



SUBJECT: Call to delete explicit mention of “online gambling and betting services” from recital 29 of the Council’s compromise text on the European Commission’s Digital Service Act proposal

12 October 2021

Dear Member of the Working Party on Competitiveness and Growth – Internal Market,

Ahead of your meeting on October 14, [The European Lotteries Association](#) (“EL”) would like to bring to your attention serious concerns we have about the following wording included in recital 29 of the Council’s compromise text on the European Commission’s Digital Services Act (“DSA”) proposal, dated 16 September 2021:

*“[...]The applicable national laws should be in compliance with Union law, in particular including the Charter and the Treaty provisions on the freedom of establishment and to provide services within the Union **in particular with regard to online gambling and betting services.** ... [”*

This particularly refers to the definition of “illegal content”, as per national law.

EL considers that the explicit mention of “online gambling and betting services” in this particular context is misplaced and inappropriate and calls for it to be deleted. “Illegal content” as defined by national law, in compliance with the Treaty and decisions of the Court of Justice of the EU, shall always be subject to the future Digital Services Act, independently of its nature or sector.

I. Gambling is an economic activity of a peculiar nature...

Gambling is an economic activity within the meaning of the Treaty on the Functioning of the European Union which means that both freedom of establishment and freedom to provide services are in principle applicable to it. However, as consistently recognized by the Court of Justice of the EU since 30 years¹, gambling is also **an activity of a peculiar nature given the considerable moral, religious and cultural differences across the EU Member States, as well as the risks they entail in terms of potential addiction and criminal use.** Due to its peculiar nature, the **Court has ruled very clearly that free, undistorted competition in the gambling sector can have severely detrimental effects**². This is mostly due to the fact that an uncontrolled competition leads gambling operators to keep making their offers more attractive and thereby increase consumers' expenditure on gambling and concurrently the risk of addiction, and its dire social and financial consequences. Furthermore, gambling can also involve a high risk of crime or fraud with damaging consequences for the society as a whole.

II. ...where restrictions to free movement principles are justified...

The Court of Justice of the EU in its case-law clarified the scope for national regulation of gambling services, confirming that gambling is a sector in which Member States, **due to “overriding reasons in the public interest”, such as consumer protection and the protection of public order**, have a wide margin for justified restrictions on the provision of gambling services, provided that such

¹ [C-275/92](#)

² joined cases [C-186/11](#) and [C-209/11](#); [C-390/12](#)



restrictions are coherent, proportionate and consistent with the underlying public interest objectives.³

The specific reference to "*in particular with regard to online gambling and betting services*" falsely implies that national regulations on illegal content in the gambling sector are often not in compliance with the EU law. Whereas there are definitely *restrictions* on the freedom to provide online gambling services in most Member States, these national laws aim to combat crime and fraud and to protect consumers in a manner that meets the requirements as set out in the case-law of the Court of Justice of the EU.

III. ...and is duly excluded from the scope of the eCommerce Directive

Article 1 of the eCommerce Directive ([Directive 2000/31/EC](#)) explicitly excludes from its scope gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

IV. "Illegal content" in the gambling sector should be covered by the scope of the Digital Services Act and subject to the proposed duty of care and notice and take down provisions.

In its original proposal, the European Commission underlined that the Digital Services Act would be without prejudice to the e-Commerce Directive ([2000/31/EC](#)) and that it builds on the provisions laid down therein. This implies that the clear exclusion of the gambling activities as stipulated in the e-Commerce Directive would continue to apply under the Digital Services Act, too. It is therefore very unclear why "*online gambling and betting services*" would have an explicit mention in recital 29 of the final text of the Digital Services Act concerning the application of the free movement principles, especially when no other sector is mentioned.

Most importantly, such an explicit mention would be misleading and potentially damaging, as it fails to take into account all the relevant case-law of the Court of Justice of the EU and the very nuanced approach to gambling and its peculiar nature. The Court clearly confirmed that restrictions in the gambling sector are justified for reasons of public order, public security, public health, or the overriding reasons in the public interest, such as consumer protection, combating fraud, crime or squandering of money.

Insofar the compatibility with EU law of a specific restriction set by a national legislation is put into question, the judge has the sole competence to assess it and make a decision consequently: it should not be left to the discretion of platforms or their business users.

For all these reasons, the explicit mention of "*online gambling and betting services*" should not be included in the Council's general approach to the Digital Services Act.

³ [C-470/11](#); For a coherent overview of the caselaw of the court see the Reasoned Order of the Court of 18 May 2021, *Fluctus & Fluentum*, C-920/19, EU:C:2021:395.



Thanking you in advance for the time you have taken to consider EL's concerns related to this extremely important dossier which will surely provide powerful tools for tackling illegal gambling online for the benefit of consumers and society as a whole.

I of course remains at your disposal for any further clarifications.

Yours sincerely,

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