

European Gaming and Betting Association

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To: Ministry of Culture
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Norway

Brussels, 29 September 2020

Subject: Comments from EGBA to the public hearing conducted by the Ministry of Culture – reference to letter number 20/3673

Dear Sirs/Madams,

By sending this letter, EGBA respectfully submits its comments to the proposal. EGBA is a Brussels-based industry body representing online gambling operators established, licensed and regulated within the European Union/EEA. We make reference to the letter by the Ministry of Culture, dated 29 June 2020, number 20/3673. The deadline for submitting comments was set to 29 September 2020.

The new draft Act relating to Gambling Games aims to reorganize the current gambling legislation under a unique Act, while also continuing to hold the current state monopolies for Norsk Tipping and Norsk Rikstoto, with the goal of protecting Norwegian customers from problem gambling and to ensure that gambling is channelled towards Norwegian regulated games.

While EGBA and its members welcome, in general, amendments in view of the objective of consumer protection, we consider that the proposal will have severe consequences, which oppose the main objective of consumer protection as pursued by Norway and affect the rule of law principle.

First, EGBA believes that maintaining a monopoly for online gambling does not acknowledge the established current digital reality in which a consumer can easily access foreign operators' websites, if the local offer does not suit his expectations. The goal of channelling Norwegian consumers into the locally regulated gambling market can only be achieved if licensed operators can offer an attractive product. Particularly online, customers' tolerance for frustration is very low and it is very easy for players to find alternative offers. This is further confirmed by new data showing that 250.000 Norwegians played with foreign operators in the last year¹. Moreover, even if the monopoly aims to

¹ <https://lottstift.no/content/uploads/2020/05/Norsk-regulert-marknad-2019-.pdf>

protect players better, data shows an increase in the number of problem gamblers, from 34.000 in 2015 to 55.000 in 2020, and players at risk, from 88.000 to 122.000 in the same period².

Most importantly, EGBA would like to express its concerns on certain provisions of the proposal, particularly on the new powers assigned to the NGA to **(1)** access to information and premises, **(2)** sanctions that can be issued by the NGA, and **(3)** the issues caused by the new draft Act and non-compliance with CJEU case law.

1. NGA power to access information and premises

Section 27 of the proposal grants the NGA the right to request from anyone information and access to documents relating to their collaboration with foreign operators. The provisions allows the NGA to have unobstructed access to locations and premises where there is reason to believe that activity takes place that is covered by the draft Act. In addition to offices, this seems to also include private homes. Thus, the provision introduces a duty to provide information to the NGA and to assist the authority in their investigations. However, section 27 fails to elaborate on the procedure that the authority has to follow in obtaining the information and does not take into account the rights of the persons subject to investigations, as for example the right to an attorney and the protection against self-incrimination. Even if the provision says that the NGA “may require that equipment used in connection with the organisation of gambling games be examined for the operator's account”, the proposal does not specify if the NGA is allowed to confiscate materials, thus lacking in clarity and leaving the provision open to interpretation.

Another issue is the lack of any prior judicial oversight regarding the NGA’s decision to access premises to investigate possible infringements of the Act. Due to the unclear language of this provision, the NGA seems to be allowed access to private homes and offices without a court order, and with no need of police assistance during the investigation. The only requirement to obtain the “unobstructed access” is only the “reason to believe that activity takes place that is covered by the draft Act”. These powers are even broader than the ones granted to the Norwegian police, as the police may search any location in Norway upon reasonable cause for suspicion of crime that could entail a custodial sentence. However, the police needs to have a court order before searching private homes. A similar situation applies for the competition authority, which needs to acquire a court order for searches in both offices and private homes. Further, the competition authority needs to respect the requirement of “particular reason to assume” that a breach of law has taken place, before requesting a court to allow them to search private homes.

Given the above, EGBA believes that the proposed right to access premises does not comply with fundamental guarantees normally required for coercive measures and would be broader than the rights granted in Norway to the police and the competition authority.

² https://www.vg.no/nyheter/innenriks/i/GGVdp4/55000-nordmenn-har-spilleproblemer?utm_source=inline-teaser&utm_content=dOVyxB

2. New sanctions that can be imposed by the NGA

Section 33 of the draft Act states that the NGA can order an internet provider to post a warning message informing users that the gambling game has neither been granted a permit nor is supervised by the Norwegian authorities, if the website concerned targets the Norwegian market without a permit pursuant to the Act. However, a similar DNS-warning will not effectively block the access to foreign operators and therefore will not affect players' possibility to gamble on their websites. In addition, internet providers will be the ones burdened with the technical issues to place such warning, even though it's acknowledged that this will not stop the access to foreign online gambling. Further, similar warnings raise principle issues in relation to the freedom of speech and censorship. The freedom of expression and to receive and impart information is protected by Article 10 European Convention on Human Rights ('ECHR'). Article 10 provides the following: *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*

Section 37 allows the NGA to impose infringement fines on any person who, intentionally or through negligence, infringes provisions in the draft Act, if the infringement is serious or has been committed repeatedly. This sanction should also be considered in relation to the protection against self-incrimination, since the wording of the section does not require the authority to inform the person under investigation about his right to remain silent and therefore to not self-incriminate himself. Moreover, the provision does not allow for the fine to be suspended in case the fine is appealed by an individual or a company subject to the enforcement measures.

3. Non-compliance with CJEU case law

As shown above, the new proposal expands the scope for the use of sanctions by the NGA, especially because the sanctions can affect individuals and companies who are not directly involved in gambling operations, e.g. consultants, PR-companies, etc. The new Act is therefore far-reaching and contains almost no limitations and no judicial oversight on the new powers allocated to the NGA. This is not consistent with the powers given to the police and the competition authority, raising issues on the consistency of Norwegian legislation regarding investigations and the rule of law. The new provisions basically allow the NGA to have police wide authority and powers. On the other hand, similar sanctions are unlikely to affect the operation of foreign gambling websites, which will still remain accessible from Norway. For this reason, EGBA believes the proposal to be not necessary, suitable or proportional.

It has to be reminded that the operation of games of chance, including online sports betting, is an economic activity that falls under the protection granted by the four freedoms of the EU treaties. Operation of such games constitutes a "service" within the meaning of the EU's rules of free provision of services. For this reason, any restriction must be justified under EU law and be necessary and proportionate. The burden of proof that the exception (i.e. the restriction on the freedom to provide services) is justified, necessary and proportionate lies with Norway³. In this case, the draft Act not only

³ Berlington Hungary, C-98/14, paragraph 65. See also Stoß, paragraph 71, Dickinger and Ömer paragraph 54 and Pfleger and others, paragraph 50.

keeps restricting the access to the Norwegian market from foreign operators, but also affects third parties by enforcing sanctions against persons who work together with foreign operators.

The Court of Justice of the European Union ('CJEU') has established that the principle of proportionality is particularly important when it comes to regulation of gambling. The principle of proportionality restricts the discretion that individual member states have in determining the objectives for regulation, and for choosing a desired level of protection. The CJEU has developed a consistency test for determining proportionality, which is to be applied horizontally, across market segments and dynamically, taking into account current developments. Moreover, the central and decisive criterion underlying the overarching consistency test that the CJEU applies is the genuineness of the Member State's submission with regard to the objectives that its legislation pursues. In other words, the CJEU applies a very comprehensive hypocrisy test⁴.

Whilst Member States are allowed to establish a monopoly, it must be regulated in a legislative framework that is suitable to ensure that the holder of the monopoly will in fact be able to pursue, in a consistent and systematic manner, the legitimate objectives of this monopoly⁵. In any case, the fundamental rules of the Treaties have to be observed, including the principles of equal treatment, non-discrimination on grounds of nationality and the consequent obligation of transparency⁶.

EGBA argues that the coherency of the legislative framework in this case should also be considered from the point of view of the new wide powers granted to the NGA and their comparison with the ones granted to the police and the competition authority.

Finally, we would like to remind that where national law on gambling infringes European law, measures taken against an operator to enforce such infringing national laws are precluded by European law.

The CJEU has in several judgments, most recently in *Sebat Ince*⁷, *Unibet International*⁸ and *Sporting Odds*⁹, clearly stated that enforcement measures imposed against an individual for alleged violation of national gambling regulation, cannot be pursued if that regulation is incompatible with EU law, for instance for failing the hypocrisy and consistency tests or violating the transparency requirement¹⁰.

The CJEU clarified that a prohibition, which stems from the principle of the primacy of EU law and from the principle of sincere cooperation laid down in Article 4(3) TEU, is binding, within the sphere of their areas of competence, on every organ of the Member State concerned including the criminal prosecution authorities¹¹.

⁴ See *Stoß*, paragraph 50 of the Opinion of AG Mengozzi of 3 March 2010

⁵ *Zeturf*, C-212/08, paragraphs 59-62; *Stoß and others*, C-316/07, C-358/07-360/07, C-409/07 and C-410/07, paragraph 83.

⁶ *Sebat Ince*, C-336/14 paragraph 55. See also *Carmen Media Group*, C-46/08, paragraph 90, and *Stanleybet International and others*, C-186/11 and C-209/11, paragraph 47

⁷ *Sebat Ince*, C-336/14.

⁸ *Unibet International*, C-49/16.

⁹ *Sporting Odds*, C-3/17, paragraph 68.

¹⁰ *Pfleger and Others*, C-390/12, paragraph 64. See also *Placanica*, C-338/04, paragraphs 63 and 64.

¹¹ *Sebat Ince*, C-336/14, paragraph 64.

Following the principles set out in both EU and EEA law, gaming monopolies must be regulated in a systematic and consistent manner with the aim of protecting consumers. The data shown above on problem gamblers in Norway and on Norwegian players playing outside of the market implies that the monopoly is not succeeding in protecting consumers as per the aim of the legislation. Regulations that are incompatible with EU/EEA law cannot be enforced.

In conclusion, EGBA believes that any further action that the Norwegian Government will undertake needs to be considered in light of the overall Norwegian framework, in a manner that safeguards channelling and a proper, working regulatory model.

We thank you in advance for your consideration of our contribution and are available to discuss at your discretion.

Sincerely yours,

Maarten Haijer



Secretary General
European Gaming and Betting Association (EGBA)