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TO:

Vienna, 7th Oct. 2016

European Commission - DG GROWTH

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REF.: Notification 2016/398/PL (Poland) - COMMENT

Why we comment:

Because direct commercial interests of our Austrian, German and even the existence of our Polish members of the Automatenverband.at, their investments and their employees are seriously affected.

The Polish government is and will be by far the largest receiver of billions of EU subsidies of all EU member states and it is incomprehensible why the Polish government nevertheless should be allowed to again ignore the primacy of EU Law, Directives, Regulations and the decisions of the ECJ.

Content:

1. Decisions of the ECJ are ignored.

2. EU Directive again ignored.

3. Missing EU wide public and transparent tender.

4. State aid.

5. This Polish notification cannot be correctly evaluated by member states in its full extent!

6. Lack of a realistic Transition Period.

7. Achieving objectives with the proposed regulation.

1. Decisions of the ECJ are ignored:

The Polish government forwarded a draft of an amendment for the introduction of a gambling monopoly, explicitly not based on the existing decisions of the ECJ in Luxembourg, which require detailed and mandatory conditions, which - only when fulfilled - allow such a monopoly to influence, license and regulate the competition of the national gambling and betting market. The Polish Government wants to eliminate, with over boarding prohibitions and discriminating regulations, the present, the consumer well protecting, competition of hundreds of existing Polish and, directly and indirectly, also foreign companies from other EU member states.

Only fair competition of many companies in the market protects consumers from being easily exploited. Especially in the gambling and betting market! Player's und juveniles protection as well as legal certainty can be achieved by lesser means than declared in the notification. (ECJ C-64/08, snrs. 43-49)

There are successful examples of less drastic regulations in other countries. The Polish Government, by introducing a new monopoly, recklessly ignores the decisions of the European Court of Justice, ECJ, which specifically require proof of scientifically reproducible data and reasons in order to allow a legal gambling/betting monopoly. *(ECJ: just to set targets is not sufficient at all!)* Ignoring known decisions of the ECJ is also explicitly proved by the published statement of the Polish government, that it wants to increase profits for the state budget as one of the 3 only reasons for introducing this state monopoly! *(see forwarded regulatory impact assessment page 1)*

As those scientific details and reproducible data, which must justify the reasonable extent of channelling and protecting the consumers, are missing, the commercial consequences of the planned Polish commercial monopoly are fully subject to EU Regulations like the Services Directive f.i. and further details in the decisions of the ECJ on this subject.

Therefore this Polish law does not fall under the exclusive exemption for gambling/betting from the Services Directive anymore.

The information in the impact assessment of the new law of the Polish government shows, that the targeted "problem solving" is nearly completely based on assumptions, opinions and believe!

Like the believe in the alleged effectiveness of the planned prohibitions and measures to fight the "informal online economy".

2. EU Directive again ignored:

Contrary to the required procedure in Directive (EU) 2015/1535, (previously 98/34/EG) the Polish government already concluded the first and second reading in the Polish parliament in September, thereby indicating that it is willing to ignore any consequences of the not finished notification process anyway.

The one-sided market manipulation will be pushed through as fast as possible. Camouflaged by claiming it is for reducing a grey market, player's protection and in an alleged public interest, it particularly paves the way for single private commercial interests in the gambling machine business of Poland!

At the same time it is already openly planned to increase the number of games offered by the sole licensee, which contradicts the alleged responsible gaming motive and again the justification for a monopoly system.

3. Missing EU wide public and transparent tender:

The new amendment does not stipulate a transparent EU wide tender for the new single gambling machine licensee! (*ECJ 64/08, snrs. 49-51, 53-55, 58*)

This should be achieved through a transparent EU wide competition for this services concession contract, as there are no realistic compelling reasons to the contrary. The value of this contract exceeds any national limitations.

This new single license issue must be subject to the EU Treaty principles of:

- non-discrimination
- free movement of goods
- freedom to provide services
- freedom of establishment

Additionally there are general principles of law which have emerged from the case law of the European Court of Justice. (*ECJ C-240/04, snr. 20-25*)

The most important general principles of law for the selection process for the issue of such a single license for gambling machines in Poland are:

- equality of treatment
- transparency of the decision making process
- mutual recognition
- proportionality

We suspect that the Polish government tries to avoid to follow f.i. the Concessions Directive 2014/23/EU of the European Parliament and of the Council, pretending that the exceptions for national regulations for gambling and betting will apply. While ignoring or not fulfilling the well-known conditions demanded by the ECJ, to be able to claim such an exception.

However ignoring the mandatory requirements and conditions in the case law of the ECJ for justifying a monopoly means that normal EU Regulations and Directives have to be applied. (ECJ The enforcement of the primacy of EU Law over this new national law is therefore a mandatory requirement.

4. State aid:

Awarding a single license to a single commercial undertaking falls within the directives 106 to 108 TFEU and in this case constitutes unfair competition.

The Court of Justice of the European Union has ruled that all entities which are controlled (on a legal or on a *de facto* basis) by the same entity should be considered as a single undertaking, which most probably is the case here. The *de minimis* ceiling is clearly surpassed and the issue of a single license to a clearly commercial enterprise (see Polish gov. expectations of tax income, which is smaller than the licensee's profits) is a form of state aid, which needs the notification and then the authorization of the Commission first! The prohibition to possess, transport, produce, test or use gambling machines without a state issued permission shows, that an abuse of a dominant market position in Poland is planned, ignoring all the consequences of violating the internal market and competition rules of the EU. (ECJ C-124/97, snr. 20,24) This granting of special and exclusive rights is contrary to the interests of the EU.

5. This Polish notification cannot be correctly evaluated by member states:

In the text of this new notification references are made to other parts of the Polish gambling/betting law.

Some of those technical matters were incorrectly never notified and therefore the details and consequences of the references cannot be followed and understood in the required necessary individual translations!

This lack of missing parts in past notifications, which were subject to interventions of the EU Commission already, lead to the present legal situation in Poland. (ECJ: C-213/11, C-214/11, C-217/11)

This was never adequately corrected by the Polish government since several years and affects also the references in this notification!

This also proves that the introduction of a new gambling monopoly in Poland was/is neither urgent nor solving an exceptionally pressing problem!

6. Lack of a realistic Transition Period:

Private Polish and foreign companies from different EU member states have invested extensively in the Polish market. Due to a lack of a proper transition period (years, not month, are necessary) the new law not only harms the treaties about foreign investors security, but also the protection of private property for both, as guaranteed in the Charter of Fundamental Rights of the European Union, second title (Freedoms), which came into force with the treaty of Lisbon on 1st of December 2009. The Polish exemptions in a side letter do not influence this basic protection of EU citizens and companies.

7. Achieving objectives with the proposed regulation:

A legitimate target is the protection of consumers and underage persons. The planned massive market manipulation in Poland, by reducing

competition and favouring a single commercial enterprise with extensive regulations and prohibitions, is likely to have only a very limited positive structural effect on the consumers. (*see restrictions by ECJ C-124/97, snr. 31*)

It is more likely to cause serious negative distortion of consumers behaviour as examples of other countries have shown in the past over many years!

In Austria the start of identification of players with player's cards caused a massive move to the uncontrollable, more anonymous international online gambling and betting market, where only partly player's protection exists.

(Introduction of new Austrian gaming law was 08/2010, since then the law has been constantly "repaired", caused thousands of court cases and because of discrimination is now soon subject of a ruling of the Constitutional Court).

The privatisation of gambling and betting via smartphones/laptops/tablets exploded therefore! Online problem gambling/betting til 2014 in Vienna: + 180%, gambling machines: +2%! This development keeps going on.

This should not be copied by the new Polish gambling regulation!

Multiple anonymous payment methods, outside of the registered banking and credit card system, exist already for more than 10 years (see failure of online controls in Norway, France or Italy f. i.).

The people have the instrument for this, a smartphone, in their pockets and handbags, readily available 24 hours.

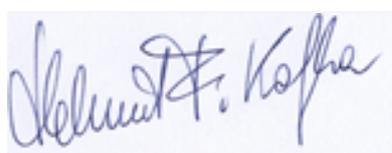
The glorified channelling effect worked only with a very small minority of consumers in Austria, which is clearly shown by the massive failure to achieve the promised gambling tax targets by not even 50% of what was expected.

The proposed blacklist of online websites and the website-blocking by providers are inefficient and are only looking good for politicians and the unaware public. (*See unbreakable 256 AES encryption, automatic VPN, TOR etc., ground school children circumventing Facebook blocking and 2012: http://www.easg.org/media/file/loutraki2012/pres_pdf_loutraki_2012/wednesday_19_september_2012/1345-1545/parallel_4/1_helmut_kafka.pdf*)

Not even Red China is able to conduct an efficient internet censorship.

How will the democratic EU member country Poland be more efficient?

This commercial and profit orientated restructuring operation of the Polish Gambling/Betting/Online market, in favour of a single entity and selected partners, without correct tenders, should be seriously reconsidered under the aspect of the supremacy of the EU Law and the Treaty. (*ECJ C-231-233/06*)



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