



EUROPEAN COMMISSION

Brussels, 20.09.2011
C(2011) 6499 final

PUBLIC VERSION
WORKING LANGUAGE
This document is made available for
information purposes only.

COMMISSION DECISION

of 20.09.2011

ON THE MEASURE No C 35/2010 (ex N 302/2010)

**which Denmark is planning to implement in the form of
Duties for Online Gaming in the Danish Gaming Duties Act**

(Only the Danish version is authentic)

(Text with EEA relevance)

COMMISSION DECISION

of 20.09.2011

ON THE MEASURE No C 35/2010 (ex N 302/2010)

**which Denmark is planning to implement in the form of
Duties for Online Gaming in the Danish Gaming Duties Act**

(Only the Danish version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions¹ and having regard to their comments,

Whereas:

1. PROCEDURE

1. On 6 July 2010, the Danish authorities notified pursuant to Article 108 (3) of the Treaty on the Functioning of the European Union (TFEU) the Legislative Proposal L 203 on Gaming Duties (the “Gaming Duties Act”²), adopted on 25 June 2010, for reasons of legal certainty. The Commission requested further information by letters dated 11 August 2010, and 22 September 2010. The Danish authorities provided the requested information by letter dated 20 October 2010.
2. In parallel, the Commission received two separate complaints with regard to the proposed Gaming Duties Act. The first complaint was submitted by the Danish Amusement Machine Industry Association (“DAB”) on 23 July 2010. The second complaint was submitted by a land-based casino operator, ‘the Royal Casino’, on 6 August 2010. Both complaints were forwarded to the Danish authorities on 23 September 2010 for their comments. The Danish authorities submitted their comments in the above mentioned letter of 20 October 2010.

¹ OJ C 22, 22.01.2011, p. 9.

² Act Nr. 698 on Gaming Duties (‘Lov om afgifter af spil’).

3. A meeting with the Danish authorities to discuss the on-going notification and the two above mentioned complaints took place in Brussels on 10 November 2010. During that meeting the Danish authorities submitted a note entitled “*The dilemma created by the pending State aid case*” in which they also announced their intention to delay the entry into force of the notified Act until the Commission had adopted a decision.³
4. By decision of 14 December 2010, the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the notified measure. The Commission decision to initiate the procedure (hereinafter the “initiating decision”) was published in the *Official Journal of the European Union*.⁴ The Commission invited interested parties to submit comments.
5. The Danish authorities submitted their observations to the initiating decision by letter of 14 January 2011.
6. In total, seventeen interested third parties submitted their comments between 11 February and 22 February 2011⁵. These comments were forwarded to Denmark on 16 March 2011, which was given the opportunity to respond to them. The Commission received the comments of Denmark by letter dated 14 April 2011.

2. DESCRIPTION OF THE MEASURE

7. Following the initiation of infringement proceedings and the sending of a reasoned opinion on 23 March 2007 concerning obstacles to the free movement of sports betting services in Denmark⁶, the Danish government decided to reform the national legislation on gambling and betting services in order to replace the existing monopoly regime with a regulated and partially liberalised one. The liberalisation was considered, inter alia, to be necessary to comply with EU law and to respond to the threat posed by illegal online gambling services provided by gaming service providers located in other jurisdictions.
8. The notified Gaming Duties Act is part of a set of legislative Acts introduced to liberalise the gambling sector⁷. According to Article 1 of the Gaming Act, the overall objective of this new law reform for gambling services is:
 - to keep the consumption of gambling at a moderate level;
 - to protect young persons and other vulnerable persons against exploitation or against developing addiction to gambling;

³ Although initially foreseen that the notified measure would enter into force on 1 January 2011, in order to comply with the State aid provisions, Article 35, paragraph 1 of the Gaming Duties Act provides that the Minister of Taxation will stipulate the time for the entry into force of the Act.

⁴ OJ C 22, 22.01.2011, p. 9.

⁵ See below, Section 5.

⁶ Infringement proceedings no. 2003/4365, see also IP/07/360.

⁷ Act on Gaming (No. 848 of 1 July 2010); Act on the Distribution of Profits Stemming from Lotteries and Horse and Dog Racing (No. 696 of 25 June 2010); Act laying down a Statute governing Danske Spil A/S (Act No. 695 of 25 June 2010).

- to protect gamblers by ensuring that gambling is supplied in a reasonable, reliable and transparent manner; and
 - to ensure public order and prevent gaming being used for criminal purposes.
9. According to the Gaming Act, “*supplying or rearranging gaming requires a licence unless otherwise provided*”. In addition, the provision or arranging of gaming is subject to the payment of a duty (Article 1 of the Gaming Duties Act).
 10. Article 5 of the Gaming Act defines gaming as covering the following activities: (i) lottery, (ii) combination gambling, and (iii) betting.
 11. Combination gambling refers to “*activities where a participant has a chance to win a prize, and where the likelihood of winning depends on a combination of skill and chance*”. Combination gambling includes thus games that are often offered by casinos, such as roulette, poker, baccarat, blackjack, and gaming machines offering cash winnings.
 12. Article 5 of the Gaming Act defines online gaming as “*gaming entered into between a player and a gaming provider using remote communication*”. The same provision defines land-based gaming as “*gaming that is entered into by a player and a gaming supplier, or the suppliers’ agent, meeting physically*”. Betting services are defined as “*activities where a participant has a chance of winning a prize and where a bet is placed on the result of a future event or the occurrence of a future event*”.
 13. According to Articles 2 – 17 of the Gaming Duties Act, the games subject to a duty are (i) lottery, including class lottery and non-profit lottery, (ii) betting, including local pool betting, (iii) land-based casinos, (iv) online casinos, (v) gaming machines offering cash winnings in amusement arcades or restaurants, and (vi) games without stakes.
 14. The Gaming Duties Act sets different tax rates, depending on whether the games are provided in online casinos or in land-based casinos.
 15. According to Article 10 of the Gaming Duties Act, holders of a licence to provide games in land-based casinos are subject to a basic charge of 45 per cent of their Gross Gaming Revenues (‘GGR’ – stakes minus winnings), less the value of the tokens in the tronc, and an additional charge of 30 per cent for GGR (less the value of the tokens in the tronc) which exceeds DKK 4 million (calculated on a monthly basis)⁸.
 16. According to Article 11 of the Gaming Duties Act, holders of a licence to provide games in an online casino are however subject to a charge of 20 per cent of their GGR.
 17. Holders of a licence to provide gaming machines offering cash winnings (slot machines) in amusement arcades and restaurants are subject to a charge of 41 per cent of their GGR. An additional 30 per cent is paid on gaming machines in

⁸ 1 Danish krone (DKK) ≈ 0,13 EUR.

restaurants for GGR exceeding DKK 30.000, and on gaming machines on amusement arcades for GGR exceeding DKK 250.000.⁹

18. With regard to the licence fees, the Gaming Act provides that, when applying for a licence to offer betting or online casino games, the applicant is liable to a fee of DKK 250.000 (DKK 350.000 if he applies both for betting and online casino) and a yearly licence fee ranging from DKK 50.000 up to DKK 1,500.000 depending on the gaming revenues.
19. The Gaming Act requires online gambling providers either to be established in Denmark, or if they are residents of another EU or EEA Member State, to nominate an approved representative (Article 27 s.).

3. REASONS FOR OPENING THE PROCEDURE

20. The Commission opened the formal investigation procedure laid down in Article 108(2) of the TFEU in respect of the measure at issue on the grounds that the measure could entail State aid within the meaning of Article 107(1) TFEU.
21. In particular, the Commission considered that the measure could be regarded as selective within the meaning of the jurisprudence. It recalled that, when assessing the selectivity of the tax measure, one should analyse whether a given measure favours certain undertakings in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the scheme in question.¹⁰
22. Given the nature of the games offered online and in land-based premises, the social experience provided by the activity of gaming in both platforms, and the socio-economic profiles of the consumers, the Commission had doubts as to whether the differences between online and land-based gaming were important enough to consider them as not being comparable in law and in fact for the purposes of their tax treatment under the Gaming Duties Act.
23. Furthermore, at that stage of the procedure, the Commission took the view that should the measure be considered to be *prima facie* selective, the Danish authorities had failed to establish that the measure could be justified by the logic of the tax system.
24. In this regard, the Danish authorities argued that the tax rate for online gambling reflected the necessary balance between, on the one hand, the need to comply with the objectives of the Danish gambling legislation to protect players, and, on the other hand, the need to face competition from online operators established in other countries with lower tax rates.
25. In addition, regarding the reference made by the Danish governments to the overall objectives laid down in the Gaming Act (see para 8), the Commission took the view that these objectives appeared to be of a general nature and external to the tax system. Since according to the case-law only intrinsic objectives of the tax system are

⁹ According to Article 12 of the Gaming Duties Act, the following amounts are additionally levied per month: DKK 3.000 per machine for up to 50 machines and DKK 1.500 for machines beyond that number.

¹⁰ See § 73 *et seq* of the initiating Decision.

pertinent, the Commission considered that the Danish authorities had not sufficiently substantiated their allegation that the selectivity of the tax measure at issue was required by the logic of the tax system.

26. Moreover, the Commission took the view that the notified Act involved a tax advantage conferred through the use of State resources since it implied a advantage granted through foregoing tax revenue in the form of a substantially lower rate applicable to online gambling operators. In addition, to the extent that the measure provides a selective economic advantage to online operators operating in Denmark, it could affect trade in the internal market and distort competition.
27. Finally, the Commission expressed its doubts as to whether the notified measure could fall within the scope of any of the derogations laid down in Articles 107(2) and 107(3) TFEU.

4. COMMENTS FROM THE DANISH AUTHORITIES

28. By letter dated 14 January 2011, the Danish authorities submitted their comments on the opening of the proceedings to the Commission.

Comments regarding the comparability of online and land-based casinos

29. The Danish authorities, relying on a list of factual and economic differences set out in their notification between online and land-based gambling, reiterated the view that online gambling should be regarded as an activity that is different from land-based gambling.
30. According to the Danish authorities, the software used in certain electronic games offered in land-based casinos and those used in online casinos is not identical. Apart of being different in terms of platforms and suppliers, these electronic games would diverge significantly since the physical presence of gamblers is required in order to play these games in land-based casinos. Such a physical presence would involve various costs (such as transportation costs, entrance fees, wardrobe fees, food or drink costs), which do not incur within the context of online gaming.
31. For the Danish authorities, the prohibition of online gambling maintained by a number of Member States, while allowing land-based gambling services, reflected the differences in the provision of the two types of gaming.
32. Furthermore, the Danish authorities claimed that the Commission did not take in consideration the conclusions of the Commission's 2006 "Study of Gambling Services in the Internal Market of the European Union"¹¹, according to which online and land-based casinos should be considered as being distinct markets.
33. The Danish authorities also stressed that the assessment of the Commission focused only on land-based casinos, and did not take account of "Amusements With Prizes" (i.e. slot machines, but no offering of roulette, black jack, poker etc.) located in land-based restaurants, or amusement arcades and gaming halls.

¹¹ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, Final Report, European Commission, 2006.
http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf

Comments regarding the justification of a prima facie selectivity by the logic of the system

34. With regard to the justification by the logic of the tax system, the Danish authorities claim that the Commission might have misinterpreted the objectives pursued by the notified measure. This measure does not aim at the preservation of the international competitiveness of the Danish gaming industry, but rather at pursuing the four objectives set out in the legislation (maintaining consumption of gambling at a moderate level; protecting young people or other vulnerable persons from being exploited through games or from developing an addiction of gambling; protecting players by ensuring that games are offered in a fair, responsible, and transparent manner; ensuring public order and prevent gaming being used for criminal purposes).
35. With regard to the different tax rates applicable for online and land-based gambling activities, the Danish authorities explained that they are confronted with a legislative and regulatory dilemma. On the one hand, they could no longer maintain the current monopolistic situation and delay the liberalisation of the online gambling market. On the other hand, providing for a uniform tax level for online and land-based gambling activities would undermine the policy objectives pursued in this field by the legislator.
36. In particular, the Danish authorities argued that setting a uniform tax level for all gambling activities would lead to inconsistent solutions, regardless of the tax model opted for. If the Danish authorities relied on a model based on a lower, uniform 20 per cent tax rate, this would result in a strong incentive for gambling in land-based casinos, which would be contrary to the general interest of consumer protection.
37. Conversely, providing a model based on a higher uniform tax rate similar to the one applied to land-based gambling would dissuade online operators from seeking a licence to provide services from Denmark, thus defeating the liberalisation objectives of the law. This would also be contrary to the general interest of consumer protection since no effective control of the online gambling activities would be possible.
38. In support of their position, the Danish government provided a memorandum from the Ministry of Taxation of 6 March 2010 to the Policy Spokesmen of the political parties of the Danish Parliament regarding the setting of the level of duty¹². The memorandum shows that the current differential tax treatment should be regarded as the result of a balancing exercise aiming to ensure, on the one hand, that the law is upheld, while on the other hand, maximising the tax revenue and maintaining consumption of gambling at a moderate level.
39. In this context, according to the Danish authorities, international competition should also be taken into account in order to consider the reality of the global nature of the online gaming industry. In this regard, the Danish authorities refer to the “Study of Gambling Services in the Internal Market of the European Union”, according to which the costs of doing business onshore for suppliers should not exceed the costs

¹² For an English version of the memorandum, see the observations to the initiating decision from the Danish authorities, 14 January 2011, Annex B. For a Danish version of the memorandum, see the notification from the Danish authorities, 6 July 2010, Annex 20.

of doing business offshore, in order to be more attractive for consumers and suppliers to operate within their jurisdictions than in other countries.¹³

40. Furthermore, the Danish authorities argued that the principle laid down by the Court of Justice in the *Salzgitter* case, according to which the Commission should not compare the notified level of taxation with levels applicable in other Member States in order to determine whether the notified measure constitutes State aid,¹⁴ does not apply to the notified Act, since the differential tax treatment between land-based and online gaming activities is based exclusively on internal tax considerations. In particular, the Danish legislator did not pay regard to the tax rates applicable in other Member States in order to enhance the competitiveness of the Danish gaming industry, but only sought to strike an appropriate balance with the four aforementioned policy objectives pursued under the notified Act.
41. Moreover, the Danish authorities argued that the Commission misinterpreted the *Salzgitter* case as it relied on it not in order to assess the selective nature of the notified measure, but in order to examine whether the selectivity of the notified measure could be justified.
42. For the above reasons, the Danish authorities consider that the notified tax measure, if it were found to be selective, should be regarded as being justified by the logic of the tax system.

5. COMMENTS FROM THIRD PARTIES

43. The Commission received comments from 17 interested third parties, including the complainants: 7 of them were associations,¹⁵ 7 of them were undertakings¹⁶ and 3 of them were Member States¹⁷.

¹³ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006, Chapter 7, p. 1402.

¹⁴ Case T-308/00 *Salzgitter v Commission of the European Communities* [2004] ECR II-1933 paragraph 81. The wording of this paragraph is as follows: "Consequently, in order to identify what constitutes an advantage as contemplated in the case-law on State aid, it is imperative to determine the reference point in the scheme in question against which that advantage is to be compared. In the present case, when a 'normal' tax burden with the meaning of the aforementioned case laws is being determined, comparing the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aid and functioning of the provisions on the monitoring of State aid. In the absence of Community-level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States. The information provided by the applicant in the present case illustrates, moreover, the disparity which exists between the Member States, particularly as regards tax bases and rates of taxation on capital goods." Commission Decision C2/2009 *MoRaKG, Conditions for Capital Investment*, (OJ C 60, 14.3.2009, p. 9), paragraph 25.

¹⁵ European Gaming and Betting Association (EGBA), Remote Gambling Association (RGA), Automatenverband, Eupportunity, Van Speelautomaten, Danish Chamber of Commerce and European Casino Association (ECA).

¹⁶ PokerStars, Betfair, Club Hotel Casino Loutraki, Royal Casino (along with DAB), BWin, Compu-Game, nine casinos in Greece (Club Hotel Casino Loutraki, Regency Casino Parnes, Regency Casino Thessaloniki, Casino Xanthi (Vivere Entertainment S.A.), Casino Rio (Theros International gaming INC.), Casino Corfu (Greek Casino Corfu), Casino Rodos, Porto Carras Grand Resort 20 and Casino Syrou).

¹⁷ Estonia, France and Spain.

Comments from third parties supporting the Danish government's position

44. With regard to the selectivity of the measure, some interested parties claim that online and land-based casinos are not in a comparable legal and factual situation because these undertakings do not operate in the same market and, consequently, the tax measure does not derogate from the generally applicable tax system. Hence, the tax measure should not be regarded as selective.
45. In support of this position, the interested third parties claim that the products offered by land-based and online casinos diverge substantially. The activities offered by land-based casinos constitute a social experience where, unlike online gaming, discussion, appearance and physical environment plays a central part of the gaming experience. Furthermore, land-based gaming should be regarded as part of the overall entertainment experience, which is complemented by other activities, including restaurant, bar, convention facilities and hotel services.
46. In addition, these interested parties argue that online and land-based gaming activities do not present the same risks of addiction. Support for this position can be found in the case-law of the Court of Justice of the European Union, which held that “the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection”.¹⁸ Reference is also made to the study on gambling published by the *Institut National de la Santé et de la Recherche Médicale*¹⁹, according to which online gambling presents an actual risk of addiction that needs, however, to be addressed by a regulated market for online gambling.
47. Moreover, some interested parties argue that there is a segmentation of the gambling market based on different distribution channels, which would constitute a pertinent element for distinguishing different relevant markets. In that respect, they refer to an opinion of the French competition authority of 20 January 2011, which notes that online gambling games could be differentiated from gambling games in clubs or outlets.²⁰
48. Some interested parties also point out that land-based gaming operators are subject to a limited competitive pressure in the specific geographic area where they offer their games. By contrast, online operators would face fierce competition from other online operators. In particular, since in land-based casinos the gaming products are bound to a physical location, customers need to physically move to get to the relevant location. For instance, in Denmark, there are only six locations where land-based casinos can operate. By contrast, online gaming activities allow players to access a great number of gaming line-ups offered by different international operators. Moreover, the strong competition for online casinos is all the more exacerbated by the existence of specialised websites that compare the offer of various online gambling providers, and by numerous blogs and forums that allow players to compare the products, prices and services offered by online operators.

¹⁸ Case C-46/08 *Carmen Media Group*, [2009], not yet published, paragraph 103.

¹⁹ Institut National de la Santé et de la Recherche Médicale, *Jeux de hasard et d'argent – Contextes et addictions*, Juillet 2008, <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000697/0000.pdf>

²⁰ Autorité de la Concurrence Française, Avis 11-A-02 of 20 January 2011.

49. In the same vein, these interested parties point out that profit margins associated with online games are significantly lower than those associated with land-based games, given the fierce competition among online operators and the absence of such competition encountered by land-based casinos. Thus, online casinos would have significantly lower margins with regard to the payout ratio, i.e. the percentage of the wagered amounts that is credited back to customers. Moreover, land-based casinos can benefit from other side-products and thus side-earnings such as casino hotels, bars or restaurants which are absent in an online environment. Consequently, since land-based gambling operators could generate higher gambling profit than online operators, the difference in tax rates would be justified by the principle of the ‘financial capacity to pay’, according to which those who can bear a higher tax burden should pay higher taxes.
50. In addition to the aforementioned arguments, some interested parties also consider that even if the Danish measure were found selective, the selectivity criterion would be justified by the nature or the overall structure of the tax system. The aim of the Danish differential tax rate would be to ensure that online operators would apply for a Danish licence and thus pay Danish taxes in the future, whilst at the same time guaranteeing that the objectives of consumer protection, as laid down in the Danish gambling legislation, would be achieved.
51. In this regard, some interested parties made reference to the 1998 Commission Notice on the application of the State aid rules to measures relating to business taxation²¹, according to which the whole purpose of a tax system is the collection of revenue for State expenditure. On this basis, they take the view that the objective of optimizing tax revenues of online gaming offerings to Danish residents would otherwise not be achieved with a tax rate higher than the rate provided under the notified Act for online gaming activities.

Comments from third parties against the Danish government’s position

52. In contrast to the aforementioned arguments, other third parties -mainly land based operators- submitted comments against the stance adopted by the Danish authorities.
53. In substance, these interested parties argued that the Danish tax regime should be regarded as selective since it introduces a difference in tax treatment between two groups of undertakings which are in a legal and factual situation that is comparable in the light of the objectives of the measure. These parties allege that the online and land-based casinos carry out competing activities in the same unique market and they are therefore in comparable situations.
54. In support of this position, the interested parties claim that that the games provided by online and land-based casinos are similar. The rules of casino games should be regarded as the same ones while virtual interactions with croupiers or other players online would be comparable with real interactions in land-based casinos. Manufacturers of land-based gaming machines would produce the same models for online gaming machines as are available under land-based forms. Hence, from a technical point of view, casino games offered online and offline would be identical in terms of technological platforms, descriptions, features, formats and parameters.

²¹ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 26.

55. Furthermore, the interested parties allege that the consumer profiles of online and land-based casinos are comparable. Hence, this consumer aspect should not be used as a pertinent argument to distinguish online gaming from land-based gaming.
56. For some interested parties online gambling should not be regarded as a type of activity that is different from land-based gambling, but rather as another channel through which games are offered to the players.
57. In addition to the aforementioned arguments, the interested parties take the view that the current gaming market should be viewed as a single one which is subject to a substantial evolution, marked by an aggregating movement of players from land-based to online casinos. This recent development could be explained by several reasons, including the ever-increasing use of Internet, the low-priced operational costs for online casinos at each level (facilities, staff or other permanent costs), the possibility for online casinos to provide unlimited access to online gaming twenty-four hours per day and from any place given the ongoing development of new technologies.
58. The interested parties predict that this shifting of the market share from land-based to online gaming will increase in the future, given the rapid technological progress, the commercial initiatives and the market penetration of the online commerce which have made this sector of the gambling services extremely dynamic and transformative. In this regard, they also refer to the opinion delivered by Advocate General Bot in the *Liga Portuguesa de Futebol Profissional* case²² according to which, the impact of new means of communication is such that games of chance and gambling, which used to be available only in specific premises, could now be played at any time and any place, given the evolution of new technologies such as phones, interactive televisions and internet.
59. Reference is also made to the 2006 Commission Study on Gambling Services in the Internal Market.²³ Accordingly, “the future of gambling in casinos is increasingly going to be server-based as gaming machines move increasingly to downloadable game software”.²⁴ This development would be marked by the development of new hybrid gaming venues.
60. On the basis of the foregoing argument the interested parties conclude that the measure is selective since online and land-based casinos carry out activities which are in comparable situation in law and in fact. Such selectivity could not either be justified by the logic of the tax system. Moreover, they consider that imposing a higher tax rate would not discourage online providers to apply for a licence in Denmark.
61. Moreover, the Danish reference to other Member States’ national tax systems in order to justify the necessity to attract providers of online casinos is not pertinent since it is settled case-law that any justification should be based exclusively on the national tax system.²⁵ In addition, the argument of the Danish authorities, according

²² Opinion of AG Bot (14 October 2008), Case C-42/07 *Liga Portuguesa de Futebol Profissional*, [2009] ECR I-10447, paragraph 41 et seq.

²³ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006.

²⁴ *Ibid.*, p. 1403.

²⁵ Case T-308/00, *Salzgitter AG v Commission of the European Communities*, [2004] ECR II-1933, paragraph 81.

to which lowering the tax rate applicable to certain undertakings is necessary in order to render the market more competitive, has consistently been rejected by the jurisprudence.

6. COMMENTS FROM DENMARK ON THIRD-PARTY COMMENTS

62. While reiterating their views that the notified measure is not selective and does not constitute a State aid, the Danish authorities point out that all intervening governments support their position that there is a need, from a regulatory perspective, to draw a distinction between online and land-based casinos.
63. They also point out that the methodology to define the relevant market under Article 101 and 102 TFEU, concern private undertakings and is based on the appreciation of product substitutability from a demand and supply point of view, and therefore should not apply for the purpose of a State aid assessment. Applying such a methodology would circumvent the limits of State aid law which in the present case relates to a Member State's sovereign tax powers.
64. In their view, online gambling should be set apart from land-based gambling. In this regard, they also refer to the Commission position adopted in merger proceedings, by virtue of which gambling machines (jackpot machines, token machines and All-cash or AWP's) constitute a separate product market²⁶. They also mention, among others, the decision adopted by the French Competition Authority, according to which land-based poker does not form part of the same market as online poker, since land-based poker requires personal self-control, observation of the other players, often higher costs and a limitation from a geographic point of view.²⁷ Reference is also made to a merger decision adopted by the British Office of Fair Trading, which draws a distinction between licensed betting offices on the one hand, and telephone or internet betting, on the other hand.²⁸
65. With regard to the differences in product markets, the Danish authorities point out that, according to many interveners, additional services are offered in venues, which are significantly more expensive. From a sociological point of view, the Danish authorities reiterate their view according to which remote and land-based players are different types of consumers, as also indicated in the recent Green paper of the Commission on Online Gambling in the Internal Market of 24 March 2011, where it is put forward that the profile of online gamblers seems to be different from the one of a traditional casino or betting shop customer.²⁹
66. The Danish authorities also reiterate that the payout-ratio is significantly higher for online operators, given the disparity in operating costs or the different degree of operating costs. They also point out that disparities between online and land-based casinos can be found in the technical aspects of the software used, the different

²⁶ Commission Decision of 14.3.2003, COMP/M.3109, Candover/Cinven/Gala, Paragraph 16.

²⁷ Autorité de la Concurrence Avis n° 11-A-02 du 20 janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne.

²⁸ Office of Fair Trading, Decision ME/1716-05 of 15 August 2005 regarding the acquisition by William Hill of the licensed betting offices of Stanley Plc.

²⁹ European Commission, Green paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 3.

regulations for granting licences and the position of local dominance for land-based casinos.

67. The Danish authorities also contest the interpretation by certain interested parties of the above-mentioned opinion delivered by Advocate General Bot in the *Liga Portuguesa* case. They point out that this opinion, which was issued in the context of the freedom to provide services, would concur with the idea that remote gambling operators should be regarded as being in a different legal and factual situation in comparison with land-based gambling operators.
68. However, the Danish authorities recognise that certain types of online gambling could still constitute another form of distribution, such as in the case of betting services.
69. With regard to the aims of the notified Act, the Danish authorities reject the argument raised by certain interested parties, according to which, the notified Act would aim at attracting foreign gambling providers. Rather, the objectives pursued by the government are the those listed in the Gaming Act. In addition, the general purpose of the new Act would remain unchanged, that is to generate income on gambling, as any similar system for collecting revenue to finance the public budget.
70. The Danish authorities also agree with the view expressed by some interested parties, according to which the financial capacity of the taxable subject could be regarded as a valid justification. In the present case, remote gambling operators would indeed be subject to a significantly lower financial capacity.
71. Finally, the Danish authorities point out that their tax system on remote gambling is designed in such a way so as to ensure that the highest revenue would be collected. Thus, the lower tax rate for online gambling would reflect the need for balancing the four objectives set out in the notified Act with the need to maximise tax revenues.

7. ASSESSMENT OF THE MEASURE

7.1. Presence of State Aid Pursuant to Article 107(1) TFEU

72. Article 107(1) TFEU provides that any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade among Member States is incompatible with the internal market.

7.1.1. State resources

73. Article 107(1) TFEU requires that the measure be granted by a Member State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.
74. In the case under review, the presence of the criterion of State-originated resources has not been contested by any of the parties, including the Danish authorities, the complainants or the third parties.

75. By allowing online gambling undertakings to pay taxes at the relatively low rate of 20 per cent of their GGR³⁰, the Danish authorities forego revenue which constitutes State resources. Consequently, the Commission endorses the view that the measure at issue involves a loss of State resources and it is therefore granted through State resources.

7.1.2. *Advantage*

76. The measure furthermore should confer a financial advantage to the recipient. The notion of advantage covers not only positive benefits, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking.³¹

77. In the present case, the existence of an advantage has not been challenged by any of the parties, including the Danish authorities, the complainants or the third parties.

78. Under the Gambling Duties Act, online gambling undertakings are liable to pay a tax on their GGR at a rate 20 per cent. This rate is substantially lower than the rate applicable for land-based gambling operators. Therefore, online gambling undertakings benefit from an advantage consisting in the reduction of their tax burden. It follows that the measure under review involves an advantage for undertakings providing online gambling services.

7.1.3. *Distortion of Competition and Effect on Trade*

79. According to Article 107(1) TFEU, the measure must affect intra-EU trade and distort, or threaten to distort competition. In the present case, online gambling providers which will establish themselves in Denmark will be exposed to competition and intra-community trade. Consequently, the Gaming Duties Act, which provides for a favourable tax treatment of Danish undertakings supplying online gambling services, necessarily affects intra-Community trade and distorts or threatens to distort competition.

7.1.4. *Selectivity*

80. In order to be regarded as a State aid within the meaning of Article 107(1) TFEU, the measure should be found selective inasmuch as it favours certain undertakings or the production of certain goods.

81. The notion of selectivity is interpreted by the jurisprudence in such a way that the measure is selective if it is “intended partially to exempt those undertakings from the financial charges arising from the normal application of the general system of compulsory contributions imposed by law.”³² It follows that the measure is selective if it constitutes a departure from the application of the general tax framework. For this purpose, the case-law of the Court of Justice states that one should assess whether a given measure favours certain undertakings in comparison with other

³⁰ See paragraphs 15 and 16 above.

³¹ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECR 3, p. 19.

³² Case 173/73 *Italian Republic v. Commission of the European Communities* [1974] ECR 709, Summary no. 3.

undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the scheme in question.³³

82. According to the case-law, if the measure is considered to depart from the general tax system, one should analyze whether such differentiation results from the nature or general scheme of the tax system of which it forms part.³⁴ In other words, one should examine whether the measure in question, which appears *prima facie* to be selective, is justified in the light of the logic of the tax system.³⁵

System of Reference

83. In the present case, the system of reference should be defined as being the taxation system for Danish gambling activities. The Gaming Duties Act aims at regulating the payment of duties of all gambling activities provided or arranged in Denmark, be it online or through land-based activities. It is therefore against this reference tax system that the measure at issue (i.e. the differential tax treatment in favour of online gambling activities) should be assessed.

Departure from the general tax system

84. Since the notified Act provides that holders of a licence to provide games in online casinos are subject to a charge of 20 per cent of the GGR, whereas holders of a licence to provide games in land-based casinos are subject to a basic charge of 45 per cent of GGR and an additional charge up to 30 per of GGR, the question arises as to whether online and land-based gaming operators, which are subject to different tax duties, should be regarded as being legally and factually comparable.
85. In this regard, the Danish authorities have consistently argued that online and land-based gaming activities are not in a legally and factually comparable situation in terms of platforms, costs, financial margins, social experience, suppliers or products.
86. Furthermore, in line with other interested parties, they have emphasised the substantial difference between the two categories of operators by reference to the fierce competition faced by online casinos compared with the absence of competition encountered by land-based operators.
87. Despite a number of objective differences between online and land-based gaming operators (such as physical versus online presence), the Commission considers that the aforementioned differences between online and land-based gaming casinos are not sufficient to establish a substantial and decisive distinction in law and in fact between the two types of undertakings.

³³ Case C-88/03 *Portuguese Republic v. Commission of the European Communities* [2006] ECR I-7115, paragraph 54; Case C-172/03 *Wolfgang Heiser v. Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 40; Case C-169/08 *Presidente del Consiglio dei Ministri v. Regione Sardegna* [2009] ECR I-10821, paragraph 61.

³⁴ Case C-487/06 P *British Aggregates Association v Commission*, [2008] ECR-10515, paragraph 83.

³⁵ Case 173/73 *Italian Republic v. Commission of the European Communities* [1974] ECR 709, paragraph 15; Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 23.

88. In this regard, the Commission notes that the games offered by land-based and online gaming operators are equivalent. The games offered by both online and land-based operators – including roulette, baccarat, punto banco, black jack, poker and gaming on gaming machines – form part of the same activity of gambling, regardless of their online or land-based settings. Moreover, from a technical point of view, casino games offered online and in land-based premises appear to be comparable with regard to their technological platforms, formats and parameters.
89. In that respect, the Commission considers that, as far as the taxation of gambling activities is concerned, online gambling emerges as another distribution channel of similar type of gaming activities. In support of this position, the Commission notes the substantial efforts carried out by online casinos to simulate the land-based casino experience in such a way that online players would have the feeling to play in land-based casino surroundings, rather than in virtual environments.
90. In order to support their view that online and land-based gambling are legally and factually not comparable activities, the Danish authorities have referred, among others, to the a decision of the British Office of Fair Trading, which draws a difference in licensed betting offices on the one hand and telephone or internet betting on the other hand³⁶. This reference however contradicts the position adopted by the Danish government, according to which online and offline betting are identical services³⁷. In this regard, it is also contradictory that the Danish authorities consider that offline and online betting services are similar activities, and thus subject these activities to the same tax treatment, while they consider that other types of online and land-based gaming activities are distinct activities, and subject them to different tax rates.
91. The Danish authorities also relied on the Candover-Cinven-Gala decision³⁸ according to which gambling machines (jackpot machines, token machines and all-cash or AWP's) would constitute an independent product market³⁹. However, apart from the fact that this decision did not concern the application of State aid rules nor the issue of selectivity, it must be noted that although this decision states that “gaming machines (jackpot machines, token machines and All-cash or Amusement with prize (AWP) machines) constitute a separate product market, it also states that they can be regarded as integrated in the gambling package at the respective sites where they are situated, i.e. in casinos, bingo clubs, arcades, pubs, betting shops etc.”⁴⁰.
92. The alleged differences in the socio-economic profiles of consumers, addiction risks or market evolution are not either sufficient to demonstrate that online and land-based gambling constitute two different types of activities that are not legally and factually comparable. Some of the studies relied upon by the Danish government and the complaints alike, appear to contain enough findings to support opposing conclusions. Thus, with regard to the 2006 Commission Study on Gambling Services in the Internal Market⁴¹, the Danish government claims that this report tends to show

³⁶ See footnote 28

³⁷ Article 6 of the Gaming Duties Act.

³⁸ See paragraph 64 above.

³⁹ Commission Decision of 14.3.2003, COMP/M. 3109, Candover/Cinven/Gala, paragraph 16.

⁴⁰ *Ibid.*

⁴¹ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union 2006.

that online and land-based markets are separate⁴². By contrast, the same report is referred to by some interested parties⁴³ in order to establish that the online gambling market should not be regarded as the creation of a new market, but rather as the evolution of the same gambling market, marked by the development of new hybrid gaming venues⁴⁴.

93. Likewise, contradictory statements are found in the study carried out by the Danish National Centre for Social Research⁴⁵, which is mentioned by the Danish authorities and the complainants. Whereas the Danish authorities claim that gamblers in land-based casinos differ from those in online casinos in terms of age, gender and education level, the complainants, relying on the same study, come to the opposite conclusion, claiming that this study demonstrates that there are no major distinctions between the profiles of the consumers playing in land-based or online casinos. In their view, this study shows that gamblers playing games both in land-based and online casinos would typically be the same young men between 18 and 24 years old⁴⁶.
94. On the basis of the foregoing, the Commission concludes that online and land-based casinos should be perceived as being legally and factually in a comparable situation. As both online and land-based gambling raise these risks, the notified measure addresses both online and land-based gambling. Accordingly the measure at issue introduces a differential tax treatment in favour of online gambling operators, to the detriment of land-based casinos. It follows thereof that the measure under review should be regarded as *prima facie* selective within the meaning of article 107 TFEU, since it constitutes a departure from the general tax regime.

Justification by the logic of the tax system

95. In line with the jurisprudence, one should assess whether a measure, which appears to be *prima facie* selective, can be justified by the nature and the general scheme of the system. For this purpose, guiding principles or rationales of the tax system can be relied upon in order to justify the selectivity of the measure.
96. In this regard, the Danish authorities argued that, given the peculiarities of the sector involved, the differential tax treatment in favour of online gambling operators constitutes the only way to ensure the efficiency of their tax regime. Accordingly, setting a higher tax rate would discourage online gambling operators from applying for a Danish licence, whereas introducing a lower level of tax burden for all operators concerned would be contrary to the overall objective of keeping gambling at a reasonable level.
97. The Danish authorities have also asserted that the financial capacity of the online gambling operators, which is allegedly lower than the one of the land-based casino operators, would justify the different tax rates between the two categories of operators.

⁴² See answers to request for information sent by the Danish government, 20 October 2010, § 2.10; Observations sent by the Danish government, 14 January 2011, p. 9, § 42.

⁴³ See comments from the Danish Amusement Machine Industry Association and Royal Casino, sent on 18 February 2011, p. 1.

⁴⁴ *Ibid*, p. 1403.

⁴⁵ Study of the National Centre for Social Research "Socialforskningsinstituttet", 2007.

⁴⁶ See for instance the observations sent by Nine Greek Casinos, 21 February 2011, p. 18.

98. In the light of the foregoing arguments, the Commission recalls that, according to the jurisprudence⁴⁷ and the Commission Notice on the application of the State aid rules to measures relating to direct business taxation⁴⁸, a Member State has to establish whether the measure under consideration derives from the basic or guiding principles of that system. A justification based on the nature or overall structure of the tax system in question constitutes an exception to the principle that State aid is prohibited. It must therefore be subject to a strict interpretation.⁴⁹
99. It follows that it is incumbent upon the Danish authorities to prove that the tax measure in question is justified by the logic of the tax system. However, the Danish authorities did not adduce any sufficient and convincing evidence to support their assertion that lowering the tax rate for a particular segment (online operators) of a wider category (gambling operators) as a means to ensure that the former would apply for a license, derives from the principles and the logic underpinning their tax system. In particular, the objective of attracting foreign online gambling service providers in Denmark and complying with the Danish rules should be regarded as a public policy objective which is external to the logic of the tax system.
100. Likewise, with regard to the alleged lower financial capacity to pay of online gambling operators, the Danish authorities failed to establish that there is a difference in profitability between online and land-based casino activities that would justify the differential tax treatment. Moreover, the Danish authorities have not either demonstrated that the financial capacity to pay is a principle embedded in their system of direct business taxation that could be relied upon in the present case as a means to justify the differential tax treatment of online and land-based casinos.
101. It follows from the foregoing that the Commission does not consider that the selectivity of the notified Act as justified in the light of the logic of the tax system.

7.1.5. *Conclusion*

102. In the light of the foregoing, the Commission considers that the criteria set out in Article 107(1) TFEU are fulfilled and that the measure of a lower tax rate for online gambling constitutes state aid for the providers of online gambling services established in Denmark.

7.2. Compatibility of the Measure on the basis of Article 107(3)(c) TFEU

103. In its paragraphs (2) and (3) of Article 107, the Treaty on the Functioning of the European Union provides for rules under which certain aids shall be compatible with the internal market, or certain aids may be considered to be compatible with the internal market.
104. The Commission considers that the measure at issue can be declared compatible with the internal market according to the derogation provided in Article 107(3)(c) TFEU which provides for the authorisation of "...aid to facilitate the development of certain

⁴⁷ Case 173/73 Italian Republic v. Commission of the European Communities [1974] ECR 709, Paragraph 15.

⁴⁸ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, Paragraph 23.

⁴⁹ Joined Cases T-127/99, T-129/99 and T-148/99 Diputación Foral de Álava and others v Commission [2002] ECR II-1275, paragraph 250.

economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”

105. The Commission notes that the measure does not fall within the scope of existing guidelines for the application of Article 107(3)(c) of the TFEU. Thus it should be assessed directly under this Treaty provision. In order to be compatible under article 107(3)(c) TFEU, an aid measure must pursue an objective of common interest in a necessary and proportionate way. When assessing the compatibility, the Commission balances the positive impact of the measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. This test is based on a three-stage examination. The first two steps address the positive effects of the State aid and the third step addresses the negative effects and resulting balancing of the positive and negative effects⁵⁰. The balancing test is structured as follows:

- (1) Is the aid measure aimed at a well-defined objective of common interest?
- (2) Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address a market failure or other objective? In particular:
 - (a) is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 - (b) is there an incentive effect, i.e. does the aid change the behaviour potential beneficiaries?
 - (c) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

7.2.1. *Objective of Common Interest*

106. The Danish government explained that they decided to proceed with a reform of the existing legislation on gambling and betting services in order to replace the existing monopoly regime with a regulated and partially liberalised regime. The liberalisation was considered, inter alia, to be necessary to comply with EU law following the initiation of infringement proceedings and the sending of a reasoned opinion on 23 March 2007⁵¹, and to respond to the threat posed by illegal online gambling services provided by gaming service providers located in other countries.

107. The Danish gambling sector until now has been mainly under State monopoly as only one licence has been issued to a state-controlled company, “Danske Spil A/S”. Despite the regulatory framework prohibiting foreign online gambling providers to market their services to consumers resident in Denmark, many online gambling providers established in other Member States and also in third countries have offered their services via channels not located in Denmark, such as satellite television channels broadcast from the UK. The Danish authorities have stated in their

⁵⁰ In this regard, see State Aid Action Plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

⁵¹ Infringement proceedings No 2003/4365, see also IP/07/360.

notification, that due to Danish court proceedings, in which it was claimed that the current Danish gambling monopoly constituted a breach of the free movement of services, the Danish authorities could not in practice enforce the prohibition against other gaming service providers marketing their services in Denmark. As a result, an unsatisfactory situation persisted whereby the legality of the existing monopoly was challenged, not only within the context of administrative and judicial proceedings, but also by the direct offer of online gambling services by unlicensed operators established in other jurisdictions.

108. According to Explanatory Memorandum accompanying the Gaming Act, the liberalisation process was justified by reference to the latest technological developments which meant that Denmark is now part of a global communication society where consumers have access to a wide range of services from providers of various jurisdictions. Over the past ten years, gaming has developed into a major sales product on the internet, especially after the introduction of online poker. The internet has provided Danish citizens with the opportunity to compare Danske Spil's products and product range with the products offered by online gaming providers established in the UK, Malta, Gibraltar and other countries. A rapidly growing number of Danish players have therefore begun in recent years to play with the international gaming providers. As explained by the Danish authorities, the fear of the legislator was that if not regulated and controlled effectively, the provision of gaming could be associated with negative effects on society in the form of criminality and a breakdown of public order, and could further lead to gambling addiction of vulnerable individuals. At the same time, the level of profits of Danske Spil has been gradually decreasing. It was therefore necessary for the Danish authorities to be able to regulate and control the gaming that is offered to Danish citizens in order to channel gaming into a controlled framework, and thus prevent negative consequences for the society.
109. In this regard, the Commission recalls that the gambling sector up to now has never been subject to any harmonisation within the European Union. According to Article 2 of the Services Directive, gambling even is explicitly excluded from the scope of this Directive.⁵² However, despite the lack of any kind of secondary legislation in this field, cross-border gambling activities may fall within the scope of the fundamental freedoms of the Treaty, namely the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU).
110. In principle, Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where it lawfully provides similar services.⁵³ It is also settled case-law that the legislation of a Member State which prohibits providers established in other Member States from offering via the internet services in the territory of that first Member State constitutes a restriction of the freedom to

⁵² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

⁵³ Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33.

provide services enshrined in Article 56 TFEU.⁵⁴ Moreover, the freedom to provide services is for the benefit of both providers and recipients of services.⁵⁵

111. In the present case, although the provision of gambling services primarily falls under the scope of the fundamental freedom of Article 56 TFEU, also the freedom of establishment is concerned by the Danish legislation. According to Article 27 of the Gaming Act, Denmark requires for the online gambling providers either to be established in Denmark, or where they are residents of another EU or EEA Member State, to appoint an approved representative. The same justifications for restrictions apply for the freedom of establishment as for the freedom to provide services.
112. Restrictions on these fundamental freedoms are only acceptable as exceptional measures expressly provided for in Article 52 TFEU, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest. Article 52(1) TFEU allows restrictions justified on grounds of public policy (“*ordre public*”), public security or public health.
113. In so far as gambling activities are concerned, a certain number of reasons of overriding general interest have been recognised by the case-law of the Court of Justice, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order. In that context, moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. According to that case-law, the restrictions must in any event be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must also be applied without discrimination.⁵⁶
114. It should be noted however that the reduction of tax revenue is not one of the grounds listed in Article 52 TFEU nor accepted by the case law⁵⁷, and cannot therefore be regarded as an overriding reason in the public interest which could be relied upon to justify a measure which is, in principle, contrary to a fundamental freedom.
115. As regards specifically the justification for restrictions on the provision of cross-border gambling, the Court of Justice has held as follows⁵⁸:

“57. In that context (...) it also should be noted that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonization in this field, it is for each Member State to determine those areas, in

⁵⁴ Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 54.

⁵⁵ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

⁵⁶ See Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraphs 63 to 65 and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 46 to 49.

⁵⁷ Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 44; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 49 and the case-law cited. In so far as restrictions on gambling activities are concerned, see Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraphs 61 and 62.

⁵⁸ Case C-42/07 *Liga Portuguesa de Futebol Profissional*, [2009] ECR I-10447, paragraph 57 and following.

accordance with its own scale of values, what is required in order to ensure that the interest in question are protected.

58. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure.

59. The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (Placanica and Others, paragraph 48).

(...)

69. In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator (...) lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

70. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.”

116. In a recent judgement, the CJEU also referred in detail to the risks of online gambling⁵⁹:

“103. It should be noted that, in the same way, the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.

⁵⁹ Case C-46/08 *Carmen Media Group* [2009] not yet published, paragraph 103.

104. Moreover, it should be noted that, having regard to the discretion which Member States enjoy in determining the level of protection of consumers and the social order in the gaming sector, it is not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue (see, by analogy, Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraphs 83 and 84).

105. Having regard to the whole of the above, it must be acknowledged that a prohibition measure covering any offer of games of chance via the internet may, in principle, be regarded as suitable for pursuing the legitimate objectives of preventing incitement to squander money on gambling, combating addiction to the latter and protecting young persons, even though the offer of such games remains authorised through more traditional channels.”

117. The lack of harmonisation in the field of gambling and the different approaches of Member States, regarding the scope of games and the operators authorised to provide services, paints a picture of a very fragmented internal market for the provision of cross-border gambling services. While some Member States restrict or even ban the offer of certain games of chance, others have opted for more open markets. Many Member States have also recently reviewed their gambling legislation or are in the process of doing so in view of the growth of online gambling services.
118. The Danish authorities did not provide detailed figures on the size of illegal gambling by Danish residents, but instead they pointed out that the development of the unregulated online gambling sector is a worrying aspect from a societal perspective.
119. This trend is confirmed by the European Commission’s Green paper of March 2011⁶⁰. The accompanying Commission Staff Working Paper cites for the year 2008, a total Gross Gaming Revenue for Online Gambling in Denmark in the amount of 250 mio €, of which 14 % (i.e. 34 mio €) concern casino games and 22 per cent (i.e. 56 mio €) concern poker.⁶¹ By definition, both online casino games and online poker are prohibited activities.
120. These numbers are expected to increase. The Green Paper reports that the online offer is the fastest growing segment of the gambling market, accounting for 7,5 per cent of the annual revenues of the overall gambling market in 2008 (EU-27) and it is expected to double in size by 2013.⁶² Second, the proportion of national gambling consumption attributable to online-gambling is estimated to be 21,9 per cent in Denmark, i.e. the second highest rate within the EU, which posts an average of 7,5 per cent.⁶³

⁶⁰ European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 8.

⁶¹ European Commission, Green paper on Online Gambling in the Internal Market, Commission Staff Working Paper SEC(2011) 321, p. 10.

⁶² European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 8.

⁶³ European Commission, Green paper on Online Gambling in the Internal Market, Commission Staff Working Paper SEC(2011) 321, p. 9.

121. Taking into consideration the above-mentioned jurisprudence, as well as the overall characteristics of the gambling market in the EU, the Commission takes the view that the arguments put forward by the Danish government to justify the adoption of the notified measure are well-founded. In particular, the Commission is aware of the peculiarities of the activities at issue: online games provided through internet have transformed the sector bringing about a global marketplace where physical borders are blurred. In this context, as referred to in the above-mentioned 2011 Green Paper⁶⁴, the Commission also refers to the need to control the online gambling sector in order to prevent harmful negative consequences that online gaming can have on consumers. In addition to the significant risk of online gambling addiction that various social studies have established⁶⁵, special attention should be given to minors and other vulnerable persons, including players on low incomes, gamblers with previous gambling addiction and young adults not aware of the risks associated with gambling problems. In order to protect these categories of potential players, the Member States should be able to control the online gambling sector by imposing, amongst other, age limits or licence conditions, controlling payment processing systems and limiting marketing or promotion of online games.
122. The reform undertaken in Denmark, resulting in the adoption of the notified Act, is therefore in line with the objective of the Green Paper of the European Commission of 24 March 2011 on “On-line gambling in the Internal Market” to contribute to the emergence in the Member States of a legal framework for online gambling providing for greater legal certainty for all stakeholders.⁶⁶ The Green paper responds to the Council Conclusions of December 2010 that welcome a broad consultation by the European Commission on online gambling in the internal market which will allow for an in-depth discussion on issues raised by online gambling services in particular⁶⁷ and to the resolution of the European Parliament adopted on 10 March 2009 that called on the Commission to study in close cooperation with national governments, the economic and non-economic effects of the provision of cross-border gambling services.⁶⁸ It must be stressed that the legislative reform implemented through the notified Act is in line with the objectives advocated by the European Commission which led to the initiation of infringement proceedings and the sending of a reasoned opinion to the Danish authorities in March 2007⁶⁹.
123. For these reasons, the Commission considers that the notified Gaming Duties Act, to the extent that it will liberalise the market and allow Danish and foreign online gambling operators to provide their services to Danish residents, while ensuring that they will fulfil the necessary conditions to be licenced by the Danish authorities, serves a well-defined objective of common interest.

⁶⁴ European Commission, Green paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 19.

⁶⁵ For further details on these studies, see European Commission, Green paper on Online Gambling in the Internal Market, COM(2011) 128 final, pp. 19 *et seq.*

⁶⁶ European Commission, Green paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 7.

⁶⁷ Conclusion on the framework for gambling and betting in the EU Member States, adopted at the 3057th Competitiveness Council meeting, Brussels, 10 December 2010, Council document 16884/10.

⁶⁸ European Parliament resolution of 10 March 2009 on the integrity of online gambling. (2008/22125(INI)), P6-2009-0097. These issues include advertising and marketing and under age people, fraud and criminal behaviour and integrity, social responsibility, consumer protection and taxation.

⁶⁹ See above paragraph 7.

7.2.2. *Well designed Aid*

124. An aid measure is considered necessary and proportional when it constitutes an appropriate instrument to achieve the identified objective of common interest, when it has an incentive effect on the beneficiaries and when it does not introduce unnecessary distortions of competition.

Appropriate instrument

125. The Danish government decided to liberalise the Danish online gambling market and to allow an unlimited number of online licences to be issued. However, the issuance of such a licence is subject to a number of conditions, which refer to the trustworthiness of the managers of the company applying for a licence. To make the liberalisation successful, the Danish government also decided to lower the taxation for online operators, only leaving intact the tax rates applicable to land-based gambling operators. In this regard, the complainants argued that lowering the tax rate for online operators was not an instrument as appropriate as other solutions. For instance, payment and communication blocking could still be used to achieve the objectives of the liberalisation process without a need to introduce lower tax rates for online operators. It follows that, according to the complainants, Denmark could have chosen to enforce the prohibition of illegal online gambling by resorting to ‘payment and communication’ blocking (domain name system filtering, internet protocol blocking and payment blocking) or by limiting the number of licences to be issued.
126. With regard to the use of ‘blocking systems’, the abovementioned Commission Green Paper states that the efficiency of blocking systems depends on a pre-defined and updated list of items to block as well as efficient software systems. However, as the Danish authorities pointed out, it is questionable whether these blocking systems could produce the expected results, as either the online gamblers could escape the internet blocking by changing the ‘ports’ used, or the prohibition of certain payments could block licit commercial transactions other than payments relating to stakes and prizes.
127. With regard to the possible issuance of a limited number of online licences, the effects depend on the numbers of licences to be issued. Where the number is restricted to only a few licences, the reduced number of competitors will reduce competition and influence the offer, which means that the price for the consumers in form of a lower pay-out ration would be higher than without an unlimited number of licences. A reduced number of licences also limits the variety and quality of choice available to consumers in the marketplace and encourages the producer to be less diligent in responding to consumer wants and needs.⁷⁰ Limiting the number of licences also raises questions regarding the criteria for a non-arbitrary determination of the number of licences, how and by which institutions the licensing requirements are monitored and how illegal offer is dealt with, i.e. who takes which measures against the illegal offer.⁷¹

⁷⁰ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006, p. 1108.

⁷¹ Schweizerisches Institut für Rechtsvergleichung, International vergleichende Analyse des Glücksspielwesens, 2009, p. 18. <http://mpk.rlp.de/mpkrlpde/sachthemen/studie-zum-gluecksspielwesen/>

128. In view of these considerations, the Commission considers that the lower tax rate applicable to online gambling activities is an appropriate instrument to attain the liberalisation objectives of the new Gaming Act. The aid measure will ensure that online operators wishing to provide gambling services directed at Danish residents will apply for a licence and comply with the applicable national regulations

Incentive Effect

129. The Commission considers that the aid measure is capable of modifying the behaviour of foreign providers of online gambling services, since the lower tax rate constitutes an incentive for these operators to obtain a licence in Denmark and therefore to provide for the first time legally online gambling services.

Proportionality of the aid

130. Aid is considered to be proportionate only if the same change of behaviour could not be reached with less aid and less distortion. The amount of the aid must be limited to the minimum needed for the aided activity to take place. In the present case, the Commission considers that the Danish authorities have designed the measure in such a way as to diminish the possible amount of State aid involved and to minimise the distortions of competition arising from the measure.

131. In the memorandum submitted by the Danish Ministry of Taxation of 6 March 2010 to the Policy Spokesmen of the political parties of the Danish Parliament regarding the setting of the level of duty⁷², the choice of the lower tax rate of 20 per cent of GGR for the online gambling was justified by reference to the following criteria:

- (a) The gambling provided under Danish licences should be adjusted to the current offering from online gambling providers abroad, i.e. the tax rate needs to be adjusted in order to match the high pay-out ratios offered by foreign online gambling providers, inducing them to actually apply for a licence.
- (b) The total number of games offered should be increased leading, overall, to a corresponding increase in turnover .
- (c) The gambling products should be so attractive that players do not want to gamble on sites of foreign (illegal) operators.
- (d) Blocking instruments should be used to ensure, in combination with item (a) - (c), that gambling on the sites of illegal operators is reduced to a minimum.

132. In this memorandum, the Danish authorities note that the legislation in the UK, which should be regarded as being very close to the Danish gambling regulation, provides for a tax rate of 15 per cent for online gambling. The Danish government considered that the tax rate for online gambling could be set at a higher level than the UK one insofar as in contrast to the UK, Denmark will also introduce complementary blocking measures to make it more difficult for players to gamble on sites of foreign operators that have not obtained a Danish licence.

⁷² See above paragraph 38.

133. In the same line, the Danish government refers to the examples of France and Italy, which have liberalised their market and set out rates of duty higher than the British ones. The Danish government notes that these markets are significantly bigger than the Danish market. The size of a market can have a tangible impact on the operators' willingness to enter a market even if there is a higher tax rate, as costs which are always associated with setting up operations in a new market tend to be comparatively higher for entering smaller markets.
134. In this memorandum, a simulation of the possible revenue consequences is also made for tax rates of 15, 20 and 25 per cent, taking also into account the potential changes in the gamblers' gambling patterns and the operators' actions. The simulation exercise concludes that a tax rate of 20 per cent will presumably still make it sufficiently attractive for gambling provides to apply for a Danish licence, and for gamblers to get an attractive offer. If the tax rate is set at a higher level (i.e., 25 per cent), the pressure on payout rates may be expected to be bigger and the positive revenue consequences of a 25 per cent rate may therefore turn out to be lower than those of a 20 per cent rate.
135. The Danish legislator came therefore to the conclusion that if the tax rate for online gambling were set at a higher level, this would most likely result in a gambling product that would not be attractive enough to gamblers, leading also to a turnover drain which may be equal to the immediate prospect of higher tax revenues.
136. The conclusions reached by the Danish legislator as to the appropriate level of taxation for online gambling activities are also confirmed by a report from an industry consulting company, according to which with a tax rate of 20 per cent, the State does not forego revenue which it would otherwise have received⁷³. According to that report, this would be the highest rate economically feasible – a higher rate would be the “rate of no return”, i.e. a tax rate that is simply too high for operators to be a valid business case for them to enter the market. Above this rate, the tax revenue will start to fall.
137. In view of the above, the Commission considers that the tax rate of 20 per cent of GGR applicable to online operators is not lower than is necessary to ensure that the objectives of the Gaming Act are achieved. Therefore, the aid measure meets the proportionality requirement set out in the case-law of the Court of Justice.

7.2.3. *Impact on Competition and Trade between Member State*

138. With regard to the impact of the aid measure on competition and trade, one has to distinguish possible distortions at the level of the trade between Member States, and on the other hand, distortions of competition within Denmark, especially with the already existing land-based gambling operators.
139. With regard to the trade between Member States, no negative impact is to be expected. The Gaming Act provides Danish residents with the possibility to legally gamble on websites of licensed online gambling operators. These websites are not restricted to Danish resident users but may be accessed by residents of all EU Member States, subject to the restrictions imposed by their national law. By setting

⁷³ H2 Gambling Capital, An independent model assessment of various taxation/licensing models for regulating remote gambling in the Netherlands, February 2011.

the tax rate on online gambling operators at 20 per cent of GGR, the Danish aid measure is within the range of rates for similar taxes which are applied by other Member States having already reformed their online gambling legislation. For example, both Belgium and the UK apply a tax rate of 15 per cent of GGR to online gambling, whereas other Member States provide even lower rates (for example Estonia 5 per cent of GGR, Latvia 10 per cent of GGR, Finland 8,25 per cent of GGR). Only Slovakia has set its similar tax at a higher rate of 27 per cent of GGR.

140. With regard to distortions of competition within Denmark, the measure will potentially benefit a considerable number of different Danish and foreign online gambling operators which up to now were prohibited to provide their services to Danish residents. Denmark provided a list of online gambling providers who already indicated their willingness to apply for a licence. As until now only the State-controlled company was allowed to provide online gambling services, the liberalisation will further increase overall competition in the market.
141. Although the measure constitutes a State aid and its implementation may not be without repercussions for the existing land-based gambling operators which are taxed at a tax rate of up to 75 per cent of GGR, the Commission considers that the overall balance of the implementation of the measure is positive.
142. As shown above, setting the tax rate for online gambling at an identical rate or in the range of the rate for land-based gambling operators would have led to a situation where industry and players would not have responded to the possibility of legally providing online gambling services on the Danish market, thus defeating the identified objectives in the common interest pursued by the Gaming Act.
143. Accordingly, the Commission concludes that the measure is compatible with the internal market pursuant to Article 107(3)(c) TFEU.

8. CONCLUSION

144. The Commission considers that the notified Act provides for a tax advantage for online gambling operators granted through State resources. The measure is regarded as *prima facie* selective, since it differentiates between online gambling operators and land-based casinos operators who, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. The Danish authorities have failed to demonstrate that the *prima facie* selectivity of the notified act is justified in the light of the logic of the tax system. Hence, the notified Act is regarded as a State aid within the meaning of Article 107(1) TFEU.
145. The Commission, however, considers that the aid fulfills the conditions to be regarded as compatible with the internal market pursuant to Article 107(3)(c) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The measure C 35/2010 which Denmark is planning to implement in the form of duties for online gaming in the Danish Gaming Duties Act is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to Denmark.

Done at Brussels, 20.09.2011

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue Josef II 70
B-1049 Brussels
Fax No: (+32) (0)2 2.96.12.42