Subject : **Notification 2009/0122/F**

Draft Law on the opening up to competition and regulation of the online gambling and games of chance sector

Detailed opinion under article 9.2 of Directive 98/34/EC of 22 June 1998

Comments under article 8.2 of directive 98/34/EC

Sir,

Within the framework of the notification procedure instituted by Directive 98/34/EC, the French authorities notified this draft law to the Commission on 05 March 2009.

The purpose of the draft law is to provide a framework for public gambling and betting services provided over the internet. As such, the rules contained within the notified draft constitute rules on services referred to in Article 1(5) of Directive 98/34/EC, as amended by Directive 98/48/EC, namely rules specifically governing Information Society services.

The Commission took note of the French authorities' response of 23 April 2009 to the Commission's services request for supplementary information, which was necessary to fully assess the draft under the relevant provisions of EC law. In their reply, the French authorities indicated their willingness to notify a number of future implementing decrees under Directive 98/34/EC and also informed the Commission about a re-numbering of the draft law adopted by the French Council of Ministers on 25 March 2009.

The Commission, whilst welcoming the generally positive direction of the French proposal, would also like to remind the French authorities of its position expressed in the reasoned opinion sent to France on 27 June 2007 (see in particular the Reasoned Opinion at 2.2) in the framework of the infringement procedure 2005/4953 that, by imposing restrictions concerning the provision and promotion of sports betting services by operators who are legally established and have been legally granted licences in another EEA Member State, it has failed to fulfil its obligations under Article 49 of the EC Treaty.

Examination of the notified text has prompted the Commission to issue the following detailed opinion and comments.

Detailed Opinion

1. Restrictions of the freedom to provide services – in particular Article 16 on the system for issuing of authorisation

According to Article 49 of the EC Treaty, restrictions of the freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Court of Justice has consistently held that Article 49 of the Treaty requires the elimination of restrictions on the freedom to provide services. All measures which prohibit, impede or render less attractive the exercise of such freedoms must be regarded as constituting such restrictions (Judgement of 15 January 2002 in case C-439/99, the *Commission against Italy*, [2002] ECR I-00305, paragraph 22; see also, to that effect, with regard to freedom to provide services, case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21).

The Court of Justice has held that in relation to sports betting services, Article 49 of the Treaty relates to the services which a provider established in a Member State offers via the internet - and so without moving - to recipients in another Member State, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services (see case C-243/01, *Gambelli and others*, Judgement of 6 November 2003, paragraph 54. see case C338/04, *Placanica and others,* Judgement of 6 March 2007 paragraph 42.). The Court has held that such restrictions can be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming. However it has also ruled that such restrictions must be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner (see case C-243/01, *Gambelli and others*, cited above, paragraph 67).

The Commission, whilst in no way requiring the automatic granting of an authorisation in France to providers legally operating in another Member State, stresses that it is of paramount importance that, in the framework of the notified text, the French authorities clarify and amend the text in question so as to indicate explicitly that the French authorities will take due account, when assessing authorisation applications, of the requirements and, in general, of the regulatory, monitoring and penalty system to which the applicant operator is already subject in the country where it is established, in accordance with the requirements

systematically imposed by the case-law of the Court of Justice (see, for example, the Commission/Italy judgment of 15 January 2002, C-439/99, paragraph 27, and the Gambelli judgment of 6 November 2003, case C-243/01, paragraph 73). Indeed, even in situations where the Court of Justice, by way of derogation from the principle of the free movement of services, has allowed the Member State of destination of a service to require an authorisation for that activity, it has stressed that schemes that 'coincided with the proofs and guarantees required in the state of establishment' are incompatible with the freedom to provide services, and has thus specified that 'in considering applications for licences and in granting them the Member State in which the service is to be provided ... must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment' (see Webb judgment of 17 December 1981, 279/80, paragraph 20) – see also judgement of the Court of 9 March 2000 in Case C-355/98 paragraphs 37 and 38 in the Commission – v- the Kingdom of Belgium **:**

" 37 The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case 279/80 Webb [1981] ECR 3305, paragraph 17).

38 By requiring all undertakings to fulfil the same conditions for obtaining prior authorisation or approval, the Belgian legislation makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established"

2. Provisions concerning the utilisation of sporting events – Article 32 of the notified draft and 52 of the bill adopted by the Council of Ministers

The Commission notes that in accordance with Article 32 of the draft law operators of online gambling are obliged to obtain the consent of the operating right owner (under conditions defined by contract for the use of names, calendars, data or results). Such a requirement could impede or render less attractive the exercise of the freedom to provide services and could be regarded as constituting restrictions within the meaning of article 49 of the EC Treaty.

The Court has held that restrictions can be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming. However it has also ruled that such restrictions must be suitable for achieving those objectives, inasmuch as they must

serve to limit betting activities in a consistent and systematic manner (see case C-243/01, *Gambelli and others*, cited above, paragraph 67).

To the extent that the requirement envisaged in Article 32 of the draft law seeks to ensure or strengthen the financing of benevolent or public-interest activities, it must be noted that this may not constitute a valid justification for the restrictive policy adopted, but only a beneficial consequence which is incidental in the meaning that it is accessory to a general public interest. Any restriction to the free provision of services must be proportionate to its legitimate aim and must be pursued in a suitable and consistent manner; legislation must not go beyond what is necessary in order to achieve the aims in question.

3. Maximum player return rate – Article 4 of the notified draft and 8 of the bill adopted by the Council of Ministers

The Commission notes that the draft law will impose a limit on the maximum proportion of bets paid back to the players per category (commonly known as the rate of return for gamblers). The actual limit will be set at a later date by decree. The Commission recalls that the question of a maximum rate of return to gamblers was addressed in infringement procedure 2005/4953. The Commission has contested the French authorities' assertion that there is a high correlation between the rate of return for winners and addiction and asked the French authorities to provide evidence to support their contention. No evidence has been offered to support such a contention.

A fixed maximum pay-back ratio could restrict the freedom to provide services under Article 49 EC. It could prevent gaming operators established in a Member State of the EEA from taking normal business decisions or utilising efficiency advantages in order to offer higher pay-back ratios and thus become more attractive to customers.

In order to justify the regulation of pay-back ratios, the French authorities could possibly seek to rely on the objective to reduce the consumption of games and avoid addiction, a potential public interest requirement that could serve as a basis for justification. In order to be justified, the measures must also be suitable for achieving the objective which they pursue and they must not go beyond what is necessary in order to attain it.

The French authorities have previously suggested that a reduced pay back ratio renders a game less attractive and that therefore it will potentially be less addictive.

The Commission would welcome any analysis or evidence from the French authorities to support this argument. The Commission is not aware of any scientific evidence to support this line of argument. Moreover, the introduction of a regulated maximum pay-back ratio for sport betting activities would plainly contradict the existing minimum pay-back ratio of 85 % for slot machines in the casino sector in France. The Commission is aware that slot machines are generally considered to constitute the category of games most prone to problematic gaming risks. There are no indications that pay-back ratios for sports betting and slot machines could have exactly opposite effects. Therefore, if the French authorities argument that lower pay-back ratios are needed to reduce problem gaming were true, then the French minimum pay-back ratio for slot machines would foster gaming consumption. The proposal would therefore appear self-contradictory and unsuitable.

Furthermore, it is questionable whether the decision to gamble for most ordinary gamblers depends mainly on the overall pay-back ratio as an individual player is more interested in gambling to win, rather than the low or high pay-back ratio. If it is true that certain individuals may take particular notice of the pay-back ratio, there is a likelihood that such players will seek out higher pay-back ratios, perhaps from an operator offering services from an unregulated offshore market.

The Commission notes the possibility for an operator to spread the requirement over a period of time and to therefore offer, either simultaneously or in periodical variations, both bets with above average ratios and bets with below-average ratios. Gaming operators could have a higher ratio in January than in December. To the extent that the average calculation will be tied to a specific timeframe, this could create considerable volatility. The longer the respective timeframe for the calculation of the average, the more volatility could be. If the reduction of gaming consumption is the main objective of a maximum fixed pay-back ratio, then the suitability of such a measure in attaining that goal is questioned

Additionally, the Commission notes that the notified draft contains many other potentially worthwhile provisions that when implemented will seek to tackle problem gambling - caps on stakes, funding of accounts and account balances, the automatic transfer of winnings to bank accounts, gambling session timers, display of losses in a session and self-exclusion.

The regulation of pay-back ratios by the introduction of an average fixed ratio might constitute a restriction of Article 49 EC for operators seeking access to the French market.

According to the jurisprudence of the Court the only, non-discriminatory, national measures admissible as restrictions to Article 49 of the Treaty are those which:

– are justified by imperative reasons relating to the public interest in so far that the relevant interest is not protected in the Member State in which the provider is established; and

– are not disproportionate, i.e. are not excessive and cannot be replaced by less restrictive measures (see Judgement of 25 July 1991 in case C-76/90, *Dennemeyer* [1991] ECRI-04221).

In the current circumstances the Commission invites the French authorities to provide evidence as to its necessity and to justify the public interest objective of such a restriction. The Commission would remind the French authorities that the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981).

4. Fiscal representative established in France – Article 18.8 of the notified draft and 39 of the bill adopted by the Council of Ministers

The obligation to have a fiscal representative established in France might raise problems of compatibility with the free provision of services, specifically concerning on line gambling.

From a general point of view, according to the case-law: "*It is true that the Court has repeatedly held that the prevention of tax avoidance and the need for effective fiscal supervision may be relied upon to justify restrictions on the exercise of fundamental freedoms guaranteed by the Treaty. However, a general presumption of tax avoidance or fraud is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty.*" (C-334/02, Comm. v. France, p.27).

Similarly, "*it is settled case-law that diminution of tax revenue cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify a measure which is, in principle, contrary to a fundamental freedom* " (C-397/98, Metallgesellschaft, p.59).

In case 478/01, Comm. v Luxembourg (p.18/19, the Court reminded that "*As the Court has consistently held, observance of the principle laid down in Article 49 EC requires not only the elimination of all discrimination on grounds of nationality but also the abolition of any restriction liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. Accordingly, the Luxembourg legislation making the supply of services by patent agents subject to a requirement to elect domicile with an approved agent, as it stood when the period prescribed by the reasoned*

opinion expired is incompatible with Article 49 EC"

As regards specifically on-line gambling, the obligation to have a fiscal representative established in France might seem disproportionate insofar as it could be replaced by a less restrictive measure, and given the requirements already imposed in Article 29 (Council of Ministers draft bill) whereby operators shall make certain specific data permanently available (real time electronic means) to the Regulatory Authority for Online Gambling.

In view of the above, the Commission services would ask the French authorities to consider amending the relevant provisions accordingly.

****

For these reasons the Commission is delivering the detailed opinion provided for in article 9.2(2) of Directive 98/34/EC to the effect that the draft order in question would infringe Article 49 of the EC Treaty were it to be adopted without due consideration being given to the above remarks.

The Commission would remind the French Government that under the terms of article 9.2 of the above mentioned Directive 98/34/EC, the delivery of a detailed opinion obliges the Member State which has drawn up the draft technical regulation concerned to postpone its adoption for four months from the date of its notification.

This deadline therefore comes to an end on 8 July 2009.

The Commission further draws the attention of the French Government to the fact that under this provision the Member State which is the addressee of a detailed opinion is obliged to inform the Commission of the action which it intends to take as a result of the opinion.

Should the text of the draft technical regulation under consideration be adopted without account being taken of the abovementioned objections, the Commission may be compelled to send a letter of formal notice pursuant to Article 226 of the EC Treaty. It also reserves the right to send a letter of formal notice should it not have received the response of the French Government by the time of adoption of the draft technical regulation in question.

The Commission invites the French Government to communicate to it on adoption the definitive text of the draft technical regulation concerned. Failure to communicate this text would constitute an infringement of article 10 of the EC Treaty as well as of article 8(3) of directive 98/34/EC, in respect of which the

Commission reserves the right to take proceedings.

****

Comments

1. Location of the operators server and references to data storage mediums – Article 17 IV of the notified draft and 22 of the bill adopted by the Council of Ministers

The Commission would ask the French authorities to clarify the position in relation to the location of an operator's server. Whilst the French authorities have stated that the operator's servers may be installed outside France, it then goes on to require that a storage media be set up in France. Does this not in fact amount to a requirement to establish an intermediate or duplicate server in France? Insofar as such a provision would amount to a requirement to establish in France, it would raise problems of compatibility with Article 49 EC Treaty. The Commission will need further details before finalising its position on this point.

2. Provisions concerning the utilisation of sporting events – Article 32 of the notified draft and 52 of the bill adopted by the Council of Ministers

Furthermore, the Commission would like in connection to Article 32 of the notified draft to draw the attention of the French authorities to the following points.

The organisers of sporting events and competitions do not enjoy the protection under Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society[1] as they are not listed as right holders under this Directive[2].

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10–19), and notably its Articles 2, 3 and 4.

[2] The Directive harmonised the reproduction right, right of communication to the public, making available right and distribution right as follows: for authors, of their works; for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of

It should, however, be analysed whether characteristic elements of sporting events or competitions, such as calendars, data or results could be protected under Directive 96/6/EC on the legal protection of databases[3] (the Database Directive) as *a sui generis* right.

Article 7 (1)[4] of the Database Directive grants *sui generis* protection if there has been a qualitative and/or quantitative substantial investment in either the obtaining, verification or presentation of the contents.

The ownership (creation), as opposed to obtaining, of the information to establish a database is not sufficient to consider a given database as a *sui generis* right which enjoys the protection under the Directive. Therefore the characteristic elements which are already in the possession of organizers of sporting events or competitions, such as calendars, data or results, cannot be treated as *a sui generis* right - see to that effect case C-2003/02 the British Horseracing Board and William Hill. Therefore, the Commission considers that the use of certain information which is in the possession of organisers of sports events or competitions, for the purpose of organising online gaming or betting could be permitted without the prior agreement of the data owners in accordance with the current European Copyright framework.

Yours faithfully,

Vice President Günter Verheugen

---

the first fixations of films, in respect of the original and copies of their films; for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

[3] Directive 96/6/EC of the European Parliament and of the Council on the legal protection of databases (OJ 1996 L 77, p. 20).

[4] Article 7 (1) of the Directive states that: "Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database".