

Message 117

Communication from the Commission - TRIS/(2019) 02099
 Directive (EU) 2015/1535
 Notification: 2019/0187/D

Forwarding of a detailed opinion received by a Member State (Malta) regarding a rule on services (article 6, paragraph 2, third indent, of Directive (EU) 2015/1535)

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamused - Επιμεριστημένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Abre el plazo de statu quo - Zahájení doby pozastavení prací - Fristen for proceduren indledes - Beginn der Verfahrensfrist - Ooteaja avamine - Έναρξη της προθεσμίας διαδικασίας - Opening of the standstill period - Ouvrir le délai de statu quo - È aperto il termine di procedura - Bezdarbības perioda sākums - Atidėjimo periodo pradžia - A halasztási időszak megnyitása - Ftuħ tal-perijodu ta' waqfien - Begin van de termijn voor de procedure - Otwarcie okresu odroczenia - Abre o prazo de procedimento - Otvorenie pozastavenej periódy - Uvedba obdobja mirovanja - Menettelyn määraaika alkaa - Inleder förfarandets frist - Откриване на периода на прекъсване - Deschiderea perioadei de stagnare - Deschiderea perioadei de stagnare.

Die Kommission hat diese ausführliche Stellungnahme am 29-07-2019 empfangen.
 The Commission received this detailed opinion on the 29-07-2019.
 La Commission a reçu cet avis circonstancié le 29-07-2019.

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1. MSG 117 IND 2019 0187 D EN 29-07-2019 29-07-2019 COM 6.2(3) 29-07-2019

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4. 2019/0187/D - H10

5. article 6, paragraph 2, third indent, of Directive (EU) 2015/1535

6. Malta's Detailed Opinion on Notification 2019/187/D on the 'Second State Treaty amending the State Treaty on Games of Chance'

1. Background

Within the framework of the notification procedure instituted by Directive 2015/1535, Germany has notified the 'Third State Treaty amending the State Treaty on Games of Chance (Third amendment to the State Treaty on Games of Chance' (hereinafter referred to as the 'draft Treaty'), proposing to amend the State Treaty on Games of Chance, the main legislative instrument in Germany regulating gambling services.

In their 'Brief Statement of Grounds', the German authorities state that:

"By partially amending the State Treaty, the model of the experimental phase for the term of the State Treaty on Games of Chance will be refined and clarity provided for providers and participating third parties (payment service providers, media, sporting clubs and associations). The limitation of concessions to 20 is therefore lifted so that each applicant who meets the conditions (already notified as part of the First amendment to the State Treaty on Games of Chance under number 2011/0188/D) can be issued a concession. At the same time, this makes it possible for authorities supervising games of chance to impose a widespread ban on unauthorised offers. This ends the progressive erosion of the rule of law."

As such some of the measures included in the notified draft Treaty constitute rules on services referred to under Article 1 (1) of Directive 2015/1535, namely rules specifically governing information society services. Detailed examination of the notified draft Treaty, in particular the rules that specifically propose to govern Information Society Services, has prompted the Maltese authorities to issue this detailed opinion. Malta notes that it had filed a Detailed Opinion in relation to the preceding amendment to the State Treaty (2016/590/D) and Malta welcomes any efforts to bring the Treaty in line with EU law by virtue of this Third Amendment. However, after having reviewed the draft Treaty, Malta has been respectfully left with doubt as to whether the proposed amendments address the concerns highlighted by itself in the Detailed Opinion filed in relation to the preceding notified draft amendment (2016/590/D). This detailed opinion seeks to outline the remaining restrictions to the freedoms guaranteed by the EU Treaty which Malta purports remain in place with this draft Treaty.

2. Detailed Opinion

2.1 Suspension of State Monopoly and Extension of 'Experimental Phase'

The draft Treaty has continued to maintain the suspension of the state monopoly during the further-extended "experimental phase". Article 1 (4b)(10a) provides that the experimental phase shall extend up until 30 June 2021 or until 30 June 2024 in the event of an extension of the validity of the State Treaty in accordance with the mechanism laid out therein. Besides the very fact of an extension of an already disputed "experimental phase", there has been no forthcoming justification as to why a suspension, rather than a termination of a state monopoly would be conducive to the objective to attain an improved regulated market for gambling and better consumer protection.

It is unclear to Malta as to what the significance of this suspension is, as the monopoly clause established by Section 10 (6) of the draft Treaty is not being deleted. In *Sebat Ince*, the Court noted that with regards to the situation prior to the notification of the draft Treaty, that "the public monopoly regime with regard to the organisation and intermediation of sporting bets provided for by the Treaty on gaming and the regional laws applying that treaty, which has been deemed by the national courts to be contrary to EU law, has persisted in practice. (C-336/14 *Sebat Ince* para 91)

It must be recalled that the CJEU has held that "national legislation concerning a public monopoly on sporting bets which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, cannot continue to apply during a transitional period. However, the refusal to allow a transitional period does not lead to an obligation for the Member State concerned to liberalise the market in games of chance if it finds that such a liberalisation is incompatible with the level of consumer protection and the preservation of order in society which that Member State intends to uphold.

Under EU law as it currently stands, Member States remain free to undertake reforms of existing monopolies in order to make them compatible with FEU Treaty provisions, inter alia by making them subject to effective and strict controls by the public authorities, that State also being able to reform the existing monopoly in order to make it compatible with EU law or to replace it with a system of prior administrative authorisation based on objective, non-discriminatory criteria which are known in advance". (*Sebat Ince* C-336/14 para 53 and 54, referring to *Stanleybet International and others* C-186/11)

Malta believes that maintaining the suspended state of the monopoly does not satisfactorily and effectively "reform the existing monopoly" or "replace[s] it with a system of prior administrative authorisation based on objective, non-discriminatory criteria which are known in advance" as has been identified by the jurisprudence.

Rather, the proposed amendments reaffirm the possibility of a reversion to a state monopoly for sports-betting at the end of the experimental phase and continues to leave operators in a state of uncertainty as to their future and financial viability in the German sports betting market. The Explanatory Notes to the draft Treaty clarify that "the temporary derogation from the principle of restricting the number of concessions should therefore be regarded as

an exception due to the progress of legal proceedings”. This suggests that a number of the German states wish to return to a monopoly on sports betting post-2021, albeit the monopoly under the State Treaty has been held to infringe EU law by the CJEU in *Sebat Ince* (see above).

Furthermore, there is no established timeline and visibility as to what would happen after the mentioned dates. In *Engelmann* (C-64/08) the CJEU recognised that a concessionaire has the “need to have a sufficient length of time to recoup the investments required by the setting up of a gaming establishment.” (para 48) The approach being taken by the German authorities does not settle the question as to what reforms Germany intend to put into place, in order to comply with the Court Jurisprudence, and whether it intends to open the sports betting market.

3. Comments

3.1 No regulation of online casino games

The Draft Treaty makes no reference to the ban on the provision of online casino games, and it can hence be deduced that the German authorities envisage the existence of this ban in the foreseeable future. In Malta’s view Germany has not satisfactorily shown why it has recognised the need to maintain such restrictive measures, and this may hence constitute an unjustified restriction to the freedom to provide services. According to the CJEU, while states may restrict the offer of gambling services within their territory, such restrictions must be justified by imperative objectives in the general interest, such as consumer protection and the prevention of fraud. Furthermore, such restrictions must be proportionate and suitable to achieving those objectives in order to limit the betting activities within a territory in a consistent and systematic manner (C-243/01, *Gambelli and others*, para 67) and furthermore, the reasons which may be invoked must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure (C-42/02, *Lindman* para 25; C-100/01, *Oteiza Olazabal*). This analysis has to date, not yet been shown by the German authorities. Malta would like Germany to provide further clarity, in the form of evidence-based analysis, as to the justifiable reasons underpinning the ban on the offer of online casino games.

3.2 Transparency of Licensing Procedure

Malta welcomes the fact that the Draft Treaty does not set a statutory limit on the number of potential online sports betting licensees, and hence on the number of sports betting operators that may access the German sports betting market. Malta also welcomes the attempt by the German authorities to address its concerns with ‘provisional permissions’ as envisaged within the previous draft Treaty. Malta is hereby kindly asking Germany to clarify whether sports betting licenses will be granted immediately with the entry into force of the proposed draft Treaty, that is, the 1st of January 2020, particularly in light of the envisaged short duration of the licence. Furthermore, the Maltese authorities would like Germany to provide guidance as to whether any further legal instruments detailing the structure of the licensing procedure, and the nature of any conditions, will be published in the near future. Malta is making this request for clarification in light of the CJEU pronouncement in *Sebat Ince* where it was held that any systems requiring prior authorisation for the provision of gambling services “must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion so that it is not used arbitrarily.” (C-336/14 *Sebat Ince* para 55).

Concluding Remarks

In conclusion, Malta has a number of concerns in regard to the Draft Treaty and kindly requests the German authorities to review its proposals, giving attention to the severe restrictions to the fundamental freedoms and principles safeguarded by EU law. Malta is indeed concerned that a number of the provisions present within, or absent from, the draft Treaty, taken with the already restrictive and disputed regime set by the existing State Treaty, impose unnecessary, inconsistent and unjustified restrictions to the internal market freedoms enshrined in EU law. Malta reiterates that such restrictions will not work towards the aim of eliminating illegal gambling, and that the fight against illegal gambling may be brought about by less restrictive means and by regulatory measures that are compliant with EU law. Finally, the draft Treaty does not provide a comprehensive solution to the regulation of the gambling industry within Germany but instead seems to indefinitely promote a continuing state of uncertainty and lack of effective regulation of only fraction of the entire gambling industry.

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