

EGBA Response on the consultation/ proposal to Amend the Norwegian Broadcasting Act

1. Introduction and Summary

The European Gaming and Betting Association (EGBA) represents leading online gaming and betting operators established, licensed and regulated within the EU. EGBA would like to raise our concerns and objections with regards to the recent Norwegian proposal to amend the Act on Broadcasting and Audiovisual On-Demand Services (the proposal).

The proposal aims to ban the dissemination (linear and on-demand) of advertising of online gambling services, deriving from other Member States of the EU. The rationale of the proposal is to protect vulnerable players and to strengthen the existing monopoly. With our response to the consultation we highlight that the proposal infringes the Audiovisual Media Services Directive (AVMSD), which prohibits measures that hinder the free dissemination of broadcasts within the EU/EEA. The proposal is also in breach of primary EEA law, namely the freedom to provide services, because the invoked public policy objective of consumer protection cannot be justified. According to the established case law¹ of the CJEU¹ restrictions to the provision of services and the freedom of establishment are allowed under EU law, only if they are applied in a consistent and proportionate manner, suitable to achieve the stated objective of consumer protection, which is not the case for Norway.

Furthermore, the lack of innovation and variety of product offerings in countries which have a non-competitive model is one of the reasons why monopolies are failing to channel the consumers towards the regulated offer. On the contrary, multi-licence regimes achieve the highest possible share of players in a given country playing within the online gambling websites which are licensed, regulated and supervised in that country. This ensures that all consumers are protected by the national consumer protection regulations, the country authorities regulate gambling activity and receive gambling tax revenue.

In competitive multi-licencing regimes, advertising also contributes to the objective of channelling the consumer to the regulated offer, as confirmed by the CJEU². Similarly, advertising can also inform the player about the risks of gambling. The European online gambling sector is growing fast, responding to the customer demand for a safe and regulated online gambling environment. We would like to highlight that over the last decade there has been a massive shift from no regulation or state monopolies to licencing regimes. In 2009, only 5 EU Member States had competitive multi-license regimes, while today 25 Member States have regulated online gambling services, allowing private operators to obtain a license.

¹ *Sjoberg and Gerdin* joined cases C-447/08 and C-44/08, *Ladbrokes* C-258/08 para 28, *Placanica and Others*, joined cases C-338/04, C-359/04 and C-360/04, paragraph 55.

² CJEU Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, *Stoß and Others*, para. 102.

2. The proposal infringes the Audiovisual Media Services Directive (AVMSD)

The aim of the AVMSD is to create a level playing field for (linear) broadcasts and on-demand audio-visual media services in Europe while preserving cultural diversity and safeguarding consumers.

Whilst online gambling services are excluded from the scope of the AVMSD, yet this is not the case for gambling advertising. This is provided for under Recital 22 of the AVMSD (Directive 2010/13/EU), which states that “*broadcasts devoted to games of chance*” are not excluded from the scope of the Directive³. It also clarifies that the definition of an audio-visual media service (broadcasts) also covers commercial communications. Therefore, gambling advertising is clearly included within the scope of the AVMSD and therefore needs to comply with the country of origin principle.

Furthermore, the changes in the revised AVMSD (Directive EU 2018/1808), which is not yet in force as it has not yet been transposed in EEA law, do not exclude gambling advertising from the scope of the Directive⁴. The revised Directive rather underlines, as the old Directive did, the Member States’ obligation to **allow the free dissemination of foreign broadcasts⁵**. A Member State is free to derogate from this prohibition, but only provided **that certain conditions are fulfilled (according to the established CJEU case law) and a specific procedure is followed under Article 4 of the Directive.**

It is therefore clear that the country of origin principle continues to apply to gambling advertising. This means that there is no legal basis for the Government to impose the proposed restrictions.

The Norwegian Government’s proposal seems to be based on their assessment that the AVMSD does not apply to online gambling advertising, on the basis of **the *De Agostini* case of the CJEU⁶**. This is an old judgment however, that was issued under the “TV without frontiers Directive” of 1989 and not the AVMSD, which took the harmonising effect a step further.

The *De Agostini* case gives discretion to Member States to regulate in fields that are not fully coordinated by the Directive. Firstly, it is unclear on what basis the Norwegian Government considers that the gambling advertising in question does not fall within the scope of the coordinated field of the Directive. Furthermore even in this case, **the hindrance of disseminations** of TV broadcasts is clearly forbidden: “*the Directive does not preclude a Member State from taking [...] measures against an*

³ Recital 22: “For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive”.

⁴ Recital 10 of the revised AVMSD clarifies that “a Member State should be able to take certain measures to ensure respect for its consumer protection rules which do not fall in the fields coordinated by Directive 2010/13/EU. Measures taken by a MS to enforce its national consumer protection regime, including in relation to gambling advertising, would need to **be justified, proportionate to the objective pursued and necessary as required under the Court’s case law**. In any event, a receiving MS must not take any measures which would prevent the re-transmission, in its territory, of television broadcasts coming from another Member State”.

⁵ Article 3 (1) of the AVMSD: “Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of audiovisual media services from other MS for reasons which fall within the fields coordinated by the Directive. This does not prevent Member States from taking appropriate measures, if such measures apply to fields not coordinated by the AVMSD”.

⁶ De Agostini [judgment](#) 1997, joined cases C-34/95, C-35/95 and C-36/95.

*advertiser in relation to television advertising broadcast from another Member State, **provided that those measures do not prevent the dissemination, as such, in its territory of television broadcasts coming from that other Member State***⁷.

The *De Agostini* judgment confirms that national measures restricting advertising disseminated from broadcasters established in foreign (EU or other EEA) Member States could be exceptionally allowed, however, the restricting measures that result in a “**secondary control of television broadcasts**” by the receiving State, or “**prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State**” are **prohibited** by the Directive⁸. **Therefore, even in the fields that are not coordinated by the Directive, it is forbidden to blindly restrict the dissemination of a foreign broadcast.** This is in line with the country of origin principle, which has always been the core of the Directive.

This has been re-confirmed by the CJEU in *Mesopotamia Broadcast*⁹: “it is clear from the non-exhaustive character of the Directive [...] that a Member State is free to apply to the activities carried out by broadcasters on its territory generally applicable rules concerning those fields, insofar as those rules do not hinder retransmission”.

Thus, neither the AVMSD nor the established case law of the CJEU support a circumvention of the AVMSD’s procedural rules for gambling advertising and the country of origin principle. The government’s reading of the *De Agostini* judgment does not properly take into consideration the principle of proportionality and the general provisions of the EEA Agreement related to the provision of cross border services. On the contrary, the Norwegian proposal **establishes a monitoring and blocking obligation of foreign channels by network providers who are established in Norway (secondary control)**. It does not specify in practice how it is possible from a technical perspective to only target the advertisement and not the broadcaster (channel), therefore, it is inevitable that the restriction will affect the broadcasters established outside of Norway.

The proposal is therefore in breach of the AVMSD and the established case law of the CJEU. Before adopting any law that hinders the dissemination of foreign gambling advertising, Norway is obliged to follow the procedure set out in Article 4 of the AVMSD and prove that the broadcaster was established in another MS, to circumvent the restrictive rules on advertising.

3. The proposal infringes EU/EEA primary law

Even if the legality of the proposal needs to be assessed under EEA law (the Treaties) and not under the AVMSD, the restrictions cannot be justified under the invoked public policy objective of consumer protection, namely prevention of gambling-related problems. Blocking the dissemination of gambling advertising by EU broadcasters, while maintaining no restrictions for the advertising of Norsk Tipping

⁷ *De Agostini*, C-34/95, C-35/95 and C-36/95 para 38.

⁸ *De Agostini*, para 34: “Thus the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out”

⁹ *Mesopotamia Broadcast* C-244/10 and C-245/10, para 37.

(the monopoly) is a disproportionate measure that violates the fundamental principle of free movement of services.

Norway is proposing to ban the advertising of foreign gambling operators, who are licenced and established in other Member States of the EU. However, no similar restrictions apply to advertising for the monopoly. This means that gambling services offered by the monopoly will continue to be freely advertised. However, the CJEU has established in its case law that restricting **measures due to the public objective of consumer protection need to be applied in a consistent manner in order to be proportionate**¹⁰. This means that the same consumer protection arguments shall apply in a non-discriminatory manner also towards the monopoly advertising, which is not the case for Norway.

Furthermore, it is clearly stated that **the proposal aims to strengthen the Norwegian monopoly** on gambling: *“advertising of unregulated gambling actors [...] leads to an undesirable competitive situation between the Norwegian gambling actors and unregulated actors”*. This statement is completely contrary to the public policy objective of controlling addiction. Strengthening the monopoly for **competition/financial reasons** is not a legitimate ground to restrict the right of establishment and free movement of services¹¹.

The Norwegian government fails to provide any evidence (e.g. data/impact assessment) to prove that advertising of the monopoly has less impact on vulnerable people than the advertising of foreign operators. The argument that the products that are advertised by the foreign operators are **“high risk” products** is not valid. It is noticeable that the Binde study of 2011 considered that lotteries are a particularly harmful form of gambling, because problem gamblers participated on the same level as no-problem gamblers. Binde points out that in order to determine at risk products, one should look into the gambling preferences and activities of problem gamblers and these should be compared to those of non-problem gamblers. Even in the case that a product is not offered by the monopoly, advertising of operators who are licenced and regulated throughout the EU, helps channelling the player towards a safe offer, that has been designed within a high level of player protection, **in comparison to the unsafe, unregulated operators that are not based in the EU**.

The [2016 VIVE study](#) by the Danish Center for Social Science conducted an international comparison of problem gambling cases including in Denmark, the UK and Norway. The study showed that unlike the UK and Denmark which have a liberated licencing regime for online gambling, Norway has the highest prevalence of problem gambling, with serious gambling problem being more than twice as common in Norway compared to Denmark, Sweden and the UK.

Before applying the ban, the Norwegian government has to examine whether less restrictive measures could be applied to achieve the invoked public policy objective of consumer protection. Online gambling operators already apply a number of self-regulatory measures in relation to advertising. These measures include prohibition to target minors and excluded players, requirements for Responsible Gambling messaging, such as obligation to display warnings about the risks of gambling and information on a help line for problem gambling.

¹⁰ *Sjöberg and Gerdin* joined cases C-447/08 and C-44/08, *Ladbroke’s* C-258/08 para 28, *Placanica and Others*, joined cases C-338/04, C-359/04 and C-360/04, paragraph 55.

¹¹ *Ladbroke’s* CJEU

In Denmark for example, online gambling operators adopted a code of conduct that has been drawn up on the basis of an agreement between the industry and the government to develop new initiatives to counter gambling addiction. Another set of self-regulatory measures was recently proposed by TV channels in Norway to be in line with Norsk Tipping's responsible marketing standards¹². Online gambling operators are willing to engage with the Norwegian authorities, to ensure an efficient and uniform regulation of the market, which promotes fair competition and addresses the potential risks related to gambling.

4. Other remarks on the practical application of the proposal

The proposal introduces a statutory provision that authorises the Norwegian Media Authority to issue orders to prevent or impede access to illegal gambling- related marketing disseminated on television or via audio-visual on-demand services. However, the proposal does not specify in practice if and how it is possible to distinguish between advertising and broadcasting. The proposal has inevitably the effect of restricting not only the advertisement, but also the broadcaster, as it does not lay out the technical mechanisms for blocking only the advertisement and not the whole channel.

Moreover, it would be up to the discretion of the Norwegian Media Authority to issue a ban or not. However, the criteria for issuing the ban are not specified, meaning that every foreign broadcast shall be judged on case by case basis. The proposed process lacks transparency and is prone to errors, because no clear criteria are set. This also has the potential to create discrimination.

In addition, the Media Authority must also obtain an advisory opinion from the Norwegian Gaming and Foundation Authority before a decision is made. The mechanism proposed is very slow, therefore the practical impact and effectiveness would be limited, as the advertisement will continue to be broadcasted until the final decision of the Media Authority.

¹² <https://kampanje.com/medier/2019/06/discovery-og-nent-vil-redusere-casino-reklame-for-a-blidgiore-regjeringen/>