

Notification Number: 2019/0361/RO - H10 (Romania)

Written contribution for the European Commission on the notification procedure for the Minimum Technical Conditions for Checks on Gaming Equipment from BMM

BMM Spain Testlabs SLU (“BMM Spain”), represented by attorneys-at-law Philippe Vlaemminck and Robbe Verbeke of Pharumlegal wishes to express its concerns in the context of the European Commission's notification procedure for the Minimum Technical Conditions for Checks on Gaming Equipment (notification number: 2019/0361/RO) issued by Romania.

CONTENTS

I.	Information regarding the stakeholder.....	2
<i>I.1. Locations</i>		2
<i>I.2. Accreditations and licenses</i>		3
<i>I.3. BMM's activities in Romania</i>		3
II.	Information regarding the Draft Regulation – Breaches of EU law	4
<i>II.1. Requirements regarding gaming equipment conformity evaluation bodies (Section 4.1(1) of the Draft Regulation)</i>		4
a. <i>The freedom of establishment (Article 49 TFEU)</i>		5
b. <i>The Services Directive 2006/123/EC</i>		7
<i>II.2. Requirement to be accredited by the Romanian accreditation body (Section 4.1(2) and Section 22 of the Draft Regulation)</i>		10
a. <i>The freedom to provide services (Article 56 TFEU)</i>		11
b. <i>Regulation (EC) No 765/2008</i>		12
III.	Conclusion	13

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I. Information regarding the stakeholder

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- BMM International LLC (“BMM”)** is the longest established and most experienced private independent gaming certification laboratory in the world. It has more than 37 years of experience in testing, certification of gaming products for regulated markets and inspections of gaming equipment. BMM (through its operating subsidiaries) is licensed to provide services in 440 regulated jurisdictions around the world. It provides certification services (conformity assessments) to its clients in the gaming industry, which consist of qualified independent and impartial reviews, certification and audits and/or inspections of gaming products.

I.1. Locations

- BMM is a company incorporated under the laws of Delaware, with headquarters in Las Vegas, Nevada, 815 Pilot Road, Suite G, Las Vegas, NV 89119, sole shareholder of BMM Spain Testlabs S.L.

BMM is also established in the European Union. The following constitutes a list of BMM entities in Europe, each being a legally registered entity:

- BMM Spain Testlabs S.L.U., a limited liability company incorporated under the laws of Spain, registered within Barcelona Trade Registrar under number (EUID Code): ES08005.000449764, holding Fiscal Registration Number (C.I.F.): B64622251, with headquarters in Edificio Vinson del Parque Empresarial Vallsolana, Cami de Can Camps 17-19, 08174 Sant Cugat del Vallés, Barcelona, Spain (hereinafter “**BMM Spain**”);
 - BMM Spain Testlabs S.L.U. Bucharest branch, with seat in Romania, Bucharest, 1st District, 12 Postelnicului Street, 3rd Floor, registered under J40/5322/ 2018, having unique identification number 39207797 (hereinafter “**BMM Romania**”);
 - BMM Spain Testlabs S.L. (Poland), spółka z o.o. oddział w Polsce, with seat at ul. Prądnicka 89/3, Kraków, Poland;
- BMM Europe GmbH with seat at Wienersdorfer Straße 20-28, 2514 Traiskirchen, Austria;
- BMM Compliance Italy SRL, with seat at Bologna Business Park, Via Trattati Comunitari Europei 1957-2007, 11 40127, Bologna, Italy.

I.2. Accreditations and licenses

2. BMM Spain is officially accredited by the Spanish National Accreditation Body/Entidad Nacional de Acreditación (hereinafter “**ENAC**”). It owns: ISO17025 accreditation for testing (accreditation n° 696/LE1541), and the ISO17020 accreditation for gaming machine inspections (accreditation n° 279/EI476).

Please find attached both accreditations with their technical scopes.

3. BMM Spain holds all licenses in Europe related to testing and/or certifying all things related to gambling. Please find attached the full list of certificates/licenses/permits held by BMM Spain.
4. In Romania, BMM Spain holds class II licenses for:
 - (i) certification of online games of chance (license N° 947);
 - (ii) audits of online games of chance (license N° 949);
 - (iii) evaluation and inspection of slot machines (license N° 951).¹

The licenses were issued on **30 May 2016** for a term of ten (10) years by the Romanian National Gambling Office - Oficiul Național pentru Jocuri de Noroc (hereinafter “**ONJN**”).

I.3. BMM's activities in Romania

5. The Draft Minimum Technical Conditions for Checks on Gaming Equipment (hereinafter “**Draft Regulation**”) submitted to the European Commission (“**Commission**”) by the Romanian National Gambling Office on 22 July 2019 for review seeks to regulate the so-called minimum technical conditions for certification and inspections of gaming equipment, such as slot machines, which are operated by companies holding a specific license for land-based operations. Based on the current Romanian legislation, such verifications can only be performed by companies holding a class II license. As explained above, **BMM Spain is a holder of such class II license for evaluation and inspection of slot machines (license N° 951).**

In Romania, evaluation and inspection of slot machines is performed by BMM Spain Testlabs S.L.U., through its Bucharest branch. The Bucharest branch of BMM was opened in April 2018, with the launch of commercial operations in June 2018.

In practice, at the end of a successful evaluation process, the gaming equipment gets certified/approved by a conformity assessment body such as BMM. In Romania such approvals/certifications are called “Type Approvals”. There are approximately 700-800 Type Approvals (certificates attesting that a specific type of gaming machines meets regulatory, technical and safety requirements) issued per year. Subsequently, prior to being available for operation by licensed gaming operators, each approved machine needs to pass an initial and periodic inspection evaluations to confirm that the software running on the machine matches that which was approved in the initial Type Approval. It is estimated that over 75,000 such inspections take place annually. BMM has a material share of the market of both Type approvals and inspections in Romania.

6. BMM Spain is the only foreign conformity assessment body active in Romania in the certification and inspection of slot machines and is the only foreign laboratory providing

¹ Available at: <http://onjn.gov.ro/lista-licentiat-clasa-a-ii-a/>.

Type Approval and inspection services in Romania that has ISO 17020 and 17025 accreditations relating to these activities in the gaming industry.

II. Information regarding the Draft Regulation – Breaches of EU law

7. BMM has provided its feedback on the initial version of the Draft Regulation to ONJN during the Consultative Council meetings held by ONJN on 15 March 2019 and 8 May 2019 as well as in writing on 22 March 2019, 10 April 2019, 16 May 2019, and 28 June 2019. In addition, our law firm has provided detailed legal feedback to ONJN on 8 May 2019. It is clear from the Draft Regulation as notified to the Commission that BMM's remarks have not been taken into account by the Romanian regulator.
8. BMM wishes to point out two specific provisions in the Draft Regulation which it finds contrary to EU law. First and foremost, however, BMM wishes to underline that it does not operate any gambling service, neither in Romania nor in any other Member State.

The legal issues addressed under the notified Draft Regulation are indeed not regulating gambling services, but the technical conditions for certification and inspections of gaming equipment performed by the conformity evaluation bodies such as BMM.

Therefore, where certain justifications may exist for specific restrictions with respect to the provision of gambling services by a Member State, no parallel reasoning can be used here. BMM provides conformity assessment services relating to gambling machines but does not provide gambling services whatsoever.

II.1. Requirements regarding gaming equipment conformity evaluation bodies (Section 4.1(1) of the Draft Regulation)

9. Section 4.1 of the Draft Regulation provides:

4.1. "In order to evaluate the conformity of gaming equipment and be licensed, a conformity evaluation body must cumulatively fulfill the following requirements:
1) to be **established under national legislation and have legal personality**;
2) to be accredited by the national accreditation body as defined in Chapter I, Section 1, Part IV, in accordance with Regulation (EC) no. 765/2008 and based on the harmonised standards published in the Official Journal of the European Union corresponding to the conformity evaluation tasks for the gaming equipment in question;
(...)"

(own emphasis)

10. The provision set out in article 4.1 (1) requires that any company providing certification and inspection services relating to gaming equipment must be established according to the national law of Romania and hold legal personality. It thereby prohibits the operation of such services through branches of companies from another Member State established in the territory of such other Member State.
11. Such restriction is **a violation of the principles of the freedom of establishment and contrary to the Articles 49 of the Treaty on the Functioning of the European Union** (hereinafter "TFEU", or "Treaty") as well as secondary EU legislation.

a. The freedom of establishment (Article 49 TFEU)

12. First, Article 49 TFEU prohibits restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (secondary establishment); provided there is a permanent establishment, the established does not need to have a separate legal personality situated in another Member State.²

13. BMM wishes to point out that the Court of Justice of the European Union (hereinafter: “CJEU”) has prevented host states from insisting that business can be conducted only through a primary establishment (with a registered office, headquarters, and a principal place of business in the host state) since that would negate the very right of secondary establishment.³

The requirement of being established under national law and holding legal personality there prevents companies from other Member States from making use of other forms of establishment, especially branches or agencies, and discriminates against them by obliging them to bear the expense of setting up a new company. Article 49 TFEU expressly leaves it to companies to choose the appropriate legal form in which to pursue their activities in another Member State.⁴

14. Secondly, we would like to point out that according to settled case-law of the CJEU, the definition of establishment within the meaning of Article 49 TFEU is “*the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*”.⁵

The economic activity in question which BMM performs based on a legally obtained license from the Romanian regulator is the evaluation, inspection and the subsequent certification of slot machines (under the license N° 951).

Should Section 4.1(1) of the Draft Regulation come into force, BMM Spain will be prohibited from providing these services through its Bucharest branch and its 10-year license to provide these services as BMM Spain, granted on 30 May 2016 would effectively be retroactively invalidated.

15. Moreover, it is the settled CJEU case-law that the requirement for an undertaking to be established in the Member State in which the services are provided runs directly counter to the freedom to provide services since it renders impossible the provision of services, in that Member State, by undertakings established in other Member States.⁶

16. The provision in question clearly constitutes a restriction on the freedom of establishment and the freedom to provide services as it completely removes BMM from the market insofar as it denies access to the market of evaluation and inspection of gambling equipment.

² Case C-414/06, Lidl Belgium, EU:C:2008:278, para 15.

³ Case C-101/94, Commission v Italy (Foreign Security Dealing), EU:C:1996:221.

⁴ Case C-270/83, Commission v. France (tax credits), EU:C:1986:37, para 22.

⁵ Case C-221/89, Factortame and Others, EU:C:1991:320, paras 20 to 22; Case C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union, EU:C:2007:772, para 70.

⁶ Case C-546/07, Commission v Germany, EU:C:2010:25, para 39, see, to that effect, inter alia, Case 205/84 Commission v Germany, EU:C:1986:463, para 52; Case C-279/00 Commission v Italy, EU:C:2002:89, para 17; and Case C-496/01 Commission v France, EU:C:2004:137, para 65.

17. With regard to the operation of gambling services specifically (which hence does not even apply here), the CJEU has accepted that restrictions which meet the proportionality test are possible only insofar as the concerned Member State pursues a consistent gambling policy.

This specific issue has been addressed by the CJEU in the *Engelmann* case.⁷ In this case the question related to the operation of a gambling concession in Austria, where an establishment requirement was imposed, similar to how the Draft Regulation is now drafted:

*“As the Advocate General has observed, in essence, in points 51 and 52 of his Opinion, **the obligation on persons holding concessions to operate gaming establishments to have their seat in national territory constitutes a restriction on freedom of establishment within the meaning of Article 43 EC inasmuch as it discriminates against companies which have their seat in another Member State and prevents those companies from operating gaming establishments in Austria by way of an agency, branch or subsidiary.***

*Doubt is not in any way cast on that finding by the fact, raised by the Austrian Government, that the obligation in question is imposed on operators only from the time that they are selected and for the duration of the concession. As the Advocate General has stated in point 62 of his Opinion, such an obligation may deter companies established in other Member States from applying, owing to the establishment and installation costs in Austria that they would have to incur if their application were successful. **Nor can that system avoid a company whose seat is located in another Member State being prevented from operating gaming establishments in Austria through an agency, a branch or a subsidiary.***

(...)

Moreover, such a restriction must satisfy the conditions which flow from the Court’s case-law in regard to proportionality and may be regarded as appropriate for ensuring attainment of the objective relied upon only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, to that effect, Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-7633, paragraphs 59 to 61).

(...)

*Without it being necessary to determine whether that objective can fall within the definition of public policy, it need merely be pointed out in this respect that **the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime.** There are indeed various measures available to monitor the activities and accounts of such operators (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 74; Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007] ECR I-1891, paragraph 62; and Commission v Spain, paragraph 39).*

(...)

The answer to the first question is therefore that Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be

⁷ Case C-64/08, *Engelmann*, EU:C:2010:506.

operated in gaming establishments only by operators whose seat is in the territory of that Member State.⁸

(own emphasis)

18. In the situation at hand, it must be stressed again that BMM does not even operate any gambling services, and no imperative requirements to protect the general interest can legitimately be invoked by the Romanian Government in order to justify the restrictions which we oppose in this submission. The reasoning of the CJEU in *Engelmann* as outlined above is therefore *a fortiori* relevant.

There is no doubt that the proposed Draft Regulation is in violation of articles 49 and 56 TFEU (freedom of establishment and freedom to provide services) as long as it requires BMM to operate through a Romanian legal entity and to be established under Romanian law.

*b. The Services Directive 2006/123/EC*⁹

19. It must first be noted that the Directive 2006/123/EC (the “**Services Directive**”) applies in full here. None of the exceptions listed in article 2 (2) of the Directive can be invoked. As mentioned numerous times, the activities at hand cannot be considered gambling activities, and therefore article 2 (2) (h) does not apply. Romania can also not rely on the exception provided for in article 2 (2) (i) of the Services Directive (“*activities which are connected with the exercise of official authority*”). It is the Court’s settled case-law that activities that are auxiliary or preparatory to the exercise of official authority must be regarded as falling outside the scope of that derogation as they do not entail the exercise of independent decision-making powers pursued in the context of direct State supervision and do not entail the exercise of powers of constraint or powers of coercion.¹⁰ Accreditation of conformity assessment bodies does not meet those requirements and cannot be considered as performing activities connected with the exercise of official authority.

20. Article 14 of the Services Directive provides a list of requirements that Member States are not permitted to impose on national service providers when carrying out a service in another Member State.

Article 14(1) prohibits all discrimination based directly or indirectly on grounds of nationality or, as regards companies, the location of the registered office. Article 14(1) explicitly mentions requirements which make access to or exercise of a service activity conditional upon the nationality or residence of the provider, his staff, persons holding the share capital or members of the provider’s management or supervisory bodies.

21. In so far as Draft Regulation requires BMM to be established under national legislation and have legal personality in the territory of Romania, that requirement is based directly on the location of the provider’s registered office within the meaning of Article 14(1).

22. In *Rina Services and Others*, the CJEU confirmed that requiring a provider’s registered office to be located within national territory restricts the freedom of that provider to choose between a principal or a secondary establishment in the territory of a Member State.¹¹

⁸ *Ibidem*, paras 32-40.

⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

¹⁰ Case C 293/14, Gebhart Hiebler, EU:C:2015:843, para 34, and references there.

¹¹ Case C-593/13, Rina Services and Others, EU:C:2015:399, para 25.

Contrary to Article 14 of the Services Directive, the provision in question of the Draft Regulation obliges BMM to have its principal establishment in national territory of Romania.

23. Moreover, the CJEU noted that no justification can be given for the requirements listed in Article 14 of Directive 2006/123:

*“As stated in the title of that article, the requirements in paragraphs 1 to 8 are ‘prohibited’. Furthermore, **there is nothing in the wording of that article to indicate that Member States have the option of justifying maintaining those requirements in their national legislation.**”¹²*

(own emphasis)

24. It means that Romania cannot argue that the requirement that the registered office of BMM must be situated in national territory of Romania is justified by any reason whatsoever, such as by the need to ensure the effectiveness of the public authorities’ supervision of the providers’ activities.

To conclude, the requirement for gaming equipment conformity evaluation bodies to be established under national legislation and have legal personality provided for in Section 4.1(1) of Draft Regulation contravenes Article 14(1) of the Services Directive.

25. Furthermore, Article 14(3) of the Services Directive contains a prohibition of requirements limiting the choice of the service provider between principal and secondary establishment. Under Article 14(3) Member States have to remove requirements which restrict the choice of a provider already established in a Member State as to the type of establishment he wants to have in another Member State.¹³ An obligation to have the principal establishment in Romania requires BMM Spain to change a location of the business, thereby in fact negates the right of being established in Romania through its secondary establishment, namely its existing Bucharest branch.

26. In addition, even if article 14 of the Services Directive would not apply here, article 16 of the Services Directive provides for the freedom to provide cross-border services without unjustified restrictions. It is one of the cornerstones of the Services Directive.¹⁴

According to Article 16(1) of the Services Directive, Member States shall respect the right of providers to provide services in a Member State other than that in which they are established and ensure free access to and free exercise of a service activity within its territory. Article 16 favors the country of origin principle. Only in exceptional cases are Member States allowed to impose host country requirements on cross-border service providers.

27. In particular, Article 16(2) of the Services Directive provides, inter alia, that:

“Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

*a) an obligation on the provider **to have an establishment in their territory;**”*

¹² *Ibidem*, para 30.

¹³ The Commission’s Handbook on the implementation of the Services Directive point 6.2.3, available at: <https://publications.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715>. The Handbook is not a legally binding instrument but may assist with interpretation of the provisions of the Directive.

¹⁴ *Ibidem*, point 7.1.2.

(own emphasis)

28. According to the Handbook on the implementation of the Services Directive:

“Article 16(2)(a) concerns requirements which oblige service providers from other Member States to set up an establishment in the Member State into which they wish to provide cross-border services. As stated by the ECJ, such requirements negate the right to provide cross-border services enshrined in [Article 56 TFEU], since they make cross-border service provision impossible by imposing an obligation on the provider to have a stable infrastructure in the receiving Member State.”¹⁵

29. If that State requires service providers to set up an establishment in its territory in order to provide services there, that is the very negation of the right to provide services in one Member State while being established in another.

Accordingly, the proposed Draft Regulation imposes a manifestly discriminatory requirement, which is one of the requirements expressly prohibited by Article 16(2) of the Services Directive, since it precludes companies established in other Member States (in the case of BMM Spain: in Spain) from providing certification services in other Member State (e.g. Romania) unless they move their registered office to that country.¹⁶

30. Article 16(1) and (3) of the Services Directive lists a number of grounds which, in certain circumstances, may justify measures adopted by a Member State which restrict freedom to provide services by a provider established in another Member State.

It is the settled case-law of the CJEU that a measure which is manifestly discriminatory — such as that at issue in the present case, based on the location of the registered office of the service provider — is compatible with Union law only if it can be justified on grounds of public policy, public security or public health.¹⁷

As the Court held in, inter alia, *Commission v Spain*¹⁸, recourse to public policy and public security as a ground of justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

31. BMM Spain cannot think of any “fundamental interest” of Romanian society intended to be protected by the adoption of the discriminatory measure which would justify the restriction of freedom to provide services.

In any event, the second criterion required by the case-law must also be satisfied, namely that that interest would be genuinely and seriously threatened if the measure concerned were not applied.¹⁹

¹⁵ Ibidem, point 7.1.3.4.

¹⁶ See to that end, Opinion of Advocate General Cruz Villalon, delivered on 10 March 2015 in Case C-593/13, *Rina Services and Others*, EU:C:2015:159.

¹⁷ See, inter alia, judgments in C-352/85, *Bond van Adverteerders v State of the Netherlands*, EU:C:1988:196, paras 31 and 32; C-288/89, *Stichting Collectieve Antennevoorziening Gouda*, EU:C:1991:323, para 11; C-353/89, *Commission v Netherlands*, EU:C:1991:325, para 15; C-17/9, *Federación de Distribuidores Cinematográficos*, EU:C:1993:172, para 15 et seq.; C-224/97, *Ciola*, EU:1999:212; C-153/08, *Commission v Spain*, EU:C:2009:618, para 37; and C-344/13 and C-367/13, *Blanco and Fabretti*, EU:C:2014:2311, para 38.

¹⁸ Case C-114/97, *Commission of the European Communities v Kingdom of Spain*, EU:C:1998:519, para 46.

¹⁹ Recital 41 of the Services Directive.

32. BMM Spain is of the opinion that it cannot be argued that, for example, the protection of recipients of certification services in Romania is “genuinely and seriously threatened” as a result of the fact that BMM Spain is established according to the national law of Spain.

Article 28 et seq. of the Services Directive contain provisions concerning administrative cooperation and mutual assistance between Member States in order to ensure that providers and the services they provide are monitored. Under those provisions, it is possible for requests to be made between Member States to carry out checks, inspections and investigations.²⁰

In light of the above, even if only established in Spain, the Romanian authorities would still be able to monitor effectively BMM Spain’s activities. In the given case, such monitoring is further facilitated by that fact that BMM Spain has its branch office in Romania.

In summary, BMM Spain cannot think of any convincing reasons which the Romanian Government may rely on to justify the measure at issue to be accepted in conformity with article 16 of the Services Directive.

33. The requirement of having to be established under national law with national legal personality provided for in Section 4.1(1) of the Draft Regulation is in clear violation of the Treaty and the Services Directive.

II.2. Requirement to be accredited by the Romanian accreditation body (Section 4.1(2) and Section 22 of the Draft Regulation)

34. Section 4.1 of the Draft Regulation provides:

4.1. “In order to evaluate the conformity of gaming equipment and be licensed, a conformity evaluation body must cumulatively fulfill the following requirements:
1) to be established under national legislation and have legal personality;
2) to be **accredited by the national accreditation body** as defined in Chapter I, Section 1, Part IV, in accordance with Regulation (EC) no. 765/2008 and based on the harmonised standards published in the Official Journal of the European Union corresponding to the conformity evaluation tasks for the gaming equipment in question; (...)”

(own emphasis)

35. Section 22 of the Draft Regulation provides:

“The conformity evaluation bodies, which shall hold a valid Class II license issued by the National Office for Gambling, **must obtain accreditation from the national accreditation body** for the specific activity undertaken within 12 months of the date of issue of the accreditation scheme by the national accreditation body defined in Chapter I, Section 1, Part IV.”

(own emphasis)

36. The abovementioned provisions exclude the possibility of being accredited by an accreditation body of another Member State. Such restriction is **a violation of the freedom**

²⁰ Article 28(3) of the Services Directive.

to provide services and contrary to the Articles 56 and 57 of the TFEU as well as secondary EU legislation.

a. The freedom to provide services (Article 56 TFEU)

37. Freedom to provide services under Article 56 TFEU relates to carrying out an economic activity in a Member State in which the service provider is not established.

38. In *Säger* the Court noted that:

“a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.”²¹

39. In *Gouda*, the CJEU ruled that restrictions come within the scope of Article 56 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the **requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.**²²

In other words, those measures which impose a dual burden on foreign service providers breach Article 56 TFEU unless they can be justified by overriding reasons relating to the public interest.²³

40. Thus, BMM Spain is of the opinion that it cannot be required to obtain the accreditation from the Romanian accreditation body since it already satisfied the conditions to obtain such accreditation in its home state, namely, Spain (ISO17025 accreditation for testing (accreditation n° 696/LE1541, and the ISO17020 accreditation for inspections (accreditation n° 279/EI476) from the Spanish accreditation body ENAC.

41. BMM Spain wishes to recall that according to settled CJEU case-law national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.²⁴

42. As already explain in point 30 et seq. above, even if the aims pursued by the Romanian regulation would be regarded as aims of "public policy" (which is in reality not the case in this instance), the obligations at issue are not indispensable for achieving those aims and thus cannot be regarded as justified.

Member States can only rely on public policy (public order) grounds in case of genuine and sufficiently serious threat affecting one of the fundamental interests of society.

²¹ Case C-76/90, *Säger v Denemeyer*, EU:C:1991:331, para 13.

²² Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media*, EU:C:1991:323, para 12.

²³ Case C-341/05, *Laval un Partneri*, EU:C:2007:809; Case C-164/99, *Portugalia Construcões*, EU:C:2002:40.

²⁴ Case C-415/93, *Bosman*, EU:C:1995:463, para 37.

There is no such threat in the fact that BMM Spain, established and accredited in Spain, performs evaluation and inspection of slot machines through its Bucharest branch. In any case, the Romanian government can easily obtain all information it could consider necessary to control BMM Spain's activities in Romania and there is no legitimate objective that can justify requiring Romania to consider a Spanish accreditation as null and void in Romania.

*b. Regulation (EC) No 765/2008*²⁵

43. Section 4.1(2) and Section 22 of the Draft Regulation also contravene the provisions of Regulation (EC) 765/2008.

44. First, BMM Spain wishes to point out that a system of accreditation aims to strengthen mutual confidence between Member States as regards the competence of conformity assessment bodies and consequently the certificates and test reports issued by them. It thereby enhances **the principle of mutual recognition** in relation to bodies carrying out conformity assessments.²⁶

Thus, as far as the Draft Regulation requires BMM Spain to be accredited by the Romanian accreditation body, whereas BMM Spain is already accredited by the Spanish accreditation body, the Romanian government does not respect the principle of mutual recognition provided for in Regulation (EC) No 765/2008.

45. Secondly, according to the principle of non-competition, national accreditation bodies shall not compete with other national accreditation bodies.²⁷

In that regard, Regulation (EC) No 765/2008 provides:

*“Competition between national accreditation bodies could lead to the commercialisation of their activity, which would be incompatible with their role as the last level of control in the conformity assessment chain. The objective of this Regulation is to ensure that, within the European Union, **one accreditation certificate is sufficient for the whole territory of the Union, and to avoid multiple accreditation**, which is added cost without added value. National accreditation bodies may find themselves in competition on the markets of third countries, but that must have no effect on their activities inside the Community, or on the cooperation and peer evaluation activities organised by the body recognised under this Regulation.*

*In order to **avoid multiple accreditation, to enhance acceptance and recognition of accreditation certificates** and to carry out effective monitoring of accredited conformity assessment bodies, **conformity assessment bodies should request accreditation by the national accreditation body of the Member State in which they are established**. Nevertheless, it is necessary to ensure that a conformity assessment body is able to request accreditation in another Member State in the event that there is no national accreditation body in its own Member State or where the national accreditation body is not competent to provide the accreditation services requested. In such cases, appropriate cooperation and exchange of information between national accreditation bodies should be established.*²⁸

²⁵ Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218, 13.8.2008, p. 30–47.

²⁶ Recital 13 of the Regulation (EC) No 765/2008.

²⁷ Article 6(2) of the Regulation (EC) No 765/2008.

²⁸ Recital 19 and 20 of the Regulation (EC) No 765/2008.

(own emphasis)

- 46.** The requirement to be accredited by the Romanian accreditation body clearly contravenes the above-mentioned provisions as well as Article 7(1) of Regulation (EC) No 765/2008 which provides that accreditation is in principle done by the national accreditation body of the Member State in which the undertaking in question is established (for BMM Spain this means the Spanish accreditation body).

It is therefore clearly contrary to EU law to impose a requirement of accreditation by the Romanian accreditation body upon BMM Spain.

- 47.** Section 23 of the Draft Regulation provides a transition period for the market to adopt the new technical standards for gaming machines promulgated therein. It provides for a period of 24 months after the publication of the Draft Regulation during which conformity assessment bodies established according to Romanian law would be able to issue inspection reports relating to gaming machines in accordance with the standards in place prior to the publication of the Draft Regulation.

This constitutes direct discrimination against foreign conformity assessment bodies such as BMM Spain – and in fact only BMM Spain at this point in time - given that BMM is the only foreign conformity assessment body engaged in this activity in Romania. Under the Draft Regulation, BMM Spain will not be able to issue any more type approvals or inspection reports after the Draft Regulation comes into force – either under the old procedures or the new procedures, which is discriminatory.

III. Conclusion

- 48.** Should the provisions referred to above enter into force, they would adversely affect rights of lawfully established entities operating as gaming equipment conformity evaluation bodies, such as BMM Spain, which are officially accredited by the National Accreditation Body in one Member State and would prohibit them from performing this activity in another Member State. This is in clear violation of the EU principles of the freedom of establishment and the freedom to provide services, as enshrined in the TFEU, and in breach of the Services Directive as well as of Regulation 765/2008.
- 49.** Given the above, BMM Spain strongly urges the European Commission to take into consideration BMM Spain's concerns and to issue a reaction in the framework of the 2015/1535 procedure, whereby Romania is requested to amend the Draft Regulation in the sense that it removes all requirements related to the obligation of licensed conformity assessment bodies to be established in Romania and to be accredited by the Romanian accreditation body.

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