross *off the list*** any operator whose licence has been revoked in all Member States. Since according to Article 8, the European Gaming Agency must be informed of "each licence", the fact that the licence is revoked only in certain Member States must also be taken into account and shown by the list.

Chapter III

PROTECTION OF MINORS AND PLAYERS

Regarding Article 10: Registration

The disclosure of the information referenced in paragraph 2 – or of the information standardised by Member States beyond the minimum information under paragraph 1 – is intended to ensure that the gaming operator contracts ***only*** with players residing in a ***Member State in which the gaming operator is licensed***. The disclosure is required to be made demonstrably through a registration procedure so that players can use the gaming operator's range of services immediately after registration, without having to wait for completion of the substantiation process, which might lead them to drift to the black market in the meantime, where no such registration is performed.

Another purpose of the disclosure of the information is to **protect the player** by preventing underage persons or persons with blocked accounts from participating in online gaming and ensuring that the players take note of the conditions of participation (Article 13) and the social programme of the gaming operators (Article 14).

The methods used for substantiation within the meaning of paragraph 2 are to be defined by the Member States. They should bear in mind that registration should allow ***reliable identification of the players*** (e.g., through photo IDs) without making registration so complicated for players that they defect to the black market where no - or no reliable – identification is demanded at all. Ideally, Member States would grant the licensed gaming operators access to official nationwide databases, such as registers of residents, in order to enable them to carry out reliable identity and age checks. Electronic reconciliation – in a similar

way to the networking of the restricted lists managed by the European Gaming Agency with the gaming operators' registrations systems as recommended in the explanatory notes on Article 16 – would enable effective verification at negligible expense and ultimately reduce the above-mentioned risk of defection.

Regarding Article 11: Rights and Obligations of the Gaming Operator

Paragraph 1:

The gaming operator should have the possibility to exclude players without stating any reasons, so that a player exhibiting suspicious gaming behaviour may be **excluded from participating in gaming** at any time. Since participation is based on contractual principles of civil law, the possibility of exclusion is in line with these principles. Such exclusion must not be discriminatory or arbitrary, however, but rather applied in such a way as to protect the players.

Paragraph 2:

The obligation to inform players in a verifiable manner of the conditions of participation (Article 13) and the social programme (Article 14) serves the purpose of ***player protection***. One way of proving that a player has received such information is to prevent the player from completing the registration process before clicking a box confirming that he or she has taken note of the information in question. Together with this confirmation, the conditions of participation and the social programme should be immediately accessible via a hyperlink.

Paragraph 3:

One purpose of the obligation to provide information is to prevent the player from unexpected **costs;** the costs of participation in certain online games should in this regard not be understood to mean the stakes ("apart from the stakes"), but rather other costs, e.g., the costs of registration or of downloading the software necessary for "certain" online games.

Moreover, the player should be able to **contact** and **obtain information about** the gaming operator. The foregoing is without prejudice to similarly designed ***duties to inform under the E-Commerce Directive***, which, as the basis of all electronic communications and transactions, is also applicable to online gaming within the meaning of the proposed directive (Article 30).

"Advertising that does not originate directly from the gaming operator" means advertising by third parties, e.g., the banners of other companies on the gaming operator's website.

Paragraph 4:

Gaming operators may only be active in the Member States in which they are licensed (Article 4). A gaming operator must therefore **deny registration** to persons living in Member States where it is not licensed (*1st item in the list).* Such denial helps protect players, as well, especially when Member States have established special licence requirements (Article 5 (2)) that they consider necessary for the protection of the players.

For reasons of player protection, the proposed directive also ensures that a **high degree of responsibility** will be required of the gaming operator. For this reason, gaming operators are obliged, in particular (*items 2 and 3 in the list*) to deny currently blocked players access to online gaming; similarly, they are required to warn previously blocked players (on that distinction, see Article 16 (3)) that they are allowed to participate in online gaming only to the extent that their living standard is not jeopardised thereby. It would constitute an unreasonable and disproportionate burden, however, to require gaming operators to verify the specific way of life of the players. The gaming operator should be considered to have satisfied its responsibility by giving players an opportunity to exercise sufficient self-control by warning them not to jeopardise their living standard through excessive gaming.

Part of the ***Responsible Gaming Plan*** is therefore the personal responsibility of the players or the gaming operator's obligation to make the players aware of their personal responsibilities and make it possible for them to act responsibly. In particular, it should be made possible for players to recognise risky gaming behaviour (which is primarily done by the player demonstrably reading and acknowledging the social programme, see paragraph 2 above) and to react in an appropriate manner by placing themselves on the restricted list (*item 4 in the list*), limiting the stakes they can wager (*item 5*) and retracing their gaming activities (*item 6*).

Regarding **voluntary exclusion**, the following points should be noted:

- First of all, the exclusion from online gaming is effective with regard to all gaming operators licensed in accordance with the present regulations (see Article 16). Without prejudice to these regulations, each gaming operator is at liberty to grant the player the possibility of voluntary exclusion only from that specific gaming operator or only from specific online games.

- Moreover, expert studies have shown the option of voluntary exclusion to be an especially important measure for the prevention of gaming addiction (*Division on Addictions,* the Cambridge Health Alliance, a Teaching Affiliate of Harvard Medical School, 2009). The proposed directive takes these research findings into account and goes even further with the measures in items 4 and 5 of the list for the sake of **qualified player protection**.

The duties imposed on gaming operators by *items 7-10* on the list (displaying the gaming label, guaranteeing payouts through appropriate collateral security, exclusion of the gaming operator's own employees from online gaming, and liability for damages) also serve the purpose of ***protecting the players***. The fact that the conditions of the gaming operator's liability for damages are not permitted to differ from the general conditions of liability for damages is due to the current legal situation in Austria, which, from the standpoint of consumer protection is considered highly dubious and/or anti-constitutional, even by the national authorities (cf. the position paper by the Federal Ministry of Social Affairs and Environmental Protection regarding the Draft Gaming Act) and the case law of the highest courts of justice (most recently the decision by the Austrian Supreme Court of Justice [*Oberster Gerichtshof*] of 30 March 2010, 2 Ob 252/09m), and contrary to the interests of player protection.

The national supervisory authorities will verify whether or not the gaming operators are safeguarding the players' interests in accordance with these regulations (see Article 24). In order to perform such verifications with the greatest possible precision, gaming operators are required to store all the player's details (*item 11*) and stakes, winnings and losses (*item 12*) and to provide the competent authorities with the relevant information.

Regarding the obligation on the part of the gaming operators to disclose their ***gross gaming revenues*** (*item 13*), the following should be noted:

According to ECJ case law, fiscal interests do not justify any gaming regulations based on substantive law (cf., for example, Decision C-243/01, *Gambelli*). Since

numerous studies (cf., for example, *Goldmedia Study* 9) have shown the immediate positive effects of reasonable taxation, however (particularly since regulated services are more reliable and thus more attractive to consumers than the black market), the proposed regulations create the necessary conditions for such **taxation** by using gross gaming revenue as its basis:

- Gross gaming revenue should be the tax assessment base in order to prevent operators from being taxed for "lost" (online) gaming (cf. the same trend in English law shown by the *Williams Study*) and also to prevent operators from being under pressure to minimise their sales revenue due to transfer taxes, which can lead operators to compensate for such losses by imposing less favourable terms on players.
- Moreover, taxation should be *uniform* in order to prevent competitive imbalances vis-à-vis competitors in Member States with low taxes, which might also be passed on to consumers and create incentives for illegal activities.
- Finally, *competitive tax rates* should be provided so as to avoid competitive disadvantages for European operators (the EU Presidency recently spoke of avoiding competitive disadvantages vis-à-vis the black market: "... avoid non-competitive advantages for those operators", Presidency Progress Report, Legal framework for gambling and betting in Member States of the European Union, 11 May 2010, 9495/10, 9). On the other hand, players should be prevented from turning to the black market, which is something to be feared, as has been demonstrated by studies (e.g., the *Goldmedia Study*), whenever the services of reliable European operators become unattractive to consumers, as a result of high taxes, for example. In this regard, the positive effects (significantly higher tax revenue through tax cuts) have also been demonstrated by studies on the corresponding developments in various Member States (*MAG Consulenti Associati* on Italian law, the *Williams-Study* on English law).

Paragraph 5:

This is without prejudice, however, to the gaming operator's obligations under the modified and thus applicable E-Commerce-Directive (cf. Article 30) and under the Distance Selling Directive, which, though not applicable with respect to the consumer's right to cancel, are applicable with respect to the entrepreneur's duty to inform. In sum, this means, above all, extensive duties to inform the players,

thereby making an essential contribution to ***corporate transparency***, which is important for consumers in order to achieve a valid basis for decision-making in light of the gaming operator's integrity.

Whether gaming operators should necessarily be subject to additional transparency criteria, such as those for issuers of securities (Directive 2004/109/EC) appears doubtful, because the factual context of gaming differs from the specific situation for which those requirements were designed. In contrast, Corporate Governance measures or standards (e.g., such as the EGBA Standards) would be welcome and in the gaming operator's own interest in terms of competitiveness; one such measure would be the duty to inform consumers under the E-Commerce Directive, which is applicable to gaming in its modified form. Moreover, ***publicly listed gaming operators*** are subject to compulsory Corporate Governance criteria, e.g., auditing of the consolidated accounts according to international accounting criteria (e.g., IFRS), publication of quarterly reports and ad-hoc announcements relating to share prices.

Besides such specially regulated duties, gaming operators are also subject to general **rules of contract law** as a result of their contractual relationship with the players. This includes duties that result from the rules governing default in performance (e.g., guarantees, delays) but also **pre-contractual obligations** which in most national systems of civil law are established as early as when potential contracting partners enter into contact with one another. In this regard, too, it should be taken into account that the gaming operator's obligations to the player under Article 11 correspond to only a **minimum standard** within the meaning of paragraph 5. If a gaming operator recognises or ought to recognise that a player has not correctly understood a certain online game, then the gaming operator cannot claim to have satisfied its duty to inform under Article 11 (2) (Conditions of Participation). On the contrary, if the player suffers damages (losses) as the result of such a misunderstanding, such a gaming operator – in those Member States that impose pre-contractual duties to inform – would be held liable on the grounds of entering into such an contract (*culpa in contrahendo*).

Regarding Article 12: Rights and Obligations of the Player

Paragraph 1:

The ***player's right to request information*** is required by privacy law, on the basis of a request to correct personal data, but may also be required by private law, for example in order to supply the player with the facts necessary to assert damages against the gaming operator (see Article 11 above).

Paragraph 3:

Since gaming operators are allowed to be active only in the Member States in which they are licensed, Member States must stipulate that transactions or the underlying agreements between gaming operators and players may be declared null and void and reversed if the player is ***registered under a false place of residence*** and resides in a Member State in which the gaming operator is not licensed. Since verifying the data and reacting to misrepresentations results in considerable expense for the gaming operators, they should be entitled to collect or withhold processing fees in such cases. Such fees may be agreed to by private contract on a "reasonable" basis, and Member States could impose further stipulations to ensure that they are reasonable, e.g., by restricting the amount thereof.

Paragraph 4:

The minimum age for participation in online gaming is 18 years of age. Thus, if a minor (person under the age of 18) registers by giving a false age (over 18), then transactions and underlying agreements are correspondingly null and void according to the general principles of private law and paragraph 3 and must be reversed; unlike paragraph 3, which stipulates that a processing fee may be charged in the case of misrepresentation of the place of residence, no such fee is chargeable in the case of the present paragraph, because ***minors merit special protection***; no special charges should be payable for such protection (reversal of all transaction), because that would relativise its importance.

Regarding Article 13: Conditions of Participation

The purpose of the conditions of participation is to protect players by informing them ***in advance*** (at the time of registration, Article 10 (3)) of the range of services, stakes and procedure, as well as the rules of the online games, so that

they are not confronted with unexpected rules or encouraged to make ill-considered wagers ***in the course of gaming***.

Regarding Article 14: Social Programme

The social programme ***corresponds to the central requirements of player protection*** in that it requires the gaming operators to take appropriate measures (*item 1 in the list*) and, in particular, to inform the players of appropriate institutions and authorities to which they can turn *(item 2)*. Whenever possible, such institutions should be located in each of the Member States in the which the gaming operator is licensed, and the information must also be classified and arranged country by country in such a way as to allow for easy orientation of the players. The state of the art (*item 3*), in contrast, should be understood to be international in nature, and Member States may impose more precise standards in that respect. The national authorities, too, should assist the gaming operators in setting such standards, since they have (or should have) the corresponding technical expertise, as it is their duty to verify maintenance and compliance with those standards during licensing and in the course of supervision.

The evaluations and publications within the meaning of item 4 are intended to help develop standards that not only correspond theoretically to the state of the art but also satisfy the requirements of current ***best practices***. This, too, is in the interest of player protection, because it ensures a higher level of information and thus an improved level of protection, thanks, in particular, to central publication by the European Gaming Agency.

Regarding Article 15: Confidentiality

Paragraph 1:

The ***participation*** in online gaming ***generates personal data***, especially in relation to financial transactions, including the stakes wagered, payout of winnings and gaming losses. According to Article 8 of the Charter of Fundamental Rights of the European Union, such data merits a high level of protection, which is ensured by the obligation to maintain confidentiality in this provision.

Paragraph 2:

To keep this level of protection from coming into conflict with player protection and crime control, there are ***exceptions*** to the obligation to maintain confidentiality, which enable utilisation by the gaming operators in cases of breach of contract or cooperation with the authorities. The obligation to maintain confidentiality can therefore not exist toward the European Gaming Agency – especially in light of the restricted lists it manages, which is essential to crime control.

Regarding Article 16: Restricted Lists

Paragraph 1:

The restricted lists managed by the European Gaming Agency are primarily for the purpose of ***player protection***, along with ***fraud and crime control***, since a player who cheats a gaming operator or another player or participates in online games for the purposes of money-laundering will be barred not only from the services of the gaming operator in question but from the services of all the gaming operators licensed in Europe.

Such ***pan-European networking*** is a decisive advantage compared to land-based gaming, and is essential particularly in cross-border online gaming. To optimise player protection and crime control, the networking should be implemented through a cross-operator database, as recommended by TÜV Rheinland (Report No. 63002072). This database would be set up and administered centrally based on restricted lists. Gaming operators would be required to report the data on restricted players to this database without delay.

Paragraph 2:

The European Gaming Agency's informing of the national authorities takes into account the fact that the ***competent national supervisory authorities also act as an interface*** between the gaming sector and law enforcement authorities (cf. Articles 19 and 20). For this reason, the corresponding information within the meaning of paragraph 2 must indicate whether a player was blocked unilaterally by the gaming operator or on a voluntary basis at the player's own request.

Paragraph 3:

The querying of the restricted lists, which the national authorities would be able to access too, would have to be limited to individual persons indicated by name and justified. Thus, the authorities would not be entitled to demand the disclosure of the data on all players in a global manner.

It is also with ***data protection*** in mind that the maximum storage period for former blocks is limited to 18 months, since a longer storage period would be disproportionate to the objectives of consumer protection as well as fraud and crime control.

Paragraph 4:

In view of the restrictions imposed by paragraph 4, gaming operators can only find out whether a player ***is registered or not but are not entitled to demand any further data***. They need to know this in order to satisfy their obligations of verification under the second and third items of Article 11 (4).

In order to intensify the performance of such obligations and reduce the administrative work involved, it is advisable to ***allow gaming operators access to electronic networks*** in such a way that the gaming operators' registration systems can automatically check the restricted lists.

Regarding Article 17: Advertising

Paragraph 1:

Regarding Article 2b of Directive 2006/114/EC, it should be noted that although it is intended to prevent advertising from misleading the persons to whom it is addressed, it is not tailored to the specificities of gaming, so that specific provisions appear to be necessary (cf., with that in mind, the CAP Regulatory Statement 27).

The importance of advertising and its specific design in the context of ***player protection*** has been emphasised by several ECJ decisions (cf., in particular, the *Gambelli Decision*), which have been taken into account by paragraph 1.

Paragraph 2:

Contrary to current national provisions, which are frequently criticised (e.g., in Austrian gaming law), the protection of consumers against advertising that violates the principles of paragraph 1 should be reinforced ***by the applicability of national competition law***. It should be recognised, in this respect, that competition law also plays a role in consumer protection: by keeping an eye on one another, competitors directly serve their own economic interests but also indirectly act in the interest of consumers by ensuring compliance with the regulatory framework.

Paragraph 3:

Incorporating the ***European Gaming Label*** (see Article 22) into the gaming operator's advertising (regarding the placement of the label during the user registration processing, cf. Article 11 (4)) ensures that players can **recognise at first glance** (which means that, for reasons of practicality, the European Gaming Label would not necessarily have to be permanently superimposed, e.g., in the case of banner advertising) that a ***licensed gaming operator*** is advertising its services, which differentiates these services from those of the black market and makes them more attractive.

The gaming label must also be used by the gaming operators in ***traditional advertising media*** (e.g., in press adverts), because even though such advertisements do not appear online they still refer to online services. The other prerequisites for non-electronic (traditional) advertising, in contrast, fall outside the scope of the present regulations and are therefore reserved for national law. This also applies, for example, to advertising in ***international sporting events*** that are held in countries or broadcast to countries – especially on television programmes – in which the gaming operator is unlicensed (on this point, cf. the Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11 May 2010, 9495/10, 11: "Member States might consider the case in which advertising or sponsoring of legal operators has effects on another Member State different from the one which has granted the licence, for example the sponsorship of a football team that occasionally plays in other Member States where the operator has not a licence"). Since broadcasting can theoretically take place in every country of the world and it is unreasonable to expect the gaming operator to get a specific advertising licence

in all these countries, such advertising should be permitted regardless of this fact; at least if accompanying measures are implemented by the Member States in which the advertising gaming operator is not licensed (in this respect, see the Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 11: "(…) useful to make public information campaigns or take other alternative measures"). This concerns, for example, banner advertising, but also the sponsoring of major events, international associations and internationally active athletes or sports clubs.

With regard to sponsoring activities, it should be noted that the present regulations do not directly concern such sponsoring or its permissibility, especially not the type of sponsoring of athletes or sports clubs addressed by the ECJ in the *Liga Portuguesa* case, which is performed by a gaming operator that takes bets on the outcome of the event. According to the EU Presidency, this issue should be left up to the national regulations. These, however, should bear in mind that:

- sponsorship should be reserved for licensed gaming operators (according to the EU Presidency: "sponsorship can only be made by legal operators", Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 11)
- contrary to the estimation of the ECJ in the aforementioned *Liga Portuguesa* case, sponsoring per se does not increase the risk of fraud to which players are exposed as long as the sponsor has no direct possibility to exercise any influence. In order to be able to monitor such activities more closely and take the ECJ's suspicions into account, it would appear advisable to stipulate that sponsorship agreements must be disclosed to the competent national supervisory authorities. We will not develop such considerations further here, however, since they are not directly connected with the present regulations but rather constitute a matter reserved for Member States.

Regarding Article 18: Ineffective Agreements

This provision, too, serves the purpose of ***consumer protection*** and is intended to ensure that the national provisions enacted to implement the present

regulations are designed by Member States in such a way that they cannot be circumvented through agreements to this effect.

With this in mind, it must be ensured that gaming operators are not entitled to use their general terms of business or separate agreements in order to contract out of their general obligations to players (e.g., under the law of contracts or pre-contractual obligations; see the explanatory note on Article 11 (5)) or, more specifically, by reason of the present regulations (especially by virtue of paragraphs 2 and 3 of Article 11).

Chapter IV

CRIME CONTROL

Regarding Article 19: Cooperation with the Competent Authorities

Paragraph 1:

Along with player protection, crime control, in particular, is one of the ***central requirements of gaming law***. The online environment entails certain risks (e.g., easy access to the black markets) but also special opportunities for crime control (e.g., the complete traceability of all transactions), which have already been discussed in detail elsewhere in this draft directive. The following sections provide further provisions to facilitate crime control in general (Article 19) and to deal with the offences of fraud, money-laundering and the financing of terrorism, in particular (Article 20) – taking the specific characteristics of online gaming into account in each case.

The same is true of the gaming operator's obligations under paragraph 1 to report suspicious activities to the competent authorities (second half of the sentence). Since the corresponding observation of the gaming operations (first half of the sentence) in online gaming generally takes place automatically, which means that each statistical deviation that might be considered suspicious cannot be identified immediately as a result of the automation, the reporting duty is limited to ***"particularly noticeable activities"***. Such activities are those that may be characterised as "flagrant digressions" rather than mere deviations from normal gaming operations, e.g., when exceptionally high stakes are wagered on an

outsider or a previously moderate player suddenly starts wagering extremely high stakes.

Paragraph 2:

Under certain circumstances, the gaming operator's **annual financial statements** may also reveal noticeable developments that suggest criminal activities. Communicating such information to the competent national authorities therefore not only facilitates general supervision by the supervisory authorities but, more specifically, crime control, as well.

Regarding Article 20: Fraud, Money-laundering and the Financing of Terrorism

To ensure the effective prevention of specific forms of crime related to monetary transactions, which are often cross-border in the case of online gaming, monitoring gaming operations not only contributes to the protection of consumer interests but also to the prevention and prosecution of the relevant crimes.

The ***"recognised standards"*** with which the gaming operators are required to comply when monitoring gaming operations refer here to the Risk Based Approach of the Financial Action Task Force: "RBA Guidance for Casinos" (2008), for instance, which, according to footnote 1, is also applicable to "Internet Casinos".

Since the offences specifically related to monetary transactions in Article 20 (see above) show specific typical characteristics in online gaming, the requirements for monitoring the gaming operations are correspondingly higher, so that the reporting obligations, in contrast to Article 19 (1), are not limited to flagrant digressions ("particularly noticeable activities"), but also include less unusual deviations. Nevertheless, **not every minor deviation** should be seen as sufficient evidence that the participation in online gaming involves fraudulent means or money-laundering and the financing of terrorism. Due to the automation of online gaming, this would lead to a system that registers every single deviation (no matter how slight); this is ***especially true in relation to money-laundering,*** because the potential for money-laundering in online gaming should be viewed as modest in light of the relatively low amounts and the traceability of all transactions (cf., for example, *Levi*, Money Laundering Risks and E-Gaming: A European Overview and Assessment [2009]: "the risks associated with the sector are

comparatively modest, due to the high traceability of e-gaming transactions and the customer identification controls in the regulated sector"). The advantages of the traceability of electronic transactions is also emphasised in this regard by the study of the Swiss Institute of Comparative Law entitled "International vergleichende Analyse des Glücksspielwesens" [International Comparative Analysis of Gaming] (2009), p. 84: "(…) especially effective prevention and/or detection of attempts at money-laundering, since in the interactive environment (unlike traditional casinos) all players and the sources of the stakes they paid are identified and all transactions are registered and recorded". In addition, the version of the Money-Laundering Directive as amended by these regulations (see Article 30 *infra*) would be applicable, rounded out by the provisions of this Article. It may therefore be expected that ***money-laundering in online gaming can be ruled out to a large extent***.

Paragraph 2:

The fact that ***in case of suspected crimes*** within the meaning of paragraph 1 ***stakes and winnings*** can only be paid out with the consent of the competent authorities also contributes to the special and general prevention, since the danger that higher stakes or winnings may be ***frozen*** has a dissuasive effect.

If any ***criminal activities are suspected***, the competent authorities can generally assess the legal situation better than the gaming operators; as a result, it should also be left to the authorities to decide whether or not to pay out the amount in question. Such consent must not be denied without good cause and must be subject to judicial review, since it ultimately involves an intervention into the contractual relationship between the gaming operator and player. This generally occurs in criminal proceedings that are initiated against the player when there are strong grounds for suspicion, in acc. with paragraph 3.

Paragraph 3:

The gaming operator must report every suspicion (paragraph 2) to the gaming authorities. The gaming authorities, on the other hand, report the player to the law enforcement authorities in accordance with paragraph 3 only when there are **strong grounds for suspicion**, because the gaming authorities should be allowed to investigate suspicious activities and use their special expertise to decide whether or not such grounds are well-founded and should be prosecuted further (reported to the law enforcement authorities) or not.

Regarding Article 21: Acceptable Methods of Payment

This provision has been kept ***technology-agnostic*** so as not to exclude new methods of payment. Special attention should be paid in this respect to the security of the method of payment (paragraph 1) and protection of minors (paragraph 2).

In the present state of the law in Europe, online payment by ***credit card***, which is often considered "dangerous", is safer than traditional over-the-counter credit card transactions, because the Distance Selling Directive made the card issuer bear the risk of fraud rather than the cardholder. Whereas consumers who use their credit card in traditional transactions often have to let the card out of their hands and bear the associated risks, consumers are relieved of that risk when using it in online transactions, where they merely have to enter the credit card information. This improved position of consumers online versus traditional payment transactions is often overlooked, as in the report on the integrity of online gaming, 2008/2215 (INI), p. 6, which refers to the specific risks of online gaming in relation to credit card fraud. The corresponding legal position (Distance Selling Directive) has been modified by Article 89 and 90 (2) of the Payment Services Directive (2007/64/EC), but the protection of the cardholder has been maintained with certain modifications.

In connection with electronic payments, it is worth noting that the new version of the ***E-Money Directive*** should contribute to the security of electronic transactions (cf. *Levi*, Money Laundering Risks and E-Gaming: A European Overview and Assessment [2009]; cf., in addition, the FATF Report on Casinos [2008], items on pp. 110 ff.).

The ***recognised standards*** that are applicable when determining acceptable methods of payment for participation in online gaming include, for example, *eCOGRA Generally Accepted Practices* and the *Payment Card Industry Data Security Standard*.

Chapter V

LABELLING

Regarding Article 22: European Gaming Label

The European Gaming Label is the ***distinguishing feature of the European Regulatory Framework*** and shows which gaming operators have been examined in accordance with this regulation and verified by the supervisory authorities.

Players would be able to recognise the label both at the time of registration (Article 11 Abs 4) and in the advertising addressed to consumers (Article 17), because licensed gaming operators would be required to display it conspicuously in both cases. This ensures that ***respectable gaming operators are identifiable at first glance***, which distinguishes them from the black market and makes them more attractive.

Chapter VI

AUTHORITIES

Regarding Article 23: European Gaming Agency

The European Gaming Agency – which has yet to be founded – would tie together all the threads of online gaming throughout Europe. It would be a central ***contact address*** for other European institutions and the competent national authorities. It would be granted the individual powers provided for by the proposed directive, especially the administration of restricted lists (Article 16) and the awarding of the European Gaming Label (Article 22).

Regarding Article 24: Competent Authorities

Paragraph 1:

Similar to the provisions of Directive 95/46/EC and Directive 2002/21/EC, this proposed directive provides for competent national ***authorities to monitor the regulation of the gaming market***. This would result in the creation of the supervisory institutions that are independent within the meaning of paragraph 2. It is for Member States to decide whether this task would be performed by such an autonomous authority or by companies under the supervision of the licensing

authority. In any case, its supervisory tasks would foremost consist in establishing standards for reporting, transparency, auditing, ethics, etc., and in monitoring to make sure that gaming operators comply with the corresponding guidelines. It may be considered necessary, for example, for reports, systems, workflows, supervisory institutions or departments involved by the gaming operator in the technical or administrative implementation of the services to be analysed in external audits to determine whether the reporting complies with the requirements of the licensing authority.

The overall objectives of such supervision, which would be enforced by imposing conditions or revoking the license as described in Article 9, are as follows:

1. *Prevention*: evaluation of responsible gaming measures (see also the provisions on the social programme, Article 14).
2. *Player protection and crime control*: compliance with the relevant requirements of Chapters III and IV, also with respect to *advertising compliance (*monitoring of marketing activities and intervention if Article 17 is violated).
3. *Product safety*: e.g., the random number generators used for various types of online game must undergo inspection for a test certificate, and the software must be tested as well.
4. *Audit*: possible (see above) specifications for external reviews (e.g., by auditors).

Paragraph 2:

The reason why the national authorities must be independent state or state-supervised non-profit organisations that are not entitled to derive gains from the gaming operators' activities is that ***neutral gaming supervision*** should be implemented. This rule is intended to prevent the tax authorities from acting as supervisory agencies, for example, as is commonly the case now (cf., in this respect, the Study of the Swiss Institut für Rechtsvergleichung, International vergleichende Analyse des Glücksspielwesens [2009] pp. 82 ff.). Supervision by tax authorities is problematic and questionable from the constitutional standpoint because they are directly affected by the tax revenue generated by the activities of the supervised entities, which means they might be disposed to exercise less strict supervision (with respect to advertising, for example) in order to maximise their receipts.

ECJ case law (see the *Gambelli* case, for example) has consistently confirmed the notion that fiscal interests should be strictly separate from the objectives of gaming law.

Paragraph 3:

This regulation concerns the ***"outsourcing" of state duties*** not only to external private-law entities (e.g., limited liability companies, associations) but also to natural persons. For the sake of legal certainty, special requirements should be observed and provided in the style of Directive 2004/39/EC (MiFID).

Paragraph 4:

Providing such information creates a ***basis for cooperation*** between the authorities within the meaning of Article 25.

Paragraph 5:

Such updating also ***promotes cooperation*** between the authorities within the meaning of Article 25.

Paragraph 6:

The competent national authorities or the European Gaming Agency may therefore **reverse** a **block** they consider discriminatory.

Paragraph 7:

What is alluded to here are cases where an insolvent person **must be prevented** (in the event of an order by the bankruptcy court) from using his or her remaining assets **to participate in games.**

Regarding Article 25: Cooperation Between the Authorities

This provision is in line with the report on the integrity of online gaming, 2008/2215 (INI) 6, which calls for **close cooperation** between Member States in order to "solve the (…) problems that arise from cross-border online gaming".

In this specific context it particularly means ***cooperating to verify compliance with the licence requirements***, because Member States should recognise the verifications that have already been performed by another Member State of the general (Article 5 (1)) or special requirements (Article 5 (2)) in accordance with the European Regulatory Framework (Article 6).

Moreover, cooperation between Member States or their competent authorities is generally suited to keep gaming within "**controlled channels**" within the meaning of the ECJ case law (see, in particular, the *Liga Portuguesa* case): "Moreover the sharing of information among Member States ... could be a useful tool for avoiding illegal gambling in Europe" (Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 12).

CHAPTER VII

FINAL PROVISIONS

Regarding Articles 26-29:

The provisions on sanctions (Article 26), review (Article 27), transitional provisions (Article 28) and implementation (29) correspond to the usual s***ystem of European Directives***.

Regarding the ***Entry into Force*** according to Article 29 (1), it is again worthwhile quoting the opinion of the EU Presidency: "Waiting periods until the new legislation enters into force, should protect the acquired rights of licence holders. For new entrants, nevertheless, it could provoke an uncertain situation from a business point of view. The interests of licence holders and new entrants therefore have to be carefully balanced" (Presidency Progress Report, Legal framework for gambling and betting in the Member States of the European Union, 11.5.2010, 9495/10, 10).

Regarding Article 30: Amendment to the E-Commerce Directive and Money-Laundering Directive

The main purpose of eliminating the current exception under Article 1 (d) of the E-Commerce Directive ("gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions") is to take into account the fact that the European Regulatory Framework can be supplemented with the provisions of the Directive basically containing provisions to protect users of electronic distance selling services. Since the **E-Commerce Directive** is also **consistently applicable to online games both systematically and teleologically** within the meaning of the present Directive, it

implies that gaming operators have duties to inform and behave in certain ways towards players for the sake of consumer protection; inversely, as is only logical, it implies that gaming operators are exempt from liability in certain cases because the gaming operator is considered to be a host provider with regard to the player's input. Another consequence of the applicability of the E-Commerce-Directive to online gaming is that the gaming operator has a duty to provide information about any self-imposed Corporate Governance measures that contribute to the gaming operator's **corporate transparency**.

According to the proposed amendments to the ***Money-Laundering Directive***, which lead to its applicability to online gaming for the purposes of Article 20, gaming operators would be required to take comprehensive measures to identify, stop and report unusual financial transactions to the law enforcement authorities (TÜV Rheinland, Report No. 63002072-01-06 [2009], p. 24; also see the individual measures in that report, such as mandatory registration, identification, risk assessment, reporting obligations, Money Laundering Reporting Officer, KYC [Know Your Customer]), prohibition of cash transactions, etc., especially useful secondary measures such as limits or enhanced due diligence for certain users; cf., in addition, the FATF Recommendations, especially points 109 *et seq.* on online gaming).

Outlook

The results of the present study have shown that the current state of European online gaming law is characterised by fragmentation and legal uncertainty that is so extraordinary as to be unique. Moreover, the study has shown that the case law of the European Court of Justice is incapable, for various reasons, of improving this *status quo de lege lata*. As a consequence, it was found that the ***current state of European gaming law, especially in relation to the internet, is not anywhere near what it should be***. The conclusion from this was that the situation has direct, lasting adverse effects on the central and recognised objectives of consumer protection and crime control in the gaming sector.

Against this backdrop, specific regulations especially designed for online gaming in line with the concept of a ***European Regulatory Framework are not only desirable from the legal policy standpoint,*** as shown by other studies and observations, but also ***a legal necessity*** in the opinion of the *european center for e-commerce and internet law*.

Independently of such concerns, the discussion of such regulation at European level, which is inevitable sooner or later, should not distract ***Member States from their duty to create conditions for online gaming that are in line with contemporary standards.***

This concerns, above all, Member States whose **gaming monopolies are in part questionable from the perspective of constitutional law**, giving rise to one of the main causes of the lack of legal certainty, because they are diametrically and symmetrically opposed to the realities of communication and information technology: whereas the monopolies end at the national borders, online gaming is cross-border by definition, so that the nationally oriented intentions underlying such monopolises come to nothing in international online gaming.: "*erasing physical and legal boundaries*", as it was so aptly put by the current EU Presidency, which will have the last word in this study.