Message 201

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Forwarding of the response of the Member State notifying a draft (Finland) to of Malta.

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2. Finland

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4. 2024/0601/FI - H10 - Games of chance

5.

6. Following Malta’s detailed opinion, Finland respectfully submits the following.

In its detailed opinion, Malta acknowledges and commends Finland’s efforts to partially derogate from the current monopoly-based regulatory framework and to allow the fair and legal provision of games with the aim of further aligning the Finnish gambling framework with EU law. However, according to Malta, the revision of the draft Gaming Act has raised a number of concerns, and Malta has therefore issued a detailed opinion.

Finland states that the aim of the gambling system reform is to prevent and reduce economic, social and health harms resulting from gambling and to improve the channelling rate of the gambling system. Another aim is to prevent irregularities and crime related to gambling. In preparing the reform, international experience has been taken into account, and efforts have been made to create a regulatory model where restrictive regulation aimed at preventing and reducing gambling-related harms is balanced with elements that support the attractiveness of the gambling system and channelling capacity.

As Malta states, Member States have the right to freely establish the objectives of their gambling policy and define the level of protection they are seeking, as long as they meet the requirements set out in the case law of the Court of Justice of the European Union. In view of the following, Finland considers that the new gambling system and the legislative proposals reflecting it comply with EU law.

Provisions on software licences (section 7 of the Gambling Act)

In point 2.1. of its detailed opinion, Malta submits that the requirement for a licence to produce, supply, install and adapt game software under section 7 of the proposed Gambling Act restricts the freedom to provide services between EU Member States. Malta maintains that this restriction should be assessed from the perspectives of appropriateness and proportionality, and that the assessment should be based on evidence and research data.

In accordance with the principle of mutual recognition, and to avoid the duplication of administrative requirements, Malta is concerned that overlapping checks and supervision of gambling operators with a view to obtaining a gambling licence in Finland may impose administrative burdens on operators who are already duly authorised to provide such services in another EU Member State. Malta points out that the overriding reasons in the public interest established by the Court of Justice of the European Union are not so easily transferable as to justify the adoption of a national measure that restricts the provision of services by gambling software providers and to which a consumer is not a party.

Malta states its observation that the Finnish Government has not provided any supporting evidence or research that would clearly define the appropriateness and necessity of adopting this restrictive prior authorisation system.

Malta considers that the licensing requirement will lead to unnecessary and disproportionate measures by the supervisory authority that will unduly restrict the freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU).

Finland considers that it is appropriate to assess the importance of the licensing requirement for gambling software not as an independent restriction, but as part of the broader gambling system reform implemented by the proposal and, in particular, as part of protecting a regulated market from illegal activities. Member States have explicit national discretion in matters relating to the regulation of gambling activities, of which the licensing procedure is an integral part. Therefore, the underlying purpose of the legal proposal is to effectively prevent and combat supply outside the regulated gambling market, thereby helping to ensure that the objectives of the new gambling system, as recognised by the case law of the Court of Justice of the European Union, are met.

Section 33 of the Gambling Act would prohibit both the use of the gambling software by non-licence holders in the provision of gambling services subject to a licence and the production, making available, installation or adaptation of gambling software for an operator who does not hold a licence to provide gambling services under the Gambling Act. The prohibitions referred to in the proposed section 33 require a licence. The provision of software to operators who organise gambling games or direct a supply of gambling games to Finland without the licence required by the proposal would create an obstacle to obtaining a gambling software licence. According to section 84 of the Gambling Act, the supervisory authority may impose a fine for violation of the prohibition, and the prohibitions are deemed to have a significant impact on legality.

The proposed licence requirement for gambling software has been limited in the proposal for suitability and proportionality reasons, so that no licence for software would be required for ancillary functions such as performance analysis, marketing, customer relationship management or financial, personnel and other management. The proposal sets out a transitional period for the provisions applicable to gambling software licences, and these provisions would only apply from the beginning of 2028 onwards. The purpose of this transitional period is to make it easier for operators to prepare for the requirements of the new regulatory framework.

As regards the administrative burden, it is important to note that the proposed licensing procedure would be very light in nature. The licensing procedure would contribute to ensuring the reliability and suitability of gambling software providers, which is essential in preventing new abuses and criminal offences related to gambling activities. A party applying for a gambling software licence would be subject to significantly lighter clearing obligations than a party applying for an exclusive licence or a gambling licence. The proposal would also not impose any regular reporting or auditing obligations. The supervisory fee for a gambling software licence holder would also be significantly lower. Therefore, the regulatory framework would take into account the principle of proportionality.

The ex ante licensing system would contribute to ensuring that operators organising gambling software activities are able to meet their legal obligations, that operators can be monitored and that any illegal activities can be addressed effectively. Although gambling software activities do not constitute business operations aimed at consumers, they are nevertheless specific economic activities that are directly linked to gambling, the licensing of which has, based on international experience, been considered one of the key means of achieving the objectives of the gambling system reform, as recognised by the case law of the Court of Justice of the European Union, namely to ensure legal certainty, to

prevent abuse and to prevent and reduce the harmful effects of gambling. Provisions similar to the proposed gambling software licensing procedure can be found, for example, in the notified national legislations of Sweden and Denmark (spellag and lov om spil).

Finland states that the gambling sector is not harmonised in the EU and that regulatory solutions differ from country to country. In its case law on mutual recognition, the Court of Justice of the European Union has emphasised that, as EU law currently stands, in the absence of harmonisation, mutual recognition of licences or authorisations is not required. In regards to Malta's view that the Government has not provided any supporting evidence or research, Finland states that, for example, in the absence of up-to-date research data, the proportionality of the law may also be assessed through other objective means.

In the light of the above, Finland is of the opinion that the proposed regulation on gambling software licences is both justified in accordance with the case law of the Court of Justice of the European Union and proportionate.

Conditions for granting a licence (section 10, subsection 2, paragraph 8 of the Gambling Act)

In point 2.2. of its detailed opinion, Malta considers that the requirement under section 10, subsection 2, paragraph 8 of the Gambling Act, concerning the reliability and suitability of a party applying for a licence, is incompatible with the fundamental freedoms of the EU.

Malta finds it difficult to see how the aforementioned paragraph of the draft Gambling Act would effectively contribute to ensuring that operators are reliable and suitable to provide gambling services on the territory of Finland. Malta is concerned that the proposed regulation will inadvertently target reputable and experienced gambling companies that meet strict licensing requirements set by other EU/EEA countries and comply with high standards of player protection as well as measures combating money laundering and the financing of terrorism. In Malta's view, the provision appears to disproportionately limit the ability of EU companies that have exercised their fundamental freedom to provide services under the TFEU to obtain a licence for the Finnish gambling market.

Malta also points out that Finland does not comment on how the proposed restriction is proportionate to the objective of safeguarding the reliability and suitability of gambling licence holders. Malta notes that it is of the utmost importance that restrictive measures taken by a Member State are accompanied by a clearly evidence-based investigation that determines the proportionality of the measures in relation to the objectives pursued.

Finland notes that, according to section 10, subsection 2, paragraph 8, an applicant cannot be considered reliable and suitable if, in the two years preceding the assessment but after 01 September 2024, either a prohibition decision or a fine for operations or marketing of gambling games in breach of the Lotteries Act has been imposed on the applicant. The provision is a part of the prerequisites laid down in the Act for assessing the reliability and suitability of the applicant for conducting gambling activities. This would be necessary in order to achieve the objectives of the legislation, such as ensuring that applicants who are guilty of irregularities or crimes that jeopardise the reliability of gambling activities would not be granted a licence. The aim of the proposed provision under section 10, subsection 2, paragraph 8 is to ensure that licences would only be granted to operators that have not violated existing gambling legislation.

EU regulation allows Member States have national discretion when deciding on the organisation and regulation of gambling activities within their territory. In the current gambling system, gambling activities in mainland Finland have been organised under the exclusive right exercised by Veikkaus Oy. Maintaining Finland's exclusive rights scheme has required the State to counter gambling games and their marketing when they are in violation of the Lotteries Act. In its recommendations, the European Union Commission has concluded that it is appropriate for Member States to act against gambling services that are not allowed according to Union law or the law of the Member State where the gambling services are used. The Commission has also taken legal action if it considers that a Member State does not consistently implement its chosen monopoly system and allows unauthorised gambling activities.

Under the current exclusive rights scheme, the operation and marketing of gambling games by operators other than

Veikkaus Oy, which holds exclusive rights, is explicitly prohibited. Through various marketing activities, gambling operators outside the current exclusive rights scheme deliberately and intentionally seek to infringe upon or circumvent this unequivocal ban. The provision and marketing of gambling games that are in violation of the Lotteries act in mainland Finland by operators outside the scheme can be prohibited by means of a prohibition decision, and unlawful activities can be penalised through penalty fees and by imposing a block on payment transactions. Such infringements of the Lotteries Act are not covered by the right of EU companies to provide their services within the EU, as guaranteed by the TFEU, but rather activities that infringe upon the right of a Member State to organised gambling activities under an exclusive scheme and the right to restrict the operation and marketing of gambling games by operators that are outside the gambling system of a Member State, as enabled by EU regulation.

The deliberate and intentional infringement of the existing gambling legislation and the consequent penalties imposed on an operator show a clear disregard of the legal obligations imposed by another Member State and thus indicate that the operator concerned is not suitable and reliable to carry on the gambling activities referred to in the proposed new Gambling Act.

Finland also refers to its previous observation that EU law does not require mutual recognition of licences or authorisations. In other words, even if a gambling company holds a licence issued by one Member State, it does not have the right to operate or market gambling games in another Member State.

Location of gambling systems and devices (section 46 of the Gambling Act)

According to the view expressed in point 2.3. of Malta's detailed opinion, the provisions under section 46 of the Gambling Act constitute a requirement for a permanent establishment and may, as such, constitute a breach of the freedoms under the TFEU. Malta points out that the Court of Justice of the European Union has ruled that the requirement of a permanent establishment is directly contrary to the freedom to provide services, as it makes it impossible for undertakings established in other Member States to provide their services in that Member State. The Court of Justice of the European Union has also held that a permanent establishment supersedes the freedom to provide services and that such a requirement can be accepted only if it is a necessary prerequisite for achieving the objective pursued.
Malta notes that the impact assessment submitted by Finland does not contain any justification for the inclusion of this section. However, Malta acknowledges that Article 46 of the Gambling Act allows derogations from this restriction in two cases, but Malta remains concerned about the practical application of such derogations.
Finland states that the proposed section 46(1) would impose a general obligation on the licence holder to place gambling systems and lottery equipment in Finland. The purpose of the provision is, for its part, to ensure that the gambling systems and lottery machines used in the operation of gambling comply with the technical requirements set for them and that the legal protection of players is not compromised and there are no risks of irregularities. It would be easier for the supervisory authority to ensure compliance with the technical requirements if gambling systems and lottery equipment were located in Finland.

However, subsection 2 of the section contains provisions under which it is possible to derogate from the general rule of subsection 1 of the section. The purpose of the derogation provisions is to ensure that, in the case of gambling systems, their reliable operation and the randomness of draws can be ensured regardless of the location of the gambling systems. The gambling system would not need to be located in Finland at all if the licence holder has a licence in another country where an authority supervises the operation of its gambling games and that authority has concluded an agreement with the supervisory authority on the supervision of the gambling games carried out by the licence holder in Finland. Furthermore, the gambling systems would not need to be located in Finland if the licence holder allows the supervisory authority to verify the reliability of the gambling system remotely or by other similar means.
Finland therefore concludes that there is no requirement for a permanent establishment as in the concerns expressed by Malta, and that the provision cannot be considered incompatible with the provisions of the TFEU in this respect.
Provisions similar to those proposed for the location of the gambling system can be found, for example, in the notified national gambling legislations of Sweden and Denmark (spellag and lov om spil).

Provisions on the implementation of gambling (loss limits and regulation of the characteristics of gambling, sections 31

and 32 of the Gambling Act)

As stated in point 2.4. of the detailed opinion, Malta strongly supports protective measures for players to ensure that the legal protection of players is guaranteed, that abuses and offences related to gambling are prevented and that gambling harm is minimised. Despite this, Malta has identified concerns related to the proposed provision on the organisation of gambling games by the gambling licence holder, which would provide for the possibility to lay down, by Government Decree, maximum loss limits per day, month and year for gambling games organised by licence holders (section 32, subsection 2), and the possibility to lay down, by a Decree of the Ministry of the Interior, the characteristics of gambling games (including, among other things, the maximum permitted stakes and winnings) (section 32, subsection 3). Malta recognises that Member States have discretion over national gambling policies, but it points out that, in accordance with the case law of the Court of Justice of the European Union, restrictive measures may not be discriminatory, inconsistent or otherwise unsuitable and must not go beyond what is necessary. Member States must therefore demonstrate that restrictive measures are necessary to achieve their objectives and that the measures are applied in a consistent and systematic manner.

Malta questions the rationale of the draft provisions it refers to and doubts whether they are necessary, as the objectives of the provisions could probably be achieved by less restrictive measures. In this respect, Malta states that it supports, for example, the draft provision (section 32, subsection 4) which allows licence holders to offer players quantitative and temporal limits.

Malta notes that Finland needs to ensure that each of the proposed provisions is consistent with EU law. Malta is concerned that the application of the draft provision to which it has referred appears to only apply to gambling licence holders and not to the holder of an exclusive licence. Additionally, the draft provision distinguishes between different types of gambling in terms of their treatment, without any justification for such a distinction. Malta notes that the impact assessment does not justify applying different regulations to on-line gambling and gambling games organised in a traditional setting and thus to gambling licence holders and exclusive licence holders.

Finland states that, in accordance with the chosen gambling policy objective of preventing and reducing the harmful effects of gambling, the draft proposal may, in both competitive and exclusive markets, impose such necessary restrictions on the organisation of gambling games as are justified in order to prevent and reduced the social, economic and health-related harms of gambling. Contrary to Malta’s claim, the Gambling Act includes the power to regulate loss limits and the characteristics of gambling also in the case of gambling games organised by an exclusive licence holder. From a regulatory point of view, the provisions applicable to gambling games organised by an exclusive licence holder (section 31) are included under a different section than those applicable to gambling games organised by a gambling licence holder (section 32). The provisions applicable to gambling games organised by an exclusive licence holder are more comprehensive and contain more regulatory power than the corresponding provision applicable to a gambling licence holder. As regards the organisation of gambling games by both the holder of an exclusive licence and the holder of a gambling licence, the power to regulate loss limits only applies to gambling games which may be found to have characteristics from which it may be inferred that the games present a specific risk of adverse gambling-related harm. For example, the legislation could provide for loss limits for both physical gambling machines (exclusive licence holder) and on-line gambling machines (gambling licence holder). Thus, the draft provisions have not placed the holder of an exclusive licence and the holder of a gambling licence in an unequal position.

As Malta points out, Member States have discretion when defining their own national policies. The inclusion in the legislation of provisions restricting the organisation of gambling games described above has been deemed as necessary in order to combat the harmful effects of gambling in the new gambling system. The availability of gambling, i.e. the ease with which gambling is accessible, its nature and its playability, is crucial in terms of its impact on gambling-related harms. Accessibility includes the visibility and marketing of gambling, exposure to gambling and the elements that make gambling attractive. Quantitative and temporal restrictions on the consumption of gambling games are also linked to the availability of gambling. The legislative proposals also take into account the principle of proportionality, so that some of the restrictions on implementation are directly based on law, some could be laid down in lower-level legislation if necessary, and some would be self-executable for licence holders.

Finally,

Malta states, in the final remarks of its detailed opinion, that it recognises and welcomes the efforts made by the Finnish Government to liberalise the gambling sector and introduce player protection measures. However, Malta is of the opinion that the collective effects of the draft Gambling Act threaten the fundamental freedoms underlying the EU's internal market, as restrictions may not comply with the principles of proportionality, consistency and non-discrimination.

In conclusion, Finland is of the view that Finland has consistently and systematically taken into consideration in its draft legislation on the new gambling system the objectives pursued by the introduction of a new gambling system that combines an exclusive right with a competitive licensing market.

In view of the above, Finland considers that the legislative proposals included in the draft proposal are consistent with the requirements set by the Court of Justice of the European Union. The legislative proposals that Malta has highlighted in its detailed opinion are a key part of a comprehensive new legislative package and are necessary to achieve the objectives of the reform as approved by the Court of Justice of the European Union. Furthermore, the draft provisions are not discriminatory in the ways described above.

Finland considers that Malta's detailed opinion does not justify amending the draft laws before submitting the bill to the Finnish Parliament for consideration. However, the explanatory memorandum has been supplemented.

Finland will submit the legislative amendments to the Commission as a notification after they have been adopted by the Finnish Parliament and confirmed by the President of the Republic.

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