

Dear Sir or Madam,

We are contacting you because we noticed that Article 3(5)(d) of the Commission proposal for a Directive on certain aspects concerning contracts for the supply of digital content explicitly excludes online gambling from the scope of the proposed directive. Excluding the particular field of online gambling from the directive would not only lead to further fragmentation of the EU market for gambling and hence maintain a gap in consumer protection in the ever-increasing cross-border aspect of online gambling, but also go against the spirit of the Digital Single Market (DSM). We would therefore like to ask you to take account of our concerns with regard to excluding online gambling in the upcoming negotiations with the European Parliament and the Council on the Directive.

Article 3(5)(d) of the Commission proposal states that the Directive shall not apply to contracts regarding gambling services “meaning services which involve wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service”.¹ The explanatory memorandum to the Commission proposal states that “the Directive does not cover services performed with a significant element of human intervention or contracts governing specific sectorial services such as healthcare, gambling or financial services”. Neither the Commission Communication on Digital Contracts for Europe², nor the ensuing Roadmap³ or the Impact Assessment⁴ mentioned that gambling services would be excluded from the scope of the Directive.

Online gambling is a fast growing service activity globally and in the EU. The global gambling market amounts to EUR 360 billion, of which 9.7% are generated online⁵. The EU has the largest online gambling market worldwide, which accounts for 17.4% of its total gambling market of over EUR 95.3 billion in 2015. Annual growth rates in this sector are expected to lie between 8.2% in Europe and 8.7% globally between 2014 and 2020.⁶ Despite the growing market for online gambling in the EU however, gambling remains a non-harmonised sector – laws and policies thus differ from one Member State to another and online gambling is often explicitly excluded from EU legislation. The 2006 Services Directive explicitly excluded gambling services from its scope.⁷ This lack of harmonisation leads not only to high and unnecessary regulatory compliance costs and a lack of legal certainty for businesses, but first and foremost risks leaving consumers exposed to potentially negative effects.

Consumer protection has however, alongside crime prevention, consistently been accepted as the public policy objective capable of justifying limitations of the freedom to provide services across borders in the EU and has consequently been the driving force behind initiatives on online gambling at EU level. In the 2012 Action Plan on Gambling, the Commission envisaged to adopt recommendations on consumer protection as well as responsible advertising (the latter to complement the Unfair Commercial Practices Directive⁸), and assess recommendations on

¹ COM(2015) 634 final.

² COM(2015) 633 final

³ http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases_en.pdf

⁴ SWD(2015) 274 final/2

⁵ H2 Gambling Capital, January 2016

⁶ H2 Gambling Capital, January 2016

⁷ Directive 2006/123/EC, recital 25 and Art. 2(2)(h).

⁸ Directive 2005/29/EC.

gambling-related internet addiction among adolescents.⁹ It specified several characteristics of consumer protection, such as authority labels on the websites of operators, player registration and identification controls, reality checks, no credit policies, protection of player funds, possibilities of self-restriction, and handling of complaints.¹⁰ The Commission further sought to increase the evidence base through research,¹¹ monitoring,¹² and benchmarking¹³ initiatives. Member States were urged to increase information exchange, awareness, and cooperation.¹⁴

The Commission has since followed up on the announcement by sending a strong signal towards evidence-based, effective consumer protection across the EU in the area of online gambling, when in 2014 it adopted a recommendation “on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online”.¹⁵ While the recommendation created a good basis for a common understanding of consumer protection across the EU, it is a non-binding measure whose practical impact yet remains to be seen. And while the “Cooperation Arrangement between the gambling regulatory authorities of the EEA Member States concerning online gambling services” signed on 27 November 2015¹⁶ provides a first legal base for cooperation and exchange of information, it is unlikely to compensate for a formalised solution. Persisting national differences also constitute an obstacle for the standardisation of gambling equipment and software, which in turn further hampers cooperation and enforcement.

As regards EU legislation on consumer protection, gambling has so far been either included or excluded in a rather erratic way: While gambling is included in the scope of the Unfair Commercial Practices Directive and the Alternative and Online Dispute Resolution Directives, gambling has been excluded from the Consumer Rights Directive. As has been rightly acknowledged in the European Parliament study on the Cost of non-Europe, “excluding gambling contracts from the Consumer Right Directive can expose consumers to situations where some contracts are unregulated” (p. 35).

Indeed, the lack of a coherent framework on online gambling can drive away players from the regulated and supervised offer to unregulated gambling websites and expose them to a wide range of risks and potential abuse. This is exacerbated by the fact that online gambling almost by definition takes place cross-border. As the Commission acknowledged in its 2012 Communication on Online Gambling in the Internal Market, “Consumers in Europe also search across borders for online gambling services which, if not properly regulated, may expose them to significant risks.”¹⁷

By excluding gambling from the scope of the digital content directive, gambling would be left outside yet another EU legal act aiming at ensuring a high level of consumer protection and creating legal certainty for businesses. This would not only lead to further fragmentation of the EU gambling market, but also run contrary to the priorities in 2012 Action Plan on gambling, the

⁹ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8570, Communication COM(2012) 596 final, p. 12.

¹⁰ Communication COM(2012) 596 final, pp. 10-11.

¹¹ E.g. on addictive behaviours among European adolescents (EU NET ADB) and on addiction and lifestyles (ALICE RAP).

¹² E.g. using the Consumer Market Monitoring Survey.

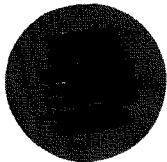
¹³ E.g. of “parental control tools through the Safer Internet Programme and the Connecting Europe Facility to improve age rating and content classification systems”, p. 12, Communication COM(2012) 596 final.

¹⁴ Communication COM(2012) 596 final, pp. 12-13.

¹⁵ Recommendation 2014/478/EU.

¹⁶ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8570

¹⁷ COM/2012/0596 final



[Redacted]

Commission recommendation on consumer protection and the Cooperation Agreement signed in November 2015.

Harmonised rules for the supply of digital content are in our opinion an important step in the direction of a truly Digital Single Market. By eliminating the key contract law-related barriers hindering cross-border trade, the rules put forward in the proposals on digital contracts would reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law between Member States. As online gambling is, again by definition cross-border and takes place in a purely digital environment, it neither seems logical nor consistent to exclude online gambling from key proposals aimed at consumer protection in this central policy field.

As Commissioner Oettinger rightly stated at an event entitled "Is Europe fit for a Digital Single Market" at the Representation of Lower Saxony in October 2015¹⁸, gaming behavior has changed and answers to challenges related to online gambling in the EU, such as player protection, need to be found on European and not at national level. Excluding gambling from new laws and policies of relevance to consumer protection does not match this logic. We would therefore like to ask you to consider adapting the relevant provisions in the upcoming negotiations with the European Parliament and the Council.

Kind regards

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¹⁸ http://www.fes-europe.eu/index.php?option=com_content&view=article&id=554:is-europe-fit-for-a-digital-single-market&catid=38:veranstaltungenhinweise&Itemid=64&lang=en